THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 23

Case No. 13,390 — Case No. 14,077

WILLIAM S. HEIN & CO., INC.
BUFFALO, NEW YORK
1995

Library of Congress Catalog Number 95-75068
ISBN 0-89941-924-0

Printed in the United States of America.

The quality of this reprint is equivalent to the
quality of the original work

This volume is printed on acid-free paper by
William S. Hein & Co., Inc.

THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 23

STEVENS—TOLEDO

Case No. 13,390—Case No. 14,077

ST. PAUL
WEST PUBLISHING CO.
1896

FEDERAL CASES.

BOOK 23.

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

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

Case No. 13,390.

In re STEVENS.

District Court, D. Massachusetts. March 20, 1877.

BANKRUPTCY—PETITION—RIGHTS OF THIRD PARTIES—SEPARATE SUIT.

The assignee petitioned the court in bankruptcy to order Stevens, the bankrupt, to deliver to him a policy on the life of said Stevens, which being upon the endowment plan, as it is called, was said to be of considerable present value. Evidence was taken before the register which tended to show that the policy had been given by the bankrupt to his son, of tender age, some months before the bankruptcy, and when, it is insisted, he was not in a pecuniary condition to warrant his making a gift of this value. The objection taken by Stevens was that his son was not made a party to the petition, and that the proceeding should be by bill in equity. *Held*, that this objection must prevail, the supreme court having repeatedly decided that when the rights of third persons are involved in a litigation the case must be conducted as a plenary action at law or suit in equity, and not by a petition in the bankruptcy.

[Cited in 15 Alb. Law J. 351, to the point above stated. Nowhere reported; opinion not now accessible.]

Case No. 13,391.

In re STEVENS.

[4 Ben. 513; [1] 4 N. B. R. 367 (Quarto, 122).]

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

BANKRUPTCY—VOTING FOR ASSIGNEE—POSTPONING PROOF OF DEBT—PREFERENCE—JUDGMENT.

1. The power of a register to postpone the proof of a debt until an assignee has been chosen, includes the case where a doubt arises as to the validity of a claim by reason of the receipt of a preference by the creditor, contrary to the provisions of the bankruptcy act [of 1867; 14 Stat. 517].

[Cited in Re Bininger, Case No. 1,421.]

2. Taking property on attachment or execution is receiving a preference, but merely recovering judgment is not.

3. It is not necessary for creditors, who have recovered judgment against a bankrupt after the adjudication, to vacate their judgments, in order to prove the claims on which the judgments were recovered.

[Cited in Bourne v. Maybin, Case No. 1,700.]

[Cited in dissenting opinion in Wells v. Edmison, 4 Dak. 46, 22 N. W. 501.]

[In the matter of Ezra M. Stevens, a bankrupt.]

[At a court of bankruptcy held at the courthouse in Catskill in said district, on the 24th day of January, 1871, before Mr. Theodore B. Gates, register of said court in bankruptcy, this being the day to which the first meeting of creditors in the above-entitled matter had been duly adjourned, I sat at the place above designated for the purpose of holding such first meeting.

[G. A. Seixas, Esquire, appeared for the petitioning and sundry other creditors, while Messrs. A. C. Griswold, S. A. Givens, D. K. Olney, T. Edwards, and — Hill represented the residue of the creditors who appeared.] [2]

By THEODORE B. GATES, Register.

[The petition was filed in this case on the 27th of September, 1870, and the adjudication thereon was 10th of October following. The question being on the right of creditors thus represented, and whose depositions for the proof of their several claims were produced and filed with me, to vote for assignee, Mr. Seixas moved to "suspend" sundry proofs until the appointment of assignee, upon the ground that the creditors holding such claims had severally sought to obtain and had obtained a preference over other creditors, in violation of the provisions of the bankrupt law, and in support of the motion read two

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

[2] [From 4 N. B. R. 367 (Quarto, 122).]

affidavits. The affidavits allege in substance that Throckmorton, Diggs & Co., Potter & Williams, Thomas L. Smith & Co., Olney & King, Peter Rowe, Cornell, Horton & Co., and Addison C. Griswold, being creditors of the said bankrupt, and having reason to believe he was insolvent and not able to pay his debts as they matured, did, between the 17th and 24th September, 1870, sue out attachments against said bankrupt and attach his property; and that said creditors did severally enter up judgment against said bankrupt upon such proceedings after the filing of the petition for adjudication in bankruptcy. The affidavits also further show that George A. Birch and others recovered a judgment against the bankrupt on the 11th day of October, 1870, on which it does not appear that any attachment or final process issued. The affidavits also further show that Daniel W. Jennings recovered a judgment against the bankrupt on the 20th day of September, 1870, and that Roman Stevens recovered a judgment against the bankrupt on the 30th day of September, 1870, and that executions were subsequently issued upon these judgments and levied upon the goods of the bankrupt. These several claims had been already proven, and the depositions were before me. It was therefore impossible to literally "suspend" or postpone proof of the claim as provided in the 23d section of the bankrupt law, and rule 6 of this court. Nevertheless, if these several claims are not the proper subjects of proof, under existing circumstances, then they should not be represented in the choice of assignee. I therefore adjourned the meeting until the 14th day of February, 1871, in order to submit the question to his honor, Judge Blatchford, whether the affidavits (with the foregoing statement) show a case that would justify and require the register to exclude these creditors from participation in the choice of assignee. If they do show such a case, then would the register be justified, upon a proper application by these creditors, to further adjourn the meeting to enable them to vacate their several judgments and place themselves (if they can) in a position to prove their claims, upon the principle laid down by your honor in Re Brown [Case No. 1,975]. I anticipate this latter question in order to save time and expense, if such a contingency arise.] [2]

BLATCHFORD, District Judge. By section 18 of the bankruptcy act, it is provided, that no person who has received any preference contrary to the provisions of the act, shall vote for an assignee. The power given to the judge, by section 23, and to the register, by rule 6 of this court, to postpone proof of a claim until an assignee is chosen, in a case where there are doubts as to the validity of the claim, or as to the right of the creditor to prove it, and an opinion entertained that such validity or right ought to be investigated by the assignee, includes the power to so postpone where the doubts are whether the claim is valid in view of the receipt of a preference, contrary to the provisions of the act, by the creditor. The provisions which define when a debt can not be proved because of the acceptance of a preference by the creditor, are found in sections 23, 35, and 39. The register ought to exclude from voting for an assignee, all persons who appear to him, on proof, to be thus inhibited from proving their debts. He may do so by postponing the proof of such claims until after the election or appointment of an assignee; and he may do so although the depositions for the proof of such claims have been produced to and filed with him. Whether, under these rules of law, the affidavits presented to the register in this case are sufficient, in point of fact, to justify and require him to exclude any or all of the creditors named from voting for an assignee, can be answered only by saying, that those ought to be excluded who appear to have accepted or received a preference before the petition in bankruptcy was filed, and none others. Taking property on attachment or execution is receiving a preference. Merely obtaining a judgment is not.

As to the second question, I do not regard it as necessary, under the decision in the case of In re Brown [Case No. 1,975], for the creditors who recovered judgments after the adjudication, to vacate their judgments, before they can prove the claims on which the judgments were recovered, provided such claims are otherwise properly provable, under the views above stated.

[2] [From 4 N. B. R. 367 (Quarto, 122).]

Case No. 13,392.

In re STEVENS.

[2 Biss. 373; [1] 10 Am. Law Reg. (U. S.) 523; 5 N. B. R. 298.]

District Court, W. D. Wisconsin. Oct., 1870.

BANKRUPTCY—EXEMPT PROPERTY—LEX DOMICILII—LEX REI SITÆ—ATTACHMENTS—LIEN OF OFFICER FOR FEES.

1. It is the duty of this court to see that the property to which a bankrupt is entitled is secured to him, as much as to see that he surrenders the balance to his creditors.

2. Property exempt by the laws of the state where the bankrupt resides and where the petition is filed, will be protected, wherever it may be actually situated.

3. At the time of the filing of the petition in Wisconsin, certain property was in the possession of an officer of the state of Illinois (where by law it was not exempt), by virtue of a writ of attachment. *Held*: This court will not consider the laws of Illinois to see whether under them the property is exempt; the rights of the bankrupt and his creditors are to be determined under the bankrupt act alone [14 Stat. 517].

4. Attachments are dissolved without reference to the property upon which they are lev-

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

ied, the object of the act being to stop all proceedings against the bankrupt in any other court, and bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

[Disapproved in Robinson v. Wilson, 15 Kan. 450.]

5. The question whether the property is exempt under the Illinois law is not material.

6. Officer in possession of the property under the attachment writ cannot retain the property until his fees are paid. The attachment being dissolved, he has no means of enforcing his claim against the property. His only remedy is by application to the court to be paid out of funds in the hands of the assignee.

[Cited in Gardner v. Cook, Case No. 5,226.]

This was a case of voluntary bankruptcy. The petition was filed on the 30th day of September, 1869, and at the request of the bankrupt a provisional assignee of his estate was appointed. A portion of the property at the time (a span of horses, wagon and harness) was in the possession of a constable in Winnebago county, Illinois, under and by virtue of attachments issued against the bankrupt by a justice of the peace of the state of Illinois, in favor of divers creditors of the bankrupt residing in this state. The property thus held was claimed by the bankrupt in his petition as exempt under the bankrupt act. The attaching creditors then moved the court to modify the order appointing the provisional assignee, so as to exempt from the operation thereof the property attached and held in the state of Illinois.

C. A. Parsons, for bankrupt.

S. J. Todd, for creditors.

HOPKINS, District Judge. The ground of this motion is that by the laws of the state of Illinois the property was not exempt and that by the attachments the creditors acquired a valid lien upon it as against the bankrupt; and further, that as under the bankrupt act it would be exempt, and would not pass to the assignee, the bankrupt was the only party who could contest the right to the property under the attachment; that the assignee had no right to take possession of it under the act, nor had the other creditors any right or interest in the question, for if released from the attachment it would be exempt under the bankrupt act, and if held, it would be taking property they could not in any way reach. This is an ingenious view of the question, but I think untenable. I think it is as much the duty of the court to protect the rights of the bankrupt as the creditors. If by the act he is entitled to certain exempt property, it is the duty of the court to see that he has it. When a bankrupt surrenders all his property to his creditors, except certain portions which the act exempts for his own use and the use and convenience of his family, it is the duty of the court to see that the portion he is entitled to is secured to him, as much as it is to see that the portion he is required to surrender to his creditors, is surrendered to them.

This court proceeds under the bankrupt law only, and administers that and has original jurisdiction as to all matters and things to be done under and in virtue of the bankruptcy. One of the things to be done under the act is to assign and set off to the bankrupt the exemptions mentioned in the fourteenth section. The bankrupt claims under that section this property that is attached, and it is the duty of the court, if it is exempt by that act, to assign it to him as exempt property. No one will deny but that it is exempt by the laws of this state—the domicile of the bankrupt; and being so, it is unquestionably exempt by the fourteenth section of the bankrupt act.

Now can this court look into the laws of Illinois to see whether it is exempt there or not? What has this court to do with the exemption laws of Illinois? I cannot see that it has anything. It must administer the bankrupt act, and settle and determine the rights of the bankrupt and his creditors under that act alone. If under that act a creditor has a valid lien, or one that it recognizes, then it will be sustained; and if that act does not recognize the lien, then it cannot be sustained. It may be true that but for the bankruptcy proceedings, the attaching creditors could have held the property, and the same may be said of all attachments against bankrupt estates that are dissolved by proceedings in bankruptcy.

After the commencement of proceedings in bankruptcy all proceedings by the creditors in the state courts against the bankrupt are forbidden, and all attachments issued within four months are, by the express terms of the act, declared to be dissolved, without reference to the property upon which they are levied, the object of the act being to stop at once all proceedings against the bankrupt in any other court, and to bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

Now, if this is so, how is the question as to whether this was exempt property, material? The creditors' right to prosecute their attachment suits being taken away, and their attachments being dissolved, what claim have they, by virtue of the attachments, to assert?

The district court for the Eastern district of Missouri, in Re Ellis [Case No. 4,400], has given a like construction to the act, and the district court of South Carolina, in Re Hambright [Id. 5,973], holds that the bankrupt is to be regarded as a purchaser of his exempt property, the consideration being the surrender of all his other property for the benefit of his creditors.

This view disposes of the motion of the creditors. But they insist that the officer should not be required to give up the property until the fees and charges upon it are paid, and there are some cases to the effect that he is entitled to his fees, but not, I think, that he can refuse to deliver the property until they are paid. For if the attachments by virtue of which he holds the property are dissolved, he has no means of enforcing his lien against the

property. He cannot sell it. His remedy, if he has a lien, is to apply to this court to have it allowed and paid out of the assets that may come into the assignee's hands, and this court could, on such an application, make such an order as might appear just and equitable in the premises; but I do not think he can interpose his lien as against the right of the officers of this court to the possession, and withhold the property from them until it is paid.

Motion denied.

NOTE. It is, however, held in Re Housberger [Case No. 6,734], that a sheriff has a lien for his costs on property attached. Contra, in Re Preston [Id. 11,393], quoting decision by Judge Grier, and that the costs in the attachment made in good faith prior to the commencement of proceedings in bankruptcy may be proved against the estate. Rule as to costs in attachment proceedings and for care and custody of bankrupt's property before filing of petition. Gardner v. Cook [Id. 5,226.]

Case No. 13,393

In re STEVENS.

[1 Sawy. 397;[1] 5 N. B. R. 112; 1 Pac. Law Rep. 45.]

District Court, D. California. Dec. 27, 1870.

SURVIVING PARTNER ADJUDGED BANKRUPT—JOINT ASSETS TO BE TAKEN POSSESSION OF.

1. A surviving partner will be adjudged bankrupt on an act of bankruptcy committed by him in the course of the administration of the assets of the dissolved partnership, notwithstanding that the separate estate of the deceased partner is sufficient to pay all his debts, joint and separate.

[Cited in Re Redmond, Case No. 11,632; McKenney v. Baker, Id. 8,853; Adams v. Terrell, 4 Fed. 802; Re Sauls, 5 Fed. 717.]

2. The messenger will in such case take possession of the joint assets in the hands of the bankrupt surviving partner, and also of his separate property.

[Cited in Re Webb, Case No. 17,317.]

In the matter of Russell Stevens, a bankrupt.

H. L. Joachimsen and R. W. Hent, for petitioning creditor.

M. A. Wheaton and Mr. Southard, for bankrupts.

HOFFMAN, District Judge. The petition in this case is filed by a creditor of the late firm of Stevens & ——, charging an act of bankruptcy committed by Stevens as surviving partner of the firm, and praying that he be adjudged bankrupt as an individual, and as such surviving partner, and that a warrant issue against his separate property, and the joint assets in his hands, as such surviving partner.

To this petition objections in the nature of a demurrer have been interposed. It is urged that the court has no authority to administer upon the joint assets, unless the firm be declared bankrupt, and that this cannot be done because it has been dissolved by the death of one of the partners, and because it is admitted that the estate of the deceased partner is amply sufficient to satisfy all of his debts, both individual and joint.

It is also urged that a bankrupt cannot be discharged from partnership debts, unless the other partners are brought in and the firm adjudged bankrupt, and that inasmuch as the alleged act of bankruptcy was committed in respect of a partnership debt, and the petitioning creditor is a creditor of the firm, the surviving partner cannot be adjudged a bankrupt in his individual capacity.

It has been held in several cases by the learned judge of the Southern district of New York, that when there are firm debts and firm assets the firm must be declared bankrupt by either voluntary or involuntary proceedings, before any member of it can be discharged from his liabilities; but that this applies only to actually existing partnerships or to cases where there are firm assets, and not to co-partnerships terminated theretofore by bankruptcy, insolvency, assignment or otherwise. In re Winkens [Case No. 17,875]; In re Frear [Id. 5,074]; In re Little [Id. 8,390]; In re Shepard [Id. 12,754].

I have not been able to understand the precise grounds on which these decisions are based. Undoubtedly, where the firm of which the petitioner is a member is bankrupt, there should be an adjudication in bankruptcy against the partners composing it, and an assignee appointed in that proceeding before the partnership assets can be reached. But cases often occur where a partner may be bankrupt while the remaining parties, as individuals, and even the firm itself, are entirely solvent. In such case no adjudication against the firm could be made. But the bankrupt partner would, nevertheless, have an unquestionable right to be discharged from all his debts provable under the act [of 1867; 14 Stat. 517]. See opinion of Mr. Register Fitch, in Re Frear [Case No. 5,074].

But if on his petition setting forth firm debts and firm assets, no adjudication can be made until the remaining partners are brought in, he will be deprived of the benefit of the act. For the partners being solvent no adjudication can be made against them or the firm.

The bankrupt act clearly contemplates that one partner may be discharged from his joint, as well as several debts, without impairing the liability of his co-partners. Section 33 provides that no discharge granted under this act shall release, discharge or affect any persons liable for the same debt, for or with the bankrupt, either as partner, "joint contractor, endorser, surety or otherwise," and such would no doubt be the law independently of this provision. 1 Gray, 623; 5 Cush. 613.

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

The case, therefore, provided for by the statute, is evidently one where one partner becomes bankrupt while the others remain solvent, and it is their liability which it is intended to preserve. In the case at bar no proceedings can be taken under the thirty-sixth section and general order No. 18. The partnership has ceased to exist, having been dissolved by the death of one of its members.

It is not insolvent, for it is admitted that the deceased partner's estate is sufficient to satisfy all his debts, joint and separate. Nor, if it were otherwise, are there any means of bringing in his executors, or of taking possession of his separate estate, which is in the course of administration in the probate court.

But all the joint assets are in the hands of the surviving partner, who holds the same for all purposes of administration until the debts are paid. The debts due the partnership must be collected in his name, and he alone can be sued by the firm creditors.

If, then, while clothed with these rights and charged with these duties, he commits an act of bankruptcy, I see no reason why the creditors cannot invoke the aid of a court of bankruptcy, to take out of his hands the joint assets, as well as his separate estate, and distribute them among the creditors. If, in respect to his separate estate, he had made a fraudulent assignment, given a preference, or suffered his commercial paper to be dishonored, there can be no doubt that he could be adjudged a bankrupt as an individual. It would be a strange anomaly if on such an adjudication, where the debts owed by him as a partner are his own debts, as much as those contracted by him separately, and where the firm assets in his possession are his own property, to the extent of his interest in the firm, that the court should have no power to take possession of the joint assets, but must leave them in his hands, to be disposed of in fraud and absolute defiance of the provisions of the bankrupt act.

Under the Massachusetts insolvent law (Gen. St. c. 118), on which it is based, no doubt seems to have been entertained as to the right of a surviving partner to institute proceedings in bankruptcy, which will include the estate of the firm. President, etc., of Adams Bank v. Rice, 2 Allen, 480.

In Durgin v. Coolidge, 3 Allen, 554, the court says: "The surviving partner is entitled to have possession of all the partnership property. During the life time of the partners, either of them might make application to the court of insolvency upon which legal proceedings might be instituted and pursued against the estate of the partners. It is therefore quite clear that upon the death of one of the partners the survivor may rightfully apply to the court of insolvency, by petition, and that thereupon the proceedings may be had for the sequestration of the partnership property and the payment of the debts due to the partnership creditors."

But the warrant will not authorize the seizure of the separate estate of the deceased partner. If this proceeding can be taken by the surviving partner, it necessarily follows that when he has committed an act of bankruptcy, the same proceedings can be taken against him by either a joint or separate creditor. The apprehension expressed by counsel, that the discharge of the surviving partner might operate to release the estate of the deceased partner from liability seems entirely groundless.

Such a result would be in direct contravention of the provisions of the thirty-third section of the act. Nor could the terms of the discharge bear any such interpretation. For the decree would merely declare that Russell Stevens was discharged from all his debts provable under the act. Some question was made at the hearings as to whether the act charged in the petition was an act of bankruptcy under the law.

It appears that the firm had been engaged in the business of manufacturing lumber. The surviving partner gave to a creditor of the firm a draft or bill of exchange on its agents, which on presentment, was dishonored and remained unpaid for more than fourteen days. The draft was undoubtedly "commercial paper" within the meaning of the law. It was paper governed by the rules which are founded on the custom of merchants. In re Chandler [Case No. 2,591].

Nor do I think that the circumstance that the manufacturing firm had been dissolved by the death of the partner, and that the survivor was engaged in settling its affairs and closing up the business, divested the latter of his character of manufacturer, especially when the debt which formed the consideration of the draft was a debt contracted by the firm in the course of its manufacturing business.

It was stipulated on the hearing that if the court should be of opinion that the objections raised by the demurrer were untenable, an adjudication should be entered without a reference to the register to ascertain the facts. The adjudication will therefore be made, and the warrant will direct the messenger to seize the separate estate as well as the estate of the firm in the hands of the bankrupt.

STEVENS, In re. See Case No. 6,346.

Case No. 13,394.

STEVENS v. APPLETON et al.

[4 Cliff. 265.] [1]

Circuit Court, D. Massachusetts. May 28, 1874.

COURTS — FEDERAL JURISDICTION — CITIZENSHIP — BANKRUPTCY — SUIT BY ASSIGNEE.

A bill alleged that one Appleton, a citizen of Massachusetts, had been declared a bankrupt; that subsequently Bowles Bros. & Co., of which he was general partner, had also been declared bankrupt; and that complainant, a citizen of Massachusetts, had been appointed their assignee. The bill was against Appleton and his assignee in bankruptcy, one Story, and alleged further that there was in Story's hands a large amount of property after paying all of Appleton's liabilities, and prayed that Story might be decreed to pay the whole amount, or the surplus after paying Appleton's debts, over to the assignee of Bowles Bros. & Co., on the ground that Appleton's property was liable for the copartnership debts. Demurrer. *Held.* the circuit court had no jurisdiction; demurrer sustained; bill dismissed.

This was a bill in equity brought by Henry J. Stevens, assignee in bankruptcy of C. S. P. Bowles, W. B. Bowles, R. P. M. Bowles, and Henry C. Stetson, partners under the firm name of Bowles Bros. & Co., against Nathan Appleton and F. H. Story. The bill alleged that the said C. S. P., W. B., and R. P. M. Bowles, and H. C. Stetson, and Nathan Appleton, were and had been co-partners, and were and had been members of a partnership, doing business as bankers at Paris, London, New York, and Boston, under the firm name of Bowles Bros. & Co.; that on Jan. 20, 1873, a petition was filed in this district against the said Appleton, praying that he might be adjudged a bankrupt; that on Jan. 29, he was so adjudged, and that F. H. Story was appointed assignee, and all the property of Appleton was conveyed and assigned to him. That since the 21st of January, there had always remained, and still were, assets and debts of said partnership. That on Feb. 3, 1873, a petition was filed in the district court of this district against Bowles Bros. & Co., and they were adjudged bankrupts Feb. 3, 1873, and the complainant was appointed assignee; that the property of said Appleton, assigned to said Story as his assignee, was much more than was necessary to pay all his separate debts and liabilities; that Appleton was a general member of the partnership of Bowles Bros. & Co., when their debts and liabilities were incurred, and was therefore liable for such debts. The bill prayed that Appleton and Story might be decreed to convey to the complainant all the estate and property of said Appleton, assigned to said Story, and all rights therein, and the proceeds and accrued income thereof, and be enjoined, paying or releasing any of the same, or if not, that then all that remained after discharge of all the debts of said Appleton. The respondents demurred to the bill.

Richard H. Dana, Jr., and J. C. Gray, Jr., for complainant.

This proceeding is authorized by the bankrupt act [of 1867 (14 Stat. 517)]. Section 2 of the bankrupt act gives the circuit court jurisdiction of all suits in equity; by the assignee against any person claiming an adverse interest; or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee. This bill is maintainable on either ground. It is a bill by the plaintiff. It is a bill against Story. By section 14 of the bankrupt act there pass to the assignee all the bankrupt's rights in equity, all debts due him, all his rights of action for property or estate, or for any cause of action arising from contract. By section 36 of the bankrupt act, all the joint property of the firm, and all the separate estate of each of the partners, is taken and passes to the assignee. The demurrer admits that Appleton is a partner. Therefore his property has passed to the plaintiff, and the plaintiff can maintain this suit against Story as a person withholding property from him. Bills in equity are appropriate ancillary methods in the administering of partnership estates, when some or all of the partners are in bankruptcy. Such proceedings may be by or between several assignees. Colly. Partn. §§ 844, 857; Ex parte Voguel, 1 Atk. 132; Hankey v. Garrat, 3 Brown, Ch. 458; Burnside v. Merrick, 4 Metc. (Mass.) 537. Original bills for such purposes are disused now in England, but, by reason of statutes or of rules, are sometimes adopted in the discretion of the court. This demurrer raises only the question of the legal possibility of such proceedings. No other mode of reaching Appleton's property, for the benefit of the partnership creditors, is so simple, proper, and convenient as this. The proceedings to apply Appleton's property to the payment of the partnership debts may be taken either by the defendants or by the plaintiff or the partnership creditors. Therefore it must be open to the plaintiff or the partnership creditors to take measures to obtain the application of Appleton's property to the partnership debts. Besides the present, there seem to be only five modes of proceeding possible:—By the petitioning creditor amending his petition by joining Appleton as a partner, and praying that he may be included in the adjudication of bankruptcy. By a new petition against all the partners, praying that both the preceding adjudications may be annulled. By consolidating the proceedings on the petition of the plaintiff. By proof of claim by the plaintiff as assignee against Appleton's estate. By proof of claims by the creditors separately against Appleton's estate. The plaintiff submits that the present method is preferable to either

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

of these five. By the petitioning creditor amending his petition by joining Appleton as a partner, and praying that he may be included in the adjudication of bankruptcy. By a new petition against all the partners, praying that both the preceding adjudications may be annulled. There is no authority to annul the previous adjudications. The petitions were valid, and the adjudications in due form. The court has no authority to annul the adjudications. By consolidating the proceedings on the petition of the plaintiff. A petition for consolidation is a very unfit way to try disputed questions. There is no authority for using it for that purpose. In the English practice it is never used when it is in dispute that they are partners. The petition for consolidation in fact, says, "Here are several persons, the property of each of whom is admitted to be liable for a certain class of debts; we pray the court to administer them together." In the present, the very fact of the joint liability is in question. The result of a petition after consolidation could be in no way different from that which would be reached by the present proceeding. The plaintiff, being chosen by the creditors of the partnership, would, by the provisions of section 36 of the bankrupt act, be entitled to have all the assets in the hands of either of the defendants placed in his custody. That is precisely what he seeks by the present proceedings. His duty to distribute them would be the same when he should get them under this bill as when he should get them under a petition for consolidation. Besides, if necessary, this bill may be treated as a petition for consolidation. The same order could be made under this bill which could be made under said petition. It is often an objection in bankruptcy proceedings that less formal measures have been taken than the bankrupt act requires, as for instance, that a summary petition has been brought, when the party should have filed a bill in equity; but it is no objection that proceedings have been too formal; that the rights of defendants have been too carefully observed; or that the parties have proceeded by a regular bill, when a summary petition would have sufficed. Any allegations in this bill unnecessary for a petition, can be rejected as surplusage, and it will then stand as a petition praying for this court to exercise its general supervisory jurisdiction under section 2 of the bankrupt act. Such a petition, if it be the proper way of proceeding, would be within the jurisdiction of this court. English Bankrupt Act 1869, § 102; Lancaster v. Choate, 5 Allen, 530, 534, et seq. By proof of claim by the plaintiff, as assignee, against Appleton's estate. The result would be the same as in this case. But the conclusive answer to this mode of proceeding is that what the plaintiff seeks, and what he is entitled to, is not to prove a debt, but to take possession of property. By proof of claims by the creditors separately against Appleton's estate. Each creditor may prove his debt against Appleton's estate, if the court should allow him to do so. This course would be unjust to the bankrupts, of whom the plaintiff is assignee. Whether they get their discharge may depend upon the dividend which the partnership pays. It is very unjust to the creditors. It compels them to prove twice over a debt against one firm; and much expense would be uselessly incurred in a double administration. This bill is a way of trying the question more favorable to the defendants than any other could be. They have on this an appeal to the supreme court. They have to meet the question once for all. Especially does it make a compromise possible. Such compromise might be most advantageous both to Appleton and to the creditors of Bowles Bros.; and if the court overrule this demurrer, it may be possible for the parties, with the sanction of the court, to effect a compromise which will bind all persons.

Sidney Bartlett, for respondents.

Has this court original jurisdiction in equity, or otherwise, to determine that a firm composed of all the persons named in this bill, including Appleton, shall be declared partners and bankrupt; or is that power exclusively confided by law to the district court? Such, in effect, is the entire scope of the bill. It is clear, on the face of the bill, that no decree, declaring a firm thus constituted to be bankrupt, has hitherto been made. It is an elementary principle that, to sustain a decree declaring a partnership bankrupt, some act of bankruptcy must be shown to have been committed or acquiesced in by each of the members, and each is therefore entitled to be heard in the usual form and before the usual tribunal. Beasley v. Beasley, 1 Atk. 96; Mills v. Bennett, 2 Maule & S. 556; Allen v. Hartley, 4 Doug. 21. If, then, this court is to declare the partnership (constituted as averred in the bill) to be bankrupt, it must, under this bill, take and hear all the proofs as to each member of the alleged partnership, in the same manner as the district court is required to do on an original application. In fact, it must exercise a concurrent original jurisdiction in bankruptcy with the district court, for which there is no warrant in the statute. But it is assumed by the bill that where a decree of the district court exists, declaring certain parties to constitute a firm and to be bankrupt, authority is vested in this court, in equity, to reform the decree and add to the designated members of the firm others, so that the original decree shall be amended and stand. But it is obvious that such an exercise of jurisdiction is, in all respects, identical with the original jurisdiction of the district court, and is a jurisdiction nowhere conferred on this court; and further, that the proceeding, if it could be maintained, must be instituted by cred-

itors and by them only. But what is fatal to the bill is, that it proceeds upon the ground that the firm of Bowles Bros. & Co. was not constituted as is alleged in the decree declaring it bankrupt, but of the parties named in that decree and also of Nathan Appleton. This averment makes the former decree wholly void. The plaintiff, therefore, cannot be aided in the present case by the nominal existence of such a decree; and thus the bill must rest, if sustained, solely upon the ground that this court is a court of original jurisdiction in bankruptcy. There cannot be a joint adjudication against three, four, or five of the members, and that such an adjudication is absolutely void is well settled. Allen v. Hartley, 4 Doug. 21; Wats. Partn. 244 (179); Streatfield v. Halliday, 3 Term R. 779. The statute 32 & 33 Vict. c. 71, § 100, has so far changed this in England, that a creditor of a firm may petition for an adjudication of bankruptcy against any one or more of the firm, and thus sever what, except for the statute, would be a joint claim. Robs. Bankr. 573. But the United States bankrupt act makes no provision of the kind. It contemplates no other adjudication in bankruptcy against a partnership, except one in which all the members of the firm are named and embraced, and where all the partners have been notified and had an opportunity to be heard. See section 36. It may not be improper to add that if this court had power and jurisdiction to amend a former decree, and add new parties to that decree, still the result of such reformation would not, as matter of course, enable the plaintiff to take from the assignee of Mr. Appleton the assets which, under an earlier decree declaring Mr. Appleton individually a bankrupt, have passed to his assignee. The course to be adopted, where a partnership has been declared bankrupt subsequent to a decree of bankruptcy against an individual partner, depends entirely upon the attitude of things when the decree declaring the partnership bankrupt is passed, and rests in the discretion of the court, whether the continued administration of the separate estate can be most advantageously allowed to stand or the whole administration confided to the assignee of the firm.

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

CLIFFORD, Circuit Justice. I am of the opinion that the circuit court has no jurisdiction to grant the relief prayed in this case, for the following reasons:—

1. Because the parties are citizens of the same state.

2. Because the subject-matter of the controversy is not within the scope and meaning of the third clause of section 2 of the bankrupt act.

3. Because the complainant, as the assignee of the bankrupts first named in the bill of complaint, is not authorized by the third clause of section 2 of the bankrupt act, nor by any other provision of that act, to maintain this suit against the respondent Story, as the assignee of the other bankrupt therein named, for any purpose set forth in the bill of complaint.

4. Such conflicting claims of assignees, as in this case, must be adjudged in the first instance by the bankrupt court, as they involve questions of administration rather than questions of title or of ownership, and consequently do not fall within the descriptive words employed in the provision giving jurisdiction to the circuit and district courts, at law or in equity, of controversies in respect to property, between an assignee and third persons claiming an adverse interest therein.

5. Orders and decrees of the bankrupt court in such matters may doubtless be subject to revision in the circuit court, under the first clause of section 2 of the bankrupt act; but I am of the opinion that neither the third clause of that section, nor any other provision of the bankrupt act, confers jurisdiction upon the circuit court to grant the relief prayed in this case.

Judge LOWELL, does not concur in the second, third, fourth, and fifth propositions expressed in the foregoing opinion, and the case is disposed of by the presiding justice, under section 1 of the act entitled "An act to further the administration of justice," approved June 1, 1872 [17 Stat. 196].

CLIFFORD, Circuit Justice. Demurrer sustained and bill dismissed.

STEVENS (BRYAN v.). See Case No. 2,066a.

Case No. 13,395.

STEVENS v. CADY.

[2 Curt. 200.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

COPYRIGHT—ACCOUNT OF PROFITS—PENALTIES.

1. An account of profits may be decreed to the owner of a copy-right, as incidental to the relief by injunction, but it must be prayed for in the bill.

2. Such an account cannot embrace penalties.

[Cited in Chapman v. Ferry, 12 Fed. 695; Untermeyer v. Freund, 7 C. C. A. 183, 58 Fed. 211.]

[This was a bill in equity by James Stephens against Isaac H. Cady to restrain the infringement of a copyright. See note to Case No. 13,400.]

This case having been remanded to this court by a decree of the supreme court (see 14 How. [55 U. S.] 528), now came on for a final decree. It appeared that the bill prayed for an injunction, and for a delivery up of the copperplate, and also all copies of

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

the map, the exclusive right to print and publish which, belonged to the complainant, and also for the forfeiture of one dollar for each sheet so illegally published, pursuant to the seventh section of the act of congress of February 3, 1831 (4 Stat. 436), but did not pray for an account.

Mr. Randall, for complainant.

Mr. Ames, contra.

CURTIS, Circuit Justice. Relief by an account, when prayed for, is incidental to an injunction. Baily v. Taylor, 1 Russ. & M. 73; Colburn v. Simms, 2 Hare, 550; and therefore, though there is no express grant of power by any act of congress, to this court, to take an account in such a case, yet, as by the act of February 15, 1819 (3 Stat. 481), the circuit courts of the United States have authority "to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors," I take it to be clear that an account may be decreed. But the course and principles of courts of equity, require it to be prayed for, and this bill not only contains no prayer for an account, but none for general relief. I cannot, therefore, embrace in the final decree any profits, received by the defendant, from the unlawful sale made by the defendant. As to the delivery up of the plate and the sheets, the complainant has no title to either of them, save through the forfeiture provided for in the seventh section of the act of February 3, 1831; and a court of equity does not enforce forfeitures or penalties, unless expressly directed by statute to do so. 41 Geo. III. c. 107, not only inflicts the like forfeiture of the sheets, but further provides that the offender "shall deliver the same to the proprietor, or proprietors of the copy-right of such book or books, upon order of any court of record, in which any action or suit in law or equity shall be commenced, or prosecuted by such proprietor, or proprietors, to be made on motion or petition to the said court." No corresponding provision is contained in any act of congress. In Colburn v. Simms, 2 Hare, 554, Sir J. Wigram, V. C., held that there was no common law right to such a delivery, and it must rest entirely upon statute. Here there is a statute which creates the right, but as it is by way of penalty, and no statute directs or enables a court of equity to enforce that penalty, I am of opinion no decree can be made for it. The proprietor of the copyright is left by the act to his remedies at law by trover or replevin. See Stevens v. Gladding, 17 How. [58 U. S.] 447. The same remarks apply to the claim for the pecuniary penalty, with the additional reason, that as the forfeiture accrues, one half to the proprietor, and one half to the use of the United States, it is the proper subject only of a qui tam action.

Let a decree for a perpetual injunction, and costs, be entered.

STEVENS (DAVIS v.). See Case No. 3,653.

Case No. 13,396.

STEVENS v. ELDRIDGE et al.

[4 Cliff. 348.] [1]

Circuit Court, D. Massachusetts. May Term, 1876.

RAILROAD COMPANIES—SUIT BY BONDHOLDERS—PARTIES—JOINDER OF ROADS.

The New York & Boston Railroad issued bonds, and mortgaged its franchise and equipment for the payment of certain bonds issued, to raise funds to complete the road, to certain trustees. Afterwards the New York & Boston road united with the Boston, Hartford & Erie Railroad, and the two were known by that title. New trustees were appointed for the new road. Bill in equity by certain of the first bondholders of the New York & Boston road against both sets of trustees, to recover the amount, with interest, of the first bonds; to depose the second board of trustees; for the appointment of a receiver; and the naming, by the court, of new trustees. *Held*, that the relief claimed should have been sought by the trustees of the New York & Boston Railroad Company; that the complainant and others holding like interests, were the proper parties to bring suit for the removal of the trustees of the New York & Boston road, for misconduct, and for the appointment of others in their places.

Bill in equity [by Daniel B. Stevens against John S. Eldridge, Henry N. Farwell, and Mark Healey, trustees of the New York & Boston Railroad Company, and William T. Hart, and Charles P. Clark, trustees of the Boston, Hartford & Erie Railroad Company] to compel certain alleged trustees of the New York & Boston Railroad to account for and pay over to the complainant certain money they might have received from said road; that they might be removed, and others appointed in their places; and that a receiver might be appointed to receive and hold the alleged trust property; and that the alleged trustees of the Boston, Hartford & Erie Railroad might be restrained from exercising any further control over the said road. The bill alleged, in substance, that the New York & Boston Railroad was established December 30, 1862, and made a deed of trust of all its property and franchise from Brookline, Massachusetts, to Daysville, Connecticut, where it crossed the Norwich & Worcester Railroad, to Daniel S. Whipple, Hiram Allen, and John M. Wood, for the payment of a series of bonds and interest not exceeding $500,000, in order to build the road, and for paying pre-existing debts, entitling the bondholders to the security derived from the mortgage. That on December 30, 1862, the trustees issued a large amount of bonds as authorized, some of which were issued to the complainant; that by the proceeds thereof the road was built, and that the same were a lien on the road; that in 1864 the Boston, Hartford & Erie Railroad took possession of the Boston &

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

New York road, and ran and managed the two roads, which were then united; that thereupon Hart, Oliphant, and Clark were appointed trustees of the Boston, Hartford & Erie road, and at the date of the case continued to run and manage the same, and received the income and earnings, but refused to pay the Boston & New York bonds, although they were a prior lien on that road. That Eldridge, Farwell, and Healey succeeded Wood, Whipple, and Allen as trustees of the New York & Boston road, but that they had for a long time abandoned their trust, and suffered Hart, Oliphant, and Clark to usurp and manage the united roads, and that no interest was paid and no payments made on the bonds of the complainant. The bill charged that Eldridge, Farwell, and Healey should be removed and a receiver appointed. The bill was filed November 5, 1873. Healey appeared December 1, 1873, and filed an answer. Hart and Clark demurred to the bill January 5, 1874. On September 17, 1874, an order was passed that the bill be taken pro confesso as to Farwell. Service was made on Eldridge, and the cause was set down for hearing on demurrer. Amendments were made to the bill, and the decease of Oliphant was suggested November 3, 1875, and the order that the bill be no further prosecuted as to him was entered, and that it be taken as confessed as to Eldridge and Farwell. The hearing was upon the demurrer of Hart and Clark.

B. F. Butler, for complainant.

F. E. and F. H. Graves, for respondent Healey.

C. Allen and Lothrop, Bishop & Lincoln, for respondents Hart and Clark.

R. Olney, for respondent Eldridge.

CLIFFORD, Circuit Justice. The determination of the court is: That the complainant, under the allegations of the bill of complaint, is not the proper party to claim the relief therein prayed for. That the relief for the matters charged should be claimed by the trustees of the New York & Boston Railroad Company. That if the trustees have abandoned their trust, the first step of the complainants and others holding like interests is to take proper measures to cause new trustees to be appointed; or, if they have not abandoned their trust, but have been guilty of the neglect and misconduct alleged, the proper remedy of the complainant and others having like interests is, to take appropriate measures to cause them to be removed, and their places to be filled by others who will perform their duty to the complaining bondholders. That the trustees of the New York & Boston Railroad Company, and not the holders of the bonds issued by that company, are the proper parties complainant to seek redress from the Boston, Hartford & Erie Railroad Company for the grievances alleged in the bill of complaint. That the complainant, suing for himself and others having like interests, is the proper party to maintain the suit as against the trustees of the New York & Boston Railroad Company, for the removal of those trustees for misconduct, and for the appointment of others, or for the appointment of new trustees in case it shall appear that the supposed trustees shall have abandoned their trust.

It is accordingly ordered that the demurrer to the bill of complaint as to William T. Hart and C. P. Clark, trustees of the Boston, Hartford & Erie Railroad Company, is sustained, and that the bill of complaint as to those respondents be and the same hereby is dismissed with costs but without prejudice; that the complainant has leave, if so advised, to amend the bill of complaint as to one or all of the other respondents; that the time of filing exceptions to the answer of Mark Healey is, in view of the circumstances, extended to the first Monday in July next, pursuant to equity rules Nos. 61 and 63.

Case No. 13,397.

STEVENS v. FELT et al.[1]

District Court, S. D. New York. March 9, 1843.

PATENTS—INJUNCTION—EVIDENCE AND BURDEN OF PROOF—PRACTICE—LACHES.

[1. When a bill for infringement is filed by the inventor himself, the practice requires him to make oath that he is the true inventor or discoverer of the thing patented, and this, together with the patent, is adequate proof on which to claim an injunction.]

[2. Complainant is not required, in addition to his patent, to present, in the first instance, full evidence that he is the first inventor, and a very slight degree of evidence is sufficient to put defendant on his justification.]

[3. The testimony of eminent chemists and of books of reputation in the science and arts are competent evidence that a coloring matter patented was not known prior to the patent.]

[4. Principals are responsible for the infringement of a patent by their agent, acting within the scope of his authority, and the legal implication of their personal knowledge and concurrence therein will dispense with all proof on that point.]

[5. Equity will not grant a peremptory injunction in patent cases, where the right is in controversy and has not been settled by a suit at law, or where the patentee's possession has not been quiet or undisputed for a long period.]

[6. Permitting infringement for several years without attempting to enforce his rights does not waive or impair the same, but it deeply affects the patentee's claim to equitable interference for the purpose of arresting defendants' operations.]

[This was a suit by Henry Stevens against David and Willard Felt, to enjoin the alleged infringement of complainant's patent for a coloring fluid.]

BETTS, District Judge. The defendants oppose the prayer for an injunction with the

[1] [Not previously reported.]

defence that the subject-matter of the patent grant was notorious and in common use in the United States when the patent in this case issued, and that the processes of the defendants are no infringement of the plaintiff's claim. The plaintiff, who is an alien, on the 28th day of October, 1837, obtained letters patent under the act of congress of July 4, 1836, §§ 6, 9 [5 Stat. 119,121], for the coloring fluid described in the bill. This patent was surrendered for some insufficiency in the specification, and a new one issued on the 21st day of April, 1838.

It is unnecessary to examine the point whether a patent is prima facie evidence that the plaintiff is discoverer and proprietor of the matter set forth and claimed by the specification. If there may be a doubt as to the sufficiency of the proof, by itself, to sustain an action, it would seem clear that a new bill alleging the discovery and possession would, with the patent, be adequate proof on which to claim an injunction. Phil Pat. 404; Stearns v. Barrett [Case No. 13,337]; Phil. Pat. 453–455. The practice requires an oath, when the bill is filed, that the plaintiff is the true inventor or discoverer of the thing patented, the applicant verifying the specification being held insufficient, as the patentee, subsequent to his grant, may have ascertained to his satisfaction that he is not the original and first inventor. Gods. Pat. 185; Phil. Pat. 454–455. This rule of practice would probably be limited to a party present and prosecuting in his own right. It would be inapplicable to the case of an assignee, and must, if strictly enforced, in many instances deprive alien patentees of that immediate relief by injunction, indispensable to the support of their rights. I do not, however, go into this subject, the point not being raised by the defendants on the argument, and, it being merely formal and technical, shall proceed to dispose of the case on the merits.

The proofs offered by the complainant show in the first instance, a valuable discovery, in possession and use by him, and that the defendants have deliberately and to a great extent violated his right. The case, accordingly, must turn upon the weight and effect of the evidence produced by the defendants to counteract this proof. The idea, advanced on the argument, that the plaintiff must, in addition to his patent, present full evidence that he is the first inventor, is not supported by the adjudged cases on the reasons on which they proceed. When this kind of proof has been called for preliminarily, a very slight degree of evidence has been regarded as sufficient to put the defendant on his justification. The testimony of eminent chemists, and of books of reputation in the sciences and arts, are competent evidence to this point, and, in the present case, show, in the first instance, that the discovery claimed by the specification was not known in the arts prior to the patent obtained by the plaintiff.

Direct testimony is given by James W. White that the patented discovery was known to him in 1832, and was in use in the United States at that time, and subsequently, in the preparation of coloring liquids. This testimony is so assailed as to throw great doubt upon the accuracy of the witness, either as to dates or the particulars of the composition of which he speaks. He also stands in direct contradiction with Thaddeus Davids, and the weight of evidence would tend to give the higher credit to Davids, independent of which the course of conduct of the defendant is in strong corroboration of Davids' testimony; and it appears to me that, as the proof stands, it is established, against the evidence of White, that the defendants did manufacture the precise article patented by the plaintiff, using his discovery and descriptions as the means of carrying on the operation. This conclusion as to the main fact does not necessarily involve any contradiction of the affidavit of the defendants. It was not necessary that they should have any personal knowledge or superintendence of the details of the manufacture. They are, however, legally responsible for the acts of their agents, acting for their interest and within the scope of their authorization, and, upon the facts in proof, the legal implication of the personal concurrence and knowledge of the defendants as to those acts of their agents will dispense with all direct proof to that point. It seems to me the defendants have failed to prove that the subject-matter of the patent was known and in use previous to the grant to the plaintiff, as also that their manufacture is not an infringement of the plaintiff's discovery; and the evidence on the part of the plaintiff being sufficient, in the first instance, to establish his right, he is entitled to relief on this bill.

The course of this court, however, is not to grant a peremptory injunction in patent cases, where the right is in controversy and has not been settled by trial at law, or where the possession has not been quiet or undisputed in the patentee, for a long period of time. The acts of infringement on the part of the defendants commenced as early as 1838 or 1839, and no reason is shown why the plaintiff has suffered it to go on for so long a period without enforcing his right under the patent. That right, undoubtedly, is not to be regarded as waived or impaired by such delay, but it deeply affects his claim to the equitable interference of the court for the purpose of arresting or breaking up the operations of the defendants, absolutely. It being understood that a suit at law is pending, in which the right can be fully investigated and settled and the credibility of the conflicting testimony be properly weighed and adjusted, the case is a proper one for a provisional, and not an absolute, injunction.

A decree will, accordingly, be rendered that the defendants keep an account of all coloring liquids made or vended by them since the filing of this bill, and claimed to be in viola-

tion of the plaintiff's patent, and render such account on oath at the office of the clerk of this court on the first Monday of April next; and, on their failure to render and file such account, that a peremptory injunction issue.

[For hearing on motion for a new trial, see Case No. 13,368.]

STEVENS (GIBSON v.). See Case No. 5,401.

Case No. 13,398.

STEVENS et al. v. GILL et al.

[1 Morr. Min. Rep. 576.]

Circuit Court, D. Colorado. Oct. 25, 1879.

MINES AND MINING—"LODE" OR "VEIN" DEFINED—"IN PLACE" DEFINED.

[1. Where a lode or vein exists in defendant's claim, and the line of contact between the porphyry and lime rock extends some distance into an adjoining claim owned by plaintiff, the question whether the apex of such lode is in plaintiff's claim, so as to entitle him to follow it downward into defendant's claim, is to be determined by finding whether, in the part lying in plaintiff's claim, there is something of value,—not of economical value for treatment, but something ascertainable, something beyond a mere trace which can be positively and certainly verified as existing in the ore. In the case of silver, such value must be reckoned by ounces, one or more, in the ton of ore; and if that amount is shown, it is enough, other conditions being satisfied, to establish the existence of a lode.]

[Cited in Shreve v. Copper Bell Min. Co. (Mont.) 28 Pac. 320.]

[2. Whether or not that which is commonly called "the contact" is to be regarded as a lode or vein, is to be judged of by its value, whatever may be the rule in regard to true fissures; and it is immaterial whether the material found is or is not sometimes or often associated with valuable ore in the deposits of the neighborhood.]

[3. "In place," as used in the act of congress in respect to veins or lodes, means in the general mass of the mountain, as distinguished from merely on the surface or covered only by the movable parts called "slide" or "debris."]

[This was an action at law by William H. Stevens and others against Andrew W. Gill and others to determine conflicting claims to mining property.]

G. G. Symes, W. S. Decker, J. Y. Marshall, and C. S. Thomas, for plaintiffs.

Hugh Braler, E. O. Wolcott, Hiram P. Bennett, and T. M. Patterson, for defendants.

HALLETT, District Judge (charging jury). Having heard the counsel, you ought now to be prepared to decide the questions in controversy between these parties. There is some difficulty upon the pleadings here in determining precisely what extent of ground is in controversy between the parties. The plaintiffs claim, by their declaration or complaint, the ground which is within the line of the first incline on the Bull's Eye lode,—that is to say, they claim that the defendants have ousted them from that portion of the lode which lies within the Silver Wave location. Further on, as you have heard from the evidence, the defendants, or some of them, are in the occupation of the same claim by more extensive workings. That point is called the "main incline" on the Silver Wave lode; and there, as I think, Mr. Doyle told you, in his evidence, the workings of the defendants are quite extensive. It is a little extraordinary that the action should be brought for a small portion only of a claim, if the plaintiffs do, in fact, claim the whole of it; and I am a little at a loss to determine, from the pleadings or from the statements of counsel, what the extent of their damage is in respect to the Silver Wave claim. I think, however, we ought not to be governed precisely by the statement in the complaint as to their location. If you find for the plaintiffs, you ought to find some part or portion of the northern end of that claim as belonging to them, so that the precise matters as adjudged between them may be determined. That is to say, you ought to find a certain number of feet, extending from the north end of the claim, as their property, without adhering precisely to the points stated in the complaint. You will remember I asked, at the close of the testimony, some of the witnesses to give the distance from the north end of the claim to the first and second incline, and to the shaft on the Bull's Eye claim opposite the main incline on the Silver Wave workings. These distances were given: To the first incline, 45 feet; to the second incline, 135 feet; and to the shaft opposite the Silver Wave workings, 250 feet. Probably the theory of the plaintiffs is that somewhere, at a point between the second incline of the Bull's Eye and the main incline of the Silver Wave, or at the shaft opposite that incline, the lode passes from their ground into that of the defendants; and, as I said before, if you find for the plaintiffs, I think you ought to determine with some degree of certainty what that point is.

Now, you have observed, in general, that the parties here have no controversy as to the surface of the ground. The defendants' location lies parallel with and alongside the plaintiffs' location, and immediately east of it. So far as the ground in dispute is concerned, there is no conflict on the surface, but the plaintiffs claim the right to pursue the lode, which they say they have in their own territory, out of their territory and into that of the defendants. Upon that the principal question relates to the top and apex of the lode, as to whether it is within the plaintiffs' location or in that of the defendants', and as that is the principal point in the case, I have written what I wish to say to you upon that subject as follows:

Upon the evidence before you it may be assumed that there is a lode in the Silver Wave location, and the principal question for your

consideration is to determine the situation of the top and apex of that lode with reference to the two locations. You have observed that the claims are continuous and parallel to each other, the defendants' claim lying immediately east of that owned by the plaintiffs. The act of congress provides that one who locates and acquires title to a vein may follow it to any depth within the end lines of his location, although in its downward course it may enter the land adjoining. And so, also, as to all other veins having their tops within the surface lines of the location extended downward vertically. So that it is often a question whether the top and apex of the lode is in one place or another, as the matter of ownership may turn on that point. And that is the main question in this case, for, if the plaintiffs hold the top and apex of the lode in their ground, they may, by the express language of the act of congress before mentioned, follow it from their own territory into that owned by defendants. That proposition may be stated in other language, as, whether the lode is to be found in plaintiffs' ground, and thence extending eastward into defendants' ground, or in defendants' ground only. On that general subject, you have observed that the witnesses concur in saying that the line of contact between the porphyry and lime rock extends more or less definitely into plaintiffs' territory for a distance of about 100 feet. They are not agreed whether the porphyry rock overlying the lime is in massive condition, or in the condition of slide or debris on the surface of the mountain. Nor are they agreed whether the material found between the lime and porphyry is of the country rock or vein matter, and whether it is of value.

It will serve our purpose to put out of view for the moment those points relating to this line of contact in which the witnesses are not agreed, and consider whether, upon the assumption that the line of contact between porphyry and lime extends from plaintiffs' ground into that of defendants', without more; that is to say, without anything of value therein, so far as it is found in plaintiffs' ground, it may be regarded as a lode or vein, within the meaning of the act of congress. And that is easily answered in the negative. For, whatever may be said of true fissures, it must be conceded that the joinder or union of rocks differing in character, or of the same character, is not in itself a lode or vein. And if, in some space between such rocks, there is found a material which sometimes or frequently exists with the valuable ore in lodes, the case is not different. As to all such contacts and all such deposits as are found in the neighborhood of Leadville, a lode cannot exist without valuable ore. But, if there is value, the form in which it appears is of no importance, whether it be iron or manganese, carbonate of lead, or something else yielding silver, the result is the same. The law will not distinguish between different kinds and classes of ore, if they have appreciable value in the metal for which the location was made. Nor is it necessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore. In the case of silver ore the value must be reckoned by ounces, one or more in the ton of ore, and if it comes to that it is enough, other conditions being satisfied, to establish the existence of a lode.

If, therefore, you find, from the evidence, that there is a line of contact between porphyry and lime in plaintiffs' ground, extending thence into defendants' ground, and in some space on that line there is a material differing from the enclosing rocks, by whatever name that material may be called, in respect to whether it is a lode or vein, it shall be judged according to its value. And this is true whether the material so found is or is not such as is sometimes or often associated with valuable ore in the deposits in the neighborhood of Leadville, whatever the rule may be as to true fissures what is commonly called "the contact" is not, in the absence of valuable ore, to be regarded as a lode or vein. Nothing will be said in this connection as to what rule shall be applied in the case of interruptions in the ore body, or barren spaces in the contact, when it has been proven to be of value to some extent from the surface. Because, upon the evidence before you, whatever your conclusion may be as to the value of the material in "the contact," you will probably find it to be continuous from a point a little below the surface in the first incline down to that place in defendants' ground from which valuable ore was taken. If, then, you say that the material in what the witnesses call "the contact" throughout plaintiffs' ground is not of appreciable value in silver, within the rule already given, there is no lode or vein in that place, and the law is with the defendants. On that point, however, the evidence is contradictory. And if, on the other hand, you find from the evidence that the material is of value, and that it is continuous from plaintiffs' ground into that owned by defendants, a further question will arise as to whether it is "in place." The act of congress speaks of veins or lodes "in place," by which, according to our interpretation, it is required that the vein or lode shall be in the general mass of the mountain. It may not be on the surface, or covered only by the movable parts called "slide" or "debris." But if it is in the general mass of the mountain, although the enclosing rocks may have sustained fracture and dislocation in the general movement of the country, it is "in place." In this instance, it is claimed by defendants that the porphyry overlying the lime is not in place anywhere in plaintiffs' ground, and, if that be true, it cannot be said that the lode is in place, if one exists there. The distinction to be made is whether the porphyry in plaintiffs' ground is part of the general slide and debris of the mountain, or stands in its

original position in the structure of that formation. It is enough if it is found in place at any point west of plaintiffs' east line, for, in this instance, the lode, if there is one, must come into place with the overlying rock. Upon this explanation, if you are able to say, on the evidence, that there is a lode, and that it is in place in plaintiffs' ground, and that it descends thence into defendants' ground, your verdict should be for the plaintiffs. If there is no lode, or it is not in place in plaintiffs' ground, your verdict should be for the defendants.

So much, gentlemen, as to the principal points. I should have said to you before that, as to the ground claimed by the defendants and plaintiffs you may, upon the paper title given in evidence, and upon the proof of occupation given by each of the parties, assume that they are the owners of their respective claims, and that each is entitled to the ground in his own location, subject to the qualification I have stated.

As to the weight of evidence and the burden of proof, I have been asked to say to you, and I say accordingly, that it is upon the plaintiffs. It is upon them because they are the plaintiffs in the action, and they are required to prove their right of action as against the defendants; and, also, because, in cases of this kind, where one party seeks to go out of his own territory into that claimed by another, the burden is upon him to show his right to do so,—that is to say, he must prove by a preponderance of testimony that he has a lode within his own territory, and that he has the top or apex of it, in order to go out of his own territory, in pursuit of that lode. He cannot, otherwise, claim the right to enter ground, or enter upon the possession of it not within his own location. So that, upon that, the burden is upon the plaintiffs to show to you by preponderance of testimony, if I may so express it, that they have the lode within their own ground, according to the definition which I have given you, and that it proceeds from thence into the ground claimed by the defendants.

A further question, if you find for the plaintiffs, as to the damages to which they are entitled: They have claimed in their complaint and they are entitled to recover if they own the lode, for the ore removed by the defendants in this first incline. You remember what the testimony was upon that subject. You remember the statements made by Mr. Doyle, and about his statement as to the value of the ore removed by the defendants from that incline; and if the plaintiffs are entitled to that ground, they are entitled also to recover the value of that ore.

I do not think of anything more, gentlemen, which it may be important to say to you. The principal question for your consideration is contained in this writing which I will hand to you, and you may take with you to your room.

See note to Stevens v. Williams [Case No. 13,413].

Case No. 13,399.

STEVENS v. GLADDING et al.

[2 Curt. 608.] [1]

Circuit Court, D. Rhode Island. June Term, 1856.

ACCOUNT—COPYRIGHT—COMMISSIONS.

Commissions received from the sales of a pirated map, are profits which must be accounted for by the commission merchant, on a bill by the proprietor of the copyright.

[This was a suit by James Stevens against Royal Gladding and Isaac T. Proud to restrain the infringement of a copyright. There was a decree dismissing the bill, case unreported. See note to Case No. 13,400.]

This case was remanded by the supreme court of the United States to this court, with directions to award a perpetual injunction, as prayed for in the bill, and to take an account of the profits received by the defendants from the sales of the map, the copyright whereof was found to belong to the complainant, and for such further proceedings in conformity to the opinion of that court as to law and justice shall appertain. See 17 How. [58 U. S.] 455. In obedience to this mandate, the cause was referred to a master to take an account of profits. His report shows, that the defendants, who were booksellers, received copies of the map from the publisher thereof for sale on commission; and he reports the amount of the commissions received by the defendants from such sales, and refers to the court the question whether the commissions, so received, are profits within the meaning of the order of reference.

Mr. Stevens, pro se.

Mr. Ames, contra.

CURTIS, Circuit Justice. I am not aware that this question has ever been made in a copyright or patent cause. That commissions may be considered profits for some purposes is settled. In Waugh v. Carver, 2 H. Bl. 235, and Cheap v. Cramond, 4 Barn. & Ald. 663, it was held that a participation in commissions was such a participation in profits, as to constitute the participants partners. So, no doubt, if one partner should, by a clandestine agreement with a third person secure to himself a commission for business in which his firm was interested, he would be held to account for it as so much profits. Carter v. Horne, 1 Eq. Cas. Abr. 7 ("Account" A) pl. 13. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted the profits of the firm, and he is compellable to account therefor. Story, Partn. § 174. It is quite immaterial in such a case, whether the gain has arisen from the difference between the cost of an article, and the price at which it

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

is sold, or from personal services of the partner. The principle is, that he has received some gain or profit, to which the firm is equitably entitled; and a court of equity forces on him the character of a trustee, and compels him to account for it.

The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits; upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission, does in truth sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sales. And what he so receives, diminishes the net profit of the one who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid; because those sums, though part of the gross profits of the sales, he has not received. That part of the profits of the sales being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me, that the term "profits" necessarily, or, when construed in reference to the subject-matter, properly, has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant.

Let a final decree be entered for the amount of the commissions reported by the master, and for a perpetual injunction and costs.

Case No. 13,400.

STEVENS v. GLADDING et al.

[8 N. Y. Leg. Obs. 297.]

Circuit Court, D. Rhode Island. July 18, 1850.

COPYRIGHT—SALE UNDER EXECUTION OF PLATE—WHAT PASSES TO PURCHASER.

A purchaser under a sheriff's sale of a copperplate on which a map is engraved acquires the right to take impressions therefrom and sell them.

This was a qui tam action brought against the defendants [Royal Gladding and Isaac T. Proud], to recover certain penalties under the act of congress for the protection of copyrights [4 Stat. 436]. The plaintiff [James Stevens] was the author of a map of Rhode Island, and sued the defendants, who are booksellers at Providence, R. I., for selling copies of the map. The defendants, among other things, justified their selling the maps under the title of Isaac H. Cady, procured by the purchase of the copperplate under an execution in a state court against the plaintiff. The great question was, what passed to the purchaser under the sheriff's sale? Did he purchase the right to print maps from the plate and sell them, or did he purchase simply the material? In other words, did he acquire any copyright privileges by the purchase, and were those rights in the plaintiff liable to be sold and divested by an execution? If they could be, then the defendants, acting under the authority of Cady, the purchaser, claimed to be justified. If not, then it was claimed they were liable to the penalty given by the act of congress. The proof established the authorship, and the taking of the necessary steps required by the act to secure the copyright, and the sale of copies by the defendants. On the other hand, there was established the sale of the plate under the execution against plaintiff, the purchase by Cady, and his authority to defendants to sell the maps. As this case presented the same points as in the case of Stevens v. Cady [Case No. 13,395], in the equity side of the same court, some time before, and passed upon by the same judges, and as the judges respectively adhered to the same opinions, Justice WOODBURY read to the jury the following opinion, Judge PITMAN dissenting from it; this division of opinion entitling the parties to take the case to the supreme court of the United States.

Henry M. Western, for plaintiff.

Seth P. Staples and Mr. Aimes, for defendants.

WOODBURY, Circuit Justice. This was a bill in chancery, averring that the plaintiff was the author and proprietor of a certain map of the state of Rhode Island; that he took out a copyright therefor, and caused an engraving to be made of the map, and never consented to the sale of it by others, but is still the sole proprietor thereof. It was further alleged that, notwithstanding this, the respondent and others confederated together to deprive him of his lawful gains, and in the year 1846 published and sold another map similar in substance to his, with only a few trifling alterations and additions; that the plaintiff's copperplate engraving of the map has for some time been laid aside, with a view to engrave said map on steel, and yet said Cady is believed in some way, without his consent, to have obtained and used that copperplate, and sold a large number of copies thereof, and thus forfeited one dollar for every sheet so printed and published; that the plaintiff had requested said Cady to abstain from publishing more copies, and to deliver the plate to him, which he refuses, and which the plaintiff prays this court to

require and enforce. Certain interrogatories were put and requested to be answered, and oath was made to the bill, January 27, 1847. The answer avers that some one sued Stevens, and recovered judgment against him in the state court of Massachusetts, April 11, 1846, for $194, and the sheriff levied the execution on the plate upon which the map of Stevens had by him been engraved, and sold the plate at public auction; that it was purchased by the respondent, as the highest bidder, for $250, and that he thereby became authorized to use the same, and did use it for striking off maps, which afterwards had been sold by him; that without the right thus to use it, and sell the maps thus engraved, the plate would be worth only the metal, or less than $10. Some evidence was put into the case which will be referred to in the opinion, when necessary,—the chief object being now to present the question, first, what property and rights passed to the defendant by the purchase of the plate; and, next, whether an injunction ought to be granted, on all the pleadings and evidence in the cause as they now stand.

The case was argued at the June term, 1849, by Mr. Stevens, for himself, and Mr. Bradlee, for defendant.

It is conceded, in the argument in this case, that the judgment against the plaintiff was regular, and the sale by the sheriff of the engraved plate valid to pass the title to the plate itself. But the plaintiff contends that no right to use it for printing maps, nor any part of his copyright to maps taken from it afterwards, was thus transferred, nor any interest beyond the mere metal of which the plate was composed. Some general questions seem to be involved in this part of the controversy, which are first to be considered, and are not without difficulty. One is, whether a right to use the plate for engraving maps would, as a general principle, pass by the sheriff's sale of the plate. Another is, whether there is anything in the patent laws, or in the nature of a copyright, which would prevent it from thus passing to the copies of a map struck afterwards by the purchaser from such a plate. I am inclined to think that all the qualities, uses, and powers belonging to the plate in the condition in which it was at the sale, and with which it had been invested by the owner of it, composed a part of its value. They were a part of its design and uses, were incident to the plate itself, and where that was duly transferred to another, the incident to it, the use of it, and its engraving as there practised, must, I think, be considered as going with it. This question is not beyond doubt, but clearly the levy and sale were not described nor regarded as so much copper in the form of a plate, without any engraving thereon, or, if not without the engraving, yet without any authority to use it. The engraving was as much a part of the plate as the copper itself, and was as much sold as the raw copper. Indeed, the use of the engraving to make copies entered more into the value and price of the plate than the metal itself, or, as is avowed in the answer, much less would have been given for the plate. This increased value had been imparted to the metal by the plaintiff, for the purpose of having the plate employed in the engraving, and reaped the benefit of this increased value on account of the application of the plate to that purpose, and its sale for something above $240 more than the metal would have brought. Nor would a sale so construed have an injurious effect on the plaintiff. He not only obtains an enhanced price on account of the engraving and the use of it with the plate, but his copyright to his map is still retained, except so far as it may be involved in the copies subsequently struck from that particular plate by the purchaser. He can enforce his exclusive right to all copies struck off while he remained owner of it, and can also enforce it in similar or improved plates, made by himself after the sale, because all the copyright to the map is still in him which has not been in some way transferred to others. He can have the renewal or extension of his copyright, too, and protect it against everything not embraced in the decision in Wilson v. Rosseau, 4 How. [45 U. S.] 646.

A different view from this, not passing th right to use the plate, would, in truth, in jure both the plaintiff and his creditors. The plate would belong to the purchaser, and the right to use it for printing to the plaintiff. Its value, so considered, would be much less to both; whereas, on our construction the value would be enhanced to both. In any other view, too, all would not pass which was incident to the plate and engraving owned by him, at the sale, and as he and his creditors have been paid for. The plate and engraving had before, in practice, been actually employed to strike off maps to be sold, and the copyright to each to pass to the purchaser of each, as an incident. The usage is often a test of what exists, and what was meant to be passed as incident. See Taft & Manchester's R. (June, 1849) Id. In cases like this, as in patents, the usage is, when selling the means or material or machinery to make a patented article, to consider the right or license to make it as passing at the same time. Brooks v. Byam [Case No. 1,948]; Curt. Pat. § 135. Again, the design of the parties as to what shall pass, is to be inferred from all the circumstances, and when once fairly elicited, should control the construction. Here the design in having a plate was to use the plate and engraving to strike off maps. The actual previous use had corresponded with this design, and hence the sale of the plate and engraving, while so in use, must be presumed to have been with the design that the purchaser should continue a like use. The princi-

ple as to this must be similar in copyrights to what it is in patent rights, and it is settled that if one has a right to use a patent machine, he has also the right to sell the produce of it, as flour or brands from patent mills, anywhere, unless restricted specially in his purchase. Simpson v. Wilson, 4 How. [45 U. S.] 709; 3 Mass. Land, 295, 423; Curt. Pat. § 208.

What passes by the sale of an article, must depend on its character and use, too, as in one case that would pass as an incident, or part and parcel of the property, which in another would be neither. Duer, Const. Jur. § 255. Thus, in case of a sale of a patent machine, it must involve the right to use it, or the purchase would be in vain. So, the sale of a patent wagon must pass the patent right to use it. So, the sale of patent types, or of a patent mill. Suppose one has invented a new kind of type, and obtained a patent for it, or made stereotype plates of a valuable work to which he has the copyright, surely in selling the type there passes, not merely the metal, but the right to use the types in printing, and as surely, in selling the stereotype plates of his own works, he sells the authority to use them in printing those works, or he sells what is worthless, except for metal, and puts a construction on the contract calculated to deceive and mislead. Brooks v. Byam [Case No. 1,948]. Of the last character seems the present claim by the plaintiff, nor could it be well doubted, if Stevens himself had, in person, by a private contract, have sold this plate, that he must be considered as giving his consent and license to all we have argued, and as passing the right to use the engraving, and to sell maps struck from it, including the copyright to those particular maps. I am not aware of any adjudged case in point on this subject. Yet a case is settled (Sawin v. Guild [Id. 12,391] which it is supposed, in Curt. Pat. p. 189, § 10, so holds) that these conclusions "may admit of a doubt." But what that case decided was that a sheriff who seized and sold some patented machines of an inventor was liable to a penalty under the act of congress of April 17, 1800 [2 Stat. 37]. That act was designed to punish a person for making or selling, without a license, machines like those which had been patented by another. There could, as before stated, be little doubt that such machines were liable to be seized and sold to pay the patentee's own debts. That was not denied there. But the gist of the complaint, under the statute, must be that the defendant, without any pretence of purchase, license, or right, imitates the plaintiff's patent or copyright. 4 Stat. 436, § 6. That was considered not to have been done or attempted there. Furthermore, it is true that there the machines had not been used after the purchase, so as to indicate whether the parties supposed the patent right to use them had passed with the timbers and irons of them, or not, and the judge intimated that the purchaser, if so using them, must do it at his own risk and peril. So he must; but I do not understand the judge there to decide, or even lay down as an obiter dictum, that such right did not pass, though he might well consider it as a doubtful and unsettled question.

The next consideration in this inquiry is whether all passed by the public sale by the sheriff which would have passed to a private conveyance or bill of sale from Stevens, the author. In ordinary sheriff's sales of property, every interest and incident is transferred as effectually as if made in person by the debtor. The law acts for the debtor, and does the same which he could. The sheriff is virtually his agent in selling, and acts in his behalf no less than for the creditor. So, everything passes by operation of law to heirs, without any personal interference of the former owner, as effectually and fully as if he himself conveyed the property. So is it, also, in case of a bankrupt's property, passing to his assignees without any conveyance by him, in England (Hesse v. Stevenson, 3 Bos. & P. 578; Curt. Pat. p. 226, note); though in some states, and under some systems, a formal assignment is required.

The second general question then arises, whether there is anything peculiar to the patent laws, or laws of copyright, or in the nature of those rights, which prevents their passing in this way by sale by the sheriff, to the extent of the use of the plate, and the right of sale of copies of the map thus engraved, by the purchaser after he buys. The first objection falling under this head is that a copyright cannot, by the act of congress, pass without an assignment in writing by the author, and recorded in the patent office, or state department. This, however, in respect to recording, has been construed as applying to third persons, and not between parties to a sale of a copyright. Webb v. Powers [Case No. 17,323]. See cases, like decisions, as to the recording of patent rights, as between a patentee and a purchaser: Pitts v. Whitman, [Id. 11,196]; Case of Modern [unreported]; Curt. Pat. p. 227; 2 Newff. Rep. Halden & Curtis. In this case the sale was between these parties in a legal view, the sheriff acting for Stevens, and the question arising between him and the purchaser, and not as to third persons without notice. It is of yearly occurrence, too, that copy and patent rights pass by bequest, and yet the bequest is not recorded in the patent office.

Again, the act of congress applies to the sale of a portion of a patent right itself, and not of a machine or manufacture, as passing with them merely a right to use these last in the ordinary way. These sales are not meant to be required to be in writing, are not so usually in practice, and it would be very vexatious to require them to be. It is a mistake, also, to suppose that copyrights themselves, or patents are not assignable sometimes, except in writing, or by voluntary

act of the patentee. When they pass to executors or administrators, it is without writing, and when they pass to creditors by a levy, it is often not voluntary, and if under the bankrupt law, it is, at times, without any writing. The act of congress refers to sales by the patentee under contract, as just adverted to. The writing is provided for there, too, for the sale of a separate and independent copyright, or a part of one; and not for a whole or a part, as incidental to a machine or a plate, and connected with these, and as if under a practical license to use them. A license to use a copyright or a patent right need not be either in writing or recorded. See cases post. So in all sales of patented articles, it is not necessary, as already shown, to reduce to writing and record the transfer of them, or of the patent right to the articles made and sold. The sale of the article is universally decreed a sale of the patent right to use it, or, in other words, a license to use it. That is the principle of the transaction. Any other restricted views would embarrass the business of the whole community, and be most fatal to the patentees and authors themselves. In any other view, the materials and machinery to make a patent medicine might be bought, with no right to make it, or the medicine itself be purchased with no right to swallow it. Hence, by a mere public sale or license, many patent rights, and doubtless some copyrights, are daily used, and legally used.

A parol license is enough to authorize a printing and publishing, now, of a manuscript of another. 2 Mer. 434; Jac. 34. Here, then, at all events, the sale by the sheriff for Stevens, may well be considered a license, in law, if not in fact, by the agent of both parties, for the purchaser to use the plate and engraving, and the maps struck from them. And there is nothing in the patent laws, or in sound principle, which should, between the parties, avoid such a license, when given, as here, for a good consideration, because it was done by parol or not recorded. Power v. Walker, 3 Maule & S. 7; 4 Camp. 8; 2 Starkie, 336; Brooks v. Byam [supra]; Curt. Pat. §§ 195, 197; Woodworth v. Edwards [Case No. 18,014], and cases there cited.

Something is said of a consent in writing and attested, being required to justify from a penalty one who prints and sells a copyright book of another. See section 6 of Act Feb. 3, 1831 (4 Stat. 437). But this is where the person printing and selling is not entitled to do it, or is acting entirely without right or title, in any way, in point of law. He must then have such a writing to exonerate him. That is not this case. Indeed, if an actual conveyance from the author of the map was, in a case like this, necessary to pass the right to a purchaser to use the plate in striking off copies, there would be strong equity in a court of chancery to make it on a state of facts such as exists here.

In conclusion: By these views it will be seen that a sale of this plate, and the incidental right to use it, with the engraving on it, is deemed as valid as if made by Stevens in person, and that Stevens, in such a sale without a written assignment, recorded in the proper office, must, in point of law, be considered as giving his consent or license to this use of the plate, through the sale of it by the sheriff for his benefit, and for a reasonable consideration paid for both the use and the plate by the defendant; nor can such a use of it, as before shown, injure the rights or interests of Stevens, but, on the contrary, increases their value. He is left to exercise all the rights not parted with on that occasion, and probably is still using, or preparing to use, them with another plate, nothing having passed from him but this particular plate, and the engraving on it, and the right or license to use them, which was incident to and involved in them, and fully paid for. It is stated in the bill that this plate had been used for some years, the demand for maps from it chiefly supplied, and the plaintiff was preparing to complete another plate, with improved materials and in better style. Now, if after all this, if after a quasi license to use, no less than a sale of his old plate to a third person for a valuable consideration, by an agent appointed by law, the author thinks proper to revoke the license, it will be seen hereafter that no court of equity can countenance it as if it was equitable and just, by lending to such an attempt an extraordinary remedy in equity, unless there was mistake or surprise, and unless the sum paid to him, or the officers for him, is first refunded.

But, before examining the last considerations, there seems to be another ground set up against the sale by the sheriff, which comes under the present head, and this is, that a copyright or patent right is not liable at all for the debts of an author or patentee. But it has been deliberately decided that a patent for making paper out of straw, etc., passed by operation of law to pay the debts of a bankrupt, in respect to such a patent, obtained even after bankruptcy. Lord Alvanley, C. J., says, in Hesse v. Stevenson, 3 Bos. & P. 578: But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest "which may be the subject of assignment. I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry." "The plaintiff here was none the less a debtor than if a bankrupt law existed, nor were the defendants any the less purchasers for the creditors, nor should any of his property of any kind, and especially his personal estate, be withheld from creditors any more than under a bankrupt law." Sawin v. Guild [Case No. 12,391]. This idea may have arisen from the circumstance that, once, a manuscript was not regarded as passing to assignees or creditors, but that rested on par-

ticular reasons. Burrows, 2394–2397; Curt. Copyr. p. 85, note 86. See a provision in our own statute on this. But now, by 5 & 6 Vict. c. 45, all the copyrights are made personal property, and may be bequeathed or distributed, like other personal property. Curt. Pat. 218, note. A copyright now clearly passes to assignees of a bankrupt. 2 Russ. & R. 385, 392; 17 Ves. 338; 2 New Reports, 67; Curt. Copyr. 231; Longman v. Tripp, 5 Bos. & P. 70. The case of Sir Walter Scott's copyright going towards the discharge of his debts, is familiarly known to most of the literary world.

I understand, from my colleague, who will soon present his views, that he does not concur in mine, that the right to use this plate in striking off copies of the map passed to the defendant by the sale. But there is another question arising in the case, yet to be considered, and before referred to, on which I believe we do not differ; that is, whether the extraordinary mode of relief by injunction, asked here in equity, ought to be granted, where the title is in controversy, without a previous offer to restore the money paid by the sale of the plate. A party in chancery, who seeks equity, must first do equity; and till the rights, if contested, are settled by an action at law, it does not seem just to interfere, unless the complainant, at least, offers in his bill to pay back what he or his agent, the officer in his behalf, has received of the respondent for the plaintiff and his creditors. Woodworth v. Woodbury.[1] Should the complainant be willing to do this, and move to amend his bill for that purpose, it can be allowed, and there then would be some plausible ground for this relief asked for, though not a very decisive one till it is settled at law that the right to the use of the engraving on the plate did not pass with the plate itself. Platt v. Button, 19 Ves. 447. But it would seem palpably unjust in equity to let the complainant retain the right in a contested and very doubtful case for which he has been paid through the sheriff, and not refund the money thus received. Walcot v. Walker, 7 Ves. 1; Millar v. Taylor, Burrows, 2401.

The plaintiff declined to make any amendment, or to restore the money received. The application for an injunction was therefore overruled, and the bill dismissed.

[NOTE. An appeal was taken by the plaintiff in the case against Cady to the supreme court, where the decree dismissing the bill was reversed, upon the ground that the purchaser at the execution sale of the copperplate did not thereby acquire any right to print therefrom. The cause was remanded. 14 How. (55 U. S.) 528. Upon the rehearing of the case in the circuit court an injunction was entered, but the plaintiff was denied an account, upon the ground that an account was not prayed for in the bill. Case No. 13,395. This last position was also reversed by the supreme court, upon appeal, in the chancery suit against Gladding et al., when it was held that, in copyright and patent cases, an account was incident to the right to an injunction. 17 How. [58 U. S.] 447. The circuit court subsequently decided, in the suit against Gladding et al., that the commissions on sales of the maps must be accounted for as profits. Case No. 13,399.]

[1] [See Woodworth v. Rogers, Case No. 18,018.]

STEVENS (HACKER v.). See Cases Nos. 5,887 and 5,888.

STEVENS (HOVEY v.). See Cases Nos. 6,745 and 6,746.

Case No. 13,401.

STEVENS v. KANSAS PAC. RY. CO.

[5 Dill. 486.] [1]

Circuit Court, D. Kansas. 1879.

PATENTS—EQUITY JURISDICTION—STATUTE OF LIMITATIONS.

1. Whether state statutes of limitation are applicable to suits by a patentee of an invention against an infringer to compel the latter to account for profits, quære?

2. Such suits, when otherwise maintainable, are of equitable cognizance, although no injunction has issued, and although brought after the expiration of the original or extended term of the patent.

Bill in equity by patentee against an alleged infringer to ascertain the amount of profits arising from the use of the patented invention, and to compel payment thereof. The bill was filed after the expiration of the original and extended term of the patent—it was brought, indeed, within three days of the lapse of six years after the expiration of the extended term. Demurrer to the bill on the ground that the matter was exclusively of legal and not of equitable cognizance, and that the suit was barred by the three and five years statute of limitations of the state of Kansas.

Mr. Usher, for demurrer.

Mr. Walker, contra.

MILLER, Circuit Justice (orally). This is a bill by a patentee against an infringer brought after the expiration of the original patent, and also after the expiration of the extended term, but within six years after the expiration of the extension; when suit was brought, six years from the expiration of the extended term had not expired by three days.

Whether the state statute applies to such suits as this I am in doubt; and, as I think it better to plead the statute than to rely upon it by way of demurrer, I shall overrule the demurrer, so far as it rests on this ground, and allow the same defence to be set up by plea or answer.

In regard to the other question: I have no doubt that a bill in equity, when otherwise maintainable, will lie in behalf of a patentee, although the patent has expired and the case is such that no injunction has issued or can issue. The infringer is converted into a trus-

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

tee for the patentee as to profits made by the former from the use of the patented invention; and this is a sufficient ground of equity jurisdiction of a bill to ascertain the amount of such profits and to compel the infringer to account for the same. No other question is presented or decided.

The demurrer is overruled, and leave is given to plead or answer. Ordered accordingly.

Case No. 13,402.

STEVENS v. LLOYD.

[1 Cranch, C. C. 124.] [1]

Circuit Court, District of Columbia. June Term, 1803.

ASSAULT AND BATTERY—PLEA—GENERAL ISSUE—SON ASSAULT DEMESNE—BURDEN OF PROOF.

1. In assault and battery, on the plea of not guilty, the plaintiff is not bound to prove that the defendant struck or assaulted him first.

2. But on the plea of son assault demesne, the defendant must prove that the plaintiff assaulted him first.

[This was an action of assault and battery by Stephen Stevens against Edward Lloyd.]

THE COURT instructed the jury that to support the issue on his part, on the plea of not guilty, the plaintiff was not bound to prove that the defendant struck him first or made the first assault; but that to support the plea of son assault demesne, the defendant must prove that the plaintiff made the first assault.

[See Case No. 13,403.]

Case No. 13,403.

STEVENS v. LLOYD et al.

[1 Cranch, C. C. 141.] [1]

Circuit Court, District of Columbia. Nov. Term, 1803.

JUDGMENT—FORTHCOMING BOND—COSTS—PRACTICE AT LAW.

If a forthcoming bond has, by mistake, been given for a sum less than the judgment, it may, on the plaintiff's motion, be quashed, as well as the execution issued thereon, upon paying the costs of the motion.

Notice was given to this day of a motion for judgment on a forthcoming bond.

Mr. Swann, for plaintiff, moved to quash the bond and execution—the execution having been issued without including costs, by an error of the clerk, in supposing that judgment for $15 in assault and battery would not carry the costs.

Mr. Youngs, for defendants, prayed that it might not be quashed without costs of the motion.

Quashed, at the plaintiff's costs.

[See Case No. 13,402.]

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

Case No. 13,404.

STEVENS v. MACK.

[5 Blatchf. 514; [1] 6 Int. Rev. Rec. 181.]

Circuit Court, S. D. New York. Nov. 13, 1867.

INTERNAL REVENUE—REMOVAL OF CAUSES.

The act of March 2, 1833 (4 Stat. 632), providing for the removal into the courts of the United States of cases arising under the revenue laws, brought in the state courts, does not apply to cases arising under the internal revenue laws.

This was a motion by the plaintiff [William S Stevens] to quash a writ of certiorari, by which this suit, brought in a state court, was removed into this court. The parties were both of them citizens of the state of New York, and the suit was brought against the defendant [John Mack] for a cause of action which arose prior to June 30th, 1864, out of acts done by the defendant as an officer in the internal revenue service, appointed prior to the passage of the act of June 30, 1864 (13 Stat. 223).

William Allen Butler, for plaintiff.

Benjamin K. Phelps, Asst. Dist. Atty., for defendant.

BENEDICT, District Judge. By the 50th section of the internal revenue act of June 30, 1864 (13 Stat. 241), the act of March 2, 1833 (4 Stat. 632), which gave to the national courts jurisdiction over all cases arising under the revenue laws of the United States, was made applicable to all cases arising under the laws for the collection of internal duties. This provision of the act of June 30, 1864, was, however, repealed by the 68th section of the internal revenue act of July 13, 1866 (14 Stat. 172), and this latter act, by express provision, confers upon the circuit courts of the United States jurisdiction over actions brought against officers appointed under, or acting by, authority of the internal revenue act of June 30, 1864, or of any act in addition thereto or in amendment thereof. The jurisdiction conferred by the act of July 13, 1866, being thus limited to cases which come under the act of 1864 and its amendments, and the 50th section of the act of 1864 having been repealed, if this court has any jurisdiction in the premises, it can only be by virtue of the act of March 2, 1833. The general terms, "revenue laws of the United States," used in the act of March 2, 1833, undoubtedly might, if standing alone, include all revenue laws of every description; but, used, as they are, in an act entitled "An act further to provide for the collection of duties on imports," they must be considered as not intended to include laws for the collection of internal duties. This construction has been the one adopted by congress itself, as is evident from the enactment, above referred to, in the 50th section of the act of June 30, 1864, while the deliberate repeal of the latter

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

section indicates an intention, on the part of congress, that the jurisdiction of the national courts, in cases arising under the laws for the collection of internal duties, should not be derived from the provisions of the act of 1833. The motion must, therefore, be granted.

Case No. 13,405.

STEVENS et al. v. NEW YORK & O. M. R. CO. et al.

[13 Blatchf. 104.] [1]

Circuit Court, S. D. New York. Aug. 17, 1875.

TAXATION — PROPERTY IN HANDS OF RECEIVER — INJUNCTION AGAINST TAX COLLECTOR.

1. There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a court of justice, for the purposes of a suit pending in such court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated.

2. Except under very special circumstances the power of taxation ought not to be interfered with by injunction.

3. In a suit pending in this court for the foreclosure of a mortgage given by a railroad corporation, receivers of the mortgaged property were appointed by this court. They applied to this court to enjoin certain tax collectors from executing warrants for taxes assessed on the mortgaged property, on the ground of irregularities in the assessment of the taxes. So far as appeared, the warrants were regular on their faces and the tax collectors were acting thereunder in good faith, in the discharge of their duty. The injunction was refused.

[This was a bill in equity by John G. Stevens and others, trustees, against the New York & Oswego Midland Railroad Company and others, to foreclose a certain mortgage.]

Ashbel Green, for receivers.

John C. Churchill, John C. Perry, E. More, Holmes & Smith, Henry W. Wiggins, Amos G. Hull, Archibald C. Niven, L. B. Kern, A. N. Sheldon, and Stewart & Read, for tax collectors.

BLATCHFORD, District Judge. This is a suit for the foreclosure of a mortgage on certain property owned by the New York and Oswego Midland Railroad Company, a corporation. Pending the suit, John G. Stevens and Abram S. Hewitt have been appointed by this court receivers of the mortgaged property. They now apply to this court, by petition, for injunctions to restrain the tax collectors of certain towns in the state of New York from proceeding to interfere with the property which is in the hands of such receivers, by selling it under warrants to satisfy certain state taxes. One ground of the application is, that the imposition of taxes on the corporation, or its property, is in violation of the constitution of the United States, as impairing the obligation of a contract made between the state and the corporation. This question has heretofore, on a separate argument, been decided by this court adversely to the receivers. Hewitt v. New York & O. M. R. Co. [Case No. 6,443]. The matter has now been argued upon objections made by the receivers to the mode of assessing the taxes.

But, a preliminary point is taken, that this court will not, in this way, examine the questions raised as to the regularity of the assessment of the taxes. The tax collectors are not parties to this suit. This court is not a tribunal to which any direct power is confided to supervise or review the regularity of the assessment of the taxes, as on certiorari. Nor are the questions raised between the adversary parties to a plenary suit, with its regular procedure in the way of trial and opportunity for review, but they are brought up on motion, in a collateral action. It is, however, contended for the receivers, that the property in their possession is in the possession of this court; that such possession cannot be disturbed without the consent of this court; and that, before this court will consent to part with the possession of the property which may be required to pay the taxes, it will assure itself that the tax collectors are lawfully entitled to subject it to the claims for taxes.

I have heretofore decided that the property in the hands of the receivers was properly assessed as the property of the corporation. There is no prerogative of sovereignty which is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of the taxes. The very existence of the state as a government depends upon the exercise of such power. Except under very special circumstances, such power ought not to be interfered with by injunction. The promptness and regularity of the collection of taxes are as important to the welfare and credit of the government, and to its capacity to fulfil its functions, as is the collection itself. If any person is aggrieved by the exercise of the authority of the tax collector, he has an adequate ultimate remedy in an action against the wrongdoer, with the preliminary remedy afforded, of directly reviewing the proceeding according to the method, and before the tribunal, provided by the laws of the government under whose authority the proceeding takes place. There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a court of justice, for the purposes of a suit pending in such court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated. So far as appears, the warrants in the hands of the tax collectors are regular on their faces, and the tax collectors

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

are acting thereunder in good faith, in the discharge of their duty. Under such circumstances this court would not hold the collectors to be guilty of a contempt of this court for levying on the property of the corporation to satisfy the taxes specified in the warrants. That being so, this court will not undertake to determine, on affidavits, and in a collateral suit, the questions raised as to the irregularities alleged to have existed in the assessment of the taxes, or to enjoin the tax collectors from executing the warrants.

The applications for injunctions must be denied and the temporary injunctions must be dissolved.

[Subsequently the court made an order of distribution of the proceeds of the mortgaged railroad and its property. Case No. 13,406.]

Case No. 13,406.

STEVENS et al. v. NEW YORK & O. M. R. CO. et al.

[13 Blatchf. 412.] [1]

Circuit Court, S. D. New York. June 14, 1876.

RAILROAD COMPANIES—MORTGAGE FORECLOSURE—ORDER OF DISTRIBUTION—PRO RATA DIVIDEND.

1. In directing the order of distribution, in a foreclosure suit, of the proceeds of the sale of the road and other property of a railroad corporation, mortgaged by it to trustees to secure the principal and interest due on registered and coupon bonds, it was provided, that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest had been paid, should be paid before coupons or interest falling due at a later period, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds.

2. The mortgage provided, that, after default, the mortgagees should sell so much of the mortgaged property as should "be necessary to pay and discharge the principal and interest, according to the tenor thereof," of all the bonds issued, and there was no provision in the mortgage for a pro rata dividend of the proceeds of sale among all the bonds and their accrued interest.

[This was a bill in equity by John G. Stevens and others, trustees, against the New York & Oswego Midland Railroad Company and others, to foreclose a certain mortgage. The receivers applied for injunctions to restrain the tax collectors from proceeding to interfere with the property, by selling it, under warrants to satisfy certain state taxes. The applications were denied. Case No. 12,405. The cause is now heard on motion for an order of distribution. See, also, Id. 6,443.]

James Emott, for priority.

Francis N. Bangs, opposed.

BLATCHFORD, District Judge. In deciding, in March last, various questions raised in this case, I held that the coupons due July 1st, 1873, were not paid by the company or extinguished, and that they are valid in the hands of those who hold them (as between such holders and the holders of others of the bonds and coupons) to the extent of the sums for which they hold them as collateral security, if less than the face of the coupons, and, if greater, to the extent of the face of the coupons. Further consideration has confirmed me in the foregoing conclusion.

I further held that unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest has been paid, should be paid before coupons or interest falling due at a later date, and before the principal of any of the bonds; and that coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds are paid. I have heard a reargument of this question. The effect of the decision, as stated by those who are dissatisfied with it, is, that unpaid coupons or interest not maturing on or after January 1st, 1874, will be paid in the order in which they became collectible down to and including July 1st, 1873, and before payment of anything on the bonds. It appears that the unpaid interest which fell due January 1st, 1870, is $350 of coupons; July 1st, 1870, $70 of coupons; January 1st, 1871, $56 of coupons; July 1st, 1871, $185 50 of coupons; January 1st, 1872, $416 50 of coupons; July 1st, 1872, $12,246 50 of coupons, and $35 of interest on registered bonds; January 1st, 1873, $16,982 of coupons and $70 of interest on registered bonds; and July 1st, 1873, $265,540 50 of coupons and $70 of interest on registered bonds. The entire interest which fell due on and after January 1st, 1874, is unpaid, being, for each semiannual instalment, $265,424 of coupons and $14,576 of interest on registered bonds. The total semiannual interest was $280,000.

Of the unpaid interest which fell due before July 1st, 1873, $30,411 50 is in coupons, and $105 in interest on registered bonds. There is no proof of the present ownership or condition of any of the $30,411 50 of coupons, and no evidence as to whether they have been detached or not from the bonds with which they were issued. Of the unpaid interest which fell due July 1st, 1873, $265,540 50 is in coupons, and $70 in interest on registered bonds. No coupons which fell due July 1st, 1873, were paid, but all of them were at that time detached from the bonds with which they were issued, and became the property of parties, named in the evidence, other than the parties who continued to hold such bonds and the unmatured coupons belonging and attached thereto. Of the interest on registered bonds which fell due July 1st, 1873, $14,388 50 was paid.

It is contended that there is no principle,

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

legal or equitable, which entitles the interest which matured before July 1st, 1873, to be paid in the order in which it fell due, and before payment of any of the bonds; that is not shown that payment of the interest was ever demanded and refused; that no right to be paid the interest accrued until demand and refusal; that, until then, the debtor was not in default; that the debtor was justified in paying subsequently maturing interest, even though prior maturing interest remained unpaid, so long as the payment of such prior maturing interest had not been demanded; that he is prior in right who is prior in the time of presenting his demand, when presentment is required; and that those who, prior to July 1st, 1873, received their interest, received no preference as against those who did not receive their interest, because the latter did not demand it and the former did.

It is further contended, that the foregoing views apply equally to the interest which matured July 1st, 1873; that there is no proof that payment of any such interest was ever demanded from the debtor; and that, as to the unpaid coupons which matured July 1st, 1873, the present holders of them, as purchasers of them from the parties for whom they cashed them at their face value, acquired, as against such parties as still holding the bonds from which such coupons were detached, only the right to present the coupons for payment and to receive payment. The general principle is invoked, that, where several debts are secured by one and the same mortgage, and become due, and the mortgage is then foreclosed, they will be paid pro rata from the fund, if it is insufficient to pay the whole of them; and it is contended that the only exception to this rule is, where the mortgage, by its terms, creates a preference in favor of some of the debts, or where the original creditor, as to any which he has assigned, has designed to confer a right of prior satisfaction on the assignee. This general principle being applied in the proposed decree in this case to all the interest which matured after July 1st, 1873, and such interest being required to be paid pro rata with the principal of the bonds, it is contended that a different rule ought not to be applied to the interest which matured on and before July 1st, 1873. The principal contest is as to the preference claimed for the $265,540 50 of unpaid coupons which fell due July 1st, 1873, the amount of all the other unpaid interest which fell due on or before July 1st, 1873, being only $30,482 50.

The bill in this case sets forth that the debtor made default, on the 1st of July, 1873, in the payment of the coupons which became due on that day, and has never paid any of such coupons. As the bill is filed by the trustees under the mortgage, who represent the bondholders, I think this averment in the bill is properly to be taken, as against the bondholders, as an averment that the coupons which fell due July 1st, 1873, were presented, and payment of them demanded and refused, and thus default was made, inasmuch as every bond with coupons attached to it provides that the interest is payable on presentation of the coupons. But, in addition to this, I am of opinion that the transactions between the debtor and the parties who furnished the money to cash the coupons were such as to amount either to a waiver, on the part of the debtor, of the presentment of the coupons, because of a previous mutual understanding that they could not, and would not, be paid if presented, or to an actual demand and refusal.

In support of the preference claimed it is contended, that, as to interest which matured at any given time on and prior to July 1st, 1873, inasmuch as some of the parties entitled to receive such interest received it from the debtor, and some did not, the former will have received a preference, unless the latter are now to be put on an equal footing with them. To this it is replied, that there really was no preference; that, so long as the debtor was solvent, every party entitled to interest was paid as he presented his matured claim; that, if he did not present it, he took the risk of the debtor's becoming insolvent; and that he had no special property in, or lien on, the funds of the debtor, which could require the debtor to set apart funds sufficient to pay undemanded matured interest which fell due at an earlier date, before paying demanded matured interest falling due at a later date.

I do not think any distinction can be made between interest which matured before July 1st, 1873, and interest which matured on that day, growing out of the fact that payment of the latter was demanded and refused, or a demand was waived, and that the former was not demanded. I do not see how any diligence of those of a given class who were paid their interest, in asking to have it paid, can be imputed as laches to others of the same class who did not ask to be paid their interest, so as to work a virtual preference in favor of the former. To give to the latter their interest in full, before paying the principal of the bonds, is only to put all those in a given class entitled to interest on an equal footing; and to put them on such equal footing requires, also, that interest maturing at an earlier date shall be paid before interest maturing at a later date. Here are special equities, it seems to me, which would be violated, if such an inequality were left to exist as the exclusion from the full payment of interest of some of a given class. There is nothing in the terms of the mortgage, in this case, which requires such exclusion. On the contrary, the mortgage provides, that, after default, the mortgagees shall sell so much of the mortgaged property "as shall be necessary to pay and discharge the principal and interest, according to the tenor thereof," of

all the bonds issued, and shall, out of the moneys arising from such sale, pay the principal and interest which shall then remain due and unpaid on the issued bonds. The words, "according to the tenor thereof," may very well be held to embrace the payment of interest, according to the times of the semi-annual recurrences of interest, and in such order. Certainly, there is nothing in those words, or elsewhere, in the mortgage, that forbids a course which is absolutely necessary, unless a result is to be effected which will not be a payment of interest according to the tenor of the bonds, but will leave some part of a given instalment of interest paid in full, and the rest of it not paid in full. In the case of Dunham v. Railway Co., 1 Wall. [68 U. S.] 254, the mortgage provided, that, in case of default and a sale, all bonds, and the interest accrued thereon, should be equally due and payable, and entitled to a pro rata dividend of the proceeds of sale. Hence it was held that there could be no preference of past due coupons over the principal of the bonds.

No case was cited on the argument which decides the above question adversely to the view I take. Most of the cases cited were not cases of coupons or interest on numerous bonds secured by mortgage, and none of them were cases where some interest in a given class had been paid and the rest not paid, and the fund was insufficient to pay all the principal and interest due. The case of Sewall v. Brainerd, 38 Vt. 364, was not such a case, nor was the case of Miller v. Rutland & W. R. Co., 40 Vt. 399; and, in the latter case, no preference was claimed.

The above views cover all the questions involved. But, as to the holders of the unpaid coupons of July 1st, 1873, there seems to me to be a special equity. It was through the advance of money to cash those coupons in the hands of the holders of the bonds to which they belonged, that such holders obtained the money for those coupons. On such advance, those coupons passed into the hands of those who now hold them. But for such advance, the coupons in the hands of the original holders of them would not have been worth their face value, as they were made to be by such advance. The original holders of such coupons must be regarded as still holding the bonds to which such coupons belonged, or, if not, those who hold such bonds and subsequently maturing coupons belonging thereto must be held to be subject to the same equities with such original holders. No special reasons are shown, in the evidence, why, as against any of such holders, the present holders of the coupons of July 1st, 1873, are estopped from claiming priority. Those who had their coupons of July 1st, 1873, cashed by means of such advance, retained the money, and, to permit them now to exclude the holders of such coupons from being paid in full, and put on an equality with the registered interest of July 1st, 1873, which was paid in full, would be to permit them to work an inequality which would be unjust.

STEVENS v. NEW YORK & O. M. R. CO. See Case No. 6,443.

STEVENS (POTTER v.). See Case No. 11,338.

Case No. 13,407.

STEVENS v. PRITCHARD.

[4 Cliff. 417;[1] 10 O. G. 505; 2 Ban. & A. 390.]

Circuit Court, D. Massachusetts. Sept. 1, 1876.

PATENTS — COMBINATION — ELEMENTS — REISSUE — ERRORS AND DEFECTS IN ORIGINAL — NEW INVENTION — BOOT AND SHOE MAKING.

1. If an inventor has produced a new and useful combination, which composes an organized machine, and also made new inventions of a less number of elements of the same combination than what compose the entire machine, he may, with proper descriptions, claim the whole combination, and also the lesser ones, or ones composed of fewer elements than what make up the whole machine.

[Cited in Herring v. Nelson, Case No. 6,424.]

2. He may, if he choose, make the several claims in one patent.

[Cited in Herring v. Nelson, Case No. 6,424.]

3. If, by inadvertence, accident, or mistake, he has failed in his original patent to claim any of the lesser combinations not embracing the whole machine, he can surrender his patent, and obtain a reissue for any additional claims so omitted in the original.

[Cited in Herring v. Nelson, Case No. 6,424; Miller v. Bridgeport Brass Co., Id. 9,563.]

4. Reissued patents are presumed to be for the same invention as that covered by the original, unless the contrary appears.

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

5. Matters of fact are not open under such an issue in a suit for infringement.

6. The conclusion must always be in favor of the validity of the reissued patent, unless it appears, upon a comparison of the two instruments, that, as matter of legal construction, the reissue is not for the same invention as the original.

[Cited in Kerosene Lamp Heater Co. v. Littell, Case No. 7,724; Smith v. Merriam, 6 Fed. 718; Atwood v. Portland Co., 10 Fed. 287.]

7. New features cannot be introduced in a reissue.

8. Errors and defects may be cured, under the condition that no new invention is claimed in the reissue.

9. What was ambiguous may be made clear and certain, under the same restriction.

10. The second claim of the reissued patent was different from the second claim of the original.

11. Such a comparison is proper in discussing the question, whether a reissue and original are for the same invention, but is not decisive of the issue, because surrenders are often made to correct errors of the party or patent office in improperly limiting a claim.

12. If the new subject of the reissue claim does not exceed what was well described in the

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

original, or what was substantially described, suggested, or indicated in the specifications, drawings, or patent office model, a reissue claim cannot be held void, because it secures a different invention from what was claimed in the original.

This was a bill in equity [by Samuel A. Stevens, trustee, against William A. Pritchard], founded upon certain reissued letters-patent for an improvement in making boots and shoes.

The claims of the original patent [No. 141,357, granted to J. L. Joyce, July 29, 1873] were these: (1) In the manufacture of boots and shoes, the insole bevelled from the lower side back towards the top, and from the upper, or so as to form a space between the edge of the insole and the upper, substantially as and for the purpose specified. (2) In combination with the insole bevelled so as to form a space between the edge and upper, as described, the outsole formed with a recess or upwardly projecting edge, substantially as and for the purpose described.

Of the reissue [No. 6,480, granted June 8, 1875], the following were the claims: (1) In the manufacture of boots and shoes, the insole bevelled from the lower side back towards the top and from the upper, or so as to form a space between the edge of the insole and the upper, substantially as and for the purpose specified. (2) In the manufacture of boots and shoes from leather, the sole constructed with a recess, into which the insole and the upper at the edge of the insole are embedded, the surrounding edge of said recess formed from the sole itself, within and so as to preserve the outer edge of the said sole, to show as the whole or part of the principal or outer sole, substantially as described.

E. Merwin, for complainant.

J. E. Maynadier, for respondent.

CLIFFORD, Circuit Justice. Cases arise where a patentee, having invented a new and useful combination consisting of several elements, which in combination compose an organized machine, also claims to have invented new and useful inventions, consisting of fewer members of the same elements, and in such cases the law is well settled that, if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations, provided he complies with the requirements of the patent act, and files in the patent office, a written description of each of the alleged new and useful combinations, and of the manner of making, constructing, and using the several inventions. He may, if he sees fit, give the description of the several combinations in one specification, and in that event he can secure the full benefit of the exclusive right to each of the several inventions by separate claims referring to the specification for the description of the inventions, without the necessity of filing separate applications for each of the inventions. Separate descriptions of the respective inventions in one application are as good as if made in several applications, but the claims must be separate, and it would follow that if the patentee by inadvertence, accident, or mistake, should fail to claim any one of the described combinations, he might surrender the original patent and have a reissue not only for the combinations claimed in the original specification, but for any which were so omitted in the claims of the original patent. Gill v. Wells, 22 Wall. [89 U. S.] 24.

Matters of fact in this case are for the most part without dispute, and they may be stated in a few propositions, as follows: The complainant is the assignee of the reissued patent of Joseph L. Joyce, as the same is exhibited in the record. By the patent, it appears that the invention is a new and useful improvement in making boots and shoes, the object of the same being to protect the upper leather near where it is joined to the sole. Superadded to that, the patentee states that in the usual construction of boots and shoes, the upper leather, as it is turned over the edge of the insole, is exposed upon the inside to the angle of the upper side of the insole, and at the toe of the shoe or boot, particularly in children's wear, and he also states that the wear of the shoe or boot, in consequence of that exposure soon cuts through the upper leather, or rather forms a bearing against which the wear upon the outside soon destroys the upper leather at such bearing. Having pointed out the defect to be remedied, he proceeds to state that the object of his invention is to overcome that difficulty; and that the invention consists in bevelling the edge of the insole from the lower side back towards the top, so that the upper will not bear against the upper angle of the insole; also in an upwardly projecting edge on the sole around the toe, formed from a part of the sole, but so as to preserve the outer edge of the sole to show as the whole or part of the principal sole.

Frequent reference is made by the patentee to the drawings, as for example, he states that in his improved construction he bevels the insole from the lower surface up, as denoted on the left of Fig. 2 in the drawings, so that the angle of the insole, around which the upper bears, will be down upon the outer sole, leaving no exposed angle in the upper against which the wear will come as in the usual construction, by which means the angle, against which the wear of the shoe is made, being removed, it follows that the wear of the shoe will be much less than when the angle is present, as in the usual construction.

Special reference is then made to Fig. 1, as illustrating the second part of his invention, and the patentee states that the sole of

[Drawings of reissued patent No. 6,480 granted June 8, 1875, to J. L. Joyce, published from the records of the United States patent office.]

fig. 1.

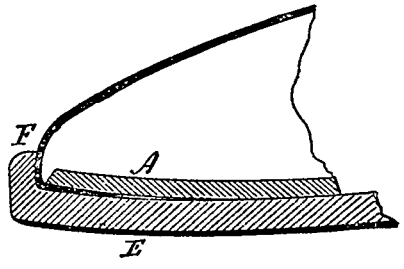
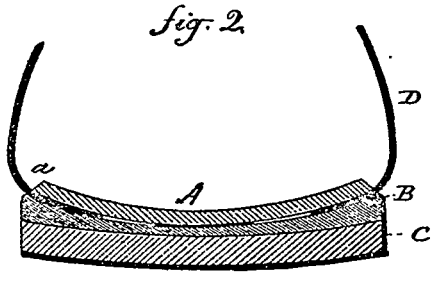


fig. 2.



the shoe or boot is constructed with an edge projecting up on to the upper so as to protect the same from wear, and that the edge is formed by cutting down the surface of the sole as represented in that figure.

Two claims are added, but it is only necessary to refer to the second, as it is not pretended that the first claim has been infringed by the respondent. What the patentee claims in the manufacture of boots and shoes from leather, in the second claim, is, the sole constructed with a recess, into which the insole and the upper, at the edge of the insole, are imbedded, the surrounding edge of the recess being formed from the sole itself, within and so as to preserve the outer edge of the sole to show as the whole or part of the principal or outer sole.

Process was issued and served, and the respondent appeared and filed an answer, in which he set up the following defences: (1) He alleges that the patentee is not the original and first inventor. (2) That the second claim of the reissued patent is not for the same invention as the original patent. (3) He denies the charge of infringement.

Suffice it to say, in respect to the first defence, that it is unsustained by any satisfactory proof, and, having been abandoned in the argument, it is overruled.

Reissued patents are presumed to be for the same invention as the original, unless the contrary appears. Matters of fact are not open under such an issue, in a suit for infringement. Instead of that, the conclusion in such case must always be in favor of the validity of the reissued patent, unless it appears, upon a comparison of the two instruments, that the reissue, as matter of legal construction, is not for the same invention as the original. Surrenders are allowed in order that what was imperfect before may be made perfect, and in order that what was before ambiguous may be made clear and certain, and for that purpose the patentee may add whatever was substantially suggested or indicated in the original specifications, drawings, or patent office model. New features may not be introduced for the reason that every interpolation of the kind is forbidden by the act of congress. Errors and defects may, however, be corrected under the conditions specified, and the prohibition that new features shall not be introduced, must not be understood as taking away the right to include in the reissue whatever was substantially suggested or indicated in the surrendered specifications, drawings, or patent office model.

Unquestioned authority is conferred upon the commissioner to grant a new patent in case the original is surrendered and his action in granting the same is final and conclusive, unless the court is of the opinion, upon comparing the two instruments, that the reissued patent, as matter of legal construction, is not for the same invention as the original. Such was the rule laid down by this court the first time the question was presented to the present presiding Justice. Sickels v. Evans [Case No. 12,839]. Attempt was made in that case to maintain the proposition, that, in the absence of fraud, the allegations in the specification of a reissued patent, however different they may be from the description in the specification of the original patent, are nevertheless conclusive evidence that the invention was made, and that the means to accomplish the result were invented as therein described. Responsive to that proposition, the court remarked that where two specifications are consistent, or where there is no positive conflict or absolute inconsistency, the proposition may be correct, but where it appears on the face of the respective specifications, as matter of law, that the specification and claims of the reissued patent are for a different invention from that secured in the original letters-patent, such a rule cannot be applied. Much consideration was given to the whole subject in that case, and the court held that where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, because that state of the case shows that the commissioner exceeded his jurisdiction, and the court in this case adheres to that conclusion without qualification or abatement.

Beyond doubt the invention in controversy is of a twofold character, both tending to accomplish the same end, and for the purposes of explanation it may be divided into two features, consisting, in the first place, in bevelling or paring away the insole so that the

upper will not bear against the upper angle or edge of the insole. All details in respect to that feature will be omitted, as nothing of the kind is in controversy in the case before the court. Coming to the second feature, it is clear that it consists in cutting a recess in the outer sole, or sole next to the inner sole, near the toe, into which the upper underlying the insole, and the insole itself can be imbedded more or less, the wall of the recess thus forming a protection to the upper at the toe. Properly applied, no doubt is entertained that the invention is a highly useful one in making boots and shoes to be worn by children. Both parties agree that it is the second feature of the alleged invention that is included in the second claim of the reissue. Attention is called to the fact that the second claim of the reissued patent differs from the second claim of the original patent, as if the difference in the claims of the two patents is sufficient to show that the former is not for the same invention as the latter. Such a comparison is doubtless proper in considering the issue before the court, but it is by no means decisive of the issue, as the surrender is often made to correct errors and defects of the patent office, or of the party in improperly limiting the claim, or in giving it a greater scope than the description will warrant. Corrections may be made in such cases by the specifications, drawings, or patent office model, and if the alterations do not exceed what was well described before, and what is substantially suggested or indicated in the surrendered specifications, drawings, and patent office model, the reissued patent cannot be held invalid upon the ground that it embodies and secures a different invention from the original. Apply those rules to the case before the court, and the conclusion necessarily follows that the second defence must be overruled, as it is not possible to decide, as matter of law, that the reissued patent is for a different invention from that embodied and secured in the original patent.

Enough appears in the answer to show that the complainant must prevail over the third defence, for the reason that the answer admits that the respondent has made and sold shoes with tips formed by turning up a portion of the sole, said shoes being, so far as concerns the tip, the same as the invention described in the patent under which he works, but of the ordinary construction so far as concerns the insole. Propositions of various kinds are advanced by the respondent in support of his third defence, but they are all too much tinged with his preceding theory, that the invention secured by the reissued patent is different from the original to require a separate examination. Suffice it to say that it has been overruled, and that in view of that, the invention described in the bill of complaint must be considered as the one embodied and secured in the reissued patent on which this suit is founded.

Defences not sustained do not modify the invention in question, and if not, then it follows, in a case like the present, that in the question of infringement the issue depends upon a comparison of the alleged infringing exhibits with the invention described in the bill of complaint. Tested by that rule the court is of the opinion that the charge of infringement is fully proved. Expert testimony was given upon the subject, and it is entirely satisfactory that the manufactures of the respondent do infringe the second claim of the reissued patent.

Decree for an account and an injunction in favor of complainant, with costs.

Case No. 13,408.

STEVENS v. RUGGLES et al.

[5 Mason, 221.] [1]

Circuit Court, D. Rhode Island. Nov. Term. 1828.

DESCENT AND DISTRIBUTION—REALTY—UNKNOWN HEIRS—RHODE ISLAND STATUTES.

1. The statutes of Rhode Island of 1768 and 1822, respecting the estates of persons dying without leaving known heirs or representatives within the United States, apply to cases, where the person so dying was possessed of an undivided moiety of an estate, as well as to cases, where he held the whole. And to cases where the unknown heir or representative would take an undivided portion, as well as where he would take the whole of the estate descended.

2. Quære, whether the statutes apply to any cases, where the heirs remove from the state, after the death of the person from whom they take.

3. A tenant in common can recover no more than his own moiety or portion of the estate, where he has not disseized his co-tenants.

[Cited in King v. Hyatt (Kan. Sup.) 32 Pac. 1107.]

Ejectment [by Robert Stevens against Nathaniel S. Ruggles and others] for certain real estates in Newport.

The statement of facts was as follows: That Thomas Teagle Taylor, late of Newport, in the state of Rhode Island, made and executed his last will and testament at said Newport, in the year 1769, (which was subsequently duly proved,) and died about the year 1774, seized and possessed of the demanded premises. That all the devisees of the demanded premises, or any part thereof, at the time of his death, resided within the state of Rhode Island. That their names were Elizabeth, Catherine, Margaret, and Mary. That at the time of the testator's death, said Catherine was married to one Nicholas J. Tillinghast, and the said Mary, to Rains B. Waite. That said Thomas Teagle Taylor devised the demanded premises to his wife Patience, who is long since dead, for life, and after her death as follows: "I give and devise to my daughters, namely. Elizabeth Taylor, Catherine Tillinghast, Margaret Taylor, and Mary Waite, after the decease of my said wife, all that my lot of

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

land and dwelling-house in Newport aforesaid, (except such part thereof as is hereinafter disposed of,) to them and their respective heirs and assigns forever, to be equally divided between them, share and share alike, to hold in severalty. Item, I give and devise to my two daughters, namely, Elizabeth Taylor and Margaret Taylor, all that southwest part of my said dwelling-house in Newport, containing a shop, back room, and entry, chambers and garret, being the whole of the addition I made to said house, and is known by the name of the shop-part, together with the land the same stands upon. Also, all my land to the southward of said addition, and to run from thence easterly 12 feet, and from thence southerly to the dividing line between Mr. Daniel Ayroult and myself, to be equally divided between them and to be and remain to them, their heirs and assigns for ever." That one Valentine Weightman, until his death, which happened about the year ——, had possession of the demanded premises, and claimed to hold the possession thereof, as agent of the owners of said estate, or a part of them. That all the devisees and heirs of said estate have long since removed from this state, some to Europe, some to the West Indies, and others to parts, to the parties in this suit unknown. That subsequent to the death of the said Valentine Weightman, one Charles Brayton, of Warwick, in said Rhode Island, was the agent of some or all of the heirs of Catherine Tillinghast, who were entitled to one undivided quarter part of the demanded premises, except the shop-part described in the will of the said Taylor herein before recited, and which shop-part was devised to said Taylor's daughters Elizabeth and Margaret. That afterwards, in the year 1818, said Charles Brayton purchased of one James Duncan and ——, his wife, their right, title, and interest, in one undivided fourth part of said estate. That the wife of said James Duncan was heir at law, or one of the heirs at law, of Catherine Tillinghast. That the plaintiff afterwards purchased of said Charles Brayton his interest in said estate by deed, bearing date the 4th day of May A. D. 1818. That after the deed of said Brayton to the plaintiff, he (the plaintiff) entered into possession of the demanded premises, and held the same until the 7th day of May A. D. 1827; when the town council of the town of Newport, by vote, directed Clarke Rodman, town treasurer of said town of Newport, to take possession of all the real estate of which the said Thomas Teagle Taylor died seized, lying in said town of Newport, to hold the same in conformity and by virtue of an act of the general assembly of the said state of Rhode Island, entitled "An act securing the estates of persons dying leaving real or personal estate within this state, and leaving no known heir or others entitled to distribution within this state." That afterwards, on the 9th day of said May, said Clarke Rodman did enter into and take possession of three undivided quarter parts of said demanded premises by virtue of said authority and direction, and leased the same to the defendants, who hold the said three undivided quarter parts of said estate from said Clarke Rodman in his said capacity. That said defendants hold the remaining quarter part of said estate of Robert Stevens, the plaintiff, and are liable to, and ready to pay the rent thereof to him. That at the time said town council directed said Clarke Rodman to take possession of said estate, said town council knew of no heirs of said devisees, or other person entitled to said estate residing within the United States, and that said town council do not now know of any heir or other person entitled to said estate residing within the United States. That since said Clarke Rodman, town treasurer as aforesaid, took possession of said estate, said Robert Stevens claimed of the town council of said Newport possession of said three quarter parts of said estate so taken possession of by said town treasurer, said Robert Stevens claiming to hold the same by virtue of his former possession, and as being himself entitled to an undivided quarter part thereof, which application was resisted by said Clarke Rodman, and refused by said town council. That no person claiming said three quarter parts of said estate or any part thereof, has demanded the same of said town council, or of said Clarke Rodman, nor has any person as agent to any one entitled to said estate, since the same was so taken possession of by said Clarke Rodman, in his capacity of town treasurer as aforesaid, demanded the same, except the demand of the said Robert Stevens made as aforesaid. If the court should be of opinion on this statement of facts, that the said Clarke Rodman, town treasurer as aforesaid, has no right to take and hold said three quarter parts of said demanded premises, judgment shall be rendered for the defendants for their costs. If the court should be of opinion, that said Robert Stevens, under his title as herein before set forth, and as tenant in common with the heirs of Thomas Teagle Taylor, is entitled to the possession of the whole estate, against the town treasurer of said town of Newport, that then and in that case, judgment shall be rendered for the plaintiff, for the demanded premises and his costs.

Pearce & Turner, for plaintiff.
R. K. Randolph, for defendants.

STORY, Circuit Justice. The demandant is admitted to be entitled to one quarter part of the estate in controversy; and he has never been ejected from it. As to the other three quarters, the defendants are in possession of it under the town council of Newport, who took possession and charge of it

by virtue of the statute of Rhode Island of 1768, empowering the town councils of the respective towns in the colony to take into their possession and care the estates of those persons, who shall die in their respective towns without leaving any heir or legal representatives in the colony, and of the statute of the same state of 1822 (R. I. Dig. 241) in furtherance of the same object.

The demandant seems to rely upon his own possession, before the town council took possession of the estate, as sufficient to entitle him to recover the whole of the estate. But his possession was not exclusive of the heirs of the three quarter parts not purchased by him. He was tenant in common with them, and his possession was quite consistent with their title. No act of disseizin of them is proved, or pretended. Under such circumstances, he can recover only according to the strength and extent of his own title. The tenants, being in possession, are entitled to hold it, until he establishes some title to displace them.

The demandant seems, also, to rely upon the ground, that, as tenant in common, he is entitled to a present possession of all the estate in the absence of the heirs, because the statute was not intended to apply to any cases, except those, where there was no heir or representative or legal claimant of any portion of it within the United States. The words of the act of 1822 are, "that when any person shall die, leaving any real or personal estate within this state, and shall leave no known heir or legal representative within the United States to claim the same, it shall be lawful for the town council of the town, in which such real or personal estate shall be, to direct the town treasurer to take the same into his possession, until the heir or other legal representative of such deceased person shall call for the same." The sound construction of this clause is, that it applies to so much of the estate of the deceased person, whether it be an undivided moiety or the whole, as is without a known heir or representative; for as to such portion of the estate, the deceased, in the very words of the statute, died, "leaving no known heir or representative within the United States." A co-heir or co-tenant is in no just sense the heir or representative of the deceased thereto. The case is equally within the mischief of the statute, whether the deceased be the owner of the whole, or of an undivided portion of the estate; and whether his unknown heir take the whole, or an undivided portion of it by descent. In each case, the object is to preserve the estate in the possession of the town treasurer for the benefit of the rightful owner, whenever he shall appear.

The only real doubt upon the words of the statute is, whether a person, who dies leaving heirs or representatives within the United States at the time of his death, who afterwards remove from the United States, and leave no representatives behind, is within its purview. In strictness of construction, the words seem limited to cases, where there is no known heir or representative of the deceased left within the United States at the time of his death. Perhaps it is not easy to enlarge that construction by implication, so as to reach all the mischiefs arising from subsequent events.

In the present case, it does not appear from the state of facts, what has become of the devisees and immediate heirs of the estate of T. T. Taylor. They are said long since to have removed abroad. Whether they are now living, does not appear. The fair presumption from the lapse of time may be, that all of them have died since their removal, and that thereby a descent has been cast upon their own heirs. If so, then as these last heirs are unknown, the case would be fairly within the reach of the statute to the extent of the three quarters now claimed.

The statement is not sufficiently precise to enable the court to draw such a conclusion with absolute certainty. The case must, therefore, be determined upon the first ground; and for want of any title in the demandant, his right of recovery must be limited to one quarter part of the demanded premises.

Judgment accordingly.

Case No. 13,409.

STEVENS v. The SANDWICH.

[1 Pet. Adm. 233.] [1]

District Court, D. Maryland. 1801.

ADMIRALTY—JURISDICTION—MARITIME LIENS—REPAIRS—WAIVER.

[1. Every contest or dispute between the owners and mariners and the owners and builders or equippers of a ship, for navigation on the sea, is of a maritime nature, and cognizable in the admiralty.]

[Cited in The Richard Busteed, Case No. 11,764; Davis v. The Seneca, Id. 3,650; Waterbury v. Myrick, Id. 17,253. Approved in Thackerey v. The Farmer of Salem, Id. 13,852; Ludington v. The Nucleus, Id. 9,598.]

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

[2. By the general maritime law a shipwright has a lien for the value of materials, labor, etc., expended by him in repairing a vessel in port.]

[Cited in Zane v. The President, Case No. 18,201; The Jerusalem, Id. 7,294; Ramsay v. Allegre, 12 Wheat. (25 U. S.) 626; Cunningham v. Hall, Case No. 3,481; Phillips v. The Thomes Scattergood, Id. 11,106; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 390.]

[3. A maritime lien for repairs may be relinquished or lost by acts which show that other securities have been substituted and accepted therefor, and the court, in examining the testimony applicable to this point, will make every presumption that a jury ought to make on the trial of questions of fact.]

[Cited in The Utility, Case No. 16,806; Leland v. The Medora, Id. 8,237.]

[4. The admiralty jurisdiction over a maritime cause is, in its nature, complete. It extends to

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

the person as well as to the res, and cannot be confined to one of the remedies on a contract when the contract itself is within the cognizance of the court.]

[Cited in De Lovio v. Boit, Case No. 3,776; The Panama, Id. 10,703; U. S. v. New Bedford Bridge, Id. 15,867.]

[5. Cited in De Lovio v. Boit, Case No. 3,776, to the point that the statutes of Richard II. have received in England a construction which must at all times prohibit their extension to this country; that no principles can be extracted from the adjudged cases in England which will explain or support the admiralty jurisdiction, independent of the statutes, or the works of jurists who have written on this general subject.]

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 473, 490.]

[This was a libel by Stevens against The Sandwich, Adams, claimant.]

WINCHESTER, District Judge. This libel involves the general doctrine of liens for the building or preparation of ships in port, and the jurisdiction of this court. I shall examine both these preliminary questions before I investigate the facts, or decide the merits of the particular case before the court.

By the judiciary act the district court has exclusive original jurisdiction of all civil causes of admiralty and maritime cognizance. And it is somewhat remarkable that neither this act, nor the constitution which it follows, limit the jurisdiction in any respect as to place. It is bounded only by the nature of the causes over which it is to decide. Its jurisdiction will not be better understood than by an inquiry into the original acceptation of admiralty powers. Since they will be found to have been military authority, and entirely contradistinguished from civil judicial powers: and after judicial authority was superinduced, the difference between that which is styled admiralty, and that which is called maritime jurisdiction is merely nominal. A tribunal similar to the district courts of the United States exists in every civilized country, peculiarly invested with the cognizance of all questions which result from the navigation of the sea, in which foreigners are or may be interested, and which are governed by the law of nations. Hence the authority and binding efficacy which has been generally conceded to the sentences of admiralty courts. But independent of the peculiar jurisdiction which appertains to the special laws by which such courts are bounded and governed (Zouch, Jure Marit. 382), other powers are added by the laws of the country in which they are established; and the general application of the term admiralty jurisdiction to municipal jurisdiction, thus added without a correct discrimination of their sources, renders it extremely difficult to restrain the precise import of the terms admiralty and maritime causes, as they are used in our constitution and laws. In England the control of their own navy, in France the right of fishery, in Holland the preservation of the dykes and mounds, and in Denmark and Sweden the superintendence of the revenue, are confided to their courts of admiralty—and different as they are in their qualities, and local as they are in their nature, they are alike denominated admiralty causes. The policy, justice or general convenience of the local regulations of commercial states, have been more or less adapted or extended to different countries; and what all adopted, all became equally interested to support. The civil law, the laws of Rhodes, and Oleron, and the particular municipal regulation of towns and nations bordering on the sea (see 2 Bac. Abr. 184), became of course the common rule of decision. In England, where the jealousy of the civil law was most conspicuous, while its authority was openly denied, the principles of equity derived from that Code, influenced the decisions of their courts in as great a degree as in countries where it was adopted.

In all of which from the books within my power, I can obtain any legal information, every contest or dispute, between the owners and mariners, and the owners and builders, or equippers of a ship for navigation on the sea, is of a maritime nature and cognizable in the admiralty. The statutes 13 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country. The reports of decisions in the courts of that country are perfectly irreconcilable. A latitude of jurisdiction has been allowed by able and liberal judges, which to others, perhaps no less wise or virtuous, were deemed inconsistent with the statute of Richard II.; as in the case of a charter party signed and sealed at land, it is holden that the admiralty has cognizance because it is a marine cause, and seamen's wages, though admitted to be a marine cause, are held not to be cognizable in the admiralty court, if the instrument is sealed, because the admiralty cannot try the deed. Salk. 31. Thus, in one case, the reason why a cause is held to be cognizable in the admiralty court, is the foundation for refusing it in another. And in another, to wit, a dispute between part owners whether a ship shall be sent to sea? is allowed to be cognizable, although the whole dispute arises on land, and is only collateral to a marine cause. I mention these cases to shew that no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes, or the works of jurists who have written on the general subject.

Within the cognizance of this jurisdiction are all affairs relating to vessels of trade, and the owners thereof, as such; and all matters which concern owners, proprietors of ships as such—all causes of pawning, hypothecating or pledging of the ship or vessel itself, or any part thereof, at sea, and whatever is of a maritime nature, either by way of navigation upon the seas, or negociation at or beyond the sea, in the way of marine trade or commerce—also the nautic right which mari-

time persons have in ships, their tackle, &c. Likewise all causes of out-riggers, furnishers, owners, and part owners of ships, as such. See, also, Beaw. Lex Merc. 282 (cites Wood, Inst. 813). It is allowed by the common lawyers and civilians, that the admiralty has cognizance of seamen's wages and contracts and debts for making ships. Postlethwaite is supported in his principles as to jurisdiction between co-owners, by Carth. 26, Beawes and Wood, and by the authorities in Rolles, Abr. 533. So in Zouch, Elem. 370. Its jurisdiction extends to all causes of navigation and maritime negociation; and according to 1 Bac. § 178, its authority to all the incidents and consequences of such causes—So in France, according to 1 Valin, Comm. 362, this is a proper question for admiralty jurisdiction; and he cites Vinnius and Lacennorius as authorities to justify the French practice. Again in Zouch, a corresponding practice in the courts of Holland, Hamburgh and Great Britain is relied on in evidence of the jurisdiction; and the decision of the state court in the case of Glass and Gibb, in which all the powers of an instance and prize-court as they are divided in England, are held to belong to the district courts. I am therefore of opinion, that the court has jurisdiction of the matter stated in this libel.

Has a shipwright a lien on the vessel by him repaired, for the value of his materials, labor, &c. is the second question in this case. To decide this question it is necessary to examine the nature of liens and privileged debts, at the civil law. Liens by the civil law are, 1st, express; 2d, privileged; 3d, implied or legal. A difference is taken between the "pignus" which can only be of personal property actually delivered to the creditor—and the "hypotheca," which is of real estates, and over which a right only is assigned to the creditor, the debtor remaining in possession. The terms however are convertible, and the legal incidents the same. The simple pledge or mortgage corresponds to that in use in England and this country, and a comparison of the British decisions with the Digest will shew that our system is almost wholly drawn from that Code. 2d. A privileged mortgage, on which, if the remedy pursued be personal, the privilege is according to the order of time only; but if the remedy is pursued in rem the privilege operates without respect to time, and according to the cause of the debt, according to Zouch; privileged, are those creditors who are to be preferred, in the course of payment, before other creditors, though prior in time, e. g. funeral charges, which are an expense of necessity, and the costs of an administration, which are for the common benefit of creditors. 3d. Implied or legal. These are given by law upon the presumed assent of the parties, where no express stipulation appears; as is the case of seamen's wages, storage of goods, and the distress for rent; of the latter description must be the libellant's case, if he has any lien at all. All the authorities of the civil law admit a ship-carpenter into the class of privileged creditors, without any regard to the place where the services are rendered; but it is not conceded by all, that he has the jus hypotheca. It is manifest his lien cannot be supported on principles of common law, since the very nature of the services of repairing a ship, precludes the idea of possession transferred from the owner. And the common law, which pursues strictly the old distinction of civil law between pignus and hypotheca only admits a lien, where there is an actual possession passed to the creditor. The extent of the incidents to a privileged debt are not necessary to be inquired into. By some civilians, cited by Zouch, a ship-carpenter is only considered as having a right of preference above other creditors, when the whole of the goods are insufficient to pay the aggregate of debts, and the jus hypotheca is denied. But Zouch, who I find is supported by the Digest, lib. 20, § 21, vol. 1, Corp. Jur. Civ. 1916, 1924, and 1932, supports his lien by the opinions and practice of other jurists, and the courts of Hamburgh, Holland and Great Britain, and satisfactorily explains the causes of the erroneous opinions of writers, who deny the lien of such a creditor to have arisen from not accurately attending to the difference between a simple privileged debt, strictly such, where among many of similar creditors the rule, "Prior in tempore potior est jure," prevails, and a privileged mortgage or lien express or implied, where the cause of the debt, and not the time of its creation, governs.

The reason of the lien to ship-carpenters for repairs, independent of considerations of policy, even among contending mortgagees, is, that such services preserve the specific thing from destruction, and securing such subsequent creditors does not injure prior mortgagees or creditors, since the pledge is increased in value, in proportion to such services. 1 Valin, Comm. states, a corresponding opinion in France, and assigns the reason of the civil law. I am therefore of opinion, that a ship-carpenter, by the maritime law, has a lien on the ship for repairs in port. But this lien may be relinquished or lost, by acts which shew that other securities have been substituted and accepted; and the court, in examining the testimony applicable to this point, will make every presumption that a jury ought to make on the trial of questions of fact, but as the interest of no other creditor is involved in the libellant's claim, I cannot conceive of what importance it is now to ascertain whether his lien continues—since the cause being a maritime cause, the court has a jurisdiction over his person as well as over the ship. The jurisdiction must in its nature be complete—it cannot be confined to one of the remedies on a contract, when the contract itself is within its cognizance.

Case No. 13,410.

STEVENS v. SHARP.

[6 Sawy. 113.] [1]

Circuit Court, D. Oregon. Nov. 21, 1879.

LIMITATION OF ACTIONS—IN EQUITY—STATE STATUTE—OREGON DONATION ACT—MISTAKE IN PATENT.

1. Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; and when the trust arises out of the fraud of the defendant, or those under whom he claims, there is no fixed rule upon the subject, but each case is decided according to its own facts and circumstances.

2. A state statute of limitation is not applicable in the national courts in a suit in equity, but under ordinary circumstances, the limitations prescribed therein will be regarded as reasonable.

3. A married settler, under the donation act, fraudulently procured a certificate and patent to the wife's share of the donation to be issued to a woman not his wife: *Held*, that a court of equity had jurisdiction to correct the error by requiring the patentee or her assigns to convey the premises to the wife or her assigns.

[This was a bill by James B. Stevens against Cragie Sharp. The defendant in this suit had already obtained a judgment in this court (Case No. 12,710), and this action is brought to restrain the execution of it.]

Joseph N. Dolph, for plaintiff.

W. Scott Bebee, for defendant.

DEADY, District Judge. This suit is brought to enjoin the defendant from enforcing a judgment obtained by him in this court against the plaintiff for the recovery of the possession of the north half of the donation of Edward S. Sexton and wife, situate in Washington county, the same being the south half of the southeast quarter of section twenty, and all of section twenty-nine except the north half of the northwest quarter thereof, in township one south, of range one west, of the Wallamet meridian, containing three hundred and twenty acres, and to have the defendant convey the legal title of the same to the plaintiff.

Upon reading and filing the bill, September 1, 1879, an order was made that the defendant show cause why a provisional injunction should not issue. The defendant showed cause by demurring to the bill, which was argued by counsel on October 8, 1879. The material facts stated in the bill are as follows:

That in January, 1843, in Fulton county, Illinois, one Edward S. Sexton was married to Angeline Bilshee, which marriage remained in full force and effect until the death of said Sexton; that prior to March 20, 1850, said Sexton left said Angeline and three children in Illinois, and came to Oregon, where he, pretending to be unmarried, in March, 1850, intermarried with India Stevens, the daughter of the plaintiff; that on September 1, 1853, said Sexton settled upon the premises as a married man, under the donation act, and resided upon and cultivated the same for four consecutive years, and otherwise complied with said act; that on January 31, 1868, a certificate was issued by the register and receiver of the proper land office to said Sexton and his wife for said donation, in which the north half thereof was designated as the part inuring to the latter, and the south half to the husband; that in procuring said certificate to be issued, said Sexton falsely and fraudulently pretended and represented to said register and receiver that said India was his lawful wife, and thereby procured and caused said certificate to be wrongfully issued to said India as the wife of said Sexton; that on May 5, 1873, a patent was issued for said donation, upon and in pursuance of said certificate, in which said India was erroneously described as the wife of said Sexton, and the premises in controversy confirmed to her as such; that the plaintiff, on July 7, 1876, purchased the south half of said donation from said Sexton; that in 1870–71, said Angeline and descendants set up a claim to said donation, and the plaintiff offered to assist said India to defend against the same, when said India informed him that she had known for years of the existence of said Angeline and that she had no doubt that she was the lawful wife of said Sexton, whereupon he purchased the interest of said Angeline and descendants in said donation for the sum of two thousand five hundred dollars, and is now the owner and in possession of the same; that in October, 1873, said Sexton being dead, said India intermarried with one Samuel Rolfe, and in July, 1878, and during her last illness, said Rolfe procured said India to join with him in a conveyance to the defendant of all their interest in the donation; that in May, 1879, said defendant commenced an action in this court against the plaintiff to recover possession of the north half of said donation, in which he obtained judgment of such possession and one hundred and eighty dollars damages and costs; that said judgment was obtained solely upon the ground of the patent to India, and that until the same was given the plaintiff supposed he had the legal title to the premises.

The grounds of the demurrer are: (1) That the court is without jurisdiction; (2) that the suit is barred by the lapse of time; and (3) that there is no equity in the bill.

The first ground is certainly untenable, and was not insisted upon in the argument.

The objection that the suit is barred by lapse of time rests upon the assumption that section 378 of the Oregon Civil Code, which provides in substance that no suit of equity shall be maintained to affect a patent, unless the same is brought within five years from the date thereof, applies to a suit in this court.

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

But, as was held by this court in Hall v. Russell [Case No. 5,943], and Manning v. Hayden [Id. 9,043], this statute is not applicable to suits in this court. In the latter case the rule applicable to this case is laid down as follows:

"In the consideration of purely equitable rights and titles courts of equity act in analogy to the statute of limitations, but are not bound by it. * * * In cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy, to force upon the defendant the character of a trustee, courts of equity will apply the same limitation as provided for actions at law. * * * But when the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification, that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has been long acquiescence in the wrong."

Although a few days over six years had elapsed when the action was brought by the defendant, which has resulted in this suit, still, practically speaking there has never been any actual acquiescence by the plaintiff in the alleged wrong, because he has been in the undisturbed possession and enjoyment of the premises since before the date of the patent, with the knowledge and apparent acquiescence of the pseudo wife, and those claiming under her, until the commencement of this litigation. Under the circumstances, he can only be charged with an omission to bring a suit to quiet his title against a claim which was not asserted, and which, as he might well think, under the circumstances, never would be.

The patentee, or those claiming under her, had by the law of the state twenty years after the plaintiff took possession, within which to bring an action to assert her right under the patent; and in my judgment it is time enough for the party in possession to resist or countervail such right when it is asserted or set up. Indeed, in a case of fraud, a delay of thirty years has been held not a bar to relief. Mechoud v. Girod, 4 How. [45 U. S.] 561.

But I admit that this court, sitting as a court of equity, when called upon to determine what delay will make a claim stale or show a want of diligence in its prosecution, so as to bar a suit thereon, should have regard to the periods prescribed by the law of the state in similar cases, as evidence of what is deemed a reasonable rule in this locality upon that subject. This being so, it must be borne in mind, that on October 17, 1876, and before the commencement of this litigation, the legislature amended section 378 so as to make the limitation therein ten years instead of five, and also declared that a party in possession, and equitably entitled to the land as against the patentee, might enforce his equity against such patentee, either as defendant in an action at law brought by the patentee to recover such possession, or by a suit in equity within the time such action for the possession might be brought. Sess. Laws, 25. This is the latest legislative expression of what is deemed a convenient and just rule on this subject, and this court may safely hold in analogy to it, that in the general a suit brought to affect a patent at any time within ten years from the date thereof, is brought within a reasonable time. But there may be cases in which a less time would be a bar to relief, and others in which twice that time would not be unreasonable, and such I think is this case.

The plaintiff is in possession and has been since before the date of the patent, with little or no reason to apprehend that the claim of the pseudo wife as patentee of the premises, would, under the circumstances, ever be asserted against him, and now brings this suit to defend such possession against the defendant's action to deprive him of the same upon said patentee's bare legal title.

The plaintiff is entitled to maintain this suit notwithstanding the lapse of time since the issuing of the patent.

The only other question arising upon the demurrer is whether this court can grant relief against the fraud committed by Sexton in falsely representing to the land department that India instead of Angeline was his wife, and the consequent mistake made by it in the issuing of the certificate and patent to said India instead of Angeline.

The donation act (9 Stat. 49, § 4) gave the wife of the settler thereunder one half of the grant in her own right on account of her wifeship. No other qualification was required on her part to enable her to claim and take one half of the donation. Vandolf v. Otis, 1 Or. 153; Lamb v. Starr [Case No. 8,021]; Fields v. Squires [Id. 4,776].

It is admitted that Angeline was the wife of the settler upon this donation, and not India, and therefore it follows necessarily that Sexton committed a fraud upon her, when in making proof of his marriage before the register and receiver, he falsely represented that India was his wife, and thus procured the certificate and patent to issue to India, when they should have issued to Angeline. It seems hardly necessary to ask the question whether a court of equity can grant relief against such a gross fraud and palpable mistake as this. In my judgment there can be no doubt about it. Johnson v. Towsley, 13 Wall. [80 U. S.] 83; Shepley v. Cowan, 91 U. S. 340.

In these cases, the supreme court affirm that courts of equity have jurisdiction to inquire into, and modify and annul the ac-

tion of the land department for fraud or mistake other than an error of judgment in estimating the value or effect of evidence. See, also, Aiken v. Ferry [Case No. 112], decided in this court.

Upon the bill, the plaintiff is clearly entitled to the relief sought. The demurrer is therefore overruled.

Case No. 13,411.

STEVENS et al. v. The S. W. DOWNS & The STORM.

[Newb. 458.] [1]

District Court, E. D. Louisiana. Feb., 1854.

SALVAGE—TOWAGE—TO ESCAPE FIRE—ESTOPPEL—DAMAGE BY TOWING STEAMER.

1. A steamboat for services performed in towing other steamboats from positions where they were moored at the wharf, and thus preventing them from coming in contact with a steamboat on fire descending the river, is entitled to a compensation for towage, and not to a compensation in the nature of salvage.

2. A party who in view of the danger with which his boat is threatened by the approach of a steamboat on fire, calls for the assistance of another steamboat to remove his property from its perilous situation, will not be allowed to plead exemption from liability to pay for the services demanded, upon the ground that his property would have been safe, if left in its original position.

3. If a steamboat, while extricating another steamboat from her perilous situation, during the excitement and confusion incident to a threatened conflagration, should unavoidably injure the latter, she will not be held responsible for the injury; and a reconventional demand in the nature of a cross libel, claiming compensation for such an injury, will be dismissed.

[This was a libel for salvage by Hiram E. Stevens and owners of the steamboat Eliza against the steamboats S. W. Downs and Storm and cargo of the Storm.]

McCALEB, District Judge. The libelants claim a salvage compensation for having taken the steamboats S. W. Downs and Storm from their landing place, at the wharf, and thus saving them from being burnt, on the 15th of February, 1853. It seems that between the hours of 10 and 11 o'clock on that day the steamboat John Swasey took fire while descending the river nearly opposite Lafayette, and drifted down the current. While enveloped in flames she passed very near the sterns of the many steamboats then lying moored at the wharf near the foot of Canal and Custom-house streets. Great consternation and alarm was created among those having charge of the boats, and the utmost anxiety was manifested to prevent them from coming in contact with the burning boat. The steamboat Eliza was about to leave port on her voyage up the river, and had already raised steam. She first towed out the steamboat Eclipse, and afterwards performed the same service for the Downs and the Storm, at the request of those having charge of those boats at the time.

While I do not feel myself called upon to decide that this is not a case of marine salvage, I have no hesitation in saying that it is a case where the services performed should entitle the libelants to little more than would be allowed upon a quantum meruit, for work and labor performed. A great deal of testimony has been taken by the respondents, to show that the boats which were towed out by the Eliza were not in danger, and would not have been burnt if they had been left in their original position at the wharf; and yet it has been clearly proven, that the bells of these boats were rung and the assistance of the Eliza expressly solicited. Much of this evidence, therefore, directly contradicts the acts and declarations of those who had charge of the boats while the John Swasey was on fire. That those who asked for assistance at the time, believed they needed it, can hardly be a matter of doubt. And while I am satisfied that the Eliza should be compensated for the trouble and delay to which she was subjected, I can see no ground for such an extravagant allowance, as seems to have been in the contemplation of the proctor who argued the cause in behalf of the libelants. I think the Eliza is entitled to a liberal compensation in the nature of towage. It has been shown that substantially the same services were rendered by another boat for a compensation upon this principle. I would certainly offer to steamboats sufficient inducement to render assistance under such circumstances; but I do not deem it either safe or proper to hold out expectations of an extravagant remuneration for services which should be dictated by generosity, and which are usually prompted by the spirit of comity prevailing among the commanders of steamboats. The services were performed in daylight, and I am satisfied that while the Eliza perhaps incurred some risk, she was subjected to little or no actual danger. For the services she rendered to the Downs, she is, I think, entitled to receive $100, and for her services to the Storm, she should receive $75, and for these sums I shall order judgment to be given in favor of the libelants, with costs.

The claim in the nature of a reconventional demand asserted by way of cross libel by the respondents, must be rejected. They were certainly benefited by the assistance so seasonably rendered by the Eliza, and it is now entirely too late to speculate upon the chances of escape from the peril to which they certainly believed their property was exposed, when they demanded that aid from the Eliza, which seems to have been promptly and cheerfully given. The injuries complained of, were, in my judgment, the result of unavoidable accident, attributable, doubtless, in a great measure, to the hasty and imperfect manner in which, amid the confusion of the moment, the boats were fastened together; and for which those on board of both boats

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

were responsible. I am satisfied from the testimony of the pilot of the Eliza, that it was impossible during the violence of the gale which was prevailing at the time, to land the boat in tow. The order to cast her loose, seems to have been dictated by overruling necessity, and it does not appear that any objection was made to it at the time, by the officers of the Downs. If, under all the circumstances of the case, the libelants were not successful in towing the boats from their position at the wharf to a place of safety without causing some injury, it should not be imputed to them as a fault; and the respondents should regard the injury complained of, as a part of the price of the timely rescue of their property from the danger of far greater injury to which it was exposed. Upon a full and fair consideration of all the facts and circumstances of this case, I cannot adopt the conclusion to which the argument of the proctor for the respondents would lead; that the Eliza after having performed the service alluded to at the express solicitation of those on board the Downs and the Storm, should now, not only be denied a reasonable compensation for those services, but condemned to pay the damage sustained from causes beyond her control.

The reconventional demand will therefore be dismissed, and judgment entered in favor of the libelants for the sums already mentioned, with costs in the proportion of four-sevenths against the S. W. Downs, and three-sevenths against the Storm and cargo, or against the claimants and sureties on the bonds executed and returned into court on the release of said boats respectively. The costs to be taxed by the clerk.

STEVENS (UNITED STATES v.). See Cases Nos. 16,391-16,394.

Case No. 13,412.

STEVENS et ux. v. VANCLEVE.

[4 Wash. C. C. 262.] [1]

Circuit Court, D. New Jersey. April Term, 1822.

EVIDENCE — MATERIALITY — HEARSAY — WILLS — COMPETENCY OF TESTATOR — TIME OF MAKING — PRESUMPTION OF SANITY — SIGNING.

1. Question upon the validity of a will and testament. The defendant's counsel offered evidence to prove that a former will, executed by the testator, had been purloined by the plaintiff. This evidence is improper, as it is not pretended that the contents of that will are to be proved, as the plaintiff relies altogether on the validity of another and subsequent will.

2. The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than their admission as evidence, either to control the construction of the instrument, or to support or destroy its validity.

[Cited in Caeman v. Van Harke, 33 Kan. 338, 6 Pac. 624; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 264; Collagan v. Burns, 57 Me. 471; Couch v. Eastham, 27 W. Va. 803; Dickie v. Carter, 42 Ill. 389. Distinguished in Dinges v. Branson, 14 W. Va. 114; French v. French, Id. 507. Cited in brief in Gibson v. Gibson, 24 Mo. 228. Cited in Herster v. Herster, 122 Pa. St. 256, 16 Atl. 346. Cited in brief in Hoshauer v. Hoshauer, 26 Pa. St. 406. Cited in Kitchell v. Beach, 35 N. J. Eq. 454. Cited in brief in Kenyon v. Ashbridge, 35 Pa. St. 159. Cited in Lewis v. Douglass, 14 R. I. 607; Linton's Appeal, 104 Pa. St. 238; Mooney v. Olsen, 22 Kan. 76. Distinguished in Neel v. Potter, 40 Pa. St. 484. Cited in brief in Robinson v. Adams, 62 Me. 381; Robinson v. Brewster, 140 Ill. 655, 30 N. E. 683.]

3. What constitutes a sound and disposing mind or memory in a person making a will.

[Cited in brief in American Bible Soc. v. Price, 115 Ill. 625, 5 N. E. 126. Cited in Bennett v. Bennett, 50 N. J. Eq. 446, 26 Atl. 573. Cited in brief in Brinkman v. Rueggesick, 71 Mo. 553; Hovey v. Hobson, 55 Me. 269; Hovey v. Chase, 52 Me. 309. Cited in Lee's Case, 46 N. J. Eq. 201, 18 Atl. 528; In re Pensyl's Will, 157 Pa. St. 465, 27 Atl. 672; Reynolds v. Adams, 90 Ill. 149; Rusling v. Rusling, 36 N. J. Eq. 607; White v. Starr, 47 N. J. Eq. 258, 20 Atl. 880.]

4. The only point of time to be looked to by a jury, who are to decide upon the competency of a testator to make a will, is that when the will was executed.

[Cited in Turner v. Hand, Case No. 14,257.]

[Cited in Craig v. Southard, 148 Ill. 45, 35 N. E. 361; Greer v. Greers, 9 Grat. 333; Harden v. Hays, 9 Pa. St. 163; Wilson v. Mitchell, 101 Pa. St. 503; Waddington v. Buzby, 45 N. J. Eq. 174, 16 Atl. 691; Yoe v. McCord, 74 Ill. 45.]

5. What is the nature of the evidence, and how it is to be estimated, in relation to proof of the execution of a will.

6. Construction of the statute of New Jersey relative to the execution of wills.

7. The will in this case was upon strictly legal principles, signed by the testator, his hand being, with his own consent, guided by another, and the will afterwards acknowledged by him.

[Cited in Blair v. Sayre, 29 W. Va. 613, 2 S. E. 97. Cited in brief in Vandruff v. Rinehart, 29 Pa. St. 233.]

8. The presumption of law is always in favour of the sanity of the person whose will is brought into question, at the time the will was executed; and the burthen of proof lies upon the person who asserts unsoundness of mind; unless a previous state of insanity has been established; in which case the burthen is shifted to him who claims under the will.

[Cited in brief in Farrell v. Brennan, 32 Mo. 331; Hill v. Hill, 53 Vt. 579; Williams v. Robinson, 42 Vt. 661.]

The plaintiffs [John Stevens and wife] claim one third of the land in controversy, in right of the female plaintiff as one of the heirs of Benjamin Vancleve deceased, and one other third part under a deed from Dr. Clark and his wife, the latter being also a daughter and one of the heirs of the deceased. The defendant [Joseph W. Vancleve] is the son of the deceased, who claims the whole of the land under an instrument purporting to be the last will and testament of

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

Benjamin Vancleve. The cause turned altogether upon the validity of this instrument, which, it was contended by the plaintiffs' counsel, 1. Was not executed according to the requisitions of the laws of New Jersey; and 2. That the said Benjamin Vancleve, at the time he executed the alleged will, was not of sound and disposing mind and memory.

The following summary contains the substance of the evidence as declared in the charge to the jury: Mrs. Pharis, one of the attesting witnesses, deposed, that, on the morning of Sunday, the 24th of August, 1817, she was at the house of Benjamin Vancleve, (who was then in bed, having been struck by the palsy some time early in the month of June preceding, which entirely disabled one half of his body) and heard the defendant inform his father, that the will he had executed in the year 1814 was missing; but that he had a copy ot it, and inquired of his father if he would execute that as his will? To which his father answered, "Yes." That upon receiving the above information, he appeared to rouse up like a person from a deep sleep, and asked, "Who has taken it?" The defendant then sent for John Pharis, and after his arrival, the defendant read over to his father the copy of the will distinctly, section by section, and asked him, at the end of each, if he understood it? To which he replied, "Yes." He was then asked, if John Pharis should steady his hand whilst he signed his name? To which he answered, "Yes, I wish him to do it." John Pharis did accordingly steady his hand, and with this assistance, he signed his name to the will. After this was done, Pharis told him that he must acknowledge the will; upon which, the testator put his finger on the seal, and the witness heard him say, "last will and testament:"—having moved her position at the moment, she did not hear the first part of the sentence. The witness further stated it as her opinion, that Benjamin Vancleve was, at the time, in his right mind, and understood what he was doing, and that he was capable of dictating his will. She added, that he could articulate so as that she could understand him very well when he spoke; and that he frequently, when she visited him, prior to this period, after the stroke of the palsy, inquired respecting her own health, and that of her family. She further proved her own signature to the will, and that of the other two attesting witnesses, made in the presence of the testator, and of each other. She stated that, after the will was executed, she saw the defendant, who sat on the bed by her father, conversing with him, but that she did not attend to what was said. She saw the father's lips move, and heard his voice.

The evidence of the two other subscribing witnesses, and also of Mary Vancleve, a granddaughter of the testator, who resided in his family, and who was present when the will was executed, corresponds in every material circumstance with that above detailed. Two of them heard the testator distinctly say, "I acknowledge that (his finger being placed on the seal) to be my last will and testament." John Pharis stated, that he was asked if he acknowledged that to be his last will and testament, and that he answered "Yes, I do." This witness further added, that the testator seemed more revived that day than he had seen him for some weeks; that he does not think that he was capable of disposing of his property by deed, or of dictating and forming a whole will at one time, being too weak for so great an effort; but that he was capable of remembering what he had done at former times, and what disposition he then wished to make of his property. That he spoke very little; only in few words at a time, and then in answer to questions; but that he understood every thing that was proposed to him, and what he was doing, as well as a man could, who was in a weak state.

In support of this testimony, the defendant examined a number of witnesses, who stated that they had seen the testator at different times, before and after his last sickness; that his memory had failed considerably as to names and persons, and recent events; but that he spoke, asked questions, particularly as to the health of those who called to see him; and that in their opinion, he was, when they saw him, of sound mind and memory. On the other side, a great number of witnesses were examined, who deposed that the memory of the testator was greatly impaired, even before the last stroke of the palsy. That he would ask foolish questions, and inquire the names of his former acquaintances who called to see him. Upon one occasion, he inquired how a particular acquaintance of his was, and being answered that he was dead, he not long afterwards expressed a wish to see him. At another time, he mistook one of his nieces for a granddaughter who had long before been dead. Many similar instances of a great decay in his memory, were stated by these witnesses. That after the last stroke of the palsy, they never heard him speak, although he would sometimes make a noise, as if he desired to speak; that when they called to see him, he lay as if in a state of insensibility, with a vacant stare, and apparently unconscious of any thing; neither speaking to, nor noticing those who addressed him, not even his own daughters. That he was entirely childish, as well as helpless, and was treated as if he had been an infant. These witnesses all concur in opinion that the testator was at no time, during his last sickness, competent to make a will, or to transact any other kind of business, and that his mind and judgment were entirely prostrated.

Some evidence was given of declarations by two of the attesting witnesses, Mr. Pharis

and Stephen Johnson, contradictory of their evidence given on oath, as to the capacity of the testator to make his will; in particular, that the hand of the testator, instead of being steadied by John Pharis, was guided, and the name in fact written by him. Some of the witnesses examined for the plaintiffs sat up with the testator at different times during his sickness, and others merely called for a few minutes to see him and to inquire respecting his health.

During the trial, the defendant's counsel offered evidence to prove that the original will, executed by the testator in 1814, when his capacity was not questioned, had been purloined by the female plaintiff.

BY THE COURT. Such evidence is improper, as it is not pretended by the counsel, that they mean to prove the contents of that will, and to rest their defence upon it. On the contrary, they rely altogether, as they avow, upon the validity of the will executed on the 24th of August 1817; and consequently the question respecting its validity cannot in any manner be fairly affected by the evidence offered in respect to the will of 1814. The only tendency of such evidence would be to prejudice the minds of the jury, and to lead them from the question which they have to decide.

The defendant's counsel also offered evidence to prove that the uniform declarations of the testator in favour of the defendant, from the year 1802, had been consistent with the disposition made of his property by the will of 1817. This was objected to, as being inapplicable to the only question in the cause,—the competency of the testator to make his will; the counsel for the plaintiffs disavowing any intention to charge the defendant with fraud, or improper conduct in obtaining the will. Parol evidence to vary or explain a deed or will, except in a case of a latent ambiguity, or of fraud in obtaining a will, is inadmissible. 1 Johns. Eng. Ch. 231, 234; 2 P. Wms. 214; Thomas v. Thomas, 6 Term R. 671; 1 Fonbl. Eq. 70; 2 Vern. 624; Smith v. Fenner [Case No. 13,046]; 2 Johns. 31; 2 South. [5 N. J. Law] 655.

On the other side it was insisted that, upon the question of competency, it might be very material to show that the testator had long contemplated the disposition of his property in the manner designated by his will; as in that case, a smaller grade of memory might be requisite, than would be if such a disposition had not been previously arranged in the mind of the testator. Harrison v. Rowan [Case No. 6,142], in this court; 1 Yeates, 108; 2 Yeates, 46; 1 Hen. & M. 476, 478; 3 Hen. & M. 502, 510; 1 Bay, 335.

WASHINGTON, Circuit Justice. The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. If the evidence is offered in support of the instrument, it could only have that effect upon the supposition of a uniform consistency of those declarations, not only with the instrument itself, but with the secret intentions of the party, at all times after those declarations were made; and yet how unsafe a criterion would this be, when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will, before they have committed them to writing. The uniform consistency of those declarations, is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiffs would be at full liberty to prove opposing declarations of the testator at other times; and thus a door would be open to an inquiry in no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and to mislead the jury. That such evidence has sometimes been given, is proved by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law, since, in none of them, was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decisions. The general rule of law is against the evidence, and no case has been cited showing an exception to it, unless when it was offered to repel a charge of fraud, or circumvention of the devisee in obtaining the will. But in this case the plaintiffs' counsel disavows any intention to impute to the defendant a charge of this sort. The evidence is therefore inadmissible.

PENNINGTON, District Judge, concurred.

It was contended by the plaintiffs' counsel, in summing up: (1) That the will was not executed according to the directions of the statute of New Jersey, passed the 17th of March, 1713 (14 Patt. Laws, 5) which declares, that all wills and testaments thereafter to be made in writing, signed and published, by the testator, in presence of three subscribing witnesses, and regularly proved, and entered on the books of records, or registers in the secretary's office, &c. shall be sufficient to devise and convey any lands, &c. This act differs from the statute of 29 Car. II. c. 3, § 5, in this important particular: that the statute speaks of wills signed by the testator, or some other person in his presence, and by his express direction. In this case, it is undeniable that the name of Benjamin Vancleve was written by John Pharis, who not only steadied, but guided his hand, and wrote the name, using the hand of the alleged testator as an instrument, as much so as if he were dead. But even under the statute of 29 Car. II. this could not be considered as a valid execution of the

will, inasmuch as the testator merely consented that John Pharis should steady his hand, as is proved by all the witnesses; there is no evidence that he expressly, or otherwise directed him to sign his name. (2) That the weight of evidence, as to the capacity of the testator to make a will, at the time this was executed, is clearly against its validity. Cases cited under this head: 2 South. [5 N. J. Law] 455; Hoge v. Fisher [Case No. 6,585]; 1 Brown, Ch. 441. 443; 2 Poth. Obl. Append.: 12 Vern. 450; 2 Cro. Jac. 497; Swinb. 113; Cowp. 92; Doug. 241.

For the defendant it was insisted, on the first point, that, upon the evidence, it appeared, that the name of the testator was signed by himself, Pharis merely guiding his hand. But even if the name had been written by Pharis, it would be a good execution; as it would be quite an inadmissible construction of the law of this state to exclude from the privilege of making a will, a person who, by accident or disease, should be incapable of writing his name. Such has never been the construction of the law by the courts of this state. The agency of Pharis is clearly proved to have been exerted at the request of the testator; which would bring the case strictly within the statute of 29 Car. II. (2) The evidence given of the state of the testator's mind, at periods prior or subsequent to the 24th of August, is not such as ought to prevail against the testimony of the attesting witnesses. The presumption of law is always in favour of competency, and the whole burthen is on the heir at law to establish the contrary fact. As to the degree of capacity in the testator necessary to give validity to his will, the following books were referred to: Swinb. 112, 76-83, 96; Jac. Law Dict. 430; Harrison v. Rowan [Case No. 6,142], in this court; 2 Phil. Ev. 191, 193; 3 Mass. 330.

R. Stockton and Wall & Halstead, for plaintiffs.

Mr. Ewing, L. H. Stockton, and Freelinghuysen & Southard, for defendant.

WASHINGTON, Circuit Justice, (charging jury). As the objection to the execution of the will will be noticed hereafter, I shall, for the present, confine my observations to the single question of the testator's competency to make a will. He must, in the language of the law, be possessed of a sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not be able, at all times, to recollect the names, the persons, or the families, of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory, and vigour of intellect, to make, and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. More especially, in such a reduced state of mind and memory, he may be able to recollect, and to understand the disposition of his property which he had made by a former will, when the same is distinctly read over to him. The question is not so much what was the degree of memory possessed by the testator as this —Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the object of his bounty? To sum up the whole in the most simple and intelligent form—Were his mind and memory sufficiently sound to enable him to know, and to understand, the business in which he was engaged, at the time when he executed his will? This being the question, and the only one at this time for your consideration, I shall proceed to lay down the following general rules to assist you in your deliberations.

1. The only point of time to be looked at by the jury, at which the capacity of the testator is to be tested, is that when the will was executed. He may have been incapable to make a will at any time before, or after that period; and the law permits evidence of such prior and subsequent incapacity to be given. But unless it bear upon that period, and is of such a nature as to show incompetency when the will was executed, it amounts to nothing.

This being the important epoch: 2. The evidence of the attesting witnesses; and next to them, of those who were present at the execution—all other things being equal—is most to be relied upon. The reason is an obvious one. The law considers the attesting witnesses, in particular, as called upon by duty to examine into, and to be satisfied of the capacity of the testator to make a will. There are few men so ignorant as not to know, that a person non compos mentis cannot make a valid disposition of his property by will, and that his signature to the will attests, not only its execution, but its validity. These witnesses besides, and others present at the execution, have a better opportunity of judging of the soundness of the testator's mind, from his words, actions, and appearance, than those who merely saw him at other times.

I now proceed to lay before you the substance of the evidence, beginning with that given by the attesting witnesses, and by those examined to support their testimony; and afterwards, that of the witnesses who

speak of the testator's incompetency before and after the execution of the will.

(After summing up the evidence on both sides, the judge proceeded.)

With respect to the evidence given of declarations made by two of the attesting witnesses upon the subject of the testator's competency, in connection with what they have sworn, I think it proper to remark that it ought in most, if not in all cases, to be received with great caution by the jury. The testimony of a witness whose veracity and character are otherwise unimpeached, given under the solemn sanction of an appeal to the great Searcher of hearts, ought not to be lightly estimated, in consequence of loose declarations made at other times to persons in no wise interested in the subject to which they refer, and which were possibly on that account little attended to, imperfectly understood, and never again thought of by them. I do not mean to say that such evidence is unworthy of the consideration of the jury; quite otherwise. But it should be received with some degree of jealousy, and should be thoroughly examined and weighed. If then you believe the four witnesses who were present at the execution of the will, and the facts to which they deposed, three of them being the attesting witnesses, the will was legally executed.

It was contended indeed by the plaintiffs' counsel, that, in point of fact, the name of the testator was written by John Pharis; and if so, the will was not executed according to the provisions of the law of this state. The fact is most probably stated correctly by the counsel: but is it to be believed that, when all persons, except those of unsound mind and memory, are permitted to dispose of their property by will, the legislature could have intended to deny this privilege to those who from accident, disease, or want of education, could not write? If such be the construction of the law, it would be insufficient for the testator to make his mark, since that would not amount to subscribing his name. The fact is, that at the time the act of assembly was passed, the statute of frauds and perjuries, 29 Car. I. was in force in this state, and was not repealed by the act. And although, at a much later period, all the statutes of England were repealed, still the above statute had become incorporated with, and formed a part of the land laws of this state, so far as it respected last wills and testaments; and has always, as I understand from Judge PENNINGTON, been considered as furnishing the rule as to the execution of wills. If so, this will was executed in strict conformity with the statute; since the submission of the testator (who, in relation to this part of the case, is to be considered as fully conusant of what he was doing) to have his hand directed, so as to write his name, was at least equivalent to an express direction to another to sign his name. For it cannot be denied that, under the statute, the direction to subscribe the name of the testator, may be given by him by signs, as well as by words. But be the law upon this subject as it may, this will, in the opinion of the court, was, upon strictly legal principles, signed by the testator, his hand being with his own consent guided by another, and the will afterwards acknowledged by him. Under these circumstances, the act of Pharis was, in point of law, the act of the testator.

Whether the testator was competent to make his will, is a question of fact, which you must decide, after an attentive consideration of the evidence given on both sides. The presumption of law always is in favour of sanity at the time the will was executed, and the burthen of proof lies upon the person who asserts unsoundness of mind; unless a previous state of insanity has been established, in which case, the burthen is shifted to him who claims under the will. In the examination of this question, your first inquiry will naturally be, can the evidence be so reconciled as that the facts stated by the witnesses on both sides may be true? If, by a fair comparison of the evidence, and a correct course of reasoning, this can be done, charity, as well as the injunctions of law, call upon you to examine that evidence with this view. Although the testator's memory had greatly failed, even to the extent stated by many of the plaintiffs' witnesses; although when those witnesses saw him, sometimes for a very short period, at others for a long duration, the testator sometimes addressed by the witnesses, and at other times not spoken to at all, or excited to speak,—although he was sometimes seen by those witnesses lying silent, and in a state of apparent insensibility, with a vacant or stupid stare, so helpless as to be ministered to as if he were an infant; sometimes appearing to recognise those about him, and at other times not;—may he not have spoken and acted precisely as the four witnesses who were with him when the will was executed have sworn he did? Between those witnesses there is no material contradiction, though they do not state all the circumstances precisely in the same way. May not John Pharis have spoken the truth, and judged correctly, when he deposed that the testator was more revived on the morning of the 24th of August than he had seen him for three or four weeks preceding, and that he continued so for the greatest part of the day? May not the anodynes, which it seems he was in the habit of using, have affected his speech, or his disposition to speak at particular times? And may he not have been more disposed, at all times, to converse with, or address questions to the members of his family, who were generally in his room, and attending to him, rather than with strangers, or even neighbours and friends who called only occasionally to see him? These, and similar questions, may be well worthy of the serious examination of the jury. But if, in your opinion, there are irreconcilable con-

tradictions in the evidence, so that the state of the testator's mind could not be as the plaintiffs' witnesses have deposed it was before and after the 24th of August, and yet that he should be competent to make his will on that day; you will then have to weigh the credit of the witnesses, to inquire into their respective capacities to form a correct judgment upon the matters about which they have deposed, and to compare the opportunities of judging correctly which were offered to the witnesses on the one side and the other.

The jury found for the defendant.

STEVENS (WICKS v.). See Case No. 17,616

Case No. 13,413.

STEVENS v. WILLIAMS et al.

[1 McCrary, 480;[1] 19 Am. Law Reg. (N. S.) 295; 1 Morr. Min. Rep. 566.]

Circuit Court, D. Colorado. July, 1879.

MINES — LODE OR LEDGE — APEX — FOLLOWING VEIN.

1. A vein, lode or ledge, within the meaning of the act of congress, is a mineral body of rock within defined boundaries in the general mass of the mountain.

[Cited in Iron Silver Min. Co. v. Cheesman, 116 U. S. 534, 6 Sup. Ct. 483; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 430, 12 Sup. Ct. 551.]

[Cited in Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 11 Pac. 540; Illinois Silver Mining & Milling Co. v. Raff (N. M.) 34 Pac. 544.]

2. The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex.

3. Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal.

[Cited in Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. 552.]

[Cited in Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 11 Pac. 536.]

At law.

MILLER, Circuit Justice (charging jury). After a very long and patient investigation of the case, with the aid which eminent counsel have been able to give to you and to the court, we approach a point when you and the court must act in the decision of the questions presented in the case. It is a satisfaction to me to state, if my experience is of any value, that I have very rarely seen as many witnesses, in so important a case as this, where they have testified so frankly, and where I have been so perfectly convinced of their integrity. * * * And as this is my first case upon important mining matters,—a class of cases coming more rapidly into the courts than heretofore,—I hope that the miners will always deserve the character which I am happy to give them in this case, of being true and honest men in what they endeavor to state. There are some things, gentlemen, of which I propose to disabuse your minds before entering upon the real merits of the case. A great deal has been said about the immense value of the interests at stake, and I think counsel on both sides have intimated to you that your verdict may settle rights of property to a very large amount outside of the case now in controversy. That is quite a mistake; your verdict settles nothing in the world but the matter in controversy between these parties. Even the opinion which the court delivers, that, perhaps, may hereafter be used in similar cases as settling principles, but for which you are not at all responsible, may be and probably will be revised by the highest court of the country, the supreme court of the United States. So that in delivering this opinion, my Brother HALLETT and myself are not deciding principles finally which governs anybody's case, possibly not even this case. Therefore, do not be frightened; do not be alarmed; do not bring in any other verdict than what you would if this were a simple controversy between the owners of the Iron mine and the owners of the Grand View mine, for that is all there is in this case. The plaintiff has asked certain instructions here which I have refused, in regard to the testimony, and I regret that they should have been introduced into his prayer for instructions, but I will rule upon them so that he can get the benefit of them if he desires. I am asked by him to state that the patent which he has received from the United States for the Iron mine is conclusive that the sheet of mineral matter in question is a vein, within the meaning of the statute. I decline to give that instruction. Certainly, outside the vertical projection of the side lines of the plaintiff's patented ground, if the defendants can show that the mineral matter which is the subject of this controversy is not a vein they have the right to show it. Outside of the side lines of the plaintiff, projected perpendicularly downwards, defendants have the right, if they can, to show that the vein, or thing which is called a vein, is not a vein.

After disposing of that much of the preliminary matter, I now proceed to state to you what I understand to be the nature of this controversy. The plaintiff has a patent from the United States, which has been read to you, for a mine or lode of mineral matter, the

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

superficial area of which is three hundred feet in one direction and fifteen hundred in another on the surface of the earth, as known and measured by the lines which have been pointed out to you and are called the end and side lines of the Iron mine. The act of congress on that subject says, that when such title or patent and such side and end lines cover the top or apex of a vein of mineral matter, if the party pursuing that vein in a downward direction, as he pursues it further, escapes from the perpendicular extension of these side lines, he may still follow that vein as long as he can find it, and so long as it is the same vein. That part of the statute is the source of this controversy. The plaintiff, acting upon that act of congress, has pursued what he calls his vein, has pursued it a very long distance, as shown by that incline on the map, which is the most continuous, outside of his side lines across the side lines of another claim and into the claim of the defendants. If it is a continuous vein of mineral matter, and if his side lines cover the apex or outcrop of that vein, and if those lines are extended in a proper direction across the shoot or course or strike of that vein matter, he has the right to pursue it. The defendants, commencing at another point on the surface of the earth and descending perpendicularly as shown on the map, have come to a point where their shaft intersects the incline which the plaintiff has made in the pursuit of his mineral, and the contest is for the mineral matter where these two shafts meet, so far as the defendants' claim covers, or may be supposed to cover it. Now I state to you in the first place, if that is a vein of mineral matter, within the meaning of the act of congress, and in the second place, if the plaintiff's side lines are laid along the course or shoot of that vein, and inclose its top, apex or outcrop, and if the plaintiff in the pursuit of that vein into the bowels of the earth, pursued it downwards continuously, he is right in this controversy, and he should obtain your verdict.

The defendants say they are entitled to your verdict upon three principal grounds: (1) They say that the mass of mineral matter which is the subject of this controversy is not a vein, lode or ledge, within the meaning of the act of congress; (2) that what the plaintiff claims to be the apex, or top, or outcrop of this lode is no such thing, but is a mere elevation of the general position of this sheet of mineral matter, and from that point it continues on a westward dip, and, therefore, this is not an apex but merely a swell in the mineral matter; and (3) that the plaintiff has not so located his side lines and end lines with reference to the strike or course of the mineral, as to entitle him to the benefit of that statute.

Now these are the three points to which your attention is to be directed, and about which I propose to lay down some matters of law which will govern you in the case. But before I proceed to give my own views in the matter, and because it will, perhaps, facilitate any exceptions that may be taken, I will read to you certain prayers for instructions asked by the defendants in this case, some of which I will give to you, others I will modify, and others I will refuse. The first one, which I think is sound law, is as follows: "In addition to the evidence of the title furnished by the patent, the plaintiff must show by a preponderance of evidence that he is the owner of a body of mineral on his patented ground; that such mineral constitutes a vein of quartz or other rock in place" (and there I want to say that by rock in place I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed up with minerals and other things, is rock, within the meaning of the statute, because it does not say common quartz rock alone, but it says "that such mineral constitutes a vein of quartz or other rock in place"); "that being such a vein it penetrates the land in controversy, known as the Grand View claim" (if it is such a vein and runs under the surface of the earth, if it goes to the perpendicular lines of the Grand View claim; that is what is meant); "that the top or apex of the vein is within the surface lines of the Iron lode location, and where it enters the land in dispute it does so in a downward course departing from a perpendicular." Counsel have inserted here that at the respective points where it leaves the Iron mine location, and where it enters the land in dispute, it does so in a "downward course, and departing at both said points from a perpendicular." I have cut out so much of that as says "that at the respective points where it leaves the Iron mine location." I think if the general course of that vein is a departure from the horizontal, that it covers the case. With the exception of striking out that single point, "that at the respective points where it leaves the Iron mine location," I give that instruction. Second: "And if these conditions are fulfilled it must also appear that the location of the Iron mine is laid upon the general course, or strike; that the vein mentioned departs from the plaintiff's location at a point on its general course within the patented side lines." That is correct. The long lines of the plaintiff's claim must be so laid, with regard to the general course or strike of the vein, that in pursuing it you pursue it to the end lines, or where it leaves the side lines within those end lines. Third: "Although the area of ground within the patented lines of the plaintiff extends fifteen hundred feet in a northerly and southerly direction, by three hundred feet in width, plaintiff is only entitled to so much of the Iron lode along its general course as is embraced within his side lines; and if the body of mineral within the patent deflects on its general course, so as to cross the side lines, plaintiff has no right to go beyond such lines to follow it. If, therefore, the supposed vein of quartz or rock in place, departs from a perpendicular in its downward

course, at any point on its course or strike outside of plaintiff's side lines, and then enters the land in controversy, plaintiff cannot by reason of this recover in this action." I refuse that for two reasons: If it means anything more than the language given in the previous instructions, I do not give it. In the second place, it is complex and confusing to the jury. I can hardly understand it myself, and therefore I presume you could not understand it better than I can. The fourth one I refuse. "In addition to the things already mentioned as essential to the plaintiff to recover in this action, the vein of quartz or rock in place" must be "one which in its descent into the earth is substantially vertical in its direction."—that is, straight down,—"which on leaving the side lines of the plaintiff and entering the land in dispute, departs from a perpendicular and not from a horizontal direction." I refuse that; if there is any departure from a horizontal direction in a downward course, it is sufficient. The sixth one is: "The 'top' or 'apex,' within the act of congress, is the highest end or termination of the vein, and this is so, even though at any intermediate point or points, where the vein is continuous, it rises higher than such highest end, it being essential to such 'top' or 'apex' that there be no vein continuing beyond it." I give that. It must be the end of the vein which approaches nearest to the surface, as I shall explain more fully in another part of the charge. That is the substantial meaning of it. The next, number seven, is: "In order to constitute a vein of quartz or other rock in place which will entitle the plaintiff to follow it into the land of another, it is not enough that there be a seam or crevice between rock in place filled with mineral, but the mineral contained between the rock in place must be of 'quartz or other rock.'" I have explained already to you, the meaning of other rock, that it did not mean solid rock necessarily, but it means any rocky substance containing mineral matter. "And unless plaintiff has shown by a preponderance of evidence, the contents of the supposed vein to be of 'quartz or other rock,' he cannot recover, for under the act of congress under which plaintiff claims, all forms of deposit excepting veins of quartz in rock in place, are placers." I give that instruction, but with the distinct understanding that all this substance between the porphyry and limestone, that has been explained to you, which contains mineral, —I mean which contains ore,—is rock in place. The eighth instruction: "Although the jury believe from the evidence that the plaintiff is the owner of a vein of quartz or rock in place, yet if such vein on its course toward the land in dispute, be interrupted for a considerable distance, then it ceases to be a lode or vein so as to give the plaintiff the right to pursue it into the adjoining land, and in such case the plaintiff cannot recover." I refuse that instruction. In the first place the evidence is uncontradicted—at least so little contradicted I would not dare to put that to the jury—that that main incline has metallic ore in it from beginning to end, as far as it has been carried; and in the second place, the words "considerable distance," do not convey any accurate conception. In some cases a mile would be a "considerable distance," and in some cases, where a life depended on it, half an inch would be a considerable distance.

There is another matter asked by the counsel, which I think is too complex, and I refuse it upon other reasons. I shall, however, charge the jury upon the whole of that matter.

Now, gentlemen of the jury, as I make out the subject matters to be considered by you in this case, the first one of them for you to determine is, what is a vein, lode or ledge of mineral matter within the meaning of the statute, and in regard to that matter, I apprehend you will have no great difficulty in this case. The statute of the United States, in determining the terms on which its mineral lands shall be sold, used or occupied, has divided mineral lands, at least all that relate to precious metals, into two distinct classes: they are those which are called placer mines and those which are called veins, lodes or ledges of mineral matter in quartz or other rock in place. Now I do not know that I can better define what is a vein, lode or ledge to you, than has already been done by my associate on the supreme bench, Brother Field, whose learning on that subject is equal, perhaps, to that of any judge of the United States courts, and whose diligence and precision are equal to his learning. Without going over all that he says about it, most of which was read to you by Mr. Symes, I adopt and instruct you that a "continuous bed of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would constitute a lode, and that the term is used in the acts of congress as applicable to any zone or bed of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. It is any class of deposits of mineral matter coming from the same source, impressed with the same forms, and appearing to have been created by the same process." I am also aided by my Brother Hallett, whose experience is greater than mine in this matter, and who has also given the definition of the word, which I propose to read to you as the law: "In general, it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries in the general mass of the mountain." And I do not know a better or more comprehensive definition than that. I say to you, further, gentlemen, that the thinness or thickness of the matter in particular places does not affect its being a vein or lode; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth or higher up, affect its character as a vein, lode or ledge. I say to you, further, that a total interruption of the ore matter, if the contact remains on each side, the limestone and porphyry are still preserved,

and the vein of mineral matter is found within a short distance further on, pursuing that same contact, it is still a part of the same vein. In short, if there is a general and pervading continuance of this mineral matter with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks off totally and is interrupted for a very large distance, it is a vein of rock or mineral matter. Now I think you will have no difficulty in applying these definitions, since the evidence here is almost uncontradicted that there is such a sheet of matter as is spoken of. All the witnesses agree that there is a substratum of limestone and a super-stratum of porphyry; all agree, even defendants' witnesses, that they come to a point where that contact is so narrow that only a sheet of paper could be got into it, but still it has the well preserved distinction—the porphyry above, the lime below, and, although in some instances to the south, some to the north, and some occasional spots in the levels, it is stated by defendants' witnesses, that no more vein matter has been found, yet you must, I think, come to the conclusion that on the whole, and taking the course on which this matter is in contact from the line of the plaintiff's location to the line of the defendants' location; taking the course of that large incline shaft, driven by the plaintiff from where he first discovered it to where it meets the defendants', it is for you to say from the testimony, not for me to find for you. But I can see no reason why you should not say there is a continuous vein of mineral from the opening shaft, the plaintiff's shaft, to the point where it reaches the Williams shaft. If that is true—if you find that to be true, why, notwithstanding these casual interruptions in various directions, notwithstanding the widening, the narrowing, the deepening and the shallowness of the vein, notwithstanding it has, in some places, acknowledged diversions down into the ground, still, if the miner is able to pursue and has been able to pursue it in the vein, notwithstanding these interruptions, you are to call it a vein, and treat it as a vein within the meaning of the act of congress.

The next point is, that it is denied that there is a top or apex to this ledge or vein, and that if there is such a one it is not within the side lines of the plaintiff's patent. Perhaps upon that point the defendants have mainly rested their case. I think that you will agree with me, as all the counsel agree and all the witnesses agree substantially, conceding that there is a vein, that the top or the apex of a vein, within the meaning of the act of congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word "outcrop" has been used in connection with it, and in the true definition of the word "outcrop," as it concerns a vein, is probably an essential part of the definition of its apex or top; but that does not mean the strict use of the word "outcrop." That would not, perhaps, imply the presentation of the mineral to the naked eye, on the surface of the earth, but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the surface of the earth; it means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface, is the top or apex of that vein. It is said in this case that the point claimed to be the top or apex is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein, in its ascent towards the surface, and what he calls the beginning of it, the defendants say that is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downwards as a part of the same vein, in a westerly or southwesterly direction. It is proper I should say to you, if the defendants' hypothesis be true, if that point which the plaintiff calls the "highest point," the "apex," is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal.

Now, gentlemen, I have but one more matter, and really I do not know that there is much to be said about that. The defendants maintain that the lines—the side lines—of the plaintiff's claim are so located in reference to the shoot or strike of the vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists. You must take all the evidence together, you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost in the east, and the course it takes, and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally as far as his side lines include the apex, so far he can pursue it laterally; if the vein projects beyond his side lines, then it is only a question as to the distance which he can include this vein within his side lines, which I don't see arises in this case at all; but that is for you to say.

Now, gentlemen, I have laid before you all that I think material for your judgment in this case. If you believe that that is the top or apex of the vein on which the plaintiff

has laid his claim; if you believe that is a vein within the meaning of the act; if you believe that is a vein under the circumstances and definitions which I have given you; if you believe that in pursuing that vein to the east, or slightly to the northeast, the plaintiff has followed substantially a continuous sheet of ore, although with occasional interruptions, occasional narrowings, occasional enlargements and occasional pockets, yet if it is substantially the same vein and sheet of ore, and he has followed it and found the defendant in possession in the line of his openings, the law is with the plaintiff. If you do not believe all of these propositions are established, the verdict will be for the defendants.

[For subsequent proceedings, see Case No. 13,414.]

Case No. 13,414.

STEVENS et al. v. WILLIAMS et al.

[1 Morr. Min. Rep. 557; Corp. Min. Code, 65.]

Circuit Court, D. Colorado. 1879.

MINING LAWS—DEFINITION OF TERMS—RIGHT TO FOLLOW DIP—CHARACTER OF DEPOSIT

[1. The words, "in place," as used in the act of congress of May 10, 1872, as descriptive of the lodes or veins for which mining claims may be taken out under the act, mean the general body of the country, which remains in its original state, unaffected by the action of the elements, as distinguished from the superficial mass known as alluvium, detritus, or débris. It is what miners usually call the "country," or the "country rock." And a vein or lode is "in place," within the meaning of the act, when it is inclosed in the general mass of this rock.]

[2. "Vein," or "lode," as used in the act, embrace any description of deposit which is inclosed in the general mass of the country rock, without regard to the technical geological distinctions in respect to beds, segregated veins, gash veins, true fissure veins, or mere deposits; and it is immaterial as to the character of the vein matter whether it be in a solid, or in a loose, disintegrated, state.]

[3. "Top," and "apex," as used in the act of congress, mean that part of the vein or lode which comes nearest to the surface, and may include a part which stands in the solid rock below a considerable body of the superficial mass.]

[4. Under this act a location may include 1,500 feet in length along the linear course of the lode and 150 feet on each side of it.]

[5. If a locator fails to locate his claim parallel with the apex of the vein, so that the latter passes out through a side line thereof, he can take nothing thereunder except what lies within the boundaries of his claim, and cannot follow the lode if it passes beyond the vertical side lines.]

[6. The right given by the statute to follow the dip of a vein, although it "may so far depart from the perpendicular * * * as to extend outside the vertical side lines," is not limited to veins having an inclination of 45 degrees or less from the perpendicular, but extends to all veins which do not lie in a practically horizontal position.]

[7. If in following a vein or lode, which is found at the point of union between rocks of different ages and different formation, as in the case of porphyry and lime, the line of contact should be found barren of ore for a considerable distance, not by reason of a mere interruption or break, extending only a few feet, but because the two kinds of rock come together, and carry nothing whatever between them, then the deposits should no longer be called a vein or lode, and the owners of the claim would have no right to another body of ore found at a considerable distance beyond.]

HALLETT, District Judge (charging jury). The first matter to which I shall ask your attention is that the reference in the law is to veins or lodes in place, bearing any valuable metals, which are here spoken of. The language of the act is, mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. That is the language of the act, used in describing the kind of mines or valuable deposits which may be taken out under the act, and the peculiar feature of that description to which I wish to call your attention is that they are lodes or veins in place. The exact language, as I before read, is "veins or lodes of quartz or other rock"; that is, veins of quartz or other rock, or lodes of quartz or other rock (the last words being added to the first by way of description), that may contain any of these valuable metals. That is to say, any kind of rock bearing any of these metals,—but whatever the rock, whether it be quartz or other rock, it must be in place. And, as to the meaning of these words, "in place," they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it. There are quite a number of words which may be applied to that superficial deposit; that which is movable, as contrasted with the immovable mass that lies below, such as alluvium, detritus, débris. Perhaps the last word comes as near as any other that is in use—the word débris. A witness in another case here used a word which he appeared to have invented for the occasion, which appeared to me particularly significant; he called it "tumble stuff," which conveys to my mind pretty distinctly the idea of that which may have been brought to its position by the action of the elements, as distinguished from the vast body of earth which lies below. In speaking of these deposits, which are in veins or lodes, and of the general mass of rock from which they may be distinguished, miners usually call the surrounding mass of rock, in which the lodes or veins are found, the "country" or the "country rock." By that word they signify the character and description of the general body of the mountain, whether it is granite, or gneiss, or syenite, or porphyry, or any other of the many different kinds of rock. They use that word to describe the general mass of rock of which the mountain is composed, as distinguished from that which is found in the vein or lode. And when this

act speaks of veins or lodes in place, it means such as lie in a fixed position in the general mass of country rock, or in the general mass of the mountain. As distinguished from the country rock, this superficial deposit may have been brought into its present position by the elements; may have been washed down from above; or may have come there as alluvium or diluvium, from a considerable distance. Now, whenever we find a vein or lode in this general mass of country rock, we may be permitted to say that it is in place, as distinguished from the superficial deposit, and that is true, whatever the character of the deposit may be; that is to say, as to whether it belongs to one class of veins or another; it is in place if it is held in the embrace, is inclosed by the general mass, of the country. And, as to the word "vein" or "lode," it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit; it matters not what the particular description of it may be; in respect to these distinctions which are observed by geologists in defining the different classes of deposits that lie in the embrace, or are inclosed by, the general mass of the mountain. In all cases I suppose that they are lodes, if not veins. It may be true that many of these deposits will not come under the description of veins, as known to geologists, but if they are not so described,—if they cannot be so correctly described,—they are, at least, lodes, and are recognized as such by miners in their search for them. In other words, whenever a miner finds a valuable mineral deposit in the body of the earth, as I have described it, he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth. The books make some distinctions between beds and lodes, and they make distinctions in the different classes of veins, as you have heard from counsel, but these distinctions are not important in relation to this answer of the discovery and taking of these mineral deposits. It has been decided that congress, in passing this act, intended by this description to embrace and include all forms of deposit which are located in the general mass of the mountain, by whatever name they may be known, and the distinctions which are adopted by geologists in respect to the different kinds of veins are not important except for one question and for one purpose, which I may invite your attention to further on. So that we may say, gentlemen, with respect to the case which is now before you, that, whether this may be called a true vein or a contact vein, or a bed; whether it lies with the stratification or transversely to it, the matter is of no importance for the purpose of determining this question; it is in any event a lode, if it lies in place, within the meaning of this act. And it is in place if it is inclosed and embraced in the general mass of the mountain, and fixed and immovable in that position. Perhaps I ought to say further, in view of some things that were said by counsel in the argument, that it is not material as to the character of the vein matter, whether it is loose and disintegrated, or whether it is solid material. In these lodes the earth that is found in them, the earthy matter which may be washed or treated with water or steam, is often the most valuable part. It was never understood here or elsewhere, so far as I know, that such earthy matter was not embraced in the location, because it was of that character. It is the surrounding mass of country rock; it is that which incloses the lode, rather than the material of which it is composed,—which gives it its character; so that even if it be true, as counsel have stated in the course of their arguments, that this is mere sand,—is a loose and friable material which cannot be called "rock," in the strict definition of that word; if that be true, it does not affect the character of the lode. If it were all of that character, it would still be in a vein or lode in place, if the wall on each side—the part which holds the lode—is fixed and immovable.

That is, perhaps, sufficient as to the character of the deposit, and that which may be located in the manner in which the evidence tends to prove that the location was made; and we have now to consider the question which was so much discussed by counsel, as to the location with reference to the top and apex of the vein. And upon that point it is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth, that is, that they stand upon their edge in the body of the mountain; and these words, "top" and "apex," refer to the part which comes nearest to the surface. The words used are "top" and "apex," as if the writer was somewhat doubtful as to which word would best describe or best convey the idea which he had in his mind. It was with reference to that part of the lode which comes nearest to the surface that this description was used; probably the words were not before known in mining industry,—at least, they are not met with elsewhere, so far as I am informed. Perhaps they were not the best that could have been used to describe the manner in which the lode should be taken and located. But, whether that be true or not, they are in the act of congress, and there seems to be little doubt as to their meaning; they are not at all ambiguous. In some instances they may, perhaps, refer to the floe of the lode; that is a part of the lode which has been detached from the body of mineral in the crevice, and flowed down on the surface; in oth-

ers, where there is no such outcrop, they may mean that part which stands in the solid rock, although below a considerable body of the superficial mass which I have attempted to describe to you. We are all agreed, however (the courts and counsel, every one), that that is the meaning of the words; that they are to be taken in some such sense as that,—as being the part of the lode which comes nearest the surface; and the act requires that the location shall be along the line of this top or apex. Supposing the lode to have a somewhat vertical position in the earth, with this line of outcrop or of appearance on the surface, or nearest to the surface, it shall be taken up and occupied by the claimant as his location, and he must find where his top and apex is, and make his location with reference to that. So that by this act he might claim fifteen hundred feet in length along the linear course of the lode, and would have one hundred and fifty feet on each side of it, making it three hundred feet in width and fifteen hundred feet in length. We have already reached this conclusion in this state. Wafley v. Lebanon Min. Co., 4 Colo. 112; Patterson v. Hitchcock, 3 Colo. 533. The supreme court of the state had adopted that construction of the law, that if he fails in that, in so far as that his location is not upon the line of this lode, that he can claim no more than he has included within his side lines; that is to say, he makes his location with reference to the top of the lode, with which the lines of the location must be parallel; and if he fails in that, if the line of the lode departs from the surface lines of his location anywhere upon the length of it, it is so far an invalid location, that he can take nothing of the lode that lies without the lines of the location. This, then, was the method pointed out by this act, and by the law of the state, for taking up these claims, that it should be along the line and top and apex of the lode; and if this is done, if the location is so made, then the language of the act is express, that he shall have, not only so much of the lode within the lines as lies in its linear course, but that if the lode, in its downward course into the earth, departs from these lines upon the sides, passes out upon its dip,—that he shall have the part, also, which lies beyond. Congress seems to have appreciated the fact, which is known to all miners, that there are very few, probably no lodes, that are exactly perpendicular to the surface of the earth; they incline one way or the other,—that is, either to the right or left,—extending along the course of the lode. It seems to be universally true that they depart from the perpendicular in one direction or the other, and if, in so departing,—if, in their downward course into the earth, they depart from their side lines, or the planes of those lines extending downward vertically,—then he is to have that part which lies without, as well as within, the surface lines. The language of the act upon that point is, "of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines of such surface location." Now, it was said with reference to the lode which is now in litigation here,—the position was taken by the counsel for the defendant,—that whenever, in its departure from the vertical course, it reaches an inclination which is greater than forty-five degrees, that then it is no departure from the perpendicular, but from a horizontal plane, and therefore it is not within the terms of the act. That position, gentlemen, is merely a verbal distinction, which goes for nothing at all. Of course, in its departure, it may depart in any degree up to the horizontal plane, and it is still a departure from the perpendicular throughout the whole course, until it comes to a right angle from the perpendicular. I think, perhaps, that we may illustrate that with these books. If we say that (illustrating) is the vertical position, as you perceive it is, then, departing from the perpendicular in every angle as you come from this vertical position, carrying it up until you come to a horizontal position (which is ninety degrees, as I understand it, of the arc of a circle), it is still a departure from the perpendicular. In that view, we have been brought to consider, in the present instance, whether the lode or vein lies in a horizontal position; that is, whether the angle of the vein is between the vertical and horizontal. The rule should be that every departure up to that which I have named is but a departure from the perpendicular, and it appears to be exactly within the provisions of this act, if the vein clearly extends outside of the limits of the surface in any angle between the perpendicular and horizontal. I agree that if we should ever find a lode which, in its course, extends precisely on the plane of the horizon,—and it is extremely doubtful whether we shall ever find one in that position,—but if we should ever find a lode which is precisely in that position, there may be some difficulty in locating it under this act; but if you find from the evidence, that there is a lode or vein in the position in which this has been described by the witnesses, and that it is in rock in place, as I have described it to you, I think there can be no difficulty in the present instance in respect to that.

This brings us to a question, gentlemen, which really is the important question in this case, and that is whether there is any lode in the position which has been mentioned by the witnesses; and in that connection, in the consideration of that question, the character of the deposit—as to whether it is a true fissure vein, or a contact deposit, or a bed, or something of that kind—is of some value; because,

in respect to fissure veins, we accept the cavity or chasm which is found between walls, and filled with what they call "vein matter," as indicating or showing the existence of the lode, even if the matter which is found in it is not very valuable,—that is, if there is anything which usually accompanies valuable ores or minerals. But, in respect to this kind of deposit, my impression is that it is to be known, called, and regulated as an irregular deposit; one which, if it should be interrupted for any considerable distance,—that is, if what they call the "contact," or junction between the porphyry and lime, should become barren for a considerable distance,—that it should no longer be called a lode. As I understand it, this line which exists when there is a union of rocks of different ages and different formation, may carry ore, or it may not; it may be productive, or it may be barren; and if this should be found at any point in the course to become barren, and remain so for any considerable distance, I do not see how it could be called a lode in that part of it, so that it could be followed with the result to claim what lies beyond. I should say, that with reference to such a line of contact between rocks of different formation, that to find that line of contact in one place, unless there were in it valuable minerals which were carried along with something like a continuous course along the line of contact, that no lode would be discovered. It could not be said that any had been found until such minerals were found. I do not mean by this, that any slight interruption for a few feet of the valuable part of the ore would have the effect to show that the deposit was broken in its continuousness. I do not mean that, nor do I mean that if any dyke or other extraordinary foreign matter should be interposed in the course of the lode so as to cut it off, and it should follow on immediately after that interruption, that would be regarded as such a displacement in the continuity of the deposit as would deprive it of its regular character. Phillpotts v. Blasdel, 8 Nev. 61. Whenever it may appear that the fissure has existed at one time, or at any time, with a continuous body of ore in it, which may have been interrupted by some subsequent convulsion, the character of the deposit would remain the same as if the interruption had never occurred. But if there was such an intervening space in the "contact," as these witnesses call it, barren in its continuity, as might show a separate and distinct body of ore, which had always been such, I should say that it would not pass with the grant of the first. It may help you, gentlemen, for me to express this in other language, and ask you to extend the line which is laid down on that map (showing), for some distance further, and to suppose that, in the course of that line, you find that there is at the head of the deposit, that nearest the surface, a hundred feet or more of continuous ore lying upon the line between the porphyry and the lime, and then there should be an interruption of a hundred feet or more of this contact which is perfectly barren; the lime and the porphyry coming together carrying nothing whatever, and below that, again, another body similar to that which was found at the head, the position which I think might be taken upon this—the position of these ore bodies—would be that there would be two lodes, rather than one, the first above and the second below; but if there is a continuous body of ore, or practically continuous, and there is no such interruption as exhibits other than a casual and fortuitous displacement, then it would be one lode.

I think, upon that explanation, gentlemen, you will be able to determine whether there is, in that sense, a fixed body of ore, extending from the upper part of these workings to the end of them; if that is its characteristic, then it is to be regarded as one and the same lode, though it may have departed from the side line, to a considerable distance, and have only an angle of thirteen, fourteen or fifteen degrees, as the witnesses have described it, from the plane of the horizon. There may be other deposits in that neighborhood, gentlemen, which show entirely different features, or show the same features, but whether that be true, or not, is not a matter for present consideration. We determine these questions only upon what appears in this case, and without reference to any others that may arise in the same locality. Other deposits in this neighborhood may be of an entirely different character; they may be such as can not in any sense be called lodes at all. Whether this be true or not, is not for present consideration. We determine this case, as I said before, upon the evidence given here, leaving other questions which may arise in respect to other locations to the facts as they may be developed in respect to them.

[See Case No. 13,413.]

STEVENS, The R. L. See Case No. 11,872.

Case No. 13,415.

STEVENSON v. HAMILTON.

[Cited in Re Jelsh, Case No. 7,257. Nowhere reported; opinion not now accessible.]

Case No. 13,416.

STEVENSON v. HARE.

[2 Sawy. 583.] [1]

District Court, D. California. March 23, 1874.

SEAMEN—WAGES—DESERTION—SHIPPING COMMISSIONER.

The provisions of section 23 of the shipping commissioners' act of June 7, 1872 [14 Stat. 267], do not apply to cases embraced within the provisions of section 55.

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

[This was an action for wages by J. D. Stevenson, United States shipping commissioner, against Charles Hare.]

W. W. Morrow, for plaintiff.
S. W. Holliday, for defendant.

HOFFMAN, District Judge. By the fifty-fifth section of the act of congress of June 7, 1872, commonly known as the "Shipping Commissioners' Act," it is provided, in substance, that all wages of seamen forfeited for desertion "shall be applied in the first instance in payment of the expenses occasioned by such desertion to the master or owner of the ship from which such desertion has taken place, and the balance, if any, shall be paid by the master or owner to any shipping commissioner resident at the port at which the voyage of such ship terminates. * * * And in case any master or owner neglects or refuses to pay over to the shipping commissioner such balance aforesaid, he shall incur a penalty of double the amount of such balance, which shall be recoverable by the commissioner, in the same manner that seamen's wages are recovered."

The present action is brought to recover the sum of $109.14, being double the amount of wages due to one Ah Lee at the time of his desertion from the vessel. The respondent admitting that $54.57 was due Ah Lee at the time of the desertion, has shown that the expenses occasioned by the desertion were largely in excess of that sum, and that no balance remains to be paid. The fact thus proved is not disputed by the libellant, but he insists that the proof is inadmissible, inasmuch as the respondent, though often requested, has omitted to furnish any account of the deductions, which, he claims, should be made from the wages, as required by section 23 of the act, and, therefore, in accordance with the provisions of that section, no deduction can now be allowed.

Section 23 is as follows: "Every master shall, not less than forty-eight hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged, before a shipping commissioner, to such shipping commissioner, a full and true account of his wages, and all deductions to be made therefrom, on any account whatsoever; and in default shall, for each offense, incur a penalty not exceeding fifty dollars, and no deduction from the wages of any seaman shall be allowed, unless it is included in the account," etc.

The question to be decided is, do the provisions of this section apply to cases embraced within the provision of section 55? In my opinion, it is clear that they do not.

1. Section 23 requires an account of wages and deductions to be made therefrom, to be furnished to the seaman or the commissioner at least forty-eight hours before paying off or discharging the former. This, obviously, refers to wages due seamen who are to be paid off or discharged. It has no more application to the case of a deserter, who is neither to be paid off nor discharged, than to that of a deceased seaman. In those cases, moreover, where the man is not to be discharged before the commissioner, a compliance with the terms of this section would, generally, be impossible, for the deserter would usually be out of the reach of the master.

2. The "deductions" referred to are deductions to be made from wages to be paid, such as advances, money furnished during the voyage, supplies from the slop-chest, etc. The expenses occasioned by a desertion are not treated by the act as "deductions" to be allowed the master. They are charges, to the payment of which the wages forfeited are "in the first instance to be applied," and the "balance" only is to be paid to the commissioner. The practical effect is, of course, the same by whatever term we characterize them. But the language of the section becomes significant when the question arises whether the "expenses" mentioned in the fifty-fifth section are embraced within the "deductions" spoken of in the twenty-third section.

3. If the master has committed any offense, it is a violation of the twenty-third section. He is, therefore, liable, if at all, to the penalties denounced in that section, to wit: The disallowance of any deduction from the wages earned, and a penalty not exceeding $50. If he fails to pay over the balance of forfeited wages, after paying expenses, he becomes liable, under the fifty-fifth section, for double the amount of such balance. The present suit is an attempt to enforce this latter liability, when the only offense which the master can have committed is a violation of the twenty-third section.

For these reasons, I think it clear that the act does not require an account of expenses occasioned by the desertion to be furnished to the commissioner. That the omission to do so does not forfeit the right of the master to have those wages applied, in the first instance to the payment of such expenses—and that when sued for double the amount of a balance alleged to be due, he may defeat the suit by showing that the expenses have equaled or exceeded the amount of such forfeited wages, and that no balance is due.

But notwithstanding that the statute does not require the master to furnish an account of expenses occasioned by the desertion to the commissioner, it is evidently fit and proper that he should do so. A knowledge of what expenses are claimed to have been incurred is necessary, to enable the commissioner to ascertain what balance, if any, is due to the United States, and a fair and just account rendered by the master will usually lead to a prompt settlement of the matter without resorting to a suit, which, in

the absence of all information on the subject, the commissioner may feel it his duty to bring.

Case No. 13,417.

STEVENSON v. KING et al.

[2 Cliff. 1.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1861.

INSOLVENCY — DISCHARGE — EFFECT IN ANOTHER STATE—CONSTITUTIONAL LAW.

A certificate of discharge under the bankrupt or insolvent laws of one state cannot be pleaded in bar of an action brought by a citizen of another state.

Assumpsit [by John Stevenson against Horace King and others] upon a promissory note signed by a firm of which the first defendant was a partner. The case came before the court upon demurrer to the plea filed in bar of the action. The note was dated at New York, and was made payable at the Rockland Bank in Roxbury, Mass. It appeared that the plaintiff was a citizen of New York. Service was duly made upon the defendant first named, who appeared and pleaded a certificate of discharge under the insolvent laws of Massachusetts, after the maturity of the note.

S. G. Clark, for plaintiff, in support of the demurrer.

The insolvent laws of a state can have no effect upon the rights of foreign creditors; therefore a discharge in insolvency under the insolvent laws of a state is no bar to an action on a contract where the creditor is a citizen of another state. Ogden v. Saunders, 12 Wheat. [25 U. S.] 368, 369; Buckner v. Finley, 2 Pet. [27 U. S.] 586; Boyle v. Zacharie, 6 Pet. [31 U. S.] 348, 634, Springer v. Foster [Case No. 13,266], 3 Story, Comm. § 1103; Woodhull v. Wagner [Case No. 17,975]; Braynard v. Marshall, 8 Pick. 196; Savoy v. Marsh, 10 Metc. [Mass.] 594; Ilsley v. Merriam, 7 Cush. 242; Frey v. Kirk, 4 Gill & J. 509; Donnelly v. Corbett, 7 N. Y. 500; Poe v. Duck, 5 Md. 1, Demeritt v. President of Exchange Bank [Case No. 3,780]. The fact that the contract was to be performed at the place of domicile of the defendant cannot affect the question.

J. Wilder May, for defendants.

The debt in this case was provable under the statute, and is discharged by its terms. St. Mass. 1858, c. 163. §§ 3, 7. In this case the contract, by its express terms, was to be performed in Massachusetts. In Ogden v. Saunders, cited by plaintiff, the court say the discharge is invalid against a creditor "who has never voluntarily subjected himself to the state laws otherwise than by the origin of the contract." The implication is, if the creditor has so subjected himself, then the discharge would be valid against him. The note being made payable in Massachusetts, the general rule is, that its validity, obligation, and interpretation are governed by the law of the place of performance. Story, Confl. Laws, § 280; 2 Kent, Comm. 459; Prentiss v. Savage, 13 Mass. 21. The law of the place of performance is taken into consideration when the contract is made. See Andrews v. Pond, 13 Pet. [38 U. S.] 65; Pope v. Nickerson [Case No. 11,274]; 2 Pars. Cont. 583. Plaintiff "has subjected himself" to the laws of Massachusetts in making the contract. Whitney v. Whiting, 35 N. H. 457, 462, 472; Scribner v. Fisher, 2 Gray, 43; Burrall v. Rice, 5 Gray, 539; May v. Breed, 7 Cush. 15.

CLIFFORD, Circuit Justice. Since the decision of the supreme court in Cook v. Moffat, 5 How. [46 U. S.] 307, I do not see how there can be any misunderstanding as to what that court has decided upon this subject. Speaking for a majority of the court, Mr. Justice Grier, after referring to the case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, and to the case of Sturges v. Crowningshield, 4 Wheat. [17 U. S.] 122, and stating the facts in the former case, says that a majority of the court there decided, first, that a bankrupt or insolvent law of any state, which discharges the person of the debtor and his future acquisitions, is not a law impairing the obligation of contracts, so far as it respects debts subsequent to the passage of such law; second, that a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another state. He makes no exceptions to the principle, and plainly did not intend to qualify the doctrine in any respect. On the contrary, he expressly affirms, in the same opinion, that, after the decision of the court in the case of Sturges v. Crowningshield [supra], it followed as a corollary, from the modification and restraint of the power of the states to pass such laws, that they could have no effect on contracts made before their enactment or beyond their territory. Some misapprehension having existed as to what the opinion of the court was, the chief justice also took occasion to express his views upon the general subject. He had ruled the case at the circuit in obedience to what he understood to be the settled doctrine of the court, and a majority of the court affirmed the judgment. Acquiescing in that judgment, as a correct exposition of the law of the court, he nevertheless thought it proper to restate the individual opinion which he entertains. Before doing so, however, he gave a clear, full, and, as I think, satisfactory exposition of what had been previously decided by the court. Those remarks of the present chief justice, taken in connection with the previous explanations given by Chief Justice Marshall, in Boyle

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

v. Zacharie, 6 Pet. [31 U. S.] 348, and by Mr. Justice Story, in Boyce v. Zacharie, Id. 642, it seems to me, ought to terminate all further discussion upon that point. At all events, the question is at rest in this court, and must remain so for the present, unless it shall be revised by the supreme judicial tribunal of the country. Demurrer sustained. Plea in bar adjudged bad.

STEVENSON (UNITED STATES v.). See Cases Nos. 16,395-16,398.

Case No. 13,418.

In re STEWART.

[1 N. B. R. 278 (Quarto, 42);[1] 1 Am. Law T. Rep. Bankr. 16; 15 Pittsb. Leg. J. 222.]

District Court, N. D. Alabama. Feb., 1868.

BANKRUPTCY — SECURED CREDITOR — ORDER TO SELL SECURITY — PROOF OF BALANCE DUE.

A creditor who has a mortgage may apply to the bankrupt court to have the property covered by his lien sold, the proceeds to be applied to the payment of his debt. Should the security fail to satisfy the claim, such creditor may be allowed to prove for the part remaining unpaid, and obtain a dividend thereon.

[Cited in Given v. Smith, Case No. 5,467; Re Brinkman, Id. 1,884; Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Id. 13,643; Re Flanagan, Id. 4,850.]

In the proceedings before the register in this case, Joseph W. Burke, the question arose respecting the disposition of certain mortgaged property of the petitioner, and upon the request of the assignee, the register certified the question to the judge. He certified that the bankrupt, Taylor R. Stewart, filed his petition in bankruptcy on the 4th day of September, 1867, enumerating in his schedule as a creditor "holding security," William Echols, said security being specified as follows: "A deed of trust given to John G. Coltart, to secure George W. Jones and John W. Scruggs, securities for the land mentioned in Schedule B—1." It appears that in the year 1860, the bankrupt, as joint purchaser with one William R. Stewart, bought from Echols the land described in Schedule B—1, giving in payment therefor four promissory notes, each for the sum of $312.50, and payable respectively, in one year, two, three, and four years after date. On those notes George W. Jones and John W. Scruggs were sureties, and to secure them in the liability thus incurred, the bankrupt and his joint tenant made to John G. Coltart a deed in trust, providing that if any of the said notes should fail to be paid at maturity, the land should be sold by the trustee and the proceeds appropriated to the payment of the debt of Echols. The first three notes were paid at maturity; the last remains unpaid, and is the debt specified in the bankrupt's schedule as due William Echols. Although the creditor Echols is not mentioned as a party to the deed, its terms distinctly prescribe that the proceeds of the property, covered by it, shall be devoted to the payment of his debt, the object seeming to be to secure for the creditor the personal security of Jones and Scruggs, as well as the equitable security afforded by the terms of the deed.

It is well settled that a creditor is entitled to the benefit of the indemnity held by the surety, and can seek in equity to be subrogated to his rights, reach the security, and satisfy his debt. In this sense Echols is secured, as no act of the bankrupt or of the sureties can defeat his equity under the terms of the deed. If the question presented no other feature, and if the security appeared to be sufficient only to pay the debt, the assignee might, under the direction of the court as prescribed in the seventeenth and twentieth sections of the bankrupt act [of 1867; 14 Stat. 524, 526], release all claim to the security upon agreement with the creditor properly controlling the same, but the great difference in the value of the property covered by the deed of trust at the time of its purchase, specified at $1,200, and the present estimated value ($100) set forth in the schedule of the bankrupt, affords in my judgment a proper subject of inquiry. The first section of the bankrupt act provides that the jurisdiction of the district courts of the United States in bankruptcy shall extend to "the collection of the bankrupt's assets and the ascertainment and liquidation of the liens and other specific claims thereon." Section 14 prescribes that "the assignee shall have authority under the order and direction of the court to redeem or discharge any mortgage or conditional contract, pledge or deposit, or lien on any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same, subject to such mortgage, lien, or other incumbrance." The jurisdiction thus conferred on the court, and the authority given to the assignee under its instructions, in my opinion refers to all liens existing on the property of the bankrupt. If a creditor has a mortgage or pledge for his debt, he may apply to the court to have the same sold, the proceeds thereof applied towards the payment of his debt pro tanto, and if the debt is not fully satisfied out of the security, may prove for the residue. In like manner may the assignee, acting in the general interest of the creditors, apply to have the lien ascertained and liquidated, or for an order directing the sale of the property held as security for any debt existing or provable under the bankruptcy, as the most correct means of ascertaining its true value, and out of the funds in his hands, derived from the sale, may pay to the creditor the amount of his debt covered by the security. By these

[1] [Reprinted from 1 N. B. R. 278 (Quarto, 42), by permission.]

means the correct status of the creditor may be determined, and should the security fail to satisfy his debt, he may be admitted to prove the part remaining unpaid, and obtain his just proportion of the bankrupt's assets. The register further certified that it was his opinion, that the assignee should apply for an order directing the sale of the property, holding the fund obtained therefrom subject to the lien of this creditor properly asserted in equity, and to the order of the court.

BUSTEED, District Judge, agreed in the conclusions at which the register arrived, and directed the necessary order for the sale of the property by the assignee, to be entered on the proper application.

Case No. 13,419.

In re STEWART.

[3 N. B. R. 108 (Quarto, 28).] [1]

District Court, W. D. Texas. 1869.

BANKRUPTCY—VOLUNTARY AND INVOLUNTARY PROCEEDINGS—ADJUDICATION—MOTION TO SET ASIDE—SCHEDULES.

Creditors petitioned to have debtor declared bankrupt; process issued thereupon, and bankrupt, by indorsement on copy of said petition served upon him, admitted the truth of the allegations therein contained, except as to those of fraud, and before the day to appear and show cause, the bankrupt filed his voluntary petition in the same court and was adjudicated bankrupt by proper register. On motion to set aside the said adjudication of bankruptcy as void, *held*, that the same was nugatory and of no effect pending the proceeding in involuntary bankruptcy. Adjudication accordingly set aside and debtor adjudged bankrupt by the court on petition of creditors, and schedules previously filed by him ordered to be held as filed under such adjudication.

[Cited, but not followed, in Re Flanagan, Case No 4,850.]

[In the matter of R. R. Stewart, a bankrupt.]

DUVAL, District Judge. On the 4th June, 1868, Zenia, Aldrich & Co., as creditors, filed their petition praying that Stewart should be adjudged a bankrupt, and alleging the commission of certain acts as grounds therefor. Process was issued, requiring said Stewart to appear, on the 2d day of November, instant, and show cause why the prayer of the petition should not be granted. On the 27th day of August, 1868, the said Stewart, by an indorsement on the copy of the creditor's petition, served upon him, admitted that all the statements, charges, and allegations in said petition were true, except those of fraud. Before the time had elapsed in which he was called upon to appear and answer, the said Stewart, to wit, on the 12th day of October, 1868, filed his petition in voluntary bankruptcy, and such proceedings were had thereon that on the 27th of October, 1868, he was adjudged a bankrupt on his own petition by Mr. Register Whitmore, The attorneys of Zenia, Aldrich & Co. now move the court to consolidate the two cases named above, or to declare and adjudge that the adjudication of Stewart, as a bankrupt, on his voluntary petition, be set aside and held for nought, and the case of the creditors held for trial. It never was intended by the bankrupt act [of 1867; 14 Stat. 517], and no correct rule of practice can tolerate it, that when a creditor has instituted proceedings to force his debtor into bankruptcy, that such debtor should be allowed to become a bankrupt, and be adjudicated as such on his own petition, before a determination of the creditor's petition. To permit such a practice might work a most flagrant wrong upon the rights of a petitioning creditor. I think, therefore, that the adjudication of Stewart, as a bankrupt, on his own petition, when the application of the creditors, Zenia, Aldrich & Co., for that purpose, was pending, undetermined, was nugatory and void, and the same is ordered to be set aside.

The court, entertaining alone the creditor's petition, and looking to the charges therein contained, the admissions of Stewart made in reply thereto, and the fact of his application, voluntarily made, to be adjudged a bankrupt, finds the allegations in said petition to be true, and adjudges him a bankrupt thereon accordingly. And, inasmuch as the said bankrupt has filed, with his voluntary petition, full and complete schedules of his property, liabilities, etc., it is ordered that they be held and regarded as if filed under adjudication of bankruptcy made against him on said creditor's petition, and have the same binding and legal effect.

It is further ordered that such other and further proceedings be had as the bankrupt law requires in cases of involuntary bankruptcy, and as may be applicable in, and proper to this case.

Case No. 13,420.

In re STEWART et al.

[13 N. B. R. 295; 2 N. Y. Wkly. Dig. 3.] [1]

District Court, Georgia.[2] 1875.

BANKRUPTCY—EXEMPTION—PARTNERSHIP ESTATE.

No individual exemption can be allowed out of the partnership estate at the expense of the joint creditors.

[Cited in Re Boothroyd, Case No. 1,652; Re Corbett, Id 3,220; Re Hughes, Id. 6,842.]

Certified question, from Mr. Register Murray, on claim of John O. Stewart for homestead and exemption.

Speer & Stewart, for bankrupt.

R. H. Johnston and D. N. Martin, for objecting creditors.

[1] [Reprinted by permission.]

[1] [Reprinted from 13 N. B. R. 295, by permission. 2 N. Y. Wkly. Dig. 3, contains only partial report.]

[2] [District not given.]

ERSKINE, District Judge. The firm of Stewart & Newton, and Stewart individually, became bankrupts. The assignee converted the partnership estate, which consisted of goods and merchandise, into cash, and he has now in his hands about one thousand dollars arising from this sale. Stewart, one of the late copartners, claims, as the head of a family, that this money ought to be exempted to him, as personalty, to be invested by the court for the benefit of himself and family, under the provisions of the bankrupt act [of 1867; 14 Stat. 517] and the constitution and laws of this state. The register allowed this claim. The creditors of the firm objected, and the question was certified to this court by Register Murray. On more than one occasion the precise question has been before this court, and has always been answered in the negative. And notwithstanding district courts have entertained opposite views on this subject, I am still of the opinion that neither the letter nor spirit of the law, or the constitution or laws of Georgia, warrant the allowance of such a claim, to the exclusion of the joint creditors of the bankrupt firm. Code, §§ 2002–2039. In Re Handlin [Case No. 6,018], Dillon, Circuit Judge, said: "While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate at the expense of the joint creditors." The case was carefully considered by that learned and eminent judge, and nothing that I could add would strengthen its authority.

The decision of the register is reversed. Clerk will so certify.

Case No. 13,421.

STEWART v. ANDERSON.

[1 Cranch, C. C. 586.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

SET-OFF—NOTES.

In an action by the indorsee against the maker of a promissory note, the defendant may set off the payee's note to him, which he held before and at the time he had notice of the assignment of his own note to the plaintiff, although not then payable, but becoming payable before his own note.

Debt for $330.56, on the defendant's note dated 23d of April, 1807, payable 180 days after date, to W. Hodgson, and by him assigned to the plaintiff. The defendant pleaded, 1. Nil debet. 2. A set-off of a note due to him from Hodgson before notice of the assignment of defendant's note to the plaintiff. 3. A set-off for goods sold and delivered to Hodgson before notice of the assignment. To these pleas there were general replications and issues. The jury found a special verdict stating that Hodgson assigned the note to the plaintiff, and on the 14th of August, 1807, informed the defendant that the note was passed away, but not to whom. That the defendant at that time held Hodgson's note for $566.67, dated June 29, 1807, payable in 60 days, which was given for a full and valuable consideration. That on the 14th of August, 1807, when Hodgson informed the defendant of the assignment of his note, the defendant gave Hodgson a note at 60 days for 225 dollars in lieu of a former note for the same sum payable 3d and 6th of January, 1808, which note Hodgson promised to renew twice. When the defendant was informed by Hodgson, of the assignment of the defendant's note, the defendant made no reply. They further found for the defendant, provided the court should be of opinion that the verbal notice given by Hodgson to the defendant on the 14th of August, 1807, of the transfer of the note in the declaration mentioned was not sufficient to bar the defendant's right of setting off the said Hodgson's note of $566.67 against the plaintiff in this action. But if the court should be of opinion that the said notice was sufficient to entitle the plaintiff to the money in the declaration mentioned as against the defendant, then they found for the plaintiff.

CRANCH, Chief Judge. In this case the defendant held Hodgson's note as a just discount to his own note, before he had notice of the assignment of his own note. It was at that time a debt due by Hodgson to the defendant. It was debitum in præsenti solvendum in futuro; and would become payable before the defendant's note to Hodgson. The silence of the defendant at the time Hodgson mentioned the assignment is no evidence of a waiver of the right of set-off. The defendant was not bound to give notice to the plaintiff; and to give it to Hodgson would have been futile and unnecessary; as Hodgson must have known it before. All that is required by the doctrine of set-off is that they should be mutual, subsisting, liquidated debts at the time of the plea pleaded. The notice given by Hodgson to the defendant on the 14th of August, 1807, is not sufficient to bar the defendant's right to the set-off. Judgment must be entered on the verdict for the defendant.

[This judgment was affirmed by the supreme court, where it was carried by writ of error. 6 Cranch (10 U. S.) 203.]

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

Case No. 13,422.

STEWART v. BARCROFT.

[1 Hayw. & H. 41.] [1]

Circuit Court, District of Columbia. May 18, 1841.

EXECUTOR — FAILURE TO PAY OVER RESIDUE — INTEREST FOR ACCOUNT.

Where an executor was authorized by will to pay one-half of the residue after the debts were paid, and instead of doing so converted it to his own use, he will be decreed to pay to the residuary legatee the amount found due, together with interest, commencing one year after the date of his letters of administration.

This bill is filed by the complainant [Adam D. Stewart] as one of the residuary legatees under the will of Elizabeth Orr, and prays for an account. He avers that the defendant [John Barcroft, executor of Elizabeth Orr] has kept and applied the funds received by him as executor to his own use; that he has called upon the defendant to pay that part of the legacy that the complainant is entitled to, but he has utterly refused to do so. The defendant does not deny the allegations of the complainant, but admits his inability to pay, and states that he has taken the benefit of the insolvent law.

Clement Cox, for complainant.
Wm. Redin, for defendant.

BY THE COURT. The cause being set for hearing on bill, exhibit, answer, and general replication, and the same being heard and duly considered, it was referred to the auditor to state the account of the defendant as executor of Elizabeth Orr with the complainant as legatee of said testatrix. The auditor reported that the executor was indebted to the estate $874.64¾; that by the will the estate, after the legacies and debts were paid, was to be equally divided between the complainant and defendant; that the sum of $500 was devised to be appropriated to the manumitting of certain negroes; that several years elapsed before the money was paid, and then it was paid by the sureties to his bond. That the defendant claims a credit of $524.94, which is allowed, leaving a balance of $349.-74¾, one-half of which, $174.87, belongs to the complainant, to which is added interest from the day it became due to the present date, $109.78, making the debt $284.65, with the costs of this suit.

If, as claimed by the complainant's solicitor, Mr. Barcroft be charged with the use of the $500 for five or six years while he held the money in his hands and used it for his benefit, it would make $82.50 to be added to the balance. But it is the auditor's opinion that Mr. Barcroft is not responsible to Mr. Stewart for this charge. The wrong done was to the negroes who remained slaves five or six years after they ought to have been free. When the money was paid and by whom was immaterial to Mr. Stewart's interest. The complainant excepted to the auditor's report, because the auditor refused to state the account in accordance with the instructions of the complainant's solicitor. The exception on motion was allowed by the court, and it was again referred to the auditor, who made a supplemental report, allowing interest on the funds retained in the trustee's hands and used by him, commencing one year after the date of his letters of administration, the law allowing that time to executors to arrange their accounts. It is not usual, the auditor thinks, for executors to be charged with interest on moneys received by them as such, but this case differs from most others. It was a small estate, and there was little or no difficulty in settling it up speedily. After payments of the very few claims and the legacies, the residue was to be divided equally between the parties to this suit. This division could and ought to have taken place in the year 1830, even if Mr. Barcroft had retained in his own hands the sum of $500, devised to be paid by him for the negroes to be manumitted. This sum was paid in 1835, which ought to have been paid in 1828, and the complainant has not been paid at all.

The defendant, by his solicitor, excepted to this supplemental report of the auditor—Because the auditor has in said supplemental report stated interest against the executor. Because he has virtually charged interest on the $500 for the purchase of the negroes while the same remained in his hands. The true view is presented by the auditor in his first report, that the wrong, if any, was done to the negroes; that the defendant cannot be answerable therefor to said complainant, and that he ought not to seek to participate in and be benefitted by any such wrong.

It was decreed by the court that the defendant's exceptions to the supplemental report be overruled, and that the defendant pay to the complainant in full of his residuary legacy under the will of Elizabeth Orr, deceased, the sum of three hundred and fifty-six dollars, with interest thereon from July 16, 1835, and the proper costs of the complainant in this behalf sustained, to be taxed by the clerk of this court, and that the complainant be allowed his execution therefor by attachment, fieri facias, or capias ad satisfaciendum, at his election.

NOTE. Interest on $349.74¾ from February 27, 1828, to July 16, 1835, is $363.15, which added to the balance as found by the auditor makes $712.89; the one-half this sum was the amount found due.

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

Case No. 13,423.

STEWART v. CALLAGHAN et al.

[4 Cranch, C. C. 594.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

SEQUESTRATION—PROCEEDS OF SALE—COMMISSIONS OF SUPERCARGO—INDEMNITY.

1. The commissions of a supercargo of a sequestered cargo are a charge upon the proceeds of sales, and are not included in the indemnity to be granted by the sequestering government.

2. The indemnity stands in the place of the proceeds of sale, and the commissions are a charge upon that indemnity.

This was a bill [by Stewart's administratrix against Callaghan and others] to enjoin the amount of the supercargo's commissions upon a voyage of the brig Ruth and Mary, out of the sum awarded by the commissioners under the treaty of indemnity with the king of the two Sicilies, and to prevent the same from being paid out of the treasury of the United States to Mr. Callaghan, assignee of Coulter, the insolvent owner of the brig and cargo. The answer having been filed, a motion was made to dissolve the injunction which had been granted by one of the judges in vacation. The plaintiff relied upon an agreement, under seal, between Callaghan and Hall, the assignees of Coulter, and her intestate; by which, in consideration of services rendered by him, (Alexander Stewart, Jr.) they agreed "that out of the recovery then in prosecution before the commissioners," &c., "whatever may be the amount thereof, the said Alexander Stewart, Jr. shall be allowed the full amount of his commission charged in the statement of the said claim, to wit, $5,307.50, together with interest on the same, if interest shall be allowed on the claim by the commissioners; and so much of any award that may be made by said commissioners, on the said claim, is hereby assigned to the said Alexander Stewart, Jr.," and they constitute him, irrevocably, their attorney to receive the sum of $5,307.50, with interest, if it should be allowed on the claim by the commissioners. The award was for $71,411, but did not include the claim for the supercargo's commissions. The defendants in their answer, contended that, as the commissioners rejected the claim for the commissions, the plaintiff's intestate was not entitled to them, under the agreement.

But THE COURT (nem. con.) was of opinion, that as the commissions of the supercargo would have been a charge upon the proceeds of the sales of the cargo, if it had arrived at the place of its destination, they are to be considered as a charge upon the fund, which stands in the place of those proceeds of sales, and were not a proper charge against the king of the two Sicilies, under the treaty of indemnity, and that the plaintiff is entitled to the same, under the agreement, both at law and in equity. The injunction was ordered to stand until final hearing.

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

STEWART (CALVERT v.). See Case No. 2,327.

Case No. 13,424.

STEWART v. DRASHA et al.

[4 McLean, 563.] [1]

Circuit Court, D. Michigan. June Term, 1849.

DISCOVERY — ANSWERS TENDING TO CRIMINATE — SUNDAY TRANSACTION—SUBSTITUTED NOTE.

1. A note being sent to the defendants to sign, for a debt acknowledged to be due, the defendants substituted a note for the same amount, dated on Sunday.

2. A bill of discovery was filed, in which the defendants were called to answer, as to the above fact

3. The defendants demurred, as the answer required would subject them to a penalty for a breach of the Sabbath. The court sustained the demurrer.

4. Also, they sustained a demurrer to that part of the bill, requiring the defendant Drasha, to answer whether he was not a lawyer, and did not write the note.

[This was a suit by John Stewart against Morgan S. Drasha and others.]

Mr. Joy, for complainant.

Mr. Howard, for defendant.

OPINION OF THE COURT. This is a bill of discovery to aid in a suit at law. The defendants being indebted to the plaintiff in $600, neglected to pay. Demand and protest being made, notice was given by letter that the note must be paid or suit would be commenced. Some correspondence took place, and defendants agreed to give a new note, including costs of protest, etc., payable in sixty days. Such a note was drawn and handed to one of the defendants to be taken to Pontiac, where they resided, to be executed. But, instead of signing the note given to them, they substituted another of the same amount, dated the 21st of March, 1847, the note sent being dated the 16th of March. The note substituted was dated on Sunday, and suit being brought the defense set up is, that the note being dated on Sunday, is illegal and can not be enforced.

A bill was filed in which the complainant called upon the defendants to answer the above facts. The defendants demur, on the ground, that by answering they would subject themselves to a penalty for a breach of the Sabbath.

The court sustained the objection as to the eighth interrogatory, "whether the said note was actually signed by all of the said defendants on the day it bears date, and if not, then which of the said defendants did not sign

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

the same on that day." As the statute inflicts a penalty for a breach of the Sabbath, which, we suppose, consists in doing an act on that day not lawful to be done, we are bound to sustain the demurrer. At the same time we can not forbear to say that the objection, under the circumstances, comes with a bad grace from the defendants. It would seem such an objection, where the act of giving the note was the act of the defendants, and against the request of the complainant, authorizes the presumption that the note was dated on the Sabbath, with the view to the objection now made.

The court also sustained the demurrer to the tenth interrogatory, "whether the said Morgan S. Drasha is not a lawyer by profession, and whether the said note so substituted was not written by him, or by some one in his presence and by his direction."

The other interrogatories the court required the defendants to answer.

Case No. 13,425.

STEWART v. DUFFEY.

[1 Cranch, C. C. 551.] [1]

Circuit Court, District of Columbia. July Term, 1809.

APPRENTICE—ORDER OF COURT—INDENTURES.

The order of the orphans' court, to bind out an apprentice, is not a binding so as to constitute the relation of master and apprentice.

This was a petition of an apprentice [Westley Stewart] against his master (a combmaker,) praying to be discharged. There was an order of the orphans' court to bind him as orphan, but no indentures were ever executed.

Mr. Jones, for the petitioner, cited the Maryland law of 1793 (chapter 45, § 2). The books of the orphans' court are not a record. The entry is a mere memorandum of a verbal contract; it is not obligatory upon the master. It is not a binding out. The power of the orphans' court is a mere substitute for the power of the overseers of the poor, or of the parent or guardian.

Mr. Swann, on the same side. In the case of Wilbar v. Mandeville [unreported], the court decided that such an order does not bind; and Wilbar's daughter was discharged from Mandeville.

Mr. C. Simms. The boy is an orphan, and the order may be complied with by executing the indenture. There was evidence of a verbal discharge by the master, who sold out his shop, gave up his house, and went to Philadelphia.

THE COURT discharged the boy on both grounds, viz. that there was no contract, and if there was, there was also a discharge.

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

Case No. 13,426.

STEWART v. FAGAN et al.

[2 Woods, 215.] [1]

Circuit Court, D. Louisiana. April Term, 1876.

CREDITOR'S BILL—CLAIM REDUCED TO JUDGMENT—EXECUTION—SALE UNDER DECREE IN ADMIRALTY—PURCHASER'S RIGHTS.

1. It is an indispensable prerequisite to a creditor's bill which seeks to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, that the claim should first have been reduced to judgment.

[Cited in Talbott v. Randall, 5 Pac. 536.]

2. A sale made in pursuance of a decree of a court of admiralty, obtained without fraud, cuts off all claims of the original builders of the boat or other creditors, and of her owners.

[This was a bill in equity by Thomas J. Stewart against William Fagan and others.]

The bill alleged that the complainant was the indorser and holder of a large number of drafts, drawn by "Miles Owen for steamer Katie" on one J. Pinckney Smith, and accepted by him; all dated April 6, 1872, except three, dated November 1, 1872, and transferred by the payees to complainant; all of which were due and unpaid. It was further alleged that one J. M. White caused the steamer Katie to be built at Louisville, Kentucky, and gave the several drafts now held by complainant for liabilities incurred in building and fitting out said steamer. On the 29th of February, 1872, White being insolvent, and having no property but the Katie, mortgaged her to certain of his creditors, as follows: to Wm. Fagan & Co. for $8,000, to Lagan & Macinson for $4,000, to Richard England for $4,000, to McCloskey, Bigley & Co. for $9,000, and to Edward Connery & Son for $20,000. It was charged that these creditors took their mortgages for these round sums, which were more than were due them, knowing that White was insolvent, and for the purpose of obtaining an unjust and fraudulent preference over other creditors. The bill further stated that said J. Pinckney Smith was originally bound with White for the debts contracted in building and fitting out said steamer, and conspired with said mortgage creditors to prevent the Katie from being subjected to the claims of her builders and White's general creditors, and induced said Miles Owen to become the purchaser of said steamer, which he did on the 7th day of March, 1872, a few days before the 13th of March, 1872, when an involuntary petition in bankruptcy was filed against White by Philip McCullough & Co., his creditors; that Miles Owen was at the time of the purchase without any knowledge of the steamboat business, and took the title of said boat at the instance of Smith, and to serve his own and the purposes of the mortgage creditors, and gave the management of the boat to a committee composed of Wm. Fagan, D. C. McCan and J. Pinckney Smith. It was further alleged, that on

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

the 29th of August, 1872, Owen mortgaged said boat to Wm. Fagan & Co. for $7,259, to E. Connery, Son & Co. for $10,601, and to fifteen other firms and individuals for specific amounts, all of which are set out in the bill; and that Miles Owen was a mere man of straw, interposed to take the title of the boat for the benefit of said mortgage creditors and said Smith, and that he did not pay for her; that in pursuance of the plan to place said boat beyond the reach of the claims held by complainant, the committee, which had her in charge, permitted her to be libeled in admiralty in the U. S. district court for Louisiana by the Underwriters Wrecking Company in November, 1872; that an order of sale was obtained, and the boat sold after five days notice; that after the order of sale was obtained, the libel was dismissed; but nevertheless the boat was afterwards, on the 11th of January, 1873, sold to Wm. Fagan, one of the committee, for $23,000. The sale was advertised for cash, but on the day preceding the sale, the court allowed the marshal to receive and take a bond for the entire price, except a sufficient sum to pay costs and the expenses of sale; but this privilege was extended only to the mortgage creditors of the boat. After this, the bill alleged, Fagan made a pretended sale of the boat to John W. Cannon, who acknowledged that he held the boat for the benefit of the mortgage creditors; that Cannon paid nothing on the boat, but assumed to pay within one and two years the debts which had been recognized by Miles Owen, by the mortgage of August, 1872; he agreed to render statements of the expenses and earnings of the boat to the mortgage creditors, for whom he in fact held the boat; that he ran said boat for two years, and her net earnings during that time amounted to $62,000; a sum more than sufficient to pay all the debts due to said mortgagees; that Cannon, after the transfer of said boat to him, gave possession of her to Wm. Fagan and others, a committee representing the mortgage creditors, who were authorized to employ the master and clerk. The bill further alleged, that on the 23d of January, 1875, Cannon transferred said boat by bill of sale to said committee, for the nominal consideration of $68,377, but the committee paid nothing for her, and merely took the title to enable them to sell said boat and appropriate the proceeds; that the admiralty sale was null and void, and that before and since the sale, the said boat had been held by the said several parties for account of said mortgage creditors, and that said committee received the title to said boat and held the same in payment of their pretended mortgage. The bill further alleged that Wm. Fagan, Edward Connery, D. C. McCan and P. G. Bigley, members of said committee, had undertaken to sell said boat to Mrs. Mary Tobin, but that the consideration money paid by Mrs. Tobin was still in the hands of Fagan, Connery and McCan, three of the committee, who had not yet paid it over to the mortgage creditors.

The prayer of the bill was, that the mortgages made by White and Miles Owen might be declared fraudulent and annulled; that the sale of the boat made January 11, 1873, by the admiralty court, and the subsequent sales might be annulled, and Miles Owen adjudged to be the owner thereof; and that complainant might have a decree for the amounts claimed in his bill against Miles Owen and J. Pinckney Smith, and that the Katie might be subjected to said claims and sold to satisfy the same, or in the event that the sale to Mrs. Tobin had been consummated, that a decree in favor of complainant for the proceeds of said sale might be rendered against Fagan, Connery and McCan, and that the claims of said mortgage creditors on said steamer might be rejected; and for an injunction against Fagan, Connery and McCan, to restrain them from paying over the proceeds of the sale to the mortgage creditors, or if the sale to Mrs. Tobin had not been perfected that they might be restrained from making the same, or any other sale or disposition of said steamer.

The cause was heard upon a motion for the preliminary injunction, according to the prayer of the bill.

Thomas Hunton, for complainant.

Wm. M. Randolph and B. Egan, for defendants.

WOODS, Circuit Judge. The obvious objection to the prayer for injunction is that there is no equity in the bill and on demurrer it would be dismissed. It is a creditor's bill seeking to subject property of the debtor fraudulently conveyed and covered up to the payment of the complainant's claims. An indispensable requisite to such a bill is that the claims upon which it is based should have been first put in judgment. There is no averment in the bill that this has been done. The bill is predicated on certain drafts alleged to have been drawn by one Miles Owen, and accepted by J. Pinckney Smith and transferred to complainant, but which have never, so far as appears, been reduced to judgment. This is a fatal defect in the bill. The complainant does not set up or claim any lien upon the property which he seeks to subject to the payment of his debt. He has simply a debt which he can sue on at law. Until he has exhausted his remedy at law by the recovery of a judgment, equity has no jurisdiction. Non constat but that on an execution he might make his money. Jones v. Green, 1 Wall. [68 U. S.] 330; Beck v. Burdett, 1 Paige, 305; McElvain v. Willis, 9 Wend. 548; Crippen v. Hudson, 3 Kern. [13 N. Y.] 161. But even if this defect in the bill did not exist, I should be constrained to overrule the motion. The answer of Fagan, Connery and McCan traverses every allegation of fraud made in the bill, and with the affidavits filed, shows that the claim of the mortgage creditors upon the boat was honest and fair, and the amounts claimed by them justly due.

The averment of the bill that the admiralty sale of the Katie was void is entirely without

proof to support it. It appears that before the libel the Underwriters Wrecking Company was dismissed, other creditors of the Katie intervened and it was upon their claims she was sold. The sale was made in pursuance of a decree of the court of admiralty. There is no proof and in fact no averment that it was unfairly obtained. This sale cuts off all claims of creditors and of the original builders or proprietors of the boat. The purchasers at that sale had the right to place the title where they pleased and to do with the boat as they pleased. There seems to be not the slightest proof of any fraudulent practices on the part of the mortgage creditors of the Katie. They were vigilant and looked after their own interests. The creditors, whose evidences of debt complainant holds, slept on their claims, and two years after a sale of the Katie under an admiralty decree, this bill is filed. The case has no basis to stand on, either upon the law or the facts. Motion for injunction overruled.

STEWART (FREEMAN v.). See Case No. 5,088.

Case No. 13,427.

STEWART v. FRENCH.

[2 Cranch, C. C. 300.] [1]

Circuit Court, District of Columbia. April Term, 1822.

NOTES—INDORSEMENT AFTER DATE OF PAYMENT—INDORSER—DEMAND AND NOTICE—INSOLVENCY OF MAKER.

If a promissory note, payable at a certain day, be indorsed and passed away after its day of payment, it is then a note payable on demand, and demand and notice are necessary to charge the indorser, although he knew the maker to be insolvent at the time he indorsed it.

Assumpsit [by David Stewart] against [Robert French] the indorser of W. A. R.'s note for $150, at sixty days, dated July 16, 1819, indorsed by the defendant, to the plaintiff, on the 16th of October, 1819, in part payment for a gig valued at $300.

Upon the trial of this cause at the last term (Cranch, C. J., absent) the court instructed the jury: "That if the note was passed to the plaintiff, after the same was at maturity, for a full and valuable consideration, the holder was bound to make demand of payment of the same, of the drawer, in a reasonable time after the same was so passed, and to give notice of nonpayment to the defendant, the indorser, unless the jury should believe, from the evidence, that the said defendant practised a deception on the plaintiff in so passing the said note, after it was at maturity, or, that it was known to the defendant that the said W. A. R., the drawer, was insolvent." The verdict being for the plaintiff,

Mr. Dunlop, for defendant, moved for a new trial, on the ground of misdirection of the jury by the court, and cited Farnum v. Fowle, 12 Mass. 89; Sanford v. Dillaway, 10 Mass. 52-54; Berry v. Robinson, 9 Johns. 121; and Chit. Bills (New Ed.) 274, in a note.

Mr. Ashton, for plaintiff, contended that the plaintiff had a right to recover for the balance of the purchase money covered by the note, which was of no value, upon the count for goods sold and delivered.

THE COURT (THRUSTON, Circuit Judge, absent) granted a new trial.

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

Case No. 13,428.

STEWART et al. v. GORGOZA et al.

[3 Hughes, 459.] [1]

Circuit Court, E. D. Virginia. Jan. 8, 1879.

MECHANIC'S LIEN—BUILDING SHIP—TITLE.

The mechanic's lien law of Virginia does not apply to ships while in the process of being built in a public shipbuilder's yard, under a contract by which the ships were the property of the owners, and not of the builder, from the laying of the keels, in favor of the material men who gave credit to the builder, and not to the ships.

In chancery, on attachment process, under claim of lien by lumber dealers, and against nonresident defendants.

George W. Beach was, in 1877, a shipbuilder in Norfolk, conducting a shipbuilder's yard and an iron works adjacent. In the winter and spring of that year he was engaged in building two brigs for the defendants, Gorgoza's Sons, and one or two or more other vessels for other persons. Under his contract with Gorgoza's Sons they were to be owners of the two brigs from the commencement of work upon them, and were to make payments to him for the value of the work and material as it progressed. These payments were punctually made as agreed. The defendants were then, as they are now, residents of New York City. Beach ordered a bill of lumber and timber from the plaintiffs, Stewart & Tucker, which was delivered in April, 1877. Another bill was ordered, which was delivered on the 19th May following. Beach made some mention, at the time of ordering one or the other lots of this lumber, or his desire or intention to use it in one or the other of the defendants' brigs. All transactions of the sort between Beach and the plaintiffs ceased with the delivery of May 19th. Beach was to have paid for the lumber in cash, but in fact he paid only about a fourth or less of the amount in money. He gave negotiable notes for the rest of the money due, namely, two notes for $500 each and one for $343.18, dated respectively on the 18th and 25th of April, and on the 18th of June, 1877, payable respectively forty, sixty, and thirty days after their dates. One of the notes for $500 was passed off by Stewart & Tucker by discount to a third person, and was not their property at the time of the commencement of this suit. On one of the other notes a payment of $100

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

was made. Except as to this latter credit, the notes are all due, and this suit is brought to recover the amount of them, not from Beach but from the defendants, Gorgoza's Sons. It is not pretended that the plaintiffs furnished this material on the credit of the vessel which they have attached or of the defendants. On the 24th of November, 1877, Stewart & Tucker drew off an account of their claim against Beach, made affidavit to it, and filed it as a claim of lien upon the Harriet G. (one of the brigs named) in the clerk's office of the county court of Norfolk county, conforming thereby to the provisions of the fourth section of chapter 115 of the Code of Virginia, amended by chapter 357, p. 437, of the Acts of Assembly for 1874–75. It is in proof that a considerable part of the lumber and timber furnished by Stewart & Tucker went into other vessels than the Harriet G.; that a portion of it was unfit for use, and was not used, in building vessels; that some of it passed to Beach's assignee in bankruptcy after his adjudication as a bankrupt, in August, 1877, and was sold by the assignee; and that only the better portion of it, probably not the larger portion, went into the Harriet G.

The suit is a proceeding in chancery, commenced by process of attachment in rem, issued against and served on the brig Harriet G., which was replevied by the defendants on bond. The bill makes Gorgoza's Sons defendants, and proceeds against them as nonresidents. It does not make Beach a defendant. The object of the suit is to recover from the defendants a debt due by Beach by subjecting the defendants' property to an alleged lien for the amount now represented by the negotiable notes that have been described No judgment has ever been obtained by the plaintiffs against Beach for the amount of the notes. The plaintiffs did not prove the claim in Beach's bankruptcy. That the amount of the notes is due from Beach to the plaintiffs has never been determined judicially, or reduced in any manner, form or proceeding to judicial certainty. The notes of Beach to the plaintiffs are a mere matter in pais, in which the defendants have no privity, and for which they are under no sort of personal responsibility,—legal, equitable, or moral.

Godwin & Crocker and Parker & Allen, for plaintiffs.

Garnett & White and Charles Sharp, for defendants.

HUGHES, District Judge. The object of this proceeding is to subject Gorgoza's Sons to this debt through a claim of lien upon a vessel of theirs, into which some of the timber which was the subject of the debt of Beach was put by Beach as a shipbuilder conducting a public shipbuilder's yard, to whom the lumber was delivered on contract to pay cash for it, and not on the credit of the vessel or of the defendants. The proceeding is founded on the third and fourth sections of the chapter 115 of the Code as amended, which chapter treats "of the lien on land for purchase money, or of mechanics and others for buildings erected or repaired, and of liens on crops for advances." The plaintiffs rely solely upon the provisions of that chapter. It need not be stated that a statute treating of the lien on land or for buildings erected or repaired, vouched in support of a claim like the present one, of a lien on a ship on the stocks, should, in the interest of the freedom of contracts and of commerce, be strictly construed. It has been held on more than one occasion by this court, that the provisions of the chapter of the Code of Virginia just mentioned apply only to buildings, improvements, and property connected with and appurtenant to real estate, savoring of the realty, and that they do not apply to mere personalty, mere chattels If it were otherwise, the greatest injury would be inflicted on the innocent purchaser of personal property; and the most serious embarrassment and obstruction would be introduced into all the ordinary transactions between citizen and citizen. A farmer could not purchase safely a wagon, or a plough, or a wheelbarrow from a wheelwright, without first going to the clerk's office of his county and ascertaining whether a claim of lien had been filed there by the mechanic who might have worked on the article, or the material man who might have furnished the wood or iron used in its construction. I do not think that any other construction of the provisions of chapter 115 than that just indicated, which is, indeed, implied in the title of the chapter itself, is admissible logically, or could be enforced in practise. And therefore it is hardly necessary for me to do more than hold that the claim of lien filed against this brig by the plaintiffs on the 24th of November, 1877, under section 4 of the chapter of the Code under review, does not establish a lien upon a ship on the stocks, such a structure not being a "building" erected on land, or an "improvement" or "property" connected permanently with land, according to what seems to me to be the necessary intendment of that chapter of the Code.

But this claim of lien could not be allowed, even if we could treat the chapter as covering personal property not connected with or savoring of the realty. Section 4 requires any person furnishing material about a building for a general contractor, in order to make good his lien, to file within thirty days after the completion of the work, on affidavit, a true account of the materials furnished, in the clerk's office of the county court of the county. The materials claimed in this suit were furnished, and the "work" of delivering them completed, on the 19th day of May, 1877, and the plaintiffs' account and claim of lien were not filed until the 24th of November, 1877,

which was too late, not being within thirty days. This omission is not cured by section 7 of chapter 115 of the Code, giving a longer time for filing the claim of lien in cases where the "contractor" gives credit on payments for a "building." The contractor there meant can be only the contractor for the building, and the credits contemplated are credits given to the owner or person for whom the building is constructed. Here the contractor, Beach, received credit from Stewart & Tucker, and did not give it to Gorgoza's Sons. Here the owners of the "building," Gorgoza's Sons, were all the while in advance in their payments, and not receiving credits on any of them. Nor have the plaintiffs brought their case within the terms of the fifth section of this chapter of the Code, which requires of subcontractors and material men, in addition to the requirements of section 4, that they shall, besides filing their claim of lien within thirty days after the completion of their "work," notify the owner of the "building" of the amount of their claim for materials within twenty days after the "building" is completed. It is not pretended that this provision of law has been complied with. The claim of the plaintiffs, therefore, is not good, even in view of the requirements of chapter 115.

On the merits, also, the case is against them. The Code requires by necessary implication that the materials furnished by a lumberman shall be furnished specially for a building, and must be used in its construction. This lumber and timber was furnished to a shipbuilder engaged in building several vessels, and the shipbuilder was at liberty, under his engagement with the plaintiffs, to put their stuff into any of the vessels he was constructing, or to sell it, or to ship it off without using it. Surely the mere casual mention of his desire or intention to use the lumber in two brigs, at the time of ordering it, without any stipulation direct or indirect that he should use it only in those brigs, cannot bind an owner hundreds of miles distant to pay to the lumber dealer the price of timber bought for use and used indiscriminately in that and other vessels.

On the law and the merits the bill must be dismissed, and I will sign a decree to that effect.

Case No. 13,428a.

STEWART v. GRAY.

[Hempst. 94.][1]

Superior Court, Territory of Arkansas. July, 1830.

RECORDS—AUTHENTICATION—JUDGE'S CERTIFICATE—NONSUIT—AT WHAT TIME MAY BE ENTERED.

1. Under the act of 1790 [1 Stat. 122] the certificate of a judge styling himself "one of the judges" of a court, is not a sufficient authentication, but it must appear that he is the chief justice, or presiding judge or magistrate.

2. A plaintiff may suffer a nonsuit at any time before the jury find a verdict; but it is too late after a court has decided on the plea of nul tiel record.

Appeal from Pulaski circuit court. Determined before Thomas P. Eskridge, Edward Cross, and James Woodson Bates, Judges.

[This was an action of debt by Adam D. Stewart against Sampson Gray.]

ESKRIDGE, J. This is an action of debt, founded upon the record of the supreme court of the state of Tennessee, and comes to this court by appeal from the circuit court of Pulaski. Issue was joined in the court below upon the plea of nul tiel record and was decided in favor of the defendant; to which opinion the plaintiff excepted. The plaintiff's counsel then moved the circuit court to be permitted to suffer a nonsuit; which motion was overruled, and to this opinion the plaintiff likewise excepted.

The questions to be decided by this court are: First, whether the circuit court erred in sustaining the plea of nul tiel record; and second, whether the court erred in overruling the plaintiff's motion to be permitted to suffer a nonsuit. The first question depends upon the sufficiency of the authentication of the record of the supreme court of Tennessee. By the constitution of the United States, congress has the power to prescribe the manner in which the public acts, records, and judicial proceedings in the several states shall be proved, in order to make them evidence in any other state; and by an act of May, 1790, has declared that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court in the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. The record of the supreme court of Tennessee is attested by the clerk, with the seal annexed, and the attestation is certified by one of the judges to be in due form. The judge states himself to be "one of the judges of the supreme court of Tennessee." Is this a sufficient authentication? It cannot be admitted that, under the act of congress, any judge can certify the record. It must, by the language of the act, be the judge, if there be only one, or if there be more, then the chief justice or presiding judge, or magistrate of the court from which the record comes; and he must possess the character at the time he gives the certificate. If this be the correct construction of the act, and it is clearly susceptible of no other, it is manifest that the judge who certified the record in question has not given himself the character required by the act. The statement that he is one of the judges of the supreme court of Tennessee, certainly does not

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

import that he was the sole judge, chief justice, or presiding judge of that court. Cases may occur in which no judge can with truth or propriety be denominated the judge, chief justice, or presiding judge of a particu'ar court; for example, where several judges constitute a court, and the law is silent as to which of them shall be the presiding judge, as is the case with the superior court of this territory. In courts thus organized, at each term one of the judges must necessarily preside; but it does not follow that any judge of a court thus constituted may certify a record when he is not the presiding judge, because he has been, or may be thereafter, possessed of that character. The only inconvenience that results from cases of this kind is, the delay that in some instances must occur in waiting until some judge is qualified by his situation to give the requisite certificate. This is an inconvenience for which the act of congress has not provided; nor has the act provided for the cases of absence, death, resignation, or removal of the judge. Stephenson v. Bannister, 3 Bibb, 369, a case expressly in point. The circuit court, therefore, did not err in not receiving as evidence the record of the supreme court of Tennessee, under the plea of nul tiel record.

The second question is, whether the circuit court erred in overruling the plaintiff's motion to be permitted to suffer a nonsuit. In issues of fact triable by a jury, the plaintiff will be permitted to suffer a nonsuit at any time before the jury actually find their verdict, but never afterwards. In the case now before the court, the issue joined upon the plea of nul tiel record was an issue of law properly triable by the court; and after the court had delivered its judgment upon the issue submitted to it, it was too late for the plaintiff to apply for permission to suffer a nonsuit. 1 Archb. Prac. 211; 3 Bl. Comm. 376. Judgment affirmed.

Case No. 13,429.

STEWART et al. v. HAMILTON.

[4 McLean, 534.] [1]

Circuit Court, D. Indiana. May Term, 1849.

MARSHAL—TERM OF OFFICE EXPIRED—SERVICE OF WRIT.

1. The service of a summons, by a deputy marshal, the day after the new marshal has filed his bond and taken the oath, the process having before been in the hands of the deputy, is good.

2. But this does not apply to the service of an execution. "If the marshal die, is removed from office, or his commission expires," he has no power to sell if he has made a levy, but another execution must be issued to his successor.

In equity.

Smith & Breckinridge appeared as counsel.

OPINION OF THE COURT. A motion is made to set aside the service of a writ issued and served under the following circumstances: It appears that Ray, a deputy marshal of Pepper, the former marshal, on the 5th of April, 1849, received the writ of summons, and served it on the 14th of the same month. on the 13th of April, Meredith, the successor of Pepper, filed his bond and took the oath of office. The 28th section of the judiciary act of 1789 [1 Stat. 87], provides, that "every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding, to execute all such precepts as may be in their hands respectively, at the time of such removal and expiration of office," etc. From this provision, it would seem there can be no doubt as to the legality of the service in question. By Act May 7, 1800, § 3 [2 Stat. 61], it is provided that "where a marshal shall take in execution any lands, tenements or hereditaments, and shall die or be removed from office or the term of his commission expire before sale, or other final disposition thereof, the like process shall issue to the succeeding marshal and the same proceedings be had as if said former marshal had not died, or been removed, or the term of his commission had not expired." But the above provision refers to executions, and can not be extended, by construction, to mesne process. The motion to set aside the service is overruled.

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

STEWART (HARRISON v.). See Case No. 6,145.

Case No. 13,430.

STEWART et al. v. HINKLE.

[1 Bond, 506.] [1]

Circuit Court, S. D. Ohio. Dec. Term, 1861.

STATUTE OF FRAUDS—DEBT OF ANOTHER—ORIGINAL PROMISE—CONSIDERATION.

1. A judgment was obtained by plaintiff against W., and a levy made on his real property to satisfy the same. H. verbally promised to pay plaintiffs the amount of said judgment in six months if he would forbear to collect the judgment against W., and extend the time of the payment of the judgment. *Held*, that such promise by H. was an original and not a collateral promise, and was not required to be in writing within the statute of frauds of the state of Ohio.

[Cited in Riffe v. Gerow, 29 W. Va. 462, 2 S. E 106.]

2. The agreement of the plaintiff was a sufficient consideration for the promise of H. to pay the amount of the judgment.

[This was an action of assumpsit by A. T. Stewart & Co. against Saul S. Hinkle. Heard on demurrer.]

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

Worthington & Matthews, for plaintiffs.
Mills & Goshorn, for defendant.

OPINION OF THE COURT. The question before the court arises on a general demurrer to the special plea of the defendant. The declaration is in assumpsit on a special promise by the defendant, and the case made is, in substance, that the plaintiffs had obtained a judgment against one Cyrus M. Williams, in the common pleas of Hamilton county, for $4,750.28, on which an execution had issued, and a levy had been made on several parcels of real estate in Cincinnati, as the property of Williams. It is there averred, that "in consideration of the premises, and that the plaintiffs agreed to release the levy aforesaid and the lien of the judgment, so far as the same existed on the following described real estate of the said Cyrus W. Williams, being part of the same described and levied upon," to wit: two certain lots in said city (which are fully described), "and that the said plaintiffs would forbear to collect the sum of $1,235.85, part of their said judgment against the said Williams, and would give time for the payment of the said last-mentioned sum for the period of six months, the defendant then and there undertook and promised the plaintiffs to pay them the said last-mentioned sum of money at the expiration of the said period of six months." The declaration then alleges that, in consideration of said promise, the plaintiffs released their levy on the two lots above referred to, and the lien of their judgment thereon, and forbore for the period of six months to collect the said sum of $1,235.85, and gave time for the payment thereof. To this declaration the defendant has filed a special plea, setting forth that the promise averred was a promise "to answer for the debt, default, or miscarriage of another person," and not being in writing no action can be maintained on it under the statute of Ohio for the prevention of frauds and perjuries. The plaintiffs demur to this plea, and thus the first question for the court is, whether the promise as set forth is within the statute referred to, and is required to be in writing to sustain an action. On this point the counsel on both sides have referred to numerous cases to sustain their views of the law. I have not regarded it as necessary to attempt a minute analysis and comparison of the cases in which the provision of the statute of frauds referred to has passed under the consideration of the courts. The question now presented is on a demurrer to the declaration, in which the court is not required to decide what evidence will be necessary to sustain the plaintiff's action, but simply whether the promise as set out in the declaration is valid as a verbal promise. In this aspect the inquiry of the court lies within very narrow limits. In involves, in the first place, the question whether the undertaking of the defendant is original in its character, or whether it falls within the designation of a collateral promise. If it is of the former class, it is not within the statute; if it is collateral, then it is void as not being in writing.

In attempting to distinguish between promises or agreements, as original or collateral in their character, there seems to be some obscurity and some conflict in the numerous cases cited. There are some general rules, however, which will be referred to, and as to which there is no question. One of these rules, as stated by 2 Pars. Cont. 300, is, "that only when the promise is distinctly collateral, is it within the clause of the statute." The same doctrine is held by the court in 20 Vt. 205. In that case it is also decided, "that if the promise is not collateral to the liability of some other person to the same party, it is not within the statute." And in the case of Nelson v. Boynton, 3 Metc. [Mass.] 396, the court draws a distinction between cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those, where although the effect of the promise is to pay the debt of another, "yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." In the former case the court held, "that the promise of the principal is not valid unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object of the promissor." And, in Story, Cont. § 861, it is laid down that the statute applies "to engagements upon which the guarantor is only conditionally liable upon the default of some other person who is solely liable originally." And again, in the same section, it is said: "The mere fact that a promise is to pay a debt due from a third party, or to pay for goods to be furnished to a third party, does not prove that the promise does not create an original liability, since it is perfectly competent to a man to assume, on sufficient consideration, to pay the debt of another." In 2 Pars. Cont. 306, the learned author puts this case: "If a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who also has an interest in the same property, promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien, this promise is not within the statute." And in Johnson v. Gilbert, 4 Hill, 178, the court held, "that the statute of frauds had nothing to do with the case. That only applies where the person making the promise stands in the relation of a surety for some third person, who is the principal debtor."

From these citations, which could be greatly extended, it would seem clear that an undertaking or promise, to be within the statute, must partake of the nature of a guaranty or suretyship. It embraces only the cases where the promise made is "to an-

swer for the debt, default, or miscarriage of another person." Now, it seems clear that the promise in this case as described in the declaration, is not within the words or the spirit of this clause. It is not a promise to pay or answer for the debt of another, but a promise founded on a consideration stated to pay a sum of money to the plaintiff, not as a surety or guarantor, but positively and absolutely. There is no such condition or contingency stated, on which he is to be liable, as the neglect or failure of the judgment debtor, Williams, to pay the sum mentioned. If this was the construction of the promise stated, the statute requires that it shall be in writing to sustain an action. The statement of the promise in the declaration is, that the plaintiff had a judgment lien and a levy on certain real estate of the judgment debtor, and that the defendant agreed in consideration that the plaintiffs would release their lien and discharge the levy, and forbear to collect a specified part of the judgment, and give time for the payment of the same, to pay the money in six months. But the promise, though direct and original, and therefore not required to be in writing, must be based on a valid and legal consideration to sustain it. It is true the plea does not allege a want of consideration as a bar to a recovery on the promise laid in the declaration. The demurrer to the plea, however, puts in issue not only the sufficiency of the plea, but of the declaration also. And if the declaration sets forth no good legal consideration for the promise, it is clear the plaintiff can not recover. It is, therefore, proper to inquire whether such a consideration is averred. On this subject the authorities are numerous and conclusive. "An agreement to forbear for a time proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise." 1 Pars. Cont. 365, and the authorities there cited. The same writer says: "Nor is it necessary that the forbearance should extend to an entire discharge; any delay which is real, and not merely colorable, is enough." "Nor need the agreement to delay be for a time certain; for it may be for a reasonable time, and yet be a sufficient consideration for a promise." Id. 367. And again: "It is not material that the party who makes the promise in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay." Id. And further: "In general, a waiver of any legal right at the request of another party, is a sufficient consideration for a promise." Id. 369.

There would seem to be no doubt that the plaintiff's agreement to release his levy and judgment lien against Williams, and to forbear the collection of a part of the judgment, is a sufficient consideration for the promise of the defendant Hinkle to pay the plaintiffs the sum claimed in this suit. It seems to be supposed by the counsel for the defendant that it must be averred that Hinkle had some interest in the release of the levy and lien, and in forbearing the collection of the sum due on the judgment, to give effect to his promise to pay the money to these plaintiffs. From the authority just cited, it would seem that this is not necessary. It is immaterial whether he is to be benefited by the release and forbearance. But if the law were otherwise, it would not affect the question arising on this demurrer. A good consideration for the promise is averred in the declaration without an averment of the defendant's interest in obtaining a release of the levy and lien on the real estate, and forbearance to proceed on the judgment. As a question of pleading merely, the court will presume that the defendant was induced to make the promise to pay, for the reason that he had an interest in disincumbering the real estate from the lien of the judgment and the levy, and procuring for Williams an extension of the time of payment. Whether it may be expedient or necessary for the plaintiff, on the trial, to prove how his interests were connected with these transactions, is not, therefore, on this demurrer, a question for the decision of the court.

Without going more at length into the consideration of this subject, I am led to the conclusion that the promise laid in the declaration is an original, and not a collateral promise, and therefore not within the statute of frauds, required to be in writing. And also that there is a good and valid consideration for the promise set forth in the declaration. The demurrer to the plea of the defendant is therefore sustained.

STEWART (JACKSON INS. CO. v.). See Case No. 7,152

STEWART (KEMBALL v.). See Case No. 7,682.

Case No. 13,431.

STEWART v. KERRISON.

[Cited in Kerrison v. Stewart, Case No. 7,734. Nowhere reported: opinion not now accessible.]

STEWART (KNOWLES v.). See Case No. 7,900.

Case No. 13,432.

STEWART v. LANSING.

[15 Blatchf. 281.] [1]

Circuit Court, N. D. New York. Sept. 21, 1878.[2]

JUDGMENT—RIGHTS ESTABLISHED—RAILROAD COMPANIES—COUNTY AID BONDS—COUPONS.

1. Under chapter 907 of the Laws of New York of 1869, passed May 18th, 1869, the coun-

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

[2] [Affirmed in 104 U. S. 505.]

ty judge of Tompkins county adjudged that certain persons, who petitioned that the town of L., in that county, might issue its bonds in aid of a railroad, were a majority of the tax payers representing the majority of the taxable property of the town, and entered the judgment of record. Under chapter 925 of the Laws of New York of 1871 passed May 12th, 1871, a certiorari was issued, May 27th, 1871, to the county judge, to review that judgment. In August following, the bonds, with coupons, were issued. In May, 1872, the judgment of the county judge was reversed. Some of the coupons passed to the plaintiff, and he brought suit on them in this court, and had judgment against the town. Bailey v. Lansing [Case No. 738]. In this suit by him on others of the coupons: *Held*, that the former judgment did not conclusively establish his right to recover in this suit. *Held*, also, that, because of the reversal of the judgment of the county judge, the town was not liable in this suit.

2. After the commencement of the proceeding by certiorari, there was no authority to issue the bonds.

[This was an action by John J. Stewart against the town of Lansing to recover for certain interest coupons.]

James R. Cox, for plaintiff.

Milo Goodrich, for defendant.

WHEELER, District Judge. This cause has been heard on the motion of the plaintiff for a new trial, after a verdict for the defendant, directed by the court. The action is brought upon interest coupons originally attached to bonds issued in behalf of the defendant town to the Cayuga Lake Railroad Company. The defendant denies that the bonds were ever lawfully issued in its behalf; that they, or the coupons, were ever binding upon it; and that the plaintiff is in any way entitled to recover upon the coupons.

The laws of the state of New York (Laws 1869, c. 907,) provided, that, whenever a majority of the tax payers, representing a majority of the taxable property of a municipal corporation, which the defendant is, should make application to the county judge, by petition setting forth that they were such majority and desired that the corporation should create and issue its bonds, and invest the same in the stock or bonds of a railroad company in the state, it should be the duty of the judge to give notice of a time and place for taking proof of the facts set forth in the petition as to the number of tax payers joining in it, and the amount of property represented by them, and at that time and place to take such proof, and, if it should appear satisfactorily to him, that the petitioners, or they and such other tax payers as should appear and join with them, were such majority, to so adjudge and determine, and cause to be entered of record; that such judgment and the record thereof should have the same force and effect as other judgments and records of courts of record in the state; and that, if he should so adjudge, he should appoint three commissioners to issue the bonds of the municipal corporation, which should be due in thirty years, and exchange them for the stock or bonds of the railroad company. Application was made by tax payers of the defendant, by petition, not alleging, however, that they were such majority, on which the county judge adjudged and determined that they were such majority, and entered the judgment of record. Afterwards, by chapter 925 of the laws of the state, passed May 12th, 1871, it was provided, that review of such proceedings should be by certiorari, on the return of which the court out of which it issued should review all questions of law and fact determined by the county judge, and might reverse, affirm or modify his determination. A writ of certiorari, to review this judgment, issued to the county judge, May 27th, 1871. In August, 1871, the commissioners appointed by the county judge, under the judgment, pursuant to the statute, being personally indemnified by the railroad company against the consequences of the certiorari which had been served upon them, and of which the officers of the railroad company were informed, issued the bonds, dated forward to October 1st, 1871, to be due January 1st, 1902, with interest coupons attached, due semi-annually. On the face of the bonds it was stated, that they were issued by virtue of the law of 1869, and that it authorized the town to issue the bonds. The county judge made return to the writ of certiorari, September 1st, 1871. On the 13th of October, 1871, the railroad company pledged the bonds to Leonard, Sheldon & Foster, bankers, to secure payment of a loan of fifty thousand dollars. Final judgment was rendered on the certiorari by the court that issued the writ, that the judgment of the county judge was manifestly erroneous, and that the same and all proceedings before him in relation thereto were in all things reversed, annulled and held for naught. This judgment was entered in the office of the county judge, May 27th, 1872. The railroad company, on the 26th of November, 1872, procured Elliott, Collins & Co., bankers, to make a loan on the pledge of these bonds, and drew on them against the loan, to pay Leonard, Sheldon & Foster, and gave them an order on the latter firm for the bonds, on which they received the bonds. The bonds afterwards passed again to Leonard, Sheldon & Foster, and some of the coupons to the plaintiff. The plaintiff brought suit on some of his coupons in this court, on which he obtained final judgment in his favor. The case is reported as Bailey v. Lansing [Case No. 738]. The plaintiff now claims, that the judgment in his favor in that suit, on those coupons, conclusively establishes his right to recover in this suit on these coupons; and, if not, that he is entitled to recover on the facts proved otherwise. The defendant denies the correctness of each of these propositions.

Each coupon in the former suit constituted, and was declared upon as, a distinct cause

of action; and so of those in this suit. The judgment in that suit conclusively settled, in favor of the plaintiff, everything involved in that controversy, necessary to the right of recovery upon those coupons. This is elementary. It also conclusively settled every fact properly put in issue there, and tried and determined, as to all other controversies between the parties in respect to the subject to which the facts pertained, and nothing more, outside of the causes of action there directly involved. It did not settle that the plaintiff could recover on other coupons like those because he did on those, nor that he had the right to have all similar suits decided in the same way. The judgment of the court became entitled to weight as an authority, on account of the eminence, learning and ability of the court, on all similar questions between any parties. It became conclusive between the parties to it, as to every part of the causes of action tried, whether actually tried or not, and as to all facts relating to other causes of action actually tried and determined, because the law requires that such matters, once tried and determined between parties, shall forever be at rest between the same parties.

The distinction between the conclusiveness of a judgment in respect to everything that might have been brought into the suit in which it was rendered, whether actually brought in or not, and only in respect to the things actually involved, and brought in and determined, in other suits, is well and very clearly pointed out by Lord Ellenborough, C. J., in Outram v. Morewood, 3 East, 346; by Putnam, J., in Arnold v. Arnold, 17 Pick. 4; and by Mr. Justice Field, in Cromwell v. Sac. Co., 94 U. S. 351, and in Davis v. Brown, Id. 423.

The issuing these bonds and coupons, the title to them afterwards, while they were kept together, and to the coupons then in suit afterwards, were in issue in the former suit, and the facts concerning them were all determined in favor of the right of the plaintiff to judgment in that suit. There was also involved, tried and determined, as between these parties, that the bonds were originally negotiated between the commissioners and the railroad company in violation of good faith; that Elliott, Collins & Co. were holders of the bonds for value before maturity, in February, 1873, including the coupons; and that they sold them under their right. These facts must be taken to be conclusively settled in this case, but, when so taken, they do not alone conclusively settle that the plaintiff is entitled to recover. If, upon these facts, in connection with the undisputed facts otherwise appearing, or which his evidence tends to prove, he would be entitled to recover, then the direction of a verdict for the defendant was wrong, and a new trial should be granted. Otherwise, not. This makes it necessary to examine further into the merits of the case.

It is understood that the town had not, and it is not claimed that it had, any power to issue these bonds, independently of that conferred by the legislation mentioned. Under the constitution of the state, probably the legislature had power to place the burden of maintaining a railroad, or a part of it, upon the towns, and to authorize the county judge to appoint agents for them to perform the duty, and procure means for that purpose by giving obligations of the towns. Town of Duanesburgh v. Jenkins, 57 N. Y. 177. But the legislature has not done so in this case. It has made the authority of the judge to appoint the agents dependent upon the application of the majority of the tax payers in number and property found by judgment to be such, on a petition alleging that they are such. The foundation of the authority to appoint, and of the agents when appointed, is the judgment. The town had no corporate authority to act in the matter, otherwise. Without the judgment, there could be no agent that could bind the town at all, and, probably, no one would claim but that, if the judge should assume to appoint without there being such a judgment, or commissioners should assume to act without any appointment, and bonds should be executed in behalf of a town, they would be merely void and of no validity, even in the hands of a bona fide purchaser for value. President, etc., of Mechanics' Bank v. New York & N. H. R. Co., 3 Kern. [13 N. Y.] 599 Township of East Oakland v. Skinner 94 U. S. 255; McClure v. Township of Oxford, Id. 429. So, all liability upon these bonds to any holder anywhere, must rest upon the judgment of the county judge. Doubtless, the petitions were sufficient to call for the exercise of his judgment; and, when he exercised it and rendered a judgment, probably, the judgment, if it had stood unchallenged, would have been a good foundation for the after proceedings. It did stand between one and two months before the law was passed under which it was reviewed, and probably a little longer before proceedings were taken to review it. While it so stood, it did not appear that the plaintiff, or any one under whom he claims, had any knowledge of it or information concerning it, except the railroad company, which also had knowledge of the proceedings to set it aside, and which took the bonds in bad faith and at its own risk. The writ of certiorari had been issued and served before that company received the bonds, and the return was made to it before they were parted with by it. This is understood to be the common-law writ, to remove the proceedings into the court issuing it. Such seems to have been the effect contemplated by the statute. When issued and served, it commenced to operate, and, when returned, it had operated, and the effect was to remove the cause, and to take away all jurisdiction in the court from which it was taken. Brooke, Abr. tit. "Certiorari," 15; Keb. J. P. VI. H. VII. 16; Fitzh. Nat.

Brev. 555, note a; 2 Hawk. P. C. c. 27, § 62; 4 Bl. Comm. 321; Bailey v. Lansing [supra]. After the writ was served, and, especially, after return was made to it, there was no judgment in force in either court on which the authority of the commissioners could rest. The proceedings were still pending to the same effect that they were at any time before the judgment of the county judge had been rendered at all. The legitimate result is, that the bonds were issued without authority and are void

It is true, that, where agents are once clothed with authority by their principals, those who know of it may presume it continues, and, if it is revoked without their knowledge, may safely continue to deal as if it continued. That is because it is more fair that the party who conferred the authority openly, and then privately took it away, should bear the consequences, than that one who did not set it on foot should. Story, Ag. § 491. In this case, there was no agency conferred by the principal, if any was conferred at all. It was conferred by the operation of law, and, if taken away by the same means, the reason for holding the principal to it after it was gone would not apply. One party would be as innocent as the other.

There is a large class of cases wherein it has been held by the supreme court, that, where a municipality has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, the holder in good faith has a right to assume that such preliminary proceedings have been had, if the fact be certified on the face of the bonds, by the authority whose primary duty it is to ascertain it. Warren Co. v. Marcy, 97 U. S. 96; Commissioners of Johnson Co. v. January, 94 U. S. 202; Commissioners of Douglas Co. v. Bolles, Id. 104; Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 6; Board of Com'rs of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; St. Joseph v. Rogers, 16 Wall. [83 U. S.] 644; Town of Coloma v. Eaves, 92 U. S. 484. But this is not a case like those. The authorities to issue the bonds were not those charged with such duty. Those to issue the bonds were the commissioners; the one charged with that duty was the county judge. And, further, the bonds do not contain nor carry such a statement. They merely state what law they are issued under, and that it authorizes their issue, without stating that any act had been done under the law. Nor do they come within the doctrine that the mere statement in or upon bonds, that they are issued in pursuance of a law, when issued by the officers charged with the duty of ascertaining whether precedent conditions have been complied with, is a sufficient warrant to a purchaser that they have been complied with, on which Board of Com'rs of Knox Co. v. Aspinwall was partly placed, for, they were not issued by officers so charged. The bonds recite matters of law merely, and are, in effect, like those in Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676, which were held to be invalid in the hands of an innocent purchaser.

It is also true, that, as these bonds are negotiable commercial securities, an ordinary lis pendens would not affect them in the hands of an innocent purchaser. Warren Co. v. Marcy, ubi supra. But, this litigation upon the certiorari was different. It affected the judgment itself, which was the foundation of all authority to issue the bonds, and not the parties merely, and, until it should be ended, leaving the judgment in force, there could be no such authority. In this case it was ended by holding the judgment for naught altogether, so that there never was a time from the commencement of the proceedings upon certiorari, by service of the writ, to their termination, when there was any authority, or color of authority, for issuing the bonds. They were issued under a general law of the state of New York providing for their issue only upon such a judgment, which was, by another general law, subject to review by such proceedings, and the proceedings were all upon the open and known public records of the courts of the state; and, probably, all persons dealing in them would be bound to know the general laws concerning them and to look for the proceedings under the law by which only they could ever have any vitality, if they desired to know, the same as all persons are bound to know, the general laws and the necessity and effect of proceedings under them, relating to other subjects. But, dealers in these bonds were not left to make good their presumed knowledge of the law, by searching it out. The bonds themselves, on their face, referred to the law of their origin. This affected them directly with notice of all the requirements of that law. McClure v. Township of Oxford, 94 U. S. 429. By that they would be informed, or be bound to act as if informed, that the authority to issue the bonds would depend wholly upon a judgment with which the commissioners had nothing of the making to do, and concerning which they would have the same opportunities to learn, by examining the records, as any other persons. An examination of the records would have shown them that the proceedings had been removed and that there was no judgment in force remaining. So Leonard, Sheldon & Foster, and Elliott, Collins & Co., although they were holders for value before maturity, were not unaffected with notice of the defects in the bonds. Id. And Elliott, Collins & Co., under whom the plaintiff claims, really took of the railroad company, which had only pledged the bonds to Leonard, Sheldon & Foster, and had remained the general owner, and was not a bona fide holder in any sense, and their taking was after the proceedings had been ended and the judgment wholly quashed, and the record of the ending had been completed in the office where the original proceedings were commenced.

These considerations seem to be fatal to the right of the plaintiff to recover. These conclusions are different somewhat from those reached in the former case, and have been reached after more careful examination on that account, and in consideration of several cases referred to bearing directly upon this subject, several of which had not then been reported and some not then decided. The motion is overruled. Let judgment be entered on the verdict.

[NOTE. On writ of error this was affirmed by the United States supreme court in Stewart v. Lansing, 104 U. S. 505. Mr. Chief Justice Waite, in delivering the opinion of the court, said that, as between the railroad company and the town, the judgment of the state supreme court, reversing and annulling the order of the county judge, invalidated the bonds, being equivalent to a refusal by the county judge to make the original order. As between the town and a subsequent bona fide holder, the bonds would be good, but under the rule that, where fraud or illegality in the inception of a negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value, the burden of proof was on Stewart to show that he was a bona fide holder. On this point the judgment in his favor in the prior suit on the coupons was not conclusive, since it did not necessarily involve ownership of the bonds, for coupons are negotiable instruments, capable of separate ownership and transfer. Although the court in its opinion in that suit "used language broad enough to cover the bonds, this language must be confined in its effect to the issues on trial; that is to say, the ownership of the coupons alone." The testimony in the subsequent suit was very defective, failed to show the exact facts as to Elliott & Co.'s parting with the bonds, or even that the plaintiff was actually in existence, or whether Elliott & Co. knew of the judgment of the state supreme court annulling the bonds. The counsel for the plaintiff was counsel for Bailey in the prior action, and for the railroad company when the bonds were got from the commissioners so that a full discovery could easily have been made. "While it would not, perhaps, have been improper for the court, in the exercise of its rightful discretion, to leave the case to the jury on the evidence, we cannot say it was error not to do so. In Pleasants v. Fant, 22 Wall. (89 U. S.) 122, it was held that 'if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant' a particular verdict, the jury might be so instructed. The record in the Bailey suit was certainly admissible in evidence upon the issue as to the bona fide ownership of the coupons of July, 1872." From Stewart, by one intermediate transfer, the bonds came into the possession of John T. Lytle. The town in May, 1887, began an action in the supreme court of New York to compel Lytle to deliver up the bonds for cancellation, and to enjoin him from transferring them pending the suit. Lytle removed the suit to the circuit court of the United States for the Northern district of New York, and filed a cross bill to compel the payment of the bonds. A decree was given for the complainant, requiring Lytle to surrender the bonds for cancellation, and dismissing the cross bill. Lytle appealed to the supreme court, which affirmed the decree. Lytle v. Town of Lansing, 13 Sup. Ct. 254, 147 U. S. 59.]

STEWART v. LANSING. See Case No. 738.

STEWART (LATHROP v.). See Case No. 8,112.

STEWART (LAW v.). See Case No. 8,130.

Case No. 13,433.

STEWART et al. v. LOOMIS.[1]

District Court, N. D. New York. July 16, 1842.

BANKRUPTCY—WHAT ARE ACTS OF—PREFERENCES.

[1. The second section of the bankrupt law (5 Stat. 442) declares "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general creditors of such bankrupt shall be utterly void and a fraud upon this act." *Held*, that the acts thus designated are in themselves acts of bankruptcy.]

[2. Assuming that the giving of a preference is not an act of bankruptcy, unless it be done voluntarily, and that, as held in England, what is done upon the demand of a creditor is not voluntary, yet the giving of a warranty of attorney to a mere indorser, whereby he secures priority, must be *held* a voluntary act, for such indorser is without legal right or power of coercion.]

[3. The expression, "in contemplation of bankruptcy," is equivalent, or nearly so, to the phrase "in expectation of stopping payment."]

[4. On June 3d a firm gave a warrant of attorney to confess judgment to persons who had indorsed for them, and 10 days later refused to pay their debts. One of the partners testified that the firm considered itself solvent and was in good credit until the 3d of June. *Held*, that the inference was that they did not consider themselves so after that date, and that it was reasonable to hold that the preference was given "in contemplation of bankruptcy."]

In bankruptcy. This was a petition, by John Stewart and others, for a decree of bankruptcy against Thomas and Charles K. Loomis. The petition, which was filed on the 18th of June last, alleges and sets forth that the debtors were partners, and merchants; that they were indebted to the petitioners to the amount of $4,381.66; that on or about the 4th of June last they voluntarily confessed a judgment to Arba Strong, Adams W. Walrath, and Richard Buckminster, for the sum of $8,000, "on bond and warrant of attorney, then and there voluntarily given and made" for that purpose, whereon a judgment was entered without any process or compulsion; that the said Charles K. Loomis, on the same day, in like manner confessed a judgment in favor of Thompson P. Stebbins for the sum of $860; that on the same day Thomas Loomis in like manner confessed two other judgments,—one in favor of Joel Blood and others, for $12,000, and the other in favor of Marcellus K. Stone for $800,—all which judgments were entered and docketed on the same day; that, as the petitioners are informed and believe, the said judgments were thus given and confessed on the pretense that the said persons named as judgment creditors were creditors or sureties of the said Thomas and Charles Loomis, and in order fraudulently to give the

[1] [Not previously reported.]

said persons, respectively, a preference and priority over the petitioners and other creditors, and to deprive them of the means and power of collecting their claims until all the said judgment creditors should be satisfied; that, as the petitioners are informed and believe, these judgments were confessed by the debtors in contemplation of bankruptcy, and for the purpose of giving a preference to the judgment creditors named, over the general creditors of the debtors; that such judgment creditors, with the knowledge and voluntary consent of the debtors, had sued out executions on the said judgments, although 30 days had not then elapsed after the entry of the judgments, and that a levy had been made on the property of the debtors in virtue of such executions. The petitioners therefore pray for a decree of bankruptcy against the said Thomas and Charles K. Loomis.

The debtors filed separate answers to the petition, stating, in substance, that in the summer and fall of 1841, they had applied to the said Arba Strong and his coplaintiffs, above referred to, to become their indorsers, and obtained their assent to do so "under the express agreement and promise" of the respondents to keep them at all times abundantly secured for all such indorsements; that in the winter of 1841–42, the said Strong and others were frequently called on to indorse for the respondents, which they did, upon reiterated promise and assurance that they should receive abundant and satisfactory security by bond and warrant of attorney, and any other security they might devise, and that upon this condition they became their indorsers for the amount of about $4,150; that in pursuance of their said promise and agreement, and of the requirements of the said indorsers, they did execute to the said Strong and others the bond and warrant of attorney described in the petition, whereon execution had been issued as alleged in the petition, and all their said partnership effects seized, and their store shut. A similar account was given to the other judgments mentioned in the petition. The other material facts stated in the answers are sufficiently noticed in the opinion of the court.

Bronson & Myers, for petitioning creditors.
J. A. Spencer and Mr. Bagley, for debtors.

CONKLING, District Judge. I understand it to be distinctly admitted by the counsel for the debtors that the acts charged against them in the petition are sufficient, if true, to bring them within the act. This relieves me from the necessity of noticing some points involved in the case, which it might otherwise be proper to discuss, for the purpose of vindicating the conclusion at which I have arrived. One of the judgments complained of, viz. that for $8,000 in favor of Strong, Walrath, and Buckminster, was confessed by the two debtors jointly, and it is unnecessary to inquire what would have been the effect, in this proceeding against them both, of the separate judgments, independently considered, because the circumstances attending the confession of each of the judgments were essentially the same. The second section of the bankrupt act [5 Stat. 442] declares "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general creditors of such bankrupt shall be utterly void and a fraud upon this act." Adhering to the construction which I have heretofore given to this enactment, I shall assume that the acts therein designated are in themselves acts of bankruptcy. That the execution by the debtors of the bond and warrant of attorney to their indorsers, Strong and others, was for the purpose of giving them a preference over the general creditors, is distinctly avowed. But in giving a construction to a similar provision in the bankrupt laws of England, the English courts have uniformly held that, in order to render a preference unlawful, it was necessary that it should appear to have been given voluntarily, and that, in general, a mere application on the part of a creditor for payment or security was sufficient to give validity to the act of preference. But it is to be remarked that the persons to whom the preference was given in this case were not creditors, but indorsers. They, therefore, were without any legal right or power of coercion, and of this the respondents cannot be supposed to have been ignorant. They could not, therefore, have acted under any apprehension of legal process, and in that respect must have acted voluntarily. This distinction between a preference to a creditor and surety was recognized in the case of Thompson v. Freeman, 1 Term R. 155. In that case a warrant of attorney to confess a judgment had been given by the bankrupt, at a time when she knew herself to be in a state of insolvency, to the defendant, who was her surety in a bond; and the question was whether the judgment was valid. There was evidence tending to show that, in giving the warrant of attorney, the bankrupt acted under the false apprehension that the defendant was taking means to enforce his demands. It was left to the jury to consider whether this was so, and they found a verdict for the defendant. Upon a motion for a new trial, Lord Mansfield, C. J., said: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favor any one creditor; but if, under fear of legal process, he give a preference, it is evident that he does not do it voluntarily. And though the defendant in this case had taken no steps to secure himself in case he was called upon, yet the bankrupt, acting from mistake, was acting under the same apprehensions of legal process as if the defendant had actually threatened her; so that her executing the

warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be." On this ground a new trial was refused.

The remaining inquiry is whether this security and preference is to be considered as having been given "in contemplation of bankruptcy." This is a phrase borrowed from the laws of England, and it is reasonable to suppose that it was intended by the legislature to be used in the same legal sense that it bears in that country. But, unfortunately, even there its signification does not appear to have been defined with perfect accuracy. I shall venture at present to consider this equivalent, or nearly so, to the phrase "in expectation of stopping payment." Did these debtors entertain such an expectation when they gave the bond and warrant of attorney? This is charged by the petitioning creditors to have been done on or about the 4th of June last. The charge, as circumstantially set forth in the petition, is met by general denial in the answers of the debtors, and this denial is followed by what purports to be a narrative of the circumstances which led to the giving of the security in question, and an admission of the execution of the bond and warrant, for the purpose and to the amount charged, without stating the date of the transaction. It is very clear, however, that it could not have been long before the time charged, and from the manner of the denial and the circumstances of the case, it is, I think, to be assumed that it was done very near that time, and probably on the 3d of June. On the 13th of June, but a few days after, on being called upon by one of the petitioning creditors in behalf of his firm for payment or security, C. K. Loomis, one of the respondents, said he would consult his partner and take counsel on the subject; and shortly after he declined a compliance with the creditor's demand. It is stated, also, in the answer of C. K. Loomis, that the firm considered itself solvent, and was in good credit, until the 3d of June. From this statement the inference is nearly irresistible that they did not so consider themselves afterwards. Upon the whole, therefore, I am of opinion that the preference may reasonably be supposed to have been given in contemplation of bankruptcy.

But the respondents are further charged with having fraudulently, in contemplation of bankruptcy, and for the purpose of giving preference, etc., "voluntarily suffered executions to be issued" on the judgments confessed by them, and their property, real or personal to be levied upon, in virtue thereof, before the lapse of 30 days from the entry of the judgments. In response to this charge, the debtor admits that, pending the application to them by the petitioning creditors for payment or security, the plaintiffs in the judgments confessed, becoming alarmed, immediately caused all the property of the firm to be levied on, and their store to be shut up by the sheriff. Who communicated to the plaintiffs the information which occasioned their alarm, or whether the respondents had any active agency in causing execution to be taken out, does not expressly appear. But their silence upon these points, their admitted anxiety to secure the plaintiffs, and the fact that the plaintiffs had not right to take out execution and make a levy at the time they did, and the acquiescence of the respondents in these illegal acts, which resulted in putting a stop to their business as traders,—are circumstances tending strongly to support this second charge. Upon the whole, therefore, I feel constrained to grant the decree of bankruptcy prayed for. My refusal to grant it would by the act be final, while under this decision, the debtors have a right to demand a trial by jury, whereby they may have a further opportunity to explain the transactions complained of, and repel the inferences I have drawn from their answers, if these inferences are not warranted by the truth of the case.

In conclusion, it is proper to add, that my decision by no means infers any actual, intentional fraud on the part of these gentlemen. Their desire to fulfil their engagements to their indorsers was natural, and, in a moral point of view, may be admitted to have been commendable. But the leading policy of the bankrupt act is to secure equality among the creditors of failing debtors in the distribution of their effects. The acts of these debtors are in contravention of this policy, and therefore bring them within the law. Independently of the bankrupt act, the confession of these judgments would have been legal, and was probably supposed to be so, notwithstanding this law. A decree of bankruptcy must be granted.

STEWART (MADDOX v.). See Case No. 8,934.

Case No. 13,434.

STEWART v. MAHONEY.

[See 5 Fed. 302].

STEWART (MILLER v.). See Case No. 9,591.

Case No. 13,435.

STEWART v. NATIONAL UNION BANK OF MARYLAND.

[2 Abb. U. S. 424; 2 Balt. Law. Trans. 951; 1 Thomp. Nat. Bank Cas. 175; 4 Am. Law Rev. 397; 10 Int. Rev. Rec. 132.] [1]

Circuit Court, D. Maryland. Oct., 1869.

CREDITOR'S BILL—POWERS OF NATIONAL BANKS—VOID CONTRACTS.

1. By a creditor's bill it appeared that the judgment debtor had assigned certain assets,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 4 Am. Law Rev. 397, contains only a partial report.]

which complainant sought to reach, to a national bank, made a defendant, as collateral security for a loan, and had afterwards, but before the bankrupt act of 1867 [14 Stat. 517], took effect, made a general assignment to trustees for the benefit of creditors. The bill charged that the loan made by the bank was void for exceeding the corporate powers, and that the bank therefore acquired no title to the assets received as collateral. The general assignment was not assailed. *Held*, on demurrer, that the bill showed no right in the complainant to relief from the assets in question; for, if they did not vest in the bank by the assignment attacked by the bill, they must have vested in the trustees under the general assignment.

2. A loan made by a national bank in excess of the restriction imposed by section 29 of the national banks act of June 3, 1864 (13 Stat. 99),—which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void upon that account. The loan may be enforced; though (by section 53) the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable.

[See Shoemaker v. National Mechanics' Bank, Case No. 12,801.]

[Cited in brief in Weckler v. First Nat. Bank of Hagerstown, 42 Md. 587; Wherry v. Hale, 77 Mo. 22.]

3. Although a loan made by a corporation appear to be in excess of a limit imposed by statute, and therefore not enforceable, yet, if it has been executed by the parties, a court of equity will not interpose, at the suit of a creditor of the borrower, to cancel the transaction and compel a return of the securities, but will leave the parties where it finds them.

Demurrer to a bill in equity.

GILES, District Judge. The complainant in this case filed a general creditor's bill against the defendants, alleging, among other things, that he was and is a creditor of Bayne & Co. to a large amount; that Bayne & Co. are bankrupts; that the National Union Bank, the National Mechanics' Bank, and the National Exchange Bank are national banks, organized under the act of congress entitled "An act to provide a national currency," approved June 3, 1864; that section 29 of said act provides "that the total liabilities to any association of any person or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid;" that on May 3, 1866, the loans to Bayne & Co. by the National Union Bank amounted to two hundred and eighty-seven thousand six hundred and forty-one dollars and thirty-one cents; by the National Mechanics' Bank to three hundred and seventy-seven thousand four hundred and forty-four dollars and seventeen cents; and by the National Exchange Bank to one hundred and forty thousand four hundred and thirty-one dollars and twenty-nine cents; which loans were made with the knowledge and permission of the directors of said banks, and were not within the reservations or provisos of section 29; that the largest part of the assets of Bayne & Co. are deposited with and held as collateral security by said national banks, defendants, for the illegal loans, so made by them to Bayne & Co.; that of such collaterals, the National Mechanics' Bank held three hundred and eighty-five thousand eight hundred and sixty-four dollars, the National Union Bank three hundred thousand one hundred and thirty-nine dollars, and the National Exchange Bank one hundred and sixty-four thousand two hundred and fifty dollars; that the capital stock of the said National Mechanics' Bank is six hundred thousand dollars, of the said National Union Bank is one million two hundred thousand dollars, and of the National Exchange Bank four hundred thousand dollars; that the loans to Bayne & Co. by said banks were, on May 3, 1866, largely in excess of the ten per cent, of their respective capitals actually paid in, and therefore contrary to law, and a fraud on the rights of complainant and other creditors of Bayne & Co. The bill prays for a discovery of the amount and nature of said collaterals, also of all transactions between Bayne & Co. and the banks, and for an order of this court transferring the collaterals so held by the banks to the assignee in bankruptcy of Bayne & Co. for adjustment of rights between their creditors, for a decree in favor of complainant, and for general relief.

To all that part of the bill which attacks these loans made by the banks on the ground that they are void by section 29 of the act of 1864, and prays for a decree of this court ordering them to be transferred to the assignee of Bayne & Co., the banks demur; and for cause of demurrer show "that according to the true construction of the act of 1864, the complainant has no right to call upon this court to examine into and decide upon the matters above demurred to, but the same are examinable only at the instance and suit of the government of the United States and its authorized officer, and in conformity with the provisions of said act." "And that the said matters, as alleged, do not affect the validity of the said loan by these defendants to the said Bayne & Co., nor do they destroy, invalidate, or affect the title of these defendants to the said collaterals and securities."

The issues raised by this demurrer are two. First, the right of complainant to the relief sought in his bill against the banks; and second, the validity under the act of congress of the loans so as aforesaid made by the said banks to Bayne & Co.

There is also a prayer in the bill for a decree for an account to be filed by Wm. Bayne, Allen A. Chapman, and Horatio R. Riddle, trustees under a deed of trust executed by Bayne & Co. on May 5, 1866; but with that part of the bill we have nothing to do at present. This case has been heard alone upon the bill of complaint, and demurrer filed by the banks, and the question to

be now decided by the court is: Does the bill show such a case as entitles the complainant to the relief he seeks against the said banks? He prays for a decree against the said banks compelling them to transfer and hand over to the assignee in bankruptcy of Bayne & Co all the collaterals which the banks received from Bayne & Co., as security for the loans made to them from time to time by the banks. Now, could such a decree be passed by this court and such relief granted, in view of the fact that Bayne & Co. had by a deed of trust (as is shown), on May 5, 1866, conveyed all their assets, of whatever kind, to trustees for the benefit of their creditors, the deed being executed before the passage of the bankrupt act, and more than six months before Bayne, Hough & Honeywell filed their petitions to be declared bankrupts. That deed has not been assailed, although allegations are made in the bill against the trustees, and they are charged with fraud and collusion. Now, it appears to me that if the complainant be right in his view and construction of section 29 of the general banking law of 1864, "that all loans made to any one beyond the amount prescribed in that section are absolutely void; and that the banks have no title to any collateral security given to them for such loans," yet he is not entitled to the relief he now seeks. Under such construction of the law, the title to these collaterals passed by the deed of trust, and if the trustees have failed duly to execute the trust confided to them, a court of equity would remove them and substitute others in their place; and, if the bill filed for that purpose made the banks parties, the court could decree such relief as would be equitable and just under the circumstances.

This disposes of that part of the case now submitted to me, and I might rest my decision here; but as the second issue raised by the demurrer has been argued at length and with great ability by the complainant and the learned counsel engaged in the cause, and as I have carefully examined all the authorities referred to, I shall state briefly the conclusions to which I have arrived as to the true construction of section 29, and of the rights of the parties to such loans as are here alleged. Now, it is observable that this section only provides, "that the total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock actually paid in." It contains no penalty, and no provision "that such loans shall be void."

In the very next section (section 30), which regulates the rate of interest, it is provided, that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest," etc. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same.

So in section 31 it is enacted, that every association in certain cities "shall always keep on hand, in lawful money, twenty-five per centum of the aggregate amount of its notes in circulation and its deposits. And if any association, whose lawful money shall fall below the amount aforesaid required to be kept on hand, shall fail, for thirty days after notice, to make good such reserve, the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a receiver to wind up the business of such association."

See, also, section 52, in which all transfers of the notes, bonds, and other evidences of debt owing to any association, and of any and all property belonging to the association, made after the commission of an act of bankruptcy, etc., are declared null and void.

Now, when you read these sections, and find no such provision of forfeiture in section 29, but find that in section 53 provision is made, "that if the directors of any association shall knowingly violate any of the provisions of this act, all the rights, privileges, and franchises of the association, derived from this act, shall be thereby forfeited—such violation shall, however, be determined and adjudged by a proper district or circuit court, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved"—the conclusion seems to be irresistible, that congress never intended by section 29 to forfeit all loans made in excess of the amount specified in section 29, no matter whether they were made through inadvertence or by mistake, for the forfeiture provided for in section 53 depends upon the guilty knowledge of officers making it.

The general banking powers are granted by section 8 of the act in the following terms: "And exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this act." The grant of banking powers is full and ample in this section, and in view of the whole act it appears to me that section 29, like many other sections of the act, is directory only, and for its violation there is no forfeiture but the one provided for in section 53. That section, it is admitted, applies to all violations of section 29, with guilty knowledge, and there can be no clearer rule for the interpretation of stat-

utes than to hold that, where congress has expressly provided a penalty for the commission of any act, you are not so to construe the statute as to add, in addition, any common law forfeiture or penalty. So that it appears to me that although these loans made by defendants, the three banking associations above named, exceeded in amount one-tenth part of the amount of their capital stocks actually paid in, the loans are not void, and if the associations were now in court, seeking to recover the same, I should have great difficulty in permitting Bayne & Co., or any one claiming through them, to set up this defense.

But can there be any doubt of this principle, that where the contracts are executed, even if the court would not have enforced them, the court will leave the parties where it finds them, giving aid or relief to neither? The learned counsel for the complainant, in his very full argument, seemed to feel the force of this principle, and to try to escape from its application. He contended that it did not apply to this case, and that if these defendants could not sustain an action in a court of law on these contracts, the court must overrule the demurrer.

The cases to which he referred, I have examined, and it does not appear to me that they sustain this position. In the case of Bank of U. S. v. Owens [2 Pet. (27 U. S.) 527], the court decided that the bank could not recover upon a note which had been discounted at more than six per cent. interest. The bank charter forbids the taking a greater rate of interest than six per cent., but it did not declare such a contract void. The court held such a contract void on general principles, and that courts could not lend their aid to enforce such contracts. I have examined the charter of the bank, and it contains no clause imposing any penalty whatever on the taking of more than six per cent. interest. It was, then, a prohibition without any specific penalty, and congress must be supposed to have left the violation of the section to the common law penalty of a denial by the courts to enforce such a contract.

The case of Leavitt v. Palmer, 3 N. Y. (3 Comst.) 19, was decided on similar grounds. In that case the court held that the notes issued by an institution in violation of the provisions of the general banking law of New York, which might circulate as a currency and the deed of trust to secure the same, were void. It did not touch the question of the validity of the original advance by the London house.

The case of Seneca County Bank v. Lamb, 26 Barb. 595, only decides what the supreme court had decided in [Bank of U. S. v. Owens], 2 Pet. [27 U. S. 527], that a bank that has discounted paper, taking more than six per cent. interest, cannot recover upon the paper thus discounted. The court in their opinion, say: "It will leave the parties to such a contract where it finds them."

To the same effect is the case of President, etc., of Bank of Chillicothe v. Swayne, 8 Ohio, 280; and the case of Miami Exporting Co. v. Clark, 13 Ohio, 1.

In the case of Albert v. Savings Bank of Baltimore, 2 Md. 160, the court only decided that although the contract was executed, yet the cestui que trust whose property had been assigned unlawfully to the bank could have relief in a court of equity. That is not this case.

The case of Coppell v. Hall, 7 Wall. [74 U. S.] 542, only decided that upon a contract for the purchase of cotton, in violation of the non-intercourse acts, during the late civil war, there could be no recovery in the courts of the United States.

The case of Hagan v. Walker, 14 How. [55 U. S.] 29, is not applicable to this case; and the case of Cheney v. Duke, 10 Gill. & J. 11, is, if applicable at all, in favor of the defendants. The court of appeals in that case held that the mere omission of the vendor of a slave to give a bill of sale as required by the act of 1817, c. 112, would not prevent his maintaining an action for the purchase money.

I consider the law of this case settled by the decisions to which I shall now refer. In the case of Mott v. United States Trust Co., 19 Barb. 569, the court held that a person who has borrowed money from a savings institution upon his promissory note, secured by a pledge of bank stock, was not entitled to an injunction to prevent the prosecution of the note on the ground that the savings bank was prohibited by its charter from making loans of that description. So, in the case of Tracy v. Talmage, 14 N. Y. (4 Kern.) 162, the court held, that while the certificates of deposit given in violation of law were void, yet that the plaintiff could recover whatever the stocks sold were worth at the time of sale, leaving the contract of sale, so far as it had been executed by payment or its equivalent, undisturbed; and in the case of Bates v. Bank of Alabama, 2 Ala. 459, the court decided that a clause in the bank charter similar to section 29 of the act of 1864, was directory merely, and that, if it were disregarded, no one party to its violation could take advantage of it.

The case of Harris v. Runnels, 12 How. [53 U. S.] 80, is directly in point, and sustains the view I have taken of the construction of section 29. That was an action brought to recover the price of slaves brought into Mississippi, in contravention of a statute of that state regulating the importation of slaves. Section 4 provided that no slaves should be brought into the state without a previous certificate, etc., being obtained. Section 6 declared that both the seller and buyer of such slaves shall pay one hundred dollars for every slave so sold and imported in violation of the law. The supreme court says that "the two sections, considered conjunctively, seem to us to imply that the penalty only

without any other loss to either the seller or buyer, was to be inflicted," and the court held that the contract of sale was not void.

Now, although by the bill as originally filed, it would appear that the said banks held collaterals to a larger amount than their loans and advances, yet by the amended schedule and agreement of counsel in reference to the same, it is clearly shown that the advance made by the banks to Bayne & Co. far exceeds in amount the value of the collaterals they received from said firm.

The court, for the reasons I have given, will sustain the demurrer filed by the banks, and will sign a decree dismissing the bill as to them. Bill dismissed.

STEWART (PLATT v.). See Cases Nos. 11,220 and 11,221.

STEWART (RIGGS v.). See Case No. 11,830.

STEWART (SEDGWICK v.). See Case No. 12,625.

Case No. 13,436.

STEWART v. SMITH et al.

[2 Cranch, C. C. 615.] [1]

Circuit Court, District of Columbia. May Term, 1825.

PRACTICE IN EQUITY—BILL CONFESSED—WHEN DECREE TAKES EFFECT.

A decree nisi, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned 'executed.' "

[This was a bill in equity by Stewart against J. K. Smith and others.]

The bill in this cause, was taken for confessed, for want of appearance and answer within three months after filing the bill, according to the 6th rule of the rules of chancery practice, prescribed by the supreme court of the United States for the circuit courts; and an interlocutory decree was passed for a sale of the property, and at the end of the decree it was stated that it would be final, "unless cause shown by the end of the next term thereafter." No cause being shown at that term, a sale was made and reported to the court, and the plaintiff obtained an order of ratification, unless cause to the contrary should be shown by a certain day.

Mr. Redin now moved to set aside the sale, because it was made before the expiration of the term next succeeding that to which the decree was returned executed, agreeably to the 6th rule of chancery practice ordered by the supreme court of the United States, to be observed by the circuit courts, by which it is ordered that, "If the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the decree shall be returned executed."

Mr. Jones, contra.

THE COURT (nem. con.) ordered the sale to be set aside, because the decree nisi, notwithstanding the clause in it stating that it should be final nisi the end of the term then next succeeding, did not become absolute until after the sale had been made. Having adopted, as general rules of practice in this court, the rules prescribed by the supreme court of the United States, this court is bound by them, and the defendants had a right to appear according to those rules.

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

STEWART (SONNEBORN v.). See Case No. 13,176.

Case No. 13,437.

STEWART et al. v. SPENSER et al.

[1 Curt. 157; [1] 1 Am. Law Reg. 520.]

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

INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VOID—STIPULATION FOR RELEASE.

1. An assignment for the benefit of creditors, made by a debtor who has absconded to a foreign country, carrying with him a large sum of money, is fraudulent and void as to creditors, if it contains a stipulation for a release as a condition of obtaining a preference under the assignment.

[Cited in Hastings v. Spenser, Case No. 6,201.]

[Cited in First Nat. Bank v. Ridenour (Kan. Sup.) 27 Pac. 154; Greene v. Sprague Manuf'g Co., 52 Conn. 394; Therasson v. Hickok, 37 Vt. 455.]

2. Whether an insolvent debtor who assigns but a part of his property for the benefit of all his creditors, can stipulate for a release in Rhode Island, quære?

This was a bill in equity, brought by [Alexander T. Stewart and others] certain judgment creditors of a mercantile firm of Horton & Brother, of the city of Providence, against Gideon L. Spenser, and Thomas Pierce, Jr., and others, to set aside an assignment of property made by Horton & Brother, for the benefit of their creditors. As the decision turned, in part, on the particular terms of the deed, its substance is here given.

"Know all men by these presents: That we, Theodore Horton and Ferdinand Horton, both of the city and county of Providence, state of Rhode Island, copartners in trade under the name and style of Horton & Brother, in consideration of the trusts and provisions hereinafter declared and made for the benefit of the creditors of said firm, and of one dollar to us paid by Gideon L. Spenser, of North Providence, and Thomas Pierce, Jr., of Providence, do by these presents give, grant, bargain, sell, assign, set

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

over, and convey unto them, the said Spenser and Pierce, their heirs, executors, administrators, and assigns, all our right, title, and interest, &c., (describing the property.) In special trust, however, for the uses and purposes following, to wit: In trust that they shall, as soon as reasonably it can be done, make sale at public auction or otherwise, of the goods, chattels, and real estate aforesaid, and so far as practicable, make collection of the claims and demands aforesaid, and the proceeds of such sales and collections after defraying therefrom the expenses incident to the making of this assignment, and the executing of the trusts herein declared, including herein a reasonable compensation for their services, they shall apply and appropriate in the manner and in the order following, to wit:

"First. They shall, out of said proceeds, pay in full, if said proceeds be sufficient, otherwise ratably, the just claims now holden against us by the persons, firms, and companies following, namely: The Providence Dyeing, Bleaching, and Calendering Co., &c., (specifying certain preferred creditors.)

"Second. They shall pay out of the residue of said proceeds in full, if sufficient, otherwise ratably, the just demands of all those creditors of the firm of Horton & Brother, who shall, within four months from the date hereof, present to our assignees their claims, with satisfactory proofs of correctness, and execute and deliver for us a release or releases of their respective claims against the undersigned. And

"Third. They shall divide and distribute the residue of said proceeds, if any there be, after making payments as above ordered, ratably and in proportion to their respective claims, among those of our creditors who shall, within eight months from the date hereof, present to our assignees their claims, with satisfactory proofs of correctness. And we do hereby severally and jointly constitute and appoint the said Spenser and said Pierce our attorneys, with full power and authority, for us and in our names to do and perform all acts proper and necessary in the executing of the trusts herein declared."

The general allegation in the bill was, that this assignment was fraudulent and void as against the creditors of Horton & Brother; and the plaintiffs pray that this obstruction to the levy of their executions may be removed by a decree of the court, declaring it to be void as to creditors, and requiring it to be delivered up to be cancelled.

CURTIS, Circuit Justice. The first question is, whether this deed of assignment is fraudulent and void as to creditors. In deciding it, not merely the terms of the deed itself, but all extraneous facts which have a bearing on the legal result, must be taken into view. A conveyance, made by an insolvent debtor, may be fraudulent on its face, containing provisions which the law deems necessarily, and under all circumstances, fraudulent in their operation; or it may be void as against creditors solely, by reason of matter dehors the deed, from a want of consideration, or of good faith; or it may have the effect to defeat or delay creditors by reason of some provisions in the deed, operating in connection with particular states of fact shown to exist out of the deed, though the same provision, in a deed, not connected with such other extraneous facts, would not hinder or delay creditors, and so would not render the deed invalid.

Before looking into the deed itself, therefore, it is necessary to ascertain the state of facts which accompanied its execution, and upon which it was intended to, and must operate. These facts are, that Horton & Brother, in August, September, and October, 1850, generally under representations that they were worth forty thousand dollars over and beyond enough to pay their debts, obtained credit for merchandise to the extent of upwards of sixty-two thousand dollars; that on the 4th day of December, 1850, without any just cause, they stopped payment; that from that time down to the eighth day of March, 1851, when the assignment was made, no considerable amount of their debts having come to maturity so that they could be proceeded against at law, they continued to make large sales, and thereby realized in money a very large sum, shown by the proof to be nearly, if not quite, fifty thousand dollars; that they ceased to keep a bank account, and retained the proceeds of their sales in their own possession; that they made proposals to their creditors to compromise with them, but these proposals the creditors refused to entertain, except upon condition of first examining their books, which was declined: that one of them professed to friends, and probably entertained apprehensions, that he might be proceeded against criminally for fraud in obtaining credit, and was in feeble health, and through Spenser, one of the assignees, made inquiries respecting a place of refuge from his creditors, and through the same agency, arrangements were made which resulted in the flight presently to be mentioned. On the evening of Saturday, the eighth day of March, they executed the deed of assignment, which, by previous concert between them and the assignees, was not delivered until the next Monday morning, and immediately after twelve o'clock of the night of Saturday, they left Providence secretly, got on board a vessel in the bay bound for Cuba, going under feigned names, conveying with them the money they had received from the sales of their merchandise and other property, and have not since returned; both the assignees knew when they agreed to accept the assignment, that the Hortons were about to leave the state, and when they did accept it, they knew they had left, and had good reasons to believe they had sailed for

Cuba. They had also good reason to believe they had carried away money; but how much they were not informed, until by subsequent investigation they ascertained the extent of their sales, and that no money, and no considerable amount of debts receivable were left behind. The property assigned is not sufficient to pay their debts; but if their whole property had been honestly appropriated to this purpose. it would have been sufficient to pay every creditor in full. Such were the facts which surrounded this deed, and upon which it was designed to operate.

The first feature in this deed requiring notice, is the clause which secures a preference to those creditors who should release the assignors within four months. There can be no doubt respecting the intention with which this clause was inserted, or the object which it was calculated to effect. Its design was to induce creditors to release them, and it was adapted to produce this effect by holding out the expectation of securing a larger dividend, or payment in full, by compliance with this condition. The question is, whether a debtor, who has absconded from the country, carrying with him a very large sum of money, has a right so to frame a conveyance of the residue of his property, as to secure to himself a chance of a release. To determine this question, it would seem only to be necessary to consider what the object is, which such a debtor is attempting to reach, and what are the means by which he endeavors to reach it. That object is the permanent and final withdrawal from his creditors of the money he has fraudulently carried away with him, and the safe and effectual reservation of it to his own use. And the means of accomplishing this object are, to marshal the residue of his property, and by means of it, to create inducements to creditors to give their assent to his unjust design. Now it may be admitted that a debtor has a legal right to pay one creditor in preference to another, when he cannot pay both, and consequently that he may make preferences in assignments of property made for the benefit of creditors. I think, also, it must be taken to be settled law for this case, that a debtor may stipulate for a release, by which his future earnings will be discharged. Brashear v. West, 7 Pet. [32 U. S.] 608; Halsey v. Fairbanks [Case No. 5,964]. But it would be as inconsistent with natural right, as with the principles of the common law, and the express language of the 13 Eliz. c. 5, reenacted in Rhode Island, to hold, that however innocent a stipulation for a release may be in itself, and under many circumstances, yet, if it be designed to be an instrument of fraud, and calculated to enable the debtor to withdraw from his creditors what it is his legal and moral duty to pay them, such a deed can stand. The object itself is an unlawful one, and taints with fraud any means, however innocent in themselves, which are laid hold of to accomplish it. A debtor who can pay in full, but who forms the fraudulent design to pay but a part of his debts, and keep the residue of his property to his own use, and makes a conveyance designed to aid him, and containing provisions capable of aiding him, in dishonestly withholding from his creditors what belongs to them, is within the very words, as well as the mischief, of the 13 Eliz. c. 5. Such a deed is made and contrived of fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors. That these debtors were able to pay all their debts in full, and fraudulently absconded with a great sum of money, is scarcely controverted; that they entertained the design permanently to withdraw this money from their creditors, and made this assignment, instead of leaving the property to be disposed of by the law, partly in order to obtain a release, I am satisfied by the proof. It would be, to the last degree, weak and blind not to perceive a fraudulent intent on their part, pervading their whole conduct. It is correctly argued that their intent, however bad, cannot vitiate a legal conveyance. But the question whether the conveyance is legal or not, depends upon the fact whether it is capable of effectuating or aiding to execute their unlawful intent to hinder and defeat creditors. If so, it is void, though the same deed, made with an honest purpose, might be good. An unlawful intent is not predicable of an act which is itself lawful, and cannot, by any possibility, produce an unlawful effect. But if a deed may have an unlawful effect, if it may be an instrument to aid in the execution of an illegal design, then it is a legitimate inquiry whether, in point of fact, such a design existed, and whether the deed was made in pursuance of it; and if found to be so, it is unlawful and void. And in this case, the Hortons, entertaining the unlawful design to hinder and defeat their creditors, by withdrawing from their reach a large sum of money and appropriating it to their own use, and having made this deed partly in consequence of that design, and to aid them in its complete execution, and the deed containing a provision capable of thus aiding them, it is forbidden by the law of Rhode Island, and is void as to creditors. Suppose one of the assignees, with the knowledge of facts they had, had purchased and paid a full consideration for a piece of land belonging to the Hortons at the time this assignment was made; it could not be doubted that a deed thereof would be void as to creditors, for the reason that its design must have been to convert land into money, so that it could be withdrawn from creditors; so this deed is void, because its design is, not to enable them to carry away the money, but what is also unlawful. to keep it to their own use.

It will be perceived, therefore, that this case stands upon an actual fraud on the part of the debtor, and a deed made with intent to execute that fraud, and capable of aid-

ing in its execution, and that the whole extent to which it is necessary to go, is to hold that an absconding debtor cannot so marshal property which he leaves within the state, as to enable himself to keep to his own use, what he fraudulently carries away with him. For such a purpose, he has no power of control over his property, and if he attempt to exercise it, his act is void as to creditors. It is quite unnecessary, therefore, to examine the numerous decisions which have been cited. They are all consistent with the conclusion at which I have arrived, however widely they may differ among themselves respecting the rules as to assignments for benefit of creditors in different states. Halsey v. Fairbanks [supra] was a case where all actual fraudulent intent was disclaimed, and the sole question was, whether the deed was fraudulent on its face. It has been suggested that this was a decision that a debtor, who conveyed only a part of his property, might stipulate for a release. I do not so consider it. Certainly the fact was not before the court that the debtor had any other property. It is true, Mr. Justice Story says he does not deem the fact material in that case. Why not material in that particular case, does not appear, and the facts are imperfectly stated. It would seem that he was considering, not an assignment for all creditors, but a special assignment for the benefit of particular creditors who had assented to it, though under what posture of the facts it could have been so viewed, does not appear. Nostrand v. Atwood, 19 Pick. 281. But that the learned judge did not intend to decide that a release might be stipulated for, when a part of a debtor's property had been reserved to his own use, I am led to think by the evident reluctance with which he arrived at the conclusion, that even a release of a debtor's future earnings could be required, and by the apparent approbation he gives to the decisions of Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Austin v. Bell, 20 Johns. 442; and the distinction which he points out on page 230, between the New York cases and the other decisions. Brooks v. Marbury, 11 Wheat. [24 U. S.] 78, is also clearly distinguishable from this case. That deed was not alleged to be fraudulent as against creditors, but to be void at common law; and the defect was supposed to consist in the fact, that the grantor entertained a hope that it might have an influence in suppressing a prosecution for a felony. But the deed itself contained no provision calculated, or adapted to realize that hope. If it had held out a preference to those creditors who should forbear to prosecute, it cannot be doubted the court would have declared it void. So in this case, the mere fraudulent intent of the debtors permanently to withdraw a large sum of money from their creditors, would not vitiate a deed, even if it were made with a hope that, because of making it, a settlement would be more likely to be made with creditors. But when the deed is so contrived as to operate as an instrument to obtain impunity for the fraud, then it is tainted with the fraud of the grantors; their unlawful intent, instead of resting in their own breasts, has entered into the deed, and shaped its terms, and modified its effect, and framed it into an instrument of fraud, whereby to hinder and defeat the lawful rights of their creditors, and therefore it is void.

There are many decisions that an assignment of part of a debtor's property, for the benefit of all his creditors, stipulating for a release, is fraudulent in law, and void. Steere v. Steere, 5 Johns. Ch. 1; Seaving v. Brinkerhoff, Id. 329; Hyslop v. Clarke, 14 Johns. 458; Sheldon v. Dodge, 4 Denio, 217; Leutillon v. Moffat, 1 Edw. Ch. 451; Thomas v. Jenks, 5 Rawle, 221; Hennessy v. Western Bank, 6 Watts & S. 301; In re Wilson, 4 Barr. [4 Pa. St.] 430. Although it is difficult to resist the force of some of the reasoning in these cases, I am not prepared to say that such a deed is necessarily fraudulent on its face. If the property not conveyed by the assignment is left within the reach of creditors, if no actual fraudulent intent by the debtor existed, and upon the whole case, it appears that the instrument was not designed to aid any fraud, and could not so operate because, in point of fact, no fraud was either practised or intended, perhaps it would be going too far to say that, under the laws of Rhode Island, such an instrument would be void. But, in my judgment, the only possible question as to the soundness of these decisions arises from the fact, that they hold the presumption of fraud to be conclusive, and refuse to look beyond the instrument. That such provisions may be made an instrument of fraud, and when proved to be so, the assignment is void, I entertain no doubt. Still it is not necessary to decide any such question in this case, and I have only intended to express my dissent from the position that Halsey v. Fairbanks [supra] is to be considered as settling that law for this circuit. Besides, if the instrument be not void on its face, the creditors who have assented to this deed, have all done so after the attachments were made, and therefore with notice that the deed was impeached as invalid against creditors. That under some circumstances, the assent of creditors to an assignment made for their benefit may be presumed, I have no doubt. Halsey v. Fairbanks. That when a valid deed is delivered to a trustee the legal estate vests at once is clear. Brooks v. Marbury, 11 Wheat. [24 U. S.] 78. But I am not prepared to hold that the assent of creditors to a void deed is to be presumed, because the whole foundation for the presumption fails. The law cannot deem such a deed beneficial to the third party. Upon the assumption that the deed is valid upon its face, and is rendered void only by extraneous facts, the

assent of creditors is still not to be presumed, because, as Chief Justice Hosmer says, in Camp v. Camp, 5 Conn. 300, "the presumption of assent is not founded on the face of the instrument, but in the nature and circumstances of the entire case." Nor will such an assent be presumed to the prejudice of the just rights of third persons; a legal fiction is not to be permitted so to operate. "In fictione juris, semper æquitas existit." 11 Coke, 51; 3 Coke, 56; Waring v. Dewberry, Gilb. Eq. 223. Being void as against creditors when made, the attachments by the creditors were legal, and the subsequent assent of other creditors could not purge the fraud, nor render the deed valid as against the attachments; and being actually, and not merely constructively fraudulent, it is wholly void, and cannot be allowed to stand as a security to a third person who has assented to it, with notice of the fraud, or of such facts as were sufficient to put him on inquiry, and enable him to learn the existence of the fraud. Boyd v. Dunlap, 1 Johns. Ch. 482; Harris v. Sumner, 2 Pick. 129; Halsey v. Fairbanks.

I have also been referred to the charge of Judge Haile, of the supreme court of Rhode Island, on a trial of an action at law in which this deed came in question. I gave my assent to that part of this charge, in which the jury were instructed, "that it must be proved that Horton & Brother intended to defraud by this deed, and that the deed was actually the instrument to defraud, or it does not hinder, delay, or defraud creditors; but if you find this to be the fact, then the deed is void." It is upon this ground, as already stated, that I hold this deed void; and in respect to the question, whether it is void on its face, I do not find it necessary to express an opinion.

Let a decree be entered, in conformity with the prayer in the bill, save that no injunction to stop the prosecution of the suit in the state court, can be granted by this court.

[NOTE. For an action at law by George Hastings against Gideon L. Spencer and others, arising from this same assignment, see Case No. 6,201.]

STEWART (UNITED STATES v.). See Cases Nos. 16,399–16,402.

STEWART (WALLER v.). See Case No. 17,109.

Case No. 13,438.

STEWART v. WESTERN UNION R. CO.

[4 Biss. 362.] [1]

Circuit Court, D. Indiana. June Term, 1869.

BAILMENT — LEASE OF STEAMER — LIABILITY OF LESSOR FOR DAMAGE — ESTOPPEL — HIDDEN DEFECTS — DAMAGES — INTEREST.

1. If a steamer, while being run under a lease, is lost by explosion, it is a question of fact for the jury whether the lessee used all reasonable skill, and whether the explosion was one which human skill could have prevented.

2. When the lease provided that the steamer was in good condition when delivered, and the lessee accepted her without objection, he is estopped from setting up as a defense any defects which were known, or might have been seen, by him or his servants.

[Cited in The Centurion, 57 Fed. 415.]

3. If the explosion was the result of some hidden, unknown defect then the lessee is discharged.

4. The jury may allow interest by way of damages since the explosion.

Action to recover for damages by the explosion of the steamboat Lansing, while being used by the defendant under contract with the plaintiff, the owner.

Samuel W. Fuller, for plaintiff.

W. K. McAllister, for defendant.

DAVIS, Circuit Justice. In the spring of 1867, the defendant leased of the plaintiff a steamboat called the Lansing with a view of transporting freight and passengers from Davenport, Iowa, to Port Byron, Illinois. By the terms of the contract the railroad was to return the steamboat to the plaintiff at the end of a certain time in good condition, paying reasonable compensation for the use of the same. While the steamboat was making passage from Davenport to Port Byron and had landed at Hampden, on the Iowa side, an explosion took place, and this action was brought to recover compensation for the damages sustained in consequence of the explosion, and the inability thereby of the railroad company to return the boat, on the ground that the explosion was the result of the negligence and want of due care and skill of the employés of the company.

The contract provided that the boat was in good condition and that two persons named in the contract might or should determine whether the boat was or was not in good condition. It turned out, in point of fact, that these persons from some cause never did determine whether the boat was in the condition named in the contract, but the boat was delivered to, and received by, the defendant without objection. If there was any defect which was known to, or could be seen by, the servants of the defendant, and without making objections in consequence of the defect, then the defendant is estopped from setting it up as a defense to this action. The time to make that objection was when the boat was delivered and that might have been urged as a reason for non-acceptance.

It was the duty of the defendant to return the boat according to the terms of the contract, unless prevented from so doing by a misfortune that skill, care and diligence could not prevent. In the use of the boat the defendant was bound to exercise all reasonable skill, and I leave it as a question for the jury to determine whether the explosion was one which human skill could have prevented. If

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

it was the result of some hidden, unknown defect, the defendant is discharged. The contract provides that for extraordinary repairs the plaintiff, the lessor, should be chargeable.

The question arises as to the right to recover interest. Although as a matter of law you are not obliged to give interest, yet if you find for the plaintiff, and fix upon the value of the boat at the particular time as the compensation due the plaintiff, you may, by way of additional damages, give interest. It is optional with you.

NOTE. Negligence and diligence are questions of fact for the jury to pass upon. Skelley v. Kahn, 17 Ill. 170; Galena & C. U. R. Co. v. Yarwood, Id. 509; Illinois Cent. R. Co. v. Nunn, 51 Ill. 78; Ohio & M. R. Co. v. Shanefelt, 47 Ill. 497; Story, Bailm. §§ 11, 174, note 1; Doorman v. Jenkins, 2 Adol. & E. 256; Vaughan v. Menlove, 3 Bing. N. C. 468, 475; Beardslee v. Richardson, 11 Wend. 25. The hirer is to restore the thing in as good condition as he received it, unless it has been injured by some internal decay, or by accident, or by some other means wholly without his default. Story, Bailm. § 414; Millon v. Salisbury, 13 Johns. 211. And parol evidence is admissible to contradict or explain a written instrument in some of its recitals of facts, where such recitals do not, on other principles, estop the party to deny them. 1 Greenl. Ev. § 285; Harris v. Rickett, 4 Hurl. & N. 1; Chapman v. Callis, 2 Fost. & F. 161.

STEWART (WILSON v.). See Case No. 17,837.

STEWART, The MARY. See Case No. 9,227.

Case No. 13,439.

In re STICKNEY.

[5 Dill. 91; 17 N. B. R. 305; 5 Reporter, 586; 6 Cent. Law J. 265.] [1]

Circuit Court, E. D. Missouri. March, 1878.

BANKRUPT ACT—MEANING OF "TRADESMAN"—DISCHARGE.

1. The word "tradesman," in section 5110 of the Revised Statutes of the United States, has a very limited signification. The expression is imported from the English bankruptcy act, and means a small merchant or shopkeeper.

2. Where a firm which became bankrupt had been, as large stockholders, connected with, and were the principal officers of, a manufacturing corporation not in bankruptcy: *Held*, that such connection did not of itself constitute the bankrupts merchants or tradesmen; and that, although outside of the business of the corporation they borrowed largely and owned a farm, and carried on business in connection therewith, but did not carry on any business of merchandising, or hold themselves out to the community as merchants, they were not "merchants or tradesmen" within the meaning of the law, and their failure to keep "proper books of account" was not ground for refusing a discharge in bankruptcy.

[Cited in Re Moss, Case No. 9,877; Re Kimball, 7 Fed. 462.]

This was an appeal from the district court of the United States for the Eastern district of Missouri, brought to this court on a petition for review filed by the bankrupt. Seven specifications were filed in the district court against the discharge of the bankrupt, all of which, with the exception of the fifth, were overruled by the district court. The fifth specification was based on the seventh sub-division of section 5110 of the United States Revised Statutes, which provides that no discharge shall be granted, or, if granted, shall be valid, "if the bankrupt, being a merchant or tradesman, has not, at all times after the 2d day of March, 1867, kept proper books of account." The district court held that the bankrupt was a merchant or tradesman within the meaning of the bankrupt act, and that he had failed to keep proper books of account, as prescribed by said act, and, accordingly, refused to grant a discharge to the bankrupt. [Case unreported.] The bankrupt was a partner of one E. T. Merrick, under the firm name of Merrick & Stickney, both of whom were adjudged bankrupts. The discharge of both bankrupts was refused, on the ground above stated, and Mr. Merrick having meanwhile died, Mr. Stickney appealed to this court. Merrick & Stickney were adjudged bankrupts on a creditors' petition filed in November, 1873. The character of their business was disclosed by the testimony of Mr. Merrick on the hearing of the opposition to the discharge. That testimony was, so far as material to the point decided, as follows, to-wit: "Mr. Stickney and myself came to St. Louis in the year 1858 and formed a law copartnership, and practiced law for about a year. We then quit the law business and directed our attention to the buying of and dealing in land warrants. We were partners from the time we came to St. Louis until our bankruptcy, in 1873. Our business since 1866 has been exclusively that of farmers and manufacturers. From 1859 to the end of 1866 we dealt largely in land warrants and government vouchers. We had many friends in the East who loaned us money with which to carry on this business. These friends could get only six or seven per cent interest on their money in the East, and we allowed them ten per cent on the moneys they advanced. We entered a large amount of Kansas lands ourselves, and gave mortgages thereon to those who had advanced us money. We had a large tract of land in St. Charles county, Missouri, on the drainage of which we spent large amounts of money—between $20,000 and $30,000—which, at one time, made these lands of great value; but, owing to a blunder of engineering, these lands were flooded and became enormously depreciated in value. This loss and the financial panic of 1873 brought us to bankruptcy. These lands were farmed by myself and my partner, Mr. Stickney. We also owned land in Cahokia, Illinois, which we also farmed ourselves. Since 1866 Merrick & Stickney have not traded in land warrants,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 5 Reporter, 586, contains only a partial report.]

nor have we since then bought any lands—at least, we have not made a business of buying lands, but have since sold some of the lands we then owned. We have since then received loans, for which we gave mortgages on the lands owned by us, or secured such loans by pledges on our stock in the stoneware company; and we also received loans on our personal credit. Our business as manufacturers has been exclusively connected with the St. Louis Stoneware Company, a corporation organized under the laws of Missouri. Both Mr. Stickney and myself were officers of the corporation, and he and I were the principal stockholders. We have, since the organization of this company, in 1865, devoted the greater part of our time to the business of that company. That company kept separate books of account, entirely unconnected with the business of Merrick & Stickney. The company employed a regular bookkeeper, and its books have been regularly kept. Said company has not gone into bankruptcy, but still carries on business. The books of Merrick & Stickney, taken together, show all the moneys received and paid out, to the best of my belief. There may have, of course, been omissions, but if so, those omissions were entirely through inadvertence."

For the bankrupt it was contended (1) that neither he nor his firm were merchants or tradesmen within the meaning of the bankrupt law; and (2) that the books of account were properly kept. His counsel urged that a trader is one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit, and cited the following authorities on the first point: 2 Bouv. Law Dict. 604; Heane v. Rogers, 4 Man. & R. 486; Sutton v. Weeley, 7 East, 442; In re Cote [Case No. 3,267]; In re Ragsdale [Id. 11,530]. And on the second point bankrupt's counsel cited the following authorities: In re Solomon [Id. 13,167]; In re Newman [Id. 10,175]; In re White [Id. 17,532]; In re Batchelder [Id. 1,098]; In re Winsor [Id. 17,885].

For the opposing creditors it was contended that the bankrupt was a tradesman within the meaning of the law, and that the action of the district court in refusing the discharge was proper.

Seneca N. Taylor, for opposing creditors.
Walker & Walker, for bankrupt.

DILLON, Circuit Judge (orally). I am prepared to decide the Case of Stickney, before me on appeal from an order of the district court refusing to grant Mr. Stickney a discharge in bankruptcy.

It seems that for some years Merrick & Stickney were partners in this city. The record is a little meagre, but I gather from it this state of affairs: Merrick & Stickney were connected largely with a corporation formed under the statutes of the state, known as the St. Louis Stoneware Company, engaged in the business of manufacturing and selling stoneware; and they were the largest stockholders. Both bankrupts were officers—one president, and the other, I believe, secretary—of the corporation; and they were the largest, but not the only, stockholders. The corporation is not in bankruptcy, Merrick & Stickney being the bankrupts. Mr. Merrick is now dead. The district court refused Mr. Stickney a discharge solely on the ground that he was a tradesman, and had failed to keep proper books of account.

There were other objections to the discharge contained in the specifications, based on the ground of fraud. They were overruled as not being sustained, and no appeal was taken therefrom. But the fifth specification was to the effect that Merrick & Stickney did not keep proper books of account. The provision of the bankrupt act is that if any merchant or tradesman has not, since March 2, 1867—the date of the passage of the bankrupt act [14 Stat. 517]—kept proper books of account, it is sufficient ground of objection to his discharge. It makes no difference, under the bankrupt act, whether or not the failure to keep proper books is through inadvertence, negligence, or fraud; it is sufficient ground for refusing his discharge, provided the bankrupt is a merchant or tradesman.

From what counsel stated on the argument, the chief emphasis and stress in the court below was upon the question whether the books that were actually kept were proper books. I have not those books before me, and if the case turned on them I would be obliged to hold that there was not sufficient certainty that the books were proper books to justify a reversal of the decision of the district court. Accordingly, the case turns on the question whether, under the circumstances, these bankrupts were merchants or tradesmen within the meaning of the bankrupt act. Now, all that the record discloses in this behalf is this: These men were large stockholders, and were main officers, in a corporation formed for the purpose of carrying on the business of manufacturing and selling stoneware. Now, I conceive that whether or not that corporation kept proper books is perfectly immaterial here, and it has not been attempted to show that it did not keep proper books of account—and, indeed, it was stated by one of the witnesses that it did. No contest was made on that ground. Now, then, were these men tradesmen or merchants? It appears that, as to their business outside of their connection with this corporation, they owned a farm in St. Charles county, and carried on business in connection with that farm, and sustained heavy losses; and it also appears that they were in the habit of borrowing money. It seems when they failed they owed between $200,000 and $300,000, mostly evidenced by

promissory notes, and some certificates of deposit; but it did not appear that they carried on any business of merchandising, or held themselves out to the community in that capacity; and the authorities that were read here on the argument show, to my mind, quite conclusively, that, having imported this word "tradesman" from the English bankrupt act, it means—and has been so held by Judge Lowell, of Massachusetts (In re Cote, supra)—that the word "tradesman," as here used in the bankrupt act, has a very limited signification. It says, "if any merchant or tradesman fails to keep proper books of account." Now, the English authorities hold that a man who owned land, or a man who rented land and has held it for a term of years, and carried on the business of brick-making as a means of realizing the profits to be derived from his land, is not a "tradesman," and they have said that the word "tradesman," as used in the bankrupt act, refers to smaller merchants or tradesmen, or a shopkeeper. And this was the meaning put upon it by the decision of Judge Lowell; it means a smaller class of merchants.

I think that, in the present condition of the law, it is very clear that Merrick & Stickney, so far as shown by this record, were not tradesmen. For this reason I will reverse the decision of the district court and order a discharge. Ordered accordingly.

Case No. 13,440.

STICKNEY v. BANK OF ILLINOIS.

[3 McLean, 181.] [1]

Circuit Court, D. Illinois. June Term, 1843.

BANKS—BILLS—ACTION TO RECOVER—PLEAS.

1. The Bank of Missouri having bills to the amount of one hundred thousand dollars of the Bank of Illinois, the latter bank agreed to draw drafts on New York for the amount, and leave its bills in the hands of a third party as collateral security, and also to place ten thousand dollars in addition in bills, to cover damages of protest. The bills were protested—and suit brought against the Bank of Illinois on the protested bills; the above agreement cannot be pleaded in bar of the action.

2. Nor can an agreement, should the drafts be protested, to deliver an amount of the said bills, to cover the damages, be so pleaded.

At law.

Keating & Strong, for plaintiff.
Logan & Harden, for defendant.

OPINION OF THE COURT. This action is brought for the benefit of the Bank of Missouri, and is founded on bills of exchange amounting to the sum of one hundred thousand dollars. The defendant pleaded five pleas.

(1) The general issue.

(2) Payment.

(3 and 4) That the Bank of Missouri by their agents entered into an agreement with the agents of the Bank of Illinois, that the latter should take up one hundred thousand dollars of its notes, held by the Bank of Missouri, by drawing bills on New York, acceptances being waived, for the above amount, payable in ninety and one hundred and twenty days, &c. The Missouri bank was to deposit the bills of the Illinois bank in the hands of P. Choteau, Jun. & Co. to be held in trust for the purpose of covering the bills so as aforesaid to be drawn. And the agents of the Bank of Illinois deposited with Choteau & Co. ten thousand dollars of its bills, so as to secure the Bank of Missouri in damages in the event of failure to meet said bills so as aforesaid drawn by the cashier of the Bank of Illinois, at Alton, which notes are to be held in trust as provided by the arrangement made between the two banks. The drafts and the one hundred thousand dollars were delivered to Choteau & Co. to be held subject to the ratification of the directors of the Bank of Shawneetown. Should the agreement not be ratified, the one hundred thousand dollars were to be returned to the Bank of Missouri by Choteau & Co., and the ten thousand dollars and the drafts were to be delivered to the Bank of Illinois. The drafts and arrangements were ratified by the Shawneetown bank. Drafts were sent on, and were protested. Suits being brought upon the drafts, the above agreement is pleaded in bar, as showing a failure of consideration.

(5) This plea alleged an agreement different from the above, to wit, that it was agreed that should the bills of exchange be protested, the said Choteau was to deliver as much of the said notes as would cover the damages of protest to the Bank of Missouri, estimating them at their nominal value, &c. There is a reference in this plea also to the written agreement.

The defendants demurred to the 3d, 4th, and 5th pleas.

If the agreement set forth in the third and fourth pleas, should not be ratified by the Bank of Illinois at Shawneetown, the one hundred thousand dollars in notes were to be returned to the Bank of Missouri, and the ten thousand dollars, with the drafts, to the Bank of Illinois. But the agreement was ratified by that bank; consequently the agreement did not require the return of the notes as above stated. The drafts were drawn, and the notes were retained in the hands of Choteau & Co. as collateral. Now if the drawee of the bills had failed to present them for payment and give notice of non payment, recourse against the drawers of the bills would have been lost. And having made the demand and protest, and given notice, the holder of the bills had a right to prosecute the Bank of Illinois as drawers, or might, perhaps, have sued on the notes in the hands of Choteau & Co. Had suits been

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

brought on these notes, the dishonored bills could not have been set up as a defence to the action. And as the drafts were received in payment, and the notes retained as collateral, there can be no question that the holder could sue, as has been done in this case, on the protested drafts.

The agreement set up in the fifth plea, constitutes no bar to the action. It simply alleges in the event of the protest of the drafts, bills to cover the damages of protest should be delivered by Choteau & Co. to the Bank of Missouri. This is no answer to the action on the protested drafts, and therefore, the plea is demurrable. The demurrers are sustained.

STICKNEY (FARMERS' & MECHANICS' BANK v.). See Case No. 4,657.

STICKNEY (FOGG v.). See Case No. 4,898.

STICKNEY (WILT v.). See Case No. 17,854.

STICKS OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of sticks; e. g. "Sticks of Timber. See One Hundred and Twelve Sticks of Timber."]

Case No. 13,441.

STIEBER v. HOYE.

[1 Cranch, C. C. 40.][1]

Circuit Court, District of Columbia. Oct. Term, 1801.

EXECUTION—ATTACHMENT—PRIORITY.

A fieri facias, received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied.

On an attachment to secure rent not due, under the act of assembly of Virginia (Rev. Code, p. 162, § 8), the marshal returned that he had attached the goods and chattels of the lessee, and also at the same time levied a fi. fa. on the same at the suit of Shuck against the said lessee, which fi. fa. was received by the marshal before the attachment was issued. No rent was due at the time of the receipt of the execution.

THE COURT decided that the execution should have priority, and hold the goods against the attachment.

STIEFEL (HOFFMAN v.). See Case No. 6,578.

STIEN (UNITED STATES v.). See Case No. 16,403.

Case No. 13,442.

STIGER et al. v. The EDWARD BECK.

[Nowhere reported; opinion not now accessible.]

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

STILES (HUIDEKOPER v.). See Case No 6,853.

Case No. 13,443.

STILES v. The JOHN STEVENS.

[1 Am. Law J. (N. S.) 385; 4 Pa. Law J. 281.]

District Court, E. D. Pennsylvania. March, 1849.

COLLISION — VESSEL NEAR WHARF — STEAMER MAKING LANDING AT NIGHT.

Where a lying vessel is near to, but not moored at, the wharf, and not in absolute contact with the wharf, or with vessels at the wharf, without a signal light hoisted on dark nights, and with her boom rigged out-board, she must take the consequences of a collision with another vessel moving prudently to her accustomed berth.

In admiralty. The libel alleged that on the first of November, 1847, the sloop was moored safely to the pier or wharf, and that about 9 o'clock in the evening the steamboat was observed coming down the river, the tide being at flood; that there was sufficient time and tide for the steamboat to be kept clear of said sloop; that the sloop was lying at her moorings, and could not possibly get out of the way; that there was room for the steamboat to pass, yet the said steamboat kept her course, and ran with great force against the sloop, and did the damage complained of. The answer denied that the sloop was safely moored, and that there was room sufficient to pass in the regular and accustomed channel, and in the usual and proper manner of navigation, by reason of the obstruction offered by the improper mooring or anchoring of the said sloop; and it further alleged that the said sloop had not a visible signal light, as is required by law; and that her boom was rigged out-board instead of in-board, and that these were the causes of the collision, and that the improper mooring of the sloop was the sole cause of the collision.

John Fallow, for libellant.

Fisher & Hazlehurst, for respondents.

KANE, District Judge. The steamer John Stevens approached her landing place on the Delaware obliquely from the channel, at night, and against the tide, with her steam shut off, and her headway nearly arrested, when within a distance considerably less than her length from the head of the wharf at which she was to come to she encountered a small vessel, which had temporarily taken a position near the wharf immediately above, while waiting for a change of tide to drop down to her berth. The boom of the sloop struck the wheelhouse of the steamer, passed through the side of the cabin, and damaged it considerably. In return the boom was broken by the collision, and the sloop received other injuries. The owner of the sloop files his libel, and asks damages against the steamer. The sloop was not at the wharf, and she had no signal lamp hoisted. This is admitted on all hands, though the witnesses, in speaking of her distance from the

wharf, vary from five to sixty feet. She was heading along the tide, at anchor, whether otherwise fully moored or not; but either she was not moored to the wharf by a hawser from the stern, or her boom was not rigged in; one or the other; for, had her stern been steadied and secured as the libellant's witnesses say it was, and had her boom been rigged in, the steamer, moving obliquely towards the city, could not by any possibility have come in contact with the end of the boom.

Now, without deciding whether a vessel is to be regarded as at anchor in the stream so as to be bound to show a light, when, although in the tide way and at anchor, she is within mooring distance of a wharf, and attached to it by appropriate fasts, we have no hesitation in saying that a vessel so placing herself, not in absolute contact with the wharf, or with the vessels at the wharf, but at some distance from it or them, must take the consequences of a collision, if she allows her boom at night so to project over her side as to infringe against a vessel which is moving prudently to her accustomed berth.

The libel must therefore be dismissed. Each party will bear his own costs. Libel dismissed. The Scioto [Case No. 12,508]; Buzzard v. The Petrel [Id. 2,261]; The Indiana [Id. 7,020].

STILES (PARKER v.). See Case No. 10,749.

Case No. 13,444.

STILLE v. TRAVERSE.

[3 Wash. C. C. 43.] [1]

Circuit Court, D. Pennsylvania. April Term, 1811.

BILL OF LADING—PRIOR BILL GIVEN—LIABILITY FOR FAILURE TO DELIVER.

The defendant, as master of the Hope, took on board a quantity of coffee at Laguira, the property of L., and signed a bill of lading, to deliver the same to C. in Philadelphia, to which port the Hope was about to proceed. Afterwards, L. having borrowed a sum of money of J., the captain signed a second bill of lading, by which he stipulated to deliver forty-five bags of the same coffee to the plaintiff, as a security for the repayment of the money borrowed. *Held*, that the defendant, although he had delivered the whole of the coffee to C. under the first bill of lading, was liable to the plaintiff, for the forty-five bags of coffee mentioned in the second.

[Cited in Wiener v. The Rafael Arroyo, Case No. 17,621.]

The defendant, the master of the Hope, lying at Laguira, took in a parcel of coffee the property of Mr. Lancaster, and gave a bill of lading, to deliver the same to Mr. Kerns of Philadelphia, to which port the vessel was destined. Lancaster, having borrowed 600 dollars of one Jacobs, then at Laguira, gave him a bill of exchange at sight, upon said Kerns; and for securing the same, he obtained a bill of lading from the defendant, for the delivery of forty-five bags of the above coffee to the plaintiff, the agent of Lancaster; which bill is dated the day after the general bill for the whole cargo. By an endorsement on the bill of lading for the forty-five bags of coffee, it was agreed, that if the same should sell for more than the amount of the said bill, in case that should not be paid, the surplus was to be paid over to Lancaster. Upon the arrival of the Hope at Philadelphia, the whole cargo was delivered to Kerns, who refused to accept or pay Lancaster's bill. Previous to such delivery, the forty-five bags were demanded by the plaintiff, but were taken away by Kerns, who had a permit for the landing of the whole cargo, as the plaintiff had for landing the forty-five bags.

Mr. Ingersoll, for defendant, stated that his client was merely a stake-holder, and that he only wished the case to be rightly decided, that his client might not lose his recourse, in case of a verdict against him; for which purpose, he had notified Kerns to appear, and defend the suit.

Mr. Peters appeared for Kerns, and exhibited the bill of lading for the whole cargo of coffee, and stated that the same were the proceeds of an outward cargo, sent out under the management of Lancaster, his supercargo; but he stated, at the same time, that he did not, on the part of Kerns, mean to defend the suit, but should leave the defendant to justify himself, for having given the bill of lading for the forty-five bags.

WASHINGTON, Circuit Justice (charging jury). Whether Lancaster or Kerns was the real owner of this coffee, does not appear; and in this case, is immaterial. It may become necessary for the defendant to ascertain that point, in case he should have to recover over against either of these parties, what may be recovered against him in this action. But there is no question, as to the defendant's liability to comply with his bill of lading to the plaintiff. If, as a stake-holder, he thought proper to deliver the property to either of the contending parties, he no doubt took care to be indemnified; and whether or not, he is bound by his contract with the plaintiff. Your verdict, therefore, must be for the plaintiff.

Verdict for plaintiff.

STILLINGER (CULBERTSON v.). See Case No. 3,463.

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

Case No. 13,445.

STILLMAN et al. v. The BUCKEYE STATE.

[Newb. 111.] [1]

District Court, D. Michigan. Dec. 8, 1856.

MARITIME LIENS—HOW ENFORCED—LIMITATIONS —STALE DEMANDS—WAIVER.

1. The maritime lien confers upon material men and seamen, the right to enforce the same by a proceeding in rem. But this right is not without salutary restrictions, arising from, and demanded by, the interests of navigation.

2. The limitations prescribed by the common law do not apply to claims in admiralty without express statutory provisions, yet public policy requires that these liens should not be permitted to lay dormant, to the injury of third parties.

[Cited in The Dubuque, Case No. 4,110; The Rapid Transit, 11 Fed. 335.]

3. No cognizance will be taken of tacit liens, where circumstances are presented, creating justly the presumption that the lien is waived, and that the creditor looks to other security than the vessel.

4. Lapse of time alone is not enough to make a demand stale.

5. The policy of the law is, that a maritime lien should not be protracted beyond a reasonable opportunity for its enforcement.

6. Upon the northwestern lakes, where several voyages are made during the season from one extreme point of the lake to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend them beyond one year, unless there are special circumstances contradicting the prescription which delay creates, especially when the rights of purchasers intervene.

[Cited in The Detroit, Case No. 3,832; The Hercules, Id. 6,400; The J. W. Tucker, 20 Fed. 134.]

7. Where libelants suffer a claim to sleep three years, with repeated opportunities to enforce it, and no excusatory circumstances exhibited, the presumption is strong and conclusive that the lien is waived.

[Cited in The D. M. French, Case No. 3,938; The Dubuque, Id. 4,110; The Artisan, Id. 567; The Bristol, 11 Fed. 163.]

The libelants were proprietors of the Novelty Iron Works, in New York City, and by their agent furnished in 1851, to the steamer Buckeye State at Cleveland, Ohio, where the owners and builders of the boat resided, a portion of the fixtures to the engine. John B. Philips was the owner. She ran through three seasons of navigation from Cleveland and Detroit to Buffalo, a port of the state where the libelants resided. Philips then sold her to S. Gardner, her present claimant, and in his hands she was libeled. The other facts in the case appear in the opinion of the judge.

H. H. Wells, for libelants, cited as to admiralty jurisdiction, Act Cong. Feb. 26, 1845 [5 Stat. 726]; Act Sept. 24, 1789 [1 Stat. 73]; The Genesee Chief, 12 How. [53 U. S.] 443. That contract was made in New York City, and not in Cleveland, see 1 Pars. Cont. 446; 2 Bibb, 280; 4 Wend. 377; 8 Gill, 430; 8 Mart. [La.] 93; 1 La. 248, 255. That this is not a "stale demand," see Willard v. Dorr [Case No. 17,679]; Ben. Adm. §§ 574, 575; Conk. Adm. 365; The Sarah Ann [Case No. 12,342]; 6 C. Rob. Adm. 48; 8 Jur. 276; Pitman v. Hooper [Case No. 11,186];—a libel sustained after twenty years had elapsed.

Towle, Hunt & Newberry, for respondents. That there is no lien for supplies furnished in home ports. see The General Smith, 4 Wheat. [17 U. S.] 438; Davis v. Child [Case No. 3,628]; The Nestor [Case No. 10,126]; Harper v. The New Brig [Id. 6,090]; The Marion [Id. 9,087]; 14 Conn. 404; Read v. The Hull of a New Brig [Case No. 11,609]. That the law of Ohio gives no lien, see Scott v. The Plymouth [Id. 12,544]; 1 Mich. 172, 173, 475; 2 Mich. 351; also 11 Ohio, 462; 14 Ohio, 408, 411; 16 Ohio, 178. That this is a "stale demand," The Nestor [supra]; The Mary [Case No. 9,186]; 5 C. Rob. Adm. 102; The Chusan [Case No. 2,717]. As to analogies of mechanics' lien by statute, see Michigan (mechanics' lien), six months; Pennsylvania (13 Serg. & R. 269), six months; Maryland (3 Md. 168), six months; Missouri (15 Mo. 281), six months; California (1 Cal. 183), six months; Mississippi (2 How. [Miss.] 874), three months; Massachusetts (4 Cush. 532), six months; Indiana (5 Blackf. 329; 8 Blackf. 252), sixty days.

WILKINS, District Judge. The steamer Buckeye State was built at Cleveland, Ohio, in the summer of 1850. While in process of construction, and in an unfinished condition, she was sold in the fall of that year, to one John B. Philips, who had her towed to Buffalo, for the reception of her engine and machinery, which in part was purchased from the complainants, the proprietors of the Novelty Iron Works, the debt for the same being contracted by her then owner, Captain Philips, in the spring of 1851. The respondent Solomon Gardner, purchased the vessel from Philips, in November, 1854, more than three years after the materials had been furnished, and when she had passed through more than three seasons of navigation in the commerce of the northwestern lakes, and without notice of the existence of the lien to enforce which, these proceedings in rem have been instituted. These circumstances are set forth in the answer, and are relied upon by the respondent as exonerating his vessel from liability on the account as "a stale demand."

The maritime lien, which attaches as soon as the debt is contracted, and though unregistered, has the effect of a registered mortgage, confers upon seamen and material men the right of enforcing the payment of the debt by a proceeding in rem, and the sale of the vessel. But such a right, which co-exists with the right to sue in personam, is not without salutary restrictions, arising from and demanded by the interests of navigation. Although the limitations prescribed by the com-

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

mon law are not applicable to claims in admiralty without express statutory provision, yet public policy requires that these liens should not be permitted to lie dormant, to the injury of third parties purchasing without notice of their existence. The policy of limitations by which the statute law defines the period in which actions are to be brought for the recovery of debt, is based upon the reasonable presumption raised from the circumstance of the lapse of time, that the debt has been paid—a presumption which may always be rebutted by legal proof to the contrary. No such restriction, however, exists in admiralty. Yet the rule has been repeatedly settled, that no cognizance will be taken in favor of these tacit liens, when circumstances are exhibited creating justly the presumption that the lien is waived, and that the creditor looks to other security than the vessel. It is not the lapse of time, merely, which constitutes the demand stale; neither can any rule be safely prescribed as absolute in all cases, as to the period necessary. There may be claims, in regard to which equity would enlarge beyond the time fixed at law as a bar, and certainly, on the other hand, there may intervene circumstances, as strongly raising the presumption, that the lien has been abandoned under a much shorter period than that which the statute indicates in analogous demands.

Seamen's wages, the most favored in admiralty courts, must be prosecuted without delay, and within a reasonable time after the termination of the voyage, or season of navigation, or the advantage of the lien, as security, will be considered as relinquished. And no good reason can be assigned why the lien of the material man, who furnishes his labor, and permits the vessel to depart from port, should be favored by the continuance of his lien, more than the seamen, who accompany the ship and aid in its navigation. Certainly, where the vessel is permitted to continue her voyages throughout the season, repeatedly leaving the home port undisturbed, the presumption is reasonable, that other security had been substituted, or that the creditor relied upon the personal responsibility of the owner. The policy of the law is, that a maritime lien should not be protracted beyond a reasonable opportunity for its enforcement. This species of property is not permanent, is continually periled by the exigencies of navigation, and liable to frequent mutations of title, and therefore the courts will make every intendment against a protracted lien. Especially in the navigation of these northwestern lakes, where several voyages are made during the season, from port to port, traversing every two weeks from one extreme point to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend their obligation beyond a year. In the case of Blaine v. The Carter, 4 Cranch [8 U. S.] 332, this principle seems to have been recognized by the supreme court of the United States. The circumstance that the case was one arising on a bottomry bond, does not render the doctrine inapplicable. The voyage of the Carter having been performed, there had been an opportunity on the part of the obligee to enforce his bond. Failing to do so, and the ship making two other voyages, and being sold, the supreme court held, "that the lien continued and had priority during the first voyage, but could extend no further." In what consists the difference between this case and the one at bar? The first is an express lien; this a tacit lien. Why continue the one beyond what is reasonable in the other? If in the commerce of the ocean, the lien cannot with propriety be extended, except under special circumstances, contradicting the presumption which delay creates, beyond the voyage and a return to the home port, where it may be enforced, with equal propriety, should a season of navigation on the lakes, embracing the whole year, be conclusive, especially where the right of a purchaser without notice, has intervened?

In this case, the libelants have suffered their demand to sleep for three seasons of navigation, with repeated opportunities to enforce it on the vessel, and at different ports, without action on their part, and no excusatory circumstances exhibited. The presumption, therefore, is strong and conclusive, that they had waived the lien, and looked alone to the owner for payment. On this point, then, without the consideration of the others, I order the libel to be dismissed, with costs.

[NOTE. Among the records of this case, which were sent to the circuit court on appeal, was a deposition which had not been read in the district court, having come in two days subsequent to the above hearing. A motion was made to suppress the deposition, which was allowed. Case No. 2,085.]

STILLWELL (LOMBARD v.). See Case No. 8,472.

Case No. 13,446.

STILLMAN et al. v. WHITE ROCK MANUF'G CO. et al.

[3 Woodb. & M. 539.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1847.

WATERS—DAMS—DIVIDING LINE OF STATE—LICENSE—PRESUMPTIONS—LIMITATIONS—ADVERSE POSSESSION.

1. Where complainants own a dam and water-power, with the adjacent land in Connecticut running to the centre of the river, which is the dividing line from Rhode Island, and the respondents on the Rhode Island side own the land, dam and water-power to the central thread, and also one-half a dam above this, respondents carried half the water from above in a canal round and below complainants' and their dam without permitting it to fall into the

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

lower dam. The parties each hold an undivided half of the water as tenants in common.

2. An injury to a party, half of the water by diversion, may be prosecuted personally in the state where the injury is done, or the injury to the mills, &c., may be prosecuted in the state where they are situated.

[Cited in Foot v. Edwards, Case No. 4,908.]

[Cited in Mannville Co. v. City of Worcester, 138 Mass. 89.]

3. The easement or service which the party has to half the water is not identical with the locality of the property from which derived, and the injury being committed in Rhode Island by respondents, this court has jurisdiction there of the injury, otherwise no remedy by injunction could exist.

4. The code of laws which govern must be that of the state beyond the dividing line, or where the injurious act is done.

5. A crime may continue into two states, and be punishable in both. So also civilly a wrong doer may be held liable, either where the direct act was done, or where the consequential injury took place.

[Cited in Foot v. Edwards, Case No. 4,908.]

[Cited in Com. v. Macloon, 101 Mass. 6; Lindsey v. State, 38 Ohio St. 512; State v. Hall, 114 N. C. 909, 19 S. E. 604.]

6. The remedy by injunction is a specific one, or quasi in rem, and whether the nuisance be in fact in Rhode Island or Connecticut, it must be enjoined against where it is.

7. The statute of limitations in Rhode Island being twenty years, an adverse possession by the respondents of seventeen years is no bar.

8. The statute of limitations of Connecticut does not govern this case; hence the court is not bound by the decisions in Connecticut that fifteen years' exclusive possession, whether adverse or not, furnishes a bar to the action.

9. Possession, to be adverse, must be consistent with the idea of a deed, or raise the presumption of one.

10. A deed is not to be presumed when the evidence is that complainants frequently remonstrated, consulted counsel, and even settled as to the wrong.

[Cited in Chicago & N. W. Ry. Co. v. Hoag, 90 Ill. 349; Lehigh Val. R. Co. v. McFarlan, 30 N. J. Eq. 186.]

11. A presumption is sometimes raised to quiet a long, undisturbed, undisputed occupation.

12. No reasons exist to favor those who seem to be open disseizers, wanton trespassers and wrong doers from the start.

13. One as owner does not lose his right to water, but by twenty years' adverse occupation; no parol license or acquiescence is enough short of that.

[Cited in Union Mill & Min. Co. v. Dangberg, Case No. 14,370.]

14. Under the circumstances of this case a presumption ought not to be raised, even had the statute of limitations run out.

This was a bill in equity [by J. P. Stillman & Co. against the White Rock Manufacturing Company and others] filed in May, 1845.

The complainants were alleged to be citizens of the state of Connecticut, and the respondents, a corporation in Rhode Island, whose members were citizens of this state, and Babcock & More, a mercantile firm belonging to the same state. The bill averred that the plaintiffs were seized of a moiety undivided of a tract of land in Stonington, Conn., and milldam over Pawcatuck river, and buildings thereon, and one-half the water-power thereof, said river being the dividing line between the two states before named. That the respondents, being the White Rock Company, owned one-half, i. e. the eastern half, of another dam two hundred and fifty rods above this, and the eastern half of this, both situated in Westerly, in the state of Rhode Island. That they also owned one-half the power of said river. That the company have made a canal from the upper dam on the eastern side of the river, and diverted a portion of the water above it round the lower dam, running then into the river below. That they leased the use of the same to the firm before named, much to the injury of the complainants. That the respondents have been often requested to desist from thus diverting the water, but they combine together and continue to divert it against equity and good conscience. The complainants pray an injunction against the continuance further and longer of the diversion of the water in this way from the use of the complainants. The bill was on motion, in August, 1845, taken pro confesso for neglect to file an answer. In November after, the firm of Babcock & More put in a plea to the jurisdiction of the court, on the ground that the complainants were citizens of Rhode Island, and not of Connecticut. This was afterwards waived. And on the 11th of November the White Rock Company petitioned for leave to answer, having, under a misconception as to the manner in which the suit was to be conducted, not answered before. This leave was granted on the payment of costs, and an answer was filed, alleging that the titles of the respective parties being as stated in the bill, the said company in 1827 built the canal described at great expense, in order to obtain the benefit of the fall from its commencement to its termination; that they carried through it their half of the water, and continued to do the same, peaceably and of right, adverse to any claim by those owning the other half of the dams described in the bill, during the whole term of fifteen years, by which the plaintiffs became barred from questioning their right to do the same. That the firm of Babcock & More are not lessees of the same, but sole members of the company, and in that capacity rightfully contrive to use the water in the manner before named. The replication denied the sufficiency of the answer.

After taking testimony in A. D. 1846, the case was argued in writing and presented to the court at the May term, 1847.

R. W. Green and J. Whipple, for complainants.

Mr. Dixon and S. Ames, for respondents.

WOODBURY, Circuit Justice. To settle the merits in this case, it will be necessary to ascertain first what are the rights of prop-

erty belonging to each of these parties, contiguous to the Pawcatuck river. The centre of that river is the dividing line between the states of Connecticut and Rhode Island, the complainants owning the land on the Connecticut side, where the lower dam is situated, and the defendants, the White Rock Manufacturing Company, and the firm of Babcock & More, owning the land on the Rhode Island side, at both the upper and lower dams.

What rights this conferred on each as to the water in the stream and its use, is the important inquiry. It is understood that previous to A. D. 1847 the owners on each side had been accustomed to draw water from their dams for their respective uses in nearly equal quantities. This usage was probably in conformity to their rights in law, the bed of the stream being, for aught which appears, regular and uniform, and half being a true exponent of what was proper between them under all the circumstances. In this view neither party would actually own land on either side covered with water beyond the centre of the river, and hence could not maintain any real action, such as ejectment or trespass quare clausum for an entry on land beyond the centre from his side. Tyler v. Wilkinson [Case No. 14,312]; 1 Paige, 448. But it is still manifest that either might be seriously injured by acts commenced or done beyond the centre filum aquæ, and on the side opposite to him, as they might there take from the stream more than one-half the water, or divert there large quantities of it, at the upper dam, as in this instance, so as to go round the lower dam before entering the stream again, and not be left to be used at all at the lower dam where the complainants are owners. Either of these acts would be clearly an injury. Cook v. Hull, 3 Pick. 269. Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the centre, and being entitled beyond it to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same state, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different states and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different state courts.

It becomes necessary, therefore, to ascertain now, what is the interest, if any, which the complainants by owning land on the Connecticut side of the river are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy. After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described to an undivided half of the water on that side, as well as on the other side. A fence or embankment cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. Ang. Water Courses, p. 11, § 3, and cases there cited; Webb v. Portland Manuf'g Co. [Case No. 17,322]. Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one state or the other, as they relate more immediately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the centre of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H. 259. The first and direct injury, then, is to the easement and consequent rights existing beyond the centre. The next consequential injury would be to the mills and land adjoining the stream before reaching the centre on the Connecticut side, and an appropriate remedy for that would lie there. Thus a right of way on land in one state to a farm in another is an interest situated in the first state, and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or state, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 Coke, 62.

The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the centre of the river, or no interests to be protected

there. If this be the correct view, which I have adopted, then no difficulty arises as to jurisdiction over the subject of this bill by this court, any more than as to the code of laws that must control our decision. It must be the code beyond the centre, when the action is brought for a violation of the complainants' rights existing beyond the centre, and which is here the code of Rhode Island, and the jurisdiction must be and properly is here for an injury done there; and hence the prosecution must be for that in the courts of Rhode Island, or if pursued in the tribunal of the general government, it must be, not in the Second circuit in Connecticut, but in the First circuit, held in the district of Rhode Island. Nothing can more fully illustrate the propriety of this view in the present instance, than some of the incidents to the peculiar remedy by injunction which is sought here. A party is entitled to that remedy in cases of great and irreparable injuries, inflicted on him, if done without right. Yet here this remedy must be sought in Rhode Island, or it would be of no use. The canal is situated there, which is made to divert the water. The owners of the canal, the supposed wrong doers, reside there, and an injunction issuing in another state or circuit could not be executed there, it being a proceeding quasi in rem. The injured party, then, must be deprived entirely of this legal, summary and useful species of redress, unless rights and jurisdiction to protect them exist beyond the centre of the stream. If this view of the rights of these parties were not thus shown to be entirely sound, it might be reasonable in a case like this to hold a wrong doer liable, either where the direct act is done, or where the consequential injury was felt. 1 Saund. 247; 2 East, 497. And Coke (part 7, p. 58) illustrates by numerous cases that: "When one matter in one county is depending upon the matter in the other county, then the plaintiff may choose in which county he will bring his action." 2 Durn. & E. [Term R.] 240; 7 Durn. & E. [Term R.] 587; 2 Strange, 727.

It is settled that the wrong doer may be sued where the mills are situated, if they are injured, though the cause of the injury may be in another county. Thompson v. Crocker, 9 Pick. 61. The action is then, of course, one in form suited to the local injury felt or experienced to the real estate. The law of the place where the real estate lies, the lex rei sitæ, must, of course, then govern in ordinary real actions brought there for injury to that; as there, in some cases, the sheriff of that county reinstates the party into possession. 1 Paige, 226; Story, Confl. Laws, §§ 364, 581. But the first act done in the present case was done in Rhode Island, and is proceeded against as a private nuisance erected in Rhode Island. The remedy by injunction is a specific one, or quasi in rem, and whether that nuisance be in fact situated in Rhode Island or Connecticut, it must be enjoined against wherever it is, and there alone, and by the laws existing there alone, it must be abated, if at all. Suppose it is proceeded against criminally, it surely may be in Rhode Island, where it is erected, and does the injury. Why not then, if prosecuted in a civil form?

The respondents are the last persons who in equity ought to complain of being called to account where their act is performed, as they are prosecuted there, as now, where they reside, where they lived when inflicting the alleged wrong, where they performed the acts complained of, where it is presumed they looked for vindication by their local contracts or local laws, if by any, and where it is likely they can most cheaply and conveniently defend. I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two states, though sometimes in different forms, at least, as here. Such is the case of theft continued from one state to another, or the felonious intent indicated in both, or a burglary in one state being a larceny in another, where the property was removed, but no house broken into. So if one fires a gun in one state which kills an individual in another state, there may be the offence of using a deadly weapon in the first state, and committing murder by the killing in the second state. Again, there is sometimes an election in which to prosecute. Thus, if a blow be given in one county, and death follows in another, an appeal of murder lies in either. Dyer, 40; 4 Coke, 426; 7 Coke, 59. If two acts are necessary to constitute an offence, and one is done in one county, and one in another, the prosecution may be in either. So if A in one county injure land in another. Bulwer's Case, 7 Coke, 57; 3 Leon. 143; Scott v. Brest, 2 Durn. & E. [Term R.] 238; Mayor, etc., of London v. Cole, 7 Durn. & E. [Term R.] 583; 1 Chit. Pl. 299. So if one in the state of Ohio draw a bill to defraud and send it to New York by another, and thus commit or complete the fraud there, he can be punished there. People v. Adams, 3 Denio, 190. And to remove all doubt by a reference to a case almost identical with this in principle: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 Hen. IV. c. 8, or I may bring it in Middlesex, for there I have the damage." 7 Coke, 60. It is rather remarkable, however, that a charge of witchcraft in one county of a person residing in another, created some embarrassment in Massachusetts at the close of the seventeenth century. 2 Hutch. Hist. 50. But the very case of a nuisance in one county to land in another is referred to in 7 Coke, 63, where a writ is said to lie in the former. So in Co. Litt. 154a; Fitzh. Nat. Brev. 183k.

It is no answer to all this, that some injury

is done by this canal to property and rights on the Connecticut side, and for which a real action could not be brought, except in Connecticut, and could not be decided, except in conformity to the laws of Connecticut. The complainants in this case have not chosen to resort to such an action anywhere, much less in this state, but on the contrary, have prayed for an injunction against the diversion of the water on the Rhode Island side, and by an unwarranted canal used there to remove large quantities of it entirely from the dam occupied in part by the complainants, and it is manifest that this remedy for this evil must be prosecuted in Rhode Island alone, where the nuisance is situated, and where it is to be restrained, or nowhere. It may be, too, that an action on the case would not lie in Rhode Island for an injury to the real estate situated in Connecticut, unless some important part of the injury was done in Rhode Island. Watts v. Kinney, 6 Hill, 82. But that principle would not militate against the propriety of such an action in Rhode Island for an injury done there to rights in the stream there, and not to the mills situated elsewhere

These points settled, the whole case is settled, because the only defence set up is not a conveyance of a right to the respondents to divert this water, made by deed, will or extent or levy of execution, but an occupation or use of the water for only seventeen years, while the statute of limitations in Rhode Island is twenty, and so is the common prescription. Bullen v. Runnels, 2 N. H. 257; Tyler v. Wilkinson [supra]. If this action had been instituted in Connecticut, or was to be governed by Connecticut laws, the statute of limitations there being but fifteen years, the occupation by the respondents might give them a right, if it was of the character required under their statutes and by their judicial construction of it.

The defendants contend that in Connecticut if it be an occupation kept up, though without a claim of title, and being an open disseizure, and though continued with or under an assertion of right by others, yet not enforced by suit or actual ouster, it would still give a title in fifteen years. Bryan v. Atwater, 5 Day, 181; French v. Pearce, 8 Conn. 439. See other cases as to the use of water exclusively for fifteen years being enough in Connecticut, though not adverse. 1 Conn. 382; 9 Conn. 162; 15 Conn. 366; 2 Conn. 584; 10 Conn. 213. But I cannot yield my assent to the correctness of these decisions, though if this case was to be decided according to the laws of Connecticut we might feel bound by the construction put on her own statutes by her own courts. Greely v. Smith [Case No. 5,750]; Smith v. Babcock [Id. 13,009].

As this point has been much argued, and may be important to these parties in other cases, I would add that in judging of it, whether the title is considered to pass by common law principles, or the presumption of a deed after so long an occupation, or by force of an express statute without reference to any deed, may not be very material always. But if a deed is to be presumed, it could not be presumed here, when the evidence is that the complainants and their grantees frequently remonstrated during the fifteen years against the diversion of the water in this way, and consulted counsel for a prosecution. And it seems settled that usually the possession, in order to avail, must be consistent with the idea of a deed, or must raise a presumption of one. 12 Coke, 5; 2 Wend. 13; 4 Greenl. 508; Ricard v. Williams, 7 Wheat. [20 U. S.] 59; 3 Johns. 109, 269; Matth. Pres. Ev. 296; 6 Cow. 706; Hurst v. McNeil [Case No. 6,936]; Gayetty v. Bethune, 14 Mass. 49; 7 Pick. 198; 8 Pick. 327; 5 Pick. 421; 10 Pick. 295; 12 Pick. 184; Bullen v. Runnels, 2 N. H. 257; 6 East, 216; 1 Camp. 260, 463; 2 Barn. & Ald. 662; 10 Johns. 236; 15 Johns. 218. Though at times a conveyance will be presumed to quiet the title where no evidence exists that it has actually taken place, except the mere length of undisturbed and unquestioned occupation. 1 Spence, Eq. Jur. 503, note; Cowp. 215; 12 Ves. 252. Such an occupation as that, however, was here wanting,

Independent of the Connecticut decisions, I should feel inclined to hold that under their statute, as well as under the Rhode Island statute, such denials of right as existed here by the plaintiffs, and such applications to buy of them as existed here on the part of the respondents, would prevent the long use of the water in this way from ripening into a title, whether by prescription, or the presumption of a deed, or the possession being strictly adverse. Such an occupation would not be wholly peaceable, not always hostile, by the intruder, and these circumstances must usually unite to constitute a good prosecution. See cases last cited, and Watkins v. Peck, 13 N. H. 361; 3 Miss. 529; 8 Clark & F. 231; Ang. Adv. Enj. 44, 47; Gayetty v. Bethune, 14 Mass. 53. One as owner does not lose his rights to water, but by twenty years' adverse occupation. No different occupation and no parol license or acquiescence is enough short of that. Heath v. Williams, 25 Me. 216; 1 Barn. & Ald. 258. An entry or possession continued by consent of the true owner, gives no title. Atherton v. Johnson, 2 N. H. 34; 3 Johns. Cas. 119; 13 Mass. 243.

It is true, that construction should be favorable to long, quiet, undisturbed, undisputed occupation, from useful public considerations, such as the preservation of the public peace or quiet, the prevention of perjuries as to ancient claims, the avoidance of evil from the loss of old papers, the injustice to others by a different course who have trusted and credited long and quiet possession, and those having them. 1 Spence, Eq. Jur. 254; 3 Bl. Comm. 544. But I can see no reasons exist-

ing in this policy to favor those who seem to be wanton disseizors, open trespassers, mere wrong doers from the start, unless the owners have long acquiesced and did not complain nor resist, so long as justly to be barred. If in a case like this, for instance, they were willing to look on and see nearly half the water which they were entitled to have taken away entirely, and not remonstrate for twenty years, they ought to lose these rights for the public quiet, and the presumption should be, that they had conveyed the right or title, as much as if without complaint they saw their field ploughed and reaped for twenty years by others.

The only excuse imaginable in that view, would be, that water enough might still be left ordinarily for the purposes then needed of the plaintiffs, or that the respondents then drew but little. There is some testimony confirming the last hypothesis. But if they did complain, if they took counsel against such an encroachment, though from a friendly and forbearing spirit, not at once resorting to litigation against so high handed an invasion, or if some recognition of their rights was made by one of the owners below, and there is evidence touching all this, it would seem as between two such parties, the statute, if run out, ought not to operate as a bar in favor of the wrong doer. But the whole time of the Rhode Island statute, which is to govern, did not run here, beside these interruptions and disputes during the period it did run. Let an injunction issue.

Case No. 13,447.

In re STILLWELL.

[2 N. B. R. 526 (Quarto, 164).] [1]

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

BANKRUPTCY—APPOINTMENT OF TRUSTEE.

It is a substantial objection to the approval of a resolution of creditors, under section 43 of the act, appointing a trustee and committee to supervise his action, that the committee is composed of only two, of which one is the trustee.

[Cited in brief in Re Cooke, Case No. 3,169. Cited in Re Zinn, Case No. 18,216.]

In this case, at the first meeting of creditors, all the creditors were represented except two, who held less than three hundred dollars of claims. The creditors represented adopted a resolution in favor of winding up the estate by a trustee, and one Smith Stillwell, the father of the bankrupt, was nominated trustee, and he and one W. J. Averill, were nominated a committee to supervise and direct the trustee under the provisions of section forty-three. These proceedings were certified to the judge by the register, and the court (HALL, District Judge) refused to confirm the resolution, and made the following order:

"A resolution of the creditors of the said William Stillwell, that it is for the interest of the general body of the creditors of the bankrupt that his estate should be wound up and settled, and distribution made among the creditors by a trustee, having been forwarded by the register to the judge of this court for approval, and the same having been examined and considered: It is ordered, that the same be not confirmed, and the same is hereby disapproved for the reasons: First. That from the petition in this case it is probable that Smith Stillwell, the proposed trustee, is an accommodation endorser, and relative of the bankrupt. Second. That from the same petition it appears to be probable that William J. Averill, who, with said Smith Stillwell, it is proposed shall constitute the committee to advise said Smith Stillwell as such trustee, if a creditor of said bankrupt for the sums set opposite his name, has become such creditor by the purchase of demands against said estate. Third. Because said Smith Stillwell is improperly named as one of the two members of the committee, under whose inspection and direction it is proposed such trustee shall act, it being clearly improper that the committee should be thus constituted. Fourth. Because, in the opinion of the judge, the interests of the great body of the creditors will not be promoted thereby. And it is further ordered that the bankruptcy and the proceedings in this case be resumed, as though such resolution had not been passed, and that the clerk transmit a certified copy of this order to the register."

Subsequently, application was made to the court to have this order vacated, and affidavits were filed showing that Averill had become a creditor by purchase of claims from creditors named in the bankrupt's schedules, and that Smith Stillwell was a bona fide creditor, having taken up a note of one thousand eight hundred dollars, upon which he was endorser, and several affidavits that such an arrangement would be to the benefit of all the creditors. HALL, District Judge, however, refused to vacate the order, because, as he said, "There is in substance no committee to supervise the action of the trustee. The trustee's own action would entirely neutralize the opposition of the other member of the committee, to any intended act of the trustee; and as a matter of precedent even, if it is not an insuperable legal objection, I think I should not sanction the election of such a committee. Further, the form prescribed by the justices of the supreme court requires the affidavit of the bankrupt, that creditors holding three-fourths of all the debts proven have signed the appointment of trustees, and in this case the certificate of the register is presented, and that only goes to those of the creditors present or represented at the meet-

[1] [Reprinted by permission.]

ing. This is, to be sure, only a formal objection, which could be obviated by producing the affidavit now, but the formation of the committee is one of substance, and I must, therefore, decline the arrangement."

Case No. 13,448.

In re STILLWELL.

[7 N. B. R. (1873) 226;[1] 11 Am. Law Reg. (N. S.) 706.]

District Court, D. Kansas.

BANKRUPTCY—CHOICE OF ASSIGNEE—RIGHT TO VOTE—SECURED CREDITOR.

A creditor whose proof of debt shows that his debt is secured by mortgage on real estate of the bankrupt, but which also shows that it is the bankrupt's homestead, and is occupied by him as such, is entitled to vote upon his whole claim at the meeting of creditors for the choice of assignee.

At the meeting of creditors for the choice of assignee, held before Hiram Griswold, register, the Capital Bank of Topeka filed its proof of debt for two thousand dollars. The proof of debt disclosed the fact that the debt was secured by a mortgage upon the real estate of the bankrupt, the real estate being the homestead of the bankrupt and occupied by him as such. It was objected by other creditors that the bank could not participate in the election of an assignee because its debt was secured by mortgage upon the property of the bankrupt. This objection was overruled by the register, and by request of counsel the question was certified to the court for decision.

By HIRAM GRISWOLD, Register:

In holding that the Capital Bank might vote in the choice of an assignee, I did not intend my decision to come in conflict with those decisions in which it has been held that a creditor whose debt is secured by a mortgage upon the bankrupt's property, cannot vote at the election of an assignee. I recognize those decisions as correct. I put mine upon the ground that the bank was not a secured creditor within the spirit and meaning of those decisions. It is clearly established that a creditor holding a security upon the property of a third party, or which is secured by the endorsement of a third party, is not precluded from voting. Such, in effect, is the position of the bank in this case. True, it has a mortgage on real estate owned by the bankrupt; but the proof shows that it is his homestead and occupied by him as such. That, so far as it bore on the question before me, was an established fact; that was the proof. Being a homestead, it was property in which the creditors have no interest. It does not pass to the assignee by the assignment. The bankrupt court has nothing to do with it—has no control over it. In such a case the creditor may prove up his whole debt and share equally with others in any dividend made from the proceeds of other property of the bankrupt. He is not required to exhaust such security and then look to the estate for the remainder. If this were so, other creditors would, in effect, subject the homestead to the payment of their debts, and thus the beneficent provision of the act, that the title of the bankrupt to the exempted property "shall not be impaired or affected by any of the provisions of the act," would be nullified and made of no effect. If such a creditor may prove and collect his whole debt from the estate, for the same reason he may vote upon his debt in the choice of an assignee. The value of his debt, as against the estate, is known, and no reason exists why the value of the security should be ascertained and deducted from it before he can vote.

G. C. Clemens, for objecting creditors.
N. C. McFarland, for Capital Bank.

DELAHAY, District Judge. The question submitted to the court in this case is, whether a creditor having a mortgage upon the homestead of the bankrupt, to secure his demand, has the right to prove his demand and vote on the choice of an assignee of the bankrupt's estate. The thirteenth section of the bankrupt law [of 1867 (14 Stat. 522)] provides who may legally vote for an assignee in the following language, to wit: "The choice to be made by the greater part in value and in number of the creditors who have proved their debts." The twenty-second section of the same law provides as follows, to wit: "To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper register or commissioner, setting forth the demand; the consideration thereof; whether any and what securities are held therefor, &c;" evidently contemplating that all demands, whether secured or otherwise, shall be proven in the manner indicated in said twenty-second section. If these two sections were alone to be considered, there would be no difficulty in deciding this question, since the thirteenth section of the law provides that all who have proven their demands may vote, and the twenty-second section provides that all creditors with, as well as without, security may prove their demands. But the twentieth section has apparently placed a limitation on this right which we must next consider. The language of said section, so far as it relates to this question, is as follows: "Where a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the

[1] [Reprinted from 7 N. B. R. 226, by permission.]

balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct."

Bump, Bankr. (4th Ed.) 123, makes this broad declaration: "A secured creditor cannot vote." This statement is much broader than the law will sustain, for unquestionably a creditor who has an endorser for security, or who holds a mortgage on other than the bankrupt's property, is not prohibited from voting, and by the terms of the law, only such as have liens upon the property of the bankrupt are not permitted to be admitted as creditors. To sustain his statement he cites three cases, one of which does not discuss this question, and the other two are not agreed, one being on each side of the question, thus in effect leaving it open and unsettled. The attorneys in this case seem to have accepted qualifiedly Mr. Bump's statement, and have failed to discuss the point as to what is the true construction to be given to the twentieth section quoted above. I am unable to see in what manner the fact that the mortgage is upon the homestead rather than any other piece of the bankrupt's property, can alter the construction to be given to the twentieth section of this law. But it seems there is a distinction between proving a claim or debt and being admitted a creditor, in this, that the proof of debt is the preliminary step only towards the admission to the ranks of a creditor, under this law. A debt may be proven while the judicial act of admitting or allowing the claim may be entirely omitted, or the claim may be rejected. The language used in the thirteenth section, to wit, "have proven their debts," evidently refers to and intends only the deposition indicated in the twenty-second section, and does not intend and mean that there shall be a judgment final, such as is implied in the twentieth section, when it uses the words "admitted a creditor," which carries with it the idea of adjudication after proof offered. It is not difficult to imagine a case where every creditor could have some lien such as would come within the provisions of the twentieth section, and if no one such creditor could vote for an assignee, as contended for by the attorneys for the objecting creditors in this case, it might be questionable whether any assignee could legally be appointed, because there might be opposing interests from such prospective creditors, and the law fails to provide that such interest shall proceed only from creditors who have "proved their debts." I am of the opinion, therefore, that the register did right in allowing the mortgagee to vote on the election of an assignee.

[NOTE. A bill in equity was subsequently brought by the assignee against the Capital Bank, to set aside a mortgage made by the bankrupt to his wife, the claim being fraudulent preference. The bill was dismissed. Case No. 11,869.]

Case No. 13,449.

STILLWELL et al. v. EMPIRE FIRE INS. CO.

[4 Cent. Law J. 463.] [1]

Circuit Court, E. D. Pennsylvania. 1877.

SERVICE OF PROCESS—FOREIGN CORPORATION—INHABITANT OF OR FOUND WITHIN STATE.

Plaintiffs, citizens of the state of Arkansas, brought suit against the defendant, a corporation created under the laws of the state of Illinois, on a policy issued by it in the state of Arkansas upon property there situated. A statute of this state requires every insurance company, not of the state, to file with the auditor a written stipulation, agreeing that all legal process affecting them, served on the auditor or agent within the state, should have the same effect as if served on the company; and the summons in this case was served as required by the act. *Held*, that such service was not sufficient, the defendant not being by virtue of the act an "inhabitant" of, or "found" within the state, as required by the act of March 3, 1875 [18 Stat. 470].

[Cited in Schollenberger v. Phœnix Ins. Co., Case No. 12,476; Ex parte Schollenberger, 96 U. S. 378; Runkle v. Lamar Ins. Co., 2 Fed. 11.]

The plaintiffs, citizens of the state of Arkansas, brought this action in this court against the Empire Insurance Company, a corporation created under the laws of the state of Illinois, to recover under a fire policy issued by the defendant in the state of Arkansas upon property therein situate, and which is alleged to have been destroyed by fire, so as, by the terms of the policy, to impose a liability upon the defendant company. The summons was served upon the local agent of the company residing at Little Rock, and also upon John Crawford, Esq., the auditor of the state of Arkansas. By the legislation of the state of Arkansas, it is provided that "no insurance company, not of this state, nor its agents, shall do business in this state until it has filed with the auditor of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor, or the agent specified by the said company to receive service of process for the company, shall have the same effect as if served personally on the company within the state." Gantt's Dig. § 3561, as amended by Laws 1875, p. 190. It is admitted that the summons was served as required by this act. The company has entered no appearance, and the case is before the court on a motion for a default for want of an answer.

N. & J. Erb and Benjamin & Barnes, for plaintiffs.

U. M. Rose and E. W. Kimball, special appearance for defendant.

DILLON, Circuit Judge. By the judiciary act of 1789, § 11 [1 Stat. 78], it was provided that no civil suit shall be brought in the circuit court against any person, by any original process or proceeding in any other dis-

[1] [Reprinted by permission.]

trict than that whereof he is an inhabitant or in which he shall be found, at the time of serving such process or commencing such proceeding. This provision was re-enacted, without change, in the act of March 3, 1875, § 1. The question before the court comes precisely to this: Was the defendant company, under the facts appearing in the statement of the case, an inhabitant of, or found in this district, within the true meaning of the above provision, relating to the jurisdiction of the circuit court?

If we were not foreclosed by the decisions which have been made upon the nature and powers of corporations, and as to the effect of the judiciary act in question, we should feel strongly inclined to hold that the true doctrine is, that for jurisdictional purposes a corporation is a citizen of the state by whose authority it was created, and an inhabitant of any other state under whose laws it established a place of business, and, as respects suits growing out of such business, agreed, as in this case, to submit itself to the jurisdiction and laws of such state. When corporations, created by foreign governments or by other states, come into this state and establish an agency for the transaction of their business therein with the citizens of this state, justice to the latter requires that such corporations should, as respects contracts here made and acts done in the prosecution of such business, be subject to the laws and jurisdiction of the state.

The reasonableness of the provisions of the law of this state, requiring foreign insurance companies doing business therein to submit to the jurisdiction of the courts of the state, is manifest. Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404; French v. Lafayette Ins. Co. [Case No. 5,102]. But the question is, whether this has the effect to make such companies "inhabitants" of the state, or "found" within it, in the meaning of the aforementioned provision concerning the jurisdiction of this court. In view of the decisions of the supreme and circuit courts, we are obliged to resolve this inquiry in the negative. These decisions treat a corporation as strictly local and necessarily confined as to personality, so to phrase it, to the territorial jurisdiction of the state which creates it. In the leading case on this subject—Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 588—Chief Justice Taney expressly says "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created; where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty," although it has power, when authorized by its charter and by comity, to make contracts and incur obligations in another state. This language, and the principle which it asserts, have been frequently approved by the same court in subsequent cases coming down to a quite recent date. Applying this doctrine, the circuit courts have held, under the judiciary act, that they could acquire no jurisdiction over the corporation of another state by service of process upon its officers passing through or found within it, on the principle that the officers are not the corporation, and finding and serving them is not equivalent to finding and serving the corporation itself. Day v. Newark India Rubber Co. [Case No. 3,685]. This view is undoubtedly sound. But the same doctrine has been extended and applied to cases like the present, in which the state only allows a foreign corporation to do business on the express condition of agreeing to be sued in the state, and that such suits should have the same effect as if process had been served personally upon the corporation within the state. It was so held by an eminent judge (Mr. Justice Nelson) in Pomeroy v. New York & N. H. R. Co. [Id. 11,261]. And the same result was reached in Southern & A. Tel. Co. v. New Orleans, etc., R. Co. [Id. 13,185]. This view of the law has been generally accepted and acted upon by the profession, and this is the third case in seven years in this circuit in which it has been attempted by the service of original process on the agents of foreign corporations to acquire jurisdiction over the corporations themselves.

The circuitous process has been adopted of bringing such suits in the state courts and then removing them to this court. This discloses a defect in the jurisdiction of the circuit courts; but it is one which has existed since the organization of such courts. It was not changed or remedied in the act of 1872 [17 Stat. 378], providing for the first time for service in certain cases out of the jurisdiction, nor by the act of 1875, which so greatly enlarged the jurisdiction of the circuit courts. The decisions to which we have referred were well known to the profession and to congress, when the acts of 1872 and 1875 were passed; and as no change was made in the language of the act upon which the present question depends, the court does not feel justified in upholding the jurisdiction, however reasonable, upon principle, it might seem to it to do so.

NOTE. Precisely the same question arose at the April term, 1877, of the United States circuit court, for the Western district of Missouri, in Dallmeyer v. Farmers', Merchants' & Manufacturers' Fire Ins. Co. [Case No. 3,546]. The plaintiff in this case is a citizen of the Western district of Missouri, and the defendant is a corporation created under the laws of the state of Ohio. The plaintiff had a summons issued, directed to the marshal of the Eastern district of Missouri; and the same was served on the agent of the defendant corporation, appointed under the provisions of section 4 of the act of the general assembly of Missouri, approved March 23, 1874 [Laws 1874, p. 75], which requires all foreign insurance companies doing business in this state, "to file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, authorizing some person, who shall be a citizen of this state, to acknowledge or re-

ceive service of process for and in behalf of such company in this state, and consenting that service of process upon such agent or attorney shall be taken and held to be as valid, as if served upon the company according to the laws of this or of any other state; whether such process is issued by any of the courts of this state or any of the courts of the United States, having jurisdiction within this state." At the return term the defendant filed a demurrer—First, to the jurisdiction of the court, on the ground that the defendant was not "found" here, and was not an "inhabitant" of the district when served with the process of the court; and, second, that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer as to the first ground of objection, but held that the second ground of objection—viz., to the petition—was such an "appearance" in the case, as to place the defendant in court for all purposes, and the demurrer was accordingly overruled. The court, on this point, cited Rippstein v. St. Louis Mutual Life Ins. Co., 57 Mo. 86.

Case No. 13,450.

STILLWELL et al. v. HOME INS. CO.

[3 Dill. 80.] [1]

Circuit Court, E. D. Missouri. 1874.

MARINE INSURANCE—ADDITIONS TO CARGO—DAMAGES—USAGE.

1. A freight policy insured "the freight of the steamboat Commonwealth, and barge, against total loss of any part of the steamer or barge's freight at and from St. Louis to New Orleans," &c. *Held*, that the policy was not limited to the freight list for goods on board at St. Louis when the voyage was begun, but in view of the well known usage of boats in the Mississippi trade to touch at intermediate ports, it covered additions to the cargo received in the usual manner at such ports.

2. Where the barge was sunk on the voyage by one of the perils insured against, and its cargo was transferred to the boat, which had the effect fully to load the boat, and when other cargo to the full capacity of both boat and barge had been actually engaged at intermediate ports for the trip and no other barge could be obtained, *held*, that the actual loss of the freight, which would have been earned if the barge had not been lost, was covered by the policy.

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

The insurance company appeals from a decree of the district court, in admiralty. The facts are these: Libellants [Stillwell, Powell & Co.] made application to respondent for insurance as follows: "Insurance wanted upon freight of steamer Commonwealth, and barge, W. B. Dance, against the total loss of any part of said steamer or barge's freight, at and from St. Louis to New Orleans, with privilege of lighting," &c. This was accepted by the respondent. There was other insurance to the amount of $3,000—making $4,000 in all. The boat with the barge in tow commenced the trip with a freight list at starting, as follows: On the boat, $1,054.71; on the barge, $2,298.22. A short distance below St. Louis the barge was sunk by one of the perils of navigation insured against, and its cargo was, thereupon, transferred to the boat. This transfer had the effect to load the boat to its full capacity in the then low stage of water. The boat had before starting on the voyage from St. Louis engaged cargo at intermediate points on the river, to the full amount which both the boat and barge could carry. In consequence of the disaster to the barge and the transfer of its cargo to the boat the goods which had been engaged could not be taken on, and, with one small exception, were not received or carried. The owners or master could not procure another barge in the place of the one which had sunk. When the barge's cargo was transferred to the boat, the latter, after some delay, owing to overloading in the low stage of water, proceeded to the port of destination and delivered the cargo.

Upon these facts the district court held that the libellants were entitled to recover on the policy. [Case unreported.] The respondent appeals.

Bakewell, Farish & Mead, for Insurance Co. (appellant).

Rankin & Hayden, for libellants (appellees).

DILLON, Circuit Judge. The action is upon a freight policy, which is a contract by the insurer to indemnify the owners of the vessel against loss by reason of the failure of the vessel to carry freight, in consequence of a peril insured against.

The contract here was for "insurance upon the freight of the steamer and barge, against the total loss of any part of the steamer or barge's freight, at and from St. Louis to New Orleans," &c. The insurance company contends that the policy covers only the freight list for the goods on board at St. Louis, when the voyage was begun; and this is really the decisive question in the case.

In construing these brief and informal contracts, the courts must keep in mind the peculiarities of inland river carriage. This was a general cargo, and it is the almost invariable usage of boats in the Mississippi trade to touch at intermediate ports to receive additions to their cargo; and such additions are covered by a contract, such as was made in this instance.

It is contended by the insurance company that there was no loss on the freight list because all the cargo on both boat and barge was, after the disaster to the barge, carried by the boat to New Orleans and the freight earned. But the other facts show that there was an actual loss of freight which would have been earned if the barge had not been lost. The loss is not conjectural, but plainly established by the proofs. Goods to the full carrying capacity of both the boat and barge had actually been engaged by the boat for the trip in question, and she was only prevented from carrying them by having received a transfer of the barge's cargo. No other barge could be obtained. It would be an illiberal construction of the contract to hold

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

that it did not cover the goods engaged and the freight which would have been earned thereon but for the loss of the barge by a peril insured against. Affirmed.

Case No. 13,451.

STILLWELL v. WALKER.

[17 N. B. R. 569;[1] 6 Cent. Law J. 406.]

Circuit Court, E. D. Missouri. April, 1878.

BANKRUPTCY — APPEAL — HOW ISSUES TRIED — FORMER JUDGMENT—DEFENSES TO.

1. When a supposed creditor takes an appeal from a decision of the district court rejecting his claim in whole or in part, and the case comes into the circuit court, it is to be there reconstructed; the creditor is required to file a declaration at law, and the issues are then to be made up and the case tried in the same way as a case at law originally commenced in the circuit court.

2. An answer to a declaration upon a judgment obtained against the bankrupt before bankruptcy, which simply sets up matters which were available to the bankrupt as a defense to the original suit, but does not allege fraud, accident, mistake or collusion, *held*, bad on demurrer; and this although the judgment was by default.

3. Semble, that where the assignee has a defense to the judgment, which is available in equity but not at law, it should be asserted by independent suit on the equity side of the court.

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

In bankruptcy.

Dryden & Dryden, for creditor.

W. R. Walker, pro se.

DILLON, Circuit Judge (orally). I proceed to announce my judgment in the case arising out of the bankruptcy of the State Insurance Company of Missouri, in which one A. J. Stillwell is a creditor. This is an appeal in bankruptcy under the eighth section of the bankrupt act as it originally stood, now section 4984 of the Revised Statutes. Stillwell filed a claim in the bankruptcy court as a judgment creditor of the insurance company, bankrupts, on a judgment recovered in a state court of competent jurisdiction in May, 1875, for about eight thousand five hundred dollars. His claim was contested in the bankruptcy court, on the ground that at the time he purchased it he occupied a fiduciary relation to the company, and on the further ground, as appears by the pleadings in that court, that he procured the rendition of this judgment by means of fraudulent contrivances. On the pleadings thus constructed, the matter was heard in the bankruptcy court, and the issue was, whether he was entitled to hold this judgment for the full amount, or for such sum only as he actually paid for the claim. The matter was decided in favor of the assignee in bankruptcy, and his claim scaled down and reduced to between four and five thousand dollars. Dissatisfied with this, he prosecuted this appeal, and in that way the case comes on at this time.

It is material to take into view, in determining the question as now presented, the provisions of the bankrupt act in respect of appeals. (Here the court quoted section 4984, Rev. St.) The substance of that provision is, that while the case is nevertheless heard in the bankruptcy court, yet when the creditor takes an appeal from a decision in favor of an assignee, and the case comes into the circuit court, it is to be there reconstructed; and the creditor is required to file a declaration at law, and the issues are then to be made up, and the case tried in the same way as a case at law originally commenced in the circuit court. Conforming to this requirement, the creditor filed his declaration in this court, which was in the usual form of an action on a judgment. To this cause of action thus stated, the assignee files his answer, to which there is a demurrer. It will be borne in mind that the judgment in question was rendered in May, 1875, and that the bankruptcy did not occur until September, 1875. In October, 1874, Mr. Stillwell, as averred in the answer, sustained toward this company this relation, namely, he was vice-president and director in the company, and member of the finance committee; and when sustaining these relations purchased claims against the company at fifty cents on the dollar—such claims arising out of losses sustained by the company which it could not pay; that the company issued to him afterwards certificates therefor, and it was on these that he recovered his judgment. The answer does not aver that he sustained this relation when the company issued to him certificates of indebtedness for one hundred cents on the dollar. The assignee claims that although, if the original claimants held these claims, they would be good for one hundred cents on the dollar, yet the creditor here—Mr. Stillwell—is limited in his recovery to the amount by him actually paid. And they issued to him certificates of indebtedness, which not being paid, he instituted suit in a court of competent jurisdiction of the state, and recovered judgment; and, although not pleaded, it is said in argument to have been a judgment by default.

Now, at this time, it is admitted he had resigned his office and was not connected with the company, and at the time he recovered his judgment was not a member of the company. This is the whole plea. It does not say that he sustained any fiduciary relation at the time he brought his suit, nor does it say this judgment was obtained by any fraudulent contrivance. Nothing of the sort. Now, I will admit that if a person sustaining a relation—as Mr. Stillwell's—to the company, purchased these claims at fifty cents on the dollar, he would be held to have pur-

[1] [Reprinted from 17 N. B. R. 569, by permission.]

chased them as a trustee for the company, and the recovery would be limited to the amount paid. But there is another element in this case, and, as it now stands, a controlling element, namely: he has not presented these claims for allowance, but has instituted suit in a court of competent jurisdiction, and brought at a time when he sustained no trust relation and that court has given him judgment for the full amount. That judgment is as good as any other, unless it can be attacked for fraud, accident, or mistake. It was the duty of the company when sued, supposing they had a defense, to make it, and if they failed to make it when it was open to them, without any fraudulent contrivance or collusion on the part of the creditor, it is presumptively as valid as any other judgment. That principle has been asserted so often in the supreme court of the United States, that it can be open to no controversy whatever. There are three cases bearing directly on the point. For sake of brevity I quote Judge Curtis's statement of them: "A court of equity does not interfere with judgments at law, unless the complainant had an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his servant." Hendrickson v. Hinckley, 17 How. [58 U. S.] 443. "And will not relieve against a judgment at law, where the defendant had a legal defense, which he omitted to set up, and does not satisfactorily account for such omission." Sample v. Barnes, 14 How. [55 U. S.] 70. "Nor will it relieve where the defense is that the contract on which the judgment rests was made in violation of a statute." Id. Why? Because it was his privilege, when sued, to come into court and plead these defenses, and, if the defenses were available at law, and he does not plead them, and there has been no fraudulent collusion, that judgment is effectually an estoppel forever between the parties.

In the case of Cromwell v. Sac Co. (recently decided by the supreme court of the United States) [94 U. S. 351], the same principle has been applied to a judgment by default; and in that case they settled a point which has been in some confusion in the books; they held that where the second suit is on the same cause of action, the judgment is not only an estoppel upon what was in litigation, but upon everything that might have been brought in litigation. So the matter now stands. I am constrained to hold that the judgment is conclusive of the rights of these parties, unless it can be assailed or impeached for fraud, or upon some ground recognized as sufficient in a court of equity. Do you propose to amend, Mr. Walker?

Mr. Walker: Yes, sir, I propose to amend.

DILLON, Circuit Judge. There is another question: Whether you will not be obliged, if you have a defense which is available in equity, and not at law, to attack this judgment in this court in the same manner in which you would be obliged to do if the case had been originally brought here aside from the bankruptcy to recover on a judgment. And my impression is that that is the proper course, but I need not now decide the point. If you have a defense in equity, on equitable grounds, to impeach the judgment, perhaps you had better file a bill on the equity side of the court; but you can consider the question and take your own course. The answer does not set up a sufficient defense to the action on the judgment, and the demurrer thereto is sustained, with leave to the defendant to amend his answer, or to file a bill in equity as he may be advised.

Ordered accordingly.

STILWELL, In re. See Cases Nos. 13,447 and 13,448.

Case No. 13,452.

STILWELL et al. v. The MAJOR ANDERSON.

[N. Y. Times, April 19, 1865.]

District Court, D. New York. 1865.

SALVAGE—VESSEL ADRIFT IN HARBOR.

This was an action [by Adrian Stilwell and others against the canal-boat Major Anderson], brought to recover salvage. The canal-boat, in January, 1864, had been made fast to another vessel in the port of New York, and during the nighttime was cut adrift by ice running in force in the bay, and was carried by an ebb tide from her moorings toward the sea, without any person on board. Being discovered in that condition by the libelants, they went out to her in a small boat, took possession of her, and made her secure. Her owners having demanded possession of her, it was given up to them, but the libelants thereafter filed this libel, which the claimants resisted on the merits, and also on the ground that the subject was not within the jurisdiction of the admiralty.

Mr. Haskett, for libelant.

Mr. Sanxxay, for claimant.

HELD BY THE COURT. That the facts constitute a case legally coming within the cognizance of the court. That salvage law as recognized and administered in this court has always been understood to comprehend all cases of property taken possession of on navigable waters at sea, and there rescued from peril or helped by necessary aid and assistance contributed voluntarily by persons not bound to give it. That the proofs do not constitute a case for excessive compensation, but as the vessel was floating out to sea in the ice without any one on board, and was thus exposed to dangerous hazard of destruction or serious damage, and opportune and

valuable assistance was afforded to her by the libelants, they are entitled to salvage compensation. That the delivery of possession to the claimant does not import a relinquishment of the lien on the boat given by law to the libelants for the salvage services rendered by them.

Decree that the libelants recover a salvage compensation for the services, and that it be referred to the clerk to ascertain and report the value thereof.

Case No. 13,453.

STILWELL & BIERCE MANUF'G CO. v. CINCINNATI GASLIGHT & COKE CO. et al.

[1 Ban. & A. 610; 7 O. G. 829; Merw. Pat. Inv. 455.] [1]

Circuit Court, S. D. Ohio. Jan., 1875.

PATENTS—NOVELTY—INVENTION—MAKING MODEL—BOILER FILTER.

1. The first claim in reissued patent, for feed-water heater and filter, granted to E. R. Stilwell, August 24, 1869, which is for "filtering material F, between a series of shelves and outlet r, substantially as described," held valid, notwithstanding the fact that filters had been used for freeing the feed water for boilers, from the matter held in mechanical suspension therein, and the further fact, that heaters, composed of a series of shelves, had been used, for a similar purpose, to remove from the water the matter held in solution, and a portion of that held in suspension.

2. Although the operation of neither the shelves nor the filter is affected by the union of the two, in the same machine, a new result is produced, inasmuch as the water is passed into the boiler in a condition different from that which would have been produced by either of the devices separately.

3. The Stilwell patent is not invalidated by the earlier English patent of Wagner, since it is doubtful whether Wagner's device could be practically used with success.

4. There is no force in the objection, that the Stilwell patent does not specify what filtering material is to be used. The patent permits the use of any suitable filtering material, and persons skilled in the art could at once use the invention without experiment or additional invention.

5. The mere making of a model by a party, held not to constitute invention, as against a patent subsequently granted to another for the same thing.

In equity.

Wood & Boyd, for complainants.

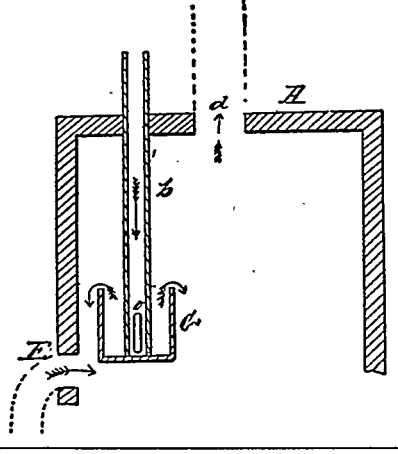
Fisher & Duncan and John E. Hatch, for defendants.

SWING, District Judge. This suit is brought for the infringement of letters patent, granted to E. R. Stilwell, for improvements in feed-water heaters and filters, and vested, by assignment, in the complainants. Three patents are claimed to have been infringed. The first, reissue No. 2,160, dated January 23, 1866; the second, reissue No. 3,618, dated August 24, 1869;[2] the third, letters patent No. 93,244, dated August 3, 1869.

The respondents file separate and joint answers, denying infringement, and that E. R. Stilwell was the original inventor, and setting up prior invention by James Armstrong, and prior use by sundry persons, named in said answers. The invention described in the first patent, relates to the means of supplying water to a "feed-water heater and filter," and of effecting the separation of foreign elements therefrom; the first claim of which is as follows: "The overflow box C, the pipe b, arranged with reference to the vessel A, substantially as described, and for the purposes specified." And this is the claim alleged to have been infringed by the respondents.

By reference to the specification and drawings of the patent, it will be seen that the end of the induction pipe b, through which the water flows, is so placed in the overflow box C as to be completely immersed, whereby the steam is prevented from entering the pipe. It is not claimed that the respondents have, in fact, any such overflow box as complainants, in form; but it is contended, that the upper plate of the respondents' heater is so constructed, and the end of the induction pipe so arranged, as that the end, in fact, is immersed, thus accomplishing the same result by equivalent means. Upon this point, there is a difference in the testimony of the witnesses for the complainants and respondents; but the model No. 4, in evidence, stipulated by complainants as correctly representing the machine of the respondents, shows, very clearly, that by its relations to the upper plate of the respondents' machine, it cannot be immersed; the space between the discharge orifice of the pipe, and upturned sides of the plate, is so great, that by no possibility

[Drawing of reissued patent No. 2,160, granted January 23, 1866, to E. R. Stilwell. Published from the records of the United States patent office.]



[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 455, contains only a partial report.]

[2] [The original letters patent No. 44,561 were granted October 4, 1864.]

could the water rise, before overflowing the plate, so as to immerse in any degree the pipe. It is suggested by counsel, that the relations of the pipe to the plate, may have been changed after the witnesses examined the machine. As to that we cannot speak; but it is stipulated that the model correctly represents the machine, and it shows no such relations, as claimed. The first patent is not, therefore, infringed by the respondents.

The invention of the second patent is set forth in its claims as follows: "1. Filtering material F, between a series of shelves, and an outlet r, substantially as described. 2. The arrangement of steam inlet n, shelves a, a, filtering material F, and outlet r, in a vessel A, substantially as described. 3. Depositing plates a, a, a, constructed and arranged substantially as described. 4. The arrangement of steam pipes m, and n, with reference to the plates a, a, a, substantially as specified. 5. The combination of the vessel A, the plates a, a, a, the plate d, the steam pipes m, n, and E, and waterpipes f^1, and r, substantially as described." Complainants allege that the first and second claims of this patent are infringed.

[Drawings of reissued patent No. 3,618, granted August 24, 1869, to E. R. Stilwell. Published from the records of the United States patent office.]

Fig. 1

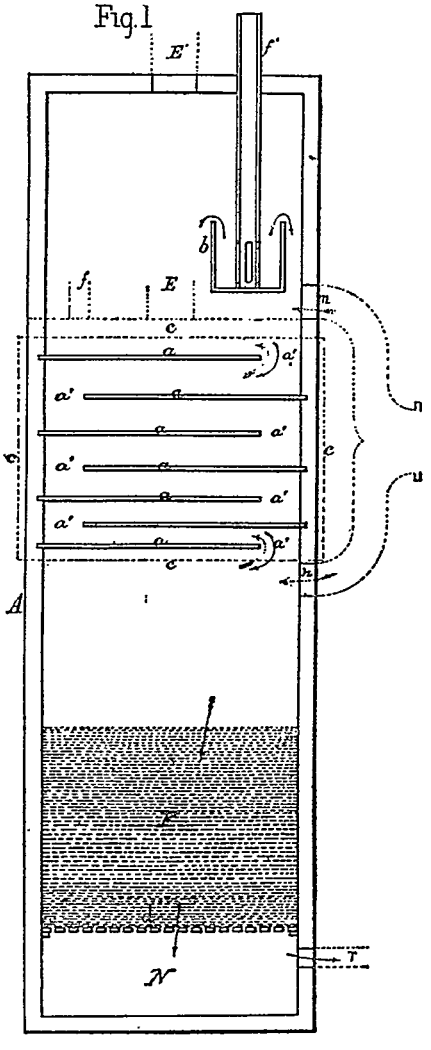
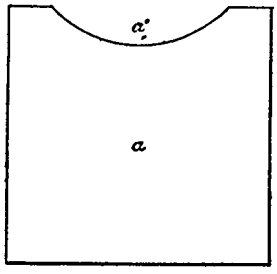


Fig. 2



The first claim is for the arrangement of three elements—filtering material, a series of shelves, and an outlet—and this arrangement is of that character, that the filtering material may occupy such position between the series of shelves and the outlet, as that the water, after flowing over the several plates, will pass through the filtering material on its way to the outlet.

The second is for the arrangement of steam inlet, shelves, filtering material and outlet. All of the elements embraced in these claims are old, and have in some way been in use, and connected with devices for heating, purifying, and separating water for steam boilers. The filtering material is found in the Covington, Greenfield, Brownell and Seaward devices; the series of shelves in the Wagner, Hooton, and Burden devices; and the outlet and inlet in all the devices referred to. This is not, therefore, in either of the claims, a combination or arrangement of any new element, or new elements with old elements, neither is it a combination of old elements applied to a new purpose; but it is bringing together, and combining and arranging in a single machine or device, that which existed before in several, and each performing the same office in their new relations which they did in their old. In the new, the water passes over the shelves in a thin sheet, is subject to the action of steam passing through the spaces between the shelves, and in this way, and by these means, the crystallizable atoms in the water will be deposited upon the shelves, and the water will be considerably heated. In the old, the water spreads in very thin films, during its whole course, on the heated partitions (shelves), and is kept constantly boiling. From this it results that all matters settling, whatever may be their nature, held in suspension or solution, are not only divided, but a portion of them are brought to adhere and incrust on the partitions (shelves), where they gradually deposit, according to their density. The filtering mat-

ter, in the new, is to deprive the water of its less soluble particles of matter, and, in the old, to free it from any sand, mud, or other foreign matters which may be mechanically intermixed therewith; and when brought together, as in complainants' device, it is difficult to see in what way the former or customary action of either is modified by its connection with the other. It is not claimed that the relation of the filtering matter with the shelves, causes them to perform any new office, or even to perform their customary office in any better or more effective manner—no increased crystallization, adhesion or incrustation. Neither can it be successfully shown, that the filtering material, by its relation with the shelves, performs any new office; it is for freeing the water from matter mechanically intermixed with the water—mechanically held in suspension—and it is by no means clear, from the evidence, that its relation enables it to perform this office in a more effective manner.

If, then, the operation of neither is affected by the other, does their union, their action in the same device, produce a result not produced by some of them separately? By the series of the shelves, the matter held in solution was crystallized, and adhered and incrusted to the plates, and a portion of that held in suspension was also deposited upon them; but a large portion of the matter held in suspension, still remained in the water, and, from the lack of the filtering material, passed into the boilers. By the filtering material a large portion of the matter, held in mechanical suspension, was taken up and separated from the water; but, from the lack of the series of shelves, the matter held in solution was not separated from the water, but passed into the boiler; but by combining both in a single machine, both of these objects are accomplished, and the water is passed into the boiler, in a condition, different, from that in which it was, in passing from either of the devices after their separate action upon it. If this be so, a new result is produced by the union—a result not previously produced by either of the elements acting separately—which removes it from the doctrine of aggregation, as laid down in the cases of Hailes v. Van Wormer [20 Wall. (87 U. S.) 353]; Birdsall v. McDonald [Case No. 1,434].

Treating the invention, then, as a combination producing a new result, is it novel? It is not contended that any of the devices, relied upon by respondents as anticipating complainants' patent, embraces all the elements, excepting that patented to Wagner. This, the respondents say, is a complete anticipation of the invention; and their expert witness, who seems to be a very intelligent man, says: "I find the invention claimed in said English patent (Wagner's), when compared with the inventions claimed in the complainants' patents, Nos. 2 and 3, to be identical in principle and operation." And the expert witness Millward says: "I am of the opinion, clearly, that the said English patent (Wagner's) cannot be justly said to embrace or contain the invention, set forth in the first claim of the letters patent No. 2, for the reason that it does not embody filtering material between a 'series of heating shelves and its outlet,' the filtering material being located in the outlet pipe itself; that its capacity is insufficient to perform the functions of Stilwell's filtering material, and that it is not designed to perform them." In speaking of the third and fourth claims of the third patent, he says: "There is, in the Wagner patent, no upward filter at all, and no mud well, from which mud can be drawn off while the heater is in operation." Again: "I do not find in this English patent a mud well below a series of shelves, and below an upward filtering chamber; and, as I regard the construction and arrangement, as essential to the invention, specified in the fourth claim of said patent, and as it is so set forth in that claim, I am of the opinion, that the English patent of Wagner does not contain or describe the invention specified in said fourth claim." Thus we have two men, well versed in mechanical and chemical science, presenting to the court, under oath, statements diametrically opposed to each other in regard to the principle and operation of the two devices.

Strictly construed, it is very certain that the Wagner patent does not anticipate complainants' invention, as described in the first and second claims of the second patent. Construed broadly, however, it may not be so clear that it does not anticipate it. It has the series of shelves, operating substantially in the same way, for the accomplishing of the same purpose; it has filtering material between the series of shelves and the outlet, and there is what may be called a mud well; but it seems clear, from the testimony, that, from the incapacity of the filtering chamber, and the kind of the filtering material described in the patent, the Wagner device would not accomplish the results as efficiently as complainants'.

The superior utility of complainants' device, over that of Wagner, is clearly shown by the evidence in the case, and is sufficient, in the opinion of the court, as against the Wagner device, to establish its novelty; for it is doubtful whether Wagner's could be, practically, successfully used. Our better opinion, therefore, is that the patent, either strictly or broadly construed, is not anticipated by the Wagner patent. It is said, however, that as no kind of filtering material is mentioned, and no function is mentioned except filtering, if it appears, that some kinds of filtering material will not work, the patent is void. By the act of congress, an inventor is to describe his invention, and the manner and process of making, constructing, and using the same, in such full, clear and exact terms as to enable any person skilled in the art, to make, construct and use the same.

This specification or description, is addressed to persons acquainted with the character and nature of the business to which the invention relates, and it is only necessary that it should be so definite, or full, as to enable persons of competent skill and knowledge to construct, produce, or use the thing described, without invention or addition of their own, and without repeated experiments. The description in the patent is not, any and all filtering material, but is, any suitable filtering material. Suitable for what? For performing the function or office assigned to it, to-wit, the separation of the solid matter from the hot water. This could hardly be said to embrace filtering material which would not perform the office or function assigned to it. The persons acquainted with the business, in which this invention was to be used, were familiar with the various kinds of filtering material suitable for this purpose, and would, at once, use it and put it into operation, without invention, addition or experiment. The patent is not, therefore, for that reason, void.

Passing from the second to the third patent, the third and fourth claims of which it is alleged respondents infringe—the third claim of the patent is: "The filtering chamber D, constructed and arranged substantially as described." Without entering into an extended review of the evidence upon this claim, but examining it in connection with the specification and drawings, and with the other claims, and in the light of the state of the art at the time of the invention, I do not think it can receive that broad construction necessary to embrace the filtering-chamber of the respondents, and, receiving a strict construction, respondents do not infringe this claim.

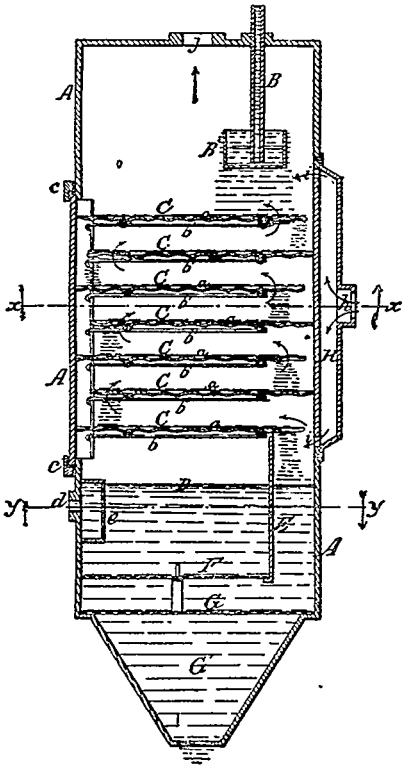
The fourth claim is: "The mud well G^1, arranged below a filtering chamber D, in combination with the shelves and steam inlets, substantially as described." A broad construction of this claim would embrace the defendants' mud well. But can this claim, from the state of the art, and fair interpretation, receive such construction?

Mr. Millward says: "Mud wells, as employed in steam boilers and other apparatus, have long been known as appliances for the collection and discharge of mud, and not simply for the collection only." Mr. Stilwell was familiar with the state of the art, at the time he prepared his specifications, and from the specification, it is very clear that he had no idea that he was claiming as his invention anything but the particular mud well, which he described in his specifications and drawings. The claim is the mud well G^1, and the mud well G^1 is described in the specifications and drawings, as below the strainer G, and as of funnel shape and form. Could complainant have entertained the idea, that he could remove the entire mud-well, shown in his drawings, and described in his specifications, below the strainer G, and substitute in the place of the strainer G, a plate at the terminus of shell A, and claim the space between the filtering chamber D, and such plate, as the mud well of his invention, as described in his patent? I think not. Nor do I think that the specification, drawings and claim, when fairly construed together, will bear any such construction; but his invention was the mud well, which he so particularly and minutely described, and as such, is not embraced in the defendants' device.

The only remaining question in the case is, whether the subject of the first and second claims of the second patent, is the invention of E. R. Stilwell, or of the defendant, James Armstrong?

The defendants claim, that the device, as used by them, was the invention of James Armstrong; that it was invented by him, and put into public practical use, in the latter part of the year 1845 or 1846; and, have introduced in evidence, a model, which they claim represents the device which was so constructed, and so used, and which was made, they say, by James Armstrong, in 1857, a period before complainant claims to have invented his device. As bearing upon the date of the existence of the model, and the construction of the device, and its public use, the depositions of eighteen witnesses were taken by the parties, twelve by the respondents, and six by the complainants. Of the respondents' witnesses, six testify in relation to the model.

[Drawing of patent No. 93,244, granted August 3, 1869, to E. R. Stilwell. Published from the records of the United States patent office.]



and eight in relation to the device. The six witnesses of the complainant were all examined in relation to the alleged construction and use of the device.

As to the model: James Armstrong testifies, that he made it in 1857, and that it represented the machine he made and used in 1845 and 1846. William Armstrong testifies, that he saw the model in 1857. Ruby E. Lucas testifies, that she saw the model in 1860, under peculiar circumstances, and placed upon it the initials of herself and friend, which she finds upon it now. John G. Sherwood testifies, that he saw it in the spring of 1862. Olin Armstrong testifies, that he saw the model in 1861 or 1862. Irwin R. Harris, that he saw it in 1863. This testimony would seem to establish the existence of the model at a period as early as 1857.

The testimony offered by the respondents, to establish the existence and public use of the device, is as follows: James Armstrong testifies to the construction and use of the device in the latter part of 1845, or fore part of 1846. William H. Armstrong testifies to the use of the device, about the same time; he also gives a general description of it. Robert A. Gettings testifies, that he helped make the device; that he furnished the plank; and gives a general description of it, but does not remember all its parts, and also testifies to the use of it. George A. Mead, testifies to the use of a long box, from five to eight feet long, with an upright at one end; saw Armstrong repairing it, with a pipe at one end. William Cuykendall testifies, that he went to look at Armstrong's mill, and saw there a wooden heater in a rough state. This was before he put steam in his mill, which was in 1847. F. W. Owings testifies, that he drew a load of straw to the mill, which was put into a box, which was used for filtering or clearing water. The box was square one way, and long the other, with a spout on one end of it, resembling the model of 1857. David Trucell testifies, that he heard William Armstrong speak of the heater that he was going to have put in the mill; didn't say whether it was wooden or no; but didn't know that it ever was put in. James S. McCarrell testifies, that, in 1867, William Armstrong told him his brother had a similar machine in successful operation, several years before that, at his saw mill, made of wood; heated the water, and removed the mud before it went into the boiler. Stephen R. Harris testifies, that he saw the model in 1869, and James Armstrong then told him, that it represented a heater and filterer he had made many years before that, in a steam mill in Huron county; that it was of wood, and worked well in practice.

The testimony offered by the complainants to disprove the existence and public use, of the device, as claimed by the respondents is, first, the deposition of John Collins, who testifies that he assisted in putting up the works, setting the engine, and fixing the machinery for starting the grist mill; that the heater used there was of sheet-copper, and used for five months, up to the time he left, and there was nothing of the kind described by Armstrong used while he was there. Seymour N. Sage, who testifies that he commenced working for Armstrong, Long & Gettings, in the New Haven Mills, in the fall of 1845, and worked there till the 1st day of December, 1846; that he helped get out the timber, and put up the saw-mill frame, late in the winter, or early in the spring, of 1846, and helped put in a steam engine, a tub-shaped iron heater, used from the time it was put up until he left in December; that they never used the device described by Armstrong in that or any mill. John and William Armstrong were the owners while he was there. Corydon Curtiss testifies, that he was frequently at the mill, from 1846 to 1847; saw Seymour Sage there, saw cast-iron heater, but did not see wooden one; thinks if one had been used, would have seen it; cast-iron heater used as long as he recollected the mill, and don't recollect of ever seeing any other heater used in the mill. Russell Curtiss testifies that he lived near the mill from 1845 to 1847; was acquainted with Seymour N. Sage, who sometimes ran the engine, and sawed in steam mill about eight months; taught Sage how to run the saw mill; recollects something they called a heater; thinks it was made of iron; it was removed he thinks, in March, 1847, and thinks he put the heater in the wagon, and thinks he would have seen the wooden heater if it had been there. David Turcell testifies, that he worked in Armstrong's mill in January, 1846; that he worked there about eight weeks; an iron heater was used while he was there; no other was used; don't think Seymour N. Sage worked there while he was there; quit before he came; heard Armstrong speak of getting another heater; didn't say whether it was to be a wooden one or not, and don't know whether he ever put it in. Asher Taylor testifies, that he owned an interest in the mill during the time that Finch owned an interest in it. "I bought after he did, and sold before he did." Thinks he purchased in May, 1846, and sold last of August or in the fall, but not certain whether 1846 or 1845; an iron heater used while he was there, and no other that he remembers while he owned the mill; if there had been a wooden one, would likely have recollected it. George W. Benard testifies, that he is a machinist, lived within three-fourths of a mile of the mill; worked in it while it was owned by William Armstrong and Finch, and when Mr. Sage was there; began the latter part of April or May, and worked till July; about a year after, worked for Taylor; tore out fore-bay and engine timbers; supposed the heater made of cast iron; no other in use while he was there; if wooden heater had been there, he thinks he would have known it.

Having thus shown what the evidence upon these points is, does it establish the fact, that the patentee was not the first and original in-

ventor? The presumption of the law is, that he was the first and original inventor, and it casts upon the respondents, who deny it, to show by clear and satisfactory proof, that he was not. The evidence, in regard to the existence of the wooden heater at the Armstrong mills, is very conflicting. On the one hand, the witnesses state it was there and used; on the other hand, they say that no such heater was there. Two of the witnesses for the respondents say they made the device; yet, on the other hand, witnesses, who are not impeached, say they worked there, during the time that it is claimed to have been made, and the time when it is said to have been used, and no such heater was there; and others say they saw it there; and yet others, who were frequently there, and familiar with the premises, say they never saw any such heater there; and if it had been there, they would have been apt to have seen it. Again, the time when it is claimed this wooden heater was used, was seventeen or eighteen years before the witnesses were testifying, and nothing is heard from it, until eleven or twelve years afterward, when it is claimed that a model of it was made; but, then, no effort is made to procure a patent for it, or to put it into use, for more than ten years after the making of the model. And it is a matter not to be forgotten, that James Armstrong, in 1868, took out a patent for a device different from that of the model of 1857, which he claims represented his invention of 1845 or 1846, and that afterward, in 1869, he took out a patent for substantially the same invention represented by said model. If the making of the model constituted invention, I should hold, that the proof established the fact, that James Armstrong was the prior inventor; but that does not constitute invention, and it can only be used as an item of testimony, reflecting upon the making and using of the wooden heater in 1845 or 1846. Taking it in connection with the testimony on that point, and weighing all the testimony together, I cannot say, that it is of that clear and satisfactory character, as requires me to find that James Armstrong invented the device, as claimed, in 1845 or 1846.

It results, therefore, from these findings, that respondents infringe the first and second claims of the second patent; but do not infringe the first and third patents, as alleged in the complainants' bill.

Case No. 13,454.

STIMPSON et al. v. BROOKS.

[3 Blatchf. 456.] [1]

Circuit Court, S. D. New York. April, 1856.

DEPOSITION—SOLICITOR'S FEES—COSTS.

1. Under the act of February 26, 1853 (10 Stat. 162), the item of $2.50, allowed as costs to a solicitor for each deposition taken and admitted as evidence in a cause, is not taxable in an equity suit, except for the deposition when admitted on a final hearing.

[Cited in Troy Iron & Nail Factory v. Corning, Case No. 14,197; Jerman v. Stewart, 12 Fed. 278; Wooster v. Handy, 23 Fed. 57; Spill v. Celluloid Manuf'g Co., 28 Fed. 870; Cahn v. Monroe, 29 Fed. 675; Winegar v. Cahn, Id. 677; James Dalzell's Son & Co. v. The Daniel Kaine, 31 Fed. 747; Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. 686; Ingham v. Pierce, 37 Fed. 647; Hake v. Brown, 44 Fed. 734; Ferguson v. Dent, 46 Fed. 90; Atwood v. Jaques, 63 Fed. 561.]

2. The distinction between an affidavit and a deposition, considered.

[Cited in Indianapolis Water Co. v. American Straw-Board Co., 65 Fed. 535.]

This was a bill [by Charles N. Stimpson and others against Alanson E. Brooks] to stay the infringement of letters patent. A motion was made on the bill, supported by affidavits, for an injunction. The motion was opposed by the answer of the defendant, and by affidavits on his part. Mr. Justice Nelson, before whom the motion was made, denied it, with costs. The defendant charged, in his bill of costs, for these affidavits, as follows:—"14 depositions of witnesses, read in opposition to the motion, at $2 $^{50}/_{100}$ each, $35;" and the clerk allowed the charge, on taxation. The plaintiffs now moved the court to set aside the taxation, as not authorized by law. The above item was the sole item of costs allowed on taxation.

BETTS, District Judge. If this motion prevails, the order of the court awarding costs becomes, in effect, nugatory.

Deposition is a generic expression, embracing all written evidence verified by oath, and thus includes affidavits; but, in legal language, a distinction is maintained, in courts of law and chancery, between depositions and affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used. Bac. Abr. "Affidavit"; Jac. Law Dict. "Affidavit" and "Deposition"; Wyatt, Pract. Reg. c. 7.

Congress recognizes a distinction between the two methods of proof, by conferring authority on particular public officers to take affidavits and depositions. Conk. Prac. 56, 253; Law, Prac. 41, 154.

The supreme court, in its rules, uses the terms "affidavits" and "depositions" as convertible expressions. S. C. Rules 9, 13, 21, 32, at law. In its equity rules, it marks the distinction more precisely. Rule 80. This court, in its rules in equity, includes under the description of depositions, affidavits offered to support the bill or the defence, in injunction cases (Rules of 1838, 105, 106); and,

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

anterior to February 26th, 1853, costs were taxed, in this court, to solicitors, for the preparation of affidavits read in injunction causes, under the rules authorizing the use of depositions. According to that usage, the charge in question would have been a legitimate item for taxation, at the rate of allowance then sanctioned. It is now sought to be taxed as a particular authorized by the act of congress of February 26, 1853 (10 Stat. 162).

The provisions of that statute are: "In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of $20." "In cases at law, where judgment is rendered without a jury, $10, and $5 where a cause is discontinued." "For each deposition taken and admitted as evidence in the cause, $2.50." And the act peremptorily directs, that "no other compensation shall be taxed and allowed" to solicitors, &c. This enactment is not left open to any liberality of intendment, but must be rigorously enforced, conformably to the mandate of congress.

This whole provision covering taxable proceedings has, manifestly, direct relation to those which are final in the cause, and not to interlocutory or incidental ones, so familiar in our practice, however necessary they may be to its progress. That branch of practice, as a ground of remuneration to attorneys and solicitors, is abrogated by the statute, in so far as their compensation is chargeable upon the adverse party.

The expenses in question accrued on a motion for a preliminary injunction, which was in no way conclusive upon either party as to the merits of the cause; and, in that condition of the proceeding, the charge cannot be brought within the grant of costs made in the statute. The court, in its order made upon the motion, treated it as preliminary only, and not one on final hearing. It is the costs on final hearing alone, which are by the statute chargeable by one party against the other. Had these affidavits, in such state of the cause, been admitted in evidence, I should have no doubt that, although not in strict legal nomenclature depositions, they might be regarded as within the intention of congress, and be taxable under the denomination of depositions; but I can find no warrant in the act for their taxation against the plaintiffs, under the facts of the case, even if they had been brought in under a formal commission issued in the cause, or had been taken de bene esse under the 30th section of the judiciary act. I consider the item as not taxable, because the proofs were not admitted on a final hearing of the cause, without considering it of moment whether they can be appropriately termed depositions.

The taxation of $35 for the depositions in question must be set aside.

STIMPSON (HALE v.). See Case No. 5,915.

Case No. 13,455.

STIMPSON v. POND.

[2 Curt. 502.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

PATENTS—PENAL ACTION—LIMITATION — STATUTE —REPEAL—PENALTY.

1. The two years' limitation of suits for penalties contained in the 32d section of the crimes act of April 30, 1790 (1 Stat. 119), is repealed by implication by the 4th section of the act of February 28, 1839 (5 Stat. 332), which extends the time to five years.

[Cited in U. S. v. Cook, 17 Wall. (84 U. S.) 173; U. S. v. Brown, Case No. 14,665.]

2. The penalty of not less than one hundred dollars, provided in the fifth section of act of August 29, 1842 (5 Stat. 544), for the offence of marking the word "patent," on unpatented articles, is a penalty of one hundred dollars, and no more.

[Cited in brief in Hankins v. People, 106 Ill. 630, 634; Illinois Cent. R. Co. v. People, 143 Ill. 437, 33 N. E. 173.]

[Cited as to form of action in U. S. v. Morris, Case No. 15,814.]

At law.

Mr. Choate and C. P. Curtis, Jr., for plaintiff.

S. E. Sewall, contra.

CURTIS, Circuit Justice. This is an action of debt, founded on the act of August 29, 1842, § 5, to recover penalties for marking the word "patent," on an unpatented article, for the purpose of deceiving the public. The defendant has pleaded that the causes of action did not accrue within two years. In support of this plea he relies on the thirty-second section of the crimes act of April 30, 1790, which limits suits for penalties to two years after the fine or forfeiture incurred. The fourth section of the act of February 28, 1839 (5 Stat. 322), enacts, that no suit or prosecution shall be maintained for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued. The defendant insists that notwithstanding this last act, the former is still in force. His counsel argues that there is no express repeal; that repeals by implication are not allowed unless the implication is necessary; that there is no inconsistency between the two laws, because the last does not declare that these actions may be brought at any time within five years, but only that they shall not be brought afterwards; and if not brought after two years, according to the act of 1790, they will not be brought after five years.

This course of reasoning is not satisfactory to my mind. The third section of the act of 1839, enacts: "That all pecuniary penalties and forfeitures accruing under the laws of

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

the United States, may be sued for and recovered in any court of competent jurisdiction in the state or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found." Then follows the fourth section, limiting such actions to five years. It is not true, therefore, in point of fact, that this act merely prohibits actions after five years. It first enacts that they may be brought, and then limits the time within which they may be brought. These two sections must be taken together, as much as if the fourth was merely a proviso to the third. In effect they declare the will of the legislature that these actions may be brought, in the competent court, within five years. But if this third section were not in the act, it would still be true that, an act, limiting these actions to five years, is necessarily inconsistent with one which limits the same actions to two years; for if the two years' act operates, the five years' act can have no operation. The plea of the statute of limitations is, therefore, bad.

The defendant further objects that debt will not lie for a penalty under the act of 1842, because it is of uncertain amount. The description of the penalty in the act is, "a penalty of not less than one hundred dollars." This is certainly an anomalous provision. After a good deal of reflection I am of opinion it does not authorize the infliction of a greater penalty than one hundred dollars. Power to inflict a particular penalty must be conferred by congress in such terms as will bear a strict construction. The only power expressly given by this act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a penalty of just one hundred dollars. The terms of the act do not authorize the infliction of a penalty greater than one hundred dollars. Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionably increased. It would be difficult to reconcile such an implication with the constitutional prohibition to impose excessive fines. It makes congress, in effect, say that for a mere malum prohibitum not of great public importance, any amount of fines might be imposed. Such a grant of power, if constitutional, would not be in accordance with any other legislation of congress. For where has such a grant of power been made? In defining the punishment of offences which are of the gravest character, and at the same time admit of great degrees of aggravation, calling for corresponding degrees of punishment, the uniform habit of congress has been to affix limits beyond which the courts could not pass. To suppose that on this subject of patent marks, it was intended, for the first time, to depart from correct principles of legislation, and confer unlimited power over the estates of citizens, seems to me a very violent assumption. Moreover, on whom is it conferred? The act does not say whether the court or the jury are to fix the amount of the penalty. I know of no ground upon which the court can assume to itself this power; and there seems to be equal difficulty in maintaining that the jury are to exercise it. By what principles are they to be guided? It is not a case where a penal action is given to a party injured. If it were, the jury might regard the extent of his injury. The act does not indicate that there are to be degrees of the offence, and it is not perceived that it admits of great aggravation. Here, also, it is manifest, that if congress has conferred on juries power to inflict penalties to unlimited amounts, with no guiding principles to influence, much less to govern them, it must be admitted to be very extraordinary legislation. "As was said by Chief Justice Marshall (U. S. v. Fisher, 2 Cranch [6 U. S.] 390), where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." In my judgment, it requires stronger implication than is found in the language of this act, to bring us to such a conclusion. It must be admitted that "a penalty of not less than $100," is not a well chosen expression to indicate a penalty of one hundred dollars. But a careful examination of this act will lessen the weight of any objection drawn from this source. Without commenting in detail on its language, I will mention that its title is, "An act in addition to an act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose." When I read this, I was somewhat startled, by the information it conveys, that the entire legislation on the subject of patents had been swept away. But I was relieved from all apprehension when I examined the act and found that though it extended some of the existing laws to new cases, it repealed no act or part of act whatsoever.

My opinion is, that this act authorizes the infliction of a penalty of just one hundred dollars for the offence described; and that it may be recovered in an action of debt. I give no opinion whether such action would lie for a penalty of uncertain amount.

Case No. 13,456.

STIMPSON v. RAILROADS, The.

[1 Wall. Jr. 164.] [1]

Circuit Court, Third Circuit. April Term, 1847.

PATENTS—DAMAGES—COUNSEL FEES—APPEAL—EXCEPTION.

1. A jury cannot allow the plaintiff in a patent case, as part of his actual damages, any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the rights given him by his patent, and though not taxable costs.

[Cited in The Margaret v. The Connestoga, Case No. 9,070; Oelrichs v. Spain, 15 Wall. (82 U. S.) 230.]

[See Bancroft v. Acton, Case No. 833.]

2. Where, however, a jury did make such allowance under a direction from the court, conceded afterwards to be erroneous, their verdict was sustained by way of an exception; the misdirection of the court not having been assigned as a reason for new trial, the expenditures having been proved to be paid, and the verdict having attained, though improperly, the same result nearly that the court, in its power to treble the damages, might have reached in a regular way.

[Cited in Pegram v. Stortz, 31 W. Va. 250, 6 S. E. 501.]

Stimpson brought sixteen suits against different railroad companies or proprietors for infringing his patent for railroad curves [granted September 26, 1835]. The validity of his patent having been settled by a previous decision, the only question in these cases was the amount of damages which it was agreed should be assessed in all the cases by the same jury. As part of the evidence of damages, the court, upon the authority of a decision of Judge Story,—Boston Manuf'g Co. v. Fiske [Case No. 1,681],—and with considerable reluctance, allowed the plaintiff to prove the value of the time he had given, with the amount of the counsel fees and other expenses, not taxable costs, which he had necessarily paid in the prosecution of these sixteen suits, and, in charging the jury, directed them, in the language of Judge Story, that "they were at liberty, if they saw fit, to allow the plaintiff as part of his actual damages any expenditures for counsel fees or other charges which were necessarily incurred to vindicate the rights derived under his patent, and are not taxable in the bill of costs." The verdicts which were for the plaintiff, shewed by their amounts that all these expenses had been assessed by the jury, as damages. After the verdicts, the defendants, on the one hand, moved for a new trial because the damages were excessive, though not because of the direction of the court on the subject of damages. The plaintiff, on the other hand, moved to treble these damages as already found. In connexion with the last motion it is requisite to state that by an act of congress (Act April 17, 1800, c. 25, § 3 [2 Stat. 38]), now repealed, it was enacted that any person infringing a patent "shall forfeit and pay, &c. a sum equal to the actual damages sustained by the patentee," and by a subsequent act (Act July 4, 1836, c. 357, § 14 [5 Stat. 123]), still in force, that where the verdict is for the plaintiff, "it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs."

After full argument by Mr. W. L. Hirst and Mr. White, for the plaintiff, and Mr. Clarkson and Mr. Saunders Lewis, on the other side, both motions were now disposed of as follows by—

GRIER, Circuit Justice. I do not think that excessive damages, the reason urged for a new trial in these cases, is sufficient to justify the court in granting the motion, it being conceded that the verdict was in accordance with the directions of the court. As the law formerly stood, where the court without any exercise of their discretion were compelled to treble the damages, cases might occur in which a court would feel it to be their duty to set aside a verdict because the damages were excessive. And even then, they would require a case which appealed strongly to their sense of justice, before they would disregard the opinion of twelve men on matters of fact which it was their peculiar province to decide. Since the act of 4th July, 1836, the court are not compelled to treble the actual damages assessed by the jury, but may increase them or not at their discretion within that limit. In the exercise of that discretion the court will judge for themselves, and will not increase the damages, if in their opinion the jury have already exceeded the proper measure.

There was however a portion of our charge to the jury the correctness of which we doubted when we gave it, and which on more mature consideration we are ready to admit was erroneous. It was that which relates to the evidence of damages; where upon the authority of Mr. Justice Story, we directed the jury, not without an expression of some doubt as to the correctness of the law as so laid down, that "if they saw fit to allow the plaintiff as part of his actual damages, any expenditures for counsel fees or other charges, which are necessarily incurred to vindicate the rights derived under his patent and are not taxable in his bill of costs, they might say so."

If the counsel for the defendants had insisted on this error as a ground for a new trial in these numerous cases, we should have felt ourselves compelled to grant it. But as in the exercise of the discretion intrusted to us of increasing the damages, we may neutralise the effect of this error, we think the ends of justice may be attained, though somewhat irregularly, without put-

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

ting the parties to the expense and trouble incident to so many new trials.

In thus disposing of both these motions, I will take occasion to state why I venture to differ from the very learned judge on whose authority alone I was induced to give my instruction on this point to the jury.

I do not think that the practice of courts of admiralty, which Judge Story would seem to have had a good deal in his mind, affords any proper precedent for courts which are governed by the common law. Courts of admiralty proceed according to the principles of the civil law; and costs are awarded at the discretion of the judge, and are paid by such parties and to such an extent as he may judge equitable and right according to the circumstances of each case. The rule of our law is different. There were no costs given at common law, but if the plaintiff did not prevail he was amerced pro falso clamore. If he did prevail then the defendant was in misericordiâ for his unjust detention of the plaintiff's right, and therefore was not punished with the expensa litis under that title. But it being thought exceeding hard that the plaintiff for the costs which he was out of pocket in obtaining his right, could not have any amends, the statute of Gloucester (6 Edw. I. c. 1) was passed, which gave costs in all cases where the plaintiff recovered damages. This was the original of costs de incremento; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. "Costs," A.

Under the provisions of this statute, every court of common law has established a system of costs which are allowed to the party who succeeds in a cause, by way of amends for his expense and trouble in prosecuting or defending his suit. It may be true no doubt, and is especially so in this country (where the legislatures of the different states have so jealously reduced attorney's fee bills, and refused to allow the honorarium paid to counsel to be exacted from the losing party,) that the legal taxed costs are far below the real expenses incurred by the litigant. Yet it is all the law allows as expensa litis. If the jury may, "if they see fit," allow counsel fees and expenses as part of the actual damages incurred by the plaintiff, and then the court add legal costs de incremento, the defendant may truly be said to be in misericordiâ, being at the mercy both of court and jury.

In courts governed by the civil law, if the court may give costs and expenses according to their discretion to the plaintiff, they can also exercise the same discretion in favour of the defendant when he has been unjustly harassed. If the jury can exercise this wide discretion of giving incremental costs to a plaintiff under the name of actual damages, why should they not be allowed to give them to the defendant when he succeeds? He has certainly as good a right to them as the plaintiff, both in law and equity. On every principle of morals a plaintiff would be as liable to punishment pro falso clamore, as the defendant, for the unjust detention of the plaintiff's right. If this principle be introduced from the civil law, both parties should have the benefit of it. A defendant should not be left to contend with such odds against him. In actions of debt, covenant, assumpsit, &c. where the plaintiff always recovers his "actual damages," he can recover but legal costs as compensation for his expenditure in the suit, and as punishment to defendant for his unjust detention of the debt. His equity is no greater, nor his injury of a higher order, where his action is for a trespass or a tort. It is a moral offence of no higher nature to infringe a patent, than to detain a just debt. Why then shall the law give the plaintiff such an advantage over the defendant in the one case, and not in the other? There is certainly nothing in the act of congress, or in the phrase "actual damages," which it uses, to countenance the doctrine. The term "actual damages," cannot be construed to mean exemplary, vindictive, or punitory damages inflicted by way of smart-money, or punishment of the defendant for fraudulent, malicious or outrageous wrongs.

Before 1836, the law compelled the court to treble the "actual damages" found by the jury. This was intended, no doubt, to punish the defendant, and thus indirectly remunerate the plaintiff for his extra expenditures in establishing his patent. This law was found to act unequally, for defendants were often found to have the prior invention and to have been unjustly harassed by the plaintiff, and yet they recovered nothing but costs. Often where the plaintiff recovered, the contention was a bona fide one, on the respective interests or titles of the parties: it was, therefore, obviously unjust in such a contest that the plaintiff should recover treble damages, if he succeeded, while the defendant could recover nothing. It was for this reason that the act of 1836 submitted the question of trebling the damages to the discretion of the court, and thus left the parties to contend on a more equal field. The defendant suffers the infliction of vindictive damages only when the court are of opinion he has acted unreasonably or oppressively.

It is a well settled doctrine of the common law, though somewhat disputed of late (10 Law Rep. p. 49), that a jury in actions of trespass or tort may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant's conduct rather than compensation to the plaintiff. Indeed in many actions such as slander, libel, seduction, &c. there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish, and make an example of the defendants. But in no case is the degree of the defendant's delinquency measured by the ex-

penses of the plaintiff in prosecuting the suit. The plaintiff, it is true, is thus indirectly compensated for his expenses, but it is not this measure of defendant's punishment, nor a necessary element in its infliction.

The doctrine for which we here contend is supported by the best authority. Arcambel v. Wiseman, 3 Dall. [3 U. S.] 306, which Judge Story admits is in conflict with him, carried it so far as to apply it to cases of admiralty, and Judge Story's own decision was a complete reversal of a rule which he had himself previously established on the authority of that case. In a Massachusetts case (Barnard v. Poor, 21 Pick 378–382), more recent than any of these decisions, Chief Justice Shaw, after remarking upon the notion that had once prevailed on the subject, says: "It is now well settled that even in an action of trespass or other action sounding in damages, the counsel fees and other expenses of prosecuting the suit not included in the taxed costs, cannot be taken into consideration in assessing damages." And in another (Lincoln v. Saratoga & S. R. Co., 23 Wend. 425–435), in New York, Chief Justice Neilson says: "The charge as to expenses beyond taxable costs and counsel fees, in conducting the suit, as a particular item of damages to be taken into the account, I am also inclined to think was erroneous. These have been fixed by law, which is as applicable to cases sounding in damages as debt." He refers to the case in Massachusetts, and approves of it "on principle."

A case in Connecticut (Linsley v. Bushnell, 15 Conn. 226), I am aware, is an apparent authority for a contrary doctrine. But the main question discussed in the opinion of the court, is whether a jury may give vindictive or exemplary damages in an action for a tort, against a defendant who has acted with gross negligence: and the proposition that the plaintiff's counsel fees and expenses should be assumed as the exact measure of the defendant's punishment, seems to have been founded on some custom or practice peculiar to the state of Connecticut, and not on any principle of the common law. The court was not unanimous, and Mr. Justice Waite who dissented from the majority, uses some arguments on this point which I have not seen answered.

Convinced, therefore, that the doctrine I laid down to the jury on the trial of these cases, is not founded on the well established principles of the common law, and that it would work inequality and injustice, I take this opportunity to retract it: and say that hereafter, such evidence as was then given, will not be objected to, if permitted to go to the jury, nor will the court instruct the jury, "that they are at liberty if they see fit, to allow the plaintiff as part of his actual damages, any expenditures for counsel fees, &c. incurred to vindicate his rights and not taxable in the bill of costs." If such expenditures are proper elements of actual damages, the jury should have no discretion to omit them: if not, the jury should not be permitted to add them. It is a principle of too much importance to be submitted to their arbitrary discretion. In almost every instance where I have seen it done, they have assessed more than treble the amount of actual damages, while the court have been called on to add to the injustice, by trebling them again. Patentees should be protected liberally by the law: but their wrongs should not be made subject for speculation and extortion.

Both rules dismissed.

[For other cases involving this patent, see Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (39 U. S.) 448.]

Case No. 13,457.

STIMPSON v. ROGERS et al.

[4 Blatchf. 333.] [1]

Circuit Court, D. Connecticut. July 8, 1859.

PATENTS — ISSUE TO EXECUTOR — TRUST — ACTION FOR INFRINGEMENT — PARTIES.

1. Under the tenth section of the patent act of July 4, 1836 (5 Stat. 121), where an inventor dies before a patent is granted for his invention, leaving a will which devises the property in the invention, a patent granted for the invention, to his executor, describing him as such, and on his application as executor, is valid, although the patent does not state that it is granted in trust for the devisees in the will.

[Cited in Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co., Case No. 10,337.]

2. The act recognizes an invention as property which goes to the heirs at law or devisees of the inventor by a patent to be granted to his administrator or executor, as trustee for the persons entitled.

3. The trust declared by the law is implied from the existence of the facts which create the trust.

4. Where one person has the legal title to a patent, and another person has an equitable right in it, both should be joined as plaintiffs, in a suit in equity on it, for an injunction and an account, founded on an infringement.

This was a demurrer to a bill in equity. The bill was filed by Sophia E. Stimpson, in her own right, and as trustee of Julia M. Colburn, and the said Julia M. Colburn, in her own right, against Rogers, Smith & Co., a Connecticut corporation, and William Rogers, George W. Smith and Elisha Colt. The bill set forth that one James Stimpson, in his lifetime, was the inventor of an improvement in the making of ice pitchers, and died without making application for a patent for the same; that, by his last will and testament, he gave all his property to the plaintiff Sophia E. Stimpson, two-thirds for her own use, and one-third for the use of the plaintiff Julia M. Colburn; that the plaintiffs were daughters of James Stimpson; that, by the will, James H. Stimpson, a son of the testator, was appointed executor; that James H. Stimpson, as such executor, made application to the patent office for a patent for

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

the improvement; that the patent was issued [October 5, 1838, No. 21,717], granting to James H. Stimpson, executor, and his assigns, for the term of fourteen years, the exclusive right to the improvements; that, after the issuing of the patent, James H. Stimpson, the patentee, sold and assigned to one McLeay all the right, title and interest which he had to the patent, and Sophia E. Stimpson also sold and assigned to McLeay all the right, title and interest which she had to the patent; and that, subsequently, McLeay sold and assigned to the plaintiff Sophia E. Stimpson, all the right, title and interest which he had in and to the patent. The bill prayed for an injunction and an account.

INGERSOLL, District Judge. Two causes of demurrer are relied on in this case: First. That it appears by the bill, that the patent was not legally issued, and is, therefore, void. Second. That, if it was legally issued, Julia M. Colburn should not have been made a party plaintiff in the bill.

The tenth section of the patent act of July 4, 1836 (5 Stat. 121), provides, among other things, that, where any person shall have made any new invention, discovery or improvement, on account of which a patent might, by virtue of that act, be granted, and such person shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent shall devolve on the executor or administrator of such person, in trust for the heirs at law of the deceased, in case he shall have died intestate, but, if otherwise, then in trust for his devisees, in as full and ample manner, and under the same conditions, limitations and restrictions, as the same was held, or might have been claimed or enjoyed, by such person in his lifetime. This act of congress recognizes a new and useful invention or discovery made by any one as property, which, in case of the death of the inventor without a will, goes to his heirs at law, by a patent in the name of the administrator, as trustee for such heirs at law, and, in case of the death of the inventor leaving a will, goes to the person or persons to whom the same is given by the will, the exclusive right to use the invention being secured to the person or persons to whom such property is given by the will, by a patent in the name of the executor, who is to hold the legal title in trust for the person or persons to whom the property is given by the will.

The bill shows, that James Stimpson made the invention in question; that it was new and useful; that he never obtained a patent for it; that he died, leaving a will; that, by that will, he gave all his property, including his property in the invention, to the plaintiff Sophia E. Stimpson, two-thirds thereof for her own use, and one-third thereof for the use of the plaintiff Julia M. Colburn; that James H. Stimpson was appointed executor of the will; that James H. Stimpson, as such executor, made application for a patent, with a specification showing that the invention was the invention of the testator; and that a patent was granted to "the said James H. Stimpson, executor as aforesaid," that is, executor of James Stimpson, securing the exclusive right to the invention for fourteen years. Upon the above-recited facts, no one could lawfully apply for a patent except James H. Stimpson, the executor of the last will and testament of James Stimpson. As such executor, he did apply for a patent. No patent could be granted for an invention discovered and made by James Stimpson, except to "James H. Stimpson, executor as aforesaid." The patent was so issued. Although so issued, it would be of no avail, unless it was granted to him, as such executor, in trust for those to whom the property in the invention was given by the will; and the question is—was it so granted?

It is claimed, that it was not so granted in trust, for the reason that it is not expressed, in the patent, to be in trust for Sophia E. Stimpson and Julia M. Colburn, to whom the property in the invention was given by the will, and that, therefore, the patent was not legally issued. It is not necessary, in order to create, in a grant, a trust in favor of a third person, that the express words "in trust for such third person," should be used in the grant. A trust may be created, and is created, not only by express terms, but, also, by implication. It may be created by the use of such terms as clearly show that a trust was intended. It may be implied. There is no necessity to express, in direct terms, by the use of a particular set of words, what is clearly shown and necessarily implied, by law, by the use of certain other terms, what the whole scope of the grant clearly shows the intention to be. The patent law declares, that where a patentable invention has been made, and the person making it dies without obtaining a patent, the right of obtaining the patent shall devolve on the executor, in trust for the devisees. The law, when the facts appear, that a patentable invention has been made, that the person making it died without taking out a patent, that he made a will and appointed an executor, that such executor, as executor, made an application for a patent for the invention of the testator, and not for his own invention, and that the patent for the invention of the testator was granted to the executor, as executor, creates the trust, that it is for the use and benefit of those to whom the property in the invention was given by the will. An executor is a trustee for the legatees under the will. 1 Williams, Ex'rs, 157. It follows, therefore, that what he does, as executor, in relation to any property given by the will, he does in trust for those to whom such property is given by such will. The patent was, there-

fore, issued in conformity to law and is a valid patent.

Is Julia M. Colburn a proper party plaintiff in the bill? Sophia E. Stimpson has now the legal title to the patent. Julia M. Colburn has no legal right in the patent. She cannot be a party plaintiff, in an action at law, for an infringement of the rights secured by the patent. She has, however, an equitable right to one-third of the patent. Sophia E. Stimpson holds one-third of the patent for the use and benefit of Julia M. Colburn—in trust for her. Her rights are seriously affected by the infringement of the defendants. Where one person has the legal title to the patent, and another person has an equitable right in the same, and a suit in equity is instituted, complaining of an infringement, and seeking an injunction and an account, the person having the legal right and the one having an equitable right which has been violated, should join as plaintiffs. This is the universal course.

With this view of the case, it must be held that the bill is sufficient.

STIMPSON (WOODMAN v.). See Case No. 17,979.

STIMSON (CARRINGTON v.). See Case No. 2,450.

STINER (UNITED STATES v.). See Case No. 16,404.

STINGER (BUTT v.). See Case No. 2,246.

Case No. 13,458.

STINGLE'S CASE.

District Court, E. D. Pennsylvania. Sept. 4, 1863.

ARMY—LIABILITY TO DRAFT—HABEAS CORPUS.

1. Under the act of March 3, 1863, § 3 [12 Stat. 731], if a married man over thirty-five years of age were enrolled and drafted in the first class, he might be discharged by a federal court on habeas corpus.

2. A person illegally conscripted into the federal army may be discharged on habeas corpus.

[Cited in Brightley's Dig. 51, 440, to the points as given above. Nowhere reported; opinion not now accessible. Decided by CADWALADER, District Judge.]

STINSON (GASS v.). See Cases Nos. 5,260–5,262.

Case No. 13,459.

STINSON v. HILDRUP et al.

[8 Biss. 376.] [1]

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

PLEADING IN EQUITY—SIGNATURE BY COUNSEL—SOLICITOR.

Where an attorney of this court signs a bill as solicitor for complainant, this is a sufficient compliance with the 24th equity rule, which requires all bills to be signed by counsel.

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

[This was a bill in equity by James Stinson against Jesse S. Hildrup and others.] A motion was made in this case, in the district court, by the defendants to dismiss the bill for want of the proper signatures of counsel; and there was also a cross motion by the complainant to amend the bill by adding to the signature the words, "of counsel." On the 15th of November the court allowed the former motion, and disallowed the latter. Thereupon, the plaintiff made a motion to set aside this order, which was overruled by the district judge. [Case unreported.] Appeal to the circuit court.

John I. Bennett and J. C. Dunlevy, for complainant.

A. B. Mason, for defendants.

DRUMMOND, Circuit Judge. The question is whether the order made by the court on the 15th of November was correct. The bill is signed by the complainant in his own person, and by J. C. Dunlevy and John I. Bennett, "solicitors for complainant." The reason of the decision of the court seems to have been because of the addition made to the signatures of Messrs. Dunlevy and Bennett, "solicitors for complainant," instead of the words, "of counsel," or "counsel for complainant."

The defendants insist that it is not a sufficient compliance with the rule—for a person who is a counselor of the court to state that he is a solicitor for the complainant, but that he should state that he is "of counsel for the complainant." The 24th rule in equity is as follows:

"Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him, and the case laid before him, there is good ground for the suit in the manner in which it is framed."

Of course this rule is obligatory in all cases, and it may be said, that no bill is complete unless it is complied with. It is not questioned, as I understand, that J. C. Dunlevy and John I. Bennett were at the time they appended their signatures to the bill, counselors of the court; but it is claimed that as they appear simply in the character of solicitors it is different from that of counselors. The authorities which have been referred to by the counsel of the defendants are, most of them, from the English courts where, as is well known, there is a distinction between attorneys, solicitors and barristers, and it might be a very proper practice in courts where there was this distinction that there should be added to the signature the description of that part of the profession to which the person belonged, whether a solicitor, an attorney,

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

or a barrister, but there is no such distinction in our courts and under our practice; and the reason of the rule requiring the description of the person to be added ceasing, the rule itself, it would seem, ought to cease. An attorney regularly admitted to practice in this court, is a counselor of the court within the 24th rule. A distinction is sometimes made as to these terms which is purely arbitrary, between proceedings in equity and at common law. The practice of the bar generally is, when a member signs a common law pleading it is as attorney; if an equity pleading, he signs it as solicitor. But this is a distinction arising merely from the two kinds, or modes of proceeding. He is counsel, and attorney, of the court in which soever form he appends his signature. In common law proceedings we speak of the actor or party bringing the suit as plaintiff and in equity proceedings as complainant; but in point of fact this is a distinction without a difference. The complainant in the equity proceeding is the "plaintiff" as the plaintiff in the common law proceeding is the "complainant." They are convertible terms, although for the purpose of distinguishing whether the suit is at law or in equity, different names are sometimes used. In the equity rules of the supreme court, the actor is always called plaintiff, and not complainant.

It will be observed that the 24th rule does not require that the party signing as counsel shall give any character to his signature. It does not say that he shall designate that he is of counsel, or solicitor, or an attorney, but simply that his signature shal be annexed to the bill. "The bill shall contain the signature of counsel." It might be a matter of grave doubt, whether, in point of fact, the true construction of this rule, if a counselor of the court did actually append his signature to the bill, would require him to describe himself in any other way than what might be inferred from the mere signature itself.

I am somewhat at a loss to know what is the distinction, under our practice, between the terms, "solicitor" and "counselor." I should be very much inclined to think that if there were the signature of counsel to the bill, whether he was described as "counselor," as "solicitor," or as "attorney," that the description might be rejected as surplusage, and that it would stand as a compliance with the rule. But, however this may be, it seems to me clear that if the signature is that of a counselor of the court, and he is described as solicitor, that the bill ought not to have been dismissed on the motion of the defendants; but that the cross-motion of the complainant ought to have been allowed, and the words, "of counsel for the complainant" have been permitted to be added to the signatures of Mr. Dunlevy and Mr. Bennett. I am, therefore, of opinion that the order of the district court made on the 15th of November ought to be set aside.

Case No. 13,460.

STINSON v. WYMAN et al.

[2 Ware (Dav. 172) 176.] [1]

District Court, D. Maine. Dec. Term, 1841.

SHIPPING—LIABILITY OF OWNER—EX CONTRACTU—EX DELICTO—ABANDONMENT—MAINE STATUTE.

1. By the common law, the owners are responsible for all the obligations contracted by the master, whether arising ex contractu or ex delicto, within the scope of his authority as master, to their full extent.

[Cited in Thompson v. Hermann, 3 N. W. 583, 47 Wis. 610.]

2. But, by the general maritime law of Europe, their liability for his obligations ex delicto is limited to the amount of their interest in the ship and cargo, and by abandoning these they are discharged from all personal responsibility.

3. Rev. St. Me. c. 47, § 8 (and Act 1821, c. 14, § 8), limit the responsibility of the owners "for any embezzlement, loss, or destruction, by the master or mariners, of any goods or merchandise or any property put on board a ship or vessel," to the amount of their interest in the ship and freight. The reason and policy of the act extend the exemption so as to include losses occasioned by the negligence of the master or crew, as well as those directly caused by their wrongful act. This construction makes the act conformable to the general maritime law, and the owners by abandoning the ship and freight will be discharged from personal responsibility.

This was a libel on a bill of lading against the owners of the schooner Waldo.

Sewell & Howard, for libellant.

Mr. Groton, for respondent.

WARE, District Judge. This is a libel in personam founded on a bill of lading, against the master and owners of the schooner Waldo, and arising out of the same voyage as is described in the case just decided. [Case No. 17,056.] The libellant shipped on board the Waldo, Wm. C. Wyman, master, twenty-eight barrels of No. 1 Magdalen herring, and twenty barrels of potatoes, consigned to Capt. Merrill, the former master, and his assigns, for a market, he to have for freight half the profit for which the goods were sold, above the invoice price. At Key West no sales could be made, but on their arrival at Atakapas, six barrels were sold by a barter trade, for five barrels of molasses, the molasses being valued at twenty cents a gallon or six dollars a barrel. The rest were so much injured that they were unsalable at any price, and were brought back to Phipsburg, where they were found to be entirely worthless and thrown into the dock. The potatoes were wholly rotten, and the empty barrels sold at fifty-five cents each. The goods were carried on deck, and the potatoes were spoiled by exposure to wet and the frost. Magdalen herring is an article that has lately come into the market. They are dry salted, and when carried by sea are stowed with the bungs of the barrels down, or holes are bored in them, to drain off the

[1] [Reported by Edward H. Davies, Esq.]

pickle; because unless they are kept dry they are spoiled in a short time. Some evidence was introduced to show that this kind of herring is of so perishable a nature, that it will not, under any circumstances, bear a sea-voyage into a warm latitude. One witness, Capt. Webb, says that in 1839 he carried 100 barrels from Bath to Martinique; that they were carefully and well secured under deck, and on his arrival they were all found to be entirely ruined and worthless; and that the same season there were several vessels at that place with these herring, and all, without a single exception, were spoiled; and he states that he had never known any of that kind of herring arrive at the West Indies in good condition. But these were all of the fares of 1839, and it appears from the testimony of their witness and also from that of Captain Bailey, who was examined for the libellant, that the fares of 1839 were badly cured, and although they looked well were all spoiled when brought in. Captain Bailey said that he had some of the fares of 1840 which were well cured, and were found to be in good order when they arrived at a market. The fish in this case were of the fares of 1840, and it appears, therefore, that although these herring are an article of an unusually perishable character, yet when well cured, as those of 1840 were, they will with proper care in stowage bear transportation into warm countries. But for this purpose great care is required in stowing them so that they shall not only be protected from wet externally, but also so that the liquor that is evolved from the fish may drain off and leave them entirely dry. The evidence in this case is, that being carried on deck, they were for several days exposed to the water breaking over the vessel, and there does not seem to be much reason for doubt that the fatal injury they received was from this cause. If they had been properly secured under deck they might have arrived at a market in a merchantable condition.

With respect to the herring which were sold by the master and the proceeds not accounted for, my opinion, for the reasons given in the other case, is that the owners were not responsible. In the capacity of consignee he was not the agent of the owners, but of the shipper. It is only in cases where it is the known usage of the trade, that the owners can be held for his default as consignee. As to the residue of the herring and the potatoes, the strong presumption from the evidence is, that the loss arose from their exposure on deck. They were shipped by what is called a clean bill of lading, that is, it contained no other exception to the master's liability, but the usual one of the dangers of the seas; and such a bill of lading imports that the goods are stowed under deck. Curt. Merch. Seam. pp. 212, 213. The Schooner Reeside [Case No. 11,657]. If the master takes them on deck, he stands as insurer, and will not be protected by the exception of the dangers of the sea; at least, not unless he can show that they would have equally perished if they had been below deck. It would not be enough for him to show that, being a perishable article, they might have sustained the same injury; he must show that they would not have been exempted from it by being under deck. Whether in that case he would be protected, it is not necessary now to consider, as it is certain that if they had not been exposed to the frost and the wet upon deck they might have gone safely. The goods were shipped on an agreement that the master was to have, for freight, one-half the profits beyond the invoice price. This for the herring is $2.75 a barrel, to which is to be added eleven cents a barrel for inspection. This for twenty-two barrels, after deducting six which the master sold, is $62.92, and twenty barrels of potatoes at $1.06½ is $21.25. Total, $84.17.

The common law, as well as the civil law, holds the owners responsible for all the obligations of the master, contracted within the scope of his authority as master, to their full extent, whether they result from contract or tort. But, by the general maritime law of Europe, their responsibility for his obligations, arising out of his wrongful acts, is limited to the amount of their interest in the ship and freight. By abandoning these they exempt themselves from all personal liability. 3 Kent, Comm. (4th Ed.) p. 218. This principle of the general maritime law has never been received in this country as part of our customary law, but we have followed the common law of England, and hold the owners responsible for the full amount of any damage occasioned by the faults or negligence of the master or any of the crew. They are strictly held to all the severe liabilities of common carriers. But in this state, by statute in conformity with the principles of the general maritime law, their liability is restricted to their interest in the ship and freight. 'No ship-owner shall be answerable, beyond the amount of his interest in the ship and freight, for any embezzlement, loss, or destruction, by the master or mariners, of any goods or merchandise, or any property put on board of such ship or vessel, nor for any act, matter or thing, damage or forfeiture, done, occasioned, or incurred by said master or mariners, without the privity or knowledge of said owners.' Rev. St. c. 47, § 8. The statute limits the owner's responsibility 'for any embezzlement, loss, or destruction by the master or mariners, of any goods or merchandise.' The loss in this case was not occasioned immediately by any act of the master or mariners. The proximate cause of the loss was the violence of the seas. But it would not have happened in this way, but through the fault of the master in carrying the goods on deck. The reasonable construction of the statute, it appears to me, is to limit the own-

er's responsibility for losses which are occasioned by the fault or negligence of the master, as well as those which arise from direct and willful fraud. This construction of the statute brings it into harmony with the general maritime law of Europe, and is fairly within the policy and general intent of the act, though not, perhaps, within its very words.

If the decree which has just been pronounced should exhaust the whole value of the ship and freight, the respondents, by abandoning them, will be discharged from all personal responsibility. The damages in that case will not, I presume, absorb the whole fund; but if it should, the owners will be entitled to show the fact, and then no execution can be issued against them personally.

STITZER (DAVIS v.). See Case No. 3,654.

Case No. 13,461.

STOBAUGH v. MILLS et al.

[8 N. B. R. 361;[1] 5 Chi. Leg. News, 526; 2 Am. Law Rec. 666; 5 Leg. Op. 139.]

District Court, D. Texas. 1873.

BANKRUPTCY — ILLEGAL PREFERENCE — INTENT — KNOWLEDGE OF BANKRUPT'S INSOLVENCY — DEED OF ASSIGNMENT.

1. To establish an intent to prefer a creditor, it is sufficient for the assignee to show that the bankrupt, while insolvent, paid or secured this creditor in full without making adequate provisions for the other creditors, and this will place upon the defendant the onus of satisfying the court, that at the time of making the transfer or payment the bankrupt did not know he was insolvent.

2. It is sufficient proof that the creditor had reasonable cause to believe that the debtor intended to prefer him to show that at the time of receiving the preference he had reasonable cause to believe the debtor insolvent, and that the debtor knew of his insolvency.

3. A deed of assignment by A to B and C, within four months prior to commencement of proceedings in bankruptcy, of all of A's property in trust, to pay first the debts of B, C and D in full, and to apply the balance pro rata upon the debts of the other creditors, and the amount turned over being insufficient to pay all in full, is void on its face, and a palpable and manifest attempt to prefer B, C and D, and to evade the provisions of the bankrupt act.

[This was a bill in equity by A. G. Stobaugh, assignee, against J. J. Mills and Thomas L. Fitch, trustees. Heard upon bill, answer, and exhibits.]

DUVAL, District Judge. Levy & Bro., filed their petition praying to be adjudged bankrupts, on the 12th of September, 1868, and were adjudicated bankrupts on the 26th of October, 1868. Complainant, as the assignee of said bankrupts, filed his bill in equity, in this court, on the 24th of March, 1871, seeking to set aside a deed of assignment made by the said bankrupts to the defendants, on the 22d day of May, 1868, as being fraudulent, and to recover the property thereby conveyed to defendants as trustees, &c. At the date of the assignment, the defendant, Mills, and his wife, were creditors of bankrupts to the amount of about two thousand dollars, and the defendant, Fitch, to about one thousand dollars, and as such creditors they accepted the trust. The bankrupts were merchants, and by the terms of the deed of assignment (which was joint and several, as well as irrevocable) they conveyed to the said defendants, all their goods, wares and merchandise, chattels, notes, bills, bonds, judgments, evidences of debt, securities and vouchers, for and affecting the payment of money, claims, demands, things in action, and all property of any nature whatsoever; all of which the defendants seem to have received in their possession as trustees aforesaid. The deed of assignment further provides that the debts due from bankrupts to defendants and one R. Walden should be paid in full—that certain other debts therein mentioned, should then be paid off and discharged, if there were sufficient funds for that purpose, and if not, they were to be paid pro rata, &c. The bill specifically alleges, among other things, that within less than four months before the filing of the petition of Levy & Bro., in bankruptcy, to wit: on the 22d of May, 1868, they being then in failing circumstances, and contemplating bankruptcy, and being insolvent, made the said deed of assignment, and, among other assets, delivered to said defendants, as trustees aforesaid, goods, wares and merchandise, then on hand, to the value of three thousand nine hundred and fifty-nine dollars and twenty-seven cents, as appears from a schedule thereof, made a part of the bill. It is further alleged in the bill that the defendants knew Levy & Bro. were insolvent at the time of the assignment, and contemplated bankruptcy, and that they combined and confederated with said Levy & Bro., and fraudulently procured the making of the same, in order that said defendants might receive a preference of payment over other creditors of said bankrupts.

The defendant, Fitch, failing to answer the bill, a decree pro confesso has been taken against him, and at this term leave to enter a final decree as to him has been prayed and granted. The defendant, Mills, filed his answer on the 3d of July, 1872. He denies any knowledge of the bankrupts contemplating bankruptcy at the time of the assignment, or that the making of the same was fraudulently procured by the trustees, who only received the same for the purpose of securing their own legal and honest debts—denies that he took or intended to take any fraudulent preference over other creditors—denies that trustees applied any assets of the bankrupt estate to the payment of their own debts in full, but admits that about one thousand five hundred and sixteen dollars worth of goods

[1] [Reprinted from 8 N. B. R. 361, by permission.]

was turned over to him, Mills, under a judgment of the district court, of Johnson county, at the fall term of 1868—denies that any demand for the goods, &c., or for any account thereof was made of him by complainant, but admits that there was of his co-trustee, Fitch, in the month of ——, 1869. The charge of insolvency on the part of Levy & Bro., at the time of the assignment, and the knowledge thereof by defendants, is not denied. They only deny any knowledge of a contemplation of bankruptcy. Admits that he and his co-trustee took possession of a bill of merchandise, amounting to about three thousand nine hundred and fifty-nine dollars and twenty-seven cents, but avers that the same were returned to the possession of Levy & Bro., after the deed of assignment was made, and before Levy & Bro., went into bankruptcy, who sold the most of them, &c.

The cause is now heard and tried upon bill, answer and exhibits. The admission contained in the answer, shows its falsity or inaccuracy in some respects; thus, while denying notice of the filing of the petition in bankruptcy until he learned through Messrs. Robertson & Herndon, in the early part of the year 1871, he admits that complainant, as assignee of the bankrupts, demanded the goods of his co-trustee in the month of ——, 1869. Now the filing of the petitions in bankruptcy in September, 1868, was constructive notice to the defendants of that fact, and a demand of the goods by the assignee in 1869, upon Fitch, was in law a demand on the defendant Mills. Again, while averring that all the goods, &c., were turned over to Levy & Bro. before September 12th, 1868, the answer admits, in another part, that six hundred dollars worth were turned over to complainant, as assignee, in 1869. The act of one joint and several trustee is the act of both. If the trustees, as alleged in the answer, returned the bill of goods amounting to three thousand nine hundred and fifty-nine dollars and twenty-seven cents to Levy & Bro., such a return was wholly inconsistent with the assignment, and the purposes for which the defendants undertook the trust. It would of itself be a very suspicious act, and in any event could not relieve the defendants from the legal effect of the trust deed. Upon the face of the answer it is, in some material respects, vague, evasive and contradictory, and not responsive to the allegations of the bill. Now, as to the legal effect of the assignment itself, it shows by its very terms that the bankrupts were then insolvent. They were merchants and unable to pay their debts in the ordinary course of business. This is the avowed cause prompting them to make the assignment. And when, in addition to this fact, we find by reference to their schedules, made exhibits herein, and filed in the bankrupt court, that the bankrupts were then indebted to over twenty thousand dollars, there can be no question as to their utter insolvency. That the defendants not only had reasonable cause to believe Levy & Bro. to be then insolvent, but that in the very nature of things they must have known it, there can hardly be a question. The deed of trust itself, with its admissions as to the inability of the bankrupts to meet their debts, was sufficient notice of the fact to the defendants who were themselves creditors. That the deed of assignment gave the defendants a preference over other creditors is equally free from doubt.

In the case of Toof v. Martin [13 Wall. (80 U. S.) 40], the supreme court of the United States, says: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that at the time he was ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy." No such proof was made or attempted in this case. Moreover, it is evident that the assignment in this case was made out of the usual and ordinary course of business of the bankrupts, and by the thirty-fifth section of the bankrupt act, this is made prima facie a case of fraud upon that act.

From the evidence before me it is clear to my mind: First. That at the time of the assignment to the defendants by Levy & Bro., the latter were insolvent. Second. That the assignment was made with a view (among other things) to give a preference to the defendants as creditors. Third. That the defendants knew, or had reasonable cause to believe, the bankrupts were insolvent at the time. Fourth. That the assignment was made in fraud of the provisions of the bankrupt act. These conclusions being reached, it follows that the deed of assignment was void, and must be set aside—that the said defendants being cognizant of the fraud, and having thereby a preference over other creditors ought not to be allowed to prove their debts or share in the dividends of the estate of the bankrupts. And that the complainant is entitled to have a decree for all such sums as were received or collected by said defendants out of the assets of the bankrupts under or by virtue of said assignment (less the amounts the said defendants may have paid over to said complainant) together with legal interest on such sums from the time the complainant demanded the goods, also that defendants are entitled to, and should be allowed, such reasonable expenses as they may have sustained in the sale of said goods. There is some difficulty in ascertaining the precise amount that defendants did receive

under the deed of assignment, but there is no doubt, I think, on the answer of Mills, that they did receive goods, wares and merchandise amounting to three thousand nine hundred and fifty-nine dollars and twenty-seven cents. This shows that in 1869, goods to the value of six hundred dollars were delivered to complainant, and complainant avers that the expenses of defendants on the sale of said goods were reasonably worth four hundred and fifty dollars. Adding these two sums together they make one thousand and fifty dollars, which should be deducted from three thousand nine hundred and fifty-nine dollars and twenty-seven cents, leaving, certainly, on January the 1st, 1870, two thousand nine hundred and nine dollars and twenty-seven cents. To this sum add the legal interest at eight per cent. from demand made (say January 1st, 1870) to May 16th, 1872, amounting to seven hundred and eighty-three dollars and fifty cents, and it will make a total of three thousand six hundred and ninety-two dollars and seventy-seven cents, for which the complainant should have a judgment. There were other sums claimed in the bill, to wit: An order on the treasurer of Johnson county for four hundred and five dollars, and accounts amounting to three hundred and fifty-five dollars and fifty-five cents, but which have not been satisfactorily proven to have been collected by defendants, nor have the two items of goods alleged to have been shipped to defendants, one for five hundred dollars, and the other for one thousand six hundred dollars.

Inasmuch as Mills and Fitch were made joint trustees, and decree final has been taken against the latter, and the cause has been fully argued and considered upon the bill, answer and exhibits in the case of Mills, it is ordered that the same decree final be entered in the cause as to both defendants, and that they be held and bound liable, jointly and severally, for the sum above stated, and final decree entered therefor in behalf of complainant. And it is ordered, adjudged and decreed accordingly.

Case No. 13,462.

STOCKDALE v. ATLANTIC INS. CO.

[See 20 Wall. (87 U. S.) 323.]

STOCKDALE (BORNIO v.). See Case No. 1,662

STOCKDALE (HOME MUT. INS. CO. v.). See Case No. 6,662.

STOCKDALE (WALKER v.). See Case No. 17,088.

STOCKHOLDERS (WILBUR v.). See Case No. 17,636.

STOCKTON (BELTZHOOVER v.). See Case No. 1,283.

STOCKTON (BISHOP v.). See Case No. 1,440.

STOCKTON (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,599.

STOCKTON v. KENDALL. See Case No. 15,518.

STOCKTON (LOWE v.). See Case No. 8,567.

STOCKTON (SALTONSTALL v.). See Case No. 12,271.

Case No. 13,463.

STOCKTON v. THROGMORTON.

[1 Baldw. 148.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

BAIL—JUSTIFICATION—SURRENDER OF PRINCIPAL.

1. Bail to the sheriff entered special bail; on being excepted to he refused to justify, whereupon he was sued on the bail bond; he surrendered the principal before the return of the writ. *Held*, that the surrender was good, and the bail entitled to relief on the usual terms.

2. No justification of bail is necessary where it is entered for the purpose of making a surrender.

Mr. Joseph R. Ingersoll, for plaintiff.

The whole proceeding is irregular. When special bail is entered after the expiration of the six weeks after the return of the writ, notice must be given though the bail is unexceptionable. Here special bail was entered after an exception, and without notice, which was a fraud on the plaintiff. This court has decided that in such case they will not give an exoneretur on the bail piece on a surrender so made, or grant relief on a suit on the bail bond; and that bail can have no relief unless they justify and perfect bail after an exception. Bobyshall v. Oppenheimer [Cases Nos. 1,589, 1,590]. A surrender by surreptitious bail is not good. 2 W. Bl. 1179, 1180.

Mr. Chauncey, for the bail.

As the plaintiff has lost neither a trial or a term, and the defendant is in custody, he has all the benefits of bail perfected, and the bail to the marshal has performed all he undertook to do by the condition of the bail bond. By the practice of the king's bench, bail to the sheriff may surrender after an exception, unless his name has been stricken from the bail piece. In the common pleas he is no longer bail after an exception—fresh bail must be put in; but any person may enter bail to make a surrender, and need not justify though the bail came from Newgate. Petersd. Bail, 234, 235, s. p. 2 W. Bl. 1179. As a universal rule, surrender is equivalent to perfecting bail, and gives the same right to relief on the bail bond suit. 1 Chit. 445; Tidd, Prac. 275; 3 Maule & S. 283; 4 Taunt.

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

669. The same rule prevails in New York. Ex parte Metzler, 5 Cow. 287. The bail bond never stands as a security where the plaintiff is put in as good a situation as if there had been no delay in entering bail. 1 Har. Dig. 175, and cases there cited; Cowp. 71. Such is the rule in this state. 2 Yeates, 387; 4 Bin. 344; 2 Serg. & R. 284. It is a security only where the plaintiff has lost a trial. 5 Serg. & R. 50; 1 Sell. Prac. 167, 182; 1 Tidd, Prac. 222, 245, 249; 2 H. Bl. 235; 4 Durn. & E. [4 Term. R.] 352. The decision of this court in Bobyshall v. Oppenheimer was founded on a rule supposed to be laid down in Harrison v. Davies, 5 Burrows, 2683, "that nothing can be a performance of the bail bond but putting in and perfecting bail." Vide Bobyshall v. Oppenheimer [supra]. Judge Washington was misled by elementary writers, who have interpolated the words "and perfecting:" which are not in the case in Burrows. There is a sound reason for the distinction. When bail is to remain as a security, it must be perfected; where it is entered only for the purpose of a surrender, it is immaterial who it is.

BALDWIN, Circuit Justice. In this case a writ issued on the 29th of July, 1829, returnable to October term; a declaration was filed on the 30th of July; the defendant was arrested and gave bond, with Thomas Butler as security, to the marshal, on the 12th of October; Butler entered special bail on the 23d of November; exceptions were filed on the 24th of November; bail did not justify; the bail bond was assigned to the plaintiff on the 16th of March, 1830; and sued on the 17th; Butler entered bail anew on the 29th of March, and surrendered the principal on the 1st of April on a bail piece.

The costs on the bail bond suit have been paid. The defendant offered to plead to issue, and try at the present term. Mr. Ingersoll now moves for judgment on the bail bond suit; and Mr. Chauncey, on behalf of the bail, to stay proceedings.

In support of his motion the plaintiff relies on the case of Bobyshall v. Oppenheimer [supra], in this court, which was an action brought to April term, 1822, bail given and the bond filed to October term, when an ineffectual attempt was made to release the bail and dismiss the suit. At April term following, another motion was made to stay proceedings, which was refused, whereupon the defendant pleaded comperuit ad diem; plaintiff replied nul tiel record, on which judgment was rendered, on an inspection of the record, for the plaintiff. Bobyshall v. Oppenheimer. This case, therefore, is no authority to support a motion for judgment, made on the return of a suit on the bail bond. The defendant has a right to plead to this suit, though the bond is forfeited, even if we should refuse to stay proceedings on his motion.

It is a well settled rule, that where a bail bond is forfeited, assigned and sued, the bail will be relieved on paying costs in the bail bond suit, and entering and perfecting special bail in the original action, where the plaintiff has not lost a trial, and on a surrender of the principal is entitled to have an exoneretur on the bail piece. Had the bail justified in this case, or fresh bail been entered and perfected, there is no doubt that a surrender on the 1st of April would have entitled the bail to the relief asked for, as the plaintiff might have had a trial at this term, which is the first at which the original action could have been tried. The only question in this case is, whether the surrender, having been made by bail who refused to justify, and afterwards enter bail anew, has any effect on the plaintiff's action on the bail bond.

There is no doubt as to the principal that the surrender is good; he cannot object to the sufficiency or want of justification of bail. As to all the substantial objects of bail, then, the plaintiff has all that he is entitled to—the body of the principal in prison. It cannot affect his rights, whether the surrender was made by sufficient or insufficient bail; that could be important to him when the recognizance of bail was to remain as a security, a substitute for the body of the principal. In such a case there is no doubt that the bail must justify, or the plaintiff may proceed on his bail bond, as if none had been entered; but when bail is entered for the purpose of making a surrender, and not as a security, there would seem to be no good reason for holding the surrender void. It comes within the principle on which bail is relieved: the exigency of the writ is answered, and we should think ourselves authorized to grant the motion made on behalf of the bail, unless it should appear that the law is clearly otherwise. In Harrison v. Davies, 5 Burrows, 2683, the original defendant had been arrested, given a bail bond, and surrendered himself to the sheriff, before the return of the writ. The court refused to stay proceedings on the bail bond, declaring "that nothing can be a performance of the condition of the bail bond but putting in bail." The sheriff is not bound to give up a bail bond, on a voluntary surrender of the defendant before the return of the writ; it is optional with him to accept the surrender or not: if he does, the bail bond is discharged (1 East, 390; 6 Durn. & E. [6 Term R.] 753; 7 Durn. & E. [7 Term R.] 122; Bobyshall v. Oppenheimer); if not, it remains in force till the entry of special bail, and this is all that was decided in Harrison v. Davies. It does not negative the acknowledged right to enter bail, and make a surrender even before the return of the writ—in which case the sheriff must cancel the bail bond. In Orton v. Vincent, 1 Cowp. 71, the only point decided was, that where a judg-

ment might have been had against the original defendant in his lifetime, but who was dead before the motion to stay proceedings on the bail bond, the court would not relieve the bail. In Bobyshall v. Oppenheimer, the first application to relieve the bail, and dismiss the suit with costs, was on the ground of the original defendant having been discharged by the insolvent law of a state after the return of the writ on a suit on the bail bond; special bail had been put in, but on exception filed, refused to justify. The defendant, in the original action, offered to confess judgment, which the court held a sufficient answer to the objection arising from the loss of a trial; but said it was necessary to put in sufficient bail to entitle the parties to a stay of proceedings on the bail bond suit, as a discharge under the insolvent act, after an assignment of the bail bond, could not affect the plaintiff's rights against the bail. The motion was renewed at the subsequent term, on offering payment of costs and confession of judgment by the principal; special bail had not been entered, and there was no surrender. The court considered it as an application by appearance bail, without a legal appearance of the principal, refused to discharge the principal on the ground of his discharge as an insolvent, and overruled the motion. Bobyshall v. Oppenheimer. The cases cited by Judge Washington from 1 East and 6 and 7 Durn. & E. [6 and 7 Term R.], are all where the principal was surrendered before the return of the writ. The points decided in that case have no bearing on the present; we must take the reasoning of the court as applicable to the subject before them, and thus far it meets our entire concurrence; but we cannot consider it as an authority, that bail can in no case be relieved by a surrender of the principal, unless they have justified after exception. Judge Washington adopts a rule, supposed to be laid down by Lord Mansfield in the case of Harrison v. Davies, that bail must be put in, and perfected—Lord Mansfield's words are "putting in bail;" the words "and perfecting," is a gratuitous interpolation by elementary writers, adopted in some later cases, and thus misleading the judge. Without this addition to Lord Mansfield's opinion, it would not have come in collision with the motion now made in behalf of the bail. We shall follow our predecessors, in adopting this opinion as our guide in this case, but omit the interpolation; in doing so, we shall likewise follow other adjudged cases, which are in perfect accordance with the ground taken by the counsel of the bail.

It was settled by the four judges and three secondaries, 2 W. Bl. 758, that no justification is necessary by bail who immediately surrender their principal, notwithstanding such bail may have been excepted against: the same principle was adopted in Mitchell v. Morriss, 2 W. Bl. 1179; and in Jackson v. Trinder, Id. 1180, it was decided that an attorney, though not allowed to justify, might surrender. In French v. Knowles, a surrender made by bail put in after a judge's order, for time to put in and perfect bail, was held good, and the court say that the worth and substance of the bail, who by the surrender are discharged, is totally immaterial, though there was no justification. Barnes' Notes Cas. 111. So where the surrender is made by bail without justifying, after the expiration of time allowed to justify, and after the assignment of the bail bond. So where the surrender is made by bail who have been rejected, unless their names have been stricken from the bail-piece. 2 Saund. 61c, note; 5 Durn. & E. [5 Term R.] 401, 534; 7 Durn. & E. [7 Term R.] 297. In late cases in king's bench and common pleas, it has been decided that a surrender is equivalent to perfecting bail. 4 Taunt. 669; 3 Maule & S. 283. It has been repeatedly decided in the supreme court of Pennsylvania (4 Bin. 344; 2 Serg. & R. 284; 5 Serg. & R. 50; 2 Yeates, 387) that proceedings will be staid on a bail bond suit, where the plaintiff has all the advantage he would have had if bail had been entered at the regular time; the reason and principle of these decisions seem to cover the whole of this case, for by the surrender the plaintiff has all the advantage of perfected bail. It is believed that there is no case when the bail had been refused relief on the bail bond, where special bail has been entered and a surrender made before the plaintiff has lost a trial, or could have had a judgment against the principal. When bail has been entered for the purpose of making a surrender, it appears never to have been held necessary to justify; this seems to have been required only where bail was entered as a security for the appearance of the principal. Believing this to be the established law of bail, it is our opinion that the bail in this case is clearly entitled to relief on the terms offered; we accordingly overrule the plaintiff's motion, and direct proceedings on the bail bond suit to be staid, on complying with the terms offered.

Case No. 13,464.

In re STOCKWELL et al.

[9 Ben. 265;[1] 18 N. B. R. 144.]

District Court, N. D. New York. Nov., 1877.

BANKRUPTCY—EXECUTION—LIEN—ASSIGNEE.

An execution against a bankrupt was delivered to a sheriff prior to the filing of the petition in bankruptcy. The assignee in bankruptcy took possession of the bankrupt's property before the return day of the execution. The execution creditor, before such return day, prov-

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

ed his claim in bankruptcy as a claim secured by a lien as thus arising. On t : application of such creditor the assignee was ordered to pay, out of the proceeds of the property which he had sold, the amount of the execution, with interest.

[Cited in Crane v. Penny, 2 Fed. 189.]

[In the matter of Miles W. Stockwell and others, bankrupts.]

WALLACE, District Judge. The claimants, having delivered an execution against the bankrupts to the sheriff of Niagara county prior to the filing of the petition in bankruptcy, and the sheriff having failed to make an actual levy, now ask that the assignee pay the amount of the execution out of the funds in his hands, he having taken possession of the bankrupts' property before the return day of the execution, and the claimants, before such return day, having proved the claim as secured by a lien, by virtue of the delivery of the execution to the sheriff.

At the time the claimants proved their judgment they had a valid lien upon the bankrupts' property. That lien was acquired by the delivery of the execution to the sheriff, and an actual levy was not essential to its existence as against an assignee in bankruptcy. The claimants had two remedies: they could have directed the property to be seized under a levy and sold to satisfy their lien, or they had the right to prove the claim as a secured debt. If they had taken the former course, they might have been restrained by this court upon the application of the assignee. If they had not been so restrained, they would have been regular and protected. They were not bound to pursue the property and take it from the possession of the assignee, and they adopted the more seemly course of acquiescing in the assignee's action in taking possession of the property, and of treating their claim as one which the assignee should satisfy out of the proceeds of the property. The assignee sold the property and sufficient funds arose to pay the lien.

The assignee now contends that, inasmuch as an actual levy was not made before the return day of the execution, the lien ceased to exist; and such is doubtless the law. Smith v. Smith, 60 N. Y. 161; Hathaway v. Howell, 54 N. Y. 97. But it did not cease to exist until the return day. It existed when the claim was proved. The claimants have not lost their lien because they elected to prove their claim. If it existed when they proved, this court will recognize and enforce it, and will not hear the assignee complain because they did not proceed to seize the property and take it from his possession.

This case is similar in its facts to In re Weeks [Case No. 17,350], where the same conclusion was reached as here.

It is ordered that the assignee pay the amount of the claimants' execution, with interest.

Case No. 13,465.

STOCKWELL v. KEMP et al.

HUFFMAN v. SAME.

[4 McLean, 80.] [1]

Circuit Court, D. Indiana. May Term, 1846.

EXECUTION—REPLEVIN BOND—SALE OF LAND—VALUATION LAWS.

1. Securities on a replevin bond are entitled to have their land sold, under the law in force at the date of the bond.

2. A sale on other principles will be set aside on motion.

[These were bills by Michael Stockwell and Benjamin Huffman against Kemp and Buchey. Heard on motion to set aside a sale.]

Mr. Smith, for plaintiffs.

Mr. Bright, for defendants.

McLEAN, Circuit Justice. Motions are made in both of these cases resting upon the same facts. On the 21st of November, 1842, Kemp and Buchey recovered a judgment in this court against John Sims, for two thousand four hundred and seventeen dollars and seventy-eight cents, and costs; and on the 21st of January, 1843, the above plaintiffs executed a replevin bond to stay the execution of the judgment. Before the stay had expired, John Sims, the judgment defendant, died; after which execution was issued against the plaintiffs on the replevin bond, which, under the statute of Indiana, has the force and effect of a judgment. The execution was levied on the real estate of the plaintiffs, which was appraised, in the first instance, under the statute, but was afterward sold by order of the plaintiffs in the execution, without the consent of the defendants, and in disregard of the appraisement. The sale has been returned, and a motion is now made to set it aside.

The ground relied on is, that the lands levied upon can only be sold on the appraisement or valuation laws of the state of Indiana, in force at the date of the replevin bond. These laws require real estate to sell for two-thirds of its appraised value. Acts 1842, p. 64.

The motion must be sustained, and the sale will be set aside. The replevin bond was a contract, by which the plaintiffs in the motion became bound,—an instrument authorized by the statute, and to which the effect of a judgment was imparted. The liability of the defendants in the execution arises wholly under this bond, and no reference can be had, to the original instrument on which the first judgment was obtained. This being a statutory bond, the liability under it, must be enforced conformably to the laws then in force; whilst the stringent provision of the act, making this bond a judgment, other acts in pari materia, which are in some

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

degree favorable to the execution defendants, must also be applied. The sale on the execution, by the marshal, is set aside.

Case No. 13,466.

STOCKWELL et al. v. UNITED STATES.

[3 Cliff. 284;[1] 12 Int. Rev. Rec. 88.]

Circuit Court, D. Maine. April Term, 1870.[2]

CUSTOMS DUTIES — MANUFACTURES OF WOOD — SHINGLES — RECIPROCITY TREATY WITH CANADA — PENALTIES AND FORFEITURES — CONCEALING AND IMPORTING — WARRANT TO TAKE POSSESSION OF BOOKS — AFFIDAVIT — POWER OF DISTRICT JUDGE — DEFECT IN ALLEGATIONS — EXCEPTIONS — DEPOSITION — ADMISSIBILITY.

1. Although the act of March 2, 1861 [12 Stat. 192], does not enumerate shingles sawed, rived, or shaved, section 22 of the act provides that a duty of thirty per cent shall be collected on manufactures of wood, or of which wood is the chief component part, if imported from a foreign country, and not otherwise provided for, and the act of July 14, 1862 [Id. 557], provides for five per cent ad valorem additional. *Held*, that shingles were within the said provisions of the revenue laws, and were not exempted by the reciprocity treaty with Canada, whence the importations were made.

[Cited in Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 535; Erhardt v. Hahn, 5 C. C. A. 99, 55 Fed. 275.]

2. Debt is the proper form of action for the recovery of the penalties sued for in this case.

3. All penalties and forfeitures incurred in consequence of the act under which this suit is brought may be sued for and collected as prescribed by the act to regulate the collection of duties on imports and tonnage. 3 Stat. 732, § 5; 1 Stat. 695.

4. Whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration.

5. Recovery for the duties and double values may be had in the same case.

6. Import duties are levied by act of congress, and when the goods are imported without paying or accounting for them, the liability is complete for the illegal importation.

7. The liability for receiving, concealing, or buying is founded upon a distinct act from that of illegally importing. An agent or a consignee may be liable for both, and the two counts may be joined.

8. The judge of the district court has power, when it appears by complaint or affidavit to his satisfaction that a fraud on the revenue has been committed by any person intrusted with or concerned in the importation or entry of goods, to issue his warrant to the marshal requiring him to enter a place or premises where any invoices, books, or papers relating to the merchandise are deposited, in respect to which the fraud is alleged to have been committed, to take possession of such books and produce them before the judge.

[Cited in Re Jordan, Case No. 7,512; Re Platt, Id. 11,212; U. S. v. Three Tons of Coal, Id. 16,515; U. S. v. Shapleigh, 54 Fed. 132.]

9. It is not necessary that a complaint or affidavit should accompany the warrant. If the court is satisfied that the fraud upon the revenue has been committed, the warrant will be granted. The granting or refusing the warrant is a judicial act, and the complaint or affidavit is not necessary to be introduced where it appears, by the recitals of the warrant, that it was shown by complaint and affidavit to the satisfaction of the court that the alleged frauds on the revenue had been committed.

10. Where the warrant described the alleged frauds to be that defendants had at certain times committed frauds on the revenue by importing large quantities of shingles subject to duty by law, into the port of Bangor and other ports in the district, without paying or accounting for the duty to which the same were liable, it was *held* that the description was made with sufficient particularity.

11. It was *held* that shingles described in the warrant as the "growth and manufacture" of the provinces of Canada, were so described as to make their importation without paying duty a fraud on the revenue.

12. It is a defect in the warrant not to allege that the district judge became satisfied, by complaint and affidavit, that the alleged frauds on the revenue had been committed. This, however, could not avail the defendants in this case: (1) Because they did not at the trial except to the ruling of the court, admitting books, documents, etc. upon that ground; (2) because the books, etc. were properly admitted, even if the search-warrant were illegal.

13. Exceptions to the ruling of a court in admitting evidence should be sufficiently specific to enable it to understand the precise ground upon which the objection is based.

14. All that appeared in this case was, that when the books, etc. were offered in evidence, the defendants objected that the court was not authorized to issue, or the marshal to serve, the warrant in question, and that the district attorney could not put them in evidence, because obtained by that warrant. *Held*, that the objections were not sufficiently explicit to avail the defendants at this hearing.

[Cited in Kimball v. Weld, Case No. 7,776.]

15. The district judge could put the papers seized under the warrant in this case into the hands of the district attorney.

16. It was objected that the books, etc. were not in themselves legal evidence. *Held*, that as the same were not set forth in the bill of exceptions, nor in any way made part of it, the presumption was that the ruling of the district judge was correct, and the point was not open for examination.

[Cited in U. S. v. Hughes, Case No. 15,417; U. S. v. Three Tons of Coal, Id. 16,515.]

17. The objections were taken to the admissibility of a deposition: (1) That it did not appear that the magistrate had examined the deponent; (2) that it did not appear that the magistrate had reduced, or caused to be reduced, to writing the deponent's answers; (3) that it did not appear that the magistrate had reduced, or caused to be reduced, to writing the answers of deponent in his presence. The return stated that (1) "an examination on oath of the deponent was had before me." (2) Cross and direct interrogatories accompanied the commission, and the magistrate's return was, "the following are the answers," to the direct and cross interrogatories, and also that "the signatures of the deponent affixed to this deposition are in his handwriting, and made in my presence." *Held*, that as the magistrate was to permit no person other than a clerk to be present at the examination except himself and the deponent, and as it did not appear that a clerk was appointed, the presumption was that no one was present but the deponent and the magistrate, and, if not, then either the magistrate or the deponent must be presumed to have written the answers, and, if by either, the first and second objections failed.

---

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

[2] [Affirming Case No. 16,406. Judgment of circuit court affirmed in 13 Wall. (80 U. S.) 531.]

(3) The fact that the signatures affixed were those of the deponent and made in the presence of the magistrate is an answer to the third objection.

18. One cannot claim property or the avails of it through the fraudulent acts of another without being affected by the act, especially if a partner, the same as if the act were his own.

19. Partners are liable in solido for the tort of one of their number, if the tort was committed by him as a partner, and in the course of the partnership business.

[Error to the district court of the United States for the district of Maine.]

This was an action of debt by the United States to recover certain duties and penalties for the alleged illegal importation of shingles into the port of Bangor, in the district of Maine. The suit was brought in the district court, where the jury returned a verdict for the plaintiffs. [Case No. 16,406.] Thereupon, after the judgment, the defendants [David R. Stockwell and others] excepted, and by writ of error removed the cause to the circuit court. Large quantities of shingles, it was alleged, were imported into the port of Bangor by certain persons unknown, without paying the duties, and that the same were then and there unladen and delivered in violation of the provisions of the revenue laws; and the charge in the first eight counts of the writ was that the shingles were then and there received, concealed, and bought by the defendants. Founded on that and other charges, as set forth in the other counts, the United States sued the defendants in a plea of debt, the writ containing twenty-three counts. Seven of the counts—to wit, from the ninth to the fifteenth inclusive—alleged that the goods as imported were subject to duty, and that the defendants did then and there knowingly attempt to make, and did knowingly make, an entry of said goods by means of a false invoice; and the remaining counts—to wit, from the sixteenth to the twenty-third inclusive—were counts for the unpaid duties, in which it was alleged that the defendants or their agents imported the goods without paying or accounting for the duties. Service was made upon all the defendants named in the writ, but the death of Leeman Stockwell was suggested at the first term, and the other defendants appeared and pleaded the general issue, and upon that issue the parties subsequently went to trial. Double the value of the goods was claimed in the first eight counts, and the jury found for the plaintiffs upon all those counts except the seventh, upon which their verdict was for the defendants; and they also found for the defendants upon all of the seven counts constituting the second set, in which it was alleged that the defendants knowingly attempted to make and made entries of the respective importations by means of false invoices. Separate claims for the unpaid duties of the respective importations were made in the third set of counts, and upon those, except the twenty-second, the jury found for the plaintiffs; but they found for the defendants upon the twenty-second count, which had respect to the same importation as the seventh count in the first set.

Prayers for instructions were presented by the defendants in substance and effect as follows: (1) That the first eight counts were bad, because they did not sufficiently aver the primary element of the charge that the shingles were in fact illegally imported. (2) That both the first and third set of counts were bad, because they did not so describe the shingles as to show that they were subject of duty. (3) That shingles imported from the adjacent provinces at the date of the importations in question were not subject to duty; that they were entitled at that time to be admitted to entry free of duty, under the reciprocity treaty with Great Britain, though manufactured in part, if something remained to be done to complete the manufacture, as if the shingles were shaved but not jointed, as explained in the record. (4) That a civil action will not lie to recover the double values, and that the plaintiff could not recover in this action both the double values and the duties.

Richard H. Dana, Jr., for plaintiffs in error.
Nathan Webb, for the United States.

CLIFFORD, Circuit Justice. Brought here as the record is by writ of error to the district court to revise certain rulings of that court, and the judgment in the case, it will only be necessary to refer to such portions of the pleadings and evidence as are material to the questions presented for re-examination in the bill of exceptions. Goods brought from any foreign port or place are forbidden to be unladen and delivered before the duties are paid or secured to be paid, and the further provision is that persons who receive, conceal, or buy any goods knowing them to have been illegally imported, and liable to seizure, shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods so received, concealed, or purchased. 11 Stat. 665; 3 Stat. 782. Large quantities of shingles, it is alleged, were imported into the port of Bangor by certain persons unknown without paying the duties, and that the same were then and there unladen and delivered in violation of that and other provisions of the revenue laws; and the charge in the first eight counts of the writ is that the shingles were then and there received, concealed, and bought by the defendants. Founded on that and other charges as set forth in the other counts, the United States sued the defendants in a plea of debt, the writ containing twenty-three counts. Seven of the counts, to wit, from the ninth to the fifteenth inclusive, allege that the goods as imported were subject to duty, and that the defendants did then and there knowingly attempt to

make, and did knowingly make, an entry of said goods by means of a false invoice; and the remaining counts, to wit, from the sixteenth to the twenty-third inclusive, are counts for the unpaid duties, in which it is alleged that the defendants or their agents imported the goods without paying or accounting for the duties. Service was made upon all the defendants named in the writ; but the death of Leeman Stockwell was suggested at the first term, and the other defendants appeared and pleaded the general issue; and upon that issue the parties subsequently went to trial. Double the value of the goods is claimed in the first eight counts; and the jury found for the plaintiffs upon all those counts, except the seventh, upon which their verdict was for the defendants; and they also found for the defendants upon all of the seven counts constituting the second set, in which it is alleged that the defendants knowingly attempted to make, and made, entries of the respective importations by means of false invoices. Separate claims for the unpaid duties of the respective importations are made in the third set of counts; and upon those, except the twenty-second, the jury found for the plaintiffs, but they found for the defendants upon the twenty-second count, which has respect to the same importation as the seventh count in the first set. Judgment was for the plaintiffs; and the defendants excepted and sued out this writ of error:

1. Shingles, whether sawed or rived and shaved, are not enumerated in the act of the 2d of March, 1861, as an article of importation subject to duty; but the twenty-second section of the act provides that there shall be levied, collected, and paid "on manufactures of wood, or of which wood is the chief component part," if imported from foreign countries and "not otherwise provided for," a duty of thirty per centum; and the thirteenth section of the act of the 14th of July, 1862, added five per centum ad valorem in addition to the duties imposed by the prior act. 12 Stat. 192; Id. 557. Prayers for instruction were presented by the defendants in substance and effect as follows: (1) That the first eight counts were bad, because they do not sufficiently aver the primary element of the charge, that the shingles were in fact illegally imported. (2) That both the first and third set of counts were bad, because they do not so describe the shingles as to show that they were subject to duty (3) That shingles imported from the adjacent provinces, at the date of the importations in question, were not subject to duty; that they were entitled at that time to be admitted to entry free of duty, under the reciprocity treaty with Great Britain, though manufactured in part, if something remained to be done to complete the manufacture, as if the shingles were shaved, but not jointed, as explained in the record. (4) That a civil action will not lie to recover the double values. and that the plaintiff cannot recover in this action both the double values and the duties.

Responsive to the first request, the instruction given by the court was that if the facts set forth in the counts were proved, the allegations were sufficient to entitle the plaintiff to a verdict; and the court here entirely concurs in that instruction, as the respective counts allege that the goods, being by law subject to the payment of duties, were on a certain day imported and brought from some foreign port or place, naming the port, by a certain vessel, giving the name thereof, into this district, naming the port, by persons unknown, without paying or accounting for the duties to which said goods were then by law so subject. Particular reference to the provision levying the duties, and enacting the prohibition, and imposing the penalty, is never necessary even in an indictment. as the federal courts take judicial knowledge of the revenue laws imposing duties and providing for their collection. Most of the remarks made to show that the first prayer for instruction was properly refused apply with equal force as an answer to the objections taken to the refusal of the court to grant the second prayer. Nothing further need be added to show that the action of the court was correct, except to say that the counts respectively aver that the goods were imported without paying or accounting for the duties to which they were by law subject. They are described as shingles, and not as manufactures of wood, but shingles are enumerated in the treasury regulations as an article subject to duty, notwithstanding the treaty of reciprocity, and it is a matter of common knowledge that shingles are manufactured from wood. Manufactured of wood, as shingles are, they were clearly within the before-mentioned provisions of the revenue laws, and as such were subject to a duty of thirty-five per centum ad valorem, unless they were exempted by the terms of the reciprocity treaty, which was in full operation at the date of the several importations. "Timber and lumber of all kinds, round, hewed, and sawed, unmanufactured in whole or in part," are enumerated in the schedule annexed to the third article of that treaty, in which it is in terms agreed that the articles therein enumerated "being the growth and produce of the aforesaid British colonies, or of the United States, shall be admitted into each country respectively free of duty." Unmanufactured timber or lumber of any kind, as well such as was hewed or sawed, as that which was round, if otherwise unmanufactured in whole or in part, was entitled under the treaty to be admitted to entry as goods free of duty; but if the timber or lumber was otherwise manufactured than by a rough hewing or sawing, whether in whole or in part, the product of such rough hewed or sawed timber or lumber became and was subject to duty as provided in the revenue laws of the United States in operation at

the time the same was imported. Regulations upon the subject were promulgated by the secretary of the treasury on the 1st of February, 1857, and it appears that those regulations were founded upon the prior practice and decisions of that department. Articles entitled to entry free of duty are first enumerated in those regulations, and then follows a schedule of articles subject to duty under the revenue laws then in operation, and shingles, shingle bolts, and shingle wood are included in the enumeration. Appended to that schedule is a general regulation upon the subject, which provides that "articles of wood remain liable to duty under the existing tariff, if manufactured in whole or in part by planing, shaving, turning, splitting, or riving, or by any process of manufacture other than rough hewing or sawing;" and the supreme court, in the case of the United States v. Hathaway, 4 Wall. [71 U. S.] 407, held that that regulation was "a sound construction of the" stipulation contained in the treaty. Round. hewed, and sawed lumber are admitted free of duty if otherwise unmanufactured in whole or in part. The article, say the court, may be round, hewed, or sawed, but if it has undergone the process of manufacture even in part, it is taken out of the free list. U. S. v. Quimby. Id. 409.

Debt, it is insisted, is not maintainable for a penalty, but it was decided otherwise in the case of U. S. v. Andrews [unreported]; and the court adheres to the opinion given in that case. All penalties and forfeitures incurred by force of the act under consideration may be sued for, recovered, distributed, and accounted for in the manner prescribed by the act entitled "An act to regulate the collection of duties on imports and tonnage." 3 Stat. 732, § 5; 1 Stat. 695. Provision was made by the eighty-ninth section of the principal collection act, that all penalties accruing by virtue of that act should be sued for and recovered, with costs of suit, in the name of the United States, in any court competent to try the same; and it was made the duty of the collector within whose district the seizure should be made, or forfeiture incurred, to cause suit to be commenced for the same without delay, and prosecuted to effect. U. S. v. Lyman [Case No. 15,647]; U. S. v. Bougher [Id. 14,627]; Walsh v. U. S. [Id. 17,116]; U. S. v. Allen [Id. 14,431]; Jacob v. U. S. [Id. 7,157].

Repeated decisions of the federal courts show that debt will lie to recover a penalty, as provided in the 89th section of the principal collection act, and that the same form of action is an appropriate remedy to recover unpaid duties in cases where goods from a foreign country have been imported without their payment and without giving security as provided by law. Authorities may doubtless be cited in which it is held that indebitatus assumpsit will lie for duties, but it is well settled in this court that debt also will lie, which is all that need be affirmed at the present time. U. S. v. Lyman [supra]; U. S. v. Howland [Case No. 15,406].

Objections to the form of the remedy are clearly not well founded, and it is equally clear that the objections to the joinder of the counts must also be overruled, as the law is well settled that whenever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration, and the fact that the duties are to be paid in gold is not sufficient to take the case out of the operation of that rule of pleading, as that matter is regulated by statute. Brown v. Dixon, 1 Term R. 276; Cheang Kee v. U. S., 3 Wall. [70 U. S.] 320; 13 Stat. 494, § 13; 12 Stat. 345.

Recovery both for the duties and the double values, it is suggested, cannot be had in the same case where the owner was the importer; but it is not perceived that the objection is entitled to any weight, and the defendants do not refer to any decided cases which give it any support. Import duties are levied by act of congress, and when the goods are imported without paying or accounting for the same, the action against the importer is founded upon a statute liability which becomes complete as soon as the goods are illegally imported. Goods illegally imported are forfeited and liable to seizure, and whoever "receives, conceals, or buys such goods, shall on conviction thereof forfeit and pay a sum double the amount or value of the goods." Owners, it is said, cannot "buy" their own goods, but they may receive or conceal goods belonging to their firm or to themselves as individuals which have been illegally imported, and which are forfeited and liable to seizure and condemnation. Suits to recover double values are founded on acts wholly distinct from the act of importation, and the owner, consignee, or agent may be liable both for the duties because the goods were imported without their payment and without giving security for the same, and also for the subsequent reception and concealment of the same, so that they cannot be seized and libelled as forfeited for a violation of the revenue laws. Counts joined for such distinct liabilities are not inconsistent, because they are founded upon distinct acts of the defendants, which, if proved, render them liable both for the prescribed penalty and for the duties.

Exceptions were taken to the rulings and instructions of the court which must also be re-examined. Prior to the institution of the suit, the district judge issued a search warrant under the second section of the act of the 2d of March, 1867, rected to the marshal, requiring him to enter, in the daytime, the store of the defendants' firm situated in Bangor, and there to search for such day-books, journals, etc., as are therein described; and the action of the marshal shows that he, in obedience to the precept, entered the store in the daytime, and there found,

took and carried away certain books, papers, letters, etc., as therein directed, and that he "brought them before the district judge as therein directed." Account-books, letters, copies of letters, and other documents so seized by the marshal and brought before the district judge, were by him placed in the custody of the district attorney for his official examination. Such account-books, letters, copies of letters, and other documents being so in the custody of the district attorney, he offered the same in evidence as tending to prove that the plaintiffs were entitled to recover.

Two objections were taken by the defendants, at the trial, to the admissibility of the books, papers, and documents as offered in evidence: I. That the court was not authorized to issue nor the marshal to execute the warrant in question. II. That the district attorney could not, if objected to by the defendants, put in evidence against them papers from his own possession, obtained and placed there by force of the warrant. Power to issue such a warrant is vested in the district judge whenever it shall be made to appear by complaint and affidavit to his satisfaction that any fraud on the revenue has been committed by any person interested or engaged in the importation or entry of merchandise at any port within such district; and the provision is that the warrant shall be directed to the marshal, requiring him to enter any place or premises where any invoices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and take possession of such books and papers and produce them before the said judge. 14 Stat. 547, § 2. Unreasonable searches and seizures are forbidden by the constitution, and the act of congress provides that "no warrant for such seizure shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and the importations in respect to which it was committed and the papers to be seized."

1. Warrants of the kind, it is conceded, may be authorized by congress, to search for articles used in the commission of crime, or for stolen goods, where the crime charged is within federal jurisdiction; but it is insisted that warrants for search and seizure, except in cases of alleged crime, are not allowed by existing laws.

2. Objection is also taken to the sufficiency of the warrant upon several grounds: (1) Because it is not accompanied by any complaint or affidavit, and the proposition is that the act of congress makes the existence of a complaint of the prescribed character essential to its validity. (2) That if even the recitals in the warrant may dispense with the production of the complaint, still the recitals in that behalf in this warrant are not sufficient because the facts recited therein do not amount to a fraud. (3) That the description of the importations in respect to which the alleged fraud was committed is bad because it is not sufficiently specific and definite. Contradicted as the first proposition is by the express language of the section under which the warrant in this case was issued, it does not seem to be necessary to give the proposition any very extended examination. Full power and authority were given to collectors, naval officers, and surveyors, or other persons specially appointed by either of them for that purpose, by the act of the 31st of July, 1789, to enter any ship or vessel in certain cases, and therein to search for, seize and secure any goods subject to duty therein concealed, and if they had cause to suspect a concealment thereof in any dwelling-house, store, building or other place, they or either of them might upon application on oath to any justice of the peace be entitled to a warrant to enter such house, store, or other place (in the daytime only), and there to search for such goods, and if any were found to seize and secure the same for trial. 1 Stat. 43. Revenue officers were also authorized by the act of the 18th of August, 1793, to go "on board of any ship or vessel * * * and the same to inspect, search and examine," and if it appeared that any breach of the revenue law had been committed whereby such ship or vessel or the goods on board were liable to forfeiture, to make seizure of the same. Id. 315.

Authority to procure such warrants upon proper application, on oath, to any justice of peace, and to make such searches and seizures, as was conferred by the first collection act, was continued by the act of the 4th of August, 1790, as appears by the forty-eighth section of that act. 1 Stat. 170. All the prior laws passed to regulate the collection of duties on imports and tonnage were revised on the 2d of March, 1799; and some of the antecedent regulations were essentially modified. But the provision which authorized collectors, naval officers, and surveyors, and such other persons as either of them might specially appoint, to procure a search warrant to search for, seize, and secure for trial goods subject to duty, where a concealment thereof was suspected, was re-enacted therein, in the same words in which it appears in the two prior acts of congress upon that subject. Id. 677. District judges were first authorized to issue such search warrants by the seventh section of the act of the 3d of March, 1863; but they were required by that act to direct the warrant to the collector of the port where the alleged frauds were committed. 12 Stat. 740. Service of the warrant under that act was to be made by the collector, as under the prior acts when he was the applicant for the same; but the act under which this warrant was issued provides that the warrant shall be directed to the marshal of the district. 14 Stat. 547, § 2. Search warrants, therefore, if in due form, are authorized in such cases by an act

of congress, on the condition and for the purposes specified in the provisions to which reference has been made. Congress may "lay and collect taxes, duties, imports, and excises," and may also "make all laws which shall be necessary and proper for carrying into effect" that express grant of power.

Experience, everywhere, shows that import duties cannot be successfully levied and collected without laws establishing regulations upon the subject requiring their payment, or security for the payment of the same, at the time the goods are imported, and before they are unladen and delivered. Regulations only are not sufficient, nor are prohibitions merely; but both must be enforced by legal sanctions. Important regulations upon the subject were adopted by the first congress at the time they created and organized our revenue system; and provision was then made for punishing their violation by fine, penalty, and forfeiture, according to the nature of the prohibited act, and as directed in the act of congress. Penalties accruing by the breach of the act were to be sued for and recovered, with costs of suit, in the name of the United States, by the collector of the district where the same accrued, unless in cases of penalty relating to an officer of the customs. 1 Stat. 47. Power to pass such laws and to prescribe the form of the proceeding for their enforcement, whether by indictment, information, debt, or action on the case, was never questioned; and any argument to support the right of congress to pass such laws would seem to be an act of supererogation, as it is clear they are necessary and proper to enable congress to carry into effect the express grant to lay and collect taxes, duties, imposts, and excises. Warrants to search dwelling houses, stores, buildings, and other places, for concealed goods alleged to have been illegally imported, and for the seizure of the goods for trial, have been allowed by law from the organization of the revenue system to the present time; and it is not perceived that any greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing such a search for the imported goods. Such warrants might be procured, until within a recent period, upon application to a justice of the peace, and the same might be served by the collector, naval officer, or surveyor, by whichsoever the application was made, and to which the warrant was granted. 1 Stat. 43; Id. 678. Abuses occurred under those laws, and congress wisely repealed the provisions authorizing justices of the peace to grant such warrants, and vested the power in judges of the district courts, and has finally provided that the warrant shall be directed to the marshal of the district for service. 12 Stat. 740; 14 Stat. 547. Guarded as the new provision is, it is scarcely possible that the citizens can have any just ground of complaint, as the condition precedent to the granting of the warrant is that it shall be made to appear to the satisfaction of the judge of the district court, by complaint and affidavit, that a fraud on the revenue has been committed by some person or persons interested or in some way engaged in the importation or entry of merchandise at some port within such district. His act in granting the warrant is a judicial act, as he hears the applicant, and, if satisfied, among other things, that such a fraud on the revenue has been committed, he will grant the warrant, and if not so satisfied the application will be refused. Attempt is made in argument to limit the power to authorize such warrants to criminal cases, but the proposition finds no support in the acts of congress or in any decision of the federal courts. Individuals can not sue out or employ such a process in the course of civil proceedings, or for the maintenance of a mere private right, and where the judges of insolvency in Massachusetts were empowered by an act of the legislature to grant search warrants on the application of the assignees to search for the property and books of the debtor, the supreme court of the state held that the act was unconstitutional and void, as the process was to be used exclusively in mere civil proceedings, where nothing but a personal claim or the right to prosecute a private suit was involved. Robinson v. Richardson, 13 Gray, 454. Private parties, it is conceded, may not employ the writ as the means of prosecuting a private right, but it cannot be admitted that congress, in providing means to detect, prevent, and punish frauds upon the public revenue, is forbidden to authorize the use of such a process merely because the penalty imposed on the person violating the law and perpetrating the fraud may be recovered otherwise than by indictment. Debt undoubtedly is the proper remedy in the present case, but congress may enact that the penalty imposed for receiving, concealing, or purchasing goods illegally imported, shall be recovered by indictment or debt at the election of the prosecutor. Suffice it to say that the acts charged in the declaration were unlawful acts, declared to be such for the prevention of fraud and for the protection of the public revenue, and as such the acts charged were public wrongs, which subjected the perpetrators to the penalty provided by law; and it is as clearly competent for congress to authorize the district judges to issue a warrant in such a case to search for and seize the invoices, books, and papers evidencing such a fraud, as it would be for a state magistrate to grant a warrant to search for and seize stolen goods. Much jealousy existed against general warrants before and at the time the constitution was adopted, and the fourth amendment provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to

be searched, and the person or thing to be seized;" but the provision affords no support to the limitation expressed in the proposition of the defendants. Entick v. Carrington, 2 Wils. 275; Cooley, Const. Lim. 299; Sanford v. Nichols, 13 Mass. 286; Bostock v. Saunders, 3 Wils. 434; s. c., 19 How. State Tr. 1030; Reg. v. Moseley, 1 Car. & K. 711. Writs of assistance, also, as granted by the courts to the revenue officers in the last century, empowering such officers, at their discretion, to search suspected places for smuggled goods, were justly regarded with great disfavor as facile instruments of arbitrary power; but the warrant for search and seizure, as authorized by the present act of congress to be issued by the district judges, is not properly subject to any of the objections which were made to those unguarded, discretionary licenses to subvert the principles of civil liberty. Paxton's Case, Quincy, 51; Cooley, Const. Lim. 301. Such a warrant cannot be issued under the act of congress, unless it is made to appear by complaint and affidavit to the satisfaction of the judge of the district court that a fraud on the revenue has been committed, nor unless "the complaint shall set forth the character of the fraud alleged and the nature of the same," describing also the importations and the papers to be seized. Search warrants for any purpose are doubtless obnoxious to very serious objections, and it is necessary in every case that the warrant shall particularly specify the place to be searched and the person or object to be seized, as it is clear that general warrants are forbidden by the fourth amendment of the constitution. Judges of the district courts have no authority to issue such warrants, unless they are directed to the marshal of the district; and the law requires that the warrant shall describe the invoice, books, or papers for which the search is to be made and the place or premises where they are deposited; and the direction to the marshal must be to enter the described place or premises where the invoices, books, or papers are deposited, and to take possession of the same, and produce them before the said judge. When the warrant is so framed as to constitute a compliance with the conditions expressed in that section of the act of congress, the court is of the opinion that it may be properly issued by the district judge, and that it might lawfully be served by the marshal of the district.

Certain formal objections are also taken to the warrant, which will be briefly considered. First, when the account books, letters, and documents were offered in evidence, the defendants objected to their admissibility; because they were obtained from their possession by force of the search warrant exhibited in the record; and it is insisted in argument that the ruling of the district judge, in admitting them in evidence, was erroneous, because the warrant is not accompanied by any complaint or affidavit; but the court is of the opinion that the introduction of the complaint and affidavit is not necessary in a case where they are referred to in the warrant, and it appears by the recitals of the same that it was shown by complaint and affidavit to the satisfaction of the district judge that the alleged frauds on the revenue had been committed as therein set forth. Objection is also made to the warrant that the alleged frauds are not therein described with sufficient particularity; but the court is of a different opinion, as it clearly appears from the recitals of the warrant that the defendants at the time therein alleged did commit frauds on the revenue by importing large quantities of shingles subject by law to duty into the port of Bangor and other ports in that district, without paying or accounting for the duties. In argument, the defendants allege that the acts charged, as described in the warrant, do not amount to a fraud, because the shingles imported were the "growth and manufacture" of the adjacent provinces, and they insist that such shingles were not by law subject to duty; but the court is not able to sustain that theory for the reasons already explained, and the objection must be overruled. They also insist that the importations were not described in the warrant with sufficient certainty; but they are described as shingles, and as shingles are enumerated in the treasury regulations as an article subject to duty under the reciprocity treaty, and as it is a matter of common knowledge that they are manufactured of wood, the court is of the opinion that the description is sufficient. Although the warrant is not defective in either of the particulars mentioned, still it does not allege that the district judge became satisfied by complaint as well as by affidavit that the alleged frauds on the revenue had been committed, and in that respect it fails to comply with the act of congress. Substantial compliance with the conditions specified in the section conferring the power is essential to the validity of the warrant, but the court is of the opinion that the defect will not avail the defendants in this case for two reasons: (1) Because they did not except at the trial to the ruling of the court admitting the books, letters, and documents in evidence upon that ground; (2) because the books, letters, and documents were properly admitted in evidence, even if the search warrant was illegal.

Exceptions to the ruling of the court in admitting evidence should be sufficiently specific to enable the court to understand the precise grounds of the objections to its admissibility, and unless they are so they cannot be regarded as the proper foundations for a writ of error to reverse the judgment. Evidence may be inadmissible because it is immaterial, or because it is secondary in its nature, or because better evidence exists.

or because it is defective in some legal requirement, or because it is oral and not in writing, or because it is offered to vary or contradict what is in writing, and in some cases because it was improperly obtained; but whenever objections to the admissibility of evidence are special in their nature and not apparent, they should be specifically stated, that the opposite party may be apprised of their real character, and that the presiding justice may not be led into error. Harvey v. Tyler, 2 Wall. [69 U. S.] 328; Rogers v. Marshall, 1 Wall. [68 U. S.] 644. Appellate courts are necessarily confined to the record, and all that appears in this case is that the defendants, when the books, letters and documents were offered in evidence, objected that the court was not authorized to issue nor the marshal to serve the warrant in question, and that the district attorney could not put the papers in evidence, as they had been obtained and placed in his possession by that warrant. Authority to issue the warrant was by law vested in the district judge, and inasmuch as the judge in issuing it exercised a judicial discretion, no doubt is entertained that the warrant, though defective in form, was sufficient for the protection of the marshal. Suppose, however, that the exception is sufficient, and that the search warrant was illegal, still the court is of the opinion that the books, letters, and documents were properly admitted in evidence, as they were pertinent to the issue, and were offered in evidence in the same condition in which they were when they came from the possession of the defendants, without mutilation or alteration. Com. v. Dana, 2 Metc. (Mass.) 329; Legatt v. Tollervey, 14 East, 302; Jordan v. Lewis, Id. 305, note. Lottery tickets in the case first mentioned had been seized under a search warrant, and the person in whose possession they were found had been indicted as having them in his possession with intent to sell the same in violation of law. Service was made and the accused went to trial, and the prosecuting officer offered the lottery tickets as evidence, and they were objected to as inadmissible by the defendant as having been improperly obtained by the use of an illegal search warrant; but the supreme court of Massachusetts held that where papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfuly, nor will the court form a collateral issue to determine that question. Judge Story laid down the same rule twenty years before in the case of U. S. v. La Jeune Eugenie [Case No. 15,551], and the rule there established has never been questioned in this circuit. Illustrations to show what is meant may be drawn from the rules applied to confessions in criminal cases. Confessions obtained by threats or promises are never admitted in evidence against the accused; but if he at the same time exhibits the implements with which he committed the crime, or the stolen goods, or, in case of murder, if the accused exhibits the money or the effects of the deceased, they are admissible because, being facts, they cannot be changed by the threats or promises. King v. Warickshall, 1 Leach, Cr. Cas. 263; Com. v. Knapp, 9 Pick. 511; 1 Greenl. Ev. §§ 231, 232. Although a confession obtained by means of promises or threats cannot be received, yet if in consequence of that confession certain facts tending to establish the guilt of the prisoner are made known, evidence of those facts may be received. Rosc. Cr. Ev. 51; 1 Phil. Ev. (Ed. 1869) 524. Viewed in either light, the objection is not well founded, and must be overruled.

The next objection is that the district judge could not put the papers so seized and brought before him into the possession of the district attorney to be used as evidence in the case; but the court is of a different opinion, as the very object of the search is to ascertain whether there are such papers deposited in the described place or premises, and, if so, that they may be seized and "produced before the said judge." Papers so seized are declared by the act of congress to be "subject to the order of said judge," but he must allow the examination of the same by the collector of customs, or by any officer duly authorized by the collector for that purpose. Invoices, books, or papers so seized may be retained by said judge as long as, in his opinion, the retention thereof is necessary; and the court is of the opinion that invoices, books, or papers so seized, like the implements of crime, or stolen goods seized on search warrants, may in a proper case be given in evidence against the offender and perpetrator of the fraud. Com. v. Dana, 2 Metc. (Mass.) 337. Suits in the name of the United States are instituted in the circuit and district courts by the district attorneys, and while pending there such suits are controlled by those officers under the instructions of the attorney general. They are the proper officers to institute proceedings to recover such penalties as those incurred in this case, and when such a suit is pending and comes on for trial, the district attorney may well claim the right to use all legal evidence at command, whether the same is in the archives of the government or on file in the court. Confiscation Cases, 7 Wall. [74 U. S.] 456. The defendants also object that the books, letters, and documents were not by themselves legal testimony; but the decisive answer to this objection is that the burden to show error is upon the party alleging it, and inasmuch as the books, papers, and documents in question are not set forth in the bill of exceptions, nor in any way made a part of it, the presumption is that the ruling was correct, and the point is not open for re-examination.

Before the trial the deposition of Thomas Dowling was taken by the United States under a commission, and when it was offered

in evidence the defendants objected to the admissibility of the same because, as they alleged, the return does not show that the commission was duly executed. They took three objections to the sufficiency of the return: (1) That it does not appear by it that the magistrate himself examined the defendant. (2) That it does not appear by it that he reduced or caused to be reduced to writing the deponent's answer. (3) That it does not appear by it that he reduced the answers of the deponent to writing or caused them to be so reduced in his presence. These objections were overruled and the deposition was admitted subject to exceptions.

Erroneous in fact as the first objection is, it is only necessary to refer to the statement made in the return for its correction, where it is stated that an examination on oath of the deponent was had and taken before me, which certainly is a substantial compliance with the directions of the commission.

Interrogatories and cross interrogatories accompanied the commission, and the return is that "the following are the answers" of the deponent given to the several interrogatories and cross interrogatories thereto annexed, and in conclusion the return states "that the signatures of the deponent affixed to this deposition are in his handwriting and made in my presence." Depositions de bene esse may be reduced to writing by the deponent, as well as by the magistrate, and the court is not induced to give the commission in the case a construction which would prohibit the magistrate from granting that privilege to the deponent if exercised in his presence. 1 Stat. 89. Directed, as the magistrate was, to permit no person other than a clerk to be present during the examination, except the deponent and himself, and as it does not appear that any clerk was appointed by the magistrate, the presumption is that no other person than the deponent and the magistrate was present at the examination, and, if not, then it must be presumed that the answers were reduced to writing either by the deponent or the magistrate, and if by either, then it is clear that the second objection cannot be sustained.

Answers were given by the deponent to the several interrogatories and cross interrogatories annexed to the commission in an examination on oath before the magistrate, and the return states that the signatures affixed to the deposition are in the handwriting of the deponent, and that they were made in the presence of the magistrate, which is all that need be said in reply to the third objection.

Examination of the exceptions to the instructions of the court must also be made, which involves the necessity of further reference to the facts in the case as reported. By the bill of exceptions, it appears that the firm of D. R. Stockwell & Co., consisting of Davis R. Stockwell, John S. Cutler, and George S. Chalmers, who was not sued, had long been engaged at Bangor in the lumber business; that the senior partner in 1863 proposed to the partners that the firm should engage with Leeman Stockwell in the shingle business, in which he had large experience, and the arrangement as proposed was accepted to the effect that Leeman should transact the business in the name of the firm and give it his entire attention; that the firm should furnish the capital, and that the profits or loss should be divided one half to the person transacting the business and the other half to the firm which furnished the capital. Pursuant to that arrangement, Leeman Stockwell engaged in the business during the years 1863 and 1864, collecting and buying shingles on the St. John's river, and in forwarding the same to Bangor, consigned to the firm of the defendants; and the bill of exceptions also shows that a separate account of the business was kept by the firm, and that the account at the end of each year was closed by the division of the profits as agreed in the arrangement. Evidence was introduced by the plaintiffs tending to show that the shingles in question were the growth and produce of the adjacent province, and that the defendants had actual knowledge that such was the fact. Opposing testimony was introduced by the defendants, but the jury returned their verdict in favor of the plaintiffs. During the period the active partner in the business employed an agent, and when the cargoes came to Bangor they were reported at the custom house, with the manifest and foreign clearance, together with the certificate of the agent and two merchants on the affidavit of the agent to their American origin, and the collector required no duties on the cargoes, and no entries were made, nor were any invoices or bills of lading produced to the collector. They were openly in the possession of the firm without any attempt at concealment; were throughout, in fact to the commencement of the suit, treated by all parties as not being subject to duty. Whether the witnesses were entitled to credit or not was left to the jury, but taking the arrangement to have been as described in the bill of exceptions, the jury was instructed that if Leeman Stockwell, in the conduct and management of the business so intrusted to him, and in the course of the business, and for the common and joint benefit of himself and that firm, went into New Brunswick, and there knowingly purchased and received, on their joint account, shaved shingles, the growth and produce of that province, and that he afterwards, by himself or his agents, knowingly sent such shingles to his copartners at Bangor, fraudulently documenting them as the growth and produce of Maine, so that the shingles in the regular course of business should thereby be, and were, admitted and received into the United States by the defendants as the growth of

Maine, the shingles so imported were illegally imported and were liable to seizure, and that the defendants, being his partners, were in this action chargeable with, and bound by, the knowledge which he possessed, if he did possess it, that the shingles were the growth and produce of that province, and as such were liable to duty, and that the shingles were liable to seizure because they were illegally imported. They were also told that, the action being a civil action, and not a criminal prosecution, the knowledge of one of the firm touching the matters involved in this suit is to be deemed the knowledge of all the defendants, his copartners in the shingle business; that if Leeman Stockwell, as a member of the firm being so engaged in the shingle business at the time of the importation and reception of the shingles at Bangor, knew that they were province shingles subject to duty and liable to seizure, and that they were illegally imported, it is not necessary for the government to prove that the several defendants personally had actual knowledge of those facts which were then within the knowledge of their partner who transacted the business.

That if, with that knowledge so possessed by Leeman Stockwell,—that the shingles were illegally imported and liable to seizure,—the defendants, in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits were divided agreeably to the arrangement, the jury were authorized to find that the defendants, being partners of the said Leeman, received the shingles knowing that the same were illegally imported, and that they were liable to seizure. Remarks beyond those already made, to show that the shingles were illegally imported and liable to seizure, are unnecessary, as that has been made to appear to the entire satisfaction of the court; nor is it worth while to occupy much time in proving that the firm of the defendants, as it existed prior to the arrangement, was a partner with Leeman Stockwell in the shingle business, as that is conceded by the defendants in their printed argument. Partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits between the respective parties. Actual participation in the profits, as principal, is, in general, sufficient to create a partnership, as between the parties and third persons; but the express agreement in this case was that the defendants should participate both in the profits and loss, and, as they furnished the capital, and have settled the accounts, and carried the agreement into full effect, the nature of this transaction is placed beyond doubt. Berthold v. Goldsmith, 24 How. [65 U. S.] 541; Denny v. Cabot, 6 Metc. (Mass.) 90.

Argument to show that Leeman Stockwell had knowledge of the alleged frauds is quite unnecessary, as it appears that he made the purchases, shipped the shingles, gave or procured the affidavits and certificates containing the false statements which misled the revenue officers and induced them to allow the shingles to be unladen and delivered without entry or permit, and without paying or accounting for the duties. Such being the state of the case, nothing remains for re-examination, except to inquire and determine whether the defendants are chargeable with the knowledge possessed by their partner and agent who transacted the business. All the shingles were consigned to them under the arrangement, and they made the sales, received the purchase money, and, when the accounts were adjusted, one half of the amount was paid over to the perpetrator of the frauds, and the other half was absorbed in their general business. Torts may arise in the course of the business of the partnership, says Judge Story, for which all the members of the firm may well be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have been concerned in the fraudulent act. Castle v. Bullard, 23 How. [64 U. S.] 188; Story, Partn. § 165; Colly. Partn. §§ 445, 447. When one assuming to be an agent had committed a fraud in a sale, it was held in Taylor v. Green, 8 Car. & P. 320, that the mere adoption of the sale and the receipt of the money by the person for whom the sale was made rendered him liable for the fraud. Decided cases of like import are quite numerous, and some of them were made at a very early period. Attorney General v. Stanyforth, Bunb. 97. Treble value of the goods was recoverable at that time, if the goods were imported knowing that the duties had not been paid; and yet the court held in the case of Attorney General v. Burges, Id. 223, that if several persons were concerned, either as partners or otherwise, the crown might proceed against any one of them for the whole penalty, it being in the nature of a tort, and not a contract, and that there was no necessity to prove that the goods actually went into the hands of the party sued; that it was sufficient if they came into his power, or into the custody of his agent, or of any person by his direction. King v. Manning, Comyn, 617. Partners constitute as such but one person in law; and the act of one in the business which constitutes the subject matter of the partnership is civiliter the act of all. McFarland v. Crary, 8 Cow. 258; Peck v. Fisher, 7 Cush. 386; Story, Ag. § 452; Smith, Mast. & Serv. 151; Doe v. Martin, 4 Term. R. 66. Most of these cases rest upon the doctrine which is so clearly applicable in this case, that it does not lie with one to

claim property or the avails of it through the fraudulent act or another without being affected by that act, especially if he was his partner, the same as if it were his own, and the court is of the opinion that the defendants, inasmuch as they have received the fruits of the fraud, are liable to the penalties annexed to their commission. Olmsted v. Hotailing, 1 Hill, 318; Nicoll v. Glennie, 1 Maule & S. 588; Stockton v. Frey, 4 Gill, 406. Partners are liable in solido for the tort of one of their number, if that tort were committed by him as partner, and in the course of the partnership business. Locke v. Stearns, 1 Metc. (Mass.) 560; Hawkins v. Appleby, 2 Sandf. 421; National Exchange Co. v. Drew, 32 Eng. Law & Eq. 1. Recent decisions in England have adopted these principles in their widest extent, and applied them in revenue cases. Attorney General v. Riddle, 2 Cromp. & J. 493; Attorney General v. Siddon, 1 Cromp. & J. 220. Examined in any point of view, it is clear that there is no error in the record, and the judgment is affirmed, with costs.

[The judgment of this court was affirmed by the supreme court, where it was carried on writ of error. 13 Wall. (80 U. S.) 531.]

Case No. 13,467.

STOCKWELL v. UNITED STATES.

[See Case No. 13,466.]

STOCKWELL (UNITED STATES v.). See Cases Nos. 16,405 and 16,406.

STODDARD (BUNNEL v.). See Case No. 2,135.

Case No. 13,468.

STODDARD et al. v. GIBBS.

[1 Sumn. 263.] [1]

Circuit Court, D. Rhode Island. Nov. Term. 1832.

HUSBAND AND WIFE — CURTESY — REMAINDER OR REVERSIONARY INTEREST.

In Rhode Island a husband is not entitled to a life estate, as tenant by the curtesy of any remainder or reversion owned by his wife, but only of real estate, of which she has an actual seisin, and possession in fee.

[Cited in Carson v. New Bellevue Cemetery Co., 104 Pa. St. 581; Shores v. Carley, 8 Allen, 426; Todd v. Oviatt, 58 Conn. 183, 20 Atl. 441; Watkins v. Thornton, 11 Ohio St. 369.]

Trespass and ejectment [by Bela J. Stoddard and others against Enos Gibbs] for certain land in Portsmouth, in the state of Rhode Island. Plea, the general issue. At the trial in June term last, the jury found a special verdict. The substance of it was, that the plaintiffs were entitled to three fifths of a moiety of the demanded premises, as heirs at law of their mother, Eliza Gibbs, the wife of the defendant, who died in 1820, seised (as the heir of her mother) of a moiety of the reversion of the demanded premises, which were at the time of her death in the actual possession of her father, Peleg Thurston, who was tenant by the curtesy thereof, and who died afterwards, in December, 1831. The defendant claimed a life estate on the demanded premises, as tenant by the curtesy upon the death of his wife, the mother of the plaintiffs.

Mr. Hunter, for plaintiffs.
Cranston & Hazard, for defendant.

Mr. Hunter, for plaintiffs, in opening said, that the special verdict in this case presents but a single point, and that is, whether a husband can be a tenant by the curtesy, in a case where his wife had no seisin of the estate, to which it is agreed she was entitled as reversioner. It is submitted, that at common law there cannot be a doubt, that Enos Gibbs, the defendant, cannot be a tenant by the curtesy; for that requires actual seisin by the wife. In this case Gibbs' wife never had even a seisin in law. 1 Cruise, Dig. p. 140; Id. p. 124; 1 Co. Litt. 550. The husband in right of his wife never had possession, nor was either of them entitled to the possession. On the death of Peleg Thurston, the grandfather, in 1831, the right of entry to the reversionary interest commenced. Wallingford v. Hearl, 15 Mass. 471. The seisin of the wife must be an actual seisin, that is, possession of the lands; a man shall not be tenant by the curtesy of a remainder or a reversion. 2 Bl. Comm. c. 8. See 2 Gwil. Bac. Abr. p. 223; Watkins, 36, 111. The statute of Rhode Island does not alter the common law; it only repeats and affirms it. Laws R. I. 1822, p. 227, § 8. Dane (4 Abr. p. 657) cites the most and the best of the authorities. His conclusion is, there can be no tenant by the curtesy of a right, nor of a seisin in law, nor of a reversion or a remainder in a freehold. The words of the Rhode Island and of the Massachusetts statute of March 9th, 1784, are identical. In the analogous case of dower (Laws R. I. 1822, p. 188), an actual corporeal seisin, or a right to such seisin in the husband during the coverture, is indispensable to entitle his widow to dower, and a legal seisin of a vested remainder or reversion is not sufficient for that purpose. Eldredge v. Forrestal, 7 Mass. 253. A widow is not entitled to dower in the reversion expectant on the determination of a life estate, where the husband dies before the tenant for life. Williams v. Amory, 14 Mass. 20–27. And see Cook v. Hammond [Case No. 3,159].

For the defendant it was argued, that estates by the curtesy are governed by the same law in the states of Connecticut and Rhode Island. In the former state, it has been decided and settled by the highest judicial tribunal, that "seisin in the wife is

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

not necessary to entitle the husband to the estate by the curtesy." Reeve, Dom. Rel. pp. 33–35; 4 Day, 305. In the case there reported, the court say, "that our system of law respecting real property, is in many instances very different from the English system." "Seisin is necessary in their law, and ownership is sufficient in our law." "Since seisin is not necessary in case of descent to heirs, nor to pass lands by devise, why should it be necessary to the husband's title by the curtesy?" The decision of the court in this case is no departure from fixed rules and precedents. The English law respecting the efficacy of seisin has long been departed from, and to adhere to it in this case would mar the symmetry of our law." In the same case, the court observe, that these statutes of limitation respecting lands, have always been construed in conformity to the same principle, whilst the same words in the English statute have been construed, not as having any effect on the title, but only on the right of entry. A case reported by Judge Reeve (Dom. Rel. 35) appears to be exactly in point. A devised lands to his executors for payment of his debts, until his debts were paid. The executors entered. B, his daughter and sole child, married C, and by him had a living child; she died while the estate was in possession of the devisee's executors. The court decided, that C, the husband, was entitled to the curtesy. Dane (4 Abr. p. 663, tit. "Estate by Curtesy," c. 130, art. 4, § 30) recognises the foregoing, as the settled law in the state of Connecticut. Our system of law respecting real property we consider to be the same. The same construction is put upon our statute of limitations; and we know of no instance in which any doctrine has been advanced different from that expressed in the cases above referred to.

Mr. Hunter, in reply.

Our law in respect to curtesy is the law of Massachusetts and of all the other states of the Union (Georgia, Vermont, and Connecticut perhaps excepted). It is substantially the common law, the law of England. Referring to the authorities already produced, what doubt can there be as to that law? With great submission, the Connecticut decision is a mistake. The dissentient judges (4 Day, 305) were in the right. They did not assign their reasons in extenso, but they might be assigned by a true common law lawyer, and this without trenching upon what appears to be the principle adopted by the majority of the Connecticut court, namely, that ownership is the principle of the American law, as contradistinguished from seisin. With that principle in all its bearings, I have now nothing to do. It may be, as a generality, true; but there are exceptions. Curtesy is not the creature of feudality. It existed anterior to it, and has continued in a great degree independent of it. The feudal maxim, "Non jus sed seisina facit stipitem," may be enforced in England, or abrogated in America, and yet the seisin of the wife continue to be the indispensable requisite of the curtesy of the husband. He is preëminently tenant by the curtesy of England, and so far as regards the Norman of "unconquered and unfeudalized England" for the reason assigned by Littleton, because this is used in no other realm, but in England only. The root of the doctrine of curtesy is in a rescript of Constantine. It is one of the few unmutilated monuments of Roman jurisprudence. Dower is probably of Danish origin, and both curtesy and dower are distinct from the doctrine of feuds, and in a great degree opposed to it. See Wright, Ten. 194; Feud. Lib. c. 1, tit. 15; 2 Wood. Lect. 18; 2 Bl. Comm. 126, Christian's note. An actual entry, or pedis positio, in certain cases, may not be necessary; but the exceptions prove the general rule, and the present is an abstract case, unmarked by any peculiarity, arrogating no exemption, seeking refuge in no exception. Beekman v. Sellick, 8 Johns. 262. As contradistinguished from curtesy, seisin in law is sufficient for dower; the wife is presumed to have no power of obliging her husband to take possession; it is therefore holden in her favor, that the right to the immediate possession is equivalent to his actual possession. Doe v. Hutton, 3 Bos. & P. 643. Even on the supposition, that this distinction does not exist, and that the intention is to harmonize the law of dower and curtesy, the words of the Rhode Island statute being in both cases the same; yet nevertheless, in the case at bar, the special verdict shows, that there was at no time, during the life of the feme, a right to possession. There was not even seisin in law. The mother of the present plaintiffs was entitled to a reversion in fee, out of which a freehold interest was carved, namely, the life curtesy estate of her own father; she had therefore not even a seisin at law, much less an actual seisin. Curtesy is an estate, uxore juris. In this case, events obstructed and literally prevented an estate, an ownership in the wife. What could the husband take and enjoy, when there was nothing for the wife to take and enjoy? 1 Rolle, Abr. 674; Co. Litt. 32; Boraston v. Hay, Cro. Eliz. 415; Wing. Max. 581. Where there is an intermediate freehold estate, there is no seisin either actual or legal. At common law the death of the owner of the remainder, or the expectant reversion, during the continuance of the life or other estate, prevented his possession and enjoyment. He had nothing, and of course transmitted nothing. Jackson v. Hendricks, 3 Johns. Cas. 214; Bates v. Shraeder, 13 Johns. 260. But there is a more general, perhaps a more philosophical view that may be presented. It may be sneered at as pedantic or far sought. It however relieves the law of curtesy from the opprobrium of being obstructed in its beneficent tendency, by what is deemed by some to be an obsolete or inappli-

cable principle of feudal law. To know how much of the law of feuds was adopted in England, and from which of its tenures, we must resort to the law of feuds. By that law the husband did not succeed to the wife's feud. The curtesy of England therefore does not depend on the feudal law, but on the rescript of Constantine,—in truth, on the civil law. That law is in general founded on the law of nature, that is, on general ethical fitness,—certainly not on a system in most respects artificial and peculiar, and in some barbarous and absurd. 'Now what is the general tendency of the rescript of Constantine, in regard to marital rights? It may be answered, that it is in conformity to the most sagacious moral conclusions. The rights of the husband had reference to his actual prosperous duties and enjoyments. If he had living children, and his wife had an estate, of which he enjoyed the use, rents, and profits, of that estate he was not to be deprived by the death of his wife. Because an accustomed enjoyment was not to be altered or diminished; because a vested interest was not to be destroyed; and because it is more fit that the father should be independent of the insolent heir (using the word "insolent" in its primitive Latin civil-law sense,—unused to,—"in soleo"), than that heir of the father. It is easy to find traces of these thoughts in the earliest reports and abridgments, though the true source is not always disclosed, from which they flowed. They all in substance concur in saying, it would be cruel to take from the husband that estate, rank, or condition he had possessed or enjoyed with his wife. If he had not so enjoyed it, there was no deprivation and no cruelty, and the children, who are by law and nature entitled, may justly, equitably, and immediately occupy and enjoy. Though perfectly sincere on this point, I dare not pursue it. It is presumptuous to attempt to be rational in the argument of a strict point of common law, in an action of ejectment.

From the mutation of human affairs, and the direction of the artificial forms of modern society in England, the instances both of curtesy and dower recur a hundred-fold oftener in this country than now in England. Without abandoning therefore the true, perhaps stern doctrine of the common law, we say, that, if the statutes of Rhode Island and Massachusetts mean that the seisin should be alike in dower and curtesy, and thus so far alter the common law, the case at bar presents the occasion, if need be, for this being so said. The plaintiffs are then protected and entitled. Reverse the case, and call it dower, could the wife possess that which the husband never did possess, nor could in his life-time claim for the purpose of possession?

STORY, Circuit Justice. There is but a single question in this case, and that is, whether in Rhode Island a husband is entitled to a life estate, as tenant by the curtsey, of land of which his wife was in her life-time seised in fee in reversion. If this question were to be decided by the common law, it would not admit of controversy. Nothing is better settled in that law, than that there can be no curtesy of a remainder or reversion. Mr. Justice Blackstone, in his Commentaries (2 Bl. Comm. 127), lays it down as one of the elements of the common law. "There are (says he) four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion." And this language is fully borne out by Lord Coke, in his Commentary on Littleton. Co. Litt. 29. Now, the common law was expressly adopted by a statute of Rhode Island as early as the year 1700, as the rule in all cases, where no particular colonial law existed on the subject. Laws R. I. 1744, p. 28. Of course the common law must prevail, unless there is some statutory provision, which has since that period intercepted or varied its application. Let us see, then, whether any such provision exists. By the statute of descents of Rhode Island (1798, 1822), it is enacted, that "when a man and his wife shall be seised of any real estate in her right in fee, and issue shall be born alive of the body of such wife, that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life, as tenant by the curtesy." Laws R. I. 1822, p. 227, § 8. Now this description of a tenant by the curtesy is in substance the same, which Littleton (section 35) has given of a tenant by the curtesy at the common law: "Tenant by the curtesy of England (says he) is where a man taketh a wife seised in fee simple, or in fee tail, &c., and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England." Now, my Lord Coke, commenting on this very passage, says, that the words, "seised in fee," mean a seisin in deed, not a seisin in law; and therefore a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture. Co. Litt. 29. See Cruise, Dig. pp. 159, 160, tit. 5, c. 1, § 1. So that it is clear, that the words, "seised in fee," do not necessarily, in the language of the law, import a seisin in deed, that is, a present estate in fee in possession. Now, since the rule of the common law was not only well known, but had been adopted in Rhode Island, it would

be natural to expect, if the legislature intended to modify or repeal it, that some language would be used, which should unequivocally, and in terms susceptible of no doubt, express that intention. In such a case we should not expect to find the very language used, which the most accurate writers upon the common law were accustomed to use, to express the very rule of that law. Co. Litt. § 3; Cruise, Dig. pp. 159, 160, tit. 5, c. 1, § 1; Bac. Abr. tit. "Courtesy," C, 2; Com. Dig. tit. "Estate," D, 1; Dane, Abr. c. 130, art. 3, § 1; Buckworth v. Thirkell, 3 Bos. & P. 652, note. Would it be safe for any court to adopt an interpretation, abolishing the common law rule, upon so loose a foundation?

The statute of Massachusetts respecting tenancy by the curtesy, is in precisely the same terms, as that of Rhode Island; and probably the latter was borrowed from the former. See Act March 9, 1784; St. 1783, c. 36. The uniform interpretation of the Massachusetts statute has been, that it does not vary the rule of the common law. Dane, Abr. c. 130, art. 3, §§ 1–3. This is strong evidence to show, what the fair interpretation of the terms is; or, at least, it shows, that the language reasonably admits of an interpretation consistent with the rule of the common law, and in affirmance of it. The language of the Rhode Island statute respecting dower, uses terms nearly the same. It declares, that the widow shall be endowed of one third part of the lands, &c., "whereof her husband, or any other to his use, was seised of an estate of inheritance at any time during the coverture." Laws R. I. 1822, p. 188. Yet, I presume, it was never contended, that this applied to a seisin in law, such as a seisin of a reversion or a remainder. But it is said, that in the state of Connecticut the doctrine has been settled upon solemn argument, that actual seisin in the wife during the coverture, is not necessary to entitle the husband to a tenancy by the curtesy of her estate. That certainly was the doctrine of the majority of the court in Bush v. Bradley, 4 Day, 298, 305, and is probably now deemed the settled law of that state. Reeve, Dom. Rel. pp. 33–35. But it is observable, that the decision in that case was not founded upon any positive language of the legislature, directly applicable to the case. There was no statute of Connecticut, which called for any interpretation by the court. The doctrine was avowedly founded upon analogies furnished by the local law of the state. It was said, that the statute of limitations of Connecticut in its terms did not take away the title of the original proprietor, but only tolled his right of entry; and yet that it had always been construed to bar all claim of title; while the same words in the English statute had been considered as having no effect whatever upon the title, but only upon the right of entry. It was also said, that actual seisin was not necessary in cases of descents or devises; but that it was sufficient, that there was a right of property. And if not necessary in such cases, the question was asked, why should it be thought necessary to the husband's title by the curtesy? And the conclusion, to which the court arrived, was, that the English law respecting the efficacy of seisin had long since been departed from in Connecticut, and to adhere to it in the case of the curtesy would mar the symmetry of the law of that state.

Now, however satisfactory this reasoning was to the learned judges, who decided this case, it has not been deemed equally satisfactory to other learned judges in other states, where the local jurisprudence furnished, in whole or in part, similar analogies. They have held, that the common law rule must prevail, until altered by the legislature; and that they were not at liberty to imply such a repeal upon mere analogy. This doctrine is, à fortiori, to be followed in Rhode Island; for, the common law having been adopted by statute in that state, nothing short of a legislative repeal, either express or necessarily implied, could justify any court of justice, sitting in that state, in an abandonment of it. Now, I confess, that I see not the slightest reason for supposing, that the legislature, in the statute already cited, had the least intention to repeal the common law in regard to tenancy by the curtesy. The language of the statute is merely affirmative, leaving what is intended by the words, "seised of any real estate," &c., to be ascertained upon the sound rules of interpretation applied to similar cases. It is a general rule of construction, not to presume the common law repealed by a statute, unless the language naturally and necessarily leads to that conclusion. Besides, though the language is not inconsistent with a larger intent, yet the subsequent words, "the husband shall have and hold such estate during his life," more naturally apply to a present possessory estate, than to one, which may never fall into possession during his life. The Connecticut law, however, cannot apply to the present case; and indeed is repugnant to the statute of Rhode Island. By the decision alluded to, it is not necessary, that the wife should have any seisin, either in law or fact, of the estate, to give her husband an estate by the curtesy. In the very case decided, she was actually disseised at all times during the coverture; and yet her husband was held entitled, as tenant by the curtesy. Now, the statute of Rhode Island positively requires a seisin in the wife during the coverture. Nor, indeed, in another view, is the Connecticut decision in point. There the wife had a present estate, of which she was, though disseised, entitled to a present possession. No question arose as to curtesy of a reversion or remainder. How that question would have been decided, if it had arisen, this court have no means of ascertaining.

I cannot agree with one remark of the counsel for the plaintiff in the present case, that Eliza Gibbs, the mother of the plaintiffs, was

not seised in law of the estate, because she had only a reversion therein, after the tenancy of her father by the curtesy should expire. My opinion is, that there can, technically speaking, be a seisin in law of a reversion, though not in deed; and that such was her predicament. She was, in the strictest sense of the terms, seised of the reversion. See Cook v. Hammond [Case No. 3,159]; Plow. 191.

Upon the whole my opinion is, that the plaintiffs upon the special verdict are entitled to recover their purparty, as heirs of their mother, Eliza Gibbs.

The district judge concurs in this opinion, and judgment is to be given accordingly.

Case No. 13,469.

STODDARD v. The PEDRO.

[See Case No. 4,489.]

Case No. 13,470.

STODDARD v. READ.

[2 Dall. 40.] [1]

Circuit Court, D. Pennsylvania. May Term, 1783.

PRIZE — PERISHING CONDITION OF VESSEL — SALE.

[This was an appeal in admiralty by Stoddard against Read and the schooner Squirrel and cargo.]

On motion of the appellant's counsel, before an appearance filed on behalf of the appellee, stating that the prize schooner was in a perishing condition, it was ordered:

BY THE COURT. That the schooner, her tackle, apparel, and furniture, be sold at public auction, to the highest bidder, for the use of those to whom the same shall be finally decreed.

STODDARD (WILSON v.). See Case No. 17,838.

Case No. 13,471.

STODDARD v. WARREN.

[7 Reporter, 517.] [2]

Circuit Court, N. D. Illinois. 1879.

CONTRACTS — SUBSCRIPTIONS FOR BOOKS — PARTIES — SUBSCRIPTIONS CANCELLED OR TRANSFERRED BY CANVASSERS.

1. Orders or subscriptions for a book taken by a general agent, or by a canvasser, authorized by the publisher, are contracts between the publisher and the subscriber. In any event, the agent or canvasser is only liable as a guarantor, or where bad faith is shown.

2. An agent for subscriptions or a canvasser of books has no right to cancel subscriptions or to transfer them to another party.

This action embraces three original actions brought by plaintiff against defendant upon certain promissory notes and accounts. The defendant admitted the demands, but pleaded a set-off. It appears that defendant was the general agent of plaintiff for the sale in the Northwest of an American reprint of the Encyclopædia Britannica, issued by plaintiff in parts, at Philadelphia. The work was to be sold by subscription, and to be furnished to defendant at certain rates. The British publishers of the work subsequently arranged for its sale in this country through a Mr. Hall. The defendant requested plaintiff to consent that he might act as Hall's agent, which was refused. The defendant thereupon notified plaintiff that he should in future canvass the "Hall edition" only. In the mean time he had obtained a large number of subscribers for the plaintiff's edition. The plaintiff refused to fill defendant's orders for these subscriptions except for cash. The defendant then, as he claims, to protect himself, and at a great expense, induced a large number of the subscribers to exchange their subscription for the "Hall edition," taking back the reprint volumes. He claims for such expense, for loss on the volumes returned him, and also for profits on subscriptions not exchanged. It is contended, on the part of the defendant, that he was not bound to continue in the execution of this contract for any specific or certain time, but that he was at liberty to suspend operations under it at any time, when it appeared to him to be his interest to do so; but that the plaintiff was bound to supply him with books to fill all orders during the time he was engaged in working under the contract. In other words, that the defendant might, at his option, stop at any time canvassing for the plaintiff's books, but that the plaintiff was bound to supply the books to fill the orders taken upon the terms provided for in the contract; and upon this basis of a construction the defendant makes his claim for damages.

Tenney & Flower and J. R. Sypher, for plaintiff.

Higgins & Sweet, for defendant.

BLODGETT, District Judge, (charging jury). After a careful study of the contract, I am of the opinion that this undertaking was entered upon, probably, by the parties with the expectation that it would continue during the time that the book was to be in the process of issue, that is, during the time the entire issue was coming out; and it was also expected that during that time the defendant would continue his canvass for the work within the territory assigned, or at least that his canvass would be continued until such time as he had made a thorough and complete canvass of the field assigned to him.

The question is: Had the defendant the right to obtain a cancellation of the orders he had secured for the plaintiff's book, and substitute orders for the Hall book, and charge the expense of so doing to the plaintiff? Upon this question I am very clear that he had no such right. The orders in question had been ob-

[1] [Reported by A. J. Dallas, Esq.]

[2] [Reprinted by permission.]

tained by the defendant as the plaintiff's agent. Both parties, we may say, had an interest in them. The defendant could not, without the consent of the plaintiff, secure the cancellation of those orders, and charge the plaintiff with the expenses he incurred in so doing. This would be a wrong toward the plaintiff, who had the right to the benefit of these orders to the extent to which they had been taken. The defendant contends that he was obliged to do this in order to protect himself from the contracts he had made with his subscribers, and which he was unable to fill by reason of the plaintiff's refusal to sell him books on credit to fill them with. It seems to me, however, that two courses lay open to the defendant in this emergency: first, to have paid the plaintiff cash for the books required to fill the orders which he had taken, for I do not think the plaintiff was bound to give the defendant credit for stock after the defendant had broken the contract; or, secondly, to have turned these orders over to the plaintiff and allowed him to fill them on proper terms of equity between them. I do not agree with the defendant that he was in such peril from the contracts which he had made with these subscribers as to justify the course he took in cancelling this large number of them. The contracts with the subscribers are, in my opinion, binding contracts upon the plaintiff himself, made by the plaintiff's duly authorized agent, the defendant, and it is at least doubtful to my mind whether the defendant is personally liable on them at all. In any event, he is only liable in the nature of a guarantor, or where bad faith is shown. It seems to me it would be a sufficient answer by Mr. Warren to any subscriber who demanded books according to the terms of the subscription to refer the subscriber to the plaintiff, and demand of the plaintiff, in behalf of such subscriber, that he should fulfil the contract which Mr. Warren had made with the subscriber as Stoddart's agent. It would follow, then, that the defendant had no right to take back from the subscribers the reprint volumes which he had delivered on orders, and to charge the plaintiff with the difference between what he paid the plaintiff for those volumes and what he could sell them to Hall, or Scribner, Armstrong & Co. for, making $5,012 of the item of $12,206.45 damages claimed. And with regard to the four hundred and eighty subscriptions still outstanding, I am equally clear that the defendant has no right to charge as damages in this case the profits he might have made on the filling of those subscriptions if the plaintiff had sold him the books on credit to fill them. First, because those profits are uncertain. The subscribers may not take the books when tendered to them. There is no proof that they have ever demanded a fulfilment of the orders by the defendant, and, as has been frankly suggested by defendant's counsel, a large percentage of these orders may prove wholly worthless; the parties may have died, or become insolvent, or positively refuse to take the books, although they have subscribed and agreed to do so, and also that they may have removed from the country, and be beyond the reach of the defendant. Secondly, because the defendant might have obtained the books to fill these orders by payment of the cash to the plaintiff as he needed the stock. Thirdly, the defendant can relieve himself of all responsibility in regard to these orders by requesting the plaintiff to fill them in accordance with the terms of the contract with the subscribers.

It is urged that the defendant was not required to turn these orders over to the plaintiff, because he had an interest in them, but I am not prepared to say that the defendant would lose his interest in these orders by requesting the plaintiff to fill them. Probably a court of equity, if not a court of law, would protect the defendant so far as his interest in the profit of filling these orders was concerned; but that is not a material question to this case, but an important question is: Was the plaintiff obliged, after the defendant had terminated his contract, to intrust the defendant with the filling of these orders, which the defendant had taken for the plaintiff, and after the defendant had transferred his allegiance from the plaintiff's book to that of a competing book? The only question here is: Can the defendant set off these damages claimed by him as against the plaintiff's demand here in suit? I am of the opinion he cannot. When the defendant elected to become the agent of the plaintiff's competitor, and in effect to assume from that time forward a hostile position to the plaintiff's interests in the publication of plaintiff's books, I think the rights of the parties under this contract are so far changed in regard to the completion of orders taken by the defendant, as the plaintiff's agent, as to call for the application of such equitable principles as would protect both parties, inasmuch as the contract does not provide for that contingency. The plaintiff might justly doubt whether the defendant would in good faith proceed to fill all the orders taken for the plaintiff's book, and might with propriety, it seems to me, insist that he would only supply the defendant with books to fill those orders on payment of the cash, and he might also, perhaps with equal propriety, demand that the subscriptions which had been obtained should also be turned over to the plaintiff himself, or some third person, in trust, to be filled in good faith, and the profits fairly divided according to the terms of the contract. I am clear, that when the defendant saw fit to terminate the contract before it was completed, and while there was no provision for executing such orders as had been taken, that the right of defendant to credit under the contract ceased, and new terms should be made in regard to the manner in which he should be furnished with stock so required.

Verdict ordered for plaintiff.

[NOTE. Pursuant to the above directions of the court, the jury brought in a verdict for

plaintiff for $2,976.53, upon which judgment was entered. The cause was then taken by writ of error to the supreme court, where the judgment of this court was affirmed. 105 U. S. 224.]

STODDERT (THORNTON v.). See Case No. 14,000.

Case No. 13,472.

STODDERT et al. v. WATERS et al.

[1 Cranch, C. C. 483.] [1]

(Circuit Court, District of Columbia. June Term, 1808.

INJUNCTIONS—MOTION TO DISSOLVE—NOTICE—WHEN TO BE GIVEN.

Notice to dissolve an injunction must be given ten days before the term; if given in term, a term's notice is required.

[This was an action by Stoddert & Mason against Waters & Griffith and others.]

Mr. Jones, for the defendants, having filed answers on the first day of the term, and then entered notice of motion for dissolution on the docket, and ten days having expired since the entry, he now moved the court to dissolve the injunction.

The bar generally stated the construction of the rule to have been that there must be ten days' notice before term, or if the notice be given in term, a term's notice is required.

THE COURT (nem. con.) said it was the construction which had always been given to the rule.

Mr. Jones then moved to have the rule amended.

But THE COURT declined, thinking the construction of the rule reasonable.

STOEVER (PAYSON v.). See Case No. 10,863.

Case No. 13,473.

STOKELY et al. v. SMITH.

[2 Ben. 407.] [2]

District Court, S. D. New York. May, 1868.

CHARTER PARTY—DILIGENCE—BLOCKADED PORT—DEVIATION.

1. Where a vessel was chartered in New York for a voyage to Port au Platte, St Domingo, or, in case of that port being blockaded, to another open port in the same island, or a market, and back to New York, the vessel to use all diligence in port and at sea, and the charterer, in answer to a libel to recover the charter money, set up various delays by the vessel, one being a deviation to Turks Island, for the purpose of inquiring whether Port au Platte was blockaded. *Held*, that the vessel would have been liable to seizure as a prize, if she had gone direct to Port au Platte for the purpose of inquiring whether the blockade of that port was raised.

2. As there was no restriction in the charter as to where the master should make inquiry, and as Turks Island was shown to be a proper place to make such inquiry, the vessel was not chargeable with any loss occasioned by her going to Turks Island for that purpose, only the necessary time having been consumed.

3. Evidence of instructions from the charterer to the master of the vessel, in reference to going to Turks Island, could not affect the rights of the parties in regard to matters that were covered by the charter.

4. For delay occasioned by a mistake of the master in passing by a port, the owners of the vessel were liable.

This was a libel to recover the sum of $1,083.85, as a balance, due on a written charter party, made at New York, between the master of the schooner Indus, owned by Benjamin Stokely and others, the libellants, and the respondent, Haskell G. Smith, on the 20th of May, 1858. The charter party chartered the vessel to the respondent, for a voyage "from the port of New York to Port au Platte, St. Domingo, or, in case of that port being blockaded, to another open port on same island, or a market, and back to New York, with a supercargo on board free, not to go to Port au Prince except in case of stress of weather, on the terms following, viz." One of those terms was, "and use all diligence in ports and at sea." The charter money was stipulated to be "six hundred dollars per month, payable in United States currency, upon completion of charter." The libel set forth, that the vessel entered on the fulfilment of the charter on the 20th of May, 1858, and proceeded to Port au Platte, and thence to Porto Rico and back to New York, and was thus employed for two months and ten days, and that the charter money payable was $1,400, of which $1,083.85 remained unpaid, and had been demanded from the respondent, and payment refused.

The defences set up in the answer were, that the vessel did not use all diligence in ports and at sea; that she lost three days, through the wilful misfeasance of the master, in not sailing from New York as soon as she should have sailed by three days; that she lost two days more by stopping at Turks Island, instead of going direct to Port au Platte; that she lost two days more by unnecessarily going beyond the port of San Juan, in Porto Rico, through the incompetency of the master in navigating the vessel, and being obliged to return over her track; that one bale of tobacco in the cargo was negligently damaged by the master and crew, to the amount of five dollars; that, if the vessel had sailed from New York when she ought to have done so, she would have arrived at Port au Platte within ten days, or thereabouts, after the blockade of that port was raised, and five days in advance of any other vessel laden with provisions, and would have sold her cargo at high prices, but that, in consequence of the delays set forth, other vessels laden with provisions arrived before the cargo of the Indus could be sold, and prices declined, and the respondent suffered a loss of $2,000; that the libellants

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

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

were entitled in no event to recover for more than two months and three days' time; that there had been paid, on account of the charter party, $375.15, and $5 for damage to the tobacco; and that there remained due no more than $878.85.

W. R. Beebe, for libellants.
A. W. Griswold, for respondent.

BLATCHFORD, District Judge. I think that the master of the Indus is, according to the weight of the evidence, not responsible for the three days' delay in sailing from New York, but that that delay was caused by the storm which was setting in just as the vessel was ready to sail, and that the master was justified in not putting to sea before he did.

As to the deviation to Turks Island, the evidence shows, that it was for the purpose of inquiring whether the blockade of Port au Platte was raised; that no more time than was necessary was consumed in making that inquiry; that Turks Island was the most proper and convenient place for making the inquiry; and that, before the vessel left New York, it was known that Port au Platte was blockaded, but it was not known whether or not the blockade was raised. A great deal of irrelevant testimony has been put in by deposition, on the part of the respondent, to show conversations by him and his agents with the master of the Indus, and instructions by him to the master, in reference to his going to Turks Island. But the rights of the parties are fixed by, and depend upon, the written charter party, and cannot be varied or affected by any such conversations or instructions, in regard to matters that are covered by the charter party. The charter party, on its face, contemplates a blockade of Port au Platte, and the evidence is, that it was blockaded, and that such blockade was known at New York before the vessel sailed from New York. The substance of the charter party is, that the vessel shall go to Port au Platte, if Port au Platte is not blockaded, and that she shall not go to any other port, as her port of destination, if Port au Platte is not blockaded, but that, if Port au Platte is blockaded, she shall go to some other port, as her port of destination. There is no restriction against her going to Turks Island, or any other place, to inquire as to the blockade, the only restriction as to going to any particular place being a restriction against going to Port au Prince, except in case of stress of weather. Under the charter party, therefore, the vessel had the right to exercise the privilege of inquiring at a proper port in regard to the blockade of Port au Platte. If, with a knowledge of the blockade of Port au Platte, the vessel had deliberately contracted to go there, she would undoubtedly have been bound to go there directly. But she did not so contract. Her contract was the very reverse, and was a contract to go there only in case the port was not blockaded. If, under this charter party, the vessel had gone, with this charter party on board, and a clearance for Port au Platte, directly to Port au Platte, and the blockade had been still in force, and she and her cargo had been captured, the plea that she had gone there to make inquiry as to the raising of the blockade, with no intention of entering if she found the port still blockaded, would not have availed her, and the respondent could have held her liable to him for his cargo, on the ground that, under the charter party, she was not authorized to go there if the port was blockaded. It is well settled that, where knowledge of a blockade exists at the commencement of the voyage of a vessel, she cannot lawfully approach a blockaded port, even for the bona fide purpose of inquiring as to the continuance of the blockade, and, if she does, she is liable to capture. The Delta [Case No. 3,777]; The Cheshire [Cases Nos. 2,655, 2,657]; The Empress [Id. 4,477, 4,478]. And, where the owner of the cargo knows of the blockade when the vessel sails, he loses his cargo, as lawful prize, in case of capture because of any fault committed by the vessel. The Sunbeam [Case No. 13,615]. The master of the Indus, therefore, in the discharge of his proper duty to the vessel and to the respondent, was bound not to approach Port au Platte, for any purpose, under the facts existing in this case, until advised of the raising of the blockade; and his going to Turks Island, to make inquiry on that subject, was proper. The obligations of the parties to the charter party were reciprocal. The respondent could have held the vessel liable for the loss of his cargo if she had gone directly to Port au Platte and found it blockaded, and had been captured with her cargo, and had been condemned for attempting to violate the blockade. The respondent is, therefore, not entitled to any allowance for any loss of time by the deviation to Turks Island.

A clear negligent loss of two days' time is shown, resulting from the mistake of the master, in passing by the port of St. Juan. For this loss the respondent is entitled to be allowed.

As there was no delay, for which the vessel is responsible, in her voyage to Port au Platte, the question raised, as to the liability of the vessel for the loss by the respondent of prospective profits on the cargo, does not come up for decision.

If the parties do not agree, there must be a reference to a commissioner, to compute the amount due to the libellants on the basis of this decision, the respondent to be allowed also for damage to the tobacco, if proved, and, for the amount so to be computed, with costs, the libellants will be entitled to a decree.

Case No. 13,474.

In re STOKES.

[1 Ben. 341.] [1]

District Court, S. D. New York. Aug., 1867.

ARMY—ENLISTMENT OF MINOR—EVIDENCE.

On a habeas corpus to inquire into the enlistment of an alleged minor, who had sworn, on his enlistment, that he was twenty-one years of age and upwards, evidence may be given as to whether he understood what he was swearing to.

[Cited in Seavey v. Seymour, Case No. 12,596; Re Davison, 4 Fed. 509.]

[In the matter of James Stokes, Jr., on habeas corpus.]

BLATCHFORD, District Judge. This case is substantially the same as that of In re Cline, just decided by me [Case No. 2,896]. Stokes is a private soldier, who enlisted in the army of the United States, at New York, July 23, 1867. His enlistment papers are, in substance, of the same character as those of Cline. His age is stated in them as being twenty-one years and four months, and he swears, in his oath of enlistment, "that he is over twenty-one years old." On the hearing, on the return to the writ, it was alleged that Stokes had, in fact, on his enlistment, stated his age to be only eighteen years, and had not understood that he was swearing he was twenty-one years old, and that the oath which he signed and swore to was not read or explained to him. I allowed evidence to be given on that point, and am entirely satisfied that the proceedings in enlisting him were carefully conducted, and that he stated that he was twenty-one years and four months old, and was willing to swear to it, and that he understood fully that he was required to swear to his age, and knew that he was swearing that he was over twenty-one years of age. For the reasons stated in the Case of Cline, the oath taken by Stokes on his enlistment, as to his age, is conclusive on that point. As his enlistment was, in all respects, regular, he must be remanded to service.

Case No. 13,475.

In re STOKES.

[1 N. B. R. 489 (Quarto, 130); 1 Am. Law T. Rep. Bankr. 122.] [2]

District Court, S. D. New York. April 17, 1868.

BANKRUPTCY—MOTION TO SET ASIDE ASSIGNEE—BY WHOM HEARD—NOTICE.

A motion on the part of the bankrupt to set aside the appointment of assignee can only be entertained by the district judge upon notice, and not by the register.

[In the matter of Edward S. Stokes, a bankrupt.]

I, Edgar Ketchum, one of the registers in said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. John Winslow who appeared for the bankrupt, and Mr. G. A. Seixas who appeared for Jenk Budlong, and Jenk Budlong & Co., creditors of the said bankrupt. These creditors attended on the 13th of March, the day fixed in the warrant for the first meeting of creditors, and duly proved, and filed proofs of their claims, and chose James Davis assignee, who was then appointed by the judge. The attorney for the bankrupt afterwards, and on the 19th of March, attended, supposing that to be the day for the first meeting of creditors, and then obtained the register's order for the creditors to show cause why the appointment of assignee should not be set aside, and the bankrupt be allowed to prove that he was not indebted to those creditors. The creditors showed cause and insisted that only the judge upon notice could entertain this motion, and upon hearing in open court, or after a reference to take the testimony, this application not being unopposed, and so not being chamber business, such as the register, under the rules and orders, might hear and direct. I was of opinion that the objection on the part of the creditors was well taken, and the counsel for the bankrupt then asked to have the question certified to the court, and written points on both sides were afterwards filed, which I transmit with this paper.

BLATCHFORD, District Judge. The register is correct in his views. The clerk will certify this decision to the register, Edgar Ketchum, Esq.

Case No. 13,476.

In re STOKES.

[2 N. B. R. 212 (Quarto, 76).] [1]

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

BANKRUPTCY—DISCHARGE—DEBT CONTRACTED BY FRAUD.

Objection to discharge based upon the fact that the debt was contracted by fraud, is not good, for such debt will not be affected by the discharge.

In bankruptcy.

BLATCHFORD, District Judge. This case will stand for hearing on the specifications filed by the creditors, for whom Mr. Seixas appears. Either party may take further testimony before the register. The specifications filed by Richard Bell are insufficient.

---

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

[2] [Reprinted from 1 N. B. R. 489 (Quarto, 130), by permission. 1 Am. Law T. Rep. Bankr. 122, contains only a partial report.]

[1] [Reprinted by permission.]

They go wholly to the fraud in contracting the debt to Bell, and, if true, the discharge will not affect that debt.

Case No. 13,477.

STOKES v. DAWES.

[4 Mason, 268.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

ESCHEAT—RES JUDICATA—DEED—RECITALS—STATE'S SEISIN—GRANT.

1. An inquest of office by the attorney general for lands escheating to the government by reason of alienage, is evidence of title in all cases; but is not conclusive evidence against any person, who was not tenant at the time of the inquest, or party or privy thereto. Such person may prove that there are lawful heirs, not aliens, in esse.

[Cited in Montgomery v. Dorion, 7 N. H. 481.]

2. A copy of a deed duly recorded is, after sixty years, admissible in evidence to establish the grant, under which the party claims title to the land in controversy.

[Cited in Deery's Lessee v. Cray, 5 Wall. (72 U. S.) 806; Fulkerson v. Holmes, 117 U. S. 399, 6 Sup. Ct. 780.]

3. Where a marriage is proved, a recital in a deed sixty years old, that the grantor is heir, and sells as such, is prima facie evidence of the fact, if possession of the property has been uniformly held ever since under that deed.

4. Where the commonwealth is seised under an inquest of office of lands, that seisin must be deemed to continue, until the title is lawfully parted with; for the commonwealth cannot be disseised.

[Cited in People v. Clarke, 9 N. Y. 361; Sands v. Lynham, 27 Grat. 297.]

5. A resolve of the legislature, releasing such title to another, may be construed as a grant, if necessary to give it effect.

[Cited in Enfield v. Permit, 8 N. H. 514.]

Writ of entry sur disseisin of the demandant. Plea, nul disseisin.

At the trial the demandant claimed title to the premises as follows: One Benjamin Stokes died seised of the premises in 1756, leaving a daughter, Rebecca Stokes, his heir at law, who died afterwards, in 1765, as the demandant alleged, without any lawful heirs. Benjamin Stokes made a will in 1749, which was admitted to probate in 1757, and gave his estate to his said daughter and appointed William Payne and Daniel Gould his executors. There was a clause in the will, by which a limited control seemed to be given to the executors, as to the time and manner of the daughter's possessing the estate. In 1795 an inquest of office was filed by the attorney general against Thomas Adams and Joshua Bentley, who were in possession of the estate, claiming the land as an escheat to the commonwealth on account of the daughter, Rebecca Stokes, having died without lawful heirs. The fact was directly put in issue by the tenants, and a verdict in the affirmative was found for the commonwealth, upon which judgment was duly obtained, and a writ of seisin duly executed and returned in April, 1796. The tenants, however, had been allowed to remain in possession afterwards by the indulgence of the commonwealth; and it did not appear, that the commonwealth had ever received any rents and profits. The present defendant, Mary Dawes, was a daughter of Joshua Bentley, her mother being a daughter of Payne. She had been in possession for several years. On the 14th of February, 1825, the legislature passed a resolve upon the petition of the demandants as follows, viz.: "Resolved, for reasons set forth in said petition, that the commonwealth remise, release, and forever quit-claim, and do remise, release, and for ever quit-claim to the said William Stokes, &c. all the right, title, and interest, which the said commonwealth have, or may have, in the said several tracts of land, being the same whereof one Rebecca Mountjoy died seised and possessed, and which the said commonwealth held by escheat for want of heirs, as alleged in their said inquests of office, to have and to hold the aforesaid premises to their use and behoof for ever."

The tenant claimed title as follows: A certificate of marriage was produced between Daniel Mountjoy and Rebecca Stokes, in September, 1739. An office copy of a deed was then offered, dated the 20th September, 1765, purporting to be a deed of one Daniel Mountjoy to Daniel Gould and William Payne (the executors of William Stokes), for the consideration of £200, "of all his right and title in and to the real estate of his grandfather Benjamin Stokes, or his mother Rebecca Stokes." The deed was duly acknowledged and recorded in October, 1765.

Blair & Blake, for demandant, objected to the admission of this deed, without some proof that Daniel Mountjoy was the legitimate son of Rebecca. They further objected to the copy of the deed's being read without some proof of the loss of the original.

The tenant then proved, that William Payne (one of the grantees) had taken immediate possession of the estate, and held the same until his death in 1786; that by his will made in 1786, and duly approved, he devised all the residue of his estate (which included the premises) to his wife for life, and after her death to his grandchildren (among whom was the tenant, Mary Dawes); and appointed the said Thomas Adams (who had married one of his daughters, by whom he had children) one of his executors; that the widow, after Payne's death, continued in possession of this estate; and that, after her death, Thomas Adams and Joshua Bentley remained in possession until after the inquest of office.

STORY, Circuit Justice, upon these facts, thought the copy of the deed admissible. If the original were now produced, after such a lapse of time, it would be admitted, without proof of its actual execution, under circumstances like the present. Here, indeed,

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

the original is not produced; but the non-production may well be accounted for, by loss from time and accident, after sixty years; and as it was recorded immediately after its execution, there seems no reason to conjecture, that there is a fraudulent suppression of it. The possession has gone in conformity to the deed. Then as to the point of legitimacy, the marriage of Rebecca Stokes is proved, and after sixty years it is not too much to say, that a fact of heirship, stated in a deed, under which possession was held without question for thirty years, may well be admitted, as of itself presumptive proof of the fact, liable, of course, to be controlled by other presumptions and evidence.

Evidence was then introduced, on behalf of the demandant, to prove, that there was a general reputation among the friends and in the neighbourhood, that Daniel Mountjoy was an illegitimate child, and that Mary Dawes had admitted the demandant's title. There was also evidence introduced to control the foregoing, on behalf of the tenant.

Blair & Blake, for demandants, contended, that the demandants were, upon these facts, entitled to recover the whole; but if not the whole, the part to which the tenant had not shown any title: 1. Because the commonwealth had a good title and seisin, which passed, by the resolve of 1825, to the demandants, under which they acquired a lawful seisin: 2. That the inquest of office in 1795 was conclusive evidence against all persons, and particularly against the tenant, that Rebecca died without leaving any lawful heirs: and 3. That if not conclusive, still, upon the whole evidence, there was an irresistible presumption of the fact. They cited Bull. N. P. 243; 4 Mass. 282, 301; Co. Litt. 2b; Plow. 229, 484; 3 Rep. 10; 6 Mass. 329; 9 Mass. 125; 1 Mass. 394; 14 Mass. 193, 203; 1 Phil. Ev. 336; 14 Johns. 79; 4 Mass. 282; 8 Cranch, 46; 4 Com. Dig. "Executors," A, 1.

S. D. Parker, for tenant, denied all these positions, and contended, that the resolve, being a mere release of the title of the commonwealth, conveyed no seisin to the demandants. He cited 1 Mass. 219, 483.

STORY, Circuit Justice, in summing up to the jury, said: The inquest of office is undoubtedly evidence in this case of a very high nature; but I do not think it is conclusive evidence. To give it the latter effect, it would be necessary to show, that the tenant was a party or privy to that suit. It is true, that Joshua Bentley, one of the defendants in that case, is her father, but she does not claim this estate under him. On the contrary, if she has any title, it is one derived directly to her by devise from her grandfather, William Payne. Then it is said, that the demandants are, at all events, entitled to recover so much of the estate, as she does not show a title to; and as her title is only to an undivided moiety with the other grandchildren of William Payne, the title of the demandants must prevail, as to all the residue belonging to the other grandchildren. But this argument is not well founded in law. The demandants by their writ admit the defendant to be a good tenant of the freehold for the whole of the demanded premises. The writ admits her seisin; and she, having pleaded the general issue, has consented to be deemed tenant of the whole. See Kelleran v. Brown, 4 Mass. 443. The case might have been different, if there had been a disclaimer. Under these circumstances the demandants must recover by the strength of their own title; and that title is good for the whole, or it is bad for the whole; there being no doubt, that if Rebecca Stokes died without lawful heirs, the escheat of the commonwealth has been perfected. If she left a son, who was her lawful heir, and the deed to William Payne was good to pass the estate, it is wholly immaterial, who are the other tenants claiming under Payne.

Now, what is the demandants' title? They prove a seisin of the commonwealth, under an inquest of office for an escheat of the estate. The commonwealth, being once seised, cannot be disseised. And its seisin must be deemed to continue, until it has lawfully parted with the title. See 4 Mass. 282; [Green v. Liter], 8 Cranch [12 U. S.] 246; 6 Deane, Abr. p. 71, c. 178, art. 16, § 3. Then, as to the resolve of 14th of February, 1825; it is said, that it only purports to release the right, title, and interest of the commonwealth in and to the premises; and that a mere release is not sufficient to pass a seisin. But it appears to me, that the resolve, though its terms are, as stated, must receive a reasonable interpretation. The intention was to grant the right, title, and interest of the commonwealth to the demandants; and the resolve would be nugatory, if it were to be construed otherwise. I hold, therefore, that it was a sufficient grant to pass the right, title, and interest of the commonwealth, and that, by operation of law, the commonwealth being then seised of the estate, a sufficient seisin passed by the resolve to the demandants to maintain their action. If then their seisin is proved, the plea admits the disseisin, unless the tenant establishes a better title. The case, therefore, resolves itself into a comparison of the titles of the litigating parties. And, indeed, the case must wholly turn upon the point, whether Daniel Mountjoy was a legitimate child of Rebecca Stokes or not; for unless he was legitimate, as no other title is shown in him, the demandants are entitled to a verdict.

The judge then summed up the facts on this point, and so left the cause to the jury. The jury found a verdict for the tenant; which was set aside, and a new trial granted, principally upon some new evidence discovered since the trial.

Case No. 13,478.

STOKES et al. v. FINDLAY et al.

[4 McCrary, 205.] [1]

Circuit Court, D. Iowa. 1879.

BANK—IMPERFECT ORGANIZATION—STOCKHOLDERS—LIABILITY AS COPARTNERS.

1. The Bloomfield Bank was organized and commenced business without paid-up capital, without a sworn statement of its paid-up capital to the state auditor, and without any certificate from the state auditor authorizing the association to commence business—all these things being required by statute. Code Iowa, § 1576. *Held*, construing said section with other provisions of the statutes of Iowa, that, notwithstanding these failures, there was an imperfect organization, and it was not the case of no corporation in which the incorporators would be liable to creditors as partners.

2. If a corporation proceeds to exercise its powers without the performance of the required conditions, it proceeds irregularly, and both the corporation and its individual members may be subjected to the penalties and liabilities prescribed by law; but it does not follow that the corporation, by reason of its delinquency in this regard, loses or forfeits ipso facto its corporate existence.

3. Under the statutes of Iowa, a corporation for pecuniary profit becomes a body corporate as soon as the articles of incorporation are filed in the office of the recorder of deeds.

In equity

LOVE, District Judge. This is a proceeding the purpose of which is to put the stockholders of the Bloomfield Bank into bankruptcy. The very ground of this proceeding is that the so-called Bloomfield Bank was in fact and in law no corporation at all; that the essential steps required by the law of Iowa to make it a corporation were not pursued; that these preliminary steps or requisites are in the nature of conditions precedent to the organization of a banking corporation; that the statute requiring the prerequisites in question is in its terms, and in the very nature of the case, mandatory, not merely directory, and that the defendants, having neglected to perform the preliminary and precedent conditions, failed to organize themselves into a corporation, but became and were an association in the nature of a private partnership for the purpose of carrying on the business of banking.

The very able and ingenious counsel for the petitioning creditors admit that the true question is whether or not the Bloomfield Bank was in fact and law a corporation. If it was a corporation, this proceeding against the stockholders as mere partners cannot be maintained; but the counsel contend that there was a total failure to organize a corporation according to the law of Iowa. They also concede that if there was a corporation, though ever so defective, these defendants may take shelter under it from the present proceeding; but the counsel insist that the question is not one of defective organization, since there was no organization at all under the law. It will be seen at a glance that if this view of the law be sound, it may be followed by most serious consequences, not only to the present defendants, but possibly to many other stockholders in corporations, standing in a like predicament, since it involves them in personal and individual responsibility for the debts of the association to which they belong, irrespective of any imputation of fraud or misconduct on their part.

It being conceded by the defendants, for the purpose of this decision at least, that the Bloomfield Bank commenced business without paid-up capital, without a sworn statement of its paid-up capital to the state auditor, and without any certificate from the state auditor authorizing the association to commence business, the counsel for the petitioners place their denial of its existence as a corporation mainly upon section 1576 of the Code, which is in these words: "No association shall be organized under the provisions of this chapter with a less amount of paid-up capital than $50,000, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid-up capital of not less than $25,000. But no association shall have the right to commence business unless its officers elect or its stockholders shall have furnished to the auditor of state a sworn statement of the paid-up capital, and when the auditor is satisfied as to the fact, he shall issue to such association a certificate authorizing such association to commence business, a copy of which shall be published as provided in section 1571." This section must undoubtedly be construed in connection with the provisions of chapter 1, tit. 9, of the Code, providing for the organization of corporations for pecuniary profit; but, standing alone, will it bear the construction which the counsel seek to put upon it? True, it says that no association shall be organized under the provisions of this chapter with a less amount of paid-up capital than $50,000, etc.; but these words cannot be taken, as claimed by counsel, in their literal sense, for a moment's thought will make it apparent that the very terms of the section necessarily imply the existence of a corporation, already organized. These words require what? A paid-up capital. And how could the capital be paid up without a previously organized corporation? To whom would the subscriber of stock pay his money, and from whom receive his certificate of stock, if no corporate body existed, with the proper officers duly elected and authorized to receive payment and issue the certificates of stock? But this interpretation of the section is placed beyond question by the words which immediately follow: "But no association shall have the right to commence business until its officers elect or its stockholders shall have

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

furnished to the auditor of state a sworn statement of its paid-up capital," etc.

Now the duty here enjoined is to be performed by whom? By the officers elect or stockholders; and how could there be stockholders and officers elect without an organized corporation? These terms clearly and necessarily imply the existence of a corporation competent to issue stock to stockholders and to elect officers. It is evident, therefore, that we must seek some interpretation of the words "no association shall be organized," etc., which will bring them into harmony with the implied fact of an existing corporation. Undoubtedly the true intention of the legislature was to provide that there should be no complete or perfect organization without the paid-up capital, the sworn statement and the certificate of the auditor; that is, that there should be no organization of a corporation which would authorize them to proceed with the ultimate business of the association without the prerequisites in question; without these prerequisites there would necessarily be an organization and a corporation, but it would be a defective organization. It would, therefore, be not the case of no organization, as counsel contend, but one of an imperfect organization. Hence the section further provides that "no association shall have the right to commence business until its officers elect or stockholders shall have performed the acts required of them." Here it will be perceived that the legal consequence annexed by the law to the failure to pay up the stock, make the sworn statement, and procure the certificate, is not that there shall be no organization or corporate existence, but that the association shall not commence business; that is, it shall not receive deposits, discount paper, issue circulation, etc. In this clause the true distinction appears between the existence of a corporation and the right to exercise its powers. Its existence depends upon the fact of its organization; the right to exercise its powers may depend upon the performance of prescribed conditions. The former may clearly exist without the latter. It is by confounding this distinction that counsel have, in my judgment, been led into error in the exceedingly ingenious oral argument addressed to the court. It is by no means to be implied that because the law forbids an association to commence business or exercise its legitimate powers without the performance of certain conditions, it is thereby intended to deny its corporate existence as a consequence of the nonperformance of the conditions. If the corporation proceeds to exercise its powers without the performance of the required conditions, it proceeds irregularly, and both the corporation and its individual members may be subjected to the penalties and liabilities prescribed by law; but it by no means follows that the corporation, by reason of its delinquency in this regard, loses or forfeits ipso facto its corporate existence. The distinction just referred to will be made quite apparent by reference to the general law of Iowa contained in chapter 1, tit. 11, of the Code, providing for the organizations of corporations; chapter 9, tit. 11, which makes certain provisions in relation to banks organized under the laws of Iowa, and among them the provisions contained in section 1576, just considered, makes no provision whatever for the organization of banking corporations. Banking corporations, like all other corporations for pecuniary profit, are to be organized under the general law contained in chapter 1, tit. 9. Some conditions are annexed in chapter 9, tit. 11, upon which banking corporations may commence and do business, but we must look back to the general law to ascertain by what means these corporations may be formed, and upon what conditions their organization gives them corporate existence.

Now, if the question vital to the decision of the matter before me is, at what time, and on what conditions, does an association for pecuniary profit become a corporation under the general law of Iowa, this is by no means difficult to decide. Section 1058 provides that any number of persons may associate themselves and become incorporated for the transaction of any lawful business, etc.; and section 1060 provides that before commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, etc. And section 1064 enacts that the "corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and a copy filed in the office of the secretary of state, within three months from such filing in the recorder's office." At what point of time, then, does the association become a body corporate? Clearly as soon as the articles are filed in the office of the recorder of deeds; for at that moment the corporation may commence business, and it would be simply absurd to say that it might commence business as a corporation, and yet not be incorporate. It is the adoption of the articles of incorporation, and the filing of them with the recorder of deeds, that creates the corporation, for then it may commence business. Here, again, the distinction broadly appears between the existence and the doings of the corporation, between its organization and its acts. Its organization, though not entirely perfect, is sufficient when its articles are filed to constitute it a corporation, for then it may commence business; but in order to make its organization perfect, and thus render its "doings" valid as to all the world, the requisite notice must be governed by publication and by the filing with the secretary of state. The statute does not pro-

vide that the corporation itself shall become invalid in consequence of the failure to publisn the notice and file with the secretary, but only that its doings shall be thus invalidated; nor is what I here say at all inconsistent with what I have said in commenting on the terms of section 1576. Section 1064 provides that the corporation may commence business as soon as the articles are filed in the office of the recorder of deeds. This is affirmative, and necessarily and in terms implies the existence of a corporation upon the filing of the articles.

The provision in section 1576, that no banking association shall have the right to commence business until its officers or stockholders shall have furnished the state auditor with a sworn statement of paid-up capital, etc., is negative, and it does not imply that no corporation shall exist till that act is done. The very terms, indeed, as I have shown, imply the existence of a corporation whose officers or stockholders shall do the required act, and it only postponed the right of the corporate body to embark in its ulterior business of accepting deposits, loaning, discounting and issuing paper until the corporate body itself or its members shall make the sworn statement of paid-up capital and have obtained the auditor's certificate. That the corporation itself is not invalidated, much less extinguished, by the failure to publish the notice and file with the secretary of state, or even by a failure to pursue substantially the steps required in its organization without some proper proceedings to forfeit its charter, clearly appears by section 1068. "A failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of the stockholders liable for the corporate debts." Thus we see the distinction is clearly made between "organization" and "publicity," and doubtless the publication of notice and filing with the secretary appertain to the "publicity" rather than the "organization" of the body corporate. And what are the consequences which, by the terms of the statute, result from the failure to comply substantially with the foregoing requisitions? Does the corporation thereby have no existence or cease to exist? Does it follow from the failure that no corporation has been formed and that none in fact exists? Certainly not! for the statute evidently contemplates the continued existence of the corporation; else why does it provide that the stockholders' property shall be liable for the corporate debts? If no corporation had been formed there could be no corporate debts; for, if no corporation had been formed, the stockholders would be mere partners, according to the theory of plaintiff's counsel, and the debts would be partnership debts. If it had been the intention of the legislature to provide that a failure to comply with the provisions of the law respecting organization and publicity should result in making the stockholders mere partners, it would have been absurd to provide that the individual property of the stockholders should be liable for the debts, since that would have been the result of the partnership without any such provision; but it is argued that a construction which recognizes the existence of a banking corporation without paid-up capital, as required by section 1576, cannot be correct, because it would be fatal to the ends of justice. The prepayment of the capital is the most essential condition of a banking corporation. It is the security of the public against fraud and loss. It is made the express duty of the "officers and stockholders" to make a sworn statement to the auditor of its paid-up capital, etc. Can they be permitted to acquire the privileges and immunities of a corporation without a compliance with the essential conditions of the law from which they derive their creation? Can any set of men be permitted to engage in the business of banking without a dollar of paid-up capital, and advertise themselves to the world, falsely, as having a certain paid-up capital, all in flagrant violation of the very law of their existence as a corporation, and yet claim exemption from personal responsibility for their debts and frauds by pleading the immunities of the very law which they have infringed? Such a doctrine, it is contended, would not only give immunity to fraud in this particular case, but it would encourage the commission of fraud in other cases.

This argument was urged with great subtlety and force by counsel, but I think the answer to it is both obvious and conclusive. That answer is that the consequences apprehended by counsel do by no means flow from the recognition of the bank as a corporation. It is true that by holding the association to be a corporation we preclude the liability of the members as mere partners, but it does not by any means follow that they are hence exempted from personal and individual liability for their alleged debts and frauds. In the first place, if the bank shall be adjudicated a bankrupt as a corporation, the assignee may compel all delinquent stockholders to pay up their unpaid stock. In the second place, I can see no reason why the assignee may not, by bill in equity or otherwise, make all stockholders who participated knowingly in the fraudulent organization or operations of the bank personally liable for all damages resulting to creditors from their fraudulent conduct. This could, in my judgment, be done upon the clearest principles of law and equity, irrespective of any statute; but there are sections of the statute providing in express terms for the protection of creditors in this regard.

Section 1071 provides that "intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or liabilities, shall subject those guilty

thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from said fraud may also recover damages therefor against those guilty of participating in such fraud." And section 1072 provides that the payment of dividends which leave insufficient funds to meet the liabilities of the corporation shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, etc. See, also, sections 1573 and 1574. Thus it appears that creditors are provided with ample remedies without denying the existence of the corporation, and by consequence subjecting the stockholders to liability as partners; and the remedies referred to are such as to enable the court to distinguish between innocent and guilty stockholders. There may be stockholders who in good faith paid up their stock, and who did not in any way participate in the original organization of the bank, and certainly it would be most unjust to involve them in the common ruin by confounding them with those who never paid a cent upon their stock, and knowingly participated in deceiving the public and defrauding creditors. If, on the contrary, the stockholders be made liable as partners, the honest man who in good faith paid up his stock to the last dollar without any knowledge whatever of any purpose to evade the law, will be made personally liable for the entire debts of the bank in common with the stockholder or bank officer who paid not a cent upon his stock and knowingly aided in evading the law. This certainly would be a most unjust, not to say deplorable result.

It is apparent that the redress which the court proposes here to give the creditors is precisely consistent with the contract between the creditors and the bank, and the intention of all parties to that contract. The creditors did not deal with the Bloomfield Bank as a mere copartnership, nor did they trust the members of the corporation as such. The creditors intended to give and did give them credit as an organized corporation. They did not rely in crediting the bank upon the individual and personal responsibility of the stockholders, and now to make the stockholders individually and personally responsible as partners, would result in giving the creditors what they did not expect or contract for. What the creditors did contract for, and what they did have a perfect right to demand, was that the capital should have been paid up by the stockholders according to law, and that there should have been good faith in the organization and operation of the bank; and precisely to this extent I propose to give the creditors redress.

The stockholders will, in my view, be compelled to repair the injury done to the creditors, by paying up their stock in full, and by making them compensation in damages for the consequences of their bad faith in failing to pay up their stock before the commencement of business. As the creditors did not intend to deal with the bank as a private partnership, so it is manifest that the stockholders did not intend to bind themselves to the creditors as copartners, and it would seem to be an extraordinary and illogical proceeding which should enforce a contract contrary to the intent and meaning of both contracting parties.

Case No. 13,479.

STOKES et al. v. KENDALL.

[1 Hayw. & H. 3.] [1]

Circuit Court, District of Columbia. Dec. 28, 1840.[2]

OFFICERS—LIABILITY FOR DAMAGES—MALICE—INTENTION TO INJURE.

An officer is liable for his acts, if the jury believe that he did not act in good faith and with intention to perform duly the duties of his office, and if he showed malice or intention to injure and oppress the plaintiffs.

The declaration claimed $100,000 damages, and contained three counts. The defendant pleaded not guilty, upon which issue was joined.

R. S. Coxe, M. St. C. Clarke, and J. H. Eaton, for plaintiffs.

Walter S. Jones and W. W. Dent, for defendant.

W. B. Stokes, Lucius W. Stockton, and Daniel Moore, surviving partners of R. C. Stockton, were contractors under the name of Richard C. Stockton, for carrying the mail, and besides performing the duties stipulated in their contracts, performed extra services, for which extra services the then postmaster-general (Major Wm. T. Barry), in conformity to the law and usage of the department caused credits to be entered on the books of the department in favor of the plaintiffs to the amount of $122,000; that the defendant was subsequently appointed postmaster-general, and wrongfully, oppressively, &c., caused the credits, upon which payments had been made, to be suspended on the books so that it was untruly, unlawfully and oppressively made to appear on the said books that the plaintiffs were indebted to the department in the said sum of $122,000, whereby they were unable to obtain large sums of money legally earned by them as contractors for other services, and were subjected to great expenses, delays, injuries and embarrassments, and were greatly injured in their credit and business, and suffered great losses in complying with their contracts with the department, &c.

The second count is for omitting, neglecting and refusing for a long space of time, viz., two years, to pay to the plaintiffs, &c., contrary to the duties and obligations of his office.

The third count sets out the act of congress

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

[2] [Reversed in 3 How. (44 U. S.) 87.]

of the 2d of July, 1836 [5 Stat. 112], by which the solicitor of the treasury was authorized and directed to settle and adjust the claims of the plaintiffs for the said extra services, and directing the postmaster-general to give credit for the amount which should be found by the solicitor. That the award was made for $161,563.89; whereby it became the duty of the postmaster-general to give credit, &c. That he refused, &c.

R. S. Coxe, for plaintiffs, opened the case, and offered the following evidence: A transcript of the record in the mandamus case against the same defendant, the report of the solictor of the treasury, and oral testimony relating to the partnership.

The defendant offered sundry depositions of officials of the government and other papers. The defendant offered four prayers to the court, viz.: 1st. That he was not responsible to the plaintiffs in the right in which they then sued under the first count. 2d. That he was not liable under the second count for refusing to comply with so much of the award of the solicitor as he, on the ground of want of jurisdiction in the said solicitor, refused to comply with. 3d. That he was not liable for consequential damages. 4th. That the plaintiffs had no joint right of action. All of which prayers were refused by the court. The defendant then offered certain evidence upon which he founded the following prayers: 1st. That the plaintiffs were not contractors. 2d. That the defendant was not liable if he acted from a conviction that the solicitor had no lawful jurisdiction to audit and adjust the items, &c. 3d. That he was not liable if he acted from a conviction that it was his official duty to set aside the extra allowance. 4th. That he was not liable for any of his acts if the jury believe that he acted with the bona fide intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs. All of which prayers the court refused to grant. The plaintiffs offered evidence to prove their special expenses and losses, such as counsel fees, tavern bills, discounts, &c., to the admission of which evidence the defendant objected; but the court overruled the objection and allowed it to be given.

The verdict was for the plaintiffs.

After the rendition of the verdict, the defendant produced the following certificate by the jurors and prayed the court to be permitted to have the same entered on the minutes of the court, to which the court assented: "We the jurors empanelled in the case of Wm. B. Stokes and others v. Amos Kendall, and in which case we have this day rendered our verdict for the plaintiffs for $11,000, do hereby certify that said verdict was not founded on any idea that the defendant performed the acts complained of by the plaintiffs, and for which we gave damages as above stated, with any intent other than a desire faithfully to perform the duties of his office of postmaster-general, and protect the public interests committed to his charge, but the said damages were given by us on the ground that the acts complained of were illegal, and that the said sum of $11,000 was the amount of actual damage to plaintiffs, estimated by us to have resulted from said illegal acts."

Reversed by the supreme court, 3 How. [44 U. S.] 87.

NOTE. In a former proceeding the plaintiffs applied for a mandamus on the defendant, to compel him to pay the sum awarded to the plaintiffs. The supreme court of the United States affirmed the action of the court below [Case No. 15,517], awarding the writ. [Kendall v. U. S.] 12 Pet. [37 U. S.] 524. The present case is reported in 3 How. [44 U. S.] 87, the supreme court there holding:

1. That where a party has a choice of remedies for a wrong done to him, and he elects one and proceeds to judgment, and obtains the fruits of his judgment, he cannot, in any case, afterwards proceed to another suit for the same cause of action.

2. After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the reference, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded.

3. Evidence of special damages was inadmissible under this declaration. It is in form an action for a tort, yet in substance and truth it is an action for the non-payment of money.

Case No. 13,480.

STOKES et al. v. KENDALL.

[1 Hayw. & H. 70.] [1]

Circuit Court, District of Columbia. April 12, 1842.

PRACTICE AT LAW—SPECIAL VERDICT—JUDGMENT.

A jury had given a special verdict on a declaration containing five counts, whereupon the defendant moved in arrest of judgment because the several counts did not set forth any sufficient cause or causes of action, and the plaintiffs moved to enter the verdict on the 1st and 5th counts, and nolle prosequi the others. The court allowed the latter and denied the former motions.

[This was an action at law by William B. Stokes and others against Amos Kendall.] Motion in arrest of judgment.

Richard S. Coxe, for plaintiffs.

Walter Jones and Richard Dent, for defendant.

The defendant, by his attorneys, appeared and prayed that judgment on the verdict of the jury be arrested and that judgment be rendered for the defendant, because the plaintiffs' declaration, and all and singular, the several counts therein do not set forth any sufficient cause or causes of action whereby to charge the defendant in the premises, and because the said declaration and all, or some one of the said counts therein, are wholly insufficient in form and substance. Whereupon the counsel for the plaintiffs submitted the

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

following motion: To enter the verdict upon the 1st and 5th counts of the declaration, and nolle prosequi on the 2d, 3d and 4th counts.

THE COURT gave the following judgment: Whereupon all and singular the premises being here seen and fully understood, and after argument of counsel being heard, and mature deliberation being thereupon had, it is considered by the court here that the motion of the defendant, heretofore made by his attorney aforesaid, to arrest the judgment of the court in the premises, be and the same is hereby overruled, and that as to the 1st and 5th counts in the declaration, the aforesaid plaintiffs recover against the said defendant as well the sum of $11,000, their damages aforesaid, by the jurors in form aforesaid assessed, to be sustained by reason of the charges as aforesaid contained in the said 1st and 5th counts of the declaration, with interest from the 17th of March, 1842, as the sum of $68.67 by the court here unto them, the said plaintiffs, as their assent adjudge for the costs and charges by them about their suit in this behalf laid out and expended, and as to the 2d, 3d and 4th counts of the declaration, it is also considered by the court here that the aforesaid plaintiffs take nothing of their writ and declaration aforesaid, &c.

The defendant excepted to the judgment of the court as follows:

Mem.—After (at the last term of this court at the trial of this cause) the plaintiffs had produced to the jury evidence under all the counts of their declaration, the court had instructed the jury on the competency of the evidence and on the plaintiffs' right of action under each and every of the said counts, as appears by the said bills of exception, the jury had returned a general verdict on the whole declaration which had been recorded as aforesaid, which verdict was returned on the last day of the term and immediately upon the rendition thereof the court adjourned until the ensuing term, the defendant had filed his motion in arrest of judgment as aforesaid before such adjournment, and the said motion had been continued to this term, as aforesaid; the plaintiffs now here at this term make the above motion, to which motion the defendant, by his counsel, objected, and the court now here, after argument of defendant's said motion in arrest of judgment, having overruled the same and entered judgment as moved by the plaintiffs, to all which proceedings the defendant, by his counsel, excepts and prays and moves the judgment so entered on the said two counts be arrested for error in the procedure aforesaid, and that judgment be rendered for the defendant, which last mentioned prayer and motion was overruled by the court.

NOTE. At the November term of 1840 judgment was entered against the defendant. At the March term of 1841 a motion was made by the said defendant for a new trial, because the verdict was against the law as laid down by the court, and against evidence, and because the damages are excessive and influenced by evidence of expenses and other special damage which the court had expressly ruled out upon the only count of the declaration under which the damages were assessed by the jury. The court granted the motion and gave the plaintiffs leave to amend their declaration. The declaration as amended contained five counts, and the verdict of the jury was upon the whole declaration.

[See note to Case No. 13,479.]

STOKES v. KENDALL. See Case No. 15,517.

Case No. 13,481.

STOKES v. MOWATT.

[1 U. S. Law J. 305.]

Circuit Court, New York.[1] Sept. Term, 1817.

EQUITY—PRESUMPTION—ADMISSION OF INTEREST—RIGHTS TO FUND.

1. Where a defendant who has received a joint debt, admits the joint interest of the plaintiff, but does not state its amount, which he had an opportunity of knowing, the plaintiff's interest, nothing appearing to the contrary, shall be deemed to be an equal interest.

2. Where it appears that a plaintiff is entitled to the whole of a given sum in certain given rights, it is no objection to his recovery of it that it is not shown how much he is entitled to in each right.

Before presenting our readers with the points adjudged in the above-entitled cause, and the elaborate opinion of the learned judge by whom they were decided, it will not, it appears to us, be unconducive to a ready apprehension of the judgment, to state a few of those facts not specifically adverted to in pronouncing it, which preceded and caused the institution of the suit.

Previous to the year 1797, Joseph Sands had been the common consignee of various shipments made to France by John Jones Waldo, in his individual capacity; the house of Francis, Waldo and Waldo trading under the firm of Waldo, Francis and Waldo, of Comfort Sands, individually, and of Comfort Sands and Lewis Tracy, jointly. These cargoes Joseph Sands had sold to the French government, and taken from its officers an acknowledgment, in his own name, for the amount at which he settled the debt due from the government for them, as for a debt due to himself. In 1797, Comfort Sands stopped payment, having previously assigned, for the nominal consideration of five dollars (see 10 Johns. 539), his interest in the debt unsettled to Nathaniel Prime, in trust to pay certain preferential creditors. This trust was never executed, in consequence of the fund having been paid to, and received by, the assignees of Comfort Sands, under the decree and affirmance subsequently mentioned. In February, 1801, Comfort Sands was declared a bankrupt, pursuant to the provisions of the bankrupt law of the Unit-

[1] [District not given.]

ed States [2 Stat. 19], and the defendants, Mowatt and Morris, appointed his assignees. Under the convention of the 30th September, 1803 (1 Laws U. S. § 142, art. 1), the amount due from the French government on the settlement made by Joseph Sands was liquidated at the sum of 526,469 livres tournois, including interest; for the payment of which, and other debts of the French government to our citizens, assumed by the United States, it was by the third article of the convention agreed, that the minister plenipotentiary of the United States in France should draw his bills on the treasury at Washington. By the act of congress of the 10th of November of the same year [2 Stat. 247] (7 Laws U. S., Old Series, 10) provision is made for the payment of such debts. By a further act of the 25th of April, 1808 [2 Stat. 498] (9 Laws U. S., Old Series, 140), it is enacted that the secretary of the treasury pay to the comptroller of the treasury the amount of bills drawn by the minister of the United States at the court of France on the treasury of the United States, and should be by him held in trust for such persons as might be adjudged to be entitled to it; and to that end should be deposited in the office of discount and deposit at Washington for safe keeping. By a subsequent section it is declared that all "suits or proceedings, at law or equity, to establish claims against or to any part of the sum deposited in the treasury on account of Joseph Sands, shall be commenced on or before the first day of November next in the circuit court of the Second circuit holden in the district of New York, or in the circuit court of the District of Columbia, to be holden in Washington county, in said District," with a right of appealing to the supreme court of the United States. Within the time limited the assignees of Comfort Sands filed their bill against Mr. Duval, the comptroller of the treasury, claiming, in right of their bankrupt, the sum paid into Mr. Duval's hands on account of the bills drawn by the minister of the United States in France in favour of Joseph Sands. In April, 1809, the now plaintiffs, Stokes and Bingham, filed their petition in the cause so instituted against Duval, claiming, as assignees of John Jones Waldo, part of the money sued for by the assignees of Comfort Sands, who thereupon amended their bill, made Bingham and Stokes parties by the description of "the assignees of John Jones Waldo;" and, without calling in question their title as assignees disputed their right on the ground of their being too late to claim it, as by the limitation of the act of the 25th of April, 1808, they were barred after the 1st of November of that year. By the decision in that suit the amount of the bills drawn in favor of Joseph Sands was directed to be paid by Duval to the assignees of Comfort Sands; but in the affirmance of that decree, which was appealed from, it is expressly said to be without prejudice to any claim which the assignees of John Jones Waldo may assert against the assignees of Comfort Sands for the money paid under the decree. Upon the foot of this decree, and to recover from the defendants, Mowatt and Morris, the proportion of John Jones Waldo in the sum received by them under it, the present suit in September, 1817, was instituted. Parker and Comfort Sands are now made parties, that all in interest might be before the court. Joseph Sands, the agent of all parties, adduced on behalf of the complainants, was the only witness examined.

LIVINGSTON, Circuit Justice. The court will proceed to a consideration of the several questions occurring in this cause without any previous statement of facts which appear on the pleadings or evidence. The same, when necessary, will be referred to. But in entering on this duty it is impossible to disguise the regret which has been excited by the very voluminous and expensive proceedings that encumber it, and which a few concessions, without any dereliction of right on either side, might have so easily prevented.

The first question of fact turns on the interest of John Jones Waldo in certain shipments of leather and other articles, which were made to France, in the year 1794, in conjunction, as is alleged, with Comfort Sands and Francis Lewis Jancy, and consigned to Joseph Sands, by whom they were sold to the French government, and who received from the officers of government an acknowledgment or liquidation in his own name, on account of those and other sales, for the sum of 376,451 livres, 5 sols and 7 deniers. Although the defendants have admitted an interest in these shipments and in this liquidation in John Jones Waldo, they have not thought proper to state the extent of such interest, although, in the frequent communications which must have passed between them and Joseph Sands prior to the commencement of this suit, they might have acquired a knowledge of it. This rendered proof of the fact necessary, from which it appears that the French government became indebted to Joseph Sands, as consignee of certain cargoes shipped to France by Comfort Sands, Francis Lewis Jancy, and John Jones Waldo, in the sum of 295,766 livres tournois, the third part whereof, to wit, 98,588 livres, 18 sols and 9 deniers, belonged to John Jones Waldo. In the year 1796 the French government settled the account of Joseph Sands, which then amounted for principal, including the demand just mentioned, and some others, to 376,451 livres, 5 sols and 7 deniers. This amount has been allowed under the convention of the 30th of April, 1803, made between the United States and France, and amounted, with interest, to 526,469 livres, and has been paid by bills drawn by the American minister on the treasury of this

country. The interest of John Jones Waldo in this liquidation being established, it is made a question whether he were solely concerned in that part of these shipments which appeared under his name, or whether they belonged to Joseph Waldo, John Francis, and the said John Jones Waldo, who were then trading under the firm of Waldo, Francis and Waldo. Of the existence of such a house in 1793, of which John Jones Waldo was a partner, there is proof; but it is very doubtful whether this was not a separate adventure of John Jones Waldo. No other interest is disclosed to Joseph Sands; and J. J. Waldo's going to France on this and other business in which the assignees of Waldo, Francis and Waldo were interested does not settle whether the French debt belonged to himself or to the firm of Waldo, Francis and Waldo, for in either case the assignees had an interest in the payment. Mr. Lee, also the agent of the assignees, and those gentlemen themselves, in their answer to the bill filed in this court by the assignees of Comfort Sands against Gabriel Duval and others, treated it as the separate debt of John J. Waldo, stating in terms that he, "unconnected with his partners, entered into some joint speculations with Comfort Sands and Francis Lewis Jancy." But it is of little or no importance in this suit, as it regards the assignees of Comfort Sands, whether the debt in question originally belonged to John Jones Waldo or to the house of which he was at the time a partner. The defendant Parker, who was alone interested in disputing this fact, admits that although in the speculation the name of John Jones Waldo alone appeared, it was on account of the partnership of Waldo, Francis and Waldo, whose assignees are now plaintiffs. But here another difficulty is interposed by calling for proof of the title of Bingham and Stokes to bring this suit as assignees of this firm. The court will not inquire what proof in ordinary cases would be expected of a bankruptcy, or of the assignment of a bankrupt's estate, in a foreign country, because the evidence before it is abundantly sufficient to establish such bankruptcy and assignment in the present case, at least so far as John Jones Waldo is concerned, and which is sufficient for the present suit. Without adverting to the declarations or letters of the bankrupt himself, written nearly twenty years ago, it is too late now for the assignees of Comfort Sands to dispute the fact. As long ago as in April, 1809, a petition was filed in this court on behalf of Bingham and Stokes, as assignees of John Jones Waldo, claiming part of this money; and, without disputing the verity of this fact, the assignees of Comfort Sands amend their bill in the action then pending against Gabriel Duval and others, and make Bingham and Stokes parties to it, calling them assignees of one John Jones Waldo; and they finally contest their right to any part of this fund, not because they had no title to it as such assignees, but because their application for it under the act of congress came too late. So also in a bill filed in the court of chancery of this state by the assignees of Comfort Sands against Samuel Dana Parker to obtain an injunction against his proceedings at law to recover from them John Jones Waldo's proportion of this money, as his assignee, under a commission of bankruptcy issued in the district of Massachusetts, they state, and as one of their principal equities, that the suit of Parker was for the same money which had been claimed by Bingham and Stokes, as assignees of John Jones Waldo, and which had already been adjudicated upon; and they complain much of the burthen which will be imposed on them if Parker is permitted to proceed at law, of proving that whatever interest Waldo may have had in this debt before his bankruptcy was assigned to the said Bingham and Stokes, as they have alleged. After this recognition of the complainant's right to represent Waldo, and availing themselves of it to defeat or stay an action of his American assignee, they cannot complain if the court does not throw upon the present plaintiffs a burthen which they were so unwilling to take upon themselves; especially as they have not thought it necessary to file a bill of interpleader against these different assignees, and who are now both before the court. On this point, then, the court is fully satisfied.

It is next said that, whatever may be done in this cause, the assignees of Comfort Sands will still remain exposed to Parker's suit in the supreme court of this state. If this court cannot make a decree which will be conclusive, and afford protection to the assignees of Comfort Sands, against every one who may exhibit a claim for this money, it is no reason for not doing justice to the complainants as far as it can. If Parker had not been made a party, a decree must still have been made, by which, however, he might not have been bound. But, as Parker is not only a defendant, but has expressly admitted this to be a partnership concern, and has expressed his willingness to submit to a decision of this court in the premises, it is not hazarding much to say that a decree, under these circumstances, will be a bar against him, before whatever tribunal he may hereafter think proper to agitate his claim. But, admitting the present plaintiff entitled to sue for any demand due to Waldo, or to the firm of Waldo, Francis and Waldo, it is supposed that the act of congress which passed on the 25th of April, 1808, and the proceedings under it in this court in relation to this debt, which were affirmed on appeal to the supreme court, are a bar not only to this suit, but to every person who may at that time have had any claim on this property. To this doctrine, as at all applicable to the present case, this court cannot assent.

It is the peculiar doctrine of a court of chancery that none but parties to a decree are affected by it. If Joseph Sands, under this act, had received the whole sum in the treasury, as might well have been the case, the debt with the French government having been liquidated, and the bills of General Armstrong drawn in his name, would this have relieved him from responsibility to those who were originally and solely interested in this demand, and for whom he had acted as trustee? If, in the same way, any one of the parties originally concerned has received not only his own share, but those of his associates, shall he be permitted to retain the whole, because in their absence he had shown a right to receive it, and had obtained a decree accordingly? But if this doctrine of the conclusiveness of a decree of the court of equity on all the world, whether parties or not, were generally true to the extent in which it has been stated, a court would feel no small solicitude to withdraw from its operation a case like the present; for when it is recollected that these plaintiffs have done all in their power to make themselves parties to the suit in which this decree was made, but were prevented by the present defendants themselves from showing any title to the money in the treasury, because they had not made their claim within the time prescribed by the act of congress, it is not with a very good grace that they interpose an ex parte decision thus obtained to an investigation at this time of their pretensions. This is not an attempt by an original bill to disturb or correct a decree made in a former cause. On the contrary, that decree is made in part the foundation of the present claim. The plaintiffs do not impeach or desire any alteration in that decree, but undertake to show that, although the money in question may have been properly received under it, the defendants, for reasons which did not appear to the court, are liable to account to them for the whole or a part of it. But all difficulty on this point, if there were any, is removed by the decree of affirmance, which it is declared shall be without prejudice to "any claim which the assignees of John Jones Waldo may assert against the assignees of Comfort Sands," for the money "paid under the decree hereby appointed." This reservation, looking directly to the present demand, has been treated as meaning nothing. But this court is of opinion that it not only removes every doubt from this part of the case, but that it is an injunction on it to examine into and decide upon the present claim, which it has no right to destroy. It was also urged under this head of argument that the limitation in this act created a bar to the present suit; but it is manifest that no other limitation is thereby created than as regarded the actions which were to be commenced under the act against the comptroller of the treasury, otherwise so short a one as six months would not have found its way into the law; and it would have been worse than useless in the supreme court to insert in its decree the reservation just mentioned, if the understanding which is now put on this limitation be correct.

The court will now proceed to the consideration of another objection which, although not the next in order, must, if it prevail, be fatal to the present and every other attempt to recover from any one anything on account of the interest which John Jones Waldo once had in this fund. It is said that the whole of it was sold by Joseph to his father, Comfort Sands, some time in the year 1802, to reimburse the former for certain demands which he had against Waldo, and to satisfy which he had a right to sell, and actually did dispose of, this debt. If a valid sale to C. Sands took place, all inquiry as to the subsequent disposition of Waldo's proportion of the French debt may stop here, because C. Sands, in that case, as its vendee, became the legal owner, and he only can have an interest in looking after it. But, if no sale took place, or a fraudulent one, we shall have to proceed in the inquiry. In examining this part of the defence it will be necessary to look at the testimony of Joseph Sands, at the correspondence which took place between him and the agent of Waldo at and immediately preceding the alleged sale, and at the conduct of Comfort Sands about that time, and subsequent to his becoming the purchaser. It will not here be necessary to be very particular in inquiring into the extent or nature of the claims which Joseph Sands had on Waldo at the time of the pretended transfer of this debt to his father, because a decision of this part of the cause will not depend so much on the magnitude or nature of his demands as on the fact of sale, which is altogether denied by the plaintiffs, and the regularity of the sale, if any there were, which is set up. If it be conceded that Joseph Sands (and so is the testimony) had some claim on Waldo which was a lien on his portion of the French debt in his hands, it would seem to follow that he must have a right to sell, or such lien, in cases where the subject of it might not be worth redeeming, would be of no value. But how is he to sell? If a sale in private, and without notice, as was the case here, be allowed when no time of payment is settled by the parties, there will be no security against fraud; and, if notice be ever necessary, it can never be more so than when a property of this fluctuating value is to be disposed of, and no particular time set for its redemption. It cannot be pretended that such notice was given. On the contrary, it is clear from the testimony arising out of the correspondence of the parties, that, although a day for the sale was once fixed by Joseph Sands, and notice given to the agent of the parties, yet that none took place on that day; and there is no evidence that any

other day was appointed, or notice given; and even this notice was so very defective as to mention neither the hour of the day nor the place where the sale would take place. The correspondence opens with a letter from Mr. Prime to Mr. John Lee, dated the 25th August, 1801, in which he states the demand of J. Sands against John Jones Waldo at about four thousand dollars, and intimates that his interest in the French debt will shortly be sold, unless this demand be paid. At the same time he lets Mr. Lee know that his (Mr. Prime's) note to J. J. Waldo will be taken in part payment by J. Sands. When this correspondence commenced, it is worthy of attention that Mr. Waldo was in Europe, and Mr. Lee but imperfectly instructed in the nature of Mr. J. Sand's claim against him. Mr. Lee, in his answer, dated 17th September, 1801, protests against the sale of this property until the account between J. Sands and Waldo is brought to some adjustment. On the 30th of September, 1801, Mr. Lee again expresses his expectations to Mr. Prime that J. Sands will take no measure for the sale of the French debt until a settlement of accounts between him and Waldo, Francis and Waldo; and that he has no objection to let his note be applied to any balance which may be due to J. Sands. This letter being shown to J. Sands, he writes to Mr. Lee, on the 6th October, 1801, that the balance due to him from Waldo admits of no dispute, and refers to his account of the 5th October, 1797; and informs him that he will defer making sale of the French debt until the 15th of January next, on which day it will be sold, if the business be not settled. On this letter only one remark will be made, which is that J. Sands himself thought some notice of the sale necessary. Whether such notice were properly given to an agent, at the distance of so many thousand miles from his principal, it is unnecessary to say, because it is very certain no sale took place on the day fixed by J. Sands. On the 4th of October, 1802, a whole year after the last letter, Mr. Lee writes to J. Sands that, not having received the necessary instructions from the assignees of Waldo, Francis and Waldo for the settlement of his account, and wishing to have it brought to a close, proposes to have the business settled in Europe, and that Mr. Prime's note shall be taken in part payment. If this plan does not meet the approbation of J. Sands, Mr. Lee wishes him to suggest a more eligible one. This letter was delivered by Joseph Sands to his father, Comfort Sands, who, by a letter dated the 17th October, 1802, informs Mr. Lee that his son had received his letter of the 4th inst., and had requested him to inform Mr. Lee that the proposition contained [in] it, respecting the settlement of Mr. Waldo's business, was fair, but that nothing could then be done, as the French government were revising all their unsettled American claims; that J. Sands had written to McPherson on this subject; and that they must wait for an answer before anything could be done with Waldo's proportion. He then states that J. Sands has credited Waldo's account with the 1,500 dollars which Mr. Prime owed him. In the same letter he informs Mr. Lee that it is probable that this debt will be funded, and stock given for it; that when this is done the transfer can easily be made, and the stock must soon get up to sixty or seventy per cent.

Admitting a sale had been made by J. Sands to C. Sands of the share of Waldo, which is very far from being proved, it was prior in date to this letter, which must therefore be regarded as an entire waiver of it; for the pretended purchaser throughout the whole of it considers Mr. Waldo as still the proprietor of this debt, and consents to the mode which he proposes of settling the business between Waldo and his son; the only impediment to which at that time was the impossibility of making a transfer of Waldo's proportion of the debt. Prime's note to Waldo was actually credited by the son, if we may believe the father, which was the only part of the proposed arrangement capable of immediate adjustment. Now it is not very material whether J. Sands dictated this letter, or not, of which he has no recollection; nor whether he credited Waldo with the amount of Prime's note, which it is probable he never did, for no settlement seems ever to have taken place between these parties. It is sufficient, for the purposes of the question now under discussion, that the person who is set up by the defendants as owner of this portion of the debt under a sale from J. Sands disclaims, or fraudulently conceals, any interest of the kind. The court, therefore, totally disregards any assertion of his to the contrary, made in his answer, filed the 14th September, 1808, to the bill filed against him and others by his assignees. If a formal transfer or sale had been made in writing,—which it is agreed was not the case,—it was solemnly waived, and that immediately after it took place, if it ever had an existence, by the only person who had any interest in it. The court is therefore of opinion that no sale of this debt was ever made to C. Sands by J. Sands; that, if a sale were made, it was irregular and void, and, under the circumstances of the case, could have given C. Sands no rightful control over the debt; and, further, that if the sale had been conducted with every legal precaution and solemnity, and had been ever so fair, it was waived by the party in whose favor it was made; and that the rights of Waldo, therefore, remain, for the purposes of this suit, precisely as though no such disposition of this part of the debt had been made by J. Sands. But it is said that, independent of any sale, it appears that J. Sands, in October, 1802, or thereabouts, transferred to Comfort Sands the whole management and

control of the residue of the French debt; and that, although no writing was executed of such transfer, yet that Mr. McPherson, who had been left in Paris, as the attorney of the concern, was directed, by letter from J. Sands, to hold the said claim, or residue thereof, subject to the control and orders of Comfort Sands. That such breach of trust was committed by Joseph Sands, and such directions given by him to Mr. McPherson, there is some reason to believe; and that Comfort Sands, whom the son knew to be a bankrupt, did assume a control over the residue of the said debt. If, therefore, he had sold or disposed of the share belonging to J. J. Waldo, or any part thereof, the assignees of the latter must look for compensation to him, or to J. Sands, or to Mr. McPherson, and not to the assignees of C. Sands; but if it shall appear that the sale made by the order of C. Sands, subsequent to his bankruptcy, was out of that portion of the French debt which belonged to himself, and that his assignees have considered and treated the sale in that light, and have actually received of other persons concerned in such sale some of their proceeds, on the ground of their fraudulent agency in the transaction, such sale must be regarded as affecting the interest of Comfort Sands, and not that of John Jones Waldo; not only to the extent of such recoveries against others, but, so far as the court shall be satisfied, either by the acts of the parties or otherwise, that such sale was made out of the share or proportion of the French debt belonging to Comfort Sands when he became a bankrupt. This part of the cause is involved in considerable difficulty, and perhaps no result entirely satisfactory will ever be obtained. It is much to be regretted that the present assignees of C. Sands, or those who preceded them in that trust, had not given earlier notice to Mr. McPherson of his bankruptcy, and of their appointment, as it would have put an end to his interference with the debt, and prevented much of the trouble and expense which such intermeddling has occasioned. Mr. McPherson, although it must have been known in this country, early in 1801, that he had the charge of the French debt, received no intimation of the bankruptcy of C. Sands until four or five years after. In the meantime, by the order of C. Sands, as defendants say, he not only disposed of a very large portion of this debt at a reduced price, but also paid the proceeds in conformity with instructions from the same quarter.

It appears that in April, 1803. Mr. McPherson, under orders received from Comfort Sands, sold 145,000 livres of the principal of the debt standing in the name of J. Sands at a discount of 50 per cent. to Mr. Fulton, and the interest thereon, if interest were eventually allowed, at a discount of 60 per cent.; that the sum received in specie in consequence of this sale was about 94,192 livres, subject to several deductions for expenses and commissions of Mr. McPherson in effecting it. On a discovery of this sale, and of the agency of Mullett and Evans in it, to whom the bankruptcy of C. Sands was known, and who had actually proved a large debt against his estate, his assignees filed a bill in the court of chancery of this state against C. Sands, J. Sands, Thomas Mullett, and Joseph Jeffries Evans. The object of this bill was to obtain a reduction of the debt proved by Mullett and Evans, and to render them and C. and J. Sands liable for what had been received or appropriated by them of C. Sands' share of the French debt at the time of his bankruptcy. This bill, among other matters, alleges: That Joseph Sands, before he left Paris, informed Mr. McPherson of the interest of his father in the French debt, and instructed him to pursue his directions in the disposition of so much of it as belonged to him. That Comfort Sands, before or soon after he obtained his discharge, as a bankrupt, set on foot a scheme to obtain the said debt due to him as aforesaid, or to dispose thereof, or apply the proceeds to his own use; or to vend for the use of some other person or persons, in fraud of his creditors, who had or should prove their debts, under the commission of bankruptcy which had been awarded against him, except Mullett and Evans, whom he designed to favour at the expense of his other creditors; and that Comfort Sands, for this purpose, advised them of the amount and situation of the said debt when he became a bankrupt, and instructed and authorized them to direct and advise Mr. McPherson from time to time, in the exercise of his authority over the said debt due to C. Sands. That C. Sands also instructed McPherson how he should conduct himself in the exercise of his power, derived from J. Sands, over the said debt due to him when he became a bankrupt. That Joseph Sands was also well acquainted with this scheme of his father to prevent his assignees from obtaining the said debt. That they are informed and believe that McPherson, who they also allege knew of the bankruptcy of C. Sands, in the month of April, 1803, in conformity to instructions given to him by C. Sands, J. Sands, and Mullett, or some or one of them, sold to Robert Fulton, of the said debt which was due to C. Sands, 145,000 livres of the principal, at 50 per cent., and 58,000 livres of the interest thereon at 40 per cent., by which sale 50 per cent. of the principal and 60 per cent. of the interest was sacrificed; McPherson then well knowing that C. Sands was a bankrupt, and that this debt belonged to his assignees; and that of the monies arising from this sale Mullett and Evans had received 83,393 livres, or thereabouts, which they had retained towards satisfaction of their debt proved against C. Sands, or otherwise applied the same in fraud of the complainants; and that the residue of their monies arising from this sale had been paid and applied by McPherson, under the

directions of C. Sands, J. Sands, and Thomas Mullett, or one of them, or remitted the same to C. Sands, or paid the same, to his use, to some person unknown to the complainants. That McPherson, acting under the same authority and instructions, had remitted to Mullett and Evans, or to one of them, 31,500 livres, which they have applied towards payment of debts proved by them against C. Sands, or otherwise applied the same in fraud of the complainants. The bill then states that McPherson had sold all the said debt standing in the name of J. Sands, except 119,854 francs, or thereabouts, which had been remitted, by the American minister in France, in bills on the treasury of the United States, to be paid to whomsoever the same might belong; which the complainants had also applied for, as belonging to C. Sands, when he became a bankrupt. The bill then states that if the complainants, as assignees of C. Sands, are not entitled to the sum thus paid into the treasury, or some of it, the whole of the said French debt, which was due to C. Sands at the time he became a bankrupt, has been received or disposed of and applied by C. Sands and J. Sands, or by said Mullett and Evans; and if the complainants shall appear to be entitled to the said sum of 119,854 livres, or some part thereof, the residue of the said debt, deducting such sum, will appear to have been wrongfully and fraudulently disposed of by Comfort and Joseph Sands, or one of them, in such manner that they or one of them will appear accountable to the complainants, as assignees of the former. The bill then alleges that £3,438:18:5 sterling, which was remitted of the said debt by McPherson, went to Mullett and Evans; and that the complainants believe, from a letter of McPherson, that he had disposed of all the said debt in the name of J. Sands, except the 119,854 livres aforesaid, as well what actually belonged to C. Sands when he became bankrupt as what belonged to other persons for whom J. Sands acted; by reason whereof they insist that C. Sands and J. Sands are accountable to them for the said debt, which belonged to C. Sands, or so much as had not been remitted by the American minister, as aforesaid. The complainants, after setting forth several letters from McPherson, respecting this debt, charge that C. Sands and J. Sands, after the bankruptcy of the former, continued to direct McPherson in the disposition of the debt due to C. Sands, and that Mullett had also some control over McPherson, and that all or the greater part of the debt due to C. Sands when he became a bankrupt has since been received or sold by McPherson, and the proceeds or amount thereof remitted or sent to Mullett, or some other person or persons designated by C. Sands and J. Sands, or one of them, for that purpose; the whole or greater part of which remittances and application of the proceeds of said debt were unlawful, as it regarded the complainants, and was in fulfillment of a fraudulent combination between C. Sands, J. Sands, and Mullett to defraud George Codwise, Junior, and others, who are complainants in certain suits in the said court of chancery against C. Sands and others, for the benefit of C. Sands, J. Sands, and Mullett and Evans. The bill then charges Mullett and Evans with receiving from the British government a large sum on account of the illegal capture of the ship Prudence, which belonged to C. Sands, which was not credited when they proved their debt against his estate.

To this bill is annexed an oath of one of the complainants, made the 11th of June, 1808, in which he swears that he is informed and believes that out of the proceeds of the debt disposed of or assigned by McPherson, Messrs. Mullett and Evans, since they proved their debt against the effects of C. Sands, have received large sums of money, amounting to 115,000 livres, or thereabouts, which they have retained, or have applied the same as directed by C. Sands and J. Sands, or one of them, since the former became a bankrupt. The whole, or the greater part whereof, he understood and believed was the property of C. Sands when he became a bankrupt; and that, except the interest of C. Sands in the bill remitted by the American minister, he believes that the whole of the said debt due to C. Sands has been received, sold, assigned or disposed of by C. Sands, J. Sands, and Mullett and Evans, and the proceeds applied towards the payment of a debt formerly due from C. Sands to Mullett and Evans; or in some other way unlawfully, and in fraud of the creditors of C. Sands.

The court has been thus particular in its extracts from this bill because they show, what is very important in the examination of this cause, that the assignees of C. Sands considered, and so alleged in their bill, more than four years after the sale by McPherson to Fulton took place, and after seeing his letters on the subject, and after they had time enough to acquire the most accurate information, that it was made in collusion with C. Sands, and out of his portion of the debt acquired before his bankruptcy, and to secure some of his creditors to the prejudice of them, or for some other fraudulent purpose. Now, the present complainants are not obliged to prove that there was a recovery by the defendants from Mullett and Evans and Joseph Sands to the whole extent of this sale; not only because they are strangers to that suit, but because it is not improbable that the referees, on whose award the decree proceeded, may have thought that some of the proceeds arising from this sale were rightfully disposed of in consequence of antecedent liens by C. Sands, or for some other reason; and that so far the complainants were entitled to no relief against any of the parties before the court; or they may have thought (for we are left to conjectures) that Mullett and Evans were not liable for such of the proceeds of this sale as did not come to their hands. The important

fact is that the assignees, and probably the referees, considered and treated the sale by McPherson as a disposition of so much of the share of C. Sands which belonged to him at the time of his bankruptcy. It is also deserving of notice that, although they state that J. Sands, while in France, and while agent for C. Sands, was also agent for one Waldo, and some others, who had or pretended to have demands on the French government, which were also liquidated in the name of J. Sands; yet they do not make any one of these persons a party to their bill, under an allegation that they were ignorant of their Christian names. The court is not required to decide whether Mr. Waldo or any other persons ought to have been made parties to this bill; but it has a right, from their not being so, to infer that their rights would not be much attended to; and, if it had been proved—which does not appear to have been the case—that the part of the debt sold by McPherson really belonged to Waldo, as in that suit he could have had no decree against any of the parties for such sale, so it is not reasonable now to presume that such was the fact, unless the testimony on that point were produced, and proceeded from witnesses against whom no objection could be alleged; especially as it would be no difficult matter to make the referees believe, in the absence of all the other parties concerned, as was the interest of the assignees of C. Sands, and probably the fact that the share of C. Sands had alone been broken in upon by McPherson. That such was the case may well be supposed if C. Sands were really actuated by the fraudulent motives which his assignees impute to him, for it would then be his interest, or at least his object, to place beyond their reach every part of this debt to which his title had accrued antecedent to his bankruptcy; for the right, which it is pretended he had acquired to the proportion of Waldo, being subsequent to his bankruptcy, could not be claimed by them, and he might be willing to let that remain as it was, and take the chance of a better market, which appears to have been his intention, as far as can be collected from his letter to Lee, of the 17th October, 1802. That such was the case may also be inferred from the sum which was sold by McPherson, which was within a few thousand livres of the whole interest which C. Sands in his own right claimed in this fund. The same intention in C. Sands may be collected from the instructions which, from time to time, he sent to Mr. McPherson on this subject. In his letter of the 10th November, 1802, Mr. McPherson is directed to raise and remit to Frederick Roberts £600 sterling by a sale of this debt whenever one could be made at 50 per cent.; and by other letters written between the 10th November, 1802, and the 20th April, 1803, the agent in Paris is ordered to raise, by sales of this debt, to the amount (including the £600 just mentioned) of £3,438:8:5 sterling. He is also requested to pay out of it $896.66 to Skipwith. C. Sands also drew on him in favour of John McPherson, payable out of this debt, for 2,500 livres, which was accepted. In none of these letters is any intimation given, so far as we know, that the debt to be sold for the purposes above mentioned was any other than the portion owned by C. Sands,—a turpitude greater than any with which the assignees have charged him. We cannot believe that at the very moment of writing to the agent of Waldo, and flattering him with the funding of this debt, and its consequent appreciation, and claiming no right whatever to or control over it, he should transmit orders to Mr. McPherson to dispose of his share, or any part of it; for not a month had elapsed between his letter of the 17th October, 1802, to Mr. Lee, in which these flattering prospects are held out, and his first letter to Mr. McPherson ordering the sale. He might easily, from the practice of others, reconcile it to himself, however incorrect in principle, to apply his own property to the payment of some of his creditors in exclusion of others, and which is admitted by the defendants to have been his object; while nothing but the greatest depravity, and which no course of reasoning could excuse, could have prompted him to practice on Waldo the duplicity and injustice which must be imputed to him before it can be believed that he deliberately converted to his own purposes the property of this gentleman. And, even if the defendants think that he would be restrained by no moral sense from the perpetration of so complicated a fraud, his own interest, which he appears ever to have in view, would have deterred him from so early a disposition of that part of the debt which belonged to Waldo; for he was not so ignorant as not to know that after his letter of the 17th October, 1802, to Mr. Lee, he could assert no title to it, and that he would of course be liable to its owner for any injury which might result from a premature aberration of Waldo's interest against an action for which his discharge from his old debts would furnish no protection. Nor is there reason to think that McPherson, at the time of the sale to Fulton, supposed he was disposing of any part of this debt other than what originally belonged to C. Sands. But, if the matter were more doubtful than it is, the reasonable presumption, in the absence of positive proof to the contrary, is that C. Sands, by these directions, intended to exercise a dominion over a property to which McPherson knew his title was indisputable, and which Comfort Sands himself might think he had a right to sell, than over that portion which, although it stood in the name of J. Sands, was known to McPherson to belong to Waldo, and the sale of which, under such circumstances, by the authority of C. Sands, might well have involved him in serious responsibilities to the original cestui que trust. It appears also by a letter from McPherson to Macomb, who was then the assignee of C. Sands, dated 10th November, 1807, and which is copied into the bill of his assignees against Mullett and others, that

he acted, in the sale to Fulton, under the power given to him by J. Sands, and in concert with Mullett, a principal creditor of C. Sands, with whom he says he had kept up a regular correspondence since 1801. Now, it is not easy to discover what connection a creditor of C. Sands would have with Mr. Waldo, so as to satisfy McPherson of any right in him to exercise a control over his part of the debt. Although no designation may have been made at the time of the sale to Fulton, from whose share a deduction was to be made of the amount sold, yet it must have been understood by all the parties concerned, considering its object, and the appropriations to be made of the proceeds, that it was made out of the share belonging to C. Sands. It was evidently an afterthought of Mr. McPherson, that it "would be equitable that each set of owners of the whole liquidation should bear their share of loss on the sale to Fulton, as it was made out of the entire liquidation previous to the Louisiana treaty, and at a time a war was apprehended in America on account of the New Orleans business." And yet, were this opinion acted upon, it would produce a more unfavourable result to the defendants than the one to which the court will be led by the view which it is taking of the whole of this transaction. On the opinion expressed by Mr. McPherson, the court will only remark that if the sale had originally been intended to operate on the mass of this liquidation, Mr. McPherson, who was an intelligent and faithful agent, and thoroughly acquainted with the subject, would have said so, and not have assigned as a reason for his opinion a circumstance which might have been a very good one for Waldo's ordering a sale, but is none at all for making him participate in a loss which was produced to satisfy the claims of others, and when no part of the proceeds was applied to his benefit. If the residue of the liquidation had perished in the hands of McPherson, the representatives of Waldo could have set up no claim to any portion of the monies received from Fulton; and, if they had, where were they to be found, or against whom would their remedy have been? Nor can there be any doubt that the referees regarded this disposition by McPherson as affecting solely the interests of C. Sands, as his assignees had alleged; for it is impossible, in any other way, notwithstanding the obscurity which surrounds this part of the case, to account for the very large debt which is awarded against Mullett and Evans and J. Sands. The debt which they had proved is reduced $22,970.81; the debt created is $13,534.24; making an aggregate of $36,505.05.

Admitting the whole of the reduction to be on account of the Prudence, which is probable enough, still the sum of $13,534.24 is allowed to the assignees of C. Sands for the intermeddling of those defendants with the French debt, or with that part of it which was sold by McPherson, which could have been done only on the basis that at least so much of the money received of Fulton was produced by a sale of what belonged to C. Sands prior to his bankruptcy. It will be remembered that Skipwith was also paid out of these proceeds, which, added to the sum just mentioned, will leave not more than three thousand dollars, or thereabouts, unaccounted for, of the monies arising from this source. If the claim for the Prudence constituted the whole of the reduction, although Mr. Varick, one of the referees, thinks that part of what was received from the French debt formed an item of it, yet it is sufficiently apparent, from the short statement just made, not only that the assignees of C. Sands considered McPherson as having sold his share, but also that the referees were of the same opinion. Why the whole sum was not allowed against Mullett and Evans and Sands, if it were not, may have been owing to the referees considering, as they did, what was paid to Skipwith as a rightful appropriation by C. Sands pro tanto. The referees must also have viewed this debt, after its liquidation in the name of J. Sands, as the counsel of his assignees have done, and as the court does; that is, they must have considered each party concerned as having a divided or separate interest, to the extent of his original share in the different adventures, out of which the whole debt arose, and a right to control and dispose of his own share as he pleased, without consulting any other who had an interest, or affecting his rights. Whether Jancy, Waldo and Sands were partners or not in the shipments to France, the court entertains no doubt that they might each, after the liquidation, direct J. Sands how to dispose of his particular share, and that such disposition by him would not have rendered him liable to the others for whom he was trustee. So also was this connection regarded by all the parties to it. With Jancy, J. Sands settled for his share, and considered C. Sands and Waldo as each representing an individual or separate, and not a joint or partnership, interest in this debt. The mention which is incidentally made in the bill against Mullett and others of the monies in the treasury cannot affect the view which has been taken of the general scope of the bill, and of the proceedings on it. The assignees of C. Sands went for the whole of the dilapidation, which they themselves locate over and over again on his portion of the debt; and the referees, according to this opinion, were not at all influenced by the cursory notice which had been taken of the money in the treasury, nor did they intend, directly or indirectly, to decide to whom that belonged. It is now, then, too late for these gentlemen to say that they asked compensation for these fraudulent applications by C. Sands, only in the event of their not being entitled to the monies which were received for the residue of this debt, under the Louisiana convention. This election or substitution of another fund

ought not to be tolerated, after they have not only asserted, but must have proved, that the portion of the debt alienated by McPherson belonged to C. Sands before his bankruptcy, and that he alone, or in conjunction with his son, ordered the sale. This fact being once established whether they had recovered from Mullett or not, would diminish to that extent their interest in this debt, and ever be fatal to the claim which they now assert for the whole of the money in the treasury; but when, in addition to this, it appears that they have excluded every other person from recovering anything of Mullett and Evans on this account, how can they now expect to be permitted to fix any of this loss elsewhere? The assignees of C. Sands boast of their industry in tracing to its source the loss which this fund had sustained, and spurn at any attempt on the part of the plaintiffs, who have so long, they say, been asleep, to claim any contribution out of the sum thus recovered. As it is not the intention of the court to let the plaintiffs into any participation with the assignees of what was thus received, it is unnecessary to inquire whether any negligence be justly imputable to them for not uniting in the suit against Mullett and others, of which, however, they were entirely ignorant. As to the allegation that it was agreed between C. Sands and J. Sands, after the bankruptcy of the former, and the return of the latter to the United States, that the original proportion of the French debt belonged to C. Sands, and the interest thereof should be preserved for the use of his creditors, subject only to certain liens subsisting at the time of his bankruptcy, the court considers it as a mere pretence, and having no foundation in fact. And here it may be well, once for all, to observe that, although J. Sands appears as a witness for the complainants, the court does not think itself bound to believe all that he has said, either on his direct or cross-examination; for although a party who produces a witness be not at liberty to impeach his character, yet if it appears from his own showing and former conduct, as exhibited by himself, that certain parts of his testimony are liable to objections, the court may believe him or not, as it thinks proper. To the part of his testimony now under consideration is opposed the nonproduction of any such agreement with his father, as is here relied on; as well as the very great improbability that either of them would enter into an arrangement for the benefit of creditors, to whom neither of them appear to have borne much good will. Another answer is that, if such agreement were made, there is no evidence of its being observed by C. Sands; and the defendants themselves in the suit, which already has been the subject of so much animadversion, have charged and proved on him a violation of it. Nor is there a single letter, or any other document, to show that such instructions were given to McPherson, who would not have failed to obey them, and somewhere or other to have mentioned them. Nor can it be credited that, while J. Sands was most improperly putting under the control of an insolvent parent, so valuable a property of a gentleman then in Europe, for whom he was trustee, that he should be so very scrupulous of the rights and interests of the creditors of another; and if such solicitude really existed,—which we find contradicted at every step which we take in the cause,—why did he not at once give the assignees of his father a letter to McPherson, apprizing him of his bankruptcy, and directing him to settle with them for his part of the debt? The defendants, therefore, cannot be offended at the court's discrediting a story of which it is impossible that they themselves can believe a single syllable.

If the view which has thus far been taken of this subject be not erroneous, it will follow that the present plaintiffs were entitled to a very considerable portion of the money in the treasury; much greater, indeed, than they will probably receive under the decree which will be made; for there is no calculation or deduction which can be considered as at all reasonable which will not give them more than one-third of it, to which, on former occasions, they have limited their claim. Although it is easy to see how the assignees of Waldo have fallen into this mistake, yet, as the defendants have been considered as committing themselves by their bill against Mullett and Evans, it is but just to apply the same rule to the complainants. The court does this with some reluctance, because it is satisfied that there is no just calculation by which their interests in that fund can be so much reduced.

Although it cannot be necessary, after this intimation, to go through the different calculations which have been suggested, all of them being merely conjectural, and none of them very satisfactory, some items which the defendants have insisted on will be adverted to, in order to show that several of them, if allowed, would leave a larger sum than has been mentioned due to the complainants, and that others of them, on no principle, can be admitted.

	Livres.
Waldo's share in the liquidation was..	137,900
If from this be deducted the sum transferred to Mullett,—the propriety of which may well be questioned.....	31,500
There will still remain.....	106,400

A deduction is also expected on account of J. Sands' demand on Waldo. This, as stated in his account of the 5th October, 1797, and confirmed by his letter to Mr. Lee, dated in October, 1801, is for principal and interest, 25,825 livres, which, if also subtracted, still leaves 80,575 livres, a sum much greater than the one-third of these monies. It is true, that J. Sands now makes out a much larger account against Waldo; but he has no right, at this time, to state his demand so very different from what he admits

it to have been, when he threatened to sell the debt, and so very shortly before, it is pretended, that it was sold. But whatever his claim may be, the court cannot perceive what title the defendants have to this deduction, which must of course leave so much the more of this fund in their hands. If Waldo's proportion of this debt was sold by J. Sands to his father, he is paid, it is to be presumed, for all his demands against Waldo. But if the debt were never sold, and that opinion has already been expressed, what right have the defendants shown to represent the demand of J. Sands, and to a deduction on that account? They have produced no title to it by assignment from J. Sands or in any other way. J. Sands is either paid or he is not. This is a question, however, in which the assignees of C. Sands have no interest. It will be time enough, when the assignees of Waldo and J. Sands litigate that question, for the court in which such suit may be pending to inquire whether the latter has so conducted himself as to be entitled to anything, and what, for his agency for that gentleman; or whether he be not liable to him for very heavy damages for a breach of trust.

As little reason is there for charging the plaintiffs with any part of the expense which was incurred in getting this money from the treasury. The complainants very properly inquire what benefit has been done to them by an act which they have always considered as one of great injustice to them. They were very willing to let the money remain where it was, until their rights were decided on. Both parties would have had an interest in a speedy decision. They have undoubtedly reason to regret the inconvenience and loss to which they have been exposed by this money's passing into the hands of the assignees, for which they are very unwilling to pay; nor can the court, under the circumstances of this case, see any propriety in throwing any part of this expense on them, unless it be for the costs allowed to Mr. Duval. Still less founded is the claim which is set up for any of the costs or charges which were incurred in the suit against Mullett and others. That suit was prosecuted for the exclusive benefit of the creditors of C. Sands, and turned out a very profitable one; but, as the plaintiffs get nothing of what was recovered in it, they ought to pay no part of its expense. Some merit has been attached to the assignees of C. Sands never having claimed any of the money in the treasury but what belonged to them. This may be, but their bill is so drawn as to claim the whole of it as their own. Although this bill was not filed until the year 1808, which was seven years after the return of J. Sands to this country, and after, it appears, that he had made them many communications respecting the French debt, yet no mention is made in their original bill against the comptroller of the treasury, of any interest whatever in Waldo; and even when it is amended—which was after filing the petition of Bingham and Stokes—they say they are unacquainted with the "foundation or particulars of their claim"; and after being fully apprized that the assignees of Waldo asserted a right to a third of this money, they insist on excluding their claim from adjudication, because it had not been made within the time prescribed by the act of congress. The court will not say that they had no right to pursue this course, but it was not one much calculated to lay the present plaintiffs under any pecuniary or other obligations. The court will pass over some other sums which are insisted on as forming proper deductions with this single remark: that after allowing every one for which even a plausible reason can be assigned, and also charging them with their full proportion of what may have been lost by J. Sands' disposing of part of this debt to Ballard and others, as stated in McPherson's account, still there will remain for the assignees of Waldo more than one-third of the monies which came into the treasury, to which it has been thought proper, for the reasons already mentioned, to restrict their recovery. So also on a principle of contributing to losses in proportion to the respective interests of these parties in this fund, and of dividing what has actually been received or realized in the same way, the complainants would be entitled to much more than they will get under the present decree.

The principle which the court has adopted for the settlement of this controversy, and the sum which has been retained by the assignees, render it unnecessary to decide whether the dividends declared by the commissioners of a bankrupt are so conclusive as to protect the assignees against every one who may have a claim on what has been thus divided, but had given no notice thereof to the commissioners previous to the dividends being made; especially, too, as there is an abundant fund in hand to replace the one which had in part been divided.

It remains to dispose of the interest and costs. Considering the early notice which the defendants had of this demand, and that they received the monies under a full knowledge of it, without allowing an inquiry to be made into the title of the complainants, which they must have known was not a frivolous one, the court considers them as taking it at their peril. The ex parte judgment under which it was received ought not to protect them against a claim for interest, it being stated in the body of the decree that the present plaintiffs were too late to have their claim to this money decided on in that suit. The use of their proportion in this fund has been lost by the interference of the defendants; and, whether they have made anything by it or not, the loss to the assignees of Waldo is not the less on this account. And although seven years have now

elapsed since the receipt of this money, and although it was left undivided on account of the demand of the representatives of Waldo on it, not a single step is taken by the assignees of C. Sands, either by the proposal of an arbitration (which they were justifiable by law in making, and which it is probable would have been listened to), or by a bill of interpleader, to which the creditors of C. Sands and the representatives of Waldo might have been parties, or in any other way to bring the question to a decision; nor is any offer made to place the fund in a productive situation for the benefit of the party who should ultimately establish a title to it. Not only is no step taken to bring the question to an adjudication, but when a suit is brought by the assignees of Waldo very little facility is afforded in bringing it to an early decision, although there was nothing in the pretensions or situation of the plaintiffs to excite unpleasant feelings of any kind. For part of the time it is conceded that the money was divided between the assignees, and used as their own. The court is more inclined to give interest from the time the money was received, nor excepting the time of the appeals depending in the supreme court (the money being all that time in their hands), because even there it is probable the plaintiffs will receive less than they are entitled to. It is left to the commissioners of the bankrupt to say whether any, and what, portion of the interest shall be allowed as a charge by the assignees of C. Sands against his estate.

The question of costs admits of less difficulty. They will be very heavy; and it is easy to see that a great portion of them might have been avoided. There is no reason why, generally speaking, costs should not be given to a successful suitor in equity as well as at law. What, in the present case, is shown to entitle the defendants to an exemption? Have not the defendants rendered the suit necessary? Did they not take the money, as has already been observed, with full notice of the claim of the plaintiffs? Have they done anything by which its decision would be accelerated or expense avoided? The court can see no reason to throw these costs on the plaintiffs. They have been compelled to come into court in quest of a very valuable property, but of which only a remnant was left, and even that was withheld. Under these circumstances, they are entitled to costs; but as it is to be presumed that this money was intended and kept for the benefit of the creditors of C. Sands, they must be paid out of his estate. As to Benjamin Dunn Parker, the bill must be dismissed, with costs to be paid by complainants. The bill is also dismissed as to Comfort Sands; but, as his improper interference in this business has occasioned much of the trouble and expense to which the complainants have been exposed, he will pay his costs.

Something having been said of a note of Nathaniel Prime to John Jones Waldo for $1,500 and upwards, the court, to prevent mistakes hereafter, will only observe that it considers the settlement of which that note was to form a part as never having taken place, and that therefore the note belongs to the representatives of J. J. Waldo; at least that their right to it is not to be in any degree affected by the decree of the court. It is a source of unaffected satisfaction to the court that this decree can be reviewed by either party, and that no one will be more satisfied than the court by which it is made in having its errors corrected.

The whole sum received into the treasury of the United States was	$22,472 65
Deduct costs of Mr. Duval.....	38 08
	$22,433 57

No deduction is made for what was decreed to Havens and McPherson, for the claim of the assignees of Waldo extended to the whole sum paid in. One-third of $22,433.57 is $7,477.55. Seven thousand dollars, or thereabouts, it is admitted, was left undivided by the commissioners of the bankrupt. If this sum exceeds what was thus reserved, it has already been remarked that there are more than funds sufficient of C. Sands, in the hands of the defendants. Interest for seven years, commencing 1st January, 1812, to 1st January, 1819, at 7 per cent. $3,663.94,—making a total of $11,141.49.

The court therefore made the following decree in the cause:

Benjamin Stokes and James Bingham, Assignees of the Estate of John Francis, Joseph Waldo, and John Jones Waldo, and the said John Francis and Joseph Waldo vs. John Mowatt, Jun., and Robert Morris, Jun., Assignees of the Estate of Comfort Sands, Samuel Dunn Parker, and the said Comfort Sands.

This cause coming on to be heard on bill, answers, replication, depositions, and exhibits, and being argued by H. D. Sedgwick and Robert Sedgwick, Esquires, on the part of the complainants, and Caleb S. Riggs and Samuel Jones, Esquires, for the defendants, John Mowatt, Junior, and Robert Morris, Junior, and no one appearing to argue the same for Comfort Sands or Samuel Dunn Parker: It is ordered, adjudged, and decreed by the court that the defendants, John Mowatt, Junior, and Robert Morris, Junior, do pay to the complainants, or to their solicitor, on demand, the sum of eleven thousand one hundred and forty-one dollars and forty-nine cents of lawful money of the United States. And it is further ordered, adjudged, and decreed that the said John Mowatt, Junior, and Robert Morris, Junior, pay to the complainants their costs, to be taxed against them, the said John Mowatt, Junior, and Robert Morris, Junior; the said costs to be paid out of the estate of the defendant

Comfort Sands, in their hands. And it is further ordered, adjudged, and decreed that the bill be dismissed as to the defendant Samuel Dunn Parker, with his taxable costs, to be paid to him by the complainants. And it is further ordered, adjudged, and decreed that the bill be dismissed as to the defendant Comfort Sands; he, the said Comfort Sands, paying his own costs.

STOLLER (ERNEST v.). See Case No. 4,520.

STOLLEY (BLOOMER v.). See Case No. 1,559.

STOLLEY (BROOKS v.). See Cases Nos. 1,962 and 1,963.

STOLLEY (WILSON v.). See Cases Nos. 17,839 and 17,840.

STONE (BABCOCK v.). See Case No. 701.

Case No. 13,482.

STONE v. BISHOP et al.

[4 Cliff. 593;[1] 6 Reporter, 706; 2 Month. Jur. 549.]

Circuit Court, D. Massachusetts. Oct. 7, 1878.

TRUSTS — DEPOSIT OF MONEY IN TRUST — NOTICE TO CESTUI QUE TRUST — PROPERTY CHARGED — FEDERAL JURISDICTION.

1. Property once charged with a valid trust will be followed in equity in whosesoever hands it comes, and the holder will be charged with the execution of the trust, unless he is a purchaser for value without notice.

2. Whatever persons or corporations are capable of having the legal title or beneficial interest cast upon them by gift, grant, bequest, descent, or operation of law, may take the same, subject to a trust, and they will become trustees, provided the existence of the trust is fully proved.

3. Mere deposit of money in a savings bank, with entry in the pass-book in the form shown in this case, that it was in trust for the alleged cestui que trust, without notice to the supposed cestui que trust, is not sufficient to show that the money deposited passed to him, especially when he knew nothing of the deposit until after the decease of the depositor, and the appointment of an administrator.

[Cited in Gerrish v. New Bedford Inst. for Savings, 128 Mass. 164.]

4. Jurisdiction was assumed, although one of the parties respondent was a citizen of the same state as the complainant, it appearing that the suit was auxiliary to the original suit previously commenced, and still pending between citizens of different states.

5. Cases occur where a person may constitute himself trustee of a fund for another, when the fund remains in his control; but in this case the testator kept the pass-book, and never notified the alleged cestui que trust that any disposition in his favor had been made of the trust.

This was a bill of interpleader, brought by the complainant [Phineas J. Stone], as president of an institution for savings, to determine to which of two claimants a fund or deposit in the bank belonged.

J. H. Sherburne and D. F. Fitz, for complainant.

Horatio G. Parker and Benjamin Poole, for respondent George Carpenter.

"If the settler proposes to convert himself into a trustee, then the trust is perfectly created, and will be enforced so soon as the settler has executed an express declaration of trust, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable,—whether it be capable or incapable of transfer." Lewin, Trusts, p. 60, c. 6, § 2, and cases cited; Morgan v. Malleson, L. R. 10 Eq. 475; Armstrong v. Timperon, 24 Law T. (N. S.) 275; Ex parte Dubost, 18 Ves. 140; Vandenberg v. Palmer, 4 Kay & J. 204–212; Wheatley v. Purr, 1 Keen, 551. Knowledge of the gift on the part of the donee is not essential. Same cases, and Wells, J., in Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 231. A trust of chattels personal may be created by parol. Lewin, Trusts, 47, 48, and cases cited. Gen. St. Mass. c. 105; Hill, Trustees, 55–59; Witzel v. Chapin, 3 Bradf. (Sur.) 386. Here is a delivery of the money to a third person for the benefit of the defendant Carpenter, and a delivery of the book to this third person. No construction can be put upon the declarations of Alonzo C. Jackson, save that he intended to create, and believed he had created, a trust for the defendant Carpenter. It is sufficient to say, that this by-law is made for the protection of the bank, and though it, perhaps, could set it up as a defence in an action at law brought against it, it cannot avail in equity to destroy a trust between other parties, when the carrying out of that trust can in no way prejudice the bank. A decree in this case, that the money shall be paid to the defendant Carpenter, will be a full protection to the bank. That decree, if thought necessary, may provide, as part of it, that the bank book be delivered to the bank. Neither of the cases, Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, and Clark v. Clark, 108 Mass. 522, can avail against us.

The facts are different. In the first case, which the court say is decisive of the second, the depositor was affirmatively shown to have deposited the money in his name as trustee for the sole purpose of avoiding the provision of Gen. St. Mass. c. 57, § 141, and to have received the dividends thereon to his own use. In the second case, no evidence of any intention to create a trust was offered, and the depositor deposited her own

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

money by her own hand. They were both actions at law. The defendant's counsel in the first case claimed only that the plaintiff could not recover in that action, relying upon the by-law. And the court say: "We have not considered the technical question, whether any action could be maintained between these parties, because that question seemed to be waived by the submission upon agreed facts." Here the court will do equity without regard to the form of action, and carry out the trust, if it shall find that there was an intention to create a trust, and sufficient done to perfect it. In Powers v. Provident Inst. for Savings, decided by the supreme judicial court of Massachusetts, April, 1878 [124 Mass. 377], May 8, 1878, the court say: "Even if the deposits had been made and entered 'in trust for A. B.,' it would be open to proof by parol evidence, that the money was absolutely owned by the depositor, and thus deposited for convenience, and without intent to give 'A. B.' any right or interest in it;" and cites the two above-named Massachusetts cases as only going so far as to sustain that position; thus implying that a deposit made as in this case would create a valid trust, unless there was evidence to show the contrary. In our case we show an intent to do something for the defendant Carpenter, in the way it was done or some other, the carrying out of that intent, and there is no evidence going to show any other intent than to create the trust we claim.

N. C. Berry, for respondent Robert R. Bishop.

No diligent search had been made for the letter referred to in George Carpenter's deposition to lay the foundation for secondary evidence, if any such letter ever existed. Carpenter testifies that the letter was shown to him by Mrs. Knight as being written to her by A. C. Jackson. The letter is the best evidence. Parol evidence of its contents could not be given till it was shown that the letter was lost or destroyed. Mrs. Knight's deposition should have been taken, and she required to produce it. 1 Greenl. Ev. § 82. The trust was incomplete. The by-law required a delivery of the pass-book, or some order or assignment of it. The relation of trustee and cestui que trust was not perfected. Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522; McCluskey v. Provident Inst. for Savings, 103 Mass. 300; Wall v. Provident Inst. for Savings, 3 Allen, 96; Chase v. Breed, 5 Gray, 440; Maynard v. Maynard, 10 Mass. 456; Sampson v. Thornton, 3 Metc. (Mass.) 275.

CLIFFORD, Circuit Justice. Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and the holder will be charged with the execution of the trust unless he is a purchaser for value, without notice. Whatever persons or corporations are capable of having the legal title or beneficial interest cast upon them by gift, grant, bequest, descent, or operation of law, may take the same, subject to a trust, and they will become trustees, provided the existence of the trust is fully proved. Perry, Trusts, § 38. Two sums were deposited by the supposed donor in the savings bank named in the record, amounting, with interest and dividends, to the sum of $1,600. Entry was made of one deposit by his direction in the books of the bank in the words and figures following:—"No. 3749. A. C. Jackson, in trust for George Carpenter, December 31, 1863, deposited one hundred and fifty-two $^{28}/_{100}$ dollars."

A bank pass-book was then delivered to said Jackson by said bank containing the above entry, and afterwards, on April 19, 1865, said Jackson, by his agent, made another deposit in the same account of $565.00, as appears by the bill of complaint. Claim to the same was made by each of the respondents, and in addition to that the said George Carpenter, a citizen of New Hampshire, commenced a suit in this court against the savings bank, a citizen of Massachusetts, to recover the amount of the deposit, including interest and dividends. Pending that suit, the savings bank, by its president, instituted the present suit of interpleader against the present respondents. The first respondent claims the deposit as administrator, with the will annexed, of the estate of the depositor. On the other hand, the other respondent claims the deposit as cestui que trust, assuming that the money was deposited by the depositor as a trust in his favor. All these facts are set forth in the bill of interpleader, and the complainant alleges that he is uncertain to which of the said two persons said money belongs, and prays that they may set forth to whom the same is payable, and may be decreed to interplead touching their several claims. Pursuant to the order of the court the respective respondents appeared and made the answers exhibited in the record. Jurisdiction of the suit will be assumed, though one of the respondents is a citizen of the same state with the complainant, it appearing that the suit is auxiliary to the original suit previously commenced and still pending between citizens of different states. Freeman v. Howe, 24 How. [65 U. S.] 460; Pennock v. Coe, 23 How. [64 U. S.] 124; Gue v. Canal Co., 24 How. [65 U. S.] 262.

Jackson made a will and gave, devised, and bequeathed all his property and estate of every description to his brother, Charles Fox Jackson, if living at his decease, and if not, to the children of his said brother. Bishop, as the administrator with the will annexed of his estate, claims the fund as belonging to the estate of the testator. Beyond all doubt the money deposited belonged to the depositor at the time it was deposited in the

savings bank. It was deposited in the name of the depositor, in trust for George Carpenter, but the depositor retained the pass-book, and never gave the person named as cestui que trust any notice of what he had done, nor did he have any knowledge of the deposit until after the death of the depositor. Money deposited, the by-laws provided, shall not be withdrawn except by the depositor, or by some person by him or her authorized by a written order signed by the depositor, and witnessed, or otherwise legally authorized, and on producing the original book of deposit that such payment may be made thereon, and in all cases of withdrawal, one week's notice may be required. Cases arise, two of which are cited in favor of the respondent Carpenter, where it is held that a person may constitute himself a trustee of a fund for another, when the fund remains in his control; but the difficulty with the respondent in this case is, that the testator kept the pass-book, and never notified the supposed cestui que trust that any such disposition of the deposit had been made in his favor. Vanderberg v. Palmer, 4 Kay & J. 212; Armstrong v. Timperon, 24 Law T. (N. S.) 275. Without more, it is clear that the mere entry in the pass-book, in the form there exhibited, is not sufficient to show that the money deposited passed to the supposed cestui que trust. Authorities to support that proposition are full, to the point, and decisive. Clark v. Clark, 108 Mass. 523; Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 230.

Attempt is made to take the case out of the rule of decision adopted in those cases by the evidence introduced in the case. None of the evidence deserves much consideration, except what relates to the supposed letter alleged to have been written by the depositor to Mrs. Knight, which fails to be satisfactory for at least two reasons: (1) Because the evidence to show that such a letter was ever sent to the witness is not sufficiently full and explicit to receive implicit credit. (2) Because the evidence of search is entirely unsatisfactory to admit parol evidence of the contents of the letter.

Viewed in that light, it is clear that the parol evidence of the contents of the letter must be excluded, and without that evidence it is manifest that the case is controlled by the decisions already referred to of the Massachusetts court. For these reasons the court here is of the opinion that the fund belongs to the estate of the depositor, inasmuch as it never passed to the supposed cestui que trust.

Decree in favor of the first-named respondent.

STONE (CLAYTON v.). See Case No. 2,872.

STONE (EVERETT v.). See Case No. 4,577.

STONE (HARD v.). See Case No. 6,046.

Case No. 13,483.

STONE et al. v. KETLAND.

[1 Wash. C. C. 142.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

COLLISION—CUSTOM OF SPEAKING—HOISTED COLOURS—LIABILITY OF OWNER—INEVITABLE ACCIDENT.

1. A master of a vessel, who at sea bears down on another vessel to leeward, which has hoisted her colours, is justified in bearing down upon her, if it is a custom to do so.

2. The master of a vessel is bound to his owners, and he and they to every one who may be affected by his acts, for his skill and care in the management of the vessel under his command.

[Cited in Carsley v. White, 21 Pick. 256.]

3. If from want of care or skill he injures another vessel, the owner of the vessel under his command is answerable.

[Cited in The Mulhouse, Case No. 9,910.]

[Cited in Northrop v. Hale, 73 Me. 70; Thompson v. Hermann, 47 Wis. 610, 3 N. W. 583.]

[4. Cited in McCoy v. Lemon, 11 Rich. Law, 165, to the point that where there is no law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern.]

The case was, that the Washington, the property of defendant, in her passage from Batavia to Philadelphia, observing a schooner, the property of the plaintiff, on her outward passage, and with colours flying, bore down upon her, supposing she wished to speak her. Upon approaching her, the wind variable and dying away, it was found she would not obey her helm, which was put in the proper situation to avoid running against the schooner. Finding that this was now inevitable, the captain ordered the helm to be changed, and the sails put aback, to deaden her way, and diminish the shock. The consequence however was, that the schooner was upset and sunk. This action was for damages. The defence was, that the Washington was justified in bearing down upon the schooner, it being the acknowledged and universal understanding at sea, that if a vessel to leeward hoists her colours, it is always understood by a vessel to windward, that she wishes to speak her; and this custom was clearly proved by many respectable sea captains. That the Washington, in bearing down on the schooner, with this view, was managed in a manner which the most skilful and attentive commander could have done. There was contradictory evidence upon this point, both as to facts and opinions. The defendant also relied upon the repeated acknowledgment of the captain of the schooner, that the accident was inevitable, and that no blame attached to Captain Williamson, the commander of the Washington.

---

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

WASHINGTON, Circuit Justice (charging jury), laid down the rule, that a man who undertook to navigate a ship, was pledged to his owners, and he and they to all the world who might be affected, for his skill, care, and attention. That it was not sufficient for him to say he had exercised his best judgment; but in case any person sustained an injury from him, he was bound to show that he possessed and had exercised the judgment of a skilful and careful commander. That the signal, as understood at sea, was a justification for the Washington, in departing from her course, and bearing down to the schooner, if, in the opinion of the jury, the custom was sufficiently proved. That it was for the jury to say, whether, in doing so, the captain had conducted himself with skill and care; whether he manœuvred as he ought to have done, and in due time; if not, the defendants were liable. That the acknowledgments of the captain, were to be considered as evidence corroborating the opinions of the defendant's witnesses, that Captain Williamson had acted properly, and that the accident was inevitable, and nothing farther.

Jury found for the defendant.

STONE (KNIGHT v.). See Case No. 7,888.

Case No. 13,484.

STONE et al. v. LAWRENCE.

[4 Cranch, C. C. 11.] [1]

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

PLEADING AT LAW—PROOF—VARIANCE—SPECIAL BAIL.

A note, payable on its face, "at St. Louis, in the territory of Missouri," cannot be given in evidence upon a count on the note, not so describing it; but it may be given in evidence upon the count for money had and received; and a motion to appear without special bail, was overruled.

Assumpsit, by [David Stone and others] the payees, against [William Lawrence] one of the makers of a joint and several promissory note, dated at Michillimackinack, on the 31st July, 1819, for $6,497.17, and payable at St. Louis, in the territory of Missouri, to the plaintiffs or order. Upon the return of the writ, this note was produced as the cause of action. The declaration had two counts upon the note, but did not state that it was payable at St. Louis, or dated at Michillimackinack, or elsewhere. There was a third count, for money had and received.

R. S. Coxe, for defendant, moved to enter the defendant's appearance without bail, and cited the case of Hyer v. Smith [Case No. 6,979].

CRANCH, Chief Judge. The note, being payable at St. Louis, and not so described in the declaration, cannot be given in evidence upon either of the counts upon the note. There is a substantial difference between the note produced and the note described in the declaration. The plaintiffs were not bound to receive the money at any other place than St. Louis, nor were the defendants bound to pay it at any other place, until they had failed to pay it at St. Louis, according to the terms of the contract. There is, therefore, a material variance between the note produced and the counts founded upon it. See the following cases: Sheehy v. Mandeville, 7 Cranch [11 U. S.] 208; Ferguson v. Harwood, Id. 408; U. S. v. McNeal [Case No. 15,700]; Pope v. Barrett [Id. 11,273]; Munns v. Dupont [Id. 9,926]; Trask v. Duvall [Id. 14,143]; Smith v. Barker [Id. 13,013]; Page's Adm'r v. Bank of Alexandria, 7 Wheat. [20 U. S.] 35.

But there is a count for money had and received, upon which the note is evidence, especially as the suit is between the original parties to the note,—that is, the payees against the maker. Harris v. Huntbach, 1 Burrows, 373; Chit. Bills (1st Ed.) p. 191, pt. 2, c. 2.

This case differs from that of Hyer v. Smith (in this court, at May term, 1829) [Case No. 6,979]. In that case, there was not, at the time of the arrest of the defendant, any count in the declaration sent with the writ, upon which the bill of exchange would have been evidence. But here is a count for money had and received, which, we think, may be supported by the note. In that case the question arose upon an amendment made by the plaintiff, and which he was obliged to make, to let in the bill of exchange as evidence upon either of the counts. The count upon the bill averred it to be indorsed to the plaintiffs, Hyer & Burdett, but the bill offered in evidence, was indorsed to Hyer, Burdett & Bremner. This objection was as fatal upon the money counts as upon the count on the bill, for it was evidence of money had and received, to the use of three, when there were only two plaintiffs; the amendment, therefore, introduced a new cause of action. But here the question is not whether the plaintiff shall amend his declaration, but whether the note is evidence upon the count for money had and received.

If the plaintiff should ask leave to amend his declaration, and he should amend it, it may be a subsequent question whether the bail shall be discharged.

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

Case No. 13,485.

STONE v. MASON.

[2 Cranch, C. C. 431.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

OFFICER—PUBLIC USE—PERSONAL RESPONSIBILITY.

A public officer who buys a bill of exchange for public use, and agrees to pay for it when it

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

should be duly honored, is not personally responsible.

Assumpsit [by John Stone against John Mason] for money had and received. The defendant, as commissary general of prisoners, received $140 for a draft on Bermuda. Edward Stone put the draft into the defendant's hands, and requested him to pay the money, when it should be received, to the plaintiff, of Baltimore. When the money was received at the defendant's office, his clerk enclosed it in a letter to the plaintiff, directed to him at Baltimore, but it never came to his hands.

On a case stated, THE COURT (THRUSTON, Circuit Judge, absent) rendered judgment for the defendant, on the ground of his being a public officer; and it being a public contract to buy a bill for public use.

Case No. 13,486.

STONE et al. v. The RELAMPAGO.

[2 U. S. Mag. 42.] [1]

District Court, S. D. Florida. Dec., 1849.

ADMIRALTY JURISDICTION — CARRIERS OF PASSENGERS—SHIPWRECK—PASSAGE MONEY —ACTION FOR.

1. A contract to transport a passenger in a ship or vessel on the high seas or on tide waters is a maritime contract, and within the jurisdiction of the admiralty.

2. A passenger who has paid his passage money in advance is entitled to recover it back, or to recover damages for the non-fulfilment of the contract, caused by shipwreck or other casualty, unless he has contracted to take upon himself the risks of the voyage.

3. Passage money is like freight, or is freight; and to entitle the owner to it, he must fulfil his contract by carrying the passenger to the port of destination.

4. If the voyage be interrupted by shipwreck or other disaster, the master or owner may hire another vessel, or repair his own, and so fulfil his contract. If he determine to repair, the passenger is bound to wait a reasonable time for such repairs to be made.

5. But, if the voyage be interrupted in consequence of an original defect and unseaworthiness of the vessel, the passenger is not bound to wait for repairs to be made, but may treat the contract as void, ab initio, and may immediately demand a return of his passage money paid in advance.

6. The maritime law gives to passengers a lien on the ship as security; and they may maintain a suit in rem as well as in personam.

7. The owner binds the ship by his contract with the passenger; and the master binds the ship by his contract, whenever he has authority, express or implied, to carry passengers.

[This was a libel by Alden Stone, Williams, and others against the schooner Relampago (Wakeman, master), to recover passage money.]

A. Gordon, for Williams.

S. R. Mallory, for respondent.

MARVIN, District Judge. This suit was instituted by the libellants, late passengers on board the schooner Relampago, bound on a voyage from New Orleans to San Francisco, in California, to recover back the passage money paid by them in advance to the owner in New Orleans; the voyage having been broken up at this port, in consequence of the unseaworthiness of the vessel. She was unseaworthy when she left New Orleans, as was made evident by a survey in this port.

The master of the Relampago claims the vessel for the owner, and objects to the maintenance of this suit on various grounds.

1. It is objected that passage money paid in advance is not recoverable back on a failure of the voyage; and that the suit is commenced prematurely. The validity of this objection depends upon the terms of the contract. Undoubtedly, a passenger or a freighter may agree to pay passage money or freight in advance, and take upon himself the risks and chances of the completion of the voyage. And, if there be a well established and known usage, that passage money or freight paid in advance, is not to be returned upon the failure of the voyage, the passenger or freighter may be considered as having agreed to such usage, and made it a part of his contract, unless he stipulated to the contrary. Abb. Shipp. 214, 407, 408; 4 Camp. 241. In such cases the contract makes the law. But if the contract is silent upon the subject, then I think that passage money paid in advance may be recovered back upon shipwreck or other accident breaking up the voyage; or upon any failure of the master or ship-owner to fulfil the contract on his part, to carry the passenger to his port of destination. Passage money and freight, in this respect, stand upon the same footing, and are governed by the same principles. They are the same thing. Howland v. The Lavinia [Case No. 6,797]; Holt, Shipp. 451; Rocen's notes 2 and 80. To entitle the master or ship-owner to freight or passage money, he must fulfil the contract on his part, by conveying the goods or passenger to the port of destination, unless prevented by some act of the owner or passenger. If the ship be interrupted in her voyage at an intermediate port, by reason of sea damage or other disaster, the master may hire another vessel to convey the goods or passenger, or repair his own ship (and for this purpose he is entitled to reasonable time); and thus complete the voyage and earn his freight or passage money. The passenger must wait a reasonable time for such repairs to be made. Abb. Shipp. 434. In such case of disaster, if the merchant voluntarily accept his goods, or if the passenger do not insist upon being carried on, he must pay freight pro rata itineris. But if the voyage be interrupted or broken up in consequence of an original unseaworthiness of the vessel, the passenger is not to wait for repairs to be

[1] [Reported by Hon. William Marvin, District Judge.]

made, or for the hire of another vessel; for the implied warranty of seaworthiness on the part of the master and owner, being broken in the very inception of the voyage, the passenger may treat the contract as void ab initio, and demand an immediate return of passage money, paid in advance. Abb. Shipp. pt. 4, c. 5, §§ 1, 340; 3 Mass. 485. Such is the fact in this case. The vessel was unseaworthy at the time of the commencement of the voyage; and in consequence thereof, and not because of any sea damage or disaster, she put into this port in a leaky condition. I think the passengers are entitled to a return of the passage money paid in advance; and that they are not bound to wait here for advices from the owner, and that, both upon the ground of unreasonable delay and original unseaworthiness, the suit is not prematurely brought.

2. The second objection is that the suit is not of admiralty jurisdiction. The subject matter or foundation of the suit is a contract to carry passengers in a vessel on the high seas, and is like a contract to carry merchandise. The contract is, I think, a maritime contract (Chamberlain v. Chandler [Case No. 2,575]), over which the court has jurisdiction (Dunl. Adm. Prac. 92). See, also, The Volunteer [Case No. 16,991]; Certain Logs of Mahogany [Id. 2,559]; Drinkwater v. The Spartan [Id. 4,085]; The Tribune [Id. 14,171]; [New Jersey Steam Nav. Co. v. Mechanics' Bank] 6 How. [47 U. S.] 344,—as to the jurisdiction of the court over contracts to carry merchandise upon the high seas.

3. The third objection to be considered is, that these passengers have not a lien upon the vessel, as a security for the fulfilment of the contract to carry them to San Francisco. The suit is in rem, and unless the libellants have such lien, their libel cannot be maintained. No such lien is created by any special terms of the contract, and, if any exist, it must be created by the law. Does the law create a lien on the ship in favor of the passengers? I cannot learn that this question has ever been decided in the American courts. By the English law no such lien is held to exist; or, rather, no such lien, if it do exist, can be made available in consequence of a defect of jurisdiction in the English admiralty court to enforce it. Abb. Shipp. pt. 2, cc. 2, 127. But the jurisdiction of the American admiralty courts is more comprehensive than that of the English admiralty. [New Jersey Steam Nav. Co. v. Mechanics' Bank] 6 How. [47 U. S.] 344. Their jurisdiction extends to enforce all maritime liens. So that the question in the present case is, does the maritime lien exist in favor of these passengers? If so, this court is competent to enforce it.

In Brackett v. The Hercules [Case No. 1,762], Judge Hopkinson said, arguendo, that the contract with a passenger was a personal contract, suable only at common law. The point was not before him for decision, and the remark is an obiter dictum. It appears to me that the remark is true only in a qualified, and not in a general, sense.

If a passenger agrees for his passage with the master of a ship, not usually employed in the business of carrying passengers, but in transporting merchandise, I admit that such contract would neither bind the ship nor the owner, but the master only; for it would not be within the general range of the master's authority, as master of a ship so employed, to contract to carry passengers. In such a case the contract is personal with the master; and, although I think it cognisable in the admiralty as being a maritime contract, yet the suit for a breach of it must be in personam against the master, and not against the ship or owner. Most contracts for carrying passengers have been of this character until within the last twenty or thirty years, and many are so still. Thirty years ago but few ships were built with a view to the transportation of passengers, or were employed in the business of carrying passengers. Many of them carried passengers, it is true, but it was not a part of their regular business or employment to do so. The owner did not regard the little passage money that was received as any part of the profits or earnings of his ship, but allowed the master to receive it, as a kind of perquisite or emolument of his office; the latter, on his own account, furnishing the passengers with stores, provisions, &c. In short, the cabin was small, and was deemed the master's or master's and mate's, and built for their accommodation; and he admitted into it, or refused to admit into it, passengers at his option. If he received a passenger, the passenger either furnished himself with provisions, &c., or the master supplied him on his own account, and charged them to the passenger. The transaction was a personal one with the master, with which the owner had nothing to do. Such are still the character and the nature of the employment of many ships; and, as to such, the contract of the passenger, unless made expressly with the owner, would be deemed to be a personal contract made with the master, and would not bind the owner or the ship. But the business of commerce and navigation, and the character of ships generally, have very much changed in latter years. Within the last twenty years many ships have been built and navigated with express reference to the business and employment of carrying passengers, as well as of carrying cargo. They are constructed with large cabins, and fitted up by the owner with costly accommodations for passengers; and passage money constitutes a large portion, and, in some voyages, the only earnings of the ship. Steam ships and packet sail ships are, in many cases, mostly supported by their receipts of passage money. Now, as to this class of vessels so employed

in the business of carrying passengers, in voyages made upon the high seas, the contract made by the master to carry a passenger becomes, in my judgment, no longer a personal contract binding himself only, but a contract made within the range of his authority, as master, and binding upon the ship and owner. By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it for his security. The Paragon [Case No. 10,708].

In the present case, however, the question of the master's authority to bind the owner and ship by his contract is not involved, for the contract was made by the owner himself; and the question is, does his contract with the passenger bind the ship? This point, I before remarked, is undecided so far as I can learn. But, so far as this point of lien is concerned, is there any difference, in principle, between the effect that ought to be given to a contract for carrying merchandise and one for carrying passengers? The ship carries both for freight. In common parlance, the money received for carrying a passenger is called passage money, but it is as much freight as money received for carrying goods. Suppose the ship, as in this very case, carries no cargo, but the owner fills her hold with passengers, instead of cargo, is not the passage money freight, and to be considered and treated as such? Now, as to the contract contained in a bill of lading, a charter party, or made by parol, to carry merchandise, the rule of the maritime law is: "The ship is bound to the merchandise, and the merchandise to the ship." By the marine law, the ship and freight are bound to the performance of the covenants of the ship-owner, and the goods to the performance of the covenants of the merchant. Abb. Shipp. pt. 4, cc. 2, 284. The latter branch of this rule, that the merchandise is bound to the ship, or, in other words, that the ship owner has a lien on the goods for freight, is well illustrated and enforced in the case of The Volunteer [Case No. 16,991], and in Certain Logs of Mahogany [Id. 2,559]; and although a passenger may not be bound in his person to the ship, or a lien may not exist upon him as upon a bale of cotton, for a very obvious reason, yet his baggage is bound to the ship, and a lien exists upon it for his passage money. Abb. Shipp. pt. 2, c. 8, §§ 2, 217; 2 Camp. 631. I fancy that a slave carried as a passenger would be bound to the ship for passage money. The other branch of this rule, that the ship is bound to the merchandise, has been illustrated and enforced in several American cases.

In the case of The Rebecca [Case No. 11,619], the libellant proceeded against the ship to recover the value of ten hogsheads of liquor shipped on board of the Rebecca, and lost in her voyage from New York to Portland. The master had stowed the liquor on deck. The vessel was, by the decree of the court, held liable for the loss. So, also, in the case of The Phebe [Id. 11,064], which was a libel against the vessel for the value of 136 tons of gypsum, shipped on board the vessel, and not delivered according to the bill of lading. The court held the vessel liable for the value of the gypsum, although the vessel was a hired or chartered one at the time of the shipment, and not in the possession or employment of the owner. The vessel in specie, no matter who is owner, is bound to the merchandise. The same principle was acted on in the case of The Paragon [supra]. In this case Judge Ware said that, "by the general maritime law, every contract of the master within the scope of his authority as master binds the vessel, and gives the creditor a lien upon it for his security." A fortiori, the contract of the owner binds the vessel. In the case of The Tribune [Case No. 14,171], Justice Story carried the principle of the vessel's being bound to the goods still further. In that case the master had agreed with the libellant to take in a cargo for him in Maine, and proceed to Havana, and back for five hundred dollars a month, for the use of the vessel. The master had commenced the fulfilment of the contract, by taking in a part of the cargo, when the owners ordered him to unload and abandon the voyage. The libellant instituted a suit in admiralty against the vessel, to recover damages for the non-fulfilment of the contract; and the court held the vessel liable.

These cases show that from the time the contract is made the vessel and the goods are reciprocally bound to each other. Now, if the ship is bound by a charter party, a bill of lading, or a mere parol contract, to the shipper of merchandise, for the fulfilment of the contract to carry the merchandise for money, upon what principle is it that it is not equally bound by a like contract to the passenger to carry him for money? The merchant may charter the whole ship, or, in a general ship, each shipper may be regarded as a charterer of so much of the ship as his goods may occupy, and the ship is held liable to the one or several charterers. So, in this case, these passengers, thirty-six in all, have in fact—though not by a regularly drawn up charter party—chartered the entire ship from the owner, not to carry cargo, but to carry themselves; and they have paid him in freight, or passage money, for the use and hire of the whole vessel, the owner retaining the possession by the appointment of a master. I think the vessel is as much bound to these passengers to fulfil the contract made with them, by the owner, to carry them to San Francisco, as it would be bound to them to carry their merchandise; and that the passengers have a lien, and may proceed in the admiralty, against the vessel, to recover damages for the non-fulfilment of the contract, or to recover back the passage money paid in advance.

A question was made on the trial whether the passengers' lien extended also to the stores and the provisions on board belonging to the vessel, and purchased for her use. I have no doubt that it does. The term "vessel" or "ship" includes the idea of an entire thing made up of many parts,—the hull, anchors, chains, rigging, sails, boats, stores and provisions, and all other things provided and intended for her use, or for the use of the crew and passengers, which may, in common parlance, fairly be said to belong to her, and without which she would not be completely furnished for the particular voyage upon which she is to enter, or has entered. In an armed ship, the armament constitutes a part of the ship. All these are insured under the name of ship (Phil. Ins. 321), and contribute as a part of the ship in a general average (Id. 359), and are bound by, and included within, the meaning of the words "ship, tackle, apparel and furniture," used in admiralty attachments, and so subjected to judicial sale in proceedings in rem. The Dundee, 1 Hag. Adm. 109.

The decree must be for a sale of the vessel and provisions to satisfy the demand of the passengers—in whole or in part.

STONE (RITCHIE v.). See Case No. 11,864.

Case No. 13,487.

STONE v. SPRAGUE et al.

[1 Story, 270; [1] 2 Robb, Pat. Cas. 10.]

Circuit Court, D. Rhode Island. June Term, 1840.

PATENTS — ABSTRACT PRINCIPLE — SPECIFIC MACHINERY—SPECIFICATIONS—LOOMS.

Where a patent for an improvement on looms set forth, as the invention claimed, "the communication of motion from the reed to the yarn beam, in the connexion of the one with the other, which is produced as follows," describing the mode; it was held, that the invention was limited to the specific machinery and mode of communicating the motion, &c. specially described in the specification. If it were otherwise construed, as including all modes of communicating the motion, &c. it would be utterly void, as being an attempt to patent an abstract principle, or for all possible and practicable modes of communicating motion whatsoever, though invented by others, and substantially different from the mode stated in the patent.

[Cited in Hovey v. Stevens, Case No. 6,746; Smith v. Downing, Id. 13,036; Singer v. Walmsley, Id. 12,900; Dederick v. Cassell, 9 Fed. 312; Rapid Service Store Ry. Co. v. Taylor, 43 Fed. 251; Blount Manuf'g Co. v. Bardsley, 66 Fed. 761.]

Case [by Amasa Stone against William and Amasa Sprague] for an infringement of a patent right for a new and useful improvement on looms, not known or used before. Plea, not guilty, with notice of special defence. At the trial it appeared, that the patent was dated on the 30th of April, 1829, and the specification was as follows. "Be it known that I, Amasa Stone, of &c. have invented a new and useful improvement in looms not known or used before my discovery, which consists in the communication of motion from the reed to the yarn beam, and in the connexion of the one with the other, which is produced and described as follows." Then follows a minute description of the particular machinery. The specification then concluded as follows, after setting forth the advantages of the invention: "I claim as my invention the connexion of the reed with the yarn beam, and the communication of the motion from the one to the other, which may be done as above specified."

Several points were made at the trial, upon which a good deal of evidence was offered. The defendants contended: (1) That the invention was known before. (2) That the loom used by them was not identical with the invention and machinery used by the plaintiff; but was a substantially different invention. (3) That the patent was in fact a patent for an abstract principle, or all modes, by which motion could be communicated from the reed to the yarn beam, and the connexion of the one with the other, and not merely for the particular mode of communication specified in the machinery described in the specification; and that it was therefore void. On the other hand the plaintiff contended: (1) That he was the first and original inventor. (2) That the machines used by the defendants were substantially the same invention as his, and an infringement of it. (3) That the patent, if it embraced all modes of communication of motion from the reed to the yarn beam and in the connexion of the one to the other, (as the plaintiff insisted it did) was still good and maintainable in point of law. (4) That if the specification did not justify this interpretation of the plaintiff's claim, it was still good and clearly supported the claim to the particular machinery described in the specification, which the defendants had patented, and his patent had been infringed by the defendants.

The case was argued by Atwell & Staples, of New York, for plaintiff, and by Mr. Pratt and R. W. Greene, for defendants; and finally, the parties consented to a verdict for the defendants, upon the points of law ruled by the court, and took a bill of exceptions thereto.

STORY, Circuit Justice. Upon the question of the true interpretation of the specification the court entertain some doubt. But, on the whole, "Ut res valeat, quam pereat," we decide, that although the language is not without some ambiguity, the true interpretation of it is, that the patentee limits his invention to the specific machinery and mode of communication of the motion from the reed to the yarn beam, set forth, and specially described in the specification. We hold this opinion the

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

more readily, because we are of opinion, that if it be construed to include all other modes of communication of motion from the reed to the yarn beam, and for the connexion of the one to the other generally, it is utterly void, as being an attempt to maintain a patent for an abstract principle, or for all possible and probable modes whatsoever of such communication, although they may be invented by others, and substantially differ from the mode described by the plaintiff in his specification. A man might just as well claim a title to all possible or practicable modes of communicating motion from a steam-engine to a steamboat, although he had invented but one mode; or, indeed, of communicating motion from any one thing to all or any other things, simply because he had invented one mode of communicating motion from one machine to another in a particular case. This is our decided opinion; and if the counsel are dissatisfied, it will be easy to take the case by a bill of exceptions to the supreme court.

Verdict for defendants; and a bill of exceptions was taken by the plaintiff accordingly.

Case No. 13,488.

STONE v. STONE.

[2 Cranch, C. C. 119.] [1]

Circuit Court, District of Columbia. June Term, 1816.

PLEADING AT LAW—NON ASSUMPSIT—FORMER RECOVERY.

The defendant upon non assumpsit, may give in evidence a former recovery of judgment against him upon an attachment in a court in Virginia; and such former judgment is a good bar to the action here.

Assumpsit [by William Stone against Edward Stone] for money had and received.

The defendant, at the trial, upon non assumpsit, produced a record of a judgment by attachment against him, in Virginia, for the same cause of action, at the suit of the plaintiff, and prayed the court to instruct the jury that if they were satisfied by the evidence that it was for the same cause of action, the plaintiff could not recover in this suit, which instruction the court gave. (THRUSTON, Circuit Judge, absent.)

Mr. Wiley, for plaintiff.

Jones & Key, for defendant.

Motion by the plaintiff's counsel, for a new trial, on the ground of misdirection of the jury by the court. Refused.

STONE (UNITED STATES v.). See Case No. 16,407.

STONE (WOODWORTH v.). See Case No. 18,021.

STONE (WYETH v.). See Case No. 18,107.

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

STONE, The CHARLES R. See Cases Nos. 2,619 and 2,620.

STOOKEY (JAMES v.). See Cases Nos. 7,184 and 7,185.

STOOPS (SMITH v.). See Case No. 13,110.

Case No. 13,489.

STORAGE CO. v. The THOMAS.

[Case reported under above title in 9 Phila. 364; 29 Leg. Int. 116; 4 Chi. Leg. News, 218,—same as Case No. 3,769.]

Case No. 13,490.

Ex-parte STORER.

[2 Ware (Dav. 294), 298.] [1]

District Court, D. Maine. June 12, 1846.

SPECIFIC PERFORMANCE — PART PERFORMANCE—LIMITATION OF ACTIONS—TIME WHEN STATUTE BEGINS TO RUN.

1. A specific execution of a parol contract for the sale of lands will be decreed by a court of equity, when it has been partly performed.

2. But in the sense of equity, when a specific performance of such a contract is sought, those acts only are considered as part performance which would operate as a fraud on parties unless the whole contract is executed.

3. The payment of part of the price is not such an act. But admitting the purchaser to take possession under the contract, and to lease the land, or make improvements upon it, is, in the sense of a court of equity, a part performance.

4. By the statute of limitations in Maine, in an action on a mutual and open account current, the right of action for the whole balance is deemed to have accrued at the time of the last item proved in the account. But if a party sleeps on a demand without entering it on his account, until the period of limitation is elapsed, he cannot extract it from the statute by entering it afterwards on his account.

5. Where a party has an unliquidated demand, the limitation begins to run from the time when the right of action accrues.

6. But if the parties, after the right of action has accrued, come to a settlement, and determine the sum due by mutual agreement, the limitation begins to run from the time of such settlement.

[Cited in Augerais v. Naglee, 74 Cal, 60, 15 Pac. 374.]

This was the case of a proof of debt offered by Seth Storer, against the estate of Jonathan Tucker.

WARE, District Judge. Storer offered proof of a debt against the estate, consisting of various items of account and promissory notes. The commissioner admitted the proof on the account to the amount of $469.33, and rejected all the other claims, either as barred by the statute of limitations or inadmissible for other causes. The statute was admitted by the creditor to be a bar to all except two items, and, as to these, he has excepted to the decision of the commissioner, and asked the judgment of the court.

[1] [Reported by Edward H. Davies, Esq.]

1. The first is for rent, or interest in the nature of rent, on a lot of land in the town of Saco, at the rate of $42 per annum, from Nov. 26, 1827, to the time of the bankruptcy. The facts, either as admitted by the parties or proved, are these: Some time before the date mentioned, but how long does not appear, Tucker, by a parol agreement, bargained with Storer for the purchase of this lot for $700. At the time of the agreement, Storer's office was standing on the lot, and it was agreed between the parties, that the building should remain on the land until Tucker should give notice to have it removed, and in the mean time the rent of the land should be an equivalent for the interest which would be due on the price. In this state the business remained until the time above mentioned, when Tucker gave Storer notice to remove his office, which he did; Tucker then intending to put up a building on the lot the following season. He, however, changed his purpose, and the lot remained vacant until 1835, when Tucker let the land to one Banks, at the rent of $60 a year. Banks placed an old house upon it, and occupied it for the greater part of a year, while he was building a new house, and then left it. The lot has since remained vacant. Banks and Tucker having an open account, the rent remained unsettled until a short time previous to Tucker's bankruptcy, when it was allowed to Tucker in the settlement, to the amount of $56. At first Tucker hesitated at receiving the rent, urging that the land was Storer's, and thereupon Banks applied to Storer, who told him that the land belonged to Tucker, and he finally settled with Tucker, and allowed the rent in the account. No conveyance of the land and no agreement for the sale had been made in writing. By the original agreement, Tucker was to pay interest upon the agreed price from the time that he gave notice to Storer to remove his office. Storer's claim, disallowed by the commissioner, is for interest on the price from that time, or, if he in equity is to be considered as the owner of the land, for rent for the same time.

The true question, as it appears to me, is: Who under this parol agreement, partly performed, is in equity to be considered as the owner of the land? If the agreement, followed by the acts in part performance, is such an agreement as equity would deem to be sufficiently executed, then the equitable title is in Tucker, if not, then it is in Storer. Are, then, the acts of part performance of such a character as, in the consideration of a court of equity, will take the contract out of the statute requiring all agreements for the transfer of land to be in writing? In my opinion they are. The general principles by which courts of equity are governed in decreeing a specific execution of a parol agreement for the sale of lands, on the ground that the agreement has been partly performed, are, first, that an act shall, or at least may, be deemed part performance when it is clearly apparent that the act was done with a view to the agreement being fully carried into execution, and solely with a view to that. Secondly, that an act will be deemed to be done in part performance, when the act might operate as a fraud on the party unless the agreement were fully performed. 2 Story, Eq. Jur. §§ 761, 762. Such acts, and such only, are permitted by a court of equity to extract a parol contract from the statute. Upon these principles it is now well settled that a payment of part of the price is not a part performance, although the payment can be referred to no other cause than the parol agreement for the purchase. This does not, in the sense of a court of equity, operate as a fraud on the party, though it may be a violation of good faith, and may be the cause of a loss to the party, if the other become insolvent. Still, as he can have what the law considers a complete indemnity, by the recovery of the money paid with the interest, equity does not hold it to be a fraud cognizable in that tribunal. But it is well settled that when the purchaser is admitted into possession under parol contract, that is a part performance. Id. § 761. For if he enters and takes possession under the agreement, unless the agreement will protect him, he will be liable to an action of trespass. If the vendor in this case were allowed to treat the agreement as a nullity, it would clearly operate as a snare and a fraud. To defeat the fraud of the vendor, equity will hold the contract, connected with such acts of part performance, valid to give an equitable title to the land, and will compel a conveyance.

The case stated is precisely the present case. Tucker was allowed to go into possession of the land. For years he considered himself as the owner, and, more than eight years after the contract, exercised acts of ownership by letting the land. He at this time certainly considered the contract valid in equity. Though he did, on the eve of his bankruptcy, hesitate about receiving the rent at first, he afterwards received it, thus, it appears to me, deliberately reaffirming the contract. The act of Storer also, in removing his office, it is not pretended can be referred to any other cause than the agreement for the sale. It appears to me, therefore, that it is a contract partly executed, perhaps on both sides, and that either party would have a right to claim, in a court of equity, a complete and specific execution of the entire contract; and if not on both sides, at least on the part of Tucker.

If this be the correct view of the case, the claim, in the form in which it is presented, cannot be allowed. It results in this: Tucker, in equity, is to be considered as the owner of the land, and Storer has a lien on the land for the purchase-money with the interest from November 27th, 1827, when he removed his office, till the time of the filing of Tucker's petition in bankruptcy; and a right of prior payment out of the land in preference to the other creditors. The just and equitable mode of settling the claim will be, to have the land sold and the proceeds

applied to the payment of Storer's debt, and the excess over that sum will go into the estate, or, if there is a deficiency, Storer will be allowed to prove in concurrence with the other creditors. Or, as it seems probable that the land will not sell for enough to discharge the lien, it may be referred to a commissioner to ascertain the value, unless the parties can agree on the value, and, on this report, the assignees will be ordered to release the bankrupt's right, and the creditor be admitted to prove the residue of his debt.

2. The second claim, rejected by the commissioner, arose in this way. In 1821, James Read & Co. recovered judgment against E. Tucker and Dyer, in which suit property had been attached on the original writ, which was redelivered to the debtors on the accountable receipt of Storer to the officer. The defendants in that suit placed property in the hands of Jonathan Tucker, the bankrupt, to be held in trust for the security of Storer, and the proceeds, when sold, to be applied to indemnify Storer against his receipt. Storer was called upon and was obliged to pay the execution. The amount and the time when paid are not stated, but if the claim is allowed, the execution is to be referred to, to ascertain both the amount and time of payment. The payment is admitted to have been made between 1821 and 1825. There is no doubt that Jonathan Tucker, after receiving the property, was bound to hold and apply it to the discharge of the trust, and that Storer, by a bill in equity, might have enforced the execution of the trust, and compelled him, after the goods were converted into money, to pay over the amount of the execution, if so much had been received upon them. 2 Kent, Comm. 307; 4 Kent, Comm. 533. But as all these transactions took place as long ago certainly as 1825, and probably in 1821, it appears to me that, if the claim is put upon the ground of a trust, the remedy is barred by the lapse of time. Equity, as a general rule, will not lend its aid to enforce stale demands. But besides this general objection to the antiquity of the demand, which is a defense peculiar to equity, the demand is clearly barred by the statute of limitations. The statute does not indeed, in its terms, apply to proceedings in equity, and there are certain peculiar trusts to which the statute is held not to apply. Kane v. Bloodgood, 7 Johns. Ch. 111. But in all cases of concurrent jurisdiction, where there is a remedy at law as well as in equity, the statute is held to apply with the same force in equity as at law; and the court holds itself bound by the statute. 2 Story, Eq. Jur. § 1520; Kane v. Bloodgood, 7 Johns. Ch. 90; Hovenden v. Lord Annesley, 2 Schoales & L. 607; Robinson v. Hook [Case No. 11,956]. And in cases where the jurisdiction is exclusively in equity and there is no remedy at law, if a party has been guilty of such laches as would have barred his right if it had been a legal right, courts of equity hold the equitable right to be lost by the lapse of time, in analogy to the statute. Bond v. Hopkins, 1 Schoales & L. 413, 429. Whether this trust, then, was one that could or could not be enforced at law, the result will be the same. In the first case the statute will be a direct bar, and in the second it will be held a bar, in analogy to the statute.

But it is said that the claim may be allowed in the open and running account between the parties, and that, as the last item of charge in the account is within six years, this, under the law of this state, takes the whole account out of the statute. By that statute, in an action on "an open and mutual account current," the cause of action is deemed to have accrued at the time of the last item proved in the account. Of course, as in the account there is one item within six years, this will extract the whole account from the statute.

In the first place it is to be observed that this is an unliquidated claim against Tucker. It is not for the amount paid on the execution, but a claim of indemnity on the trust fund placed in his hands. The amount realized from that may be less than the execution, and to ascertain what the claim amounts to, an account must be taken. This has never been done. Now until the amount is ascertained, it does not appear to me that it can properly be entered as an item in an open and running account. And this seems to be the view which the creditor himself took of the matter, for though the account comes down to 1836, this is nowhere entered on his books as an item of charge. Now it may be admitted that, if this amount had been ascertained and entered on Storer's books as a debit, the latter items in the account would have taken this out of the statute. But certainly the current account can extract nothing from the operation of the statute, which does not appear in the account. It can only save such claims, of more than six years' standing, as have been entered by the party in his books, in the regular and ordinary course of his business.

But it is further contended by the creditor, that, as the demand is uncertain, the statute will not begin to run against it, until the amount is ascertained, and that when it is, and not before, it may be entered on the account as a debit. This in a certain sense is undoubtedly true. Where A has a claim against B of an uncertain amount, and they come to a settlement and determine the amount by mutual consent, the limitation will not begin to run but from the time of settlement, though the claim and right of action may have originated some years before. But this is because the settlement and acknowledgment of the debt amount to a new promise, and the debt, in relation to the statute, is considered as having its commencement at that time. If Storer and

Tucker had made such a settlement, even after six years had elapsed, this would have taken the demand out of the statute, for here would have been a new promise. It might, then, have been entered on his account and escaped the limitation. But no such settlement and acknowledgment of debt has ever been made.

This claim had its origin, it is admitted, as far back at least as 1825. Before that time, Storer had paid the execution, and Tucker had sold the property. At that time, Storer could have enforced his right, by an action of account or of assumpsit at common law, or at least by a bill in equity, and the limitation began to run from the time that the right of action accrued. Now it will not be contended, where there is an open and running mutual account, that a party, who has slept on a demand for more than six years without entering it on his account, can save it from the statute by entering it on his current account after the period of limitation has completely elapsed. Such a construction of the statute would open a door to unlimited confusion and fraud. Besides it is clearly inadmissible on the plainest legal principles, because the statute bar is complete and perfect before the entry, and such an entry on the books of the party cannot restore life to a claim already dead.

I should have been well satisfied if I could have found my way on firm and safe grounds to another conclusion, for, from the admissions of the parties, as I understand them, especially connecting them with the unsettled account in Tucker's books with E. Tucker and Dyer, there is reason to believe, or suspect at least, that there was a balance in favor of Tucker and Dyer, which ought to have been applied to the indemnity of Storer. If, therefore, I could see any legal ground on which the claim could be supported, I would refer it back to the commissioner for further explanation. But in every view which I can take of the case, on the facts which are undisputed, it seems to me that the statute is a conclusive bar, and the court cannot bend the established rules of law to meet the equity of particular cases.

STORER (NORMAN v.). See Case No. 10,301.

STOREY (ADAMS v.). See Case No. 66.

Case No. 13,491.

The STORM KING.

[Cited in The E. W. Gorgas, Case No. 4,585. Nowhere reported; opinion not now accessible.]

STORMS, In re. See Case No. 7,681.

Case No. 13,492.

STORRS v. ENGEL.

[Nowhere reported; opinion not now accessible.]

Case No. 13,493.

STORRS et al. v. ENGEL et al.

[Case reported under above title same as Case No. 12,053.]

Case No. 13,494.

STORRS et al. v. ENGEL et al.

Ex parte GARNETT.

[3 Hughes, 414;[1] 19 N. B. R. 90.]

District Court, E. D. Virginia. April 16, 1879.

BANKRUPTCY — FRAUDULENT SALE — SEIZURE OF PROPERTY—FORTHCOMING BOND—APPEAL BOND — ELECTION OF ASSIGNEE — PROCEEDING UPON BOND.

1. Where an order of seizure was given in an involuntary bankruptcy proceeding against goods in the hands of a purchaser by sale, afterwards adjudged to have been fraudulent, and on this purchaser's petition the goods were released to him on his giving a joint and several bond to the marshal, with sureties for the forthcoming of the goods, or else to answer the future judgment of the court in the matter; and plenary proceedings were afterwards instituted in the district court on its equity side against the purchaser and his securities in this bond to set aside the sale, and a decree was in due course rendered declaring the sale to have been fraudulent, and decreeing the value of the goods to be paid by the fraudulent purchaser and his sureties, and the purchaser (not joined by his sureties) appealed to the circuit court, giving an appeal bond with new sureties; and, after decree of the circuit court affirming the decree below, the said purchaser appealed to the supreme court, giving an appeal bond with new surety, and that appeal was dismissed, and then execution was taken out against the fraudulent purchaser, on which only a small part of the debt was made, leaving a large balance unpaid; and a petition was filed in the bankruptcy proceeding by the assignee against the sureties in the original delivery bond (not making the fraudulent purchaser a party) for the payment of the balance due under the decree, and the said purchaser soon after died insolvent, but leaving real estate not sufficient to satisfy by sale the amount of the decree: *Held*, on demurrer and answer, that the assignee in bankruptcy could select which of the several bonds to proceed upon, and might proceed upon the original delivery bond, and, this being joint and several, he might proceed against any one or more of the obligors.

2. The assignee might proceed by summons or petition, and need not resort to a plenary suit upon the bond.

3. The assignee might proceed at once against the sureties in the original bond, and need not first subject the real estate of the fraudulent purchaser of the goods replevied before so doing.

In June, 1870, Storrs Brothers filed in this court a creditors' petition in involuntary bankruptcy, against Engel & Son, retail dry-goods merchants of Richmond, Virginia. There was an adjudication of bankruptcy upon the petition on the 23d of the same month. Among other acts of bankruptcy relied upon, the petition charged that within six months before the filing of the petition, to wit, on the 16th of May, 1870, the defend-

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

ants had sold, in block, the contents of their store in Richmond, being their whole stock of drygoods in trade, for a lump sum, to one Lisberger; that this was a sale in fraud of creditors, by an insolvent, in contemplation of bankruptcy; that Engel & Son's insolvent condition was known to Lisberger; that Lisberger was party to the fraud, and was then selling and disposing of the goods in question. The petition, therefore, prayed for an order of seizure against the goods. The petition was supported by the usual affidavits. The court thereupon immediately entered an order directing the seizure of the stock of goods, which was executed by the marshal on the same day. On this same day Lisberger filed his petition denying the charges of the creditor's petition affecting the bona fides of his purchase of the stock of goods from Engel & Son, and praying that, on his executing to the marshal a bond, with security approved by the marshal in such penalty as to the court might seem proper, conditioned for the forthcoming of the said goods or the value thereof, and to abide such further order as might be made by the court, the stock of goods might be returned to him. The court on the next day granted the prayer of Lisberger's petition, in an order running nearly in the terms of its prayer; and on the same day, on Lisberger entering into a bond to the marshal, conditioned as described, in the penalty of eight thousand dollars, with M. Rosenbaum and two other persons (who have since become discharged bankrupts) as sureties, the marshal delivered the stock of goods to him. M. Rosenbaum was one of the principal creditors of Engel & Son, and proved his claim in bankruptcy. The bond was joint and several.

In due course of proceeding, Otway D. Brown was afterwards elected the assignee of Engel & Son in bankruptcy, and qualified as such. Brown was a clerk in the employment of Rosenbaum, who is a large wholesale drygoods merchant of Richmond. Counsel for most of the creditors desired a proceeding to be instituted for the purpose of annulling the sale which Engel & Son had made of the stock of goods to Lisberger, but Brown refused to take the proper steps for the purpose, alleging, in excuse, the opposition of his employer, Rosenbaum, to such a measure. Finally, after the lapse of several months, Brown was, on petition of creditors, removed as assignee, and the present assignee, E. M. Garnett, was appointed on the 4th of April, 1871.

On the 11th day of that month, Garnett file a petition in the bankruptcy proceeding, charging in detail the fraudulent character of the sale, and praying that Lisberger, M. Rosenbaum, and the other sureties in the bond, which had been given as mentioned, should be made parties defendant. This petition was ultimately directed by the court to be treated as a bill on the equity side of the district court (Lisberger v. Garnett [Case No. 8,383]), was referred to rules, and was then proceeded in as a plenary suit in equity, and not as a summary proceeding in bankruptcy. The result of the litigation thus instituted was a decree of the district court, made on the 10th day of May, 1876, pronouncing the sale of the stock of goods to Lisberger to have been fraudulent; and, inasmuch as they had been sold by Lisberger after delivery to him, fixing their value when received from Engel & Son at five thousand six hundred and eighteen dollars and fourteen cents; and decreeing the payment by Lisberger and his sureties to Garnett, assignee, of that sum, with interest from the 16th day of May, 1870, until payment and costs. From this decree an appeal was taken by Lisberger to the circuit court of the United States for the district, on the 16th day of May, 1876, when he gave an appeal bond, with sundry persons, other than Rosenbaum, as sureties, in the penalty of nine thousand dollars, conditioned to prosecute an appeal with effect, or else to answer all costs and damages which the appellee might be decreed to pay. On the 9th of October, 1877, the circuit court affirmed the decree of the district court, and directed execution to issue as at law for the amount of the original decree; whereupon Lisberger took an appeal to the supreme court of the United States, giving an appeal bond, with sundry sureties other than those on the other two bonds, in the penalty of twelve thousand dollars. This appeal was dismissed from the supreme court at its October term of 1878. On the 13th of November, 1878, executions were issued against Lisberger upon the decree of the circuit court, upon which an aggregate sum of one thousand one hundred and eighty-five dollars and forty-eight cents has been realized, and from which it appears that Lisberger, who has since died, was insolvent. It is shown that he has no personal estate, and that he has real estate in the city of Richmond, though doubtless insufficient to satisfy the decree in favor of Garnett, assignee.

On the 17th of January, 1879, this assignee filed his petition in this court in the bankruptcy proceedings of Storrs Brothers v. Engel & Son, reciting the facts which have been detailed, and praying that M. Rosenbaum and the two sureties with him in the original delivery bond of the 18th of June, 1870, may be required to show cause here why they should not be ordered to pay the residue of the value of the stock of goods not satisfied by the executions mentioned, in accordance with their obligation given to this court as a condition of its surrender to Lisberger of the stock of goods in question at the date of this bond. Rosenbaum demurred to this petition on the ground, first, that the proceeding should be a plenary suit at law on the bond, and that the defendant is not liable to be proceeded against by a summary petition in bankruptcy for a recovery

upon the writing obligatory; and, second, that any proceeding on the bond should have made Lisberger, the obligor, who was living at the filing of the petition, a party thereto. The demurrer was overruled by the court, which held that the bond, having been given to the court itself, conditioned to abide its decree in the matter, no proceeding other than by motion or petition was necessary; and which also held that the bond being several, either obligor might be proceeded against severally, or together, as the plaintiff in the decree might elect.

Thereupon the defendant Rosenbaum filed his answer to the petition, resisting its prayer on various grounds, viz.:

(1) That the order of seizure made on the 17th of June, 1870, by virtue of which the stock of goods was seized, and the bond for their forthcoming or the value of them given, was issued without authority of law, that the said seizure was illegal, and that the said bond so taken was taken without authority of law, and is in law null and void, and of no effect to bind the respondent.

(2) That even if respondent were bound by said original bond, yet that he and his co-sureties were wholly absolved and discharged from all liability upon the same, by reason of the granting and allowance of the two appeals, which were taken by Lisberger, and the execution of two appeal bonds given thereon, to which bonds and proceedings this respondent was not a party; by which bonds and proceedings the responsibility for the said stock of goods was transferred to the sureties in the appeal bonds, who, respondent avers, were and are perfectly solvent, and liable in law to answer for the default of Lisberger.

(3) That at the time that the decree of this court was pronounced declaring invalid the sale by Engel & Son to Lisberger of the stock of goods in question on the 16th of May, 1870, the said Lisberger was amply responsible, and had sufficient goods and estate to pay the said decree in full; that if Lisberger has become insolvent it was while the proceedings on said appeals were pending, and that the consequences of said insolvency cannot in law and equity be made to fall on this respondent, but should fall on those by whom said appeals were prosecuted and maintained.

(4) That respondent is informed and believes that Lisberger died seized of valuable real estate in the city of Richmond; that the same ought to be sold in due course of law, and the net proceeds applied in discharge, as far as it will go, of said decree; that until that be done there is no legal evidence of the insolvency of Lisberger, or the inability of his estate to pay said decree; that before this respondent can in law be held for this decree, the extent of the deficiency of the estate to pay the same should be first ascertained by such sale and application of its proceeds, in order that respondent may have the benefit of the same, and to this end:

(5) That the personal representative of Lisberger should be made a party defendant to this petition.

E. Y. Cannon, for defendant, cited U. S. v. Kellogg, 7 Wall. [74 U. S.] 361; Catlett v. Brady, 9 Wheat. [22 U. S.] 553; 6 Gray, 141; 2 Gill & J. 431; 6 Har. & J. 431; Sessions v. Pintard [Case No. 12,674], note; 4 Smedes & M. 210; Winston v. Rives, 4 Stew. & P. 269; U. S. v. Hillegas [Case No. 15,366]; Pow. App. Proc. p. 275, § 17, and Id. p. 371, § 19; Nelson v. Anderson, 2 Call, 242 [287]; Cook v. Marsh, 44 Ill. 178; Patton v. Vially, 1 Cranch [5 U. S.] 463; Mayo v. Williams, 17 Ohio, 244; Gross v. Pearcy, 2 Pat. & H. 483; and Clarkson v. Read, 15 Grat. 288, 289.

John Howard and Robert Stiles, for petitioning assignee, cited section 5024, Rev. St. U. S., at close of section, letter C; Bump, Fraud. Conv. 447; Brandt, Sur. p. 535, § 394; Dolby v. Jones, 2 Dev. 109; Ashby v. Sharp, 1 Litt. (Ky.) 156; Smith v. Falconer, 11 Hun, 481; Hinckley v. Kreistz, 58 N. Y. 583; Shannon v. McMullin, 25 Grat. 229, 230; Miller v. Dowse, 94 U. S. 444. And on the demurrer: Taylor v. Carroll, 20 How. [61 U. S.] 594; Russell v. East Anglian Ry. Co., 3 Macn. & G. 104; Freeman v. Howe, 24 How. [65 U. S.] 457; [Ableman v. Booth] 21 How. [62 U. S.] 506; [Cooper v. Reynolds] 10 Wall. [77 U. S.] 308; 1 Wall. [68 U. S.] 344–354; Lisberger v. Garnett [Case No. 8,383]; Inbusch v. Farrell, 1 Black [66 U. S.] 572; [Blossom v. Milwaukee & C. R. Co.] 1 Wall. [68 U. S.] 655; Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 634; Wiswall v. Campbell, 93 U. S. 351; Smith v. Gaines, Id. 342; and Moore v. Huntington, 1 Black [66 U. S.] 572.

HUGHES, District Judge. The seizure of the goods in the possession of Lisberger was, after plenary proceedings in which both Lisberger and Rosenbaum were parties defendant, finally and solemnly adjudged to have been legal and proper; that is to say, the sale to Lisberger by Engel & Son was adjudged to have been fraudulent, null, and void. The seizure of these goods by the marshal under the order of this court was, therefore, a seizure of the assets in bankruptcy of Engel & Son, fraudulently held by Lisberger. Rosenbaum joined in the bond for the delivery of the goods, and for answering the decree of the court in the matter, and was party to the subsequent suit brought to test the validity of Lisberger's title to the goods. Lisberger, for whom Rosenbaum became surety, has been the person who has prolonged the proceedings in the district, circuit, and supreme courts, which delayed the court of bankruptcy in giving the order against his surety Rosenbaum, now asked for by the petition. The petitioning assignee has in no manner,

direct or indirect, created any delay, or been guilty of any laches.

In the appeal from the decree of the district court to the circuit court Lisberger was appellant. So also, from the affirming decree of the circuit court to the supreme court, Lisberger was appellant. In no instance and at no stage of these proceedings has the assignee Garnett committed any laches, or instituted any proceeding of a dilatory character. It follows, now that the invalidity and nullity of Engel & Son's sale to Lisberger, and the fraudulency of Lisberger's original possession of the goods, have been finally determined, that the assignee, Garnett, is in equity entitled to proceed against the surety or sureties on either one of the bonds that have been given which he may elect to proceed against. He is not bound to begin with the sureties last responsible, and proceed with each set until he makes good his claim. He may begin with either surety or sureties. He has chosen to do so with the sureties in the first bond, and the court will sustain him in so doing and grant this petition; for that bond stands for the goods originally seized. Inbusch v. Farwell, 1 Black [66 U. S.] 572. The same principle applies to Lisberger's property. The assignee is not bound to await the result of the proceedings to subject Lisberger's property to the satisfaction of the claim of the assignee. The latter may proceed at once against Rosenbaum. I think this is in accordance with the equity of the case, and with the teaching of the authorities on the subject.

[See Case No. 12,053.]

Case No. 13,495.

STORRS v. HOWE et al.

[2 Ban. & A. 420; 4 Cliff. 388; 10 O. G. 421.] [1]

Circuit Court, D. Massachusetts. Sept. 2, 1876.

PATENTS — INFRINGEMENT—CONFLICTING PATENTS —MECHANICAL EQUIVALENTS.

1. In a suit brought for the infringement of letters patent, one of the defendants appeared and filed an answer, in which he alleged that two valid patents were granted to him, which he still holds and which, as he alleged, were granted to him for inventions of which he was the original and first inventor. Having described these patents, he admitted that he had caused machines, for the same purpose as complainant's machines to be made and sold for use in accordance with those patents, but he denied that in such acts he had infringed the patent of the complainant. He also denied infringement in any and every form in which it was charged in the bill of complaint: *Held*, that, under these pleadings, the complainant having made prima facie proof that he was the original and first inventor of the improvement, which he could do by the introduction in evidence of his patent in due form, the only question in the case was whether the patent had been infringed by the defendants.

2. The doctrine of mechanical equivalents discussed.

[Cited in Putnam v. Hutchinson, 12 Fed. 134.]

[This was a bill in equity [by Levi B. Storrs against Patrick Howe and others] for the infringement of certain extended letters-patent granted the complainant for the pressing machine for tailors' use. On the 8th of June, 1858, a patent [No. 20,519] in due form was granted to the complainant, for a new and improved pressing machine for tailors' use, of which he alleged that he was the original and first inventor, and the record showed that the patent was subsequently extended to him for the term of seven years from and after the expiration of the first term. By virtue of the patent there was secured to the complainant, as he alleged, the exclusive right to make, use, and vend to others to be used, the patented machine, and he alleged that the respondents had, in violation of his exclusive rights, wrongfully made, used, and vended to others to be used, the said invention, and he prayed for an account and for an injunction. Service was made, and the respondent, Patrick Howe, appeared and filed an answer, in which he alleged that two valid patents were granted to him, which he still held, and which, as he alleged, were granted to him for inventions of which he was the original and first inventor, as follows: one dated Oct. 10, 1871, for an improvement in clothes-pressing machines, the other dated Dec. 12, 1871, for an improvement in machines for pressing cloth. Having described these patents, he admitted that he had caused machines for pressing cloth to be made, and sold for use in accordance with those patents, but he denied that in such acts he had infringed the patent of the complainant. He further denied infringement in any and every form in which it was charged in the bill of complaint.] [2]

C. H. Drew, for complainant.

J. S. and J. E. Abbott, for respondents.

CLIFFORD, Circuit Justice. Equivalents are allowed in an invention consisting of a combination of old ingredients, as well as in every other class or description of inventions. Such an invention consists entirely in the combination, and the rule is that the rights of the patentee under it differ in one respect from those of a patentee of an invention that consists of an entire machine, or of a new and useful device, as the rights of a patentee for a mere combination of old ingredients are not infringed unless it appears that the alleged infringer made or used the entire combination. Prouty v. Ruggles, 16 Pet. [41 U. S.] 341. Combinations of the kind include not only the ingredients described in the patent, but equivalents also, by which is meant any other ingredients

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Ban. & A. 420, and the statement is from 4 Cliff. 388.]

[2] [From 4 Cliff. 388.]

which will perform the same function as the one described, and which were well known at the date of the patent as proper substitutes for the ones actually described in the patent. Gill v. Wells, 22 Wall. [89 U. S.] 28.

On the 8th of June, 1858, a patent in due form was granted to the complainant for a new improved pressing-machine for tailors' use, of which he alleges that he is the original and first inventor, and the record shows that the patent was subsequently extended to him for the term of seven years from and after the expiration of the first term. By virtue of the patent there was secured to the complainant, as he alleges, the exclusive right to make, use and vend to others to be used, the patented machine, and he alleges that the respondents have, in violation of his exclusive rights, wrongfully made, used and vended to others to be used, the said invention, as more fully set forth in the bill of complaint, and he prays for an account and for an injunction. Service was made, and the respondent, Patrick Howe, appeared and filed an answer, in which he alleges that two valid patents were granted to him, which he still holds, and which, as he alleges, were granted to him for inventions of which he was the original and first inventor, as follows: one dated October 10, 1871, for an improvement in clothes-pressing machines, the other dated December 12, 1871, for an improvement in machines for pressing cloth. Having described these patents, he admits that he has caused machines for pressing cloth to be made and sold for use in accordance with those patents; but he denies that in such acts he has infringed the patent of the complainant. Superadded to that, he denies infringement in any and every form in which it is charged in the bill of complaint. Persons seeking redress for the unlawful use of letters patent are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of the improvement, and that the patent has been infringed by the party against whom the suit is brought. Both of these allegations must be established by the party instituting the suit; but the law is well settled that the patent in question, if it is introduced in evidence, and is in due form, affords a prima facie presumption that the first-named allegation is true, and it is equally well settled that that presumption, in the absence of satisfactory proof to the contrary, is sufficient to entitle the party instituting the suit to recover for the alleged violation of his exclusive rights. Seymour v. Osborne, 11 Wall. [78 U. S.] 538.

Tested by that rule it is as clear as anything in legal decision can be, that the only question in this case is whether the allegation of infringement is proved. Such a charge being an affirmative allegation made by the complainant, the burden of proof is upon him to establish it, unless it is admitted in the answer. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 609. Sufficient appears in the specification and drawings to show that the invention consists in attaching, by a universal joint, a goose, or tailor's iron to a jointed arm, the arm and other parts being constructed as therein shown, and connected to the treadle, the same being attached to a proper frame, and used in connection with a press-board, the whole being so arranged that the manipulation of the goose or iron is greatly facilitated, whereby the work to be ironed may be subjected to a heavy or light pressure, as may be desired, with a slight exertion or expenditure of power by the operator. Of course it must have a platform, which must be supported at the proper height by a suitable frame, which may be constructed of wood or iron. Particular description is given of each part of the machinery, from which it appears that the lever is a very essential ingredient, being of cast-iron, its lower end being connected by a link to the lower end of a bent lever, which is attached to a treadle. From the same it also appears that the bent lever is attached to the lower part of the frame by a fulcrum pin, and that a vertical rod is attached to the treadle, and that a cross-plate is attached to the upper end of the rod, and that the cross-plate rests on the upper ends of two spiral springs, which are fitted on guide-rods, the lower ends of the springs resting on a cross-piece, to which the guide-rods are attached, the cross-piece being attached to the frame. One of the functions of the spiral springs is to keep the treadle elevated, and, consequently, the upper end of the bent lever is thrown backward from the platform as far as it is allowed to move. Two horizontal lifts are formed in the upper end of the bent lever, between which a jointed arm is attached by a screw, which passes through those lips and through the jointed arm, the screw fitting in a thread in the jointed arm, and the screw has a crank on its upper end. All these particulars are given in the specification, and the patentee states that the goose or iron is attached by a universal joint to the outer end of the jointed arm, the joint being formed by pivoting a sphere or ball in a fork, the shank of which is fitted and allowed to turn freely in the jointed arm, to which the patentee adds that the goose is provided at the centre of its upper part with a vertical spindle, which passes through the sphere or ball in which it is allowed freely to turn, and that the goose is hollow, and is heated by means of hot irons placed within it. Connected with the machinery is a press-board, one end of which is secured in proper position on the platform by means of a clamp, which is formed of a jaw actuated by a cam being pivoted at the upper end of a described standard, and directly over a stationary jaw, attached to a standard. Description is also given of the means of supporting the other end of the press-board; but it is sufficient to say that the means described show that the

platform may be adjusted under any part of the press-board. Very satisfactory description also is given of the mode of operating the machine in substance and effect, as follows: that the cloth or garment to be pressed is placed on the press-board, that the goose, being properly heated, is pressed down on the work to be operated by depressing the treadle with the foot, it appearing that the goose may be moved over the cloth in any direction in consequence of its described connection with the jointed arm. Perfect freedom of the goose is obtained, and as the foot of the operator is employed for giving pressure to the iron, and the hands are only employed for moving it, the desired work may be performed very effectually, a greater pressure being obtained and the goose manipulated with much greater facility than when the hands alone are employed for performing the work. By turning the screw the jointed arm may be raised or lowered, and the standard or support, by being movable, allows work that is sewed at the edge to be slipped over on the press-board, as shown in drawings, which is a great convenience.

What he claims as new is: (1) the lever, the jointed arm, the goose, and the treadle, when connected together, and arranged relatively with each other and the press-board, so as to operate as and for the purpose set forth. (2) He also claims the particular manner of connecting the goose and spindle, which passes loosely through the sphere or ball of the universal joint, whereby the goose is allowed an independent rotary movement; but he does not claim the sphere or ball, nor the fork with its shank fitting in the jointed arm; instead of that it is only the peculiarity attending the connection of the goose to the sphere which he claims, as set forth in the specifications. Briefly stated, the mode of operation is as follows: Pressure being applied to the treadle by the foot of the operator, the same is transmitted through the lever to the jointed arm, so that the goose, which is attached to the forward end of that arm, may be brought down upon the work to be pressed with such degree of force as in the judgment of the operator will be sufficient to accomplish the desired result, which shows that it is pressure upon the treadle which depresses the extreme end of the jointed arm to which the goose is attached, and which causes the goose to accomplish the work described in the specification. All these features, it is claimed by the complainant, are contained in the respondents' machine, and the complainant insists that they operate together as and for the same purpose. Beyond all question the respondents have the press-board, and it is conceded that they have the treadle, the jointed arm, and the goose; but the respondent who filed the answer denies in argument that he uses the lever which constitutes the fourth element in the combination of the complainant.

Differences of a formal character certainly exist in the fourth ingredient or element of the two machines; but it is clear that the lever employed in the machine of the respondents performs the same function as that performed by the lever shown in the complainant's machine, and the better opinion is that the two are substantially alike, differing only as to mere mechanical arrangements. Pressure is transmitted to the jointed arm in both by the foot of the operator applied to the treadle. In the complainant's machine the pressure brings down the link attached at one end of the treadle, and at the other end to the lower end of the lever, and thus brings down the upper end of the lever, to which is attached the jointed arm, the forward extremity of the same, to which the goose is attached, being depressed, and thus the necessary pressure is exerted upon the cloth or garment. Just the same function is performed by the same element or ingredient in the respondents' machine, but the treadle pushes up the forked connecting-link, which takes the place of the link in the complainant's machine, by which action the forward end of the lever, to which the upper end of the lever is attached, is depressed, and the jointed arm, with the goose attached, is thus brought down upon the work exactly in the same manner as in the other machine. Examined in the light of these suggestions, as the case should be, it is clear that there are in each machine substantially the same four elements or ingredients, operating together to produce the same result. Whatever differences exist are to be found in the mode of transmitting motion from the treadle to the lever, to which the jointed arm is connected. In the complainant's patent the lever is described in a perpendicular position, while in the latter it is shown in a horizontal position, which is the controlling difference between the two machines. Enough appears to show that these are mere formal matters, as it is not claimed in either patent that the position of the lever is any part of the invention. These differences in the mechanical arrangements are mere formal variations, producing no new result, and come clearly within the proper range of mechanical equivalents.

Properly construed it is clear from what has already been remarked that the respondents also infringe the second claim of the complainant's patent. Remarks already made show that it is the particular manner of connecting the goose to the arm which is embodied in that claim, by which is meant that the goose or iron is provided with a spindle which passes loosely through the sphere or ball of the universal joint, whereby the goose is allowed an independent rotary movement subject to the before-mentioned disclaimer. Nothing being alleged to the contrary in the answer, it must be assumed in this case that the complainant is the original and first inventor of that improvement, and if so, the court is of the opin-

ion that the charge of infringement is proved by the evidence in the case.

Decree in favor of the complainant for an account and for an injunction.

Case No. 13,496.

STORY et al. v. DERBY et al.

[4 McLean, 160; [1] 4 Leg. Int. 39.]

Circuit Court, D. Ohio. July Term, 1846.

COPYRIGHT—INJUNCTION — EXTENT OF INFRINGEMENT.

Before granting an injunction on a charge of an infringement of copyright, the court will, generally, refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act on the case.

[This was a bill for an injunction by Sarah W. Story and others against H. W. Derby and others.]

Mr. Walker, for complainant.

Gholson & Holcomb, for defendant.

McLEAN, Circuit Justice. This is an application for a preliminary injunction, which, having been argued, the court adopted the following order: This day came the parties, by their solicitors, and the motion on behalf of the complainants for a preliminary injunction to restrain the publication of the book of the respondent, named in the bill, and answers, and affidavits; and having heard the arguments of counsel, and deliberated on the same, do order that the injunction prayed for be not granted. And it is further ordered, that the case stand referred to Master Commissioner Mansfield, for examination and report—that is to say:

1. Whether the book of Mr. Holcombe contains any portion, and if so, what portion, of the commentaries of the late Justice Story, described in the bill, showing fully the similarities or coincidences of the book of the respondents, with the commentaries, as well in arrangement and plan as in matter; and whether, in the points of coincidence between the two books, in the matter, plan, or arrangement, in which the similarity, if any, is found, was original in the commentaries of Judge Story.

2. Whether the book of the defendants is a fair and bona fide abridgment of the commentaries of the complainant, or a colorable one, calculated to supersede the use of the commentaries to any considerable extent.

3. Upon such other matters, relating to the matters in controversy, as either party may request him to examine and report upon. And in making said report, the said master may use the original papers on file, or such as either party may place on file, and may, in aid of his examination, summon such persons as he may deem expedient, and report the testimony so taken, if any, to the next term of this court. The said master may proceed to said examination at any time agreed upon by the parties; or, in case no such agreement is entered into, then at such time as the said master may fix, giving the amount of the parties at least ten days' notice of such time. Either party may proceed to take testimony for the final hearing of the cause, as they might do if this order of reference had never been made. And for the coming in of the report, and further proceedings in the premises, this cause stands continued.

[The master reported, and the complainants filed exceptions. The cause was argued and decided on its merits. Case No. 13,497.]

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

Case No. 13,497.

STORY v. HOLCOMBE et al.

[4 McLean, 306; [1] 5 West. Law J. 145.]

Circuit Court, D. Ohio. Nov. Term, 1847.

COPYRIGHT—ABRIDGMENT—COMPILATION — PART INFRINGEMENT.

1. Every abridgment of a work, however fair, does more or less affect the sale of the original work.

2. The theory that such a work adds to the value of the original work, by making it more extensively known, is unfounded in fact. A copyright of an author should be protected by the same rule that applies to a patented machine.

[Cited in Lawrence v. Dana, Case No. 8,136.]

3. Any machine, however differently constructed, which acts upon the same principle, violates the patent.

[Cited in Drury v. Ewing, Case No. 4,095.]

4. A fair abridgment contains the principle of the original work. A compiler or reviewer can not extract from an author so as to convey the same knowledge as the original book.

[Cited in Lawrence v. Dana, Case No. 8,136.]

5. There is a clear distinction between an abridgment and a compilation. The abridgment necessarily adopts the same arrangement, and conveys the same knowledge in a condensed form.

6. A compiler can neither adopt the arrangement, nor convey by his extracts the same knowledge.

[Cited in Greene v. Bishop, Case No. 5,763.]

7. A fair abridgment, though it injure the sale of the original book, is lawful.

8. The same effect, by a compiler, renders his work unlawful.

9. The intent with which extracts are made, can be of little or no importance.

[Cited in Harper v. Shoppell, 26 Fed. 520.]

10. A part of a book may be an infringement, and the other parts not.

[Cited in Greene v. Bishop, Case No. 5,763: Lawrence v. Dana, Id. 8,136.]

11. In such a case the relief will only extend to the part considered to be an infringement.

[Cited in Greene v. Bishop, Case No. 5,763; Lawrence v. Dana, Id. 8,136; West Pub. Co. v. Lawyers' Co-Operative Pub. Co., 64 Fed. 364.]

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

[2] [Complainants are executors of Joseph Story, deceased, who was the author and proprietor of the copyright of "Commentaries on Equity Jurisprudence." Defendants are the authors and publishers of "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries." The bill alleges that the latter is an infringement upon the former in three respects: (1) That the work is derived from the Commentaries; (2) that its plan, combination, and arrangement of materials, are copied therefrom; (3) that the one is pirated from the other. The prayer is for an injunction, account, surrender of copies, and general relief. Defendants answer, admitting title in plaintiffs, but denying the charge of infringement. They allege that their work is a fair and bona fide abridgment of the Commentaries, such as they have a right to make. General replication. At the July term, 1846, after argument, on motion for a preliminary injunction, the case was referred to E. D. Mansfield, a special master commissioner, to report upon the usual matters required in such cases, in order to enable the court to determine how much, if any, of defendants' work, is a piracy from the plaintiffs' work. [Case No. 13,496.] The master reported, and the complainants filed exceptions, denying that the facts were correctly found, and alleging that the report was indefinite and argumentative. But these exceptions were waived at the hearing.

[The two principal questions presented by the argument were: (1) Whether, in this country, even a fair abridgment of a scientific work, is the subject of copyright. (2) If so, whether the work of defendants is a fair abridgment of the work of complainants.

[T. Walker and J. C. Wright, for complainants.

[J. P. Holcombe and W. Y. Gholson, for defendants.] [2]

McLEAN, Circuit Justice. The plaintiffs in this case complain that the defendants, in printing and publishing, "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries, etc., by James P. Holcombe," have infringed the copy right in Judge Story's "Commentaries on Equity Jurisprudence," and they pray that the defendants may be enjoined, etc. The defense set up is, that the work complained of is a bona fide abridgment of the Commentaries. The special master, to whom both works were referred, reports, that "the chapters and the subjects are the same in both." He states that the "Equity Jurisprudence" of Judge Story contains one thousand eight hundred and fifty-six octavo pages, including notes; and that the "Introduction to Equity," by Mr. Holcombe, contains three hundred and forty-eight octavo pages, including notes. That "a page in Holcombe contains a little more than one of Story; that, reduced to the same sized page, the ratio in the amount of matter in Holcombe's book to that of Story, is about in the relation of two to nine; that, in the entire work of Story, there are two hundred and twenty-six pages, constituting nearly an eighth part, on which there is some matter which has been extracted in the same language, or very nearly so, into the book of Mr. Holcombe. This matter comprises eight hundred and seventy-nine lines of Mr. Holcombe's book, which is about equivalent to twenty-four pages of Holcombe and thirty of Story, which makes one-fifteenth part of Holcombe and one-sixtieth of Story. This matter is found in scattered paragraphs in the first third of Holcombe's book." And the master states, that "all the other portions of the 'Equity Jurisprudence' of Judge Story have been abridged by Mr. Holcombe without any transcription of the common language or words of Story. The part so abridged by Holcombe comprehends two-thirds of his book." The first hundred pages of Mr. Holcombe's book, which comprises ten chapters, contain about two thousand lines, exclusive of notes, about nine hundred of which are copied from Judge Story's Commentaries. From the succeeding chapters of Story, Mr. Holcombe has copied certain passages; but generally he has abridged the matter so as to reduce it, in his own language, to a small space. Very few, if any of the notes are taken from Story. After a very able and laborious examination of the two works, the special master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment of the Commentaries of Judge Story. It was agreed that the cause should be argued and decided on its merits, and not on exceptions to the report of the master.

This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and indeed there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill, is not controverted by the defendants. The decision must turn on the question of abridgment. If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down

[2] [From 5 West. Law J. 145.]

to the latest publications. The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law.

The same rule of decision should be applied to a copyright as to a patent for a machine The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built: and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.

The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege can not be so exercised as to supersede the original book. Bramwell v. Halcomb, 3 Mylne & C. 737; Folsom v. Marsh [Case No. 4,901]. In the language of Godson (page 352), the extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition; and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowledge as the original work, it is an actionable violation of literary property. Wilkins v. Aikin, 17 Ves. 422; Roworth v. Wilkes, 1 Camp. 97. In Folsom v. Marsh [supra] it is said: "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In Cary v. Kearsley, 4 Esp. 170, Lord Ellenborough takes the same view. But I can not perceive how the intention with which extracts are made, can bear upon the question. The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed: and it can be of no importance to know with what intent this was done. Extracts, made for the purpose of a review, or a compilation, are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work.

But the great question in the case is, whether the book of Mr. Holcombe is a fair abridgment of that of Judge Story. The word abridged means "to epitomize," "to reduce," "to contract." In Strahan v. Newberry [In re Newbery], Lofft, 775, Chancellor Apsley said, "to constitute a true and proper abridgment of a work, the whole amount must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a larger work into a smaller compass." In this view Mr. Justice Blackstone concurred, who seems to have been consulted by the chancellor. Mr. Justice Story says, in Folsom v. Marsh: "So it has been decided, that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author; but then, what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work." In Gyles v. Wilcox, 2 Atk. 143, Lord Hardwicke said: "Where books are colorably shortened only, they are undoubtedly within the meaning of the act of parliament, and are a mere evasion of the statute, and can not be called an abridgment."

A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in

the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages. It must be in good faith an abridgment, and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. Gould's Abridgment of Allison's History of Europe gives all the material facts of the original work, covering the whole line of the narrative: and this, in a legal sense, may be called an abridgment.

In the argument it was insisted, that an elementary work is not a proper subject for abridgment. There may be works which are not susceptible of this process. Treatises on the exact sciences may constitute an exception; but works on law, elementary or otherwise, are not within the exception. Hale's Pleas of the Crown, Blackstone's Commentaries, and Kent's, have been abridged, and other works of a similar character. What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;" and in the preface the author says: "It is not intended to supply the place of the Commentaries, with any class of readers, but to serve simply as an introduction, a companion and a supplement to their study. The text is substantially an abridgment of that work. The same general plan and arrangement has been pursued, and the elementary principles which are supposed to possess most practical value, selected and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations and additions (entirely, however, of an elementary character), believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the Commentaries." If this book were intended to be a mere abridgment of the Commentaries, the fact is not indicated in the title. Within my knowledge no abridgment has been made of any book which has not been so entitled. An introduction may be an exordium, a preface, or the preliminary part of a book; but it is not an abridgment. The author says "the text is substantially an abridgment of the Commentaries;" but he also says, that "he has felt at liberty to make very considerable alterations and additions." Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore, that "the text is substantially an abridgment," Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with "very considerable alterations and additions" of his own. A supplement to the Commentaries, which Mr. Holcombe says, in some sense is the character of his work, may supply defects in the original; but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author.

It may not be essential to exclude extracts entirely from an abridgment; but in making extracts merely, there is no condensation of the language of the author, and consequently there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the judges would seem to consider, that where a book is greatly reduced in its size, though made up principally of extracts, it is an abridgment. In a book of reports, such as "Bacon's Abridgment," the language of the court is necessarily adopted often to show the principle of the decision. But the same necessity does not exist, and the same license can not be exercised in abridging an elementary work. In the case of the assignees of Dodsley v. Kinnersley, 1 Amb. 402, it was held, that abstracts made from a tale written by Johnson, called the "Prince of Abyssinia," did not infringe the copyright; but that decision was much influenced by the fact, that the author himself had published similar abstracts in a periodical paper. In Emerson v. Davies [Case No. 4,436], Judge Story says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion which operates injuriously to the copyright of the plaintiff."

All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying. To compile is to copy from various authors into one work. In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result.

Between a compilation and an abridgment, there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former can not be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged and consequently conveys substantially the same knowledge. The former can not adopt the arrangement of the works cited; the latter must adopt the arrangement of the

work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful. 1 Brown, Ch. 451; Gyles v. Wilcox, 2 Atk. 141. There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order. It is therefore important that the works of these two characters should not be so blended as to place them upon the same footing: and yet in many of the decisions, no distinction is made between them. The same facts and reasoning are applied indiscriminately to both cases; and not unfrequently there is a confusion in the argument, which tends more to perplex than to enlighten the reader. In the case of Folsom v. Marsh, above cited, Mr. Justice Story says: "It seems to me, therefore, that is a clear invasion of the right of property of the plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as, upon principle and authority, I have no doubt it may be. If it had been the case of a bona fide abridgment of the work of the plaintiffs, it might have admitted of a very different consideration." It is said that in many parts of the Commentaries there are citations from other works. This is true. And who could write a book entirely new upon jurisprudence? Principles, not familiar to the profession, could be of little value and of no authority. No author, by copying from others, can withdraw from general use, that which has been given to the public. Judge Story did not intend his book to be an abridgment, but a treatise on jurisprudence; and the approbation of this work by the profession, in this country and in England, is high evidence of its merit, and of the great learning and ability of the author.

Whatever doubts may have been formerly entertained, it is now clear, that a book may, in one part of it, infringe the copyright of another book, and in other parts be no infringement; and in such a case, the remedy will not be extended beyond the injury. Lord Hardwicke once laid down a doctrine contrary to this; but that opinion has been overruled by subsequent decisions. Nearly one half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. That this was done by him under a conviction that he was exercising a common right, no one acquainted with his legal talent and honorable bearing, can doubt. But these constitute no criterion for the decision of the case. That the view of Mr. Holcombe in this respect, is not without a seeming sanction, in the opinion of some judges, is admitted. To class these extracts under the head of "Abridgment," would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them. So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted: but the words in which an idea is expressed, is a subject of property; and so is the classification of the subject discussed.

Looking at the smallness of Mr. Holcombe's book, in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages, affords no guide to a proper decision. The character of the work must depend upon its matter: and it would seem from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, can not be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiffs' right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe in his own language, and in a manner highly creditable to him.

The prayer of the bill as to the first hundred pages, is granted. I have been brought to this result reluctantly, being sensible that the motives of Mr. Holcombe were honorable, and that there was no intention on his part, unjustifiably, to appropriate the labors of Judge Story to his own advantage. In this view, I can not refrain from saying, that an adjustment of the controversy by the parties themselves, would be extremely gratifying to me; and, from my intimate knowledge of the eminent qualities of my lamented brother, and I will add, of his unbounded respect for talent and high character, that I can not be mistaken in saying, if he were living, an amicable adjustment would be most gratifying to him.

Case No. 13,498.

STOTESBURY et al. v. CADWALLADER et al.

[31 Leg. Int. 229; [1] 10 Phila. 281.]

District Court, D. Pennsylvania. July 11, 1874.

BANKRUPTCY—SUITS BY ASSIGNEE—FORM OF ACTION—EQUITY JURISDICTION.

[1. It is no objection to the assignee's bringing a suit to recover assets in the form of a creditors' bill, that there are also other creditors of the defendants; for in such a bill complainant sues as one of a class for the benefit of all members thereof who may become parties.]

[2. In a suit brought by an assignee to recover assets alleged to belong to a bankrupt corporation, the subjects of litigation were classified by the court under three heads: (1) Property and effects traceable as investments, products, or substitutes of the funds of the corporation, in which no defendant had any pretense or color of beneficial ownership; (2) property and effects acquired with funds of uncertain source, but as to which the burden of proof was on the defendants to show a beneficial interest therein; (3) property and effects which were apparently the property of one of the defendants, and as to which the burden was on complainant to show the contrary. *Held* that, in view of this threefold character, the case was a proper one for equitable investigation and remedies.]

[This was a libel in equity by Stotesbury and others, assignees of the Franklin Savings Fund Society, bankrupts, against Cyrus Cadwallader and others.]

CADWALADER, District Judge. This case was heard upon the bill, and amended and supplemental bill, and upon the answers of certain defendants, and the respective replications and upon certain proofs adduced, among which was the examination of the defendant, Cyrus Cadwallader, in the court of bankruptcy, &c. Whereupon the court, after hearing counsel, was of the opinion that the subjects of the litigation might be considered under three heads, to wit: 1st. Property and effects traceable, as investments, products or substitutes of the funds of the bankrupt corporation, and in which no defendant has any pretence or color of beneficial interest. 2d. Properties and effects acquired with funds of uncertain source, but as to which the burden of proof is on the defendants, who hold the apparent legal estate, to show that the same are not beneficially the bankrupt corporation's. 3d. Property and effects which from the date or mode of their acquisition are apparently the defendant, Cyrus Cadwallader's, and as to which the burden of proof is on the complainants to establish the contrary. The court was further of the opinion that the complainants are entitled to an immediate decree under the first and second heads, but that as the pleadings now stand such decree could not be carried into effect without an inquiry under each head before a master.

Under the third head the complainants would not have any relief, as the bill is now drawn. But it is amendable (and the case has been discussed by counsel, as if it had already been amended) by being converted under this head into a creditor's bill. This will be explained. The answer of the defendant, Cyrus Cadwallader, suggests what, at first view, might seem to impede any action of the complainants under a creditor's bill. He suggests that there are other creditors who ought not to be affected by such a bill. The answer to the objection is that the complainants in such a bill would sue as one of a class, and would sue in this respect as well on their own behalf as on that of all other creditors who may become parties or may otherwise establish their right to participate in the avails of the suit under this head. If it be further objected that execution at law would be the only proper remedy under this head, the extraordinary peculiarities of the case furnish an answer to the objection.

The answer is, that the complainants are (under the three-fold character of the subjects) frustrated of all present available recourse at law, by reason of the necessity of equitable investigation for the discovery and ascertainment of the proposed classification of the subjects. This, I think, makes the case a proper one for equitable redress throughout. It is the only means of obtaining prompt relief.

From what has appeared of the proportional amount of the other debts, which is comparatively very small, I incline to think that a determination of the whole controversy as to the three subjects might be speedily reached without undue sacrifice by the complainants of any right of the general body of the creditors in bankruptcy. There is no inconsistency in the complainants claiming both as beneficiaries and as creditors, and their claim in the latter capacity is good until they obtain satisfaction by payment in the former capacity. Now their amendments, as proposed, may be made by giving in this alternative such an aspect to their bill as to cover contingently all the subjects of litigation as to which any possibility of doubt can be reasonably suggestable. In this form of a creditors' bill a decree can, perhaps, be made at once, dispensing with inquiries before the master under the first and second heads, and for the benefit of other creditors of this defendant, giving to the bill the character of a creditors' bill throughout. But on this point a final opinion cannot be pronounced without seeing the proposed amendment, and a draught of the decree proposed, and perhaps a draught also of the conveyances, by which effect is to be given to such decree. Of course there can be no reservation of any benefit to this defendant, Cyrus Cadwallader, or to any of his family, as voluntary beneficiaries. But it

[1] [Reprinted from 31 Leg. Int. 229, by permission.]

has been said that his wife is willing, for a small consideration, to unite in the conveyances in such manner as to bar her dower. If, for an amount not exceeding that which has been named, she will so unite, it would be a very judicious payment on the part of the complainants. She cannot be compelled to unite in the conveyances, and if her dower could, in Pennsylvania, be defeated, as perhaps it might be by forcing sales under the present bill, and its proposed amendment, this could not be done without increased expense, delay and complexity.

STOTT (KRAFT v.). See Case No. 7,929.

STOTT (UNITED STATES v.). See Case No. 16,408.

Case No. 13,499.

STOUGH v. HATCH.

[16 Blatchf. 233;[1] 8 Reporter, 7; 20 Alb. Law J. 78.]

Circuit Court, E. D. New York. May 1, 1879.

REMOVAL OF CAUSES—WHEN REMOVABLE.

A cause was noticed for trial by the plaintiff, at a term of the state court, and a note of issue for that term was filed by the plaintiff. Both parties consented that the cause go off for the term, and it was not tried. After the term expired the defendant removed the cause into this court, under the act of March 3, 1875, (18 Stat. 470:) *Held*, that the removal was not in time, not having been made before or at "the term at which said cause could be first tried."

[Cited in Forrest v. Edwin Forrest Home, 1 Fed. 462; Wheeler v. Liverpool, L. & G. Ins. Co., 8 Fed. 198; Johnson v. Johnson, 13 Fed. 193.]

[Cited in Eldred v. Becker, 60 Wis. 45, 18 N. W. 642; First Nat. Bank v. Conway, 67 Wis. 218, 30 N. W. 218.]

[This was a motion by Charles J. Stough against Asa L. Hatch. Heard on motion to remand.]

Theodore Hinsdale, for plaintiff.

Turner, Lee & McClure, for defendant.

BENEDICT, District Judge. This cause was upon the calendar of causes for trial, at the circuit of the supreme court of the state, at the January term, 1879. It was noticed for trial at that term, by the plaintiff, and a note of issue for that term was filed by the plaintiff. It was not tried at that term, both sides having consented that the cause go off for the term. After the expiration of that term, application was made to the state court to remove the cause to this court, which application was granted. The plaintiff now moves this court to remand the cause to the state court, on the ground that the application to remove was made too late. This motion must be granted. The January term, 1879, was "the term at which said cause could be first tried," within the meaning of the act of March 3, 1875 (18 Stat. 470,) for the cause was at issue, duly noticed for trial, and subject to be tried on its merits at that term. That the parties were not prepared for a trial at that term, and consented that the cause go off the calendar for that term, are facts that do not affect the question here.

Motion granted.

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

Case No. 13,500.

STOUGHTON v. DIMICK.

[3 Blatchf. 356;[1] 18 Law Rep. 557; 29 Vt. 535.]

Circuit Court, D. Vermont. Oct. Term, 1855.

NEUTRALITY—SEIZURE BY MILITARY OFFICER—PERSONAL LIABILITY—LIMITATION OF ACTIONS.

1. Where an officer belonging to a military force ordered out by the president, under the 8th section of the neutrality act of March 10, 1838 (5 Stat. 214), "to prevent the violation and to enforce the due execution" of the act, and instructed by his commanding general to execute that purpose, seized property, as a precautionary means to prevent an intended violation of the act, with a view of detaining it until an officer having the power to seize and hold it, for the purpose of proceeding with it in the manner directed by the statute, could be procured and act in the matter: *Held*, that the seizure was lawful.

2. Where the property so seized by such officer was a vessel, which was not intended to pass the frontier herself, but was laden with arms and munitions of war, which were intended to be transported across the frontier, for the use of insurgents in Canada, then in arms, near the line, against Great Britain, and the vessel was wrecked the same night, without any fault on the part of the officer: *Held*, that an action of trover for the vessel could not be sustained against him.

3. Circumstances stated under which a plaintiff is chargeable with knowledge of the existence of attachable property of a defendant in the state of Vermont, so as to cause the statute of limitations of that state to run in favor of the defendant, even though he be personally absent from the state.

This was an action of trover [by De Clancy Stoughton against Justin Dimick] to recover the value of a vessel taken and detained by the defendant while acting in the capacity of a military officer, under the act of congress of March 10, 1838 (5 Stat. 212), commonly called the "Neutrality Act." The defendant pleaded not guilty, and the statute of limitations. A verdict was rendered for the plaintiff, with damages assessed, upon the issue joined on the former plea, and for the defendant on the issue growing out of the latter plea. The verdict was taken subject to the opinion of the court on the law arising upon the facts proved, and was to stand, or be altered or amended, and judgment to be rendered thereon, or to be set aside and a new trial to be granted, accordingly as that opinion might be.

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

O. Stevens, for plaintiff.
Lucius B. Peck, Dist. Atty., for defendant.

PRENTISS, District Judge. Two questions arise in this case: (1) Whether the defendant had authority to take and detain the vessel; (2) whether the action is barred by the statute of limitations.

1. Admitting that no officer but one of those mentioned in the first section of the act of 1838, a collector, naval officer, surveyor, inspector of the customs, marshal, deputy-marshal, or other officer specially empowered by the president for the purpose,—could make a seizure, properly speaking, under the act, or, in other words, could take property for the purpose of holding and proceeding with it in the manner prescribed by the act, the question still remains, whether the defendant, by taking the vessel in question into his possession, under the circumstances, and in the manner and for the purpose he did, assumed unauthorized power, and is, consequently, liable to the plaintiff for it.

By the 8th section of the act, it was made lawful for the president, or such person as he might empower for the purpose, to employ such part of the land or naval forces of the United States, or of the militia, as should be necessary "to prevent the violation, and to enforce the due execution," of the act. Under instructions from the president, and pursuant to the power thus given to him, a military force, by orders issued by the secretary of war, was placed at different points upon the Northern frontier—at Niagara, at Sackett's Harbor, and at Plattsburgh, on Lake Champlain. The defendant was a captain in the army, stationed at the latter place, and was ordered, by the commanding general of the station, to take post, with his company, at Rouse's Point, on the lake, near the frontier line, for the purposes mentioned in the section just referred to, with instructions faithfully to execute those purposes. Under the orders thus given to him, and while stationed at the post so assigned to him, the defendant, at Champlain, a port a short distance this side of the line, took possession of the vessel. The vessel was fastened to the dock, but was wrecked and destroyed, in the night of the same day, by a storm, so that it could no longer be the subject of detention, of re-delivery, or of any proceeding under the act.

Though the destination of the vessel was only to Champlain, and she was not intended to pass the line, she had arms and munitions of war on board, which were intended to be taken across the line, though by another conveyance, to and for the use of the insurgents in Canada, then in arms near the line. If the vessel herself, as the plaintiff would maintain, was not liable to seizure, not being, in fact, "about to pass the frontier," clearly, the arms and munitions of war on board of her, among which were eight tons of fixed ammunition, were so liable; and these could not be seized and secured without, or otherwise than by, arresting and taking possession of the vessel. And, even supposing that the military force, so far as concerned the seizure of property, was intended to act in aid of the civil authority, or rather of the civil officers mentioned in the first section of the act, and that the commander of such force had not the power of seizure which those officers had, he might, at least, when necessary, take property, as a precautionary measure to prevent an intended violation of the act, and detain the property, until an officer having the power to seize and hold it for the purpose of proceeding with it in the manner directed, might be procured and act in the matter. Without such power, how could the military force fully perform the duty assigned to it, or be effectually employed "to prevent the violation, and to enforce the due execution," of the act? In this view, which is, perhaps, a view more limited and restricted than might be consistently taken, the defendant did not exceed the authority given him by the act; and, as it does not appear that the loss of the vessel was the consequence of any want of ordinary care on his part, he cannot be held liable for it.

2. The plaintiff having, as appears from what has been said, no cause of action against the defendant, the question arising under the statute of limitations ceases to be of any importance in the case. Still, as that question has claimed and received consideration, it may be well to say a few words upon it, rather than pass it over in entire silence.

The statute of limitations of this state runs in favor of a party, although he be absent from and resides out of the state, if he have, to use the words of the statute, "known property within the state, which could, by the common and ordinary process of law, be attached." [Rev. St. 1839, c. 58, p. 307.] The meaning and intention are, that the statute shall not run in favor of a party who is not subject to process; but that, if he be subject to process, either by being personally within the state, or having known attachable property within it, the statute runs in his favor.

It was settled by the supreme court of this state, in the case of Wheeler v. Brewer, 20 Vt. 113, that actual knowledge of the property and of the defendant's title to it, need not be possessed by the plaintiff, if, by reasonable diligence, he would acquire that knowledge; but that, in order to warrant this inference, and thereby to bar the action, the defendant's ownership of the property must be notorious, to such an extent that it would not escape a reasonable search and inquiry on the part of the plaintiff. Taking this to be the law of the state, the inquiry here is, whether the defendant had such property, and whether the plaintiff, by rea-

sonable diligence, might have obtained knowledge of it.

It appears that the defendant owned a large and valuable farm, with stock upon it, in Bennington, in this state, situate about two miles west of the village, on the great road to Albany, called and known as the "Dimick Farm," and formerly occupied for many years by the defendant's father as a tavern stand. The farm consisted of two hundred acres, was of the value of six thousand dollars, and was conveyed to the defendant by his father, subject to a life estate in the father, by a deed duly executed and recorded in 1830. The father died in 1839, and the defendant has ever since leased the farm, with the stock upon it, to tenants, who have occupied it under him. Both farm and stock, during the whole time, have been set in the list, for the purpose of taxation, in the name of the defendant, with the name of the occupant, and were generally known in the town, which, it is to be observed, was not only the seat of justice for the county, but a town otherwise of much note, to be the property of the defendant.

In addition to these facts, it is to be borne in mind, that Bennington, where the property was situate, was the dwelling-place of the family, while living, to which the defendant belonged, and the place where he was brought up, and where he might, if anywhere, claim to have his domicile, though personally absent therefrom, except an occasional return, during his long service in the army; and, taking all the facts together, it appears to us, that they well warrant the conclusion, that the plaintiff might, in the course of the six years allowed him for inquiry, by using reasonable diligence and due means, have ascertained and attached the property.

Such being our opinion upon the several questions involved in the case, the defendant is, of course, entitled to judgment, and judgment must be entered up for him on the verdict accordingly.

Case No. 13,501.

STOUGHTON et al. v. HILL.

[3 Woods, 404.] [1]

Circuit Court, S. D. Georgia. April Term, 1877.

DOMICILE—ENEMY—AGENT—DEPRECIATED CURRENCY—LAWFUL MONEY.

1. A domicile once acquired is presumed to continue. But this presumption does not prevail when its effect would be to impose upon the party the character of an enemy to his government.

2. An agent, unless expressly authorized, cannot bind his principal by receiving in satisfaction of a note held by him for collection a greatly depreciated currency which is not a legal tender.

3. By a note of hand, made in Georgia, February 16, 1859, and due January 1, 1860, the payment of a certain number of dollars was promised. *Held*, that the word "dollars," as used in the note, meant dollars in lawful money of the United States.

[This was a bill in equity by Stoughton & Peck against B. Hill.] Heard upon pleadings and evidence for final decree. The facts are stated in the opinion of the court.

A. W. Stone and A. Sloan, for complainants.
B. Hill, in pro. per.

ERKSKINE, District Judge. The bill alleges that the plaintiffs are the owners and holders of a promissory note, purchased by them in due course of trade, before it became due, and of which the following is a copy: "Macon, Ga., February 16, 1859. On the first of January, 1860, we promise to pay the Macon & Brunswick Railroad Company, or bearer, five hundred dollars. Value received. (Signed) Stubbs & Hill." And that, not being paid at maturity, they, on the 8th of January, 1860, placed it with Poe, Grier & Poe, attorneys at law, for collection. That this firm was subsequently dissolved, and the note remained with W. Poe for collection. That the defendant Hill, surviving partner of Stubbs & Hill, the makers, combined to defraud the plaintiffs, with one Daniells, receiver of the so-called Confederate States,—who had got the note from said Poe, as the property of alien enemies, for sequestration,—and obtained possession of it without payment of the same, or any part thereof, which fact has just come to the knowledge of the plaintiffs. That it is still in his possession, unless he has lost or destroyed it, and they ask that he be decreed to pay it, according to its tenor and effect. Hill answered the bill, and he and said Poe responded to certain interrogatories. It may be here remarked that the allegation of fraud charged against Hill has not been established. On the contrary, the evidence shows that he got possession of the note in a business-like manner, and not otherwise. And if he received it from Poe—for there is no evidence that he received it from Daniells—under a mistake of his legal liability, it is his misfortune; nothing more. Hill states that Stubbs, in signing the note in the name of the firm, went beyond the scope of his authority; that it was given for railroad stock, which soon became worthless, and that he never heard of the note until the latter part of 1859, nor that Poe had it for collection until 1862, when he promised to pay it, and did afterwards, on the 24th of December, 1863, pay it in Confederate treasury notes and state of Georgia treasury notes, and then received it from the hands of Poe, the attorney, who caimed the right to collect it; and that when he paid it he understood that the plaintiffs lived in this state when they traded for it, and supposed that they resided here when he took it up. And as to Daniells, the receiver's connection with the note, Poe says Daniells compelled him to surrender it, as the property of alien enemies, for sequestiation by the Confederate court, and that subsequently, on re-

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

ceiving the Confederate and Georgia treasury notes from Hill, he turned them over to Daniells, who then delivered him the note, and he handed it to Hill; but he does not recollect whether the note had been sequestrated and confiscated or not. Hill says he attached the note to the plaintiffs' interrogatories, and has not seen it since.

Upon a careful perusal of the evidence, I do not think it sustains the position of the defendant, that the plaintiffs had their domicile or fixed residence in Georgia, on the 8th of January, 1860, when they placed the note with the attorneys for collection. But, assuming that it was then their actual residence, still, notwithstanding such fact, no presumption arises as to these plaintiffs (though the contrary was urged), that they continued to dwell here, on the 24th of December, 1863, when Hill got possession of the note, or during any period of the Civil War. It is true that the supreme court declares, in Mitchell v. U. S., 21 Wall. [88 U. S.] 350, that "a domicile once acquired is presumed to continue until it is shown to have been changed." But it seems to me that it would be illogical, if not, indeed, a pernicious straining of the general doctrine of inhabitancy, to infer and determine that these plaintiffs continued to reside here after the war commenced,—a conclusion which, in judgment of law, would impress them with a hostile character to the United States, whether they were adherent to the Rebellion or not.

Again, suppose that they really were residents of this state when they gave the note to the attorneys for collection, and that from the commencement to the termination of the war they resided here or elsewhere within the limits of the Confederate territory, and without conferring any authority upon the attorneys to take, or having any knowledge, until long afterwards, that they had taken payment for it in Confederate States treasury notes and state of Georgia treasury notes,—currencies not in existence until two years subsequent to the date of the note,—and when received at par for it, the relative value of the Confederate States paper, never made a legal tender by their congress, was as twenty, and the state of Georgia paper, which state, at no time, passed any law to compel creditors to receive it, or any in regard to it, that would otherwise impair the obligation of contracts, as fifteen to one of gold, it clearly seems to me that the acceptance of these currencies by the attorneys, under such a state of facts, would not discharge Hill from liability on his note. Be that as it may, the testimony discloses that the note was made on the 16th of February, 1859, and matured on the first of January, 1860; and it is not questioned that the plaintiffs took it for value, and while under due. The term "dollars," as employed in this instrument, means dollars of the lawful money of the United States; and as it was not only executed, but came to maturity before the civil strife began, no extraneous evidence will be permitted to give it a different signification.

No evidence has been adduced to show that the plaintiffs knew of the pretended payment of the note, or of its delivery to Hill until immediately before the institution of this suit, therefore no negligence is imputable to them. Then it is useless to pursue this subject further than to quote the language of the supreme court, by Mr. Justice Field, in Ward v. Smith, 7 Wall. [74 U. S.] 447: "The power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is, by common consent, considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction, within a reasonable period after it is brought to his knowledge."

There must be a decree for the plaintiffs, with interest at the rate of seven per cent. per annum on the principal from the first of January, 1860, to the 19th of April, 1861, when the interest shall cease, and commence again on the second of August, 1866, and run to the present time, with costs of suit. See U. S. v. Muhlenbrink [Case No. 15,831].

Case No. 13,502.

STOUGHTON v. TAYLOR.

[See Case No. 7,558.]

Case No. 13,503.

STOUT v. SIOUX CITY & P. R. CO.

[11 Am. Law Reg. (N. S.) 226; 6 Am. Law Rev. 759.]

Circuit Court, D. Nebraska. 1872.

NEGLIGENCE DEFINED—DANGEROUS MACHINERY—INJURY TO YOUNG CHILD—CONTRIBUTORY NEGLIGENCE OF FATHER—RAILROAD TURNTABLES.

[1. Negligence may be defined to be doing some lawful act in a careless, unusual, and improper way, or omitting the performance of some act required by law to be done, by which injury results to the person or property of another.]

[2. Negligence of a father in permitting his young and inexperienced child to wander from home, and go upon a dangerous piece of machinery, will not prevent liability of the owner of the machinery for an injury to the child, resulting from such owner's carelessness and negligence in not properly guarding and securing the same.]

3. If a railroad company keeps and uses its turntable as prudent and well-managed railroad companies in other places are in the habit of doing, and it is not the habit of such companies to keep them locked, so that they cannot be turned by children, or others, such company is not liable for a personal injury resulting to a young child, playing about the turntable, by reason of its failure to keep the same guarded or locked, so that it could not be turned by children.]

This was an action brought to recover the sum of $15,000 damages resulting to the plaintiff [Harry G. Stout], a minor child

aged six years, on account of injuries received while at play upon the "turntable" of the railroad company, in March 1869. The plaintiff's petition alleged that the defendant was, at the time the injuries were received, running and operating a railroad running through the town of Blair in Washington county, Nebraska, and in connection with said railroad used and operated a "turntable," which was so "constructed and arranged as to be easily turned around and revolved in a horizontal direction; that across the upper surface thereof there were fastened two large and heavy bars of iron corresponding with the iron rails of the railroad track used in connection with said turntable, and so placed and arranged that when the turntable revolved, the ends of the iron bars running across the face of the same passed by the ends of the rails on the railroad track; that said turntable was situated in a public place, and in immediate proximity to a passenger depot of the defendant;" that many children were in the habit of going upon said turntable to play; that the turntable was unfastened and in no way protected to prevent it being turned around at the pleasure of small children; that the defendant had notice of these facts; that the plaintiff was a child of tender years without judgment or discretion, and that in consequence of the carelessness and negligence of the defendant in not locking said turntable, it was revolved, and while it was being so revolved by other children, "the plaintiff had his right foot caught between the ends of one of the iron bars on said turntable and the end of one of said rails upon the railroad track," and his foot was badly crushed, causing the loss of several bones of his foot, and was permanently injured. Petition also alleged that it was the duty of the defendant to keep its turntable fastened, or in some way protected so that children could not have access thereto. The answer of the defendant denied all the averments of the petition, and alleged that the plaintiff had no right upon the turntable; that he was a trespasser, and "that law or usage or reasonable prudence did not require the defendant to keep its turntable locked or guarded." Upon the trial the plaintiff proved substantially all the averments of the petition, excepting that the proof showed that the turntable was distant from the depot of the defendant about one-quarter of a mile; that the nearest public street was distant from the turntable about 1500 feet; that the plaintiff lived with his parents about three-quarters of a mile away. The plaintiff also proved that the turntable was so constructed that it was easily turned around by children of the age of plaintiff, and was even turned around by the wind. The defendant introduced several railroad engineers to prove, and did prove in fact, that it was not the custom of other railroads to fasten, lock, or in any manner guard their turntables.

E. Wakely and Strickland, Ballard & Walton, for plaintiff.

Cook & Hubbard, for defendant.

DUNDY, District Judge (charging jury). You are directed to find in addition to the general verdict three special verdicts as follows:—(1) Was the father of the plaintiff guilty of any negligence in allowing his child, the plaintiff, to wander away from his home upon the grounds of the defendant? (2) Was the plaintiff capable of exercising any judgment as to the character of the machinery upon which he was playing, and if so, was he negligent at the time he received the injury? (3) Was the defendant guilty of negligence in allowing the turntable in question to remain unfastened and unguarded? Careful reading of the petition and answer, which form the issues, will show clearly enough that there is but little in dispute between the parties thereto, so far as the alleged facts are concerned. It is upon questions of law, mostly, that the parties or their counsel differ, and their differences are as irreconcilable as the adjudged cases upon which they rely. There does not seem to be much, if any, room to doubt that the plaintiff was, at the time of the alleged accident, a child of tender years. That the alleged injury to the foot was received at the time, place, and in the manner stated in the petition, and that the "turntable" upon which the plaintiff received the alleged injury was owned and used by the defendant at the time aforesaid. Nor do I understand counsel to question either one of these propositions. It would seem, then, stripping the whole case of all unnecessary surroundings, that the question of negligence of one or both parties is about all that is in controversy between them. What, then, is "negligence," according to the legal acceptation of that word? The meaning of the word is pretty generally, and no doubt correctly, understood by those learned in the law, but, in my judgment, it is exceedingly hard to define. I think I could give no definition of the word where I would be willing to adhere to it in every case where I might be called upon to apply a test. For, to ascertain the question of the existence of negligence, time, place, things, persons, results, and every thing connected with the entire transaction in question must be taken into consideration. And when this be done, if we find that some person or corporation has done some thing, not in itself unlawful, in a careless and improper way, and without using ordinary caution, or where such person or corporation is required by law to do certain things, the performance of which is, for any reason, omitted or neglected, in consequence and by reason of which wrongs are done and injuries received, we can then safely conclude that the party charged therewith is guilty of "negligence." If I am correct in what is here stated, I think I can give a general

definition of the word "negligence" that will properly apply to the controversy between the parties to this suit, and for my present purpose only I will say, "it is doing some lawful act in a careless, unusual, and improper way, or omitting the performance of some act required by law to be done, by which injury results to the person or property of another." With the word thus defined, you must apply the rule to the case at bar, and if you find that either party has been guilty of such negligence, it will be your duty to visit the consequences thereof on the party who is responsible for the very serious accident described by the witnesses who have testified herein.

It is claimed and insisted on by counsel for the defendant, that the plaintiff's father was guilty of negligence in permitting him to wander so far from home, and to go upon the turntable of the defendant, which, it is claimed, was near three-quarters of a mile distant. This question, as well as the question of negligence on the part of the defendant, is not without its embarrassment. And the opinions I now entertain and here express thereon, I may, after further examination and more mature reflection, be compelled to change. A father is bound by law to maintain and protect his children. It is a natural as well as legal duty resting on him so to do. To effect this, he is authorized to exercise the necessary restraint and control over the child to accomplish this responsible duty. This is a duty the father owes to all of his children alike. And more especially does he owe it to those of tender years, who are unable from youth and inexperience, to take care of themselves. You will observe that this duty is one the father owes to his child. But if the father fails to discharge that duty, and a child wanders off, and is injured in consequence of the negligence of another, the negligence of the father will not excuse the party whose negligence caused the injury complained of. If, then, the father of this plaintiff negligently permitted him to wander off from his home, and to go upon the turntable, where, it is claimed, he received the injury complained of; and if the plaintiff was so young and inexperienced, and did not possess sufficient judgment to warn him of the danger of the place or the character of the machinery where the accident occurred, and the accident was the result of the carelessness and negligence of the defendant, there would, nevertheless, still be a liability on the part of the defendant for the injury sustained, if any. If this view of the law be the correct one, it would seem to make but little difference about the alleged negligence of the father of the plaintiff. But does the testimony show, or tend to show, negligence on the part of the father which finally resulted as before stated? A child possessed of natural reason and ordinary intelligence, and endowed with the full powers of locomotion, cannot be tied up and confined as we confine our domestic animals. This would not be permitted, were it even practicable. Most, if not all, of us who are at all conversent with human nature, and understand the difficulties growing out of the parental relation, know full well how easy it is for children six or eight years of age to escape the watchful care and vigilance of parents for the purpose of indulging in childlike amusements. These things ought to be fully considered by you in order to ascertain if the father of the plaintiff was guilty of negligence in the premises. I mean, of course, in permitting the plaintiff to wander off as before stated. Was the plaintiff possessed of sufficient judgment and understanding to apprise him of the dangerous undertaking which he claims he failed to accomplish, and from which failure he claims the injury arose? If he had sufficient knowledge, judgment, and foresight to know or see this, and did not exercise the same so as to avoid the danger of such an undertaking, the defendant would not be liable, notwithstanding it may have been guilty of some negligence. But of this you alone must judge.

If you should be of the opinion, from the evidence, that the plaintiff was injured at the time, in the place and manner stated in the petition and by the witnesses, and that he was at the time too young to have the necessary discretion to avoid such a danger as he claims attended him, and that he was therefore without blame, then it will become important to inquire about the alleged negligence of the defendant. Does the testimony show negligence on the part of the defendant? You will recollect from the evidence where the depot, round-house, and turntable were at the time situated, the distance they were from each other and from the plaintiff's home. You will also recollect the character of the country surrounding and in close proximity to the same. The plaintiff claims that the turntable was in a public place, and where children were in the habit of going and playing upon it. The defendant claims that it was in an unfrequented place, remote from public places, and where children had no right to go, and even if the plaintiff had a right to be there, that no negligence could be imputed to the defendant, for the reason that due diligence was used by the defendant in taking care of and protecting the turntable. If the turntable was a heavy and dangerous machine, and in a public place where children were in the habit of going to play upon it with the knowledge of the defendant or its servants, as the plaintiff claims, then it would seem to me to be necessary to protect it in some way, either by fastening or by enclosing the same. But if it was remote from places of public resort, or if the defendant or its servants had no knowledge of boys going there to play upon it, so that no danger could reasonably be apprehended from it,

even though it may have been in the open prairie, I do not think such diligence would be required of the defendant. So the degree of diligence in such a case would greatly, depend on the locality in which the turntable might be found. But to show that due care and diligence have been exercised in the premises the defendant called several witnesses to testify upon the subject of diligence used by other railroad companies in matters of the same kind. The testimony upon this subject is before you, and if you are satisfied from that that other railroad companies, when the same are properly and carefully managed, make their turntables, manage and leave them in a condition such as the one where the accident is said to have occurred was at the time, then you would not be justified in finding that the defendant was guilty of negligence. If an individual does what prudent men generally do, there is no danger of incurring risk or loss from alleged negligence. So with railroad or any other companies. It is true, then, that if the defendant kept and used its turntable, as prudent and well-managed railroad companies in other places kept and managed theirs, no liability could attach to the defendant for the injury in question, even if the plaintiff was without blame. This question you will determine for yourselves upon the testimony introduced in support of it. If you should be of the opinion from the evidence in the cause, all taken and considered together, that the plaintiff is entitled to recover, the only remaining question will be, what is the measure of damages which the plaintiff may be entitled to recover? There is no rule by which we can arrive at the precise cash value of a hand, a foot, or the loss of the use of either. The nature of such a loss or such an injury is not susceptible of it. But in determining a question of this kind, you must take into consideration the entire facts and circumstances stated in the evidence. The extreme youth of the plaintiff; the character and extent of the injury to the limb; the probable effect the injury will have on the future and further development of the limb; the permanent nature of the disability; the great bodily pain consequent upon the injury, and the sickness resulting therefrom. In short, every fact and circumstance occurring since the injury was received, that tends to throw light on the condition of the boy in the past, present, or future, should be fairly and fully considered in order to reach a fair estimate of damages to be awarded to him.

Let it be fully understood here and now, that whatever conclusion is reached by you it must be based upon the testimony as you understand it. This must be taken and considered all together, and thereafter the result ought to be as above stated.

In conclusion, I will only say that if you believe from the evidence that the plaintiff was guilty of negligence as before defined, then your verdict should be for the defendant. On the other hand, if you believe from the evidence that the plaintiff was free from blame, and that the negligence of the defendant caused or contributed to the injury complained of, then your verdict should be for the plaintiff for such sum as you in your judgment may see proper to award him, not exceeding $15,000.

[NOTE. The jury impaneled for this hearing failed to agree, and on the second trial the jury found a verdict for the plaintiff for $7,500. Case No. 13,504. A writ of error was then sued out, and the cause carried to the supreme court, where the judgment of the circuit court was affirmed. 17 Wall. (84 U. S.) 657. See 8 Fed. 794.]

Case No. 13,504.

STOUT v. SIOUX CITY & P. R. CO.

[2 Dill. 294.] [1]

Circuit Court, D. Nebraska. 1872.[2]

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURY TO CHILD—UNGUARDED TURNTABLE.

1. Under certain circumstances, a railroad company may be liable, on the ground of negligence, for a personal injury to a child of tender years in a town or city, caused by a turntable, built by the company upon its own unińclosed land, and which is left unguarded and unlocked in a situation which renders it likely to cause injury to children.

[Cited in Barrett v. Southern Pac. R. Co., 91 Cal. 303, 27 Pac. 668; Bishop v. Union R. Co., 14 R. I. 319; Burns v. Sennett, 99 Cal. 373, 33 Pac. 920; Daniels v. New York & N. E. R. Co., 154 Mass. 351, 28 N. E. 284. Cited in brief in Rushenberg v. St. Louis, I. M. & S. Ry. Co. (Mo.) 19 S. W. 217.]

2. Negligence defined, and the necessary elements of such a liability in respect to unguarded and unlocked turntables stated.

[Cited in Keffe v. Milwaukee & S. P. Ry. Co., 21 Minn. 213; Maynard v. Boston & M. R. Co., 115 Mass. 460.]

This is an action by an infant [Harry G. Stout], by his next friend, to recover damages for a personal injury, caused by the turntable of the defendant. The material facts appear in the charge of the court to the jury, given below.

Wakeley & Strickland, for plaintiff.

N. M. Hubbard and Isaac Cook, for defendant.

DILLON, Circuit Judge (charging jury). 1. This is both a novel and important case. The injury for which this action is brought happened in the town of Blair, in this state, on the 29th day of March, 1869. The plaintiff was then a boy of the tender age of six years and two or three months. The undisputed testimony shows that the town of Blair was, at that time, a new place, had been recently laid off,

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

[2] [Affirmed in 17 Wall. (84 U. S.) 657.]

and contained a population of about one hundred people. On the plat of the town of Blair is a tract of land of variable width, extending almost the entire length of the plat, owned and used by the defendants for their road-bed and depot grounds, and which divides the town into two portions. The cross streets of the town run up to this railroad ground and there stop, with exception of one or two streets, which were laid out across it. On this ground, which was not enclosed, was situated the defendant's depot house, and, about one-quarter of a mile distant from the depot house was located the turntable, on which the plaintiff was injured. There were but few houses in the immediate neighborhood of the turntable, and the plaintiff's parents lived in another portion of the town, and about three-fourths of a mile distant from the turntable.

The circumstances under which the accident to the plaintiff occurred are not in the main, if in any respect, in dispute. The plaintiff, without, as it appears, the knowledge of his parents, started with one or two other boys to go to the defendant's depot, about half a mile away, with no definite purpose in view. When the boys had arrived at the depot, it was proposed by some of them to go to the turntable to play; and the boys proceeded to the turntable, about a quarter of a mile distant, traveling along the defendant's road-bed or track. When the boys had reached the turntable, which was not attended or guarded by any employé of the company, and which was not then fastened or locked, and which revolved easily on its axis, two of them commenced to turn it, and the plaintiff, in attempting to get upon it (being at the time upon the railroad track), had the misfortune to get his foot caught between the end of the rail on the turntable, as it was revolving, and the end of the iron rail on the main track of the defendant's road, and his foot was badly cut and crushed, resulting in a serious and permanent injury.

There is the evidence of one witness (Quimby), then an employé of the company, that he had previously seen boys playing at the turntable, and had forbidden his children to play there. But this witness had no charge of the turntable, as he says, and did not, as he testified, communicate the fact to any of the officers or employés of the company having charge of the turntable. It appears, from the plaintiff's testimony, that he had not before that day been engaged in playing at the turntable. The turntable was constructed on the defendant's own land, and the testimony tends to show that it was constructed in the usual and ordinary manner.

2. Now the ground of complaint against the defendant, as set out in the petition, is that the turntable, as it was constructed, was of a dangerous nature and character, when unlocked or unguarded, and that being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded, so as to prevent injuries such as befell the plaintiff.

The basis of this action, therefore, is that the defendant owed the plaintiff a duty of this kind; that, in failing to discharge this duty, the defendant was guilty of negligence; that this neglect caused the injury to the plaintiff, and that, therefore, the defendant is liable in damages therefor.

Now, if this action had been brought, under the circumstances disclosed in the evidence, by an adult, who, himself, meddled with and set in motion the turntable which caused the injury, we should have no hesitation in saying that the law would not allow it to be maintained. And we confess that we have had serious doubts whether, under the circumstances, the action was any more maintainable, being brought by an infant of tender years.

On reflection it is our judgment, and we so instruct you, that this action may be maintained, if certain facts be established by the evidence.

In the first place, it is alleged in the petition, and it must appear by the evidence, that this turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if left unguarded or unlocked, would be likely to cause injury to children. You have heard described the manner in which this turntable was constructed and left, and very much evidence has been adduced to show that turntables are constructed and left in this manner elsewhere; and the evidence is quite undisputed that it is not the practice of railroads to guard or lock them. The circumstance that other roads throughout the country do not guard or fasten turntables (if you find such to be the fact), is not conclusive in the defendant's favor that there was or could be no negligence on its part as respects the turntable in question, but, while not conclusive, it is still a very important fact or circumstance to be considered by the jury in determining the question of the defendant's negligence.

This action rests, and rests alone, upon the alleged negligence of the defendant, and this negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation.

If the turntable, in the manner it was constructed and left, was not dangerous in its nature, then of course the defendants would not be guilty of any negligence in not lock-

ing or guarding it. But even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue.

The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them.

But if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence. Counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defense upon the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental, or brought upon himself. The defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds; and there are many injuries continually happening which involve no pecuniary liability to any one.

To find against the defendant you must find that it has been guilty of neglect, of a wrong, of a want of due and proper care in the construction of machinery of a dangerous character, and, so leaving it exposed as before explained, that, as reasonable men, the officers of the road ought to have foreseen that an accident, happening as this happened, would probably occur, or be likely to happen.

NOTE. The cause was previously tried before Dundy, District Judge, and the jury failed to agree. His charge on that trial will be found in [Case No. 13,503].

On the second trial the jury found a verdict for the plaintiff for $7,500, and the court signed a bill of exceptions, and a writ of error was sued out, [and the cause carried to the supreme court, where the judgment of this court was affirmed. 17 Wall. (84 U. S.) 657.] The statement of facts in the foregoing charge of the circuit judge was not objected to by either party, and the main ground of exception on the part of the company was that the case was allowed to go to the jury, it contending that the jury should have been directed, as a matter of law, that the company, in respect to its turntable, owed no duty towards, and hence was under no liability to, the plaintiff. See Brown v. Railroad Co., 58 Me. 384.

[See 8 Fed. 794.]

Case No. 13,505.

STOUTZ v. BROWN et al.

[5 Dill. 445.] [1]

Circuit Court, D. Nebraska. 1879.

TAXATION—SCHOOL LANDS—TAX DEEDS.

School lands held by the state of Alabama under the act of congress of June 22, 1854 (10 Stat. 299), situate within the state of Nebraska, are not taxable by the authority of the latter state.

This suit [by Fred. A. Stoutz against James E. Brown and John Finley] is brought to quiet title and to remove a cloud created by certain taxes and tax-deeds upon a portion of the lands lying in Otoe county, Nebraska, which are known as the "Alabama School Lands." By act of congress of June 22d, 1854, certain school districts in the state of Alabama were allowed to select from the government lands certain tracts in lieu of sections 16 and 36 in a certain district of Alabama, otherwise disposed of by the government. In accordance with said act, certain lands in Nebraska were so selected. In February, 1870, the state of Alabama conveyed said lands to one George F. Harrington, through whom complainant derives his title. The defendants originally claimed title under sundry tax-deeds; but having withdrawn their claim of title, they now rely upon their tax receipts, tax certificates, and tax-deeds as evidence of their right to be treated as assignees of the amount of the taxes levied and paid on the property and subrogated to the rights of the state and county in this regard. The taxes claimed by the defendants are of two classes: 1st. Those levied between 1860 and 1870. 2d. Those levied after 1870. The plaintiff offers to pay the defendants the amounts paid out by them for taxes levied after 1870, and twelve per cent interest from date of payment and costs of suit. As to the taxes prior to 1870, the plaintiff claims that the lands were not taxable by the state of Nebraska, because they were the property of the state of Alabama, and formed part of the school lands and fund of that state. On the other hand, the defendants insist that the state of Alabama cannot legally take, hold, or transfer realty within the limits of Nebraska, but if it can, they further insist that the lands are taxable in the same manner as if owned by private individuals. Issues have been made up, the proofs taken, and the cause is now on final hearing.

G. W. Covell and S. H. Calhoun, for plaintiff.

E. F. Warren and J. L. Mitchell, for defendants.

DILLON, Circuit Judge. Congress, in providing for the admission of Alabama into the Union, in 1819 [3 Stat. 489], made the usual grant of the 16th section, or, if sold or dis-

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

posed of, then other lands equivalent thereto and most contiguous to the same, for the use of schools (3 Stat. 400, § 6). In 1836 (5 Stat. 116), provision was made by congress for carrying into effect in that state the existing compacts in regard to schools. In 1845, this last-named act was amended (5 Stat. 727). On June 22d, 1854, the state having lost the benefit of certain of the school lands by reason of a different disposition thereof by treaty with certain Indian tribes, congress passed an indemnity act authorizing the state authorities of Alabama "to select, by legal subdivisions, from any of the surveyed public lands," the requisite quantity; "which selections, upon being approved by the secretary of the interior, shall be holden by the same tenure, and upon the same terms, for the support of schools in such townships, as the sections numbered sixteen, within the said reservation would have been, had not treaty stipulation made other disposition thereof." 10 Stat. 299.

Under this act, selections were made by authority of the state in September, 1858, of lands lying in the then territory of Nebraska. These selections were approved by the secretary of the interior in December, 1859. The state of Alabama provided for the sale of these lands by an act approved February 23, 1860, amended December 29, 1868. The lands were sold by the state to one Harrington (under whom plaintiff derives title), October 5th, 1869, and duly conveyed to him February 24th, 1870.

After the selection and approval of these lands to the state of Alabama, viz., April 19th, 1864, congress authorized the people of Nebraska to form a constitution, with the usual provisions in respect of the public lands (13 Stat. 47), and the state was subsequently admitted into the Union.

From 1860 to 1870, the territory, and after its admission the state, of Nebraska, assessed these lands owned by the state of Alabama for taxation, the same as if they had been owned by private individuals. The plaintiff claims that Nebraska had no authority to tax these lands while owned for school purposes by the state of Alabama. On the other hand, the defendants claim that the state of Alabama had no authority of law to hold lands within the limits of the state of Nebraska. As the title of the state of Alabama to these lands was perfect when Nebraska was a territory, and was derived immediately from congress, there is no solid ground for the defendants' claim in this respect.

It is a somewhat more difficult question whether these lands while owned by Alabama were exempt from taxation by the territorial and state authorities of Nebraska. No act of congress declares such exemption. On the other hand, no act of congress or of the territorial or state legislature has expressly declared that they were taxable.

But since these lands were granted for schools—were in lieu of those first given for this purpose—and were to be "holden by the same tenure and upon the same terms" as those originally granted, and since the title of the state of Alabama was derived immediately from congress, and became perfect during the territorial status of Nebraska, it seems to my mind reasonably plain that it was not intended that they should be subject to local taxation while held by Alabama for the purposes of the grant. If the lands had been in Alabama, where it was originally intended they should be, they would not, while remaining unsold, have been taxable by that state. Congress, in order to keep its compact with the state, granted, in the place of lands it had lost, other lands situate within the territory of Nebraska, but upon the same trusts. Congress was the supreme legislative power in the territory where these substituted lands were situated, and it can hardly be supposed that congress, to which we must attribute both the intention and purpose to deal justly, designed to subject these lands, or allow them to be subjected, while held by the state, to local taxation.

The special facts of this case do not involve the broad question argued by counsel as to the right of one state to own lands within another, or the further question, if a state can thus own lands, whether they are impliedly subject to the revenue laws of the state in which they are situate. Under the circumstances, these lands were held for public uses to the same extent as if they were within the state of Alabama. There is no express adjudication on the point here decided, but the analogies of the law support the conclusion we have reached. Dill. Mun. Corp. § 614; Cooley, Tax'n, 57, 58; Railroad Co. v. Penniston, 18 Wall. [85 U. S.] 30.

All taxes, therefore, levied on these lands prior to 1870, are void. As to those levied afterwards, the stipulations and offers of the respective parties reduce the controversy to narrow limits. The defendants, while relying on their tax certificates and tax-deeds as evidence of their rights, disclaim all title. The plaintiff offers to pay all taxes assessed after 1870, with twelve per cent interest. The defendants claim forty per cent (the statutory rate) for two years, and twelve per cent (the legal rate of interest) afterwards.

The plaintiff asks affirmative relief. The principles enunciated this term, in the case of Craig v. Pollock [Case No. 3,335], apply. The lands were taxable after 1870. No illegal valuation is shown. The irregularities relied on by the defendants were harmless. The taxes were not paid. They were tendered for the year 1875.

The plaintiff may either dismiss his bill or submit to a decree to pay the amount of taxes actually paid by the defendants since 1870, with forty per cent for two years and twelve per cent thereafter, except for the year 1875, for which the rate will be twelve per cent. Ordered accordingly.

Case No. 13,506.

In re STOVER et al.

[1 Curt. 93.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1851.

FEES—REPAYMENT BY UNITED STATES—ACT FEB. 28, 1799.

The eighth section of the act of February 28, 1799 (1 Stat. 626), does not direct the fees paid by the claimant to the officers of the court, to be repaid by the United States; it applies only to the costs of the prosecution, not of the defence.

William Stover, who represents the claimants of certain fishing vessels, shows by his petition that, in June, 1847, these vessels were seized and libelled in the district court of the United States for the district of Rhode Island, on account of an alleged violation of the laws of the United States; and that the petitioner having intervened, and claimed the vessels in behalf of the owners thereof, was obliged to pay to the officers of the court certain fees, growing out of their seizure, custody, and delivery on bail, and the trial of the suits instituted upon the seizures; that, by decrees of the district court, the libels were dismissed, and appeals were taken, and the causes brought to this court; that, upon a hearing by this court, the libels were dismissed, without costs to the libellants or claimants; but directing that the taxable fees of the officers of the court, in the district as well as the circuit court, in all the proceedings connected with the said seizures and since their commencement, be paid as directed by the act of congress of February 28, 1799; and, at the same time, this court granted to the officer of the United States, by whom the seizures were made, certificate of probable cause. The petitioner further alleges, that he has applied to the clerk of this court [John T. Pitman], and the other officers, to refund the money so paid by him, but they refuse, alleging that the United States has refused to pay the same to them; and the petitioner prays for an order, to compel the officers to refund to him the amount paid by him.

The petition of the clerk states substantially the same facts respecting the decree and certificate of probable cause; and that, by direction of the court, all the fees of the officers, both in the circuit and district court, connected with the said seizures, including all the fees which form the subject of Stover's petition, were taxed, and having been allowed by the court, were forwarded to the proper department at Washington for payment, on or about the 4th day of August, 1848; and that, in January, 1850, the controller of the treasury refused to allow, of the said fees, the sum of $599.30, including the fees which are the subject of Stover's petition, on the ground that they were not due from the United States, but were for services rendered to the claimants, and were to be borne and paid by them. That there is now due to the petitioner, for his fees, the sum of $531.30, besides the amount paid him by the said claimants; and he prays for an order to compel the claimants to pay the same.

A similar petition having been filed by Stover in the district court, touching the fees of the officers of that court in the same suits, while pending therein, it was remitted to this court, by an order of the district judge, on account of his relationship to the clerk, who is one of the parties respondent to the last mentioned petition.

CURTIS, Circuit Justice. Stover's petition rests upon the ground that, by the final decree of the circuit court, pronounced by the late Mr. Justice Woodbury, he was entitled to have the sums due to the officers of the court, for services to him as claimant in these suits, paid by the United States; and, in consequence thereof, that the officers of the court are bound to repay to him what he has heretofore advanced to them on that account. The decree of this court was in the following words:

"This cause came up upon a pro formâ decree on appeal from the district court, and was heard upon the libel, under depositions and other pleadings in the case. On consideration whereof, it was ordered, adjudged, and decreed by the court here, that the libel be, and the same is hereby, dismissed, without costs to the libellants or the claimants. And it is further ordered, that the taxable fees of the officers of the court, in the district as well as in the circuit court, in all the proceedings connected with this seizure since its commencement, be paid as directed by the act of congress of February 28, 1799. Levi Woodbury, Associate Justice of the Supreme Court. John Pitman, District Judge, United States, for Rhode Island District.

"Entered by order of court. John T. Pitman, Clerk."

The concluding clause of this decree, requiring the fees of the officers of the court to be paid as directed by the act of congress of February 28, 1799, it becomes necessary to decide, whether the fees for services rendered by the officers to the claimants are embraced within that act.

The 8th section of the act of 1799 (1 Stat. 626), is as follows: "That if any informer on a penal statute, and to whom the penalty, or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if, upon trial, judgment shall be rendered in favor of the defendant, unless such informer be an officer of the United States, he shall be alone liable to the clerks, marshals, and attorneys for the fees of such prosecution; but if such an informer be an officer, whose duty it is to commence such prosecution, and the court

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

shall certify there was reasonable ground for the same, then the United States shall be responsible for such fees."

In these cases, the informer was a revenue officer of the United States, and the court has certified that there was reasonable ground for the prosecutions; so that the question is, whether the words, "the fees of such prosecution," extend to and include fees paid to the clerk and marshal, by the claimant, for services rendered to him in the course of the proceedings. There is nothing in the language of this section which indicates an intent to confer on the claimant any new right to recover his costs or expenses. The apparent object of the law, and the whole effect of its terms, are, to point out the party to whom the officers of the court are to look for payment of their fees for the prosecution of this class of cases. If the informer is an officer, charged with the duty of commencing such prosecutions, and he obtains from the court a certificate of probable cause, this act directs that the fees of such prosecution be paid by the United States, otherwise the informer alone is to be liable therefor. And before we can say this law imposes on the United States the payment of fees which the claimant has expended in defence of his property, we ought to find some law which gives him a right to recover those fees. Because if the claimant, under no circumstances, can have a title against any one to recover those fees, it cannot be that they were intended to be embraced within the terms of this law, which simply points out the party who is to be responsible to the officer, but gives no new right to the claimant.

Now, by the act of February 24, 1807 (2 Stat. 422), it is enacted, that when a seizure like this is made, and probable cause certified, the claimant shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to any action, suit, or judgment, on account of such seizure and prosecution. This effectually debars the claimant from any recovery for these expenses. For, although the term costs is not identical with fees of clerk and marshal, it necessarily includes them; and if the claimant cannot recover any costs, he cannot recover these fees. And if he is not entitled to them, it is very plain they cannot be included within the 8th section of the act of 1799, for if they were, he would be entitled to them as against the United States. Moreover, the act of July 22, 1813, § 2 (3 Stat. 21), provides that, in case judgment shall pass in favor of the claimant, he shall be entitled to his property "upon paying only his own costs." I suppose it is not doubted that, pursuant to this act, he is to pay his costs, including the fees now in question; but the assumption is, that, after he has paid them, the clerk and marshal are to claim and receive from the United States the fees thus paid to them by the claimant, and then are to repay the same to him. But, aside from the extraordinary and anomalous character of such a proceeding, and the improbability that it was intended by congress, several reasons concur to prove that the act of 1799 is not susceptible of such a construction. In the first place, the very terms, "fees of such prosecution," certainly do not naturally indicate fees incurred in the defence against such a prosecution. In the next place, the act declares that, in one event, "the informer shall be alone liable to the clerks, marshals, and attorneys, for the fees of such prosecution." Now, it is plain, the claimant is liable to the clerk and marshal for their fees, for services rendered to him in making his claim and defence. He is so on general principles, according to the case of Caldwell v. Jackson, 7 Cranch [11 U. S.] 276; and this liability is affirmed by the act of 1813, above referred to. This strongly tends to prove, that the fees of the prosecution, spoken of by the act of 1799, are not the fees paid by the claimant; for certainly it was not intended to exempt the claimant, in the first instance, from all liability therefor, and impose that liability on the informer alone. In Caldwell v. Jackson, the supreme court held, that each party is liable to the clerk for his fees, for services performed for such party, and it is immaterial to the clerk which party recovers judgment. When, therefore, the act of 1799 speaks of fees of the prosecution, for which the informer alone is to be liable to the clerk, the sound construction must be, that he is made liable for fees for services rendered to the party prosecuting, and for those only, and of course the United States are liable for the same, and none other, when, as in this case, the informer is an officer, and a certificate of probable cause is given.

I am of opinion that the decree of this court, ordering the fees of the officers to be paid as directed by the act of 1799, must be construed to refer only to the fees due from the prosecutor, and that it gave no title to the claimant, or the officers of the court, to have, from the United States, the fees paid by the claimant for services rendered to him.

His petition must therefore be dismissed; but as the terms of the decree on which he rested his petition, involved a new question of construction of the act of 1799, I shall direct that no costs be taken by either party. I shall not make any order at this time concerning the clerk's petition, understanding that none will probably be necessary, now that the respective rights of the parties are ascertained. But if the fees still remaining due shall not be paid, an attachment must issue to compel their payment.

[See Case No. 13,507.]

Case No. 13,507.

In re STOVER.

[1 Curt. 201.] [1]

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

COSTS—DISMISSAL WITHOUT COSTS TO EITHER PARTY.

1. Where a third person appears and defends a suit in admiralty, in behalf and in the absence of the party to the suit, he is to be treated as a party, and made liable, personally, for the fees of the clerk of the court, for services rendered in the cause at his request.

[Cited in The Maggie M., 33 Fed. 592.]

2. Where a decree is made, dismissing a libel in admiralty, "without costs to either party," it merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the clerk for his fees for services rendered to such party.

[Cited in Goodyear v. Sawyer, 17 Fed. 5; U. S. v. Ames, 99 U. S. 43.]

CURTIS, Circuit Justice. The clerk of this court moves for an order of the court on William Stover, that he pay the fees due to the clerk for official services rendered by him to the claimants in certain cases in the admiralty. Many of the facts have been stated in giving the opinion upon Stover's petition. The other material facts are, that Stover, as agent for the owners of nine of these vessels, was admitted by the court to claim them, and filed his claims as agent; that, instead of stipulating, with a surety, to pay the costs, he deposited, as security therefor, in each case, the sum of one hundred dollars; that, in his capacity of agent, he answered the libels; and that, after the decree was entered in this court, dismissing the libels without costs [Case No. 13,506], the sums deposited were paid out to him by the clerk, under the belief that all the fees of the officers were to be paid by the government. Stover has filed an account between himself and the owners of the vessels, by which it appears that he had applied the moneys received from the clerk to pay counsel fees and expenses of the proceedings, including charges for his own services, traveling expenses, &c., amounting to $442.64. He denies his personal liability for costs in any of these cases.

When a claim is to be made in the admiralty, the owner should do it, if practicable; but it is in the power of the court to permit a representative of the owner to intervene, and claim and answer. The Adeline, 9 Cranch [13 U. S.] 244; The Sally [Case No. 12,258]; The Lively [Id. 8,403]. And this practice is sanctioned and provided for by the 26th rule for the regulation of admiralty practice, adopted by the supreme court.

By the Roman law, any third person could appear, and take upon himself the defence of another's cause. He was, however, required to enter into an obligation, with sureties, to pay whatever should be adjudged against him; and he was considered as substitute, for all purposes, in place of the original party. Lane v. Townsend [Case No. 8,054]. Under our practice, in suits in rem, third persons, duly authorized by the owners, may be admitted to claim and contest the suit; and when admitted, the rule of the Roman law is in part applied, nemo alienæ rei, sine satisdatione, defensor idoneus intelligitur. For the 26th rule, respecting claims by agents, requires them to file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against them by the final decree of the court, or upon appeal, by the appellate court.

When a third person has thus intervened and claimed, he becomes the dominus litis, and is, for many purposes, to be treated as a party. It is true, he acts for another, and may so act either in his own name, as agent, or in the name of his principal, as he thinks best; it is but a difference of form. Houseman v. The North Carolina, 15 Pet. [40 U. S.] 49. But in either way, he is a party on the record, contesting the suit, and controlling the defence, as a guardian or prochein amy does suits in equity and at the common law. It is manifest, also, that, ordinarily, he is the only party defendant, over whom the court can have any control; for the reason for admitting an agent to claim, is, that the owner is out of the country, or resides at so great a distance as to render it impracticable for him to appear. This personal disability, arising from distance and absence, is the occasion for allowing a third person, duly authorized by the owner, to appear and defend for him, just as the personal disability of an infant or feme covert induces other courts to admit third persons to defend for them. But both courts of law any equity treat the third person, so intervening, as a party, liable to costs; and adjudge against him, not merely the fees of the officers of the court, for services rendered to him, but the whole costs of the party prevailing against him. Beames, Costs, 129; Marnell v. Pickmore, 2 Esp. 473; Blood v. Harrington, 8 Pick. 555. And in a court of law, he may be compelled to pay the costs by an order and an attachment, if the order be not obeyed. Wilson v. McGhee, 2 A. K. Marsh. 601; Browne, Actions, 290, 291.

Here it is not a question whether he shall pay costs, but whether he shall be ordered to pay the fees of the clerk for services performed for him as claimant. If the agent had complied with the 26th rule, and stipulated, with sureties, to pay all such costs and expenses as should be awarded against him, both he and his sureties would then have been bound to pay these expenses. By force of a similar obligation as respects sureties, Mr. Justice Story held an indorser of a writ

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

(Anon. [Case No. 445]) liable for fees. And the question is, whether such a stipulation is essential to render such a claimant liable for fees for services rendered to him by the clerk. I think it is not essential, and that an obligation on his part to pay such expenses, arises from his relation to the cause, and from his procuring the services to be rendered. It is argued, that an agent, who discloses his principals and acts for them, does not bind himself. This is true, in general. But if the credit be given to the agent, and not to the principal, the former is liable; and when the principal resides abroad, the credit is presumed to be given to the agent. Paley, Ag. (by Lloyd) 373. Such a presumption may well arise in the case at bar. It springs from the fact that the agent who ordered the services is the dominus litis, is before the court, a party on the record, and subject to its control; while the principal is not before the court, and is out of the jurisdiction. To him, and not to his principal, the services must be deemed to be rendered, and the credit given; and upon this ground, he is personally responsible for the fees of the officers of the court. That the courts of the United States may compel a party to pay the fees of their officers for services rendered to him, by an order, to be enforced by an attachment, is settled. Caldwell v. Jackson, 7 Cranch [11 U. S.] 276; Bowne v. Arbuncle [Case No. 1,742]; Anon. [supra].

It is argued, that such an order, in this case, would be in conflict with the decree of the court in each of these cases, dismissing the libel "without costs to the libellant or claimant." But this is founded on a misapprehension of the meaning of the decree; which is, simply, that neither party is to claim costs of the other. It has no reference to the claims of the clerk, for his fees, upon the party for whom the services were rendered. It is wholly immaterial to the clerk what order is made respecting costs. He has a right to be paid for his services by his employer. Caldwell v. Jackson, 7 Cranch [11 U. S.] 276.

That the residue of the decree, directing the fees of the officers to be paid according to the act of February 28th, 1799 [1 Stat. 624], can have no bearing on the fees for services rendered to the claimants, has been already shown in disposing of Stover's petiton.

In each of the nine cases, in which Stover made the claim, I shall have an order entered, that he pay the fees of the clerk; but as their amounts have not been admitted by him, I shall, if he desires it, refer it to some member of the bar, to tax the fees and report them to the court. If the clerk's claim should be reduced by this proceeding, he must pay the expense of it; otherwise, it must be borne by the respondent.

In the other cases, I see no ground to charge Stover; and there has been no motion to charge any other person.

[See Case No. 11,184.]

Case No. 13,508.

STOVER v. DENSLEY.

[1 Cranch, C. C. 267.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

APPEARANCE—INSOLVENCY—DISCHARGE.

Quære, whether a defendant, discharged under the insolvent law, after arrest on a capias ad respondendum, and before the return, can be compelled to appear.

Assumpsit. The capias was returned "cepi—discharged under insolvent law."

Mr. Sprigg, for plaintiff, objected to the return without an appearance. THE COURT thought he could not compel an appearance; but gave him leave to move it again.

Case No. 13,509.

STOVER et al. v. HALSTED et al.

[13 Blatchf. 95; 2 Ban. & A. 98; [2] 8 O. G. 558.]

Circuit Court, S. D. New York. Aug. 3, 1875.

PATENTS — NOVELTY — IMPOSSIBILITY — CONSTRUCTION OF CLAIM—PLANING MACHINES.

1. The 3d claim of letters patent granted to Henry D. Stover, July 23d, 1861, for an "improvement in planing-machines," namely, "the arrangement of matching cutters, to be adjusted both laterally with each other, and vertically upon the bed-piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereupon, or the platen be fixed, and the piece be made to move thereon," is a valid claim.

2. Although lumber cannot be matched upon a movable platen by the machine, because the matching spindles project through apertures in the platen, and would, when in a position for matching, prevent a forward movement of the platen, yet, as the description of the machine in the specification shows that no such mechanical impossibility was contemplated, the claim must be so construed as not to involve such impossibility.

3. The question of the infringement of said 3d claim, considered.

4. Said 3d claim is infringed by the devices described in letters patent granted to Rufus N. Meriam, November 5th, 1867, for "improvements in planing machines."

5. Said 3d claim is not void for want of novelty.

[This was a bill in equity by Henry D. Stover and J. A. Fay & Co., against Ezekiel S. Halsted and Gilbert W. Merritt, for an injunction to restrain the infringement of letters patent No. 32,904, granted to H. D. Stover July 23, 1861.]

Samuel A. Duncan and George Gifford, for plaintiffs.

Abbett & Fuller, for defendants.

---

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

[2] [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here republished by permission.]

SHIPMAN, District Judge. This is a bill in equity, praying for an injunction and an account, and is founded upon letters patent for an "improvement in planing machines," which patent was issued to Henry D. Stover, one of the complainants, on July 23d, 1861. The other complainants, J. A. Fay & Co., are a corporation, and the assignees and owners of an undivided half interest in so much of the patent and of the invention covered thereby as is embodied in the third claim of said patent. The assignment was executed September 14th, 1868. The answer admits that said patent was issued to said Stover, and puts the complainants to proof of their present title thereto, and alleges that the patent is void for want of novelty. The defendants deny that they have infringed, by averring that the only machines which they use, or have used, for planing or matching lumber, are machines made under letters patent which were granted to Rufus N. Meriam on November 5th, 1867, and which patent is alleged to have been for a "different invention from that claimed by said Stover in his patent." The answer also avers that the complainants are equitably estopped, by their own acts, from any recovery in this suit. The fact that J. A. Fay & Co. are a corporation, is, in effect, admitted by the pleadings.

The machine to which the alleged improvements in each of the patents relate, is a machine for planing and matching lumber. Machines for planing the surface of boards, and at the same time for planing or grooving and matching the edges of boards, have been long in use, and were well known prior to the date of the Stover patent. In these machines, the boards were planed by means of a cylinder, which occupied a horizontal and transverse position above the bed or platen upon which the boards were placed, and the edges of the boards were, at the same time, grooved and matched by means of matching cutters. These cutters were attached to spindles which were supported in a vertical position, so as to project through and above the bed, and thus enable the knives to operate upon the edges of the lumber as it passed between the knives after leaving the planing cylinder. The machines were also provided with mechanism, by means of which the space between the matching cutters could be increased laterally, so that stuff of different widths could be matched upon the same machine. Although, in the machines which were in use prior to the Stover patent, there were devices which caused a slight vertical adjustment of the matching cutters upon their spindles, so that lumber of different thicknesses could matched, yet there was no machine in which the matching apparatus could be entirely removed, by mechanical means, below the surface of the platen, when the surfacing of wide boards only was desired. Oftentimes there was a necessity for planing, without matching, boards of greater width than would pass between the matcher heads, and, in such case, it was necessary to detach and to remove, by hand, the spindles from the machine. It was thus impossible to surface wide boards upon a machine of ordinary dimensions, without incurring the labor and delay which were incident to a removal of the matching mechanism by hand. One object of the machines of Stover and of Meriam was to obviate the difficulty, and each patentee adopted the same general mode of accomplishing the desired result. The matching spindles are so attached to each machine that they can, at the pleasure of the operator, be simultaneously dropped below the surface of the platen. In the Stover machine, the platen is movable or stationary. When boards are to be both planed and matched, the platen is stationary, and the lumber is passed under the cutting cylinder, by feed rolls, to be planed, and thence between the matching cutters, to be matched. When boards are to be planed without being matched, they can be placed and secured upon a movable platen, which, with the lumber upon it, is passed under the cutting cylinder. But the platen cannot be moved without previously removing the matching spindles, which would, if not removed, prevent the progress of the platen. The objects of the Meriam machine are described by the patentee, in his specification, as follows: "In that variety of planing machines designed not only for planing the surface of lumber but also for matching the edges thereof, much inconvenience has resulted from the necessity of lowering that portion of the bed of the machine which supports the upper ends of the vertical shafts which carry the matching cutters, whenever it is required to adjust the said cutters for matching lumber of different thicknesses, or to move the said shaft out of the way in using the planes for surface planing only. The object of this invention is to remedy this defect." One result which was intended to be accomplished by each machine, was the lowering of the shafts beneath the surface of the bed, when it was desired to use the machine for surfacing and not matching.

The defendants place their defence upon three grounds: (1st) That the third claim of the Stover patent, which claim alone the defendants are charged with infringing, describes a mechanical impossibility and a machine destitute of utility; (2d) that the Stover patent is void for want of novelty; (3d) that the Meriam machine is not an infringement of the Stover patent.

(1) Is the 3d claim of the plaintiffs' patent valid? The claim is as follows: "I also claim the arrangement of matching cutters, to be adjusted both laterally with each other and vertically upon the bed piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or

either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereupon, or the platen be fixed and the piece be made to move thereon." The defendants contend that the patentee is confined, by this language, to a mechanism whereby the lumber may be both planed and matched at the same time, or planing and matching may be done separately, either upon a movable or a fixed platen. It is obvious, that the lumber cannot be matched upon a movable platen by the Stover machine, because the matching spindles project through apertures in the platen, and the spindles, when in a position for matching, would prevent a forward movement of the platen; and it is also obvious, from the description of the machine, that no such mechanical impossibility was contemplated.

The specification is as follows: "To the platen A′ is secured a guide D′, which may be removed at pleasure; this correctly guides the board, in connection with the spring E′, to be matched by cutters, which may be raised up through holes V^2 and W^2, formed through the platen for that purpose, and adjusted at the desired elevation, they being driven by pulley S from pulley Q′, on a drive shaft L′. The platen may thus be used stationary, and over which the boards may be moved by feed rolls, to be both planed and matched on both edges at the same time, or either may in the same manner be done separately, or the platen may be moved by any means (not necessary to be shown), and the lumber secured thereupon, while lying perfectly natural, by jaws F′, operated by right and left hand screws G′, to pinch and hold the piece, by turning the lever H′. * * * In order to dress dimension lumber, the platen is moved in bed along with the piece secured upon it to be dressed; and, when boards are to be dressed by passing them under the cutting cylinder, requires that a set of feed rolls shall be combined with the other portions of my machine, to feed the boards or pieces over the platen A′ and under the cutter, to be dressed, the platen being fixed during such operation." The intention of the patentee was to state in the third claim the improvements which he had described, and which consisted in part of devices for the removal by mechanical means of the matching apparatus when "dimension" lumber was to be dressed, that is planed and not matched. The third claim is not expressed with accuracy, but should be construed "ut res magis valeat quam pereat," and in connection with the specification, so that "the inventor shall have the benefit of what he has actually invented." Woodman v. Stimpson [Case No. 17,979]. "If the court can clearly see what is the nature and extent of the claim, by a reasonable use of the means of interpretation of the language used, then the plaintiff is entitled to the benefit of it, however imperfectly and inartificially he may have expressed himself." Ames v. Howard [Id. 326]. The inventor intended to claim a surfacing and matching machine, in which the matching cutters were adjusted laterally and vertically, in combination with the platen, and were so adjusted vertically that the matching mechanism could be mechanically dropped below the platen, when surfacing alone was to be done. By such a machine the matching and planing could be done at the same time, or the planing could be done separately with the matcher cutters removed, or the matching could be done separately when the cutters were raised above the surface of the platen. He had previously claimed the movable platen, which he supposed to be an improvement upon other planing machines. The movable or fixed character of the platen is not a necessary part of the improvement to which the third claim relates, and might have been omitted from the statement of that claim. A construction which should compel the patentee to the declaration that his machine could either match or plane boards when placed upon a movable platen, the matching cutter being upon stationary arbors projecting through the platen, would be a construction of the utmost rigor, and in violation of the liberal rules in regard to the interpretation of patents, which have

[Drawing of Patent No. 32,904, granted July 23, 1861, to H. D. Stover, published from the records of the United States patent office.]

Fig. 1.

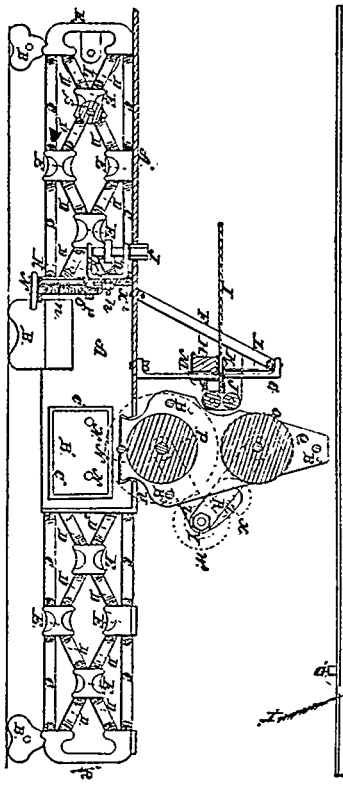
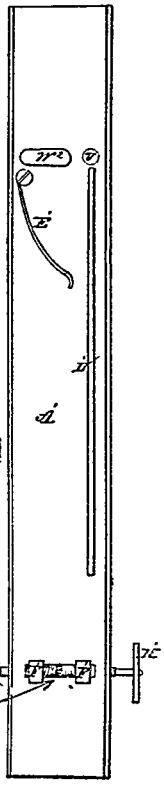


Fig. 2.



prevailed in courts of this country. It is a just and reasonable construction to hold, that the concluding clauses of the claim were introduced parenthetically, and related to the platen which the patentee had previously claimed, and had no reference to the planing or matching which are mentioned in the clauses which immediately precede those now under discussion. Thus construed, the claim would read as follows: "I also claim the arrangement of matching cutters, to be adjusted both laterally with each other, and vertically upon the bed piece, essentially as described, in combination with the platen, (whether the platen be made movable with the piece secured thereupon, or the platen be fixed and the piece be made to move thereon,) so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately."

(2) Does the Meriam machine infringe the complainants' patent? The object of the Meriam machine has already been given in the language of the patentee. One object was to "move the shaft out of the way, in using the planer for surface planing only." He also states, that, "by this arrangement, they" (i. e., the vertical spindles) "can be lowered beneath the surface of the bed, for surface planing only, without removing any portion of the bed, and in a moment of time." In the Stover patent, the device by which the matching cutters are dropped below the surface of the platen is thus described: "The matching cutters and bar X^2 are made vertically movable and adjustable by sliding in grooves n, which are formed in central portion of bed piece A, by means of screw O^1, threaded and fitted to stand P^1 on bar X^2 and turned by wheel N^1." By this single screw the two spindles are simultaneously moved above and below the surface of the platen. The same simultaneous movement is effected by double racks instead of by a single screw, as in the model which was used upon the trial. The same movement is effected in the Meriam machine by racks, pinions and a weighted lever. The mechanism is thus described by one of the defendants' witnesses: "This is accomplished by two separate sliding steps, having their motion vertically, each step provided with a rack in which mesh two pinions connected together by a longitudinal shaft. By rotating this shaft, it gives to the sliding steps which carry the matcher spindles a vertical motion sufficient to raise them to their places when performing their work, or depress them entirely out of the way." The elevation and depression of the matcher spindles in the two machines is performed by substantially the same means, and in substantially the same way. It is true, that the Meriam machine is probably an improvement upon the Stover machine, but the principle and essential elements of the two machines are the same.

It is claimed that the Meriam machine does not infringe the plaintiffs' patent, because the specifications of the Stover patent describe no method by which a lateral movement of the matcher spindles can be produced. A lateral movement of the matching mechanism was well known prior to the date of the Stover patent, which was not granted for any improved lateral adjustment. The third claim was for the arrangement of matching cutters, to be adjusted both laterally and vertically, as described, in combination with the platen. The method of vertical adjustment is described and claimed. Any appropriate and customary method of lateral adjustment could be used, and one method was indicated in the drawings, but, as the patentee claimed no improvement in the mechanism by which lateral motion was obtained, it was not important to give a description of any particular method of accomplishing this result, when the methods already in use were well understood.

The third claim of the Stover patent is for "an arrangement of matching cutters." In the Meriam machine the cutting blades are placed upon "heads" of larger diameter than that of the spindles to which the heads are attached, the heads are removed from the spindles by hand, and the spindles are then dropped below the surface of the platen. In the machine which was shown in the Stover patent the cutting blades are inserted in slots in the end of the spindles, and are raised and depressed with the spindles. It is contended that the Stover patent is limited to an arrangement of cutters or knives which must be lowered by mechanical means, and that the patent is not infringed, by reason of the fact that, in the Meriam machine, the matching spindles only are carried below the platen. The object of the Stover invention was to enable wide surfacing to be done upon a planing and matching machine of ordinary width. To accomplish this object the entire matching apparatus must be removed below the surface of the platen. In the Stover machine, as shown in the drawings, the spindles and cutters are simultaneously dropped. The cutters cannot be lowered unless the spindles are lowered also, and, unless the spindles are lowered, the machine cannot plane wide boards. The invention was for an arrangement of the cutting mechanism, and it would have been a more accurate use of language, had the word "mechanism," or an equivalent term, been used, instead of the word "cutters;" but, by a common form of expression in the language which was employed, a part of the mechanism was substituted for the whole.

But, in case a limited signification is given to the word "cutters," the conclusion for which the defendants contend is not reached. The cutters or knives must be placed upon spindles, and the "arrangement of matching cutters" is an arrangement upon spindles which are so vertically adjusted that the

whole can be dropped below the surface of the platen. The matching spindles of the Meriam machine are so vertically adjusted that they can be lowered below the surface of the bed, and, in the mechanism by which the dropping of the spindles is effected, the Stover patent is infringed. The Meriam machine "incorporates in its structure and operation the substance" of Stover's invention. Carter v. Baker [Case No. 2,472].

(3) The novelty of the Stover machine. It has already been remarked, that machines which were in use prior to the Stover patent contained devices for a slight vertical adjustment of the matcher cutters, so that boards of different thicknesses could be accurately matched. This vertical adjustment was sometimes effected by a thread at the upper end of the spindles, and sometimes by loosening a set screw which secured the cutter head to the spindle. These machines did not contain any device by which the spindles could be simultaneously dropped below the surface of the platen at the will of the operator, so that boards could be planed which were wide enough to pass over the top of the spindles thus lowered. Upon the entire proofs it does not appear that any machine existed prior to the date of the Stover patent, which had the principle of the Stover machine.

(4) As to equitable estoppel. The testimony in regard to Stover's propositions to a witness, and one of the manufacturers of the Meriam machine, is, if true, not sufficient to justify a court in dismissing the bill.

Let a decree be passed for an injunction and an account.

Case No. 13,510.

STOVER v. KENNEDY.

[5 Reporter, 136.] [1]

Circuit Court, E. D. Pennsylvania. Jan. 5, 1878.

BANKRUPTCY—PREFERENCE—AGREEMENT TO GIVE SECURITY—SECURITY GIVEN AFTER DEBTOR IS EMBARRASSED.

Where a debt is contracted and a certain security agreed to be given therefor by the debtor, which security is through mistake not given, and the debtor afterwards and in involved circumstances gives the security promised, it is not voidable as against creditors under the bankrupt act [of 1867 (14 Stat. 517)].

A bill in equity was filed by an assignee in bankruptcy to set aside a confession of judgment as in fraud of the bankrupt act. The bill and amendment alleged that on the 6th of September, 1876, Parker, subsequently adjudged a bankrupt, gave an agreement for a confession of judgment in favor of the defendant, who was his mother-in-law, upon which judgment was entered and execution issued; the said Parker being in contemplation of insolvency, and the confession being given in order to give a preference to the defendant, who had reasonable cause to believe that the confession was given in fraud of the act, and that Parker was insolvent.

The answer alleged that in June, 1868, Parker borrowed money of the defendant, and gave her a bond therefor, payable in one year; that it was agreed a judgment bond should be given for the sum borrowed, and the loan was made upon the faith of that contract; that the bond was drawn by Parker, and by mistake no warrant of attorney to confess judgment was inserted; that at the time Parker was solvent and in good credit; that the defendant believed she had a judgment bond until September 6, 1876, when the confession was given to correct the mistake in the original instrument, and in pursuance of the agreement under which the loan was made. The evidence supported the answer.

G. T. Bispham and Wayne McVeagh, for defendant.

The question is whether there is anything in the bankrupt act which forbids parties to a contract of loan correcting an error in the instrument which was intended to be the evidence of the terms of the contract. As between the original parties equity would reform the instrument. 1 Story, Eq. Jur. 5; Adams, Eq. 169. An assignee in bankruptcy, a judgment creditor, or a voluntary assignee, is not a bonâ fide purchaser for value without notice, against whom only equity will not interfere for the purpose of correcting a mistake. Story, Eq. Jur. § 165; Cooke v. Tullis, 18 Wall. [85 U. S.] 332; Mitchell v. Winslow [Case No. 9,673]; Donaldson v. Farwell, 3 Law & Eq. Rep. 401; Bump, Bankr. (9th Ed.) p. 494. The bankrupt law prohibits assignments with preferential intent; here the intent was merely to correct a mistake. The party has only done what equity would have compelled him to do. But, apart from the above, is a security given in pursuance of a prior agreement voidable, under the act, because of the insolvent condition of the debtor when it is actually given? The English rule is that it is not, if at the time the debt was contracted there was a distinct agreement that the specified security should be given. Hutton v. Cruttwell, 1 El. & Bl. 15; Harris v. Rickett, 4 Hurl. & N. 1; Ex parte Hall, 4 Ch. Div. 682. The rule seems to be favored in the United States. Sawyer v. Turpin, 91 U. S. 114; Wadsworth v. Tyler [Case No. 17,032]; In re Wood [Id. 17,937]; In re Reed, U. S. Dist. Ct. E. D. Pa. (unreported); Burdick v. Jackson, 7 Hun, 488.

J. Q. Hunsicker and B. M. Boyer, for plaintiff.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge) held that there having been an agreement to give a judgment to secure the loan at the time the loan was made, and the warrant to confess said judgment having been omitted by mistake, it was not a fraud upon the provisions of

[1] [Reprinted by permission.]

the bankrupt act to carry out the terms of the contract, even after the circumstances of the debtor had become involved, and that the judgment should not be set aside; and further, that the issue of execution on the said judgment was not a fraudulent procurement of execution within the meaning of the act.

Case No. 13,511.

STOVE WORKS v. PERRY.

[Cited in Cleaver v. Traders' Ins. Co., 40 Fed. 864. Nowhere reported; opinion not now accessible.]

Case No. 13,512.

STOW v. CHICAGO.

[8 Biss. 47;[1] 3 Ban. & A. 83; 9 Chi. Leg. News, 425.]

Circuit Court, N. D. Illinois. Sept., 1877.[2]

PATENTS—FUNCTIONS OF DEVICE—WOODEN PAVEMENTS—INFRINGEMENT—CONTRACTOR—LICENSE—ROYALTY.

1. A principal is not liable for the claim of a patentee under work done by a contractor who held a license, even though he has not paid his license fees or royalty.

2. If a device in use will perform a certain function or office, it is immaterial whether the patentee describes such performance, or even knew that it would so operate.

3. The use of wedge-shaped blocks in making a pavement is not patentable; that being the principle long since applied in laying cobble stone pavements.

4. Uniformity of spacing, and the use of a strip to secure the same in laying a pavement, is not patentable.

5. A mere change of material, as from stone to wood, or vice versa, is not patentable.

6. Mere matter of judgment as to the amount of force to be used, is not patentable.

7. An English patent is a matter of public record in that country, and also in this country, by patent and by publication.

8. Omission of an element from a patent, so that the less number of parts will perform all the functions of the greater, is not an invention.

9. Degree of force, in ramming or swaging, is not patentable.

10. Sundry patents and processes for pavements commented upon.

[11. A reconstruction of a machine so that a less number of parts will perform all the functions of the greater may be invention of a high order, but the omission of a part with a corresponding omission in function, so that the retained parts do just what they did before in the combination, is a mere matter of judgment, depending upon whether it is desirable to have the machine do all, or less than, it did before.]

[Cited in McClain v. Ortmayer, 33 Fed. 287.]

In equity.

Carter, Becker & Dale and J. N. Jewett, for complainant.

West & Bond, for defendant.

BLODGETT, District Judge. This is a bill in equity, charging the defendant with an infringement of four patents issued by the United States, and praying an account for damages and an injunction.

The patents described in the bill are: First. A patent dated December 10, 1867, and number 72,110, issued to the complainant [Henry M. Stow] and re-issued January 19, 1869, re-issue number 3,274, for an improved pavement. Second. Patent dated February 25, 1868, number 74,862, issued to the complainant for an improved street pavement. Third. Patent dated April 6, 1869, number 88,765, issued to D. L. De Golyer, for an improvement in laying down block pavements, and of which complainant claims to be assignee. Fourth. Patent dated December 31, 1872, number 134,404, issued to the complainant for an improvement in wood pavements.

The defendant denies any infringement, and also denies the novelty of the alleged improvements claimed in the patents.

The patent issued December 10, 1867, and re-issued January 19, 1869, is for a pavement composed of alternate tiers of square ended and wedge-shaped blocks, the latter, that is, the wedges, being driven down into the foundation bed of sand or earth; also, a pavement composed of blocks with the lower ends all wedge-shaped, and all driven or rammed down into a foundation of sand or earth.

From the proofs in this case it appears that the complainant has been paid for all the pavement in which this device has been used, except a block on Market street, between Randolph and Lake, and the intersection of Lake and State streets, which were laid as samples under the direction of the complainant and his brother, W. H. Stow. There were some of these pavements put down on Clark street, but Mr. McBean testifies that he did this under a license from the complainant, and the defendant was not to be liable therefor. He states that he has not yet paid Stow, but that does not make the city liable. It, therefore, hardly seems necessary to consider this patent, but if deemed material to do so, I would be of the opinion that this patent was anticipated in part by an English patent issued to Stead in 1839. In 1839 David Stead received a patent in England, which is a matter of public record in that country, and also in this country, by patent and by publication, for a wooden pavement made of octagonal blocks set together, and as the blocks go together, they leave a square opening through which he drove a pile or wedge down into the earth or gravel, for the purpose, as he says, of laying his pavement firmly upon the earth in newly made embankments. The reason which the patentee gives for the operation or use of his device is not conclusive. A man may, in other words, invent an improvement producing results beyond what he knows or dreams of, and a better reason

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

[2] [Affirmed in 104 U. S. 547.]

may be given by a skilled person than the one assigned for the use of the device which is used or adopted. So, in this case, the driving down of these wedges into the earth under the blocks could be done just the same under the Stead device as it could be under the Stow device; although Stead does not allude to the driving of the wedge down there for the purpose of compacting the earth, yet it produces that result. His failure to state that as one of the reasons or results does not necessarily change the fact that there is no longer anything novel in the Stow device, from the fact that Stead anticipated him by a great many years.

The second patent is for a pavement composed of tiers or rows of wedge-shaped wooden blocks driven into a foundation of sand or earth, as there shown. It is claimed that by this means the earth would be compacted. The spaces between the rows are then filled in with gravel.

It is sufficient, in regard to this patent, to say that there is no proof that the city has ever used it; but if it had been used, it may well be doubted whether the patent can be sustained, as his wedged blocks do not, it seems to me, differ in principle from the old cobble stone pavement, made of cobble stones with their sharp or pointed ends, or smaller ends, set downwards, and the whole rammed or driven into the sand or gravel on which it was laid. We all know, of our own knowledge, that is, every person who has seen a cobble stone pavement knows, that the process of making it was to set the cobble stones with their small end downward upon the ballast or gravel, covered with sand to fill the spaces between them, and then ram the whole structure down solid. Now, here is simply this difference: A man, instead of using the sharp ends of the cobble stones, sharpens wooden blocks and sets them together, and drives them down so as to make a solid foundation. It being conceded that the cobble stone pavements are so laid, the substitution of a new material is not patentable. This patent is also obviously anticipated in the second form of the original patent of December 10, 1867. Mr. Stow states that he claims a wooden pavement composed of blocks with the lower ends wedge-formed, and all driven down into a foundation bed of sand or earth. Now, here in 1867, the year before this patent, in his first patent, where he claims the alternate wedge-shape and square-ended blocks, he also describes and claims a series of wedge-shaped blocks, all driven down into the sand or gravel; so it seems to me that he has here, by the second patent, attempted to prolong the life of his first patent or first device, by taking a patent afterwards upon the wedge-shaped blocks, shown and claimed with the wedge-shape and alternate square-ended blocks.

The De Golyer patent (the third) is one for a method of spacing distances between the blocks by the use of a removable strip or board of the thickness of the required spaces: that is to say, the way in which the blocks were set up against each other, and a board set between them while they were being set, and after they were set the board was removed so as to leave a space of the required distance between the rows or tiers of blocks.

This is fairly anticipated, in my estimation, by the patent of McDougal, where he had a spacing apparatus like this that was set between the blocks and was removable. But in point of fact, as the evidence shows in this case, the skillful workmen who lay these wooden pavements, no longer depend upon the spacing apparatus at all, but use their fingers and their eyes; and they become so skilled that they can readily make the spaces of a uniform width by the application of their fingers as they lay their blocks as well as by a spacing board, or any other device of that kind. And the case is fairly illustrated by the improvement in telegraphing. Formerly (we all know) the process of telegraphing by the Morse telegraph was by a reel upon which a paper was wound, and the action of the machine made a dot, or dots and lines. It was necessary to write out the words by this operation. But in course of time the operators became so skillful that the ear took the place of the paper and reels, and now no person is considered skillful enough to act as a telegraph operator unless the ear is sufficiently trained to enable him to dispense with the reel and paper. So here in the actual operation of the laying of these wooden pavements, the eyes and the fingers of the workmen dispense with the spacing apparatus. There is also no evidence in the record that I can find, and I have looked carefully through it, of any use by the city of this special device. I find no proof that the city has ever adopted this removable spacing board as a matter of practice. But even if they had, such a mere mechanical device, such as is used by joiners in fitting floors together, or in fitting lattice work, or pickets on a picket fence, or any other place where uniform spacing is required, would seem to anticipate this device. In setting an ordinary picket fence, the joiner who sets the picket uses another picket or spacing board for the purpose of securing uniformity in the spacings.

This brings us to the consideration of the last patent issued to the complainant in December, 1872, and it is mainly upon this patent that the controversy in this case turns. The device covered by this patent is described by the patentee in the re-issue of his first (1867) patent as follows: "The nature of my invention consists in putting down a pavement of wood, or other suitable material, upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge-blocks driven down into the same and forming a part or the whole of the pavement." He also says, in reference to

these wedge-blocks: "It will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will act as wedges." Also, that the blocks No. 2 may be of dressed stone, brick or wood, or of any suitable material that will bear driving down into the foundation bed.

His last specification is as follows: "In constructing my pavement I first grade the street, and cover it to a depth of not less than three inches with sand or loam, which I wet and pack with a maul or rammer until the whole is of sufficient compactness. I then strike the surface to a proper grade, and lay the blocks A. in rows transversely across the street, placing between the rows a removable strip of wood, B., of sufficient thickness to form the necessary space between the blocks, as shown. After a sufficient number of rows have been laid in this manner, I remove the strips and partially fill the spaces with sand or gravel. I then drive the gravel or sand in said spaces into the sand foundation below by means of a swage maul or other suitable instrument, until the foundation under the blocks is sufficiently compressed. I then fill the spaces with gravel or sand, and cover with coal tar or other cement or with gravel or sand alone, and go over the whole with a smooth iron instrument to finish the surface. What I claim is a pavement composed of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel, which is swaged or driven into the said foundation substantially as and for the purpose specified."

We have a sample, or model rather, of the pavement as the complainant claims to make it; that is, square-ended blocks set upon sand, the spaces between them filled with gravel, and that packed or swaged down until it comes somewhat below the ends of the blocks. It will be noticed that while the patentee in his patent title names wooden blocks as the main material used in his pavement, yet he has described and claimed broadly a pavement composed of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel swaged or driven down into the sand. He names wooden blocks in his title; yet he does not, in his specification or claim, limit himself to the use of wooden blocks, but can use any kind of blocks. And it may well be suggested, I think, in view of the state of the art, whether this claim is not too broad, because the use of other material as well as wood is so old in the art that it is at least questionable in my mind whether there is any novelty in making a pavement of blocks of any material set in sand or gravel foundation, with the spaces filled with gravel or sand. That, however, is a point not made in the trial, and I do not attach much importance to it. The question is, was this device new at the time this patent was applied for? It seems to contain the following, as some of its elements: The street or roadway is to be brought to a suitable grade and shape, and covered to a depth of not less than three inches with sand or loam; second, the whole is then rammed until it is of sufficient compactness; third, upon the grade so formed the blocks are laid in rows transversely, or across the street, leaving sufficient spaces between the rows; fourth, these spaces are partially filled with sand or gravel, which is swaged or rammed until the foundation is sufficiently compact; fifth, the spaces are then wholly filled up with sand or gravel, or with sand and gravel and coal tar, so as to make the surface even with the top of the blocks.

There is nothing in the patent which makes it necessary for the constructer to use wooden blocks. He might, for aught that appears, use stone, concrete, or any other kind of blocks. And it is a matter of general knowledge that pavements have, for many years before this patent was asked for, been laid with stone blocks, set upon a road-bed prepared with sand or gravel, and I must insist that I can see nothing patentable in the idea of substituting wooden blocks for stone, which had heretofore been used. But even if he confined himself to the use of wood, the proof shows that Stead, in 1839, proposed to make a pavement of wooden blocks set on sand or earth foundation. In 1854, Nicolson took out his patent for a wood pavement, which he constructed by bringing the road-bed to the proper grade, upon which he laid a covering of boards; on these boards he set rows of wooden blocks; against each row he set a shorter row of thinner blocks, or a strip of board about half the height of the first row, and so he continued to set alternate rows of long and short blocks, or rows of blocks with an intervening strip of board between; and in the spaces between the rows of longer blocks, he applied gravel and coal tar, or other cementing matter, which was rammed or swaged so as to make the whole firm and solid. The pavement in question, is the Nicolson device, or combination, with the board floor left out, and the spaces between the rows of main blocks filled with gravel, instead of partly filling the spaces with a strip of board or short blocks.

This patent was before his honor, Justice Field, of the supreme court, in 1868. The Nicolson patent is referred to in that case. He there referred to the state of the art at the time of the granting of the Nicolson patent in these words: "This pavement," that is the Nicolson pavement, "is not the entire invention of Nicolson. Wooden pavements were invented and in use in different parts of the world, many years before his attention was directed to the subject. He makes no claim of novelty in the use of blocks, or of the gravel and tar between or over them, nor of any of the separate parts that go to make up the structure. What he claims as his invention is the combination of the foundation of the pavement with the blocks or the

long blocks, and strips of board, these being bounded so as to form cells or channels, with wooden bottoms, for the reception of brick, stone or gravel and tar, as already described."

Now, here is the judicial finding of his honor, Justice Field, on the state of the art at the time. Nicolson entered the field as an inventor in 1854, so that wooden blocks with the spaces or channels between them, filled with gravel and tar was then old, and had been used and adopted long before Nicolson's patent in 1854, and he only sustained Nicolson's patent upon the ground that it was a combination of the road-bed, ballasted and packed, with boards on top, the blocks set on the boards, and then the pavement filled in with coal-tar and gravel, as described in the Nicolson patent. That is, he sustained it as a combination, and such a combination as no person before Nicolson had ever made, and a combination of useful elements.

In view of the state of the art, the question arises in reference to this patent that is now before us, can any person, after Nicolson has gone over the field and made and described his invention, dismember Nicolson's combination, and get patents for a part of the Nicolson combination? That is to say, can a party make an invention by omitting from a combination an element which performed a distinct office therein, and leaving the remaining ones to perform the same offices or functions without the omitted element that they did with it? Nicolson's improvements were found to consist of an improved foundation consisting of a board covering, laid on the old sand or earth foundation, and, in their best form, of a superstructure of alternate rows of vertical blocks and compacted filling, laid transversely or across the roadway. Is it invention to take the boards from under Nicolson's superstructure and remit it back to the common foundation? Is it not rather a mere matter of judgment with the constructer, whether he will use the improved or the common foundation? It seems to me that it cannot be that he has made an invention when he decides to leave out the improved foundation. Suppose a man to have invented a harness with a breeching, can it be invention for another man to take the breeching off and leave the remaining parts to perform the identical functions that they performed before? A reconstruction of a machine so that a less number of parts will perform all of the functions of the greater may be invention of a high order, but the omission of a part, with a corresponding omission in function, so that the retained parts do just what they did before in the combination, cannot be other than a mere matter of judgment, depending upon whether it is desirable to have the machine do all, or less than it did before.

Does this inventor do anything more than others have done before, or than any lazy operative that Nicolson might set to construct his pavement might do—that is, leave the boards out, and set the blocks directly on the ground, and run the spaces full of gravel? It seems to me that it does not rise to the dignity of an invention. Leaving out a member of this Nicolson combination cannot be the proper subject matter of a patent.

Stead, in 1839, laid his wooden blocks upon a road-bed of gravel or earth, and provided that in certain cases the spaces between the blocks should be filled or partly filled up. In 1864 Chappell procured a patent in which the condition of the art is thus described by him: "Wooden pavements have been constructed on the continent of Europe and in the United States, by laying wood blocks endwise of the grain, in parallel rows, with openings or channels between, into which gravel or gas tar was placed." Now this is a description found upon the public records of the patent office years before this patent was used or applied for, in which the state of the art was described at that time, (in 1864,) by saying that pavements were well known on the continent of Europe, and in the United States, made of wooden blocks set endwise on the earth, and in parallel rows, with openings or channels between them, into which gravel and coal tar were placed. Again, the only thing that can be claimed as different in the Stow combination from what is described here by Chappell, is that he claims to ram his filling harder down into the sub grade, so as to compact the earth underneath. Now, is it a subject matter for a patent to strike a blow of ten pounds, instead of a blow of four pounds weight—a blow which shall drive this filling down into the ballast underneath, instead of leaving it at the top? Is it the subject matter of a patent to drive a nail home into the wood, so that it is below the surface, or to leave it sticking up even? Much stress is laid by the complainant, in the testimony, upon the preparation of the road-bed by ramming or packing until the whole is of a sufficient compactness, before the blocks are set thereon. But Cowing, whose invention dates back to November, 1865, makes express provision for preparing the road-bed, by grading to the proper form and ramming the same solid, so that the idea of ramming the road-bed solid, making it compact before setting the blocks upon it, is an old idea, described by Cowing in 1865.

The setting the blocks and then filling and ramming the crevices with earth or gravel, was a provision also made by Cowing. The only difference is that the Cowing blocks were not set in line so that channels extended across the street in continuous lines. Cowing does not expressly direct us to ram or swage the gravel down into the sand or gravel ballast underneath; but he provides for ramming the filling, which would, of necessity, drive it down to some degree into the ballast, and the degree of ramming can hardly be made the subject matter of a patent. We must assume that Cowing intended to have

his filling sufficiently rammed to make a firm and solid pavement, and that is all Mr. Stow proposes. How much swaging or ram ming would be needed to make the filling penetrate the foundation must depend entirely upon the degree of compactness to which the road-bed was brought before the blocks were set. That is to say, if he pounds or rams, or in any other way or method compacts the road-bed underneath, or if the road-bed upon which the blocks are set is solid enough so that it needs no compacting, then he need not, in order to make a solid pavement, ram his filling below the blocks at all. At all events, the only difference between Stow and Cowing, in the matter of swaging or ramming, is one of degree. So, also, the patent of Van Cowp & Hodgman provides for ramming the filling between the blocks until the same is thoroughly compacted. Now, where is the difference, except in degree, when in the Van Cowp & Hodgman patent they provide for ramming the filling between the blocks until the whole is thoroughly compacted? Mr. Stow certainly would not do any more than that. All he wants to do is to ram the filling until he makes a solid roadway, and Van Cowp & Hodgman propose to do that. I might go through in detail with all the various patents, ante-dating the complainant's patent, which are in evidence by the defendant, but for want of time I must content myself with the remark that several patents besides these I have specially described, seem to have anticipated the complainant both in the idea of setting the blocks directly upon an earth or sand foundation, and also of filling the spaces between the blocks with gravel or sand, packing or ramming them firmly in such spaces. Aside from these patents we have the Nicolson patent of 1854, which was only sustained because it was a new combination of useful elements; but after Nicolson instructed the public how to make a pavement of his construction, it does not seem that another man could have a patent for using a part of the same as he used it. It seems to be obvious that the degree of packing to which the filling between the Stow blocks is to be subjected depends largely upon the foundation upon which the blocks are set. The sand or loam dressing, which he provides for, is to be first compacted as hard as possible before the blocks are set, and if sufficiently compact to sustain the blocks, then no ramming down below the ends of the blocks is necessary or possible, and the invention would therefore practically be inoperative.

Among the defendant's exhibits, is the Prescott patent of the issue, June 20, 1871, which is almost identical with complainant's patent, issued in December, 1872, eighteen months afterwards. It is almost identical in description with the Stow specification. Prescott says his pavement is composed of a series of blocks having their intermediate spaces filled with concrete, the concrete being caused to extend down below the lower line of the blocks into the road-bed, for the purpose of forming the gravel spacing as described. He specifies that the concrete is placed or driven down into the interstices between the blocks, and extends three or four inches below the surface of the road-bed or street-bed, so as to effectually prevent water from going under the blocks, and also prevent water from accumulating and running under the pavement. Then he describes the mode of laying it, as precisely the Stow method, by setting blocks endwise. But I find in the proofs a more insuperable answer to this patent than any which I have named, and it is a fact which I consider abundantly substantiated by the evidence that this precise form of wooden pavement was used in this city as early as 1864. Mr. J. K. Thompson, and other witnesses, whose testimony is in the record, have all testified that in 1864 the city of Chicago laid a pavement at the end of the viaduct on North State street, where it forms a junction with Kinzie street, in which the precise combination of the blocks with the spaces between filled in with gravel, and the whole rammed, was used. This was in 1864, and the patent in question was not issued until 1872. In 1871 or 1870, the witness seems to be a little in doubt which, when the La Salle street tunnel was built, a portion of the road-bed in the tunnel was laid with the same kind of pavement that was used at the junction of Kinzie and State streets, by a combination of blocks and gravel filling, without the boards, as now claimed by Stow. Now, here is the proof of the state of the art by other inventors; here is the proof of the use of precisely this Stow invention in the city of Chicago, as early as 1864, nearly eight years prior to this patent, and it seems to me there is no ground of novelty for this patent to stand on. The patentee must be considered as anticipated in every feature of his patent by those who had in fact, taken out patents, or those who had used a pavement similar in character before he entered the field.

In this view the bill will be dismissed for want of equity.

[On appeal to the supreme court this decree was affirmed. 104 U. S. 547.]

Case No. 13,513.

In re STOWE.

[6 N. B. R. 429.] [1]

District Court, D. Maine. July 3, 1871.

BANKRUPTCY—MORTGAGE—ILLEGAL PREFERENCE—PRE-EXISTING DEBT—SEVERANCE—PRACTICE.

A creditor advanced money to his debtor, within four months of proceedings in bankruptcy, and took a mortgage of the debtor's stock in trade, first, as security therefor; secondly, included in the same mortgage, another (antecedent) debt due to himself, which was secured by a prior mortgage on the same property,

[1] [Reprinted by permission.]

held by and given to the bankrupt's (debtor's) former copartner; and, thirdly, for convenience, and to save writing an additional mortgage, an overdue note taken up and held by the endorser, by whose request it was inserted in the mortgage. Subsequent to proceedings in bankruptcy, the stock in trade was sold, with the consent of the several mortgagees, who proved their claims before the register as secured debts, and joined with the assignee in submitting to the register their rights under the mortgage. The register held that the mortgage was void as against the assignee, because intended to secure a pre-existing debt, &c.—the overdue note—according to the principle of the decision in Denny v. Dana, 2 Cush. 160. *Held*, on appeal by the mortgagee, (the endorser withdrawing therefrom and surrendering all rights under the mortgage,) that the mortgage could be severed and sustained in part, and denied as to the rest. The court also disapproved the mode of presenting the case. It should be presented by a petition of the mortgagee against the funds in court.

[Cited in Corbett v. Woodward, Case No. 3,223.]

The bankrupt applied, within four months of the proceedings in bankruptcy, to Godfrey for a loan of money, and agreed to give him a mortgage, as security, on his stock in trade in his store in Oldtown. He needed the money to pay off some overdue notes held by one Smith, which were secured by a mortgage of stock in trade, executed by the firm, Stowe & Waldron, composed of the bankrupt and Waldron, previously doing business at the same place then occupied by the bankrupt, and to whom he was successor. Godfrey was also the owner of a note of Stowe & Waldron, secured by another mortgage, given by Stowe to Waldron at the dissolution of the firm, as indemnity against partnership debts, and which it was agreed should also be included in the mortgage to secure the loan then being negotiated. While the negotiation was pending, Dillingham, another creditor, who had as an accommodation endorser been compelled, a few days before, to pay a note of the bankrupt, learning that Stowe was about making the mortgage in question, called upon Godfrey and informed him of the circumstances, and requested him as a favor, and to save multiplying papers, to include his claim in this mortgage. A mortgage was accordingly made, including Dillingham's claim, which was evidenced by a note of the bankrupt, payable to his own order, endorsed in blank, and dated the same day as the mortgage, and a new note given to Godfrey, embracing his two claims. Shortly after, Stowe failed, and proceedings in bankruptcy having been commenced against him, his stock in trade was sold under section twenty-five, with the consent of the mortgagees, and the funds arising from the sale were deposited in court, subject to the rights of the mortgagees; and, thereupon, by agreement between the assignee and the secured creditors, their rights under the last mortgage were submitted to the register in charge of the cause. Both Godfrey and Dillingham claimed before the register that they held a valid lien upon the funds in court, by virtue of the mortgage to Godfrey; and each filed "proofs of debt with security," accompanied by their examinations, taken on application of the assignee. No evidence was offered to show whether any of the Stowe and Waldron stock at the dissolution of that firm was in existence at the date of the mortgage to Godfrey. The register decided the mortgage was void as against the assignee, under section thirty-five, for several reasons, but principally because it was a preference of the Dillingham claim—that the mortgage was an entirety as presented by Godfrey, and being void in part, according to Denny v. Dana, 2 Cush. 160, was void in whole. On the issues of fact and law thus arising the register, at the request of the parties, adjourned the same into court for the decision of the judge. At the hearing before the judge, and upon the suggestion of the court, that the proceedings were irregular, the parties withdrew their proofs, and Godfrey presented instead a petition against the funds in court, claiming payment only of his own demand; Dillingham making no further claim under the mortgage.

H. C. Goodenow, for assignee.
C. P. Stetson, for Godfrey.

FOX, District Judge (orally). I find the consideration of Godfrey's note was in part money then loaned and the balance was received in discharge of a note upon which he then had full security, first by the partnership of Stowe & Waldron and second by and through the mortgage on Stowe's stock, held to be sure by Waldron, but which in equity would inure to Godfrey's benefit as the holder of the liability thereby protected. Under these circumstances, it does not appear to me that Godfrey and Stowe can be deemed to have intended a fraudulent preference of this demand; under the provisions of the bankrupt law there was a full present consideration for this mortgage qua this note, and the estate has not been in any way defrauded thereby. Whether the Dillingham claim is equally pure and protected it is not in my view necessary to determine, as Dillingham makes no claim to payment from the mortgaged property, and the case of Denny v. Dana, 2 Cush. 160, I think is not to control the rights of Godfrey. If Dillingham had taken the mortgage charged with a fraudulent motive and preference of his debt, under the bankrupt law, it may be that this case would control, but Godfrey himself is found by me entirely innocent, and so far as he is concerned, is a bona fide holder for present value. I think the case falls within that class of which U. S. v. Bradley, 10 Pet. [35 U. S.] 360 is an illustration, that a contract may be good in part and void for the residue, where the residue is founded in illegality, but not malum in se. Now extra the provisions of the bankrupt act Dilling-

ham had a perfect right to take this security, and as all proceedings in bankruptcy are based on principles of equity, I think we are justified in severing the conditions of the mortgage and sustaining it so far as one of the claims in behalf of the sole mortgagee, entirely innocent of all violation of the law, is concerned.

The following decree was subsequently entered by the court:

FOX, District Judge. The assignee named in the foregoing petition having acknowledged notice, and the case having been argued by counsel in behalf of the respective parties, it is by the court now ordered, adjudged and decreed, that the security by mortgage of September twenty-seventh, eighteen hundred and seventy, on the bankrupt's stock of goods and merchandise, as set forth in said petition, for the payment to said Godfrey of the note of said bankrupt for seven hundred and ninety-three dollars and seventeen cents, on six months with interest, (said note being in part for a present consideration then advanced by said Godfrey to said bankrupt, and the residue thereof being in payment of a demand held by said Godfrey against said bankrupt, payment of which before that time had been and then was fully secured to said Godfrey,) constituted a valid and legal incumbrance on the property mortgaged to the extent of the amount due upon said note and was not in fraud of any of the provisions of the bankrupt act, and that said stock in trade passed to said assignee in bankruptcy, charged with and subject to said lien and incumbrance. And it is therefore further ordered, that said assignee pay to said Godfrey, forthwith, from the net proceeds of the sale of said mortgaged property, if the same shall be sufficient for that purpose after satisfaction of any previous liens, if any there be, the amount due upon said note with legal interest at six per cent. from the time said note became due and payable.

STOWE (BARKER v.). See Cases Nos. 994 and 995.

Case No. 13,514.

STOWE v. THOMAS.

[2 Wall. Jr. 547; 2 Am. Law Reg. 210; 1 Pittsb. Rep. 82; 1 Pittsb. Leg. J. 129; 11 Leg. Int. 2; 2 Liv. Law Mag. 417.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1853.

COPYRIGHT — COPYRIGHT TRANSLATION — SUBSEQUENT TRANSLATION.

A prose translation (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the author's copyright of the original.

[Cited in Keene v. Wheatley, Case No. 7,644; Greene v. Bishop, Id. 5,763; Lawrence v. Dana, Id. 8,136; The "Mark Twain" Case, 14 Fed. 730. Cited, contra, in Henry Bill Pub. Co. v. Smythe, 27 Fed. 921.]

The act of congress (Act Feb. 3, 1831 [4 Stat. 436]) respecting copy-rights gives to the "author of any book" the "sole right and liberty of printing, reprinting, publishing and vending such book:" and if any other person shall print, publish or import, &c., "any copy of such book" without the consent, &c., affixes certain penalties for the infringement of copy-right. With this act in force, Mrs. Harriet Beecher Stowe published in 1850–52, a romance called "Uncle Tom's Cabin: or Life among the Lowly." The copy-right had been duly secured. The book became very popular, and soon after its publication Mrs. Stowe "employed at much expense Hugo Rudolph Hutton, a competent German scholar of ability and critical knowledge of the German language, as also of the English, to translate and copy it into the German language." Dr. Hutton was assisted in his labours by Mrs. Stowe's husband: and by these individuals, at her expense, her said book, as she alleged, had "been fully, completely, accurately and skilfully translated and copied, printed and published in the German language;" and in that form duly secured by copy-right. With this original and translation before the public, the defendant made a second translation into German. It appeared in chapters, in the columns of a daily newspaper, Die Freie Presse; the type before distribution being used to print a re-publication in pamphlet form. The ordinary formalities to secure copy-right had been taken in regard to this translation. The Die Freie Presse was printed at Philadelphia and circulated extensively among the German population with which that place and adjoining parts of Pennsylvania are known to abound. There being no considerable dispute about facts, the question on this bill for injunction was, whether the translation was an infringement of Mrs. Stowe's copyright in the original.

S. H. and S. C. Perkins, for Mrs. Stowe.

The question is novel. There are no decisions on the point either in England or in the United States, and but recently in France. Prussia, in her general Code of 1791, §§ 1027, 1028 (1 Renouard, 267), and the general law of 1837, § 4 (1 Renouard, 268); Russia, in the Digest of 1835, tit. 2 (1 Renouard, 283); and Belgium, by the laws of 1814, art. 12 (1 Renouard, 248), and 1817, art. 2 (1 Renouard, 249), have all deemed the subject of importance enough to make it one of express provision. We have no express legislation, but the subject has been discussed abstractly by text-writers. The question is more important in America than elsewhere, owing to the originally mixed character of our people, and to the

[1] [Reported by John William Wallace, Esq. 1 Pittsb. Leg. J. 129, contains but a partial report.]

constant emigration of foreigners to our country, most of whom become our citizens long before they can read our language. This influx from the continent of Europe is greatly increasing. It will go far to change the nature of our population. There is no doubt that the question is of deeper importance in this country than it ever has been in this or in any other country, at any time before.

An author is the "creator," the "efficient cause" of a thing. Webst. Dict. In respect to a book, he is the creator of the ideas—the thought—the plan—the arrangement—the figures—the illustrations—the argument—the style of expression. The exclusive right to sell these is what is secured by copyright. The right is original, inherent; a right founded on nature, acknowledged, we think, at common law; a right which stands on better ground and is more deeply rooted than the right to any other property whatever. See Marlin's argument, 3 Repertoire de Jur. 701, tit. "Contrefaçon," § 11.[1] Now a translation is an infringement of this right. The translator aims to convey to the mind of his reader the ideas and thoughts of the author; nay, the very shades of his ideas and thoughts; his exact manner and form of expression, and even his words, so far as represented by similarly constructed expressions in the new language. All changes, all variations in any of these particulars, are failures, and are studiously guarded against. Particular language—words of one tongue as distinguished from words of another—are but the signs of his ideas. A perfect translation will present the identical creation and mental production, in a way that the sign is never thought of.

A mere or bare translation, which this is, even though spirited, if it be so, calls for no creation on the part of the translator. Any one who understands two languages can translate from one to the other. The translation is the same book. We have nothing to do in this case with the question of paraphrase, or rendering from prose to poetry, or vice versa. Those matters may present difficulties. Our case is simple and does not touch them. This is a mere translation, and is no more a new book because every American cannot understand it, while every German can, than a book printed in common characters from a copy in raised characters (such as is used by the blind) is a new or different book, because a blind man cannot read this first, while one who has the use of his eyes can.

Admitting, as is true, that great genius of a particular kind is required to make a perfect translation, so much the worse. It is great genius applied to present everything which is the author's in a form which is his in everything but his right to profit by it. It is great genius applied to great wrong; and the greater the genius, and the more perfect his work, the greater the wrong. There is not so much genius required to translate

[1] "It is provided in the constitution of the United States," says Mr. Webster, "that congress shall have power to promote the progress of science and the useful arts by securing for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The law acknowledges the existence of the right of an inventor to his invention as property, and the constitution is remarkably exact in the language in which it speaks of this important subject. The constitution does not attempt to give an inventor a right to his invention, or to an author a right to his literary productions. No such thing. But the constitution recognizes an original, pre-existing, inherent right of property in the invention, and authorizes congress to secure to inventors the enjoyment of that right. But the right existed before the constitution and above the constitution, and is, as a natural right, more clear than that which a man can assert in almost any other kind of property. What a man earns by thought, study, and care, is as much his own, as what he obtains by his hands. It is said that, by the natural law, the son has no right to inherit the estate of his father—or to take it by devise. But the natural law gives man a right to his own acquisitions, as in the case of securing a quadruped, a bird, or a fish by his skill, industry, or perseverance. Invention, as a right of property, stands higher than inheritance or devise, because it is personal earning. It is more like acquisitions by the original right of nature. In all these there is an effort of mind as well as muscular strength. Upon acknowledged principles, rights acquired by invention stand on plainer principles of natural law than most other rights of property. Blackstone, and every other able writer on public law, thus regards this natural right and asserts man's title to his own invention or earnings. The right of an inventor to his invention is no monopoly. It is no monopoly in any other sense than as a man's own house is a monopoly. A monopoly, as it was understood in the ancient law, was a grant of the right to buy, sell, or carry on some particular trade, conferred on one of the king's subjects, to the exclusion of all the rest. Such a monopoly is unjust. But a man's right to his own invention is a very different matter. It is no more a monopoly for him to possess that, than to possess his own homestead. But there is one remarkable difference in the two cases, which is this, that property in a man's own invention presents the only case where he is made to pay for the exclusive enjoyment of his own. For by law the permission so to enjoy the invention for a certain number of years is granted, on the condition that, at the expiration of the patent, the invention shall belong to the public. Not so with houses; not so with lands; nothing is paid for them, except the usual amount of taxation; but for the right to use his own, which the natural law gives him, the inventor, as we have just seen, pays an enormous price. Yet there is a clamor out of doors, calculated to debauch the public mind. But a better feeling begins to prevail. A more intelligent estimate of this species of property begins to spring up. Yet I am sorry to say, that there have been men—there are still some men in the community,—who would not do an immoral action, who would not for their lives, 'pick a flaw' in their neighbour's title-deed, and who yet make no scruple of endeavouring by every means in their power to 'pick a flaw' in his patent. That feeling is unjust, illegal, and unsocial." Speech at Trenton, N. J., March, 1852, in Goodyear v. Day [Case No. 5,569].

See, also, a beautiful defence of the rights of authors in the American Law Register for 1853–54, vol. 2, p. 129; an essay not more remarkable for its convincing strain of argument, than for its happy and dignified temper.

a book into a foreign language, as to translate it into other words in the same language. Yet, if a man were to put the identical ideas, and every characteristic of a book, except its words, into synonymes, would it escape? Independently of this, genius or labour misapplied, cannot consecrate its success. It may take a vast deal of both genius and labour to perpetrate a successful forgery, but the court would hardly hold a man of genius, who thus exercised it, the lawful owner of the property which he got. His genius, like that here, is of the sort which we say is "worthy of a better cause." The translator is wholly dependent on that which is the author's. His act at best is a voluntary and wrongful mixture of his labour with that which belongs to another, and from the result of which he can therefore claim no profit. Being a chemical as distinguished from a mechanical or separable mixture, he must lose all.

If no translation is an infringement, a work may be published in any characters different from those used by the original author, and adapted to another class of readers, without any violation of his rights. It may be published in phonographic or phonetic characters, which, while they convey to the mind of some readers the identical ideas, words, and style of the author, convey to others unacquainted with those characters, no ideas at all. Could an algebraic work be printed and published without infringement by the employment of different characters to represent the algebraic formulas? Could a treatise on chemistry, or other science purely, or indeed any work where the thought, or argument, or facts, or narrative was everything, or the great thing, and the style, language, or mode of communication nothing, or a small thing, be translated with impunity? Where is the court to stop? Take such a book as Euler's Algebra, which, dealing very largely in algebraic formulæ, a fine mathematician would in some degree understand in its original form, even though he understood not the original language—might that, if copyrighted here, be translated into a form purely English with impunity? Could a profound course of mathematical argument, set forth by algebraic process, be resolved, as it may often easily be, in the different shape of linear exhibition? Perhaps it might: but could one by printing or painting in different colours, a design invented or produced by another, escape the penalty of the act of congress for the protection of designs (Act Aug. 29, 1832, c. 263, § 3 [5 Stat. 543]), and enjoy its protection for the mere change of colours? Could a drawing, where the drawing might be everything, done in line engraving and protected by copyright, be mezzotinted or lithographed with impunity? These last are our case.

Again, unless a translation is an infringement, both the original work and the translation must be regarded, with respect to further translation, as publici juris; and the translation may be re-translated into the original language. Even in a book where the style was a great matter, the demand which would make it profitable to publish a translation would recompense such a double process of translation. In a work of science, or in any work where style was not important, the re-translation would be just as good as the original. Indeed, if as often happens with the literary composition of scientific men, the style of the book was obscure or otherwise bad, the re-translation might, with no merit in the translator, be better than the original. The author would find no protection by publishing simultaneously in two or more languages. Mrs. Stowe did actually translate this book herself into German; but she thereby only afforded encouragement and facilities to another desirous of interfering with her profits. If a translation be not an infringement, it must itself, and independently of its character quâ translation, be entitled to protection as possessing the quality of originality. But who would contend that this is so?

So far as this question depends on authority, authority is with us. Without citing the cases, it may be stated generally that the principle of them lies in this question: "Whether the work complained of could ever have existed, had not the original existed, without a coincidence in the mental conceptions and modes of expression of the original author and the alleged infringer, so striking as to be beyond all probability?" Or in this: "Whether the alleged infringer had used the literary property of another, not as a centre about which to group his own thoughts and ideas and in his own style, but as that, out of which itself, from its peculiar and intrinsic value, he has undertaken by publication to make profit for himself?" Or, to advance a step upon the last form of question, "Has the original author suffered, or will he suffer, injury from the act complained of?" Curt. Copyr. p. 240. All these tests are with us. The translator, it will be confessed, has taken our object, plan, facts, sentiments, narrative, and all our communicable style; taken, in short, everything down to our parentheses, exclamation and punctuation points. Nothing is changed but the arbitrary mechanical signs, no way connected with the essentials of anything, through which some of these are conveyed; and this is in a work where the plan, object, fact, sentiment, and narrative, is everything, and style—so far as it is incommunicable and not taken—is nothing. Undoubtedly, too, the author is injured. If it is a perfect translation, she is injured in the sale of her work; for there are numbers of people in our country who, reading two languages indifferently, will read it in that one which costs the least. If it is a bad translation, she is injured still more in her reputation; for there is another vast class who will have no conception of the book other than that which comes through a translation,

whether it cost much or little. Against both classes, so far as both classes are our own people, the copyright act was meant to extend. Has any one doubted that congress meant to secure to authors the profits from their work throughout the length and breadth of this country? Yet the argument of the defendant would deprive them of any profits as respects a vast class of our people; and not only so, but it would give to our population from abroad, many of them still foreigners in every sense, a privilege denied to our native citizens. It is begging the question, to say that we have secured the copyright in English, and in English alone.

The point now in controversy has been several times already adjudicated in France. M. Jules Delalain upon the law of July 19, 1793, says: "On trouve dans la jurisprudence plusieurs décisions en ce sens. Un arrêt de la cour de Rouen, (7 Novembre, 1845,) deux arrêts de la cour de Paris, (17 Juillet, 1847, et 26 Janvier, 1852,) reconnaissent aux auteurs seuls on à leur agents le droit de publier ou d'autoriser la traduction de leurs œuvres dans une langue étrangère." Legislation de la Propriété Litterare (3ime Ed. Paris, 1853) p. 5, note 2. In Lumley v. Bayard, 1 Am. Law Reg. 499, (not referred to by M. Delalain,) Donizetti had written the music of La Fille du Regiment, and Saint Georges and Bayard its French words. Both were rightfully represented at the Opéra Comique. Lumley taking the music, and by the permission of Saint Georges, but not of Bayard, translating the words into Italian, brought both out at the Theatre Italien. The question of the music was of course involved as well as that of the words. But the court is just as strong on the subject of the words as on that of the music: "The court being of opinion," says the decree, "that the opera styled la Figlia del Reggimento, and represented by Lumley at the Theatre Italien is the same as that the words of which were written by Saint Georges and Bayard, &c. * * * that the translation of the French words makes an unimportant (insignifiante) difference between the pieces; * * * that the change or translation of the words can have no influence so far as regards the composer of the music. * * * Being also of opinion with regard to the words that their authors have therein a right of property which should belong to them fully and exclusively; that if a mere translation were permitted to compete with the original," &c., were of opinion against Lumley. The court speaks of the "alteration of the words, especially when in so subordinate a form as a translation."

In England there is no doubt as a matter of fact that a translation into English of Burnett's Archæologica, written by the author in Latin, was injoined. Burnett v. Chetwood, 2 Mer. 441, note. The reasons for the injunction are not so clear; though we think that they are still clear enough. The case arose on a statute much like ours, the act of 8 Anne, c. 19. 4 Ruffh. St. 401. It is entitled an act "for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such books," &c. It recites that "printers, booksellers and other persons have taken the liberty of printing, reprinting and publishing books and other writings:" and enacts the author of any book already printed, &c., or the "printer or printers, or other person or persons who hath or have purchased the copy or copies of any books in order to print or reprint the same, shall have the sole right or liberty of printing such book or books; and that if any other person print, reprint or import any such book," &c. The act expressly provides—we may add—that it shall not prohibit "the importation, vending or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas." A translation made abroad would clearly not come within it. The only report we have of the case is from the Register's Book, and from a note of counsel, reporting the argument of the defendants alone. The former shows that the grounds of applying for the injunction were that "the book was only intended to the learned, and for that reason was wrote in Latin and not in the vulgar tongue * * * and that the said translation is erroneous, and the sense and words of the author mistaken and represented in an absurd and ridiculous manner;" in other words that the author had a right to say whether his book should be translated at all, and if he was willing that it should be, then to control the manner of translation. There is nothing said in the application of the book's being of a mischievous tendency, which on an application by the author's own executor would have been of itself, at that time, probably, as now certainly, an answer to any application for an injunction; whatever it might have been to an application from the crown. When the case came to be argued, counsel opposed to the application argued that the copy-right act was "intended only to restrain the mechanical art of printing * * * but not to hinder a translation of the book into another language, which, in some respects, may be called a different book, inasmuch as some skill in language is requisite thereto * * * that the translator dresses it up and clothes the sense in his own style and expression." Lord Chancellor Parker—responding, clearly, to the argument, and, in a qualified way, granting it for argument's sake—said, "that though a translation might not be the same with the reprinting the original * * * yet this being a book which to his knowledge, (having read it in his study) contained strange notions intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt * * * he thought it proper to grant an injunction." He put

in afterwards, to be sure, in an adjectitious form, "that he looked upon it that this court had a superintendency over all books, and might in a summary way restrain the printing and publishing of any that contained reflections on religion and morality." But the moving ground of the injunction was the intention of Dr. Burnett.

Several text writers, American and foreign, are of opinion that a translation like this is an infringement. Mr. Curtis (on Copyright, 292), of our own country, puts the question: "Does the mere act of giving to a literary composition the new dress of another language, add to the case an element which ought to take it out of the rule by which reproduction in other forms is prohibited?" He thus resolves it negatively: "To attribute to such a new medium the effect of entire originality, is to declare that a change of dress alone annihilates the most important subject of his right of property. It reduces his right to the narrow limits of an exclusive privilege of publishing in that idiom alone in which he first publishes. But we do not find that his privilege is thus circumscribed; because a mere change of phraseology is not held to justify the adoption of matter that is under the protection of law." The French jurists, Pardessus (Droit Commercial, tit. 1, Nos. 164, 167), and Etienne Blanc (Traité de la Contrefaçon, 416), hold this same opinion. The counsel on this side, made also a learned examination to the question of copy-right at common law, and independent of the statutes securing it.

Mr. Goêpp and B. H. Brewster, contra.

The act of congress speaks of reprinting such books as the author had previously printed: and the prohibition is only against printing, publishing or importing "any copy of such book." In no parlance—either ordinary or legal—does "copy" mean "translation:" and the act of congress does not enact that a translation shall be considered a copy. On the contrary, it uses the term "copy" clearly in the sense of reprint. On principle a translation is not an infringement. The subject of a book is confessedly not capable of copy-right. Writing and thinking are separate things, and the results of distinct gifts and of separate labours. Thought is the gift of heaven; style or ease in writing, comes from art. The thought may be more meritorious than the style; but the thought, independent of its language, cannot be protected; and therefore literary property attaches not to the thoughts as expressed, but to the expression of the thoughts; that is, to the language in which they are conveyed. A book which had little or no thought, would as much be the subject of copy-right, as if it was the Essays of Francis Bacon: and a copy or reprint of it, would be as completely within the statute, as if it contained the profoundest, the most original and inestimable discoveries or truths. This may arise from the inability of men to secure perfect justice on earth; but it is necessary to secure the greatest measure of justice which we can.

There being here no question of a verbatim copy or of colourable variations, the only question is whether there is a servile and mechanical imitation. We have confessedly taken not a part, but the whole. We concede and we boast that we have taken every sylable, comma and i-dot of the original. The question cannot be how much we have taken, for we have taken all; nor how much we have added, for we have added nothing: but only how have we taken, and what have we done with it? The criterion given by Lord Lyndhurst (Jollie v. Jaques [Case No. 7,437]; D'Almaine v. Boosey, 1 Younge & C. Exch. 288–300) is "whether the appropriation could have been made by a mere mechanic in literature, or whether it required the aid of genius and reflection?" Is the work such as any body, if ordered, like a tradesman or mechanic, to make it, would have produced substantially in the same shape as at present? Or is it such as would not have had the same merits and the same character, if produced by any body but the one who did produce it? In the former case it is servile. In the latter it is the creation of genius. This is not the case of an almanac, or a collection of chemical recipes, or a set of algebraic or nautical calculations, in which every word is a term of science, and has an exact correlative, which may be found by a mere mechanical exercise, analogous to that of a printer, when he seeks a type corresponding to the written character. A translation of a romance, or any like work, depends entirely for its success upon its individuality, and for that reason, is original with the translator.

It is settled that translations of books, not copy-rights, are subjects of copy-right (Wyatt v. Barnard, 3 Ves. & B. 77); and in this respect they are undistinguishable from other works. To exclude us from the benefit of the rule, is only possible on the basis of an alleged distinction between translations from originals not copy-righted, and translations from originals secured. The distinction is unfounded in authority. In principle it proves too much, for it would make reprints (which are mere copies) from foreign works, legitimate subjects of copy-right. It will not do to say, that a translator is a copyist, so far as he appropriates, and an author, so far as he contributes his own exertion. Every copyist, every reprinter contributes his own exertion, and every author appropriates thoughts from others. The argument would result in subjecting a translator to prosecution by those from whom he has translated, and at the same time allowing him to take advantage of his own wrong, by prosecuting those who reprint his translation. There is no hybrid between a thief

and a thinker. Author and copyist are irreconcileable opposites. If a translation were a copy, it would, under any circumstances, be incapable of copy-right. Having, under some circumstances, been adjudged capable of copy-right, it has been adjudged to be no copy under any.

The author's rights are not injured. A translation enhances the value of the original. None will buy the former who are able to read the latter: and the translation attracts the notice of many to the original. If Mrs. Stowe had not thought so, she would not herself have published a German translation. The sale of her translation, indeed, was impaired; but we are not charged with a piracy of it: and the reason why it is injured, is that her translation has less genius than ours.

The analogy of a mechanical or chemical mixture is untenable. A mechanical mixture may be said to have occurred when the translator bought the book; but this cannot be complained of, because the monopoly of selling it, is the very subject of the claim. A chemical mixture took place, if at all, when he read it, and it became amalgamated with his own mind; when, by the communication—which is the soul and essence of the book—the ideas of the writer were imparted to the reader. But to complain of this, would be to complain of the very purpose of the copy-right law itself; the monopoly of reproducing the material, mechanical engine of the communication, the body of the book, was granted for no other consideration than the general diffusion of the communication itself. Anything, therefore, which legitimately ensues upon the reading of the book, is publici juris, and outside of the author's privilege. A book may be copied and reprinted without being read; but must be read to be translated or abridged. Translation or abridgement is, if any thing, an organic, germinating process, entirely outside the circle of the law on bailments.

On authority: Burnett v. Chetwood, cited on the other side, is really no authority for any thing; or, if authority, is for us. The petition for injunction, puts the case on Dr. Burnett's intention to keep his book locked up in a learned tongue, and upon the injury which the translation brought upon his character, by his sense and words being "mistaken and represented in an absurd and ridiculous manner." But the lord chancellor grants no injunction on those grounds. He travels out of the record to find other ground for his decision, and introduces a new element, to wit, that having himself read the book, he knew it to contain strange notions, which, while they were in the Latin tongue, "could not do much hurt;" but which, he implies, if translated, would be very noxious. He treats the book as one containing "reflections on religion and morality," and therefore within his summary control, as a guardian of public morals. To say the least, he seems to have had serious doubts whether, on the ground set forth by the petition, he could interfere; and to have been pressed by the consideration that a translation was not within the act, because the translator had bestowed "care and pains" upon his work.

Mr. Curtis, of our own country, though his book is laborious and valuable, goes to lengths quite untenable on the subject of protection to authors. His opinion on translations is in conflict with Mr. Godson, the English author. As to the cases cited from France, it is enough to say, that we know nothing of the words of the legislative enactments on which they are founded. And with respect to the speculations of its text writers, that the speculations of one are answered by the speculations of another; that while the name of Pardessus is found on one side, that of Renouard, which "weighs as much," and "sounds as well," is ranged upon the other. See Curt. Copyr. 293.

GRIER, Circuit Justice. In the balance of opinions among learned jurists, we must endeavour to find some ascertained principles of the common law as established by judicial decision on which to found our conclusion.

In order to decide what is an infringement of an author's rights, we must inquire what constitutes literary property, and what is recognised as such by the act of congress, and secured and protected thereby.

An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise.

The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another

the ideas intended to be conveyed. This is what the law terms copy, or copyright. Curt. Copyr. 9–11, et seq.

The statute of 8 Anne, c. 19 (which so far as it describes the rights and property of an author, is but declaratory of the common law), is entitled, "An act for the encouragement of learning, by vesting the copies of printed books in the authors, &c." It gives the author "the sole right of printing and reprinting such book or books," and describes those who infringe the author's rights, as persons "printing, reprinting, or importing such book or books" without the license of the author. Our acts of congress give substantially the same description both of the author's rights and what is an infringement of them.

Now, although the legal definition of a "book" may be much more extensive than that given by lexicographers, and may include a sheet of music as well as a bound volume; yet, it necessarily conveys the idea, of thought or conceptions clothed in language or in musical characters, written, printed or published. Its identity does not consist merely in the ideas, knowledge or information communicated, but in the same conceptions clothed in the same words, which make it the same composition. 2 Bl. Comm. 406. A "copy" of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or "copy" of the same "book." I have seen a literal translation of Burns' poems into French prose; but to call it a copy of the original, would be as ridiculous as the translation itself.

The notion that a translation is a piracy of the original composition, is founded on the analogy assumed between copy-right and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodies the principle or essence of the invention. But as the author's exclusive property in a literary composition or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence, in questions of infringement of copyright, the inquiry is not, whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work, requiring invention, learning and judgment, or only a mere transcript of the whole or parts of the original, with merely colourable variations. Hence, also, the many cases to be found in the reports, which decide that a bonâ fide abridgment of a book is not an infringement of copyright.

To make a good translation of a work, often requires more learning, talent and judgment, than was required to write the original. Many can transfer from one language to another, but few can translate. To call the translations of an author's ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation.

Although the question now under consideration, was not directly in issue in the great case of Millar v. Taylor (4 Burrows, 2303), yet the inference that a translation is not an infringement of copyright, is a logical result, and stated by the judges themselves as a necessary corollary, from the principles of law then decided by the court. That case exhausted the argument, and has finally settled the question as to the nature of the property which an author has in his works; and it is, that after publication, his property consists in the "right of copy," which signifies "the sole right of printing, publishing and selling his literary composition or book," not that he has such a property in his original conceptions, that he alone can use them in the composition of a new work, or clothe them in a different dress by translation. He may be incompetent to such a task, or to make a new work out of his old materials, and neither the common law nor the statute give him such a monopoly, even of his own creations.

An author, says Lord Mansfield, has the same property in his book, which the king has to the English translation of the Bible. "Yet if any man should turn the Psalms, or the writings of Solomon, or Job, into verse, the king could not stop the printing or sale of such a work. It is the author's work; the king has no power or control over the subject-matter. His power rests in property. His whole right rests upon the foundation of property in the copy." Mr. Justice Willes, in answer to the question, "Wherein consists the identity of a book?" says, "Certainly, bonâ fide imitations, translations and abridgments are different, and in respect of property, may be considered new works." And Mr. Justice Aston observes: "The publication of a composition does not give away the property in the work. But the right of copy still remains in the author. No more passes to the public from the free will and consent of the author, than unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve it, imitate it, translate it, oppose its sentiments; but he buys no right to publish the identical work."

The distinction taken by some writers on the subject of literary property, between the works which are publici juris, and of those which are subject to copyright, has no foundation, in fact, if the established doctrine of the cases be true, and the author's prop-

erty in a published book consists only in a right of copy. By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. [Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza.] [2] All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. [They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.] [2] All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, "copies of her book." A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.

Bill dismissed, with costs.

STOWELL (ALLIS v.). See Case No. 250.

STOWELL (UNITED STATES v.). See Case No. 16,409.

Case No. 13,515.

STOWELL v. WILLIAMS.

[17 Int. Rev. Rec. 38.]

Circuit Court, S. D. Ohio. 1873.

INTERNAL REVENUE—DISTILLERY—SUSPENSION.

The plaintiff in this case [E. H. Stowell] was a distiller at Deerfield in the Third collection district of Ohio, and brought his action against [Robert Williams, Jr.] the collector for illegally requiring him to pay the sum of $2,100, which was paid under protest, and which he now sought to recover back in an action in the state court. The case was brought to this court by writ of certiorari. The petition or declaration averred that the plaintiff was a distiller, and had paid all the taxes due on the spirits distilled by him during the month of January, 1871, but that during that month an explosion of the boiler occurred, and his machinery was so injured by the accident that he stopped working for five days, until the repairs enabled him to proceed; that during these five days he neither mashed nor distilled. He had notified the assessor of the district of the unavoidable accident, and had requested him in writing to legally suspend the operations of his distillery, to lock up the furnaces, etc., as required by law. But that the assessor paid no attention to his request; and although he (the distiller) had paid to the collector 80 per centum of the working capacity of the distillery for that month, the assessor, nevertheless, assessed upon him the taxes for the five days during which he had been prevented from running by reason of the explosion and accident above referred to. He had paid under protest, and had appealed to the commissioner of internal revenue, where the case was still pending. To this declaration the district attorney, who appeared for the collector, filed an answer, setting up: That at the time of said alleged explosion and injury to the machinery of the distillery there were large quantities of mash and beer on hand in the tubs; that the assessor notified the distiller that he must either fix the intended time of suspension, so as to enable him to run off the mash and beer on hand, or he must destroy the said mash and beer, before a legal suspension could take place. This the distiller (the plaintiff) refused to do; hence the assessment and exaction of the taxes as required by law. The plaintiff filed a general demurrer to the answer.

Bruce, Wilson & Craig, for plaintiff.

Henry Hooper, U. S. Asst. Atty., for defendant.

SWING, District Judge, held that there was but a single point in the case, and that was: Had the commissioner of internal revenue the power and authority under the statute to prescribe the mode and the time when a legal suspension could take place in a distillery? In the regulations issued by the commissioner of internal revenue, under the law of July 20, 1868 [15 Stat. 125], as amended by act of April 10, 1869 [16 Stat. 41], and entitled "Series 5, No. 7," it is prescribed as follows: "Unless the distiller chooses to destroy the mash on hand when he suspends work, he must fix his time, so that he will have time to run off the mash on hand before the notice takes effect, as after the time stated he can have no mash, wort, or beer on his distillery premises." There is nothing in section 22 of the act of July 20, 1868, which conflicts with that portion of the regulation which requires the distiller to "fix his time so that he will have time to run off the mash on hand before the notice takes effect;" to the contrary, the law authorizes him to make the regulation and prescribe the mode in which the detail of the statute is to be carried out. The answer sets this up, and avers that the distiller refused to fix his time so as to enable him to run off the beer before the legal suspension could take place. The plaintiff admits this by his demurrer. Whatever would be the opinion of the court as to the equities of the plaintiff, upon a different state of pleadings, so far as this case is concerned, the demurrer must be overruled, and the judgment given for the defendant.

Judgment was entered for the collector.

[2] [From 2 Am. Law Reg. 210.]

Case No. 13,516.

In re STOWERS et al.

[1 Lowell, 528.] [1]

District Court, D. Massachusetts. Jan., 1871.

BANKRUPTCY—PARTNERSHIP—DISSOLUTION—PETITION BY FORMER PARTNER.

1. One partner may petition to have himself and his copartner adjudged bankrupt after a dissolution of the copartnership.

2. He will not be estopped from petitioning by having undertaken to pay all the joint debts, the joint creditors not having accepted him as their sole debtor.

[Cited in Re Bennett, Case No. 1,314; Re Smith, 16 Fed. 467.]

This was a petition by J. R. Stowers alleging that he had been a partner with one Johnson, and that the firm had been lately dissolved, but was insolvent, and praying that a joint warrant be issued against their estate. There were allegations tending to impeach the fairness of the dissolution on the part of Johnson. The evidence was that Stowers bought out Johnson and paid him five thousand dollars for his interest in the joint assets, and gave him a bond to pay all the joint debts, and very soon after discovered that he had paid him too much. Stowers then sold out the stock in trade to Cobb & Co., taking notes on long time, and offered to settle with the creditors for seventy-five per cent of their debts. Failing in a settlement, he brought this petition.

C. P. Hinds, for Stowers.

J. Nickerson, for Johnson.

LOWELL, District Judge. The petitioner does not stand in a very enviable position, for, whatever may be the merits of his controversy with his late partner, it is clear that he has committed a technical fraud, at least, by conveying away all his property in order to gain an advantage in settling with his creditors or with his partner. Notwithstanding this, I must decide the case on the law and evidence as a case in bankruptcy. After a dissolution of copartnership, either partner may apply to have the firm adjudged bankrupt if they are in fact insolvent. Thompson v. Thompson, 4 Cush. 127. I have often taken jurisdiction of joint petitions in such cases, a course of action which involves substantially the same question. This being so, the only doubt is whether this petitioner stands differently from other copartners. He has undertaken to pay all the joint debts, and if this were an ordinary suit he might be precluded from setting up, as against Johnson, that the debts which he has undertaken to pay remain the joint debts of the firm, for they both agreed to treat them as the separate debts of Johnson. But in bankruptcy, if the firm is really insolvent, the partner who petitions is acting for the creditors as well as for himself, and it cannot be doubted that the joint creditors could proceed against both debtors in bankruptcy, unless they had agreed to accept Stowers alone as their debtor, which the creditors of this firm have not done. It seems to me, therefore, that the doctrine of estoppel does not apply, and that Johnson and Stowers, or either of them, might, after the dissolution, petition for the benefit of the act on behalf of the firm. Such a proceeding by partners differs in this from one by creditors, that no act of bankruptcy need be alleged, but only that the firm is insolvent. If then we decide that a partner cannot petition by reason of any contract with his copartner, we deprive the creditors of the very important power of procuring adjudication through the petition of one partner when the firm is clearly insolvent, but no technical joint act of bankruptcy has been committed.

The evidence here shows that the firm is insolvent, and that it was so before Stowers made the conveyance to Cobb & Company, and that Johnson has not himself the present available means to pay the joint debts on demand. Whether if he had the ability he could defend successfully such an action as this except by actually paying the debts, I need not now decide.

As I understand the principal ground of defence, it is this: That there was no insolvency until Stowers caused it after Johnson had retired from the firm. The evidence upon this point is not quite distinct. There was no actual failure to pay before that time, but they needed indulgence and forbearance from their creditors. But granting that they were not insolvent immediately on the dissolution, it seems to me that Johnson by intrusting Stowers with the payment of the debts, took the risk of his being both able and willing to do so, and that he cannot set up now that he left the firm solvent and that the act of the petitioner has changed the state of affairs. It seems a great hardship that one partner should be able thus to involve another, but it results from the relation between the parties, and all that the court in bankruptcy is concerned with is the fact of present insolvency. The argument would be no less strong before the firm was dissolved, that the petitioning partner had brought it to insolvency by his fraud or mismanagement, contrary to the articles, and without justification as between the partners; but no such defence has ever prevailed or been set up that I know of. I ought to say that Stowers believes himself to be the injured party, and alleges that his partner deceived him in various ways throughout their joint dealings. Both partners adjudged bankrupt.

[For subsequent proceedings in this litigation, see Case No. 7,369.]

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

Case No. 13,517.

STOYEL v. LAWRENCE.

[1 Brun. Col. Cas. 31;[1] 3 Day, 1.]

Circuit Court, D. Connecticut. 1807.

EXECUTION—SERVICE AFTER RETURN DAY—TRESPASS.

An execution after the expiration of the time within which it is made returnable, is of no force, and an arrest under it is a trespass.

This was an action of trespass for false imprisonment [by Isaac Stoyel against John Lawrence]. Plea, not guilty. On the trial it appeared that one Job Smith had obtained a judgment, before the Windham county court, against the plaintiff, and had taken out an execution, dated the 13th of May, 1804, returnable according to law.[2] On the 25th of August, 1804, Lawrence was deputed by the sheriff of Windham county to execute it. On the 31st of July, 1805, Lawrence, with the assistance of Adams, arrested the plaintiff, by virtue of that execution, and kept him in confinement one or two days, when he paid the execution and was released. The only question in the case was whether the execution gave the officer any authority to make the arrest.

Mr. Ingersoll, for plaintiff, contended that, the time within which the execution was returnable having expired, it became a dead letter, and that the arrest under it was a trespass.

Mr. Daggett, for defendants, contended that the time limited for the return of an execution is only for the benefit of the creditor. When that time is expired the officer becomes liable to him. But with regard to the debtor it makes no difference. His indebtedness is the same till the execution is satisfied. He may be taken at any time. The right of the creditor to renew his execution at pleasure shows that the limitation is in his favor. Further, an officer may justify under a process which is either irregular or erroneous, provided it be not absolutely void. In the following cases it was holden that though the process was irregular, yet it was sufficient for the sheriff to make the arrest, and therefore he was liable for an escape: Howard v. Pitt, 1 Salk. 261; Shirley v. Wright, Id. 273; 2 Salk. 700; 2 Ld. Raym. 775; Ognell v. Paston, Cro. Eliz. 165; and Bushe's Case, Id. 188. A capias ad satisfaciendum, made returnable at a day which falls out of the term is not void, but only liable to be set aside, upon motion, for irregularity. Campbell v. Cumming, 2 Burrows, 1187. In this state an execution after the return day is not more irregular than the executions in the cases cited. The reason why, in England, an execution may not issue after the expiration of a year and a day, without a scire facias, is that the court concludes, prima facie, that within that time the judgment is satisfied. Here, a scire facias to obtain execution is unknown; but in lieu of it we take out an alias, and if the judgment has been satisfied the debtor is entitled to an audita querela.

Mr. Ingersoll, in reply, said there was a material difference between an execution in England after a year and a day, and an execution here which has run out. In the former case the officer does not know but that the execution had been stayed by a writ of error, in which case it would be good; it is good upon the face of it; and he ought not to be hurt for executing it. But in the latter case the execution is bad upon the face of it. He knows that it can give him no authority.

EDWARDS, District Judge, after remarking to the jury that the case depended upon a mere question of law, directed them to find for the plaintiff. The execution, he said, gave the officer no authority whatever, and consequently formed no defense. A verdict was found for the plaintiff accordingly.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] By statute "all writs of execution shall be made returnable within sixty days, or to the next court (in case sixty days are remaining between the date of the execution and the next court), at the election of him that prays it out." 1 St. Conn. tit. 63, c. 1, § 10.

Case No. 13,518.

STRAAS v. MARINE INS. CO.

[1 Cranch, C. C. 343.][1]

Circuit Court, District of Columbia. July Term, 1806.

MARINE INSURANCE—VALUED POLICY—MISREPRESENTATIONS—NEUTRALITY—DEPOSITIONS.

1. Upon a valued policy, a misrepresentation as to the age and size of the vessel will not avoid the policy. If there be no warranty of neutrality, the policy covers belligerent risks.

2. When depositions have been taken by one party without notice to the other, the cause may be continued.

Covenant on a policy upon the brig Hope, whereby the defendant, in consideration of a premium of seventeen and an half per cent. "paid by W. Hodgson for G. F. Straas and others, of Richmond," insured eight thousand dollars on the brig Hope, a prize vessel, at and from her last port of lading in St. Domingo, to a port of discharge in the Chesapeake, valued at ten thousand dollars. The loss was stated to be by capture by British vessels, and condemned in Jamaica. Issue was joined on the 1st, 2d, 3d, 7th, and 8th pleas, and demurrer to the 4th, 5th, and 6th. The 4th plea was, that to induce the defendants to sign and seal the policy, insuring eight thousand dollars on the vessel, the plaintiff represented that she was a stout, well-built vessel of about 250 tons burden, in good order

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

and well found, &c., built in Massachusetts, and from six to seven years old; and that in consequence of such representation, and placing full faith and credit therein, they signed, sealed, &c., and they aver that she was not about 250 tons burden, but of less burden than 165 tons, namely, about 162 tons, and was not from six to seven years old, but more than eight and a half years old, and that she was not worth eight thousand dollars, and was built in the province of Maine, in Massachusetts, in 1790, and this they are ready to verify, &c.

Mr. Hiort and Mr. Swann, for the plaintiff, contended that the plea was bad because it does not aver that the misrepresentation was fraudulent or material to the risk, and because there is always an implied warranty of seaworthiness which covers the objection as to the age and tonnage of the vessel; and the value is fixed by the policy. 5 Bac. Abr. (Guillim) 444; Marsh. Ins. 200, 252, 335, 336; Lewis v. Rucker, 2 Burrows, 1171; Trevivan v. Lawrence, 1 Salk. 277; Marsh. Ins. 341; Park, Ins. 207, 322, 397; Barnewall v. Church, 1 Caines, 217; Craufurd v. Hunter, 8 Term R. 23; Page v. Fry, 2 Bos. & P. 243.

C. Lee and E. J. Lee, for defendants, contended that, if the plea alleges facts which in law amount to fraud, it is not necessary to aver fraud. The misrepresentation as to the size and age of the vessel went to support the false allegation that it was worth eight thousand dollars, when in fact it was worth only three thousand. 1 Wooddeson, 207, 208; Filles v. Brutton, Park, Ins. 182, 204; Marsh. Ins. 586; De Ghettoff v. London Assur. Co., 4 Brown, Parl. Cas. 436; Marsh. Ins. 348; Stewart v. Dunlap, Park, Ins. 236; Marsh. Ins. 208, 350; Heyward v. Rodgers, J. P. Smith [Eng.] 289; Marsh. Ins. 200, 201, 601; Bright v. Eynon, 1 Burrows, 396; Marsh. Ins. 335, 339, 340; Park, Ins. 195; Sherley v. Wilkinson, Doug. 306, in note; Macdowall v. Fraser, Id. 260; Marsh. Ins. 348; Millar, 46, 47, 52; Park, Ins. 3; 2 Atk. 254; Har. Ch. 21; Burn, Ins. 20; Shep. Touch. 58, 59; 1 Burrows, 474; Wesk. Ins. 226; 2 Bl. Com. 458; Carter v. Boehn, 3 Burrows, 1909; Chit. 8, 9; 1 Fonbl. (Ed. 1805) 122, 230, note; Collins v. Blantern, 2 Wils. 347.

The 5th plea was, that the vessel was captured by the British, and was the property of the enemy of Great Britain; and the 6th plea was, that the vessel was the property of a French citizen and that there was war between Great Britain and France, and that the vessel was captured by the British, etc. The answer to these pleas was that the policy covered war risks, there being no warranty that the property was neutral.

Mr. Swann, for plaintiff, cited Christie v. Secretan, 8 Term R. 192; Barnewall v. Church, 1 Caines, 217, 237.

E. J. Lee, for defendant, cited 1 Rob. 11, and Anon., Skin. 327, that naming the insured as of Richmond, was an implied representation that the property was neutral.

THE COURT (nem. con.) decided that the three pleas were all bad;—the fifth and sixth because the risks and persons there stated were covered by the policy. THE COURT did not give the reasons of their opinion on the 4th plea.

On motion of the plaintiff's counsel, THE COURT continued the cause until the next term, because the defendants had taken depositions under the act of congress, without notice to the plaintiff, which depositions were first opened in court at this term. See the case of Dade v. Young [Case No. 3,534], in this court at June term, 1803.

Upon the trial of the issues of fact, at November term, 1807, it appeared that the first plea was general performance, with general replication and issue. The second plea denied the capture and condemnation, as stated in the declaration. The third plea denied the seaworthiness of the vessel. The seventh plea averred the same misrepresentation which was stated in the fourth plea, and averred it to be material to the terms of this contract of insurance; and the issue was joined upon the materiality. The eighth plea was that the plaintiff had no interest in the vessel.

C. Lee, for defendants, objected to the plaintiff's reading any of the proceedings of the court of vice-admiralty in Jamaica, except the sentence of condemnation. Russel v. Union Ins. Co., 4 Dall. [4 U. S.] 424.

Mr. Swann, contra, was stopped by THE COURT, who said that the point had been decided by this court in the case of Croudson v. Leonard [Case No. 3,439], in March, 1806. And see, also, Lambert v. Smith [Id. 8,028], at November term, 1806, in which last case the court decided that the plaintiff might give in evidence to the jury, the depositions and other evidence contained in the proceedings of the court of vice-admiralty, to show that the grounds of condemnation stated in the sentence were not true.

THE COURT now said that they did not mean to say that the depositions in the record of vice-admiralty were evidence in chief of the facts therein stated, but were only evidence of the real grounds of condemnation, so that the jury may judge of the weight which the sentence ought to have in the question whether the policy was violated by the plaintiff.

Mr. Lee then objected to the policy being admitted as evidence in this action, which is in the name of Straas alone, but the policy is in the name of William Hodgson for Straas and others, of Richmond. The suit should have been in the name of Hodgson, the trustee. Cabell v. Hardwick, 1 Call, 358; Peter v. Cocke, 1 Wash. [Va.] 257.

Mr. Swann, contra. The plea of performance admits the execution of the policy and all the obligations arising out of it. 4 Bac. Abr. 54; System of Pl. 321; Grills v. Mannell, Willes 380.

THE COURT decided that the policy was

substantially set forth in the declaration according to its legal effect.

A deposition had been read by the plaintiff's counsel; and C. Lee, for defendants, offered to read a prior deposition of the same witness, taken informally by the plaintiff and filed, but which the plaintiff had not offered to read in evidence. The defendants waived all objection to its informality, but the plaintiff refused to consent to its being read.

THE COURT (nem. con.) refused to permit the defendants to read it to the jury.

Mr. Swann, for plaintiff, prayed to the court to instruct the jury that, if the plaintiff was at all interested in the vessel he has a right to recover the whole sum insured. Park, Ins. 259, 263, 265, 300, 304; Lewis v. Rucker, 2 Burrows, 1167; Grant v. Parkinson, Perk. 305; Da Costa v. Firth, 4 Burrows, 1966.

Mr. Lee, contra, cited Marsh. Ins. 200, 612; Goddart v. Garrett, 2 Vern. 269; Le Pypre v. Farr, Id. 716, 717; Craufurd v. Hunter, 8 Term R. 13; Thellusson v. Fletcher, Doug. 314.

THE COURT decided that upon a valued policy, and a total loss, the plaintiff is entitled to recover the whole sum insured, if he prove that he has a bona fide interest in the property insured.

Upon the issue on the seventh plea, Mr. Swann, for plaintiff, prayed the court to instruct the jury that, if the vessel was seaworthy, the misrepresentation was not material to the said contract of insurance.

C. Lee, contra, cited Unwin v. Wolseley, 1 Term R. 674; Macdowall v. Fraser, Doug. 260; Collins v. Blantern, 2 Wils. 347; Hayne v. Maltby, 3 Term R. 438; 1 Wooddeson, 307; Marsh. Ins. 248; 1 Fonbl. 230; Jenk. 254; Bull. N. P. 173; 2 Vent. 107; Kent v. Bird, 2 Cowp. 585; Hardr. 464; Pawson v. Watson, 2 Cowp. 785; Carter v. Boehn, 3 Burrows, 1905.

Mr. Swann, in reply, cited Park, Ins. 206; Doug. 271; Macdowall v. Fraser, Id. 260; Marsh. Ins. 335, 336.

THE COURT (DUCKETT, Circuit Judge, absent) refused to give the instruction last prayed by Mr. Swann, and the plaintiff became nonsuit. See Hodgson v. Marine Ins. Co. of Alexandria [Case No. 6,567].

Case No. 13,519.

In re STRACHAN.

[3 Biss. 181; [1] 4 Chi. Leg. News, 145.]

District Court, W. D. Wisconsin. Jan. Term, 1872.

BANKRUPTCY—PURCHASER OF CLAIMS—RIGHT TO PROVE—INTEREST—BANKRUPTCY FORMS.

1. A party who in good faith purchases claims against a bankrupt with the intention of stopping proceedings and giving him time, should not be deprived of participation in the estate.

2. To enable him to prove them, however, he should take an assignment. A simple receipt of payment is not sufficient.

3. Such claims should be proven as of date of adjudication, but may draw interest to date of actual payment.

4. The bankrupt act [of 1867 (14 Stat. 517)] should not be so strictly construed as to prevent a debtor from making every effort to extricate himself from bankruptcy proceedings.

5. The forms, prescribed in the general rules are not binding, but may be altered to suit circumstances.

In bankruptcy. Objection by creditors to proof of debt by William T. Henry, against the estate, certified to the court by the register.

J. M. Smith, for Mr. Henry.

E. P. Weber, for opposing creditors.

HOPKINS, District Judge. The fact that the bankrupt owed the debts sought to be proven, is not disputed, and if it were, the proof is sufficient to satisfy me that he did owe them at the time of the commencement of the bankruptcy proceedings against him.

The main objection urged to the allowance of the claims is, that they were bought by him after the filing of the petition in bankruptcy, and such is the fact, except as to an accommodation acceptance of $3,000 which was given before that time. At the time of filing the petition a very large proportion of the bankrupt's indebtedness was evidenced by promissory notes and bills of exchange, all of which, so far as known, were purchased by Mr. Henry before the adjudication.

After the proceedings were commenced, he says he thought that, if they could be discontinued, the bankrupt could pay all his debts and have something left; but, if forced through bankruptcy, his estate would not pay all; that, acting upon that hypothesis, he undertook to buy up all the debts at eighty cents on the dollar, and end the proceedings; that after buying up over $50,000 worth (being all the undisputed claims,) he found some which were not acknowledged as just by the bankrupt, and which the parties being unable to adjust satisfactorily, prevented him from carrying out his purpose. Thereupon he decided to let the proceedings go on, and Mr. Strachan was accordingly by default, on the 20th day of May, 1871, adjudged a bankrupt.

The parties representing such disputed claims (which are still in progress of trial and not yet allowed) object to Mr. Henry's being allowed to prove his claims, because he bought them after the filing of petition in bankruptcy. He owns all the claims against the bankrupt except the claims of the parties opposing his right to prove.

The testimony satisfies me that he, in good faith, undertook to buy up all the claims against the bankrupt with the intention of stopping these proceedings and giving him time to pay them, and was only prevented

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

from doing so by the presentation of some claims that were disputed by the bankrupt, and not being able to settle and purchase those, the continuance of the proceedings already pending, or the commencement of new ones, he thought, was unavoidable. I do not see that in so doing he violated any of the provisions of the bankrupt act, nor did he interfere with the rights of the creditors whose claims he did not buy, nor did his acts in any manner affect injuriously their rights in the bankruptcy proceedings.

I do not think the act should be construed so strictly as to prevent the bankrupt from making any effort to extricate himself from the bankruptcy proceedings, and if he can find a friend to buy up his debts, for the purpose of giving him time to convert his property into money to pay them, I think he should be allowed to do so. I do not think a person who honestly undertakes to purchase up the debts for such purpose, after he has purchased the principal part, as in this case, and then fails because some party presents a claim which is denied by the bankrupt, should be deprived of the right of participation in the estate of the bankrupt. The act does not require any such construction, and certainly the general interest of both debtor and creditor is opposed to any such interpretation.

The bankrupt act encourages all honest efforts of a debtor to pay his debts, and to give it any other construction would be to condemn the whole act as false and oppressive in theory and fact.

The clause in the twenty-second section, which provides that the creditor must prove "that the claim was not procured for the purpose of influencing the proceedings under this act," I was at first inclined to think prohibited the transfer of claims altogether after the commencement of proceedings, but upon further reflection I concluded that it did not relate to transfers after the filing of petition any more than before, and that it was not intended to interfere with ordinary transfers, but only such as were procured for the purpose of influencing the proceedings in bankruptcy.

And as the testimony fails to show that Henry procured these for any such purpose, I think his purchase is good.

The argument drawn from the form of proof, No. 22, I do not regard as of much force. Those "forms" are not prescribed in the act, and general rule 33 declares that the "forms" annexed "shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

It does not, therefore, follow, by any means, that if a creditor cannot make that particular deposition, that his claim is to be rejected. The "forms" may be altered to suit circumstances.

As the bankrupt owed these debts at the time of filing the petition, they were provable under the act (section 19) and will, therefore, be barred by his discharge.

Now, if no party can prove them by reason of such change of ownership, then they will be wiped out without any part being paid. I cannot yield my assent to such a construction of the bankrupt act in cases where the claims, as in this case, were bought in good faith.

I therefore hold that Mr. Henry, as the owner and holder of these notes and bills of exchange, may prove them as against the bankrupt's estate, notwithstanding he purchased them after the commencement of the bankruptcy proceedings.

I find that a like view has been taken of the act in Re Murdock [Case No. 9,939]; Ex parte Davenport [Id. 3,586]; and in Re Frank [Id. 5,050].

But this question is not raised for the first time under the present bankrupt act. It was presented under the act of 1800 [2 Stat. 19], and Justice Washington, in Humphries v. Blight's Assignees [Case No. 6,870], in deciding it says: "We have no doubt upon the right of the assignee of the note in this case, to prove the debt under the commission, and to receive a dividend. The certificate of the bankrupt would be a bar to a recovery in an action by the present holder of the note against him. And wherein a certificate will be a bar, the right to prove the debt under the commission must be unquestionable."

The transfer of the note in that case was after the commission of bankruptcy had issued; after the proceedings were commenced, as in this case.

That case came before the court again, and the same learned judge said: "It would be unreasonable that such an assignee should not be allowed to prove, under the commission, since the debt would most certainly be barred by the certificate, being a debt due at the time of the bankruptcy, and such an one as might have been proven under the commission. It can produce injury to no person, as it can make no difference to the assignees whether the debt be proved as due to A, or to his assignee; and as they ought not to be injured, so they ought not to derive a benefit from this change, not of the debt, but of the creditor."

The act of 1867 provides, it is true, that a party shall forfeit his right to prove a debt, when he acts in violation of its provisions, but I have found in this case that Mr. Henry did not so purchase these claims, which brings this case within the rule laid down by the eminent judge who decided that case.

And that reasoning applies with equal force to a case arising under the act of 1867 as under the act of 1800. So that, following that decision as authority, it settles the questions involved here in favor of Mr. Henry's right to prove, and be allowed the amount of the notes and drafts, although purchased after the filing of the petition in bankruptcy.

But I do not think the accounts that he claims to own and prove are assigned to him

in a way to entitle him to prove them. He has no assignment of them, simply a receipt of payment, and if that was the transaction he might have a claim for money paid as against Strachan, but that cause of action would not accrue until the payment, which was after the commencement of bankruptcy proceedings, which would not be a debt provable under the act, nor be affected by the discharge.

This view excludes the account of M. E. Fuller & Co., $652.33; of Nichols, Shepherd & Co., $366.96; and that of E. P. Dickey, $91.53. The drafts of bankrupt drawn upon Henry in favor of Boal, Andrews & Cook, for $34.05, dated April 25, 1871, and in favor of Johnson, Murphy & Co., for $1,500, dated May 19, 1871, and accepted and paid by him, are not provable, as they were drawn and paid after the commencement of bankruptcy proceedings.

The bankrupt's liability to Henry arose upon his acceptance and payment of the drafts, and Mr. Henry is not, as the proof now stands, entitled to be subrogated to the rights of the creditors to whom the drafts were given. If he intended to have been, he should have taken an assignment of their claims.

The counsel for the opposing creditors contends that the debts should be proven as of the date of the adjudication; I am inclined to adopt that as the proper construction of the 19th section of the bankrupt act.

But the claims will, of course, draw interest, since then and up to the payment, at the agreed rates, where it was agreed upon, and when not, at the legal rate.

I therefore find and adjudge that there was due from the bankrupt to William T. Henry, on the 20th day of May, 1871, the day of the adjudication, the sum of $72,507.95, and order and direct the register to enter him in his minutes and list of creditors, as a creditor to that amount, and to so certify to the assignee in this case.

Case No. 13,520.

STRACHEN et al. v. CLYBURN et ux.

[3 McLean, 174.] [1]

Circuit Court, D. Illinois. June Term, 1843.

COURTS—FOLLOWING STATE PRACTICE—REMEDIES.

The circuit courts of the United States adopt the local remedies of the respective states.

[This was an action at law by Strachen and Scott against Clyburn and wife.]

Mr. Spring, for plaintiffs.

Mr. Butterfield, for defendants.

OPINION OF THE COURT. This is a scire facias on a mortgage regulated by the act of the 17th of January, 1825 [Laws Ill. 1824-25, p. 157]. A motion was made to strike this case from the docket, on the ground that the act referred to is local, and does not apply to the courts of the United States. The act named gives a remedy by sci. fa. It provides that two nihils shall amount to a service, which shall authorise the plaintiff to proceed to judgment. This court under various acts of congress and by virtue of its own rules, adopts the remedies authorised in the state courts, though they may be local and peculiar in each state. In Kentucky, a writ of right, modified by statute, is a common remedy; and that remedy is used in the circuit court of the United States. Under the statute, the plaintiffs had a right to issue a scire facias on the mortgage, and the motion is consequently overruled.

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

Case No. 13,521.

STRAIN et al. v. GOURDIN.

[2 Woods, 380; [1] 11 N. B. R. 156.]

Circuit Court, S. D. Georgia. Nov. Term, 1874.

APPEAL—EXCEPTIONS—WHEN TAKEN—STATEMENT OF EVIDENCE — CHECK — BANKRUPTCY — SUBSTITUTION—RATIFICATION.

1. A bill of exceptions which shows that the exceptions to the rulings of the court below were not taken at the trial, but were taken for the first time four days after the verdict and judgment, will not, as a matter of right, be considered by the court.

2. A statement made by counsel for plaintiff in error of what he understood the evidence to be, on the trial of the cause in the court below, which is not made a part of the bill of exception, and is not verified by the signature of the judge, forms no part of the record, and no matter how formally certified by the clerk, will not as a matter of right be considered by the court on error.

3. The drawing of a check and the delivery thereof to the payee, without presentation, acceptance or payment, do not transfer from the drawer to the holder of the check so much of the fund drawn on as is equal to the sum named in the check.

[Cited in Re Smith, Case No. 12,992.]

[Cited in Harrison v. Wright, 100 Ind. 524. Distinguished in National Park Bank v. Levy, 17 R. I. 750, 24 Atl. 779.]

4. Advice of counsel given to debtors in failing circumstances, that unless they paid their depositors, they would be liable to a criminal prosecution under the state laws, does not take the case out of the operation of the 35th section of the bankrupt act [of 1867 (14 Stat. 534)], and make a payment to the depositors a good one.

5. A debtor can not, without the consent of his creditor, substitute another person in his stead as the debtor.

6. The ratification by one, of the unauthorized act of another, can not have a retroactive efficacy so as to defeat the rights of third persons which have intervened between the act ratified and the ratification.

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

R. E. Lester, for plaintiffs in error.

Geo. A. Mercer, for defendant in error.

WOODS, Circuit Judge. The record in this case sets out the pleadings and process, the

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

verdict, judgment and certain exceptions to the rulings of the court upon the admissibility of the evidence, and the charge of the court to the jury. The declaration alleges the appointment of R. N. Gourdin as assignee of Ketchum & Hartridge, and avers that said A. & R. Strain are indebted to him as such assignee in the sum of $2,250, because on June 1, 1873, the said Ketchum & Hartridge, being indebted to said A. & R. Strain in the amount aforesaid, and being insolvent and in contemplation of insolvency within four months of the filing of the petition in bankruptcy against them, and with a view to give a preference to said A. & R. Strain, paid over to them the said sum of $2,250, said A. & R. Strain having at the time reasonable cause to believe that said Ketchum & Hartridge were insolvent, and that said payment was made in fraud of the bankrupt act; and said A. & R. Strain received said money and appropriated it to their own use, and thereby became indebted to the plaintiff in said amount. To this declaration the defendants pleaded the general issue. The verdict and judgment were for the plaintiff in the court below for the amount claimed, and the judgment was rendered on April 25, 1874.

The bill of exceptions states that the defendants excepted to the ruling out of certain evidence offered by defendants, and to certain charges of the court, but it does not show what the evidence ruled out was, nor does it set out any of the evidence in the case by which this court can judge whether the charges given were correct or not. It also appears from the bill of exceptions that the exceptions were not taken at the trial, but on April 29, 1874, four days after the verdict and judgment. It is impossible for this court to say, upon this bill of exceptions, whether the court below fell into any error or not. We cannot say whether the evidence ruled out was properly ruled out or not, because there is no statement to show what the evidence was or for what purpose it was offered. Neither can we say whether the charge of the court was correct or not, for the facts to which it is applicable are not shown. Error is never presumed; it must be made to appear. Cliquot's Champagne, 3 Wall. [70 U. S.] 140. But it appears from the bill that the exceptions were taken four days after verdict and judgment. To be effectual, they must be taken at the trial, although the bill itself may be signed after the trial. Bradstreet v. Potter, 16 Pet. [41 U. S.] 317; Stimson v. Westchester R. Co., 3 How. [44 U. S.] 553; Pomeroy's Lesse v. Bank, 1 Wall. [68 U. S.] 592, 599, 600; French v. Edwards, 13 Wall. [80 U. S.] 506. There is, in the record, a petition for a writ of error, which purports to set out all the evidence in the case. This court can take no notice of this. It is not made a part of the bill of exceptions; it is not verified by the signature of the judge, but is simply the statement of the counsel for plaintiffs in error, of what they understood the evidence to be. This forms no part of the record, no matter how formally certified by the clerk, and this court is not bound to take notice of it. Suydam v. Williamson, 20 How. [61 U. S.] 428, 433, 437, 440; Pomeroy's Lessee v. Bank, 1 Wall. [68 U. S.] 592; Young v. Martin, 8 Wall. [75 U. S.] 354; Thompson v. Riggs, 5 Wall. [72 U. S.] 675; Reed v. Gardner, 17 Wall. [84 U. S.] 409.

Although the bill of exceptions is ineffectual to present the points to which exception was taken, I have looked into the statement of the evidence presented by counsel for the plaintiffs in error, to determine whether the court below did in fact fall into error. It appears from this statement, that A. & R. Strain, living at Darien, Georgia, had on deposit with Ketchum & Hartridge, before their bankruptcy, the sum of $2,250. Early in April, 1873, Ketchum & Hartridge became embarrassed. On April 14th, they became satisfied that they must stop payment, and on that day, took legal advice about the propriety and duty of providing for the payment of their depositors, and were advised that they would be liable to a criminal prosecution under the state laws if they failed to pay their depositors. On the 15th of April, they procured certificates of deposit in the Savannah Bank & Trust Company, for the amounts due their several depositors, among them one for the amount due A. & R. Strain and payable to their order. On the 16th of April, Ketchum & Hartridge telegraphed to A. & R. Strain as follows: "We have stopped payment; you will lose nothing; where shall we deposit your funds?" This was the first intimation that A. & R. Strain had of the failing condition of Ketchum & Hartridge. To this, on the same day, they replied: "Place the funds in the Southern Bank of Georgia." Thereupon Ketchum & Hartridge turned over the certificate of deposit to the Southern Bank of Georgia, where it was placed to the credit of A. & R. Strain. The defendants below offered in evidence four checks drawn by them on Ketchum & Hartridge, amounting, in the aggregate, to $1,312; the first dated April 2d and the last April 14th, but it was conceded that none of them had been presented or paid. These checks were ruled out by the court. On these facts and the charge of the court, as set out in the paper called the petition for writ of error, the following questions appear to have been raised. Were the checks drawn by A. & R. Strain admissible in evidence to show an appropriation pro tanto, before the failure of Ketchum & Hartridge of the funds deposited with them? In other words, does the simple drawing of a check and delivery thereof to the payee, without presentation, acceptance or payment, transfer the fund drawn on, to the amount of the check, from the drawer to the holder of the check? The authorities answer this question in the negative. Morse, Banks, 471; Mandeville v. Welch, 5 Wheat. [18 U. S.] 286. See Bank of Republic v. Millard, 10 Wall. [77 U.

S.] 157, and numerous cases there cited. These checks were offered for the purpose of reducing the amount due from Ketchum & Hartridge, at the time of their failure, to A. & R. Strain. It is clear, upon the authorities cited, they were not admissible for that purpose, and were, therefore, properly ruled out.

The next question presented is, whether the legal advice received by Ketchum & Hartridge that unless they paid their depositors, they would be liable to a criminal prosecution, would take the case out of the operation of section 25 of the bankrupt act, and make the payment to their depositors a good one. There seems to be no warrant in the language of the section for making an exception of such a payment. "It is wholly immaterial whether the preference was voluntary or involuntary, or by reason of threats or coercion. The voluntary or involuntary character of the transaction is not important." Foster v. Hackly [Case No. 4,971]; Wilson v. Brinkman [Id. 17,794]; In re Batchelder [Id. 1,098]; Giddings v. Dodd [Id. 5,405]; Sawyer v. Turpin [Id. 12,410]; Ex parte Ames [Id. 323].

The last point presented is whether the procuring by Ketchum & Hartridge, on the 15th of April, of a certificate of deposit in the Savannah Bank & Trust Company for the amount due from them to A. & R. Strain, and payable to their order, was a payment to them. The plaintiffs in error claim that it was, and as it was made before they had any reason to suspect the insolvency of Ketchum & Hartridge, that it was a good payment. I cannot coincide in this view. Ketchum & Hartridge, being the debtors of A. & R. Strain, could not, without the consent of A. & R. Strain, substitute another person in their place as the debtor. If after Ketchum & Hartridge had procured the certificate of deposit for A. & R. Strain, and before any ratification, the Savannah Bank & Trust Company had failed, A. & R. Strain could still have held Ketchum & Hartridge liable. But it is claimed that the subsequent ratification by A. & R. Strain, of what had been done by Ketchum & Hartridge in taking the certificate of deposit, relates back to the date of the certificate, and makes it a payment as of that date. And as the certificate bears date before A. & R. Strain had any notice of the insolvency of Ketchum & Hartridge, the payment is a good one. "The general rule as to the effect of a ratification by one of the unauthorized acts of another respecting the property of the former is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification." Cook v. Tullis, 18 Wall. [85 U. S.] 338.

I think this case falls clearly within the qualification here laid down to the general rule. When the insolvency of Ketchum & Hartridge was brought to the notice of A. & R. Strain, on the 16th of April, the rights of other creditors instantly intervened, and they could ratify no previous payment to their prejudice. I am of opinion there is no error in the proceedings of the district court. Its judgment is therefore affirmed.

[See Case No. 4,320.]

Case No. 13,522.

STRANAHAN v. GREGORY et al.

[4 N. B. R. 427 (Quarto, 142).] [1]

District Court, D. Vermont. 1871.

BANKRUPTCY—INSOLVENCY—KNOWLEDGE OF CREDITOR—INTEREST AND COSTS.

A person is held to be insolvent when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation; hence, where creditors have accounts overdue seven or eight months, and finally have to resort to legal measures for the collection of them, they must be considered as having reasonable cause to believe their debtor insolvent, and money received under these circumstances must be paid to the debtor's assignee in bankruptcy, together with interest and costs of the proceedings instituted by said assignee for the recovery of the money.

[Cited in brief in Cook v. Whipple, 55 N. Y. 156; Noble v. Scofield, 44 Vt. 284.]

This is a petition in favor of Stranahan, assignee of Mark Bannister, bankrupt, praying that the defendants, Gregory & Co., be adjudged to pay to said assignee two hundred dollars, alleged to have been paid to Gregory & Co. by the bankrupt, in fraud of the bankrupt law [of 1867 (14 Stat. 517)]. Defendants' plea denies that they had any knowledge of the insolvency of the bankrupt, or that they had any reason to suppose that he was insolvent when the money was paid. It appeared from the evidence that Bannister, the bankrupt, had been for some years a small trader in Richford, in the northern part of Vermont. That he had been in the habit of buying goods of Gregory & Co., at Bennington, for two or three years. That the bills he made were payable in cash or on demand, and that for some time he paid them when presented. That some seven or eight months before the 15th of November, 1869, a balance had accrued against him of some two or three hundred dollars, and that Gregory & Co. repeatedly called upon him for the amount due, which he did not pay, but put them off by saying that he would as soon as he could. That in October, 1868, the custom-house officers seized at St. Albans, some ten hundred dollars' worth of butter belonging to Bannister, as smuggled property, which Bannister bonded and took back into his possession. That in November, 1868, the government prosecuted him for the penalty, about two thousand dollars, double the

[1] [Reprinted by permission.]

value of the butter seized, and attached all his real estate, and that both prosecutions are still pending in the court, which Miner, one of the defendants, well knew, Bannister having talked with him about it. It further appeared that Bannister had been for some eighteen months previous to the 15th of November, 1869, owing one Rublee, a trader in St. Albans, about twelve hundred dollars. That the demand was left with one Powell, an attorney in Richford, for him to collect as fast as he could. That Bannister had for some time been in the habit of paying Powell small sums of money, and turning out to him small demands against his (Bannister's) customers, to be collected and applied upon the Rublee debt, so that by the 1st of November, 1869, the debt had been reduced to some one or two hundred dollars. That about the 1st of November, 1869, Mr. Miner, one of the firm of Gregory & Co., procured a writ of attachment in their favor against Bannister, and with it went up to Richford for the purpose of securing their debt. That he went to Mr. Powell, the attorney aforesaid, for his advice in relation thereto. That upon consultation Powell advised him, that in consideration of the bankrupt law, he had better not attach, but to get security or payment some other way if he could. Powell told him about the Rublee debt, and how he had been collecting it. That thereupon Miner went to see Bannister. That Bannister paid him fifty dollars in money, and gave him an order for fifty dollars on a responsible person in Burlington, and Miner sold him a small bill of goods—twenty-five or thirty dollars' worth. That Miner then went back to Powell, told him what he had done with Bannister, and said that he would leave the writ with him (Powell), to be used if he thought advisable. That Miner came back to Burlington and presented the order, which the drawer refused to pay or accept, saying that he owed Bannister nothing. Miner at once wrote back to Powell that if Bannister did not immediately pay or otherwise secure the debt, to have the attachment served. When Powell received the letter he went to Bannister and informed him what he was directed to do. Bannister then paid the debt, partly in money and partly in demands against other persons, which Powell collected, and in a few days transmitted the amount, two hundred and six dollars, to Gregory & Co., at Burlington. It further appeared that all of Bannister's property, real and personal, amounted to about two thousand dollars in value; his only interest in real estate consisted of a bond for a deed of a house and lot in Richford. On the 15th day of February, 1870, the creditors of Bannister petitioned to have him declared a bankrupt, and such proceedings were had thereon, that, on the 5th day of April, 1870, he was so adjudged; and on the 27th day of April, Stranahan was duly appointed assignee. It appeared that Bannister absconded the 1st day of February, 1870, and has never returned. It further appeared that there had been no material change in his property or pecuniary condition, from the 1st of November, 1869, to the 15th of February, 1870. It further appeared that on the 15th day of February, 1870, Bannister was owing five thousand eight hundred dollars in addition to the claims which the government was prosecuting against him, and that his assets of every description were less than two thousand dollars. It was admitted that a demand was made of Gregory & Co., by the assignee, for the repayment of the money before the filing of this petition.

Dewey, Noble and Smith, for petitioner.
L. R. Englesby, for petitionees.

SMALLEY, District Judge. The evidence in this case shows clearly that Bannister, the bankrupt, was largely insolvent when he made the payment to Gregory & Co. That is not denied by the defendants, but they maintain that they had no knowledge of such insolvency, nor "reasonable cause to believe him to be insolvent." Miner, one of the defendants, testified that he did not know him to be insolvent, and did not suppose him to be so; and Gregory, the other defendant, does not seem to have known much about Bannister or his business in any way.

The question then is, did Miner, from this evidence, have reasonable cause to believe Bannister to be insolvent when he forced the payment of this money? What is the meaning of the word "insolvent," as used in the bankrupt law? It has often been defined by judges in different sections of the Union. I have never known or heard of more than one definition upon that question. The courts seem to have been much more unanimous upon that, than some other clauses of the bankrupt law. A person is held to be insolvent, when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation. This rule has been repeatedly laid down by this court, and I see no reason to change it. Apply that rule to this case. Bannister had been trading with Gregory & Co. some two or three years, and finally run behindhand between two and three hundred dollars, which had been overdue some seven or eight months. They had repeatedly called upon Bannister for payment, but unsuccessfully. They finally procured a writ of attachment, and went to Richford to get pay or security; went to an attorney there; consulted with him; were told that the attorney had been over a year collecting a debt of about twelve hundred dollars against Bannister; that he had received it in small sums at different times, partly in money and partly in demands turned out to him (Bannister) against his customers. The attorney advised Miner not to attach. The reason is

obvious. It might put Bannister into bankruptcy. Miner then went to Bannister, who gave him fifty dollars in money, and an order for fifty dollars more. Miner came home, leaving the writ with the attorney; presents the order; payment is refused; he then writes to the attorney to have the attachment served. The attorney thereupon goes to Bannister, who pays him Gregory & Co.'s debt, partly in money and partly in demands, and after collecting the demands he pays the proceeds of them over to defendants. It should be borne in mind, that Miner was before this fully informed of the government prosecutions against Bannister and his property. These facts in relation to Miner's knowledge are not disputed. Did they not, therefore, furnish Miner, in the language of the law, reasonable cause to believe him (Bannister) to be insolvent, within the meaning of the bankrupt law? Without multiplying words, I think it very clear that they did. I cannot doubt it.

It is therefore ordered and adjudged that Gregory & Co. pay to the assignee the sum paid them by Bannister on the 15th day of November, 1869, with interest, and the cost of this proceeding.

Case No. 13,523.

STRANG v. MONTGOMERY & E. R. CO.

[3 Woods, 613.] [1]

Circuit Court, M. D. Alabama. May Term, 1879.

RAILROAD COMPANIES—SALE UNDER DECREE—WHAT PROPERTY PASSES.

1. The railroad, and other property of a railroad company, which had for several years been in the hands of a receiver, was sold by a decree of the court, which directed a sale of the road, the franchises of the company, right of way, depots, rolling stock, tools and all other property of the company, real, personal and mixed. *Held*, that the purchaser was not entitled to the money, the surplus earnings of the railroad, in the hands of the receiver.

2. The purchaser was entitled to all cars, engines and other property placed on the railroad by the receiver, in the discharge of his duty, to carry on the business of the railroad and keep it in repair.

This cause was heard upon a petition filed therein by the Louisville & Nashville Railroad Company. The petition made the following averments: The Louisville & Nashville Railroad Company had purchased, since July 3, 1877, and was the owner of 965 first mortgage bonds of the Montgomery & Eufaula Railroad Company, and also 1,307 coupons for forty dollars each, and that said first-named railroad company was the legal and equitable owner of said bonds and coupons, and they had been allowed by the master. While the Montgomery & Eufaula Railroad Company was in the process of construction, it issued its bonds for $1,280,000, with interest coupons at eight per cent., and, under various statutes of the state of Alabama, procured the indorsement of the governor of the state upon said bonds, which indorsement had the effect to give the state a statutory lien on the railroad and other property of the railroad company, to secure the payment of the principal and interest of said bonds. Afterwards, in June, 1870, the said Montgomery & Eufaula Railroad Company executed a mortgage on its railroad and other property to secure an issue of bonds to the amount of $500,000. This mortgage expressly recognized the priority of the lien of the bonds for $1,250,000, indorsed by the state, on the property covered thereby. On May 10, 1870, Samuel A. Strang, trustee of said mortgage, filed his bill in this court for the foreclosure of the same, whereupon A. J. Lane was appointed receiver of the road and property of the defendant company, and at once took possession and control of said property, and possessed, used and employed said property, and conducted the business of said railroad, until May 12, 1879. On May 1, 1875, Mason Young, on behalf of himself and other first mortgage bondholders, filed his bill in this court to foreclose the statutory lien on said railroad, by which the first mortgage bonds were secured. [Case No. 18,166.] These two suits were consolidated, and a final decree made by this court, adjusting the claims of the parties and establishing their rights, and ordering a sale of the property of the defendant company, to pay this said first mortgage, and for that purpose directed the sale of "all the railroad of the Montgomery & Eufaula Railroad Company, and all the franchises, rights, privileges and immunities of said company, and all the property of said company, including road-bed, right of way, depots, workshops, tools and implements, warehouses and real estate of every description, together with all appurtenances thereunto belonging, its rolling stock, locomotives, cars, and all other property, real, personal and mixed, of any kind or description whatever." The original decree of sale was rendered July 3, 1877. Said decree was superseded by an appeal therefrom to the supreme court of the United States, which was dismissed about February 1, 1879, when application was made to this court for a supplemental decree, on February 22, 1879, to carry said original into execution, and said supplemental decree was then made by the court. In pursuance of said decree, all the property and franchises of said railroad company, as described in the decree of July 3, 1877, were advertised for sale, and sold at public sale, on May 1, 1879, to William M. Wadley of Georgia, for the sum of $2,120,000 cash, which has been paid. On May 6, 1879, the sale was confirmed, and the receiver was ordered by this court to deliver to the purchaser the property bought by him. Included in the property in the custody of

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

the receiver, at the time of the sale, were certain engines and cars and personal property, to be used in carrying on the business of the road, which were purchased by the receiver with the income and earnings of the road, earned while he carried on the same under the orders of the court, and before the day of sale, and a portion of said property was purchased by him after the decree of July 3, 1877, and with income and profits earned after that date. All the cars and rolling stock appertaining to said railroad, as well that purchased by the receiver as aforesaid as that turned over to him when he first took possession of the railroad, were by him delivered to William M. Wadley, the purchaser at said sale. On May 1, 1879, the day of sale, there was in the hands of the receiver the sum of $22,185.92, income and profits of said railroad, earned and collected between July 3, 1877, the date of the original decree of sale, and May 1, 1879, the day of sale. The amount bid at the sale of said railroad was insufficient to pay the first mortgage bonds and interest, and the amount still due thereon largely exceeded the value of said cars and other property purchased by the receiver, and the said sum of money in his hands.

The petition was filed by the Louisville & Nashville Railroad Company, in own behalf, and for the benefit of all other holders of first mortgage bonds. It claimed that the cars and other rolling stock, purchased by the receiver with the income and profits of the road, and by him placed upon and used in carrying on the business of the road, did not pass, by the sale of May 1, 1879, to Wadley, the purchaser, and that this property should be sold by order of the court, for the benefit of creditors of the road, according to their respective priorities, and that the purchaser, Wadley, should be required to deliver back said property when required, and that the said money in the hands of the receiver should be paid into the registry of the court, to be distributed among the creditors of the railroad company, according to their equities. Wadley, the purchaser, answered the petition, admitting substantially the facts set out in the petition, but claiming that not only did the cars and rolling stock, mentioned in the petition, pass to him by the sale, but also the money in the hands of the receiver at the date of the sale, and that his possession of the cars and rolling stock should not be disturbed, and that the court ought to order the said money in the receiver's hands to be turned over to him. Upon the issue of law, presented by these facts, the cause was submitted to the court.

Thomas G. Jones and D. S. Troy, for petitioners.

Henry C. Semple, for purchaser.

WOODS, Circuit Judge. The claim of the purchaser, that the money in the hands of the receiver passed to him by the sale of the railroad and other property of the Montgomery & Eufaula Railroad Company, has no ground to stand on. One of the main purposes in the appointment of a receiver is, that the income of the railroad, so far as not used in the preservation of the property and conducting the business, may be applied to the payment of its mortgage creditors. If surplus earnings come into the hands of the receiver, they ought to be distributed to the creditors of the railroad company, in the order of their priorities. Such is the constant practice of courts of equity. The surplus earnings of a railroad, in the hands of a receiver, are not the property of the railroad company, and are not included in a general description of its property. The possession of the money is in the court, and the equitable title to it is in the creditors of the railroad company. Thus, in American Bridge Co. v. Heidelbach, 94 U. S. 801, the supreme court says: "In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed and possession delivered to him. In either case, the income would thereafter have been theirs." This surplus in the hands of the receiver could not, therefore, be properly described as the property of the railroad company, because it was not its property. A court should not be presumed to order so futile a thing as the selling of money, unless its decree to that effect is clear and specific. The decree of sale in this case specifies as the property to be sold, the railroad and franchises and immunities of the company, and all its property, including road-bed, right of way, depots, shops, tools, rolling stock, real estate and all other property, real, personal, and mixed. Such a description of property does not apply to money. Under the celebrated rule, "that when particular words are followed by general ones, as if, after an enumeration of second classes of persons and things, there is added 'and all others,' the general words are restricted in meaning to objects of the like kind with those specified," it is clear that money is not included in the property ordered by the court to be sold. The title to the money did not pass to the purchaser of the railroad, because the money was not the property of the railroad company, and because, even if it had been, it is not fairly included in the description of the property ordered to be sold. So much of the prayer of the petition as asks that this surplus fund be paid into the registry of the court for distribution among the creditors of the railroad company, must be granted.

The next question to be settled is, did the cars and other rolling stock purchased by the receiver from the income of the road, pass, by the sale, to the purchaser? The mortgage which was foreclosed in this case covered not only the railroad and other real

property, but also the cars, engines and other rolling stock, and all descriptions of personal property owned by the railroad company, or to be thereafter acquired. The road and its equipments constituted the complete and entire thing which was covered by the mortgage. The road, on the one hand, and the equipments on the other, were useless unless held and used together. One of the purposes to be accomplished in the appointment of a receiver, was the preservation of the mortgaged property. This could only be done by repairing the track, and replacing the engines and cars when required. Money expended for either of these purposes becomes incorporated into the corpus of the mortgaged property. Money expended in repairing or rebuilding a bridge, and money expended in repairing a locomotive or replacing one that had been destroyed or worn out, both stand on the same footing. Such expenditures are necessary to the preservation of the mortgaged property, and enter into its corpus. The claim of the petitioners is, that after the road passed into the hands of the receiver, all its income and profits become their property by an absolute title, and, therefore, that the engines and other property purchased with such income and profits, vests in them, and do not become a part of the mortgaged property.

What are the creditors entitled to out of the income and profits of the railroad in the hands of a receiver? Clearly, only to the surplus after paying the expenses of conducting the business of the railroad, and preserving the property and keeping it in working condition. The receiver has the power, and it is his duty, even without an order of the court, to apply so much of the income of the property as may be necessary to its care and preservation. He could do this in spite of the mortgagees. But in this case, where the order of the court directed him to use the road and carry on its business, and keep it in repair, there can be no question as to his right and duty. All outlays made by him in good faith, in the ordinary course of the business of the road, with a view to advance and promote its interest, and to render it profitable and successful, may be allowed in passing his accounts. Such outlay may include, not only the keeping the road and its buildings and rolling stock in repair, but also providing such additional accommodations and stock as the necessities of the business may demand. Cowdrey v. Railroad Co. [Case No. 3,293]. If the receiver has the right to do these things, to use the earnings in repairs and replacements of the road and its equipment, how can it be said that the mortgagees are entitled to the gross income? Can they demand that no money shall be expended in repairs? If they cannot, it is because they are not entitled to such part of the income as is necessary to keep the property in repair. They are entitled to the net income. That portion of the receipts which is expended in carrying on the business of the road, and in the preservation of the property, is not income. The income and profits is the surplus after all expenses and repairs and necessary replacements have been made. The mortgagees are entitled to that surplus, and nothing more. These bondholders might as well claim that a bridge rebuilt by the receiver did not pass by the sale, as to claim that engines and cars put upon the road, and necessary to keep up its equipment and do its business, did not pass. Money so expended is no more income and profit than money paid to engineers and brakemen for their services. There is no consideration which would justify the court in holding that the purchasers of the mortgaged property have not acquired title to the rolling stock bought by the receiver. It was as much a part of the mortgaged property as the iron rails put on the track by him. It enhanced the value of the property. The railroad brought a larger sum at the sale, by reason of the fact that this rolling stock had been placed upon it. The mortgagees have received the benefit of this property in the increased price which the railroad brought at the sale. They cannot keep the price of the property and claim the property too.

In accordance with these views, I must hold that the purchaser is entitled to the engines, cars and other personal property referred to in the petition, and that so much of the prayer of the petition as asks that the purchasers be required to deliver up said property, in order that it may be sold again, must be denied.

STRANGE (KELLY v.). See Case No. 7,676.

Case No. 13,524.

STRANGE v. REDFIELD.

[Cited in Hutton v. Schell, Case No. 6,961. Nowhere reported; opinion not now accessible.]

Case No. 13,525.

The STRANGER.

[1 Brown, Adm. 281;[1] 3 Chi. Leg. News, 217; 4 Am. Law T. Rep. (U. S. Cts.) 161; 13 Int. Rev. Rec. 150.]

District Court, E. D. Michigan. March, 1871.

TUG-BOATS—THEIR LIABILITIES AND DUTIES—PRACTICE IN ADMIRALTY.

1. Tugs, though not liable as common carriers, are bound to the exercise of ordinary skill and diligence in taking up, arranging and managing their tows.

2. It is also the duty of vessels in tow to use all possible means to avoid injury, and where injury ensues, to do all in their power to make the damages as light as possible.

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

3. A tug, using ordinary care, is not liable for the sudden and unexplained sheering of the tow to the right or left.

4. The admissions of a party to a suit may be given in evidence as independent testimony, though he has been sworn as a witness, and no impeaching questions asked him.

5. The statute permitting parties to be sworn has not changed the practice in this regard.

This was a libel against the tug Stranger, for unskillful towing of the schooner Monteagle through the Sault Ste. Marie canal on the 24th of June, 1868, in consequence of which she was caused to strike a sunken rock at the entrance of the canal, near its westerly side, breaking a hole through her bottom, and causing her to sink just below the lower lock. Schooner claims damages for salvage expenses, repairs, detention, &c., in the sum of $5,746 40.

The faults alleged against the tug, were: (1) That she entered the canal with her tow at too late an hour. (2) Entered at too great speed. (3) Entered to the right of the centre of the canal instead of the left of the centre, as she should have done, to avoid drawing the schooner upon a sunken rock, the locality of which was well known to the tug, and was unknown to the schooner. (4) Failure to inform the schooner of the existence and location of said sunken rock, or to give any information or orders to the schooner as to entering and getting through the canal safely. (5) Let her steam run down, and so failed to handle the schooner properly, in view of her condition, and thereby caused her to strike again below the lower lock. (6) The master of the tug left her after entering the canal, thereby neglecting his duty. (7) The master of the tug failed and omitted to inform himself of how much water the schooner drew, and how much cargo she carried, as was his duty, and as was the custom, before attempting to take her through the canal.

The answer admitted the towing as alleged, denied all the allegations in the libel of fault on the part of the tug, and charged that if the schooner struck a sunken rock at the entrance of the canal, it was in consequence of her not following the tug, and by her sheering to the westward at the entrance of the canal; that the injury caused thereby was slight, and was not the cause of the schooner sinking below the lock; that the sinking of the schooner at that point was in consequence of her striking a rock there, and was caused by the negligence and mismanagement on the part of the schooner, and without any fault on the part of the tug. The evidence is noticed in the opinion so far as necessary to a decision of the case.

Mr. Alfred Ruesell, for libellants.

The vessel in tow is considered under control of the tug, and the tug is liable for an injury to the vessel unless it can be shown that it is not in fault. The Quickstep, 9 Wall. [76 U. S.] 670, 671, and cases cited. This case holds that the tug must see that the tow is properly made up, and that the lines are strong and securely fastened. The principle underlying it is that the tug assumes the responsibility in all things concerning the mode of performance of the contract of towage—that she is the mistress and not the servant—a point upon which previous cases had been in irreconcilable conflict. 1 Pars. Ship. 534–536. Consequence is, the tug is prima facie liable, and burden is upon her of disproving negligence. She is the pilot, and must keep the tow at a safe distance from the shore and from sunken rocks which are generally known and with the knowledge of the existence of which the tug is chargeable. The Angelina Corning [Case No. 384]; The Galatea, 2 Pars. Ship. 276, note.

The admission of libellants that the tug was not in fault should be stricken out.

(1) The rule allowing admissions against interest was established when parties were not competent witnesses, and for that reason alone. The party is now merged in the witness; evidence of his admissions becomes impeaching testimony, and the usual foundation must first be laid. His answer in chancery is now of no force except as a deposition. Roberts v. Miles, 12 Mich. 297.

(2) The fault of the tug is a mixed question of law and fact, concerning which an admission operating by way of estoppel cannot be made.

W. A. Moore and H. B. Brown, for claimants.

An admission of fault, though a mixed question of law and fact, is competent. The Manchester, 1 W. Rob. Adm. 62. Negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do, under all the circumstances surrounding each particular case. Shear. & R. Neg. § 7; Taylor v. Atlantic Mut. Ins. Co., 9 Bosw. 369; Blyth v. Proprietors of Birmingham Waterworks, 11 Exch. 781.

LONGYEAR, District Judge. [The towing and salvage services and supplies rendered and furnished by the tug, and the reasonableness of the charges therefor being admitted, nothing remains but to consider and determine the case of the libel against the tug.] [2] It may be regarded as now well settled that tugs are not liable as common carriers. They are, however, bound to use ordinary care, skill and diligence in taking up, arranging, and managing their tows. The Syracuse, 12 Wall. [79 U. S.] 171. The vessel being towed has also certain duties to perform, among which are to follow the tug, and in situations of danger, to use all possible means to avoid injury, and when injury ensues, to do all in its power to make the in-

[2] [From 3 Chi. Leg. News, 217.]

jury as light as possible. The primary injury complained of, and the one from which all the damages alleged are claimed to have flowed, is that caused by the schooner striking a sunken rock at the upper entrance to the canal. If the tug is not in fault for this injury, then she is not liable at all. If she is liable for this primary injury, then she is also liable for all subsequent injuries and damages to the schooner necessarily and naturally flowing from or caused by it, and which could not have been avoided by ordinary care and diligence on the part of the schooner. The whole gravamen of the case is contained in the third article of the libel, and is stated in the following words: "Third. That said tug proceeded on said voyage, and while in said canal, towed said schooner out of, and away from the proper and ordinary course in the centre and easterly side of said canal, towards the westerly side thereof, and ran said schooner upon a sunken rock upon said westerly side, staving a hole in her bottom, whereof she soon sunk just below the lower lock." And further on, in the fourth article it is alleged, "that the master, mate, second mate, and wheelsman were on deck, and kept said schooner directly after said tug, and the damage was occasioned solely by the fault of said tug, and without fault on the part of said schooner;" thus recognizing the duty of the tow, as above stated, to keep directly after the tug.

The first important inquiry therefore is, did the tug "run the schooner upon a sunken rock" as alleged; and, conceding that the schooner did run upon a sunken rock, did she do so while following directly after the tug, and if not, then was it in any manner occasioned by the fault of the tug? I think these questions are fully answered by a simple statement of a fact clearly appearing by the proofs, and in regard to which there is no controversy, viz: That on entering the canal, the schooner took a sheer some distance, how far does not appear, to starboard, and that it was while she was on this sheer that she struck. The tug is not charged in the pleadings or proofs with being in any manner in fault for the sheering of the schooner, and as it is clear that she struck solely in consequence of such sheering, and would have gone clear if she had been kept as she is alleged to have been, directly after the tug, it is equally clear that the tug cannot be held in any manner responsible for the schooner striking as she did. The case of The Angelina Corning [supra], cited by libellant's advocate, was not one of the sudden sheering of the tow from bad steering qualities or otherwise, as in this case, and consequent running upon a sunken rock, but was that of the sagging or hanging off of the tow to leeward, occasioned probably by the change of course by the tug. It is very easy to see how a tug, knowing of the existence and location of a sunken rock, should be held responsible for running a tow upon such a rock in consequence of a change of course resulting in the sagging or hanging off of the tow in such a way as to bring her upon the rock. In that case the tug would be in fault for not having made due allowance for the sagging of the tow in consequence of the change of course; which is very different from a case of sheering of the tow solely on her own account, and not on account of any act or manœuvre of the tug, and which the tug could not have anticipated, or guarded against even if anticipated; because it would have been impossible to have known beforehand which way the tow might sheer. In that case it was held that whether the sagging of the tow was chargeable to the pilot of the tug or to the men on the tow, was immaterial, for the reason that the danger was not known to either. What would have been the result if the danger had been known to the tug and not to the tow, and the sagging of the tow in consequence of which the injury occurred had been, as in this case, chargeable to the tow, the court does not intimate. The case of The Quickstep, 9 Wall. [76 U. S.] 670, holding that the tug is liable for an injury to the tow, unless the tug can show that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment. In that case the primary cause of the injury was the use of imperfect and insufficient towing lines, and the court held that it was among the duties of the tug to see that the lines were sufficient, and she was therefore held liable. But it certainly cannot be considered among the duties of a tug to anticipate and guard against the tow taking a sudden sheer.

But it is also charged:

1. That the lateness of the hour and the darkness contributed to the result. I think the proof clearly shows that entering the canal at the time they did was at the suggestion and solicitation of those in charge of the schooner, and also that it was not at an unusual hour, and that it was still sufficiently light for all ordinary purposes in navigating the canal.

2. That the tug entered at too great speed. I think this is entirely unsupported by the proofs.

3. That the tug entered to the right of the centre of the canal, instead of at or to the left of the centre, in order to avoid the sunken rock, which rock was well known to the tug and not known to the schooner. The proof shows that the custom is to enter at the centre, and I think there is a clear preponderance of evidence that the tug so entered.

4. That the tug failed to inform the schooner of the existence and location of the sunken rock, or to give the schooner any information or orders in relation to entering and getting through the canal safely. Without stop-

ping to argue the question whether it was or was not the duty of the tug to give such information, under the circumstances of this case, or in any case of towage through the Sault canal, a channel perfectly familiar to all the navigators of the upper lakes, and through which those in charge of the schooner had frequently passed, it is a sufficient answer to that charge that under the proofs it is evident that such failure to give the information specified, did not in any manner contribute to the catastrophe. Besides, this charge is inconsistent with the theory of the libel, and the proofs in the case. The theory of the libel is, that the accident happened while the schooner was following directly after the tug, and that it so happened in consequence of the tug's drawing her against or upon the rock. The proof shows that it did not so happen, but, on the contrary, that if the schooner had so followed the tug, she would have passed in perfect safety. Under this theory and these proofs, it was entirely a matter of indifference whether such information was given or not.

5. The tug let her steam run down after the schooner struck; also failed to examine promptly the extent of the injury done to the schooner; so that, from these two causes, she could not and did not handle the schooner properly in view of her condition, in consequence of which she struck again below the lower lock. This is a charge of fault on the part of the tug after the accident at the entrance of the canal, and is independent of the question as to the responsibility of the tug for that accident, and there might be some question as to its admissibility under the libel as framed; yet, as some evidence was admitted in regard to it, and it was insisted on in the argument, I will proceed to consider it. First, that the tug let her steam run down. This is an inference merely, drawn by one of the witnesses, Mosier, from the fact sworn to by him, that the master or person in charge of the tug, when the tug was trying to draw the schooner off from the rocks below the lower lock, and had made two efforts to do so and failed, and he was asked "why he did not go ahead on her," replied, or, to use the language of the witness, "I heard him singing out about the tug that they had to get steam up." She certainly had steam up, or she could not have made the two efforts she did make; and to my mind, it is more rational to infer from what the master said that, although he had on his usual amount of steam, he desired to get up more in order to make an extraordinary effort, than it is that he had let his steam run down. Secondly, that the tug failed promptly to examine the extent of the injury occasioned by the accident at the entrance to the canal. There is no proof that those in charge of the tug knew anything of that accident until the canal had been passed, or nearly so. And then how can it be claimed that it was the duty of the tug to examine the extent of the supposed injury, when those in charge of the schooner did not deem it of sufficient importance to even sound her pumps? I think this charge entirely unsupported.

6. The master of the tug left her, and neglected his duty. It was shown that the tug was in charge of a competent pilot, and therefore the charge is untenable.

7. The master of the tug failed and omitted to inquire of the schooner how much water she drew, and how great a cargo she carried. It nowhere appears that the draft of the schooner or the greatness of her cargo had anything to do with the accident, or that the want of a more minute knowledge of those matters on the part of the tug contributed in any manner to the accident. I hold, therefore, upon the whole, that the tug is exonerated from all blame as charged for the accidents to the schooner.

Other questions were raised and discussed, which it is unnecessary to consider, after having arrived at the above conclusion. I have arrived at my conclusions in this case wholly independent of and without any reference to the proved admissions of Richards, one of the owners, and Byram, also an owner and master of the schooner, exonerating the tug from blame for the accidents; and it is therefore unnecessary to decide the motion made by the schooner's proctor to strike out that testimony. But as an abstract question, however, it is clear to my mind that evidence of the admissions of parties to the record is just as competent now as it was before parties were admitted to testify as witnesses; and that, too, notwithstanding the parties whose admissions are sought to be proven have been sworn and have testified as witnesses on the trial, and were not asked upon the witness stand whether they had or had not made such admissions. Admissions are allowed to be proven, because they tend to prove some fact or facts pertinent to the issue, and not for the purpose of impeachment. If, however, statements made by a party, not otherwise admissible, are offered to be proven for the latter purpose, then, no doubt, the question should be first asked of the party while on the stand as a witness.

As to the other ground of the motion, that the admissions were of conclusions merely, and that such conclusions were of mixed law and fact, I think they would not be inadmissible on that ground alone. But where admissions are of conclusions merely, and not of facts simply, and have not been acted on so as to work an estoppel, they are entitled to but little weight. Libel dismissed.

---

*STRASSBERGER (LEHMAN v.). See Case No. 8,216.

Case No. 13,526.

In re STRASSBURGER et al.

[4 Woods, 557.] [1]

Circuit Court, M. D. Alabama. May Term, 1877.

BANKRUPTCY — DEBT DUE THE UNITED STATES — PRIORITIES — PARTNERSHIP.

[1. The United States are not bound by the general equity rule for marshaling assets, nor by the rule prescribed by the bankrupt act in conformity thereto, any further than as that rule is founded, in the particular case, on the lien of the several parties inter sese. Lewis v. U. S., 92 U. S. 618, followed.]

[2. Where the United States have obtained a judgment against persons composing a bankrupt partnership, they are entitled to priority over all partnership creditors, notwithstanding the fact that the judgment debt was originally the debt of one of the partners as principal, and the other was merely his surety.]

Heard upon petition to review a decree of the bankrupt court awarding to the United States priority in the payment of its judgment out of the bankrupt assets.

S. F. Rice and David Clopton, for petitioner.

Chas. E. Mayer, U. S. Atty. and D. S. Troy, contra.

BRADLEY, Circuit Justice. The United States obtained a judgment for $2,858.06 against the two bankrupts [A. & H. Strassburger] and one Warren on the 7th day of December, 1876, between the time of filing the petition against the bankrupts and the decree of bankruptcy made thereon. The judgment was on a distiller's bond, given by Herman Strassburger as principal, and Albert Strassburger and Warren as sureties. The recovery was for internal revenue taxes due, as appears by the judgment record, from Herman Strassburger, on spirits distilled. The United States claims priority of payment over all other creditors out of the partnership assets of the bankrupts, as well as out of the individual assets of their several states.

The bankrupt law (Rev. St. § 5121 [14 Stat. 534]) prescribes a marshaling of assets between partnership and individual creditors. But it has been held in several cases that the bankrupt law is not binding on the United States. U. S. v. Herron, 20 Wall. [87 U. S.] 251; U. S. v. The Rob Roy [Case No. 16,179]. The earlier act of 1797 (Rev. St. § 3466 [1 Stat. 515]) gives to the United States priority over all other creditors in cases of the bankruptcy or insolvency of any person or persons indebted to it, and the bankrupt act recognizes this preference by making debts due to the United States the first in order to be paid out of the bankrupt's estate, after paying the fees, costs and expenses. Rev. St. § 5101 [14 Stat. 530].

When the United States have a claim against one member of a firm, and not against the other, its priority extends only to the interests of that member, which, as between him and his copartners, is only his share of the partnership assets after all the partnership debts are paid. The other partners have a lien on the partnership funds for this purpose; and equity gives the partnership creditors the benefit of this lien when it can do so without violating any principle of law. But where, as between the partner who owes a debt to the United States and his copartners, the latter have no such lien for the payment of the partnership debts, the priority of the United States is not barred. The government is not bound by the general equity rule for marshaling assets, nor by the rule prescribed by the bankrupt act in conformity thereto, any further than as that rule is founded in the particular case on the lien of the several parties inter sese. Lewis v. U. S., 92 U. S., 618.

Now, in the present case, the judgment of the United States is against both partners, Albert and Herman Strassburger, and also Warren; but it appears by the record of that judgment that it is for the individual debt of Herman Strassburger as principal, and that Albert Strassburger and Warren were bound as sureties. Supposing this to be so, then has Albert Strassburger, as copartner of Herman, lost his lien on the partnership assets, for the payment of the partnership debts before the payment of any of Herman's individual debts? I think he has; for the judgment is against him, as well as against Herman, and binds his interest as well as Herman's, and is superior to his partnership lien. An execution against both partners would be leviable on the corpus of the partnership property, and not merely on the interest of the partners after payment of the partnership debts. Nevertheless, equity would, in ordinary cases, I think, marshal the assets having regard to the fact that though Albert has lost his legal lien, yet he is really bound only as surety, and as such surety he has an equity to have the debt satisfied out of Herman's individual property in relief of the partnership estate. But the United States is not subject to such equities. It has a preference given by the law and both partners being its debtors, their joint property as well as their several property is liable to the payment of this indebtedness; and the joint creditors as well as the separate creditors are postponed.

This view renders it unnecessary to examine the question of the admissibility of parol evidence to show that the distilling on which the tax arose was really carried on by the partnership. The claim that the United States ought first to pursue its remedy against the other surety before coming upon the partnership assets of A. & H. Strassburger is not tenable. It has been decided that the government is not limited as to its choice of remedies or funds liable to its debt. Lewis v. U. S., 92 U. S. 618.

I think the proceeding in the case is properly by petition of review, and not by ap-

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

peal. The appeal, therefore, will be dismissed; and the decree of the district court will be affirmed so far as it gives preference to the claim of the United States over other creditors of the partnership, or of the individual members of the firm, but subject to the costs and expenses of the proceedings in bankruptcy. The district court will take order that these costs and expenses be ascertained, if necessary, and that the amount due the government be paid without delay.

STRASSBURGER (ANDERSON v.). See Case No. 364.

Case No. 13,527.

STRATTON et al. v. BABBAGE.

[18 Law Rep. 94; 3 Liv. Law Mag. 586.]

District Court, D. Massachusetts. 1855.

SEAMEN—PORT OF DISCHARGE—COLORED SEAMEN—NEW SHIPPING ARTICLES.

1. A port where colored seamen are obliged to remain in jail or on board the vessel while she remains in port is not a port of discharge within the United States, unless at their option.

2. Consequently they are entitled to their wages, under the shipping articles, until their arrival at a port where they can be discharged in safety.

3. Such seamen required in such Southern port to sign new shipping articles at a reduced rate of wages, and doing so under protest, will not be bound by such articles, but will be entitled to recover the wages stipulated in the original shipping articles.

[See Azuria v. Insurance Co. of Pennsylvania, Case No. 691.]

This was a libel for seamen's wages on board brig Iddo Kimball, of which the respondent was master.

F. W. Sawyer, for libellants.

R. H. Dana, Jr., for respondent.

SPRAGUE, District Judge. The libellants, who are free colored seamen, joined this vessel at Halifax, Nova Scotia, and signed articles for a voyage thence to Europe, and thence "to a port of discharge in the United States," at the rate of $24 per month. The vessel went to England, and thence to New Orleans. The laws of Louisiana oblige a master of a vessel bringing free colored seamen to New Orleans, to give bonds in $1,000 to take every such seamen out of the state in his vessel, or to see that they go in some other vessel before he sails. While in port, the men must live on board the vessel, or in jail. The master stated the law to the men, and told them they might stay on board and work, and he would allow them the current wages, which were $15 per month, from the day of arrival in New Orleans. The vessel lay some three weeks in New Orleans, and then sailed for Boston. On the day of sailing, the master required the crew to sign articles for the voyage from New Orleans to Boston for $15 per month, including the time they lay in New Orleans. They signed the articles, but under protest.

The question is, whether New Orleans is "a port of discharge" for free colored seamen. Upon reflection, I am of opinion that a port in the slave states, where laws of this description prevail, is not a port of discharge for colored seamen. They cannot be, in any just sense of the term, discharged from the vessel. They are not free to go where they please, and to find other voyages. They must be either in jail or on board this vessel, and must go to sea in this vessel, or in such other as the master may find for them. They cannot even leave the vessel without the hazard of being made slaves. The master is under obligations also, being compelled to keep them, at great pecuniary risk, whether he will or no. Neither party is clear of the other. I do not mean to decide that such a port may not be treated as a port of discharge, if the seamen choose so to treat it. If they freely change their vessel, or freely make new terms with the master, I do not mean to say that they may not do so. It is not necessary to pass upon that question. But it cannot be treated as a port of discharge as against colored seamen. As New Orleans was not "a port of discharge," as against these men, they were entitled to proceed to Boston in the vessel at the original rate of wages. They did not waive this right freely, or for a valuable consideration, but made the new contract under duress and under protest, and for no consideration.

Decree for the libellants for full wages, to the arrival in Boston, with certain additional wages as compensation for short provisions, and certain deductions for refusal of duty, and for the sickness of a seaman by his own fault.

STRATTON (MICKEY v.). See Case No. 9,530.

Case No. 13,528.

STRATTON v. YOUNG.

[1 Hayw. & H. 229.] [1]

Circuit Court, District of Columbia. Nov. 26, 1845.

ATTACHMENT—WHAT LIABLE—TREASURY CERTIFICATE—GARNISHMENT.

1. The undivided interest of the defendant in a negotiable treasury certificate issued in payment of an award can be attached in the hands of a garnishee.

2. Where a negotiable certificate is issued by a garnishee who is indebted to the defendant, the attachment becomes a lien on the amount of the certificate while in the hands of the original owner even before or after maturity.

[This was a proceeding by Henry Stratton against McClintock Young, acting secretary

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

of the treasury, garnishee of Gerris S. Hammond.]

Clement Cox, for plaintiff.
James Hoban, for garnishee.

The following warrant from H. Naylor, a justice of the peace for the county of Washington, was directed to Wm. Brent, Esquire, clerk of the circuit court: "Whereas, Henry Stratton, of the county of La Fayette and state of Mississippi, on the 18th day of May, 1842, before James M. Howry, Esquire, judge of the Eighth judicial district of the state of Mississippi, made oath according to the act of the general assembly of the state of Maryland in such case made and provided that Gerris S. Hammond is bona fide indebted to him the said Henry Stratton in the sum of six hundred and nineteen dollars and thirty-three cents with interest until paid over and above all discounts; and whereas the said Henry Stratton also then and there produced to the said judge the account and notes by which the said Gerris S. Hammond is so indebted, and which are here annexed; and whereas also the said Henry Stratton further then and there made oath as aforesaid that he is credibly informed and verily believes that the said Gerris S. Hammond is not a citizen of the District of Columbia and doth not reside therein; all of which appears under the hand and seal of the said James M. Howry and the certificate of Clairborn M. Phillips, clerk of the circuit court of the county of La Fayette, state of Mississippi, under the public seal of said court hereunto annexed: These are therefore to require you to issue an attachment against the lands, tenements, goods and chattels and credits of the said Gerris S. Hammond situate and being in the county of Washington, to satisfy unto the said Henry Stratton the said debt or sum of six hundred and nineteen dollars and thirty-three cents, with interest until paid, over and above the cost of prosecuting this attachment, pursuant to the provisions of the act of assembly of Maryland entitled 'A further supplement to the act entitled An act directing the manner of issuing attachments in this province, and limiting the extent of them.'" Laws, 1834, c. 79. An attachment was accordingly issued and served on the chief clerk of the treasury department, by whom service was acknowledged. The register of the treasury department certified that there were issued in the names of Eli E. Hammond and Gerris S. Hammond on an award in their favor by the commissioners appointed to carry into effect the convention between the United States and Mexican republic, certificates to the amount of $3,085.48.

The points raised were: 1st. Whether the defendant's undivided interest could be attached; and, 2d. Whether the issuing of a certificate from the treasury for the debt, if negotiable, would prejudice the attachment.

On the first point the following authorities were cited: Bing. Ex'ns, pp. 246, 247; 13 Law Lib. 104; McElderry v. Flannagan, 1 Har. & G. 308; Evans, Prac. Md. (2d Ed.) 471.

On the other point Mr. Cox cited Steuart v. West, 1 Har. & J. 536. This case was where the garnishee was indebted to the defendant by a promissory note, and an attachment is laid in his hands before such note is passed away by the defendant, whether it be before or after it is due it is a lien on the amount of the note.

Judgment of condemnation of Gerris S. Hammond's undivided interest in the joint credits of said Gerris S. and Eli E. Hammond in the treasury to the amount claimed and costs.

Case No. 13,529.

The STRATTON AUDLEY.

[3 Ben. 241.] [1]

District Court, S. D. New York. May, 1869.[2]

SALVAGE — CORPORATION — WORK AND LABOR — COSTS.

1. A British ship, worth, with her cargo, $250,000, in attempting to enter the port of New York, at night, lost sight of the coast lights in a snow squall. Her port anchor was let go, but the chain parted. Her starboard anchor was then dropped. She dragged some distance, but finally brought up at the edge of the Romer shoal, in 27 feet of water, the tide being high. She drew 19¼ feet aft, and, when the tide fell, there was but 21 feet of water under her, and, there being considerable sea on, her stern sometimes thumped heavily. About six o'clock the next morning, a steam-tug, owned by a corporation incorporated for the purpose of wrecking, came to her, and a conversation passed between the masters of the two vessels, in which the master of the tug said he would tow the ship off for $1000, and the master of the ship offered $500. It was finally agreed that the tug should render assistance, and that the amount of compensation should be left to arbitration. The tug then took hold of the ship, and, with the aid of another tug belonging to the same corporation, got the ship off about noon, parting a hawser several times in doing so, and brought her up to New York, arriving there about four o'clock p. m. The wind had shifted from the eastward to south and west about the time the first tug came up. The owners and masters of the two tugs filed a libel against the ship and her cargo, for themselves and all interested, claiming $25,000 salvage. It appeared that the masters and crews of the tugs were employed on fixed rates of compensation, and would receive no share of the recovery: *Held*, that the ship was in a condition to be the subject of a salvage service.

2. As the masters and crews were to have no share in the recovery, they must be wholly left out of the case.

3. The corporation could not claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage.

4. The corporation itself could not be a salvor; what the law recognizes as the main element in a salvage service, namely, the impulse to boldness and heroism, being wholly wanting in the case of a corporation.

5. The corporation was entitled to a proper compensation for the use of its two steamers,

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

[2] [Affirmed in Case No. 13,530.]

and of such of the appliances on board as were used in the service, without reference to the value of the ship and her cargo.

6. The hazard to the tugs was to be considered in fixing such compensation.

7. $1,500 was ample compensation, and, as the claimants had offered, before suit brought, to pay $2,000 by way of compromise, no costs would be allowed to the libellants.

[Cited in The Plymouth Rock, 9 Fed. 417.]

In admiralty.

E. W. Stoughton and J. E. Parsons, for libellants.

E. C. Benedict and T. Scudder, for claimants.

BLATCHFORD, District Judge. This is a libel, filed by Thomas F. Marshall, master of the steamer Yankee, and David A. Wolcott, master of the steamer Rescue, and the Atlantic Submarine Wrecking Company, a corporation created by the state of New York, and authorized to engage in the business of wrecking and of assisting vessels in danger and distress, and who were the owners of the said steamers. The libel is filed by the libellants, for themselves and the crews of the said steamers, and claims the sum of $25,000, as a reasonable compensation, by way of salvage, or otherwise, for the services of the libellants and of the said crews in removing the ship Stratton Audley, a British vessel, and her cargo, from off the Romer shoal, near the entrance to the lower bay of the harbor of New York, where she was aground, on the 23d of March, 1869.

The answer gives substantially a correct version of the facts of the case, as they appear in evidence. The ship was bound from Calcutta to New York. She took a pilot off Barnegat Light about half past six o'clock in the evening of March 22d. At a quarter before eleven o'clock at night, while running for the bar at the entrance to the lower bay, she encountered a snow squall, which obscured the coast lights. Her port anchor was then let go, but the chain parted. Her starboard anchor was then dropped. She dragged for some distance with this, until she brought up in 27 feet of water. She drew 17¾ feet forward and 19¼ feet aft. The tide, which was very high, being driven in by an easterly wind, so that low water was as high as ordinary high-water, fell, while the vessel lay in this position, so that there came to be but 21 feet of water under her aft, and, as there was considerable sea on, she struck bottom, occasionally, near her stern, and, when she struck, thumped heavily. About six o'clock in the morning, the Yankee came within hail of the ship, and was asked by her master what the charge would be for towing the vessel off. Marshall, the master of the Yankee, asked, in reply, how much water the ship drew. The answer from the ship was, about 20 feet. Marshall asked how much water there was alongside of the ship. The answer was about 21 feet. Marshall asked if she was not striking. The reply was, once in a while. Marshall then said he would tow the ship off for $1,000. The master of the ship said that was too much, and offered $500. The Yankee then drifted out of hailing distance. She soon came up again to the ship. The master of the ship then asked Marshall: "How much did you say?" Marshall replied "£2,000." The master said: "I understood you, dollars." "No," said Marshall, "I said pounds." It was then agreed that the Yankee should render her assistance, and that the amount of compensation should be left to arbitration. The Yankee then got a hawser to the ship, about six and a half o'clock a. m. The Rescue soon came up, and aided the Yankee in pulling, there being a hawser from the stern of the Rescue to the bow of the Yankee, and another hawser from the stern of the Yankee to the ship. The latter hawser, which belonged to the Yankee, and was a new one, eight inches in circumference, parted, and was put in place again, with another hawser, which belonged to the ship. The two were then pulled with until the ship's hawser broke. The pulling with the other hawser was continued, the ship being moved as the sea lifted her, until that hawser parted again. The hawser from the Rescue to the Yankee parted two or three times. The result was, that, by the use of hawsers, and hawsers alone, and the power of the two tugs, the ship was hauled off into deep water about noon, a space of six hours from the time the Yankee first reached her. She was towed by the tugs to New York, arriving there about four o'clock p. m. She was an iron vessel, and, so far as appears, was not injured or strained. When the Yankee reached the ship, it was the beginning of the ebb tide, and the wind had shifted from the eastward, and came out light from the south and west, but the sea did not abate. It was low water about 10 o'clock a. m., and about that time the wind got around to the west or northwest. The answer avers a willingness and readiness, on the part of the claimants, at all times, to submit to arbitration the question of the amount to be allowed to the libellants for the service, as one of towage, but alleges that the libellants have, at all times, insisted on submitting their claim to arbitration as one of salvage. The claim is pressed upon the court by the libellants as one of salvage. The value of the ship and her cargo was $250,000. The value of the two steamers, at the time, was about $80,000, and the value of the wrecking apparatus and material on board of them was about $50,000 more.

I think, on the evidence, that the peril to the ship at and after the time the Yankee reached her, has been very much exaggerated by the libellants. So, too, the danger to the steamers has been inadequately magnified, in order to enhance the value of the

service. But substantial service was rendered to the ship by the two steamers, and for that service a liberal, but at the same time a reasonable, compensation must be awarded. The ship was undoubtedly in a condition to be the subject of a salvage service, but, on the principles settled by the circuit court for this district, in the case of The Morning Star [Case No. 9,818], and applied by this court in the case of The J. F. Farlan [Id. 7,313], no salvage compensation for the service rendered in this case can be awarded to any of the libellants. The masters and crews of the steamers were hired on wages by the corporation, which owned the steamers and all the apparatus and material on board of them. They received those wages steadily, whether the steamers were employed or not. Their compensation for the services they rendered to this ship, and for the time occupied in rendering those services, was not at all dependent on the success of those services. In rendering those services, they did not render them directly to the ship, but they rendered them incidentally in the discharge of, and as a part of, their duty to their employers. When they were hired, they were given to understand by the corporation, that they should receive only their wages, and that they should have no share otherwise in any earnings of the vessels or of the corporation; and none of them will have any share in anything that may be awarded to the libellants in this case. The masters and crews of the steamers must, therefore, be wholly left out of the case. The corporation cannot claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage; and those servants, having cut themselves off, by their contract with the corporation, from setting up any claim for salvage in this case, such claim never had any existence, so as to be capable of assignment after the fact.

Nor can the corporation itself be a salvor. It cannot hire persons on wages, and claim salvage for services rendered by those persons. If such a principle were to be admitted, it would have to be extended to individuals; and yet it was never heard, that one person could hire another on wages to perform a salvage service to a vessel in distress and to have no share otherwise in the compensation therefor, and that, after such service had been rendered by the latter, the former, who had taken no personal part in it, could claim salvage compensation therefor, as such. Yet that is precisely the claim which the libellant corporation in this case is urging, when it asks to be paid as if it had been an individual salvor. The main element which the law recognizes and requires as an element in a salvage service, is wholly wanting in the case of a corporation. That element is, the impulse and stimulus which spurs the individual salvor to manifest boldness and heroism and incur risk and peril, by the expectation of the large compensation which the law awards in case of success. That element was wholly wanting in this case. The ship and her cargo, as a consideration for their liability to pay a salvage compensation, were entitled to the exercise of all the energies which individual salvors could put forth, impelled by all the hopes of salvage reward which could operate to stimulate those energies. There were no such hopes of salvage reward in this case, on the part of the officers and crew of the steamers; and it is at least doubtful—in view of the fact that the Yankee failed, through timidity, to reach the ship, until on the third attempt to do so, while a pilot boat and her yawl boat seemed to have no difficulty in navigating safely in a no less boisterous sea—whether the same energies were put forth by those on board of the Yankee to reach the ship promptly that would have been manifested if they had been working for themselves and not merely for their employers. The master of the Yankee says that he turned back, on his first attempt to reach the ship, because he considered the risk too great, and that he abandoned the second attempt because he would not run the risk until daylight. It is very questionable whether wrecking corporations for salvage business, with their employees placed on the footing occupied by those of this corporation, are, on the whole, of advantage to commerce. There is, on the one hand, the benefit of associated capital of large amount, with well fitted appliances for the business. But this has the effect to drive individual salvors out of the business, and the daring and courage and insensibility to danger, nerved by the prospect of large reward, which are manifested constantly by individual salvors, are replaced by the poor substitute of hired labor, which has nothing to gain by taking risks, and is, therefore, likely to fail to use promptly, at critical moments, the ample means placed at its disposal.

The corporation is entitled to a proper compensation for the use of its two steamers, and of such of the appliances on board of them as were used in the service rendered to this ship. The case must be viewed as one of contract, for work and labor, without reference to the value of the ship and her cargo, as an element in the measure of compensation. Marshall, the master of the Yankee, placed it in that position, by what passed between him and the master of the ship. It is manifest, that the latter, by regarding $1,000 as a large charge, and offering $500, had no idea that he was subjecting his vessel and cargo to a salvage charge. It is entirely clear, on the evidence, that if he had been told that, if he allowed himself to be towed off from where he was, by the Yankee, he would, in the end, be obliged to pay her owners a compensation of $25,000 for the service, he would have assumed the risk of remaining there, the wind having already

changed to a favorable quarter, until a vessel, more moderate in her demands, should come to his aid. The master of the ship says, that he heard no mention of any price by Marshall, except $1,000, and that he heard nothing about £2,000, or about any pounds.

The hazard to the steamers and the property on board of them, whatever it was, is to be taken into view, as making the service worth more than if there had been no hazard to them. But the idea that a proportion of the cost of maintaining the steamers and property for occasional service, and of the current expenses of the corporation, while such steamers and property are not employed in the service of this ship, is to be paid by this ship, is wholly inadmissible. In this case, the corporation would have had a claim for compensation for the time and services of the steamers in endeavoring to pull the vessel off, even if they had failed. Their compensation must, of course, be greater because of their success.

I wholly reject the testimony of the so-called expert witnesses on both sides, who give evidence as to their opinion of the value in money of the services rendered. They proceed on grounds which are unsound, and not in consonance with the views which, as above stated, must govern this case.

On the whole evidence, I think $1,500 is ample compensation in this case, and, as the claimants, before suit was brought, offered to pay $2,000 by way of compromise, I allow no costs to the libellants.

[On appeal to the circuit court, the above decree was affirmed. Case No. 13,530.]

Case No. 13,530.

The STRATTON AUDLEY.

[8 Blatchf. 264.] [1]

Circuit Court, S. D. New York. Feb. 18, 1871.[2]

SALVAGE—NATURE OF SERVICE—TOWAGE—NEGOTIATION FOR COMPENSATION.

A service by steam tug boats, in towing off, by hawsers, a vessel which was aground, compensated, but not as a salvage service, where an exorbitant sum was claimed for the service, as a salvage service, where no peril of life or extraordinary risk of property was involved, where the service was not accepted by the ship as a salvage service, and where it proceeded upon a negotiation for compensation not involving any idea of salvage.

[Cited in Baker v. Hemenway, Case No. 770.]

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

In admiralty.

John E. Parsons, for libellants.

Augustus F. Smith and Townsend Scudder, for claimants.

WOODRUFF, Circuit Judge. I find no satisfactory reason for interfering with the award made in favor of the libellants by the district court [Case No. 13,529]. The case exhibits an effort by the corporation owning the tug-boats which relieved the Stratton Audley, to compel the payment of an exorbitant sum for a service involving no extraordinary peril either of life or property, and a service which, upon the whole evidence, I think, would have been readily procured at a less cost than the amount which was awarded. It is entirely manifest, that the service was not accepted by the ship as a salvage service, and that the negotiation therefor did not, on the part of the tug, proceed upon any such idea. The captain of the tug offered to perform the work for one thousand dollars, and the captain of the ship offered five hundred. Upon this difference as to what amount would be suitable, it was consented that the amount should be settled by arbitration. I do not regard the amounts thus respectively proposed as concluding either party, but the negotiation shows that neither acted upon the idea, that the service was perilous, or that the danger to the ship was imminent, or that the elements were present which raised the question of salvage; and, after that, nothing occurred to change the condition of things in that respect.

Doubtless, the ship had need of assistance; but the wind had shifted, the sea was becoming less violent, and there was a possibility, and, perhaps, a probability, that the ship might get off on the next flood tide. There was no danger to be encountered by the tugs, except, it may be, unusual wear or strain in relieving the ship, and, if it be conceded that the use of tugs and hawsers, &c., in effecting the removal of the ship, was more than an ordinary towage service, it was not a perilous service. It may have involved extraordinary use and wear and tear of property; but it did not threaten loss of property in any other sense. It was a case in which it is proper to take into consideration the time, labor, difficulty of effecting the object, and wear and tear of tugs and hawsers, and, I think, that was done by the decree appealed from, which should be affirmed, without costs to the libellants, but allowing to the claimants costs of the appeal.

STRAUS (BARNES v.). See Case No. 1,022.

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

[2] [Affirming Case No. 13,529.]

Case No. 13,531.

STRAUSE et al. v. WESTERN UNION TEL. CO.

[8 Biss. 104.] [1]

Circuit Court, D. Indiana. Nov., 1877.

TELEGRAPH COMPANIES — NEGLIGENCE — FORGED MESSAGE—FORM OF ACTION.

1. A telegraph company, negligently delivering forged dispatches, is liable for the damage thereby sustained.

2. Where the dispatch was concerning the payment of a forged draft, the fact that the plaintiff had a remedy ex contractu against a solvent indorser, is not a bar to an action ex delicto against the company, and it is not necessary to sue the indorser first.

[Cited in Pacific Postal Tel. Cable Co. v. Fleischner, 14 C. C. A. 166, 66 Fed 905.]

The declaration alleges that the plaintiffs [Frederick Strause and others] are copartners and private bankers under the firm name of "The Citizens' Bank," at Ligonier, Indiana; that on the 25th day of December, 1875, a bill purporting to have been drawn by the Citizens' National Bank of Peru, Indiana, on Winslow, Lanier & Co., at New York, for $2,180, was presented at the plaintiffs' bank to be discounted; that the plaintiffs at once telegraphed to the Peru bank, asking if the draft was genuine, in answer to which telegram the Peru bank delivered to the defendant a dispatch saying, "it had drawn no such bill;" that the last named dispatch was sent over the defendant's wires from Peru to Ligonier, the plaintiffs paying the usual charges therefor; that on the receipt of the dispatch at Ligonier, the defendant placed the same in the hands of a messenger, to be delivered to the plaintiffs, but instead of delivering the genuine dispatch the messenger carelessly permitted a false and forged message saying the bill was correct, to be substituted therefor, which forged dispatch was duly delivered to the plaintiffs; that believing the forged dispatch was a reply from the Peru bank to the plaintiffs' dispatch, and in good faith believing the draft to be genuine, the plaintiffs paid out on the same the sum of $1,500 and issued their certificate of deposit for the balance. Judgment is demanded for $2,500.

In its third plea, the defendant alleges that the draft was on its face payable to L. W. Lane; that before any of the messages described in the declaration were delivered to the defendant for transmission, the draft had been indorsed by Lane to George Sackett, who after indorsing the same in blank had offered it to the plaintiffs for discount; that Sackett was at that time well known to the plaintiffs as a man of financial responsibility; that the money paid out on said draft was paid to Sackett; that no demand has been made on Sackett for said money, and no suit has been brought against him on his indorsement, although the defendant has often notified the plaintiffs to sue the indorser; that no tender of said draft has been made to the defendant, whereby it might be subrogated to the rights of the plaintiffs; that the plaintiffs never protested the draft nor gave notice to Sackett of the dishonor thereof; that Sackett is still solvent; and that it is liable to the plaintiffs, in damages in the amount paid for the Peru bank's dispatch—namely, fifty cents and no more, which sum it tenders and brings into court. The fourth plea sets up the same facts in bar of the entire cause of action.

Demurrers to both pleas.

Baker, Hord & Hendricks and J. C. S. Mitchell, for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, District Judge. On the facts here stated the plaintiffs had a remedy against the defendant for its negligence, also against Sackett on his indorsement. There is no privity between Sackett and the defendant. If liable at all, the one is bound by his contract of indorsement while the other is liable as tort feasor. There is no right of subrogation in favor of the defendant against Sackett. Even if the defendant had paid the demand I am not able to see on what ground it could be subrogated to the rights of the plaintiffs against Sackett. So far as the pleadings are concerned Sackett was no party to the fraud which was successfully practiced against both the plaintiffs and the defendant. The presumption is that Sackett was a bona fide holder of the forged draft for value. In fact it was conceded in the argument that Sackett did not participate in the fraud, and that he was induced to sign the draft for accommodation. There is no equity in favor of the defendant against Sackett, and there is no relation of privity between them.

It is further urged by counsel for the defendant that when one person is injured by the fault of another the latter is liable for such damages only as are sustained after the injured party has used reasonable care and precaution to protect himself against the consequences of the negligent or injurious act. The soundness of this proposition cannot be questioned, but the authorities relied on to sustain it do not support the pleas even by analogy.

The defendant admits its negligence but insists that, because the plaintiffs had the genuine indorsement of Sackett, who was and still is solvent, the measure of damages is the amount paid for the dispatch sent by the Peru bank, namely, fifty cents.

If a railroad train is wrecked by the carelessness of a drunken engineer, the injured passengers have two remedies, one against the engineer for the tort, and the other against the company on contract. In an action by a passenger in such a case against

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

the engineer, the latter would not be allowed to plead against all but nominal damages, that the passenger has a remedy against the solvent carrier.

If it be the law that the plaintiffs are damaged only to the amount paid for the dispatch, they holding the genuine indorsement of Sackett, then the forger himself, in an action of tort, would be liable for the amount the plaintiffs paid for the dispatch and no more.

Sackett's indorsement is worth just as much in the plaintiffs' hands against the forger as against the telegraph company.

A tort feasor is liable for the damages sustained by the injured party, and that, whether the law gives the plaintiff a remedy against other parties or not. When a wrongdoer is sued he is not allowed to plead to all but nominal damages, that by suing other solvent parties either in an action of tort or on contract the plaintiff can recover full compensation for the injury. Demurrer sustained.

Case No. 13,532.

In re STRAUSS.

[2 N. B. R. 48 (Quarto, 18).] [1]

District Court, S. D. Ohio. Sept. 12, 1867.

BANKRUPTCY—BEFORE WHOM DEBT PROVEN—NOTARY—COURTS IN BANKRUPTCY.

1. A creditor residing in the judicial district where proceedings in bankruptcy are pending, must prove his claim before the register of that district. Residing in another judicial district, his deposition must be taken before a register of that district. Residing in a foreign state, his deposition must be taken before a minister, consul, or vice-consul of the United States.

2. A court of bankruptcy is sui generis in its nature, and its practice is controlled by the laws that created it. A deposition by a creditor is not a deposition as ordinarily understood. It is in the nature of an examination. Notaries have not the judicial power requisite to take legal proof of a claim. They are state officers and responsible alone to them, and a creditor residing in another judicial district cannot make proof of his claim before them.

[Cited in Re Merrick, Case No. 9,463.]

In bankruptcy.

By FLAMEN BALL, Register:

I, Flamen Ball, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Alexander Long, who appeared for the bankrupt, and Mr. J. G. Douglass, who appeared for H. B. Claflin & Co., claiming to be one of the creditors of said bankrupt: "Is it lawful for the said parties, who claim to be creditors of said bankrupt, they residing in the city of New York, to make legal proof of their claim by a deposition taken before a notary public of said city of New York?"

Upon consideration I hold that such proof was not authorized by law; that said claim was not duly proved, and I, therefore, reject the same for the reasons given in my opinion filed herewith.

And the said parties requested that the same should be certified to the judge for his opinion thereon.

Opinion or the Register:

A claim purporting to be in favor of H. B. Claflin & Co., of the city of New York, for the sum of two thousand eight hundred and two dollars and forty-two cents, against the estate of said bankrupt, verified before a notary public of said city of New York, has been presented by the duly accredited attorney of the claimants, for allowance against said estate.

By the twenty-second section of the bankrupt law [of 1867 (14 Stat. 517)], provision is made for the proof of claims by creditors against the estate of bankrupts in three classes of cases: First. Where the creditor resides in the judicial district in which the proceeding in bankruptcy is pending, his claim must be proved by his deposition, taken before a register of that district. Second. When he resides in another judicial district, his deposition must be taken either before a register or a commissioner of the circuit court of the United States of the district in which such creditor resides, and Third. When he resides in a foreign country it must be taken before a minister or a consul, or a vice-consul of the United States.

No other officers are, by that section, authorized to take such depositions, and, I think, if congress intended to intrust that power to others than officers of the United States the law would have so conferred it in express terms. Such a power cannot be obtained by implication; the power is conferred, in express terms, solely upon the officers named in the law.

The constitutionality of the bankrupt law has not yet been brought in question. The constitution confers upon the congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States." Article 1, § 8. It is also provided in that instrument that the judicial power of the United States shall extend to all controversies which may arise between "citizens of different states," and in such cases the courts of the United States are the supreme arbiters. Article 3, § 2.

The congress has exercised the power conferred on it, by establishing "a uniform system of bankruptcy throughout the United States," and to that system, so established, all state courts and state officers must yield obedience. A proceeding in a court of bankruptcy is not either an action at law, a suit

[1] [Reprinted by permission.]

in equity, a criminal proceeding or a proceeding in admiralty, over all of which the courts of the United States have exercised jurisdiction. It differs from all these in its modes of proof, trial and relief, although, in its progress, it may sometimes invoke the aid of all other courts, except those in bankruptcy. A court of bankruptcy, like a court of admiralty, is sui generis in its nature, and its practice is controlled by the laws which created it, aided by such lights as may be thrown upon it by the reported decisions in England, whence the system has been borrowed. In enacting this law, the congress saw proper to confer upon officers, responsible solely to the government of the United States, all the important powers necessary for its full and complete execution. They did not confer such powers upon any of the officers of the respective states, or of foreign governments. In this they carried out the spirit of the constitution. Mr. Hamilton has well observed that, "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranged among its number. The mere necessity of uniformity in the interpretation of the national laws decides the question."—Federalist, 364.

A "deposition" by a creditor proving his claim against the estate of a bankrupt is neither an affidavit nor a deposition, as known in the ordinary practice of law. It is the result of an examination of the creditor made by the officer of the law authorized to make it. The creditor is not only required to testify to the amount of his claim, but he must testify to its consideration, and whether he has received any payment, or holds any security or satisfaction whatever, for the same. He must also testify in his deposition, "that his claim was not procured for the purpose of influencing the proceedings under the act of congress entitled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2d, 1867; that no bargain or agreement, express or implied, has been made or entered into by, or on behalf of this deponent, to sell, transfer, or dispose of said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person in the proceedings under said act, has been, is, or shall be in any way affected, influenced, or controlled."

In no other court of justice is such testimony required for the due proof of any debt, and it is evident that congress intended that the court and its officers should, by a careful examination of the creditor, (which examination is frequently in the absence of the debtor,) purge his conscience, and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, existed. "A deposition in bankruptcy is in the nature of an examination. It is drafted in the third person, and is sworn before the register, in court or in chambers, the creditor attending for that purpose." 2 Doria and Macrae, 760; Rice, Manual, 168. This power, so delegated alone to officers created by, and responsible to, the government of the United States, and involving important consequences to creditors as well as bankrupts, is now sought to be exercised by a notary public of the city of New York, an officer by the laws of the state of New York, and responsible to the government of that state.

It is claimed by counsel, on behalf of the notary, that by virtue of the acts of congress of September 16th, 1850 [9 Stat. 458], and July 29, 1854 [10 Stat. 315]; Brightly, Dig. p. 705, §§ 1, 4, all notaries public in the United States are, ex officio, commissioners of the courts of the United States in respect of taking depositions to be used in those courts, and that, therefore, notaries must be regarded as possessing all the powers conferred upon commissioners by the twenty-second section of the bankrupt act. Upon reference to those acts it will be seen that the law of September 16th, 1850, merely extended to notaries certain powers in the taking of depositions, which the laws of the United States had previously conferred upon justices of the peace of states and territories. I do not perceive how, under this law, notaries can act, when justices of the peace cannot act. But I apprehend that the chief ground relied upon in behalf of the notary arises under the second section of the act of 1854, which is as follows: "That notaries public be, and they are hereby authorized, to take depositions and to do such other acts in relation to evidence to be used in the courts of the United States in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully do."

In the view which I take of this question I deem it unnecessary to refer to or construe the word "now" as used in the section quoted. If that expression read "now or hereafter," my opinion would be the same. I understand the words "depositions" and "evidence" to mean such testimony as might be adduced, as such, in adversary cases pending in the courts of the United States, where such testimony is taken, either upon notice by commission or upon interrogatories and cross-interrogatories. But I do not understand those words to intend to confer upon notaries the judicial power under the bankrupt act to take legal proof of a claim against the estate of a bankrupt. If a notary can thus assume jurisdiction, any justice of the peace, in any part of the United States outside of the judicial district in which the case in bankruptcy is pending, may, by signing his name "Justice of the Peace and ex Officio Commissioner," &c. In a practice of thirty years in Ohio, I have never seen such an assumption

made by any justice of the peace. Notaries public and justices of the peace are state officers, and responsible to the governments of the states which created them. As officers, they are not obliged to execute the national laws; they may refuse to do so, and the party applying to them has no remedy. If there is no legal obligation on them to execute a law of the United States, where would be their liability in case they misperformed their duty? The judge, the register, the commissioner, marshal, messenger, assignee, and all other officers of the courts of the United States are amenable to those courts, under the forty-fifth section of the bankrupt law, to all the penalties therein provided against them for any malfeasance in office. But no penalties are prescribed against notaries and justices of the peace. In a case of malfeasance in office under this law, an indictment would be sustained against a register or a commissioner, but not against an ex officio register or commissioner.

Again: A creditor of this bankrupt residing in this district is compelled to prove his claim by his deposition taken before a register of the district. But it is now claimed that another creditor of the same bankrupt, residing in New York, need not submit to the examination which the register is required to give him, but make proof of his claim before a notary public, which cannot be done by the creditor residing in this district. In other words, the assertion on behalf of the notary is, that although a notary residing in this district has no power to receive proof of a claim of a creditor of a bankrupt whose petition is pending in this district, he has power to receive proof of claims by all creditors of all other bankrupts whose cases are pending in any other of the judicial districts of the United States. This presents an anomaly which, in my judgment, was not intended to exist by the framers of the law.

I have given this matter as much thought and reflection as I could consistently do with reference to other duties, but I am clearly of the opinion that, in the language of the last clause of the twenty-second section of the law, the claim of Messrs. H. B. Claflin & Co., "is not duly proved," and I, therefore, rejected it, with leave to represent it on its being proved before a register or a commissioner in New York.

LEAVITT, District Judge. I hereby approve of the decision of the register on the point within stated.

STRAUSS (MORAN v.). See Case No. 9,787.

STRAW (SUTHERLAND v.). See Case No. 13,644.

STRAWBRIDGE (KITCHEN v.). See Case No. 7,854.

STREET (BUCKNER v.). See Case No. 2,098.

Case No. 13,533.

STREET v. DAWSON.

[4 N. B. R. 207 (Quarto, 60);[1] 2 Balt. Law Trans. 369.]

Circuit Court, D. Maryland. 1870.

BANKRUPTCY—PREFERENCE—CONFESSION OF JUDGMENT.

1. On the 19th of April, 1867, Gover, Hardesty & Co., of Baltimore, failed in business, and closed their banking-house, owing the appellant Street, as trustee, a large sum—balance on deposit account. The partners of the banking-house, it is admitted, regarded this deposit indebtedness as entitled to special preference in payment of debts.

2. The bank had to their credit, at the time of their failure, two thousand nine hundred dollars in New York. This sum was on the 22d of April attached by the appellant, in a proceeding in the courts of that city, based on a confession of judgment by Gover, one of the partners of the Baltimore bank, then in New York, and judgment was obtained on the attachment in favor of Street.

3. On the 20th of April, Hardesty, the other partner, in Baltimore, drew on the New York funds in favor of George H. Williams, attorney for Cohen. A controversy thus sprung up in the New York courts between these opposing creditors, in which the appellant Street prevailed and obtained judgment.

4. Within four months afterwards, Gover & Hardesty were adjudged bankrupts.

5. In a suit brought by Dawson, assignee in bankruptcy, against Street, to recover back this money, *held*, that the plaintiff was entitled to re-recover; and judgment of the district court to that effect is, on appeal, now affirmed.

[Cited in Platt v. Archer, Case No. 11,214.]

[6. Cited in Haskell v. Ingalls, Case No. 6,193, to the point that counsel fees paid for services rendered in opposition to the interests of the general fund in bankruptcy cannot be recovered from such fund.]

[Error to the district court of the United States for the district of Maryland.]

This was an action of assumpsit [by Dawson, assignee in bankruptcy of Gover, Hardesty & Co., against J. M. Street] in the district court.

Wm. Schley, for appellant.
Geo. H. Williams, for appellee.

BY THE COURT. The case was substantially as follows: Gover, Hardesty & Co. were bankers in the city of Baltimore. J. M. Street, as trustee for the heirs of St. Clare, deposited with them certain sums of money amounting in the aggregate to three thousand four hundred dollars. The last of these deposits was made on the 12th of October, 1866. On the 19th of April, 1867, Gover, Hardesty & Co. failed in business and closed their banking house. At that time the deposit of Street, as trustee, had been reduced to three thousand one hundred dollars. Both of the partners regarded this deposit as made under peculiar circumstances, and entitled to special preference in payment. At the time of the failure, Gover, Hardesty

[1] [Reprinted from 4 N. B. R. 207 (Quarto, 60), by permission.]

& Co., had a balance in their favor of two thousand nine hundred dollars and thirty-nine cents, in the hands of Scott, Capron & Co., of New York. To secure the transfer of this balance to Street in payment of the trust deposit, Gover and Street proceeded together to New York on the evening of the 21st of April. Upon arrival, they called upon Scott, Capron & Co., and found that telegrams had been received by them from Hardesty and from George H. Williams, prohibiting the payment of the money. It appears that, on the 20th of April, Hardesty had drawn drafts in the name of the firm, upon Scott, Capron & Co. for the balance in their hands, in favor of George H. Williams, who was attorney for Lewin M. Cohen. The balance in favor of Cohen seems to have accrued from the sales of stock belonging to him, and sold for his account by Gover, Hardesty & Co., through Scott, Capron & Co. Under these conflicting assignments, a controversy sprung up in New York. A suit was commenced by Street against Gover, Hardesty & Co., and judgment obtained, by consent of Gover, on the 22d of April, and proceedings were instituted to subject the balance in the hands of Scott, Capron & Co. to the payment of this judgment. In the course of these proceedings, the claim of Cohen was set up. After a protracted contest, an order was made for the payment of the money to Street; a large percentage was absorbed by costs and attorneys' fees; the sum only of two thousand four hundred and twenty-three dollars and twenty-seven cents came to his hands. Within four months after the judgment, Gover & Hardesty were adjudged bankrupts. The object of the suit in the district court was to compel Street to refund the money to the assignee in bankruptcy of Gover, Hardesty & Co.

Upon the trial, various instructions were asked, all of which were refused by the judge, who, however, gave the following instruction to the jury: "If the jury shall find from the evidence in this case that the firm of Gover, Hardesty & Co. was insolvent, and closed their banking-house on the 19th of April, 1867, and that George P. Gover, one of said firm, went on to New York in company with the defendant, on the 21st of said month, and on the next day defendant brought suit in said city against said firm, for the money due him by said firm, in which suit the said George P. Gover, without the knowledge and consent of his partner, and with intent to give a preference to said defendant, confessed the judgment on the day of the institution of said suit, upon which judgment, execution by attachment issued, and the funds of said firm in said city were attached, and condemned, and paid over to the defendant; and if the jury shall further find that when said suit was brought, judgment confessed, and money received, the defendant had reasonable cause to believe that the said firm was insolvent, and that such confession of judgment was made in fraud of the provisions of the bankrupt act [of 1867 (14 Stat. 517)]; and, if the jury shall further find, that within four months from the confession of said judgment, and before the institution of this suit, the said Gover, Hardesty & Co. had been adjudged bankrupts by a decree of this court, and that the said plaintiff had been duly chosen assignee of said bankrupts, and had accepted said trust, and that his selection as assignee had been duly approved by this court,—then the jury shall render their verdict for the plaintiff for the amount received under said attachment by the defendant, or by his attorney, with such interest as the jury may think proper to allow, not to exceed six per centum on the amount received." This instruction was clearly correct, and it covered, either by affirmation or negation, the whole ground of the instructions asked. There was, therefore, no error in the instructions given.

Upon one point only could any doubt be entertained. The amount which actually came into the hands of Street was only two thousand four hundred and twenty-three dollars and twenty-seven cents, and it is doubtless a hardship that he should be compelled to refund what seemingly he never received. But under the 35th section of the bankrupt act, there can be no doubt that the transaction, through which he attempted to obtain possession of the balance in the hands of Scott, Capron & Co., was void as against the assignee in bankruptcy, and that the assignee was entitled to the full amount of that balance. Having notice of the insolvency of Gover, Hardesty & Co., Mr. Street intervened at his peril, and in a legal sense, it must be agreed that the whole amount came to him, and that the sum which was appropriated to the costs and attorneys must be considered as having been paid by him after it was received under the order of the court. The judgment of the district court, therefore, must be affirmed.

STRICKER (UNITED STATES v.). See Case No. 16,410.

STRICKLAND (CLARKE v.). See Case No. 2,864.

STRICKLAND (PIERCE v.). See Case No. 11,147.

Case No. 13,534.

STRIDER v. KING et al.

[3 Cranch, C. C. 67.] [1]

Circuit Court, District of Columbia. 1826.

VENDOR AND PURCHASER—VENDOR'S LIEN—LEGAL ESTATE—SEPARATE SECURITY.

A purchaser of land, who had paid a large part of the purchase-money, and had only a right to call for the legal estate upon payment of the balance, sold it to the first vendor for a

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

less price, and took his bonds with surety for the amount due. The land was afterwards sold by a trustee under a decree of this court upon a bill filed by the creditors of the first vendor showing a deficiency of personal assets: *Held*, that the first vendee, who had thus resold the land, had no lien upon it as against creditors, for the balance due to him upon such resale; because he never had the legal estate; and because he had taken a separate security.

[Disapproved in Johns v. Sewell, 33 Ind. 3.]

This was a bill in equity to charge the land, or rather the proceeds of the sale of the land, in the hands of a trustee who had sold it under a decree of this court on a bill filed by creditors of the late George King, to charge the real estate, for the deficiency of personal assets for the payment of his debts. Mr. George King sold the land to Mr. Strider, the complainant, who paid $3,600 out of $5,000, which was the whole price of the land, and would have had a right to call for the legal estate upon payment of the balance. Mr. Strider, not having obtained the legal estate, resold the land to Mr. King at a less price, and took his bonds with Mr. Boone as his surety, for the amount due upon this resale. Strider filed his bill against Charles King, the administrator, the heirs, and the creditors of George King, who had obtained the decree for the sale of the land to pay the debts of George King, claiming a lien on the land, and priority of payment out of the proceeds of the sale made by the trustee under the decree.

Mr. Marbury, for complainant.

C. Cox and R. P. Dunlop, for defendants.

CRANCH, Chief Judge. I think the complainant has no lien on the money in the hands of the trustee, because, 1. The complainant never had the legal estate; he had only a right to call for it upon payment of the balance of the purchase-money; and when he agreed to rescind that contract he lost that right. 2. Because he took a separate security, namely, the bond of Mr. Boone.

The other judges concurred.

Case No. 13,535.

STRING et al. v. HILL.

[1 Crabbe, 454.] [1]

District Court, E. D. Pennsylvania. Dec. 17, 1841.

SHIPPING—MASTER—EXTRA SERVICES.

A master is entitled to an extra allowance for services rendered out of the line of his duty, as in painting the ship.

This was a libel for work, materials, &c. [by David A. String and Maria A. Wood against John F. Hill, late owner of the sloop Regulus].

O. Hopkinson, for libellants.

H. Hubbell, for respondent.

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

HOPKINSON, District Judge. The claim of Maria A. Wood is for certain repairs done to the yawl boat of the Regulus, and for wharfage. The account was fully proved, and there has been no defence set up against it; there must therefore be a decree in favor of the libellant for the amount of her account, with interest from the 28th October, 1839, the date of the last item. The claim of the other libellant is made up of various items, set forth in an account annexed to the libel. The first is a charge made by the libellant, who was master of the sloop, for eighteen days' work of himself and one George Link, in painting and scraping the sloop, at one dollar per day for each of them. It is proved by Link, who was hired for this work by the master, that the work was done, that it occupied the time stated in the account, and that the wages he received were one dollar per day, which was paid to him by the master. As to so much of this charge as is for the sum paid to Link, there seems to be no reason why it should not be paid. As to the charge made by the master for his own work a question is raised, and it is denied that he is entitled to any extra pay or allowance for this service, beyond his wages as captain. That the seamen on board a vessel perform this duty, without any additional charge for it, is, I think, the constant usage, it being considered a part of their duty; and we find that nothing beyond his wages was paid to Samuel String, the master's brother, who also assisted in doing this work. It is clear, however, that such work does not fall within the duty of the captain. An attempt was made to prove a custom or usage obliging the captain to do this work when the vessel was lying in port, but it did not succeed. The evidence of George Link, a very substantial witness, with no interest whatever in the question, has a strong bearing in support of this charge. He says that the respondent told the captain to have the vessel overhauled; that he came there while the work was going on and was well pleased and satisfied; that they were, each, to have a dollar a day; and that the work took eighteen days. This seems to put the question at rest, and to support the charge by the agreement of the respondent, independent of the general ground that it was extra work, not presumed to be provided for in the captain's wages.

The other charges and credits are not contested. The account, therefore, will stand thus:

Wages for painting, &c.		$ 36 00
Other charges		120 42
		156 42
Less, credits allowed		100 00
Balance		56 42
Interest from 29th September, 1839		8 44
		$ 64 86

Decree for libellant Wood for $11 75, and for libellant String for $64 86, with costs.

Case No. 13,536.

STRINGHAM v. SCHLOENER.

[4 Ben. 16.] [1]

District Court, E. D. New York. Jan., 1870.

SHIPPING SUPPLIES—MASTER—ESTOPPEL.

1. Where the owners of a vessel permitted one K. to act as master of the vessel while she was getting ready for sea, the understanding being that he should command her as master if he should purchase an interest in her, and one of the owners made oath at the custom house that K. was the owner, and K. cleared her at the custom house as master, but, failing to purchase an interest, was displaced as master: *Held*, that the owners could not now be permitted to say that K. had not the ordinary power of a master to order stores for the voyage.

2. They were liable for stores, ordered by him, which were proper for the voyage and were used on the vessel.

[This was a libel by David H. Stringham against Otto Schloener to recover for supplies furnished the Grapeshot.]

BENEDICT, District Judge. This is an action brought to recover of the owners of the schooner Grapeshot the amount of a bill of stores and chandlery furnished to that vessel in this port upon the orders of one Kempton. The defence is, that Kempton was not, in fact, the master of the vessel, and, if he was, had no authority to bind the owners in the place of their residence.

The evidence shows that Kempton was permitted by the defendants to act as the master of the vessel while she was getting ready for sea, the understanding being that he should go on board as master, and should command her, if he purchase, during the voyage, a certain interest in her. One of the defendants made oath at the custom house that Kempton was the master of the vessel, and Kempton cleared her as master, but, failing to purchase an interest, was then displaced just before she sailed.

Under this state of facts the owners cannot be permitted now to say that Kempton had not the ordinary power of a master to order for the vessel the necessary stores and chandlery for the voyage proposed. The evidence shows that the stores and chandlery sued for were ordered by Kempton for the vessel, and were proper for the voyage intended; that they were delivered on board the vessel, and used on board for the benefit of the defendants, and that one of the owners knew of the fact that Kempton was ordering such articles of the libellants for the vessel. Having permitted Kempton to order the articles as master, and accepted and retained the articles which he so ordered, the owners are liable for the value.

Decree for the amount of the bill, with interest and costs.

STROBRIDGE (LLOYD v.). See Case No. 8,435.

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

Case No. 13,537.

STRODE v. THE STAFFORD JUSTICES.

[1 Brock. 162.] [1]

Circuit Court, D. Virginia. May Term, 1810.

WRIT OF ERROR—LIMIT OF TIME—ERROR CORAM NOBIS—PRACTICE AT LAW.

1. The 22d section of the original judicial act [1 Stat. 84], limiting the period within which writs of error may be brought to five years after the rendition of the judgment, or decree complained of, applies only to writs of error in law, and does not extend to writs of error coram nobis.

[Cited in Sanders v. State, 85 Ind. 326.]

2. In the construction of statutes, one part must be construed by another. In order to collect the legislative intention, the whole statute must be inspected.

[Cited in U. S. v. Freeman, 3 How. (44 U. S.) 565; U. S. v. Collier, Case No. 14,833.]

[Cited in Braithwaite v. Cameron, 38 Pac. 1086.]

In May, 1795, a judgment was obtained in this court, in favour of Rebecca Backhouse, administratrix of John Backhouse, deceased, against Adam Hunter and Abner Vernon, executors of James Hunter, deceased, surviving partner of "Ward & Hunter," for $8238 45, to be levied of the goods and chattels of the said James Hunter, deceased, in the hands of the defendants, to be administered. Before the rendition of this judgment, Abner Vernon had died; and in December, 1809, the plaintiff, John Strode, administrator of the said Abner Vernon, presented his petition to this court, setting forth the death of his intestate, prior to May, 1795, and praying a writ of error, coram nobis, to reverse the said judgment, for the alleged error in fact. The writ of error was awarded, and the defendant, the relator in the action, pleaded the statute of limitations in bar. To this plea, the plaintiff demurred generally, and the defendant joined in demurrer.

MARSHALL, Circuit Justice. The sole question in this case is, whether the limitation of five years, can be pleaded to a writ of error in fact, and this question depends on the construction of the 22d section of the original judicial act.[2] That section contains the following clause: "And writs of error shall not be brought, but within five years after rendering or passing the decree complained of." That this clause, standing unconnected with other provisions, which necessarily limit its operation, would extend to writs of error in fact, will not be controverted. But it is intermingled with other clauses, which essentially influence its construction. For reasons urged at the bar, which I will not repeat, it is perfectly clear, that the writ of error given in the 22d section, is not a writ of error coram nobis, but

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

[2] 1 Story's Laws, c. 20, § 22, pp. 60, 61; Act 1789 [1 Stat. 84].

a writ to be issued from a superior court, for the purpose of correcting the errors of an inferior jurisdiction. This is admitted by the counsel for the defendant; but he would obviate the inference to be drawn from it, by contending, that writs of error for the purpose of correcting errors in fact, lie from the supreme to the circuit court, and from the circuit to the district court. In aid of this argument, he states a doubt expressed by one of the judges of the court of appeals, respecting the power of that court to reverse the judgments of inferior courts for errors in fact. If, instead of a doubt, the jurisdiction had been averred, that opinion would have been totally inapplicable to this case, because the law, by which the court of appeals is constituted, gives them cognizance of all causes brought before them by writ of error generally,[3] without specifying the nature of the writ, or restricting their powers to errors in law; but the judicial act expressly provides, that "there shall be no reversal in either court," "for any error in fact." Consequently, the act of congress must be entirely disregarded, before the supreme court can take cognizance of errors in fact, committed in an inferior court, in a case brought up by writ of error. This positive prohibition of the act, is supposed to be overruled by the exceptions to the clause which limits writs of error. They are, that "in case the person entitled to such writ of error, be an infant, feme covert, non compos mentis, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability."

It is contended, that these cases are necessarily cases in which the error must be an error in fact, and, therefore, the act of limitations must be construed to extend to writs of error in fact. But the truth of the original proposition cannot be conceded. Judgments may certainly be rendered against infants, femes coverts, persons non compos mentis, or imprisoned, which may be erroneous in point of law; and for these errors, a writ of error may be sued out, the right to which is not barred by the act of limitations. There is, then, no necessity for giving these words a meaning repugnant to the plain terms and intention of the act. But it is contended, that the general words: "And writs of error shall not be brought, but within five years after rendering the judgment, or decree complained of," are unrestricted, and apply to all writs of error whatever, whether such as congress then had in contemplation, or such as were at the time, entirely out of the mind of the legislature. This would be a manifest departure from the common principles of construction, and from what appears to be the plain intent of the act. These words, though general, are not such as to show, that the term "writ of error," is used in this instance in a more extended sense than is affixed to it throughout the section, and also through the 23d and 24th sections. They are, "and writs of error," that is, writs of error which are the subjects of the law. It is probable, that had a more extended operation been intended, some terms would have been used indicative of that intention. Instead of the words, "and writs of error," we should, most probably, have found the words, "all writs of error whatever," or "all writs of error, whether brought in a superior court, or in the same court," or some other terms, indicative of an intention to regulate writs which were not the objects to which the attention of the legislature was at the time directed.

But it is urged, that one sentence of a law cannot be affected by the context. I should as soon have expected the declaration that one sentence of a will was not to be affected by other parts of the will. In each, the intention of the maker is to be affected, and, consequently, each instrument must be wholly inspected. Without reasoning upon this subject, the books abound with authorities, which seem to be conclusive. In 1 Inst. 381, Lord Coke says: "It is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers." He afterwards adds: "And this exposition is ex visceribus actus." The instances which illustrate this axiom, in the construction of statutes, are numerous. They are to be found in all books which touch on the subject, and many have occurred in the supreme court of the United States. The statute of England is inapplicable, because it is not connected with other clauses. The demurrer is sustained, and the judgment of reversal must be rendered.

[See Case No. 13,538.]

STRODES v. The COLLIER. See Case No. 13,272.

Case No. 13,538.

STRODES v. PATTON et al.

[1 Brock. 228.][1]

Circuit Court, D. Virginia. May Term, 1812.

ARBITRATION AND AWARD—UPON WHOM BINDING—EXECUTORS—CREDITORS—VENDOR AND PURCHASER—DEFICIENCY IN QUANTITY—SALE BELOW VALUE.

1. An executor or administrator may submit any account of his testator or intestate, to arbitration, and if he adopts the award of the arbitrators, the award is binding, not only upon the executor, or administrator, but upon creditors of the estate which he represents.

2. Quære, if such award be glaringly unjust, may not the executor, under certain circum-

[3] See Tate, Dig. tit. "Judiciary Court of Appeals," p. 374.

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

stances, be made personally responsible, and may not items unknown to the executor, and not acted on by the referees, be set up either by the executor himself, or by the creditors, notwithstanding the award of a general balance?

3. If the party, in whose favour a general balance has been awarded, relies upon the award in his bill, and the other party in his answer, neither contests it, nor alleges any claim on the part of the estate which he represents, which had not been submitted to, and decided by the referees, the award must be considered as a complete adjustment of the affairs of the two estates up to the time when it was given.

4. The sale of a final settlement certificate by an administrator is valid, and if such sale was necessary in a course of administration, and was for the highest market price, the administrator will be protected, though it sold greatly below its nominal value. It could only be made available by a sale, as payment could not be coerced by suit, as in the case of a bond.

5. A sale of land was made under a decree of a court of chancery, by commissioners appointed for that purpose. The tract was composed of three contiguous tracts, purchased by the defendant's intestate of three different individuals. The commissioners exhibited the title-papers at the sale, expressing a certain quantity, and sold the land, as directed by the decree, by the acre, undertaking, however, neither for quantity nor title, and declaring that the purchaser must buy at his own risk. A judgment was obtained against the purchasers on their bond, and they came into equity to enjoin this judgment, on the ground, that the defendant's intestate was not entitled to, nor ever in possession of a single acre, under one of the three deeds; that a certain portion of another tract had been surrendered by the representatives, previous to the sale, in an adjustment of boundary; and that the third tract was also deficient. *Held*, that the judgment for the purchase-money ought to be enjoined, to the extent of the deficiency in the land.

6. Quære, if the land sold so far below its value, as to justify the court in the opinion that the purchaser took into his estimate the deficiency in the quantity, should not the bill be dismissed, unless the purchasers would consent to vacate the contract?

A decree was rendered in this court, in favour of the representatives of John Backhouse, against Robert Patton, administrator with the will annexed, of James Hunter, deceased, appointing the said Patton and others, special commissioners, with directions to any two or more of them, to sell, on a credit of twelve months, at public auction, all the real estate whereof the said Hunter died seized, which remained unsold by his executors, for certain purposes set forth in the decree. Among other lands sold under this decree, was "the marsh tract," so called, in the county of Fauquier, of which the plaintiffs in this present suit became the purchasers. The commissioners produced on the day of sale, two several deeds, made to James Hunter, in his lifetime, purporting to convey 500 acres, and 200 acres of land respectively; and also a patent for 420 acres of land, granted to Reuben Wright, in April, 1775, and afterwards conveyed by Wright to Hunter. These several parcels of land, containing together, according to the purport of the deeds, 1120 acres, composed "the marsh tract," purchased at the commissioners' sale, by the two plaintiffs, John and Thomas Strode, for $5 per acre. The commissioners declared, on the day of sale, that they acted merely as such, and refused in any manner, to become personally responsible for quantity or title, but should sell the lands, according to the tenor of the decree, and the deeds, and patent, for the quantity expressed on the face of each, by the acre. John and Thomas Strode, executed their bond for the purchase-money of the land bought by them, and after the expiration of the period limited for its payment, suit was instituted against them, and judgment recovered. In the year 1807, pending a suit in the court of chancery, for the Richmond district, between John Strode, one of the present plaintiffs, as administrator of Abner Vernon, deceased, (who had qualified and acted as the executor of James Hunter, deceased,) and one of the present defendants, Robert Patton, as administrator, with the will annexed, of James Hunter, deceased, the parties in the suit agreed to submit all the matters in controversy between them, touching the estates of their intestates, to the arbitration of Robert Hening, and John W. Green, who made their award on the 5th day of May, 1807, awarding a general balance due from Hunter's to Vernon's estate, of £2361 1s. On the 27th day of June, 1808, the court of chancery, approving this award, rendered a decree in pursuance thereof, against Hunter's administrator, to be satisfied out of the unadministered assets in his hands to be administered. This present suit was instituted, for the purpose of enjoining the bond given by the plaintiffs to the defendants, above recited, and for the purpose of obtaining a decree against the estate of James Hunter, for the amount due to the plaintiff, John Strode, as administrator of Vernon, as ascertained by the award of Hening & Green, and for other smaller sums; and also, for money alleged to be due from Hunter's estate, to the plaintiff, John, in his own right. The injunction was asked, partly on account of an alleged deficiency in the lands purchased at the commissioners' sale, and partly on account of the debts, which have been stated. After the answer of the commissioners, and the administrator of Hunter, were filed, an account was ordered by consent of parties, and the cause now came on to be heard on exceptions to the report of the commissioner.

[See Case No. 13,537.]

MARSHALL, Circuit Justice. 1. The first exception is general, and will therefore be passed over.

2. That the commissioner set aside the award of Hening & Green. This exception is not entirely and literally true in its statement of the fact. The commissioner did not set aside the award of Hening & Green. He gave the plaintiff credit for the amount of that award, and the defendants have ex-

cepted to this item of the report. The commissioner, however, has debited the plaintiff, in the account of his intestate with James Hunter's estate, with several sums supposed to have been omitted by the persons by whom the award was made, and by doing so, has, in fact, overturned the award, and has made the representative of Vernon, a debtor, instead of a creditor, of Hunter's estate. This exception involves an inquiry into the validity of the award, and into the power of an executor, or administrator, to submit any question respecting the estate he represents to arbitration.

It has been laid down, in broad terms, that an executor has no power to submit any account of his testator to arbitration, and that, as to creditors, a submission by him is an absolute nullity. I know not where this law was found. The gentleman who advanced it, did not produce a single dictum in support of it, nor have I been able to find any case in which it has been so decided. No reason can be perceived for such a rule. The executor has a right himself to settle the account; and if he submits it to the settlement of others, and adopts their award, he is as much concluded by it, as if he himself made the settlement. The executor necessarily acts for the creditors; for as his act binds the fund to which creditors may have recourse, they are bound by his act, where it is a fair one. If an award be glaringly unjust, I will not say, that the executor may not, under certain circumstances, be made personally responsible, nor should I feel much difficulty in allowing items unknown to an executor, and not acted on by the referees, to be set up, either by the executor himself, or by the creditors, notwithstanding the award of a general balance. That such an opinion would be affirmed by a superior tribunal, is far from being certain. It is, however, my opinion. But to go beyond the award, either to charge the administrator, or the person who claims under it, the award itself must be controverted by the pleadings in the cause, and the objections to it distinctly stated. In the present instance, this has not been done. The bill relies on the award, and the answer neither contests it, nor alleges any claim on the part of Hunter's estate, which had not been submitted to and decided by the referees. In such a case, the award must be considered as a complete adjustment of the affairs of the two estates, up to the time when it was given.

3. Upon this reasoning, the third exception must also be sustained. This exception refers to the sale of a final settlement certificate, by Vernon, as executor of James Hunter, much below par, which is alleged by the plaintiff to have been sold for the highest market price, and that the sale was necessary in a course of administration. The plaintiff farther insists, that all inquiry with regard to it is precluded by the award. Upon this exception, however, it may not be improper to add, that if the sale of the certificate was really necessary in a course of administration, there can be no doubt of the power of the administrator to sell it. It cannot be tendered in payment, and can only be converted into specie by a sale. In this, it differs from a bond, which may be put in suit, and payment coerced. An executor, however, ought to be well satisfied of the necessity, before he sells a certificate at a price greatly below its nominal value.

Upon the point of necessity, no evidence is furnished, except what may be found in the commissioner's report. He states that the sale was not necessary, and that no account of it was laid before the arbiters. These facts would be very material, if the pleadings were such as to bring the award, or the accounts existing before its rendition, into controversy. The other exceptions are chiefly to debits against Abner Vernon, in his accounts with Hunter's estate, for debts due to that estate, and supposed to have been lost through the negligence of Abner Vernon, and for payments made on account of that estate, as is supposed, improperly. The testimony on which these charges are made, is not laid before the court. It might, perhaps, be taken as sufficient to support them, since no exception was made to it before the commissioner. But this inquiry is also precluded by the state of the pleadings.

The exceptions are sustained, and the report set aside.

The equity suggested in the bill, in consequence of a deficiency in the quantity of land sold, will next be considered. The land was sold under a decree of this court, directing commissioners, therein appointed, to sell the lands whereof James Hunter died seized and possessed, and which remained unsold by his executors. Acting under this decree, the commissioners sold a tract of land called the marsh tract, which had been purchased of three different persons by James Hunter. At the sale, they exhibited the title papers, which expressed the quantity of 1120 acres, and sold the land contained in those deeds by the acre; declaring, however, that they undertook neither for quantity nor title, and that the purchaser would buy at his own risk. It is now stated, that under one deed, that made by Reuben Wright, for 420 acres, James Hunter was not entitled to, nor ever in possession of, a single acre. That 39 acres, part of the land conveyed by a different person to Hunter, were surrendered by one of the executors, in an adjustment of boundary made with one Wyckoff. That there is also a deficiency of 50 acres for land under the third deed. If the land sold had existed, but had not measured 1120 acres, the plaintiff admits that he would have had no right to apply for the interposition of this court. By consent, the quantity specified in the deeds was substituted for the quantity which the tracts might

contain in survey, and the survey was dispensed with. But had it been known to this court, that nothing was held under Wright's deed, this court would not have authorised a sale of it. In fact, the terms of the order do not authorise such a sale. Had the fact been known to the commissioners, they could not have offered it for sale. It is, then, a sale made without authority, or by mistake. Had the truth of the case been reported to this court before a conveyance, the justice of the case would have imperiously demanded, that the mistake should be corrected, either by setting aside the sale altogether, or so much of it as was improperly made, as circumstances might require. A court could not tolerate such an imposition, practised, in fact, by itself. The conveyance having been made, the doubt is, whether the relief prayed for shall be granted unconditionally, or on conditions. If it had appeared that the land sold so far below its value, as to justify a suspicion that the purchaser took into his estimate this deficiency in the quantity, I should be much inclined to require that things should stand as they are, unless the purchaser would consent to vacate the contract. But this being neither alleged nor proved, cannot be presumed. The court, therefore, will enjoin the bond given for the purchase money, to the extent of the deficiency in the land.

Decree. 1st. That the report ought to be set aside. 2d. That the plaintiffs are entitled to a deduction as to so much of the purchase-money for the land sold them by the defendants, as is equal to the deficiency in the quantity of the said land. One of the commissioners of the court, is ordered to state and report to the court, the amount and nature of the deficiencies in the said lands, with the comparative value of such deficiencies at the time of the sale, and the amount which ought to be deducted from the purchase-money on account of those deficiencies, agreeably to the foregoing opinion. Leave given to the defendants to amend their answer in the cause, and to the representatives of John Backhouse, who claim to be creditors of James Hunter, to file their cross bill in this suit, and to assert any claim they may have against any of the parties.

Case No. 13,539.

STROHM v. UNITED STATES.

[Taney, 413.] [1]

Circuit Court, D. Maryland. April Term, 1840.

FORFEITURE — VESSEL BUILT FOR SLAVE-TRADE — GUILTY KNOWLEDGE—ACT OF CONGRESS.

1. Construction of the act of congress, passed 20th April, 1818, c. 91, in relation to the slave-trade [3 Stat. 450].

2. The appellant built and fitted out two vessels at Baltimore, for a Portuguese merchant named De Sylva, member of a mercantile house at Bahia, and residing in Cuba; they were built under the superintendence of two men sent to Baltimore for that purpose from Havana, and who were to have command of the two vessels when built; De Sylva placed $14,000 in the hands of the appellant, his factor, in Baltimore, to be applied towards the construction of the vessels, and offered to pay any further sum that might be required. When the first of these vessels, called the Anne, was ready for sea, she was registered as the appellant's own property, and the usual oath of ownership taken by him at the custom house; as soon as she was so registered, she was seized by the collector, and proceedings were instituted against her in the district court, under the second section of the act of congress, passed 20th April, 1818, c. 91, on the ground that she was fitted out for the slave-trade, and the appellant appeared to these proceedings as her claimant; it was proved on the trial, that she was built and fitted out for the slave-trade, and that the appellant knew she was intended to be so employed: *Held*, that as the contracts for building the vessels, were made with the appellant, and the bills and expenses paid by him, as factor for De Sylva, the vessels must be regarded as built, fitted out and equipped by him, as factor for De Sylva, in the sense in which those words are used in the act of congress.

3. If the guilty purpose was entertained by the owner for whom the vessel was built or equipped, it is immaterial, whether the person who builds her or equips her, as factor or master, was apprised of it or not.

4. In order to work a forfeiture, a criminal intent must exist in the mind of the party who is lawfully entitled to direct the employment of the vessel; if the owner places the vessel under the control of a factor or master, who builds or equips her, with that unlawful intention, having at the time authority from the owner to direct the employment of the vessel, the offence described by the law is committed, and the vessel is liable to the penalty.

5. As the factor or master derives his authority over the vessel from the owner, she is, in their hands, responsible as fully, for any violation of law, as if the owner were present and directed it.

6. The fair construction of the act of congress is, that where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches; and if the owner entertained the purpose, or the factor or the master, having at the time the control and direction of the vessel, the purpose of either one of the three being proved, it is not necessary to bring home the knowledge or purpose to either of the other two.

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

In admiralty. This was an appeal from the decree of the district court, condemning the above-named vessel, upon the ground that she was built, fitted out and equipped, at the port of Baltimore, for the purpose of being employed in the slave-trade. The vessel was seized and proceeded against under the second section of the act of the 20th of April, 1818, c. 91. It appeared from the evidence, that this schooner (together with another of a like description built at the same time), was built for a Portuguese merchant, named De Sylva, who was a partner of a mercantile house established at Bahia, in

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

South America; but De Sylva himself generally resided in Cuba. The two vessels were built under the superintendence of two men who were sent to Baltimore for that purpose, from Havana, by De Sylva; one of these men was a Spaniard and the other a Portuguese; and it appeared from the letters of De Sylva, introducing them to his factor, that they were to have the command of these schooners, as masters in the service, when the vessels were finished. The contracts for the building and equipping these vessels were made by [John F.] Strohm & Co., merchants of Baltimore; who were the factors of De Sylva, and in whose hands he placed $14,000, to be applied towards the building and equipping of the vessels, with an offer to pay anything further that might be found necessary to complete them. When the Anne was finished and equipped, and ready to sail, she was registered by Strohm & Co., as their own property; and the usual oath of ownership was taken by Strohm, at the custom-house, in order to obtain for her American papers. As soon as Strohm thus registered her, she was seized by the collector, and the proper information lodged against her with the district-attorney; after some evident hesitation and wavering on the part of Strohm & Co., they appeared in court and claimed the schooner, and denied that she was built for the purpose of being employed in the slave-trade; and appealed from the decree of the district court condemning the vessel.

The counsel for the appellant contended, 1st, that there was no sufficient evidence to prove that the vessel was built or equipped for the slave-trade: 2d, that if De Sylva intended to employ her in the slave-trade, there was not sufficient evidence to show that Strohm & Co. knew it: and 3d, that the schooner having been built and equipped by Strohm & Co., as factors, she was not liable to condemnation, unless Strohm & Co. built or equipped her for the purpose of being employed in the slave-trade, and that the guilty purpose must be entertained by the party who builds or equips the vessel, in order to subject her to forfeiture.

J. Glenn and R. Johnson, for appellant.
N. Williams, Dist. Atty., for appellee.

TANEY, Circuit Justice, said, that upon the two first points above stated, it was very clear that the Anne was built for the slave-trade, and that Strohm & Co. knew it, and he then entered into a particular examination of the testimony, to show that it established the fact beyond a reasonable doubt.

In relation to the 3d point, he said, it was true, that the vessel was built, fitted out and equipped by Strohm & Co. as factors, and not by De Sylva himself as owner, nor by the two men, as masters, who superintended the building. The contracts were made with Strohm & Co., and the bills and expenses paid by them, as factors for De Sylva, and the schooner must therefore be regarded as built, fitted out and equipped by them, as factors, in the sense in which these words are used in the act of congress. But as the court was satisfied, upon the evidence, that Strohm & Co. knew the vessel was intended to the slave-trade, and built her for that purpose, she was liable to forfeiture, even upon the construction of the act of congress contended for by appellant.

The court were, however, of opinion that, if Strohm & Co. had been ignorant of the purpose for which De Sylva procured the schooner to be built, it would make no difference. If the guilty purpose was entertained by the owner, for whom the vessel was built or equipped, it is immaterial whether the person who builds her or equips her, as factor or master, was apprised of it or not. Upon any other construction the law would be nugatory; for it would be very easy for the foreign owner who, through a factor or a master, procured a vessel to be built or equipped for the slave-trade, in a port of the United States, to conceal from them any positive knowledge of the uses for which the vessel was intended. In general, the purpose of employing the vessel in the slave-trade, can exist only in the mind of the owner, for he has the power to control her movements; and if he procured her to be built or equipped for such a purpose, she is liable to forfeiture, although the factor or master, through whom the work was done, knew nothing of her destination. In order to work a forfeiture, a criminal intent must exist in the mind of the party who is lawfully entitled to direct the employment of the vessel; this the owner may always do; but if he places her under the control of a factor or master, who builds or equips her with that unlawful intention, having at the time authority from the owner to direct the employment of the vessel, the offence described by the law is committed, and the vessel is liable to the penalty. And inasmuch as the factor or master obtains his authority over the vessel from the owner, she is, in their hands, responsible as fully for any violation of law, as if the owner were present and directed it. Indeed, it might well happen, when the owner resided in a foreign country, that the unlawful purpose of the master or factor could be abundantly proved, while it would be impossible to offer any evidence of the knowledge of the owner.

The fair construction of the act of congress is this: that where the criminal purpose is proved to exist in the owner, or in the factor or master, who has the direction of the vessel at the time she is built or fitted out, the forfeiture attaches; and if the owner entertained the purpose, or the factor, or the master, having at the time the control and direction of the vessel, the purpose of either one of the three being proved,

as above-mentioned, it is not necessary to bring home the knowledge or purpose to either of the other two; the purpose of either one of them, as above stated, would subject the vessel to forfeiture. Here, however, it is clearly established by the evidence, that the owner, the factor and the master, all had a perfect knowledge of the unlawful purposes for which the Anne was built and fitted out: and in either view, therefore, of the construction of the act of congress, she must be condemned.

The decree of the district court is, therefore, affirmed with costs.

Case No. 13,540.

The STROMLESS.

The C. E. PAGE.

[1 Lowell, 153.] [1]

District Court, D. Massachusetts. April, 1867.

COLLISION—GROUNDED VESSEL—DEMURRAGE—PRESUMPTIONS.

1. Where a schooner had grounded in the entrance to a dock, and a brig that was ready for sea undertook to haul by her after her officers were warned that there was not room enough, and became jammed, and both vessels were injured; *held*, the brig was solely to blame.

2. Demurrage is allowed in cases of collision for the time the injured vessel is necessarily detained, if she has lost employment.

[See The Baltic, Case No. 824.]

3. A coasting schooner (collier) during the busy season may be presumed to have lost employment.

In admiralty.

J. C. Dodge, for owners of the C. E. Page.

G. O. Shattuck, for owners of the Stromless.

LOWELL, District Judge. Cross-libels for damage to the schooner C. E. Page and the brig Stromless. In August, 1865, the schooner arrived at Boston with a cargo of coal, and attempted to haul in to Robbins's wharf. The dock which divides this wharf from French's wharf, which is next it on the south, narrows towards the harbor. The brig was lying near the end of French's wharf taking in ballast, and the people of the schooner were apprehensive that there was not room to pass, and asked to have the brig hauled up the dock a short distance, which was done. The schooner then attempted to haul in, but grounded in the narrowest part of the dock and stuck fast. The brig being soon after ready to go out tried to haul by, but was jammed between the schooner and the wharf, and when the tide fell both vessels were somewhat damaged. The mate of the brig was warned that there was not room enough, and knew that the schooner was aground.

LOWELL, District Judge. The grounding of the schooner appears to have been an ordinary accident of navigation, and one which had no direct tendency to cause the collision, because the officers of the brig were fully warned of it, and undertook to pass notwithstanding. However provoking the delay may have been, the brig, under these circumstances, went forward at her peril, and must bear all the loss, which, fortunately, is not large.

Demurrage is the principal item of the damages, and it is shown that three days were necessary for making the repairs. The rule is to give demurrage if the vessel has lost employment; and it seems a fair matter of inference that a coasting vessel of this character would obtain freights during the busy season of the year. We have no fixed measure of so much a ton for each day's delay, and I must rely on the evidence in every case, which in this points to forty dollars a day for this schooner. Damage pronounced for.

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

Case No. 13,541.

STRONG v. CERTAIN QUANTITY OF WHEAT.

[2 Amer. Law Reg. (N. S.) 287; 4 West. Law Month. 82.]

District Court, N. D. New York. 1863.[1]

DEMURRAGE — DELIVERING AT ANOTHER PORT — CUSTOM—BILL OF LADING—FREIGHT.

1. A carrier, finding, on his arrival at the end of his portion of the route, that an unusual press of business there would prevent his delivery of his freight for several days, is not thereby justified in taking the goods to another place and forwarding them from there to the consignees.

2. A cargo was shipped to a certain port, to be there forwarded by railroad to the consignees. The master of the vessel, after waiting two days and finding that his vessel could not be discharged for several days more, sailed to another port in the same state, and discharged his cargo there: *Held*, that his claim for demurrage at the first port could not be allowed.

3. The custom of the lake ports, that on the failure of the consignees to provide for the delivery of the property consigned to them for twenty-four hours after the report of its arrival, the master of the vessel was entitled to store the freight subject to charges at the nearest port, would not be a reasonable custom at Port Colborne, where there was no facility for the discharge of the cargo except at one place, and there was some proof of the custom of the port for vessels to wait their turn at that place.

4. Though the charter-party is ordinarily the controlling evidence of the contract as to everything clearly expressed therein, and bills of lading are often regarded as little more than evidence of the shipping and receipt of the cargo, yet, where the charter-party is not proved, or where it makes no provision in regard to the consignee or mode of delivery, the bills of lading become the proper and controlling evidence, in whole or in part, of the contract.

5. Freight is usually payable when it has been fully earned by the safe carriage and right delivery of the cargo.

[1] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 3 Wall. (70 U. S.) 225.]

[This was a libel for freight and demurrage by Heman Norton Strong against a certain quantity of wheat, the cargo of the Convoy; Frederick T. Carrington and William J. Preston, claimants.]

HALL, District Judge. The libel in this case was filed to compel the payment of freight, on the cargo proceeded against, from Chicago to Port Colborne, and thence to Buffalo; demurrage for two days' detention at Port Colborne; and sundry expenses incurred by the unlading, storage, and insurance of the cargo at Buffalo.

The bills of lading for the cargo were in the following form:—

"Chicago, August 18, 1860.

"Shipped in good order and condition, by E. G. Wolcott, on board the schooner Convoy, of ——, whereof —— is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition (the dangers of navigation only excepted) unto consignees as per margin, or to his or their assigns. Freight and charges to be paid as noted below, upon the actual and complete delivery of the said goods and freight to said consignees or their assigns. In witness whereof the master of said vessel hath affirmed unto three bills of lading all of this tenor and date, one of which being accomplished the others to stand void.

ACC. J. H. Burch & Co. Care Carrington & Preston, Oswego, N. Y. *via* Welland Railway from Port Colborne to Port Dalhousie, thence by sail or steam vessel to Oswego."	16,014 35-60 Bushels No. 1 Spring Wheat (16,014 35). Freight to Port Colborne eight and one-half cents per bushel.

The bill of lading copied above was signed by E. G. Wolcott as agent of the shippers; and three other copies were signed by the master of the Convoy. The copy of the bill of lading annexed to the answer of the claimant is in substance the same, except that the name of "Alex. McKirdy," as master, is inserted in the body of the bill, that the name of "Alex. McKirdy" is signed at the bottom, and that under that signature is the following entry: "Freight from Port Colborne to Oswego four and one-half (4½) cents per bushel—to be shipped from Dalhousie by steam or sail vessel classing not below standard. Dangers of navigation excepted. For Welland Railway, Walker & Brother, Agts." There is no proof in regard to this entry, and it does not appear that at the time of the execution of the bills of lading, the agent or master of the Convoy knew that any special contract had been made for the transportation of the cargo of the Convoy over the Welland Railway. It must therefore be assumed that their knowledge of the final destination of the cargo, and of the mode of its transportation from Port Colborne, via the Welland Railway, to Oswego, was wholly derived from the entries in the bill of lading, so signed by the agent of the shipper, and similar bills of lading signed by the master of the Convoy. The Convoy, with her cargo on board, reached the western terminus of the Welland Railway, at Port Colborne, on Lake Erie, on the 28th of August, 1860, between 9 and 10 o'clock in the evening. The next morning her arrival was reported to the agents of the Welland Railway Company, and, during that day and the next, the master of the schooner and the agent of her owner several times desired the agents of the company to discharge the vessel, or to fix some specific time for her discharge. The agents of the railway company declined to do either; stating that they could discharge vessels only in the order of their arrival, and that the Convoy should be discharged in her turn, as soon as the other vessels which had arrived before her and were then awaiting their turn could be discharged. There was an unusual and extraordinary press of business at the Welland Railway Company's elevator at Port Colborne, and though vessels were discharged as rapidly as the capacity of the elevator and railway would permit, there was at that time an accumulation of vessels and consequent delay in their discharge. There was no other elevator or place of storage at Port Colborne, and if the Convoy was to be discharged there she would necessarily be discharged at the elevator of the railway company, or by hand labor. If discharged by hand labor, there was no means of storing the cargo there; and it would have been exposed to injury and loss. When the Convoy arrived there were twelve or thirteen vessels waiting to be discharged, and as two vessels were usually discharged in each twenty-four hours, the Convoy, if she had been discharged in turn, would have been discharged on the sixth or seventh day after her arrival—or about the 4th day of September. There was no agent of the consignees at Port Colborne, but there was telegraphic communication between Port Colborne and Oswego, where the consignees resided. No instructions were asked of the consignees and no information was sent them by the master of the Convoy, who, with his vessel, remained at Port Colborne until the afternoon of the 30th of August. He then sailed for Buffalo, which was the nearest port at which storage for the wheat could be obtained. The Convoy reached Buffalo the same evening, and the next day discharged her cargo at an elevator, her master taking a receipt for the wheat to be delivered to his order.

The day after the cargo was discharged the libellant, as owner of the Convoy, sent a telegram from Buffalo to the consignees at Oswego, in the following terms: "Buffalo, Sept. 1, 1860. To Carrington & Preston: Obliged to store cargo Convoy in the Hatch Elevator in this city. Shall libel cargo for freight, demurrage at Port Colborne, and freight and charges here, unless settled immediately. Answer. H. N. Strong, Owner Convoy." On

the receipt of this telegram the claimants despatched an agent to Buffalo, who offered to pay freight to Port Colborne and fifty or one hundred dollars in addition, but the libellant demanded $300 in addition to the freight provided for on the bill of lading. No settlement was made, and on the 5th of September, 1860, the libel in this case was filed.

On the hearing it was insisted, on behalf of the libellants, that the Convoy was chartered for the trip from Chicago to Port Colborne, to carry the wheat which constituted her cargo; that the bill of lading, subsequently executed, was therefore to be regarded only as a mere receipt for the wheat; that the charter-party, and not the bill of lading, was to be looked to as containing the contract of affreightment between the parties; and that if there was anything in the bill of lading to prevent the recovery of freight immediately on delivery of the cargo at Port Colborne, or relieve the owners of the cargo from the duty of receiving it there on the vessel's arrival, the bill of lading ought to be reformed so as to make it correspond with the alleged charter-party. The libellants also offered and gave (subject to the claimants' objection) proof of the custom of the lake ports in respect to the disposition to be made of freight when the consignee does not provide for its reception within twenty-four hours after he is informed of its arrival. This evidence will be more particularly detailed hereafter, and its effect considered.

The allegations of the libel, so far as they relate to the alleged charter of the Convoy, are, in substance, that on the 18th day of August, 1860, E. G. Wolcott, the agent of the owners of this cargo, shipped, and the master and owner of the Convoy received on board that vessel, the wheat before mentioned, which the shipper agreed should be carried, and which the said schooner, master and owner, agreed said schooner should carry from Chicago, aforesaid, to Port Colborne, in Canada, for the freight mentioned in a bill of lading, which was on the said last-mentioned day duly executed and delivered in triplicate; that it was agreed that said wheat should, pursuant to said bill of lading and contract, be carried to and delivered at Port Colborne, and that all the parties to such bill of lading and contract of affreightment (except said schooner, master and owner) agreed that they would receive the said cargo from the said schooner on her arrival at said Port Colborne, and would then and there relieve the said schooner therefrom, and pay the freight thereon from Chicago to Port Colborne aforesaid, and also, that the said schooner, master and owner did not, nor did any or either of them, ever, in fact, agree to carry said property from said Chicago to any other place than said Port Colborne, but did agree to carry said wheat from said Chicago to said Port Colborne, and there deliver the same —as the same as aforesaid was agreed to be received—to be carried from thence as in said bill of lading mentioned. The libel also further alleges that if the said bill of lading expressed any other or different agreement, the same was so expressed by mistake, and it prayed that the same—the said bill of lading—might be reformed and altered to conform to the contract of affreightment as aforesaid made.

The only evidence to sustain the allegation that there was a contract of charter prior to and independent of the contract evidenced by the bill of lading, is to be found in the deposition of Mr. Goodnow, the agent of the libellant, and the deposition of Mr. Wolcott, the agent of the claimants, by and between whom the arrangements for the carriage of the wheat were made. The agent of the libellant says: "On or about the 18th day of August, A. D. 1860, I, as agent of H. N. Strong, chartered the schooner Convoy, which was then at the port of Chicago, to Mr. E. G. Wolcott, a commission merchant on South Water street, Chicago, Illinois, to carry a cargo of wheat from Chicago to Port Colborne, in Canada, at eight and one-half cents per bushel freight. This is the cargo now in controversy in this suit. At the time of making said contract, or charter, no other destination or port was named but Port Colborne. Mr. Wolcott made out some bills of lading for me, leaving the number of bushels of wheat blank for the captain to sign, as she would not be loaded until after office hours. The captain signed the bills of lading and I took them to the office of Mr. Wolcott, the next morning. The bills of lading signed by the captain were three in number. The fourth bill of lading annexed to the deposition as exhibit A, is signed by the shipper, E. G. Wolcott, and is an exact copy of the three bills of lading signed by the captain, with the exception of the names of the signers. At the time the cargo was shipped and the bills of lading were signed, there was no contract or any other understanding of whatever kind for the transportation of the cargo to Oswego or any other port. It was only from Chicago to Port Colborne that said contract was made for." The agent of the claimant says: "I contracted with Mr. Goodnow for the schooner Convoy, about the 18th of August, 1860, to take a cargo of wheat from Chicago to Port Colborne, and I think I made a contract with one of the Mr. Walkers to take it from there through to Oswego. Walker was agent of the Welland Railway Company." * * * "My only conversation or understanding with Mr. Goodnow was in relation to Port Colborne only, and that was the contract made with Goodnow, from Chicago to Port Colborne."

There is nothing in this testimony or in the other testimony in the case to justify this court in disregarding or modifying the contract evidenced by the bill of lading. There was probably a simple agreement that the vessel should take a cargo of wheat to Port Colborne at 8½ cents per bushel. Leaving

the details of the contract to be determined by the custom and usages of shippers, masters, and vessel-owners, at Chicago, and looking to the execution of a bill of lading as the final evidence of the terms of the contract; or it may be that the bills of lading which were prepared with a blank for inserting the quantity of wheat, after the cargo was put on board and the quantity ascertained, were prepared at the time of the first agreement as evidence of the contract agreed to by the agents of the parties. This testimony of the agents of the parties should not therefore control or affect the bill of lading in this cause.

It is true that bills of lading, signed by the master of a vessel, under a charter-party for the voyage, are often regarded as little more than evidence of the shipping and receipt of the cargo, and that the charter-party is ordinarily the controlling contract as to all the terms or provisions clearly expressed therein. Pars. Mar. Law, 240, 241. But where a written charter-party makes no provision in regard to the consignee or mode of delivery, the bills of lading, which supply the omission, cannot be deemed inoperative and invalid, because of the pre-existing charter-party. But in this case there is no evidence of a charter-party. If the cargo had been lost or damaged prior to its arrival at Port Colborne, the liability of the owners of the Convoy would not have been that of bailees to transport for hire, under a charter-party—who are only bound to the use of ordinary skill and care;—but the greater and more stringent liability of shipowners and carriers. The contract made by the agents of the parties was a contract for the carriage of the wheat, not the charter of the Convoy; and the bill of lading is, therefore, the proper and controlling evidence of the contract.

The bill of lading shows that the Convoy was to carry the wheat only to Port Colborne; at least this is apparent when the terms of the bill of lading are considered in connection with the proof that if the wheat was transported to Oswego, via the Welland Railway, it must necessarily leave the vessel at Port Colborne. The parties who made the contract knew this. They stipulated for the freight to Port Colborne only; they provided for a different mode of transportation beyond; and they knew that on the arrival of the vessel at Port Colborne, she would, in the ordinary course, and according to the custom of that port, be discharged at the elevator of the Welland Railway Company. The master who signed the bill of lading had been at that port frequently, and he knew that the wheat, if discharged there and sent forward by the Welland Railway, must necessarily be delivered at that elevator, unless the tedious and expensive process of unloading by hand labor was adopted.

Doubtless both parties expected and intended the vessel should be discharged at the elevator. The shipper did not expect that the cargo would be delayed by the slow process of discharging the wheat by manual labor, and the shipowner did not expect to incur the expense of manual labor for that purpose. The Welland Railway Company was one of the carriers on a portion of the line of transportation over which the wheat was intended to pass (as appeared upon the face of the bill of lading signed by the master under the inspection of the agent of the Convoy), and both parties expected that the railway company would receive and transport the cargo of the Convoy over their road. They equally relied on the ability of the railway company to receive and forward the cargo without delay; and they doubtless were equally disappointed when it was found that in consequence of an unusual and extraordinary press of business, at Port Corborne, several days must elapse after the arrival of the vessel before she could be discharged.

The testimony shows that the railway company discharged the vessels at Port Colborne in their turn, according to the order of their arrival, and as rapidly as their means would allow; that the Convoy would have been discharged in her turn, as soon as all other vessels waiting for their discharge at the time of her arrival, had been discharged; and that she would have been so discharged in from six to eight days after her arrival. She remained at Port Colborne two days and three nights, for which her owner now claims $150 demurrage, and then, there being no means of immediately storing her cargo at Port Colborne, she came to Buffalo and put it in store in this city.

In determining the rights of these parties in regard to the disposition of the cargo of the Convoy, under the contract evidenced by the bills of lading and the peculiar circumstances of this case, it is proper here to consider the proof of the custom of the lake ports, which it was insisted justified the course taken by the master of the Convoy. The libellant's witnesses stated in substance, that it was the custom of many of the lake ports—and so far as they knew at all of them—for the master of a vesssel to report her arrival with freight, and to allow the consignees twenty-four hours to provide for the delivery and receipt of the property consigned to them, and that if the consignees were not, at the end of that time, prepared to receive the freight, the master of the vessel was entitled to store it, subject to charges, at the nearest point. It was not, however, stated by these witnesses, that they could mention any case where a vessel had left the port of destination, under such a custom. The agent of the libellant admitted he could not do so, and that the information he had in regard to the custom at Port Colborne was, that it was there the custom for vessels to wait their turn to be discharged.

It is true that in the absence of express agreement, the duty of the master in the delivery of freight must necessarily be determined by the custom which regulates the mode of de-

livery at the port of discharge. In the absence of express contract, the parties are presumed to have contemplated a delivery according to the established custom. And proof of a custom prevailing at most of the ports on the Great Lakes, without any countervailing proof in respect to the other ports, might be sufficient proof of the custom, at other ports on the same lakes, under similar circumstances. If there was no reason for presuming the existence of a different custom, the general usages and customs of the lake ports might, in the absence of all proof in respect to the particular port, be presumed to prevail there also; but in this case there is some proof of a different custom at Port Colborne,—a custom to discharge vessels in the order of their arrival. Port Colborne, as a commercial port, is very different from the other lake ports, and the custom proved which is reasonable and proper at other ports, is not likely to be adopted at that port. Considering the peculiar character of the port and of its business, and especially the fact that it has no facilities for discharging vessels or storing their cargoes, except such as are furnished by the elevator of the Welland Railway Company, no custom except for vessels to wait their turn can be considered as just or reasonable; and no other custom can, under the proofs in this case, be considered as having been within the contemplation of the parties by whom the contract of affreightment in this case was made. The master of the Convoy and the agent of her owner knew, as well as the shipper and owned of the cargo, what means of discharging the vessel were to be found at Port Colborne, and if, when the contract of affreightment was proposed, they were unwilling to take the danger of delay consequent upon this mode of discharging this vessel, they should have provided against it by stipulating for demurrage.

I am therefore of the opinion that the master of the Convoy was bound to deliver his cargo to the Welland Railway Company, and to wait his turn for the delivery of his vessel. But if the master of the Convoy was not bound to remain at Port Colborne until his vessel could be discharged in its order, he did not do what he ought to have done, before taking the cargo to Buffalo and there storing it. There was telegraphic communication between Port Colborne and Oswego, where the consignees of the wheat resided, and during the time he remained at Port Colborne information of the delay and its cause could probably have been sent to the consignees, and their instructions received in return. The consignees might have offered a fair demurrage or have given special instructions for the disposition of the wheat; and it was the duty of the master to endeavor to communicate with the consignees, when it was probable that their instructions could be readily obtained. If, when a cargo reaches the port of destination at the residence of the consignee (who is presumed to know that his interests will require attention on its arrival), the shipmaster, in the absence of any particular custom, is bound to use due diligence to find the consignee and obtain his instructions, before he assumes to put the cargo in store, on the ground that no other proper delivery can be made, it would seem to be more clearly his duty to use due diligence to obtain the consignee's instructions, in regard to the disposition of the cargo, where the difficulty in carrying out his contract of affreightment, as originally contemplated, arises at an intermediate port, where the consignees were not expected to be present, either in person or by their agents.

The disposition of the cargo by the master requires, at all times, the utmost caution on his part. He should always bear in mind that it is his duty to do all in his power to carry out, to the extent of his engagement, the prime object of his employment—the forwarding of his freight, by the route and means agreed upon, to the place of its final destination. It is for this purpose that he has been intrusted with it, and this purpose he is bound to endeavor to accomplish, by every reasonable and practicable effort, until he has delivered his freight according to his contract, or such delivery has become entirely impracticable. Even at the port of final destination and the presumed residence of the consignee, he is bound to make every reasonable effort to deliver the cargo personally to the consignee, or in accordance with the known and established customs of the port; which customs are presumed, in the absence of express agreement, to be within the contemplation of the parties, and to be, by their tacit consent, silently introduced into the contract of affreightment. If he is required to do this at the port of final destination and the place of business of the consignee, he cannot be required to make less effort to perform his contract and protect the interests of the absent owner, in an unforeseen emergency, at an intermediate point, where the consignee was not expected to be present, but necessarily relied upon the acts of another carrier having exclusive control of the means of carriage over a portion of the line of transportation. Good faith, the interests of commerce, and a wise public policy equally require that the master should do all in his power to protect the interests of freighters in such unforeseen and extraordinary emergencies, and the master of the Convoy should not have diverted the wheat of the claimants from the line of transportation they had chosen, and have thereby subjected it to unusual and unexpected charges, and exposed its owners to a prosecution for a breach of their contract with the Welland Railway Company, until he had attempted by telegraph to communicate with the consignees.

It was contended on the argument that under the bill of lading in this case no freight could be demanded until the delivery of the wheat to the consignees at Oswego, the port of final destination, but in the view I have taken of this case it does not become necessary to decide the question. It may possibly be doubtful

what would be the true construction of the bill of lading independent of any custom;—and also whether the custom for the different carriers along the same line of transportation, to advance to each preceding carrier all accrued freight and charges and receive the goods and merchandise, subject to such charges, to be collected with their own charges, on delivery to the next carrier or the consignee, has been so long and so well established, and so often proved in court, as to require this court to take judicial notice of such custom without proof in the particular case. It is probable that this custom was understood by the parties in this case, and that they intended it should be acted upon; and it is most likely that it was not intended or expected that the freight earned by the Convoy should either remain unpaid, after the delivery of the wheat at Port Colborne, or be advanced by the consignees before the wheat reached Oswego. All parties doubtless supposed it would be advanced by the Welland Railway Company, according to the known and established custom.

Independent of the custom and looking to the bill of lading alone, I am not prepared to say that the consignees were bound to pay freight before the wheat arrived at Oswego. Freight is usually payable when it has been fully earned by the safe carriage and right delivery of the cargo, and if the bill of lading had simply provided for the payment of the Convoy's freight on delivery, the delivery referred to would have been the delivery by her at Port Colborne. But such is not the provision in the bill of lading. The freight is declared to be payable "upon the actual and complete delivery of said goods and freight to said consignees or their assigns"—and it is clear that the delivery to the consignees was to be at Oswego and not at Port Colborne.

What would have been the effect upon the rights of the parties of an absolute refusal on the part of the Welland Railway Company to receive the wheat or advance the freight of the Convoy, and what would have been the duty of the master under such circumstances, it is not now necessary to decide, for the railway company did neither, and only asked that the Convoy should wait her turn, and be discharged in her order. The libel is dismissed, with costs.

NOTE. This case, for which we are indebted to the courtesy of Judge Hall was decided by him in the early part of last year, and taken to the circuit court on appeal. At the October session, 1862, the opinion of that court was delivered briefly by Mr. Justice Nelson, affirming the decree upon the opinion of Judge Hall in the court below. [Case unreported. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 3 Wall. (70 U. S.) 225.] The case was of importance, not only as it affected the right of the shipmaster to change the port of delivery and forward his freight to the consignees by a route different from that laid down in his contract, but also as it involved, to some extent, the judicial recognition of customs claimed to be established at the lake ports. The particular custom alleged was for the master of a vessel to report her arrival and allow the consignees twenty-four hours to provide for the delivery and receipt of the cargo, and in case they failed to do so in that time, the master to be entitled to store the freight, subject to charges, at the nearest point. The reasonable character of such a custom is discussed, though not expressly decided upon, the proof having failed to come up to the point claimed by the libellant, and there being some evidence that the custom of the particular port named in the contract was different and was known to all the parties. While the general principle is abundantly well settled, that the custom of the trade or the usage universally attached to the subject-matter in the place where the contract is made, may be used as evidence to explain the ambiguities or supply the omissions of defective contracts (Add. Cont. 851; 1 Greenl. Ev. § 292); and though the decisions draw a clear line of distinction between a custom modifying general contracts, which must be long-continued, even from time immemorial, and a usage of trade which may be of recent origin (Barton v. McKelway, 2 Zab. [22 N. J. Law] 165; Knowles v. Dow, 2 Fost. [N. H] 387; Townsend v. Whitby, 5 Har. [Del.] 55), yet it is important to bear in mind that even in the case of mercantile usage this rule was meant for a general, uniform, notorious, and reasonable course of trade in long-established commercial communities, and should be applied with great caution to avoid fettering the commerce of our growing towns by hasty judicial recognition of their early crude and temporary customs. See Harper v. Pound, 10 Ind. 32; Wall v. East River Mut. Ins. Co., 3 Duer, 273; and the remarks of Judge Story in the case of The Reeside [Case No. 11,657].

STRONG (CONSOLIDATED FRUIT-JAR CO. v.). See Case No. 3,130.

Case No. 13,542.

STRONG v. GOLDMAN et al.

[8 Biss. 552.] [1]

Circuit Court, N. D. Illinois. June, 1879.

CREDITOR'S BILL—ILLINOIS STATUTE—FRAUD—RECEIVER.

1. The Illinois statute of 1877 concerning assignments for the benefit of creditors and providing that the county court shall have jurisdiction over assignees and the execution of the statute, does not deprive courts of equity of jurisdiction of a creditor's bill to set aside a fraudulent assignment, or preference consummated prior to the making of the assignment.

[Cited in Clapp v. Dittman, 21 Fed. 18.]

[Cited in brief in Preston v. Spalding, 120 Ill. 208, 10 N. E. 905.]

2. Where the debtor had made disposition of from $150,000 to $200,000 worth of stock without accounting for the proceeds, or paying his indebtedness, and then made an assignment under the state law, of about $18,000 worth of goods, it was *held* that this was a proper case for the appointment of a receiver, for the purpose of unearthing if possible the disposition of the property.

This was a creditor's bill filed by complainant [Edward Strong] as judgment creditor of Philip Goldman. The bill alleged in substance the recovery of three judgments in this court against Goldman in favor of the complainant; that execution was issued, and returned no property found; that up to September 1, 1878, Goldman was engaged in the wholesale boot and shoe business in Chicago

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

as manufacturer and dealer; that he had a large amount of merchandise in his possession, and claimed to be worth over eighty thousand dollars, over and above all his liabilities; that during the months of August and September he made very large purchases of goods, and had in his possession, as the result of these purchases, and of the stock previously obtained, something over $200,000 worth of goods; that sometime during the month of August he commenced without the payment of debts to deplete his stock, and to dispose of his property, and continued to do so until some time in November last when he made an assignment to one Beiersdorf for the benefit of his creditors. The property thus assigned at that time amounted only to some $16,000 or $18,000, and the bill charged that in the course of about four months the debtor had disposed of and made way with something like $150,000 or $200,000 worth of goods, and left a very large amount of indebtedness uncancelled and unprovided for, and then made over to Beiersdorf, for the benefit of his creditors, this small remnant of his stock in trade. It was charged that the creditors did not know with any degree of certainty what disposition was made of it—whether he gave the goods away, secreted them, or made fraudulent sales—but it was charged generally that he had had dealings with sundry persons who were made parties defendant to the bill. The defendant by his answer denied all fraud in the case, especially all specific allegations of fraud in the bill, and denied all fraudulent collusion or dealings with the defendants who were specially charged with having had fraudulent dealings with him. These defendants also denied that they had fraudulent dealings with Goldman. Goldman did not deny that he had this large amount of assets on hand at the time charged in the bill, nor that when he came to make his assignment in November he had no such amount of assets on hand. He did not state what he had done with them. He admitted the existence of the immense indebtedness, and a commercial indebtedness, contracted in the due course of business for goods purchased.

Tenney, Flower & Abercrombie, for complainant.

McClellan & Tewkesbury, for defendants.

BLODGETT, District Judge. The question is made, that inasmuch as the statute of Illinois passed in 1877, (Rev. St. Ill., Hurd's Ed., 1877, c. 10a), regulating the method of executing assignments made for the benefit of creditors clothed the assignee with power to execute the trust under the direction of the county court, after having given bond approved by the county judge, that a court of equity is from this time forward deprived of the power to exercise the ordinary jurisdiction, with which they have been heretofore clothed for entertaining creditors' bills and searching out fraudulent conveyances to set them aside, and that the whole subject-matter of investigating the affairs of a debtor who has seen fit to make an assignment is relegated to the county court under the operation of this law. I cannot give any such scope to this statute regulating assignments. Undoubtedly the intention of the Illinois legislature was as far as possible to give the aid of the county court to the execution of assignments, but it nowhere clothes the voluntary assignee with power to set aside a fraudulent assignment which the assignor had made, or any other fraudulent acts. It does not give him authority to set aside a preference which had been made even upon the very eve of the assignment. It simply declares that any preference made in the assignment itself shall be void; but suppose that a debtor the very day that he makes his voluntary assignment to the assignee for the benefit of his creditors takes all his ready money and pays certain creditors in full, and then assigns the remnant of his estate for the benefit of his other creditors; there is no method by which the voluntary assignee can get behind his assignment—no method given by the statute by which he can get behind these preferences and set them aside, but he must simply step into the shoes of the debtor himself, and execute the assignment under the law without the power to challenge or cause to be set aside any of the fraudulent transactions that the party may have been guilty of, up to the very moment he made his assignment. This is no question of conflict of jurisdiction between the county court and this court; but it is a question whether the legislature intended to clothe the county court solely with power of administering the affairs of a debtor who has made a voluntary assignment so that creditors could not attack, except through the county court and the assignee, a fraudulent assignment, or fraudulent actions and preferences consummated prior to the making of the assignment. I do not think there is any fair inference in the language of the law itself for any such intention on the part of the legislature. It is not a question of conflict between the county court of Cook county and the federal court of this circuit, but it is a question between the county court and courts of equity, and in that light, it seems to me, the inference cannot be deduced that the legislature intended to repeal a portion of the chancery act of this state, which has been in force over forty years, authorizing the filing of creditor's bills, and the pursuit through the agency and machinery of a court of equity of equitable assets and setting aside fraudulent conveyances. It did not intend to denude courts of the power they have so long exercised by the mere placing of voluntary assignees within the control of some tribunal which could overlook and control their transactions.

Then the question is, should this court appoint a receiver under the prayer in this bill, and the facts disclosed? As I have already said the complainants in this case ask that a receiver shall be appointed for the purpose of bringing suits and generally investigating the affairs of this debtor, and taking possession of any equitable assets which he may have. Inasmuch as the debtor himself, and the defendants who are charged in the bill with having had collusive or fraudulent dealings, all deny that they ever had any fraudulent dealings such as ought to be set aside, or have in their possession any assets they ought to surrender, it is claimed there is no reason shown in that regard for the appointment of a receiver, and that a receiver should not be appointed until there is something for him to receive—some disclosure made of assets which he ought to have possession of. The answer is this: There is a disclosure, to some extent, that this man has by some method made way with a large amount of assets. The precise manner in which he has done it is not shown, nor perhaps known to the creditors. The complainant does not aver it in his bill any further than he avers fraudulent dealings and collusion with the parties made defendant. The fact that those parties deny that they have any assets they ought to surrender, does not necessarily involve the assumption that he has made no fraudulent disposition of his property. At most, it only involves the conclusion that the complainant has not yet discovered to whom this property has been conveyed. While it is true Goldman does emphatically deny that he has made any fraudulent disposition of property, at the same time the fact remains unchallenged that he has made disposition of an immense amount of his estate without accounting for the proceeds of it, and has left much of his indebtedness unpaid. On this showing, it seems to me, there is a case made for the appointment of a receiver to be clothed with powers, competent for the court to confer, for the purpose of bringing suits, or prosecuting this suit, and unearthing, if it is possible, the disposition this man has made of this property. A receiver will, therefore, be appointed with such powers as the court may now or hereafter confer upon him in the premises.

Case No. 13,543.

STRONG et al. v. NOBLE et al.

[6 Blatchf. 477; 3 Fish. Pat. Cas. 586; Merw. Pat. Inv. 324.] [1]

Circuit Court, S. D. New York. June 22, 1869.

PATENTS—NOVELTY—NEW USE—IMPROVEMENT IN WHIPS.

1. The invention covered by letters patent granted to Henry A. Strong and Edmund F. Woodbury, December 18th, 1866, for an "improvement in whips," on the invention of Woodbury, is a patentable invention.

2. Although a tubular knit fabric was old, and although a whip was old, and although the idea of covering a whip and a whip-handle with something was old, the application, in the manner shown in that patent, of such a knit fabric to the covering of a whip, to produce a whip or a whip-handle covered with such a fabric, substantially as described in that patent, was not merely applying such knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent.

[Cited in Gottfried v. Phillip Best Brewing Co., Case No. 5,633.]

3. Where a fabric is knit, by machinery, in flat strips, of the proper width to form a tube of the required diameter, and projecting loops are then produced on each edge of the strip, and those loops are then interlooped with each other, by a crochet needle, by hand, forming the same stitches as in the rest of the fabric, and making it impossible to tell where the union was effected, or that the fabric was not knit wholly by machinery, the resulting fabric is a fabric brought into a tubular form wholly by knitting.

4. Such fabric is substantially the tubular knit fabric of the patent of Strong and Woodbury.

5. It is no infringement of that patent to make and sell whips covered in whole or in part by a covering made of threads of warp and weft interwoven.

[This was a bill in equity filed [by Henry A. Strong and Edmund F. Woodbury] to restrain the defendants [Reuben Noble and others] from infringing letters patent [No. 60,606] for an "improvement in whips," granted to complainants as assignees of the inventor, Edmund F. Woodbury, December 18, 1866.] [2] This was a final hearing, on pleadings and proofs.

Stephen D. Law, for plaintiffs.

F. A. Brooks, for defendants.

BLATCHFORD, District Judge. The bill in this case is founded on letters patent, granted to the plaintiffs on the 18th of December, 1866, for an "improvement in whips," the plaintiffs being the assignees of the plaintiff Woodbury, as inventor. The specification contains the following statement of the nature and utility of the invention: "My invention consists in using a knit fabric for the cover of the handle or other portion of a whip. The benefits arising from constructing a whip with such a cover are these: First, it makes a more ornamental cover than ordinary plaiting, and looks equally as well or better than what is termed a 'worked' cover; second, the cost of such a cover, especially for the handle of a whip, is much less than that of covers 'worked' by hand, and they are more durable. I design to use this cover principally for the handles of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 477, and the statement is from 3 Fish. Pat. Cas. 586. Merw. Pat. Inv. 324, contains only a partial report.]

[2] [From 3 Fish. Pat. Cas. 586.]

whips, where there is more wear than on any other parts of the whip, but it can be used for any other portion or for the entire whip." The specification then describes the manner in which the inventor covers the whip or the handle with such knit fabric. It says: "The fabric is first knit onto a machine, just as ordinary plain tubular knitting is produced, of a size proper to permit of its being drawn on the body of the whip. I then usually turn the fabric 'wrong side out,' as I think it is more ornamental for this purpose; but this is a matter of choice, and not essential. When the body of the whip has been prepared for the cover, I take a piece of the knit fabric of the length desired, and draw it on the body of the whip to the desired place. Then, after fastening the cover at one end in any suitable manner, if it is not as close a fit to the handle as desired, I twist the other end around the handle, causing the rows of stitches to lie spirally around the handle. The twisting of the cover makes it smaller, and causes it to fit closely to the handle, and also improves the looks of the handle so covered. After the cover is fitted on as above described, I apply one or more coats of glue or sizing, which cause it to adhere firmly to the handle, or body, of the whip, in every place." The claims are as follows: 1. A whip, having the handle, or any other portion, covered with a knit fabric, substantially as herein described. 2. Covering the handle, or any other portion, of a whip, by drawing on the same a piece of tubular knit fabric, and fastening it thereon in any suitable manner, substantially as and for the purpose herein described.

The first defence set up is, that the invention patented is not a patentable invention. It is urged that the knit fabric, referred to in the first claim, is a tubular knit fabric; that it appears, by the evidence, that tubular knit fabrics were known and used, for various purposes, before Woodbury applied such a fabric to the covering of whips; that the application, in accordance with the patent, of such a knit fabric to the covering of a whip is merely the application of an old article to a new use; and that, therefore, the patent is void, as respects the first claim. The conclusion by no means follows from the premises. Although a tubular knit fabric was old, and although a whip was old, and although the idea of covering a whip and a whip-handle with something was old, it by no means follows that the application, in the manner shown in the specification, of such a knit fabric to the covering of a whip, so as to produce a whip, or a whip-handle, covered with such a fabric, substantially as described in the patent, is merely applying the knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent. Such applications are of this character—using an umbrella to ward off the rays of the sun, it having been before used to keep off the rain; eating peas with a spoon, it having been before used to eat soup with; cutting bread with a knife, it having been before used to cut meat with. To apply the principle here invoked, to avoid the first claim of this patent, would render void the mass of patents that are now granted. There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve any thing more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it. In the present case, the points of advantage, set forth in the specification, as attending the invention, are ornament, economy, and durability. It could not be told necessarily, a priori, without experiment, that these advantages would accompany the application of the knit fabric as a covering for the whip.

Another ground of defence urged is, that the defendants' whip-handles are not covered with a knit fabric, or, if they are, that such knit fabric is not made wholly by machinery, and is not made tubular wholly by machinery. The evidence is entirely satisfactory, that the fabric used by the defendants is a knit fabric, and not a woven fabric, within both the etymological and the technical definitions of a knit fabric. It appears, that, with a view to invade the patent, and, at the same time, to seem to evade it, the defendants have resorted to a discreditable and circuitous method of making a tubular knit fabric—a fabric which shall be knit, and shall also be tubular when ready to be applied to the whip. The patentee, desiring to use a fabric that is knit and tubular, does what every person proceeding in an honest and straightforward way would do. He uses a fabric which is knit in a tubular form on a machine, and. which is in a tubular form when it is taken off from the machine on and by which it is knit. The defendants, it appears, knit their fabric by machinery, in flat strips, of the proper width to form a tube of the required diameter, and projecting loops are then produced on each edge of the strip, and those loops are then interlooped with each other by a crochet needle, by hand, forming the same stitches as in the rest of the fabric, and making it impossible to tell where the union was effected, or that the fabric was not wholly knit by machinery. But the interlooping by hand of the two rows of loops is knitting, and the fabric, when completed, and in a tubular form, is a knit fabric, and a tubular fabric, and a tubular knit fabric, and a fabric knit into a tubular form, and a fabric brought into a tubular form wholly by knitting, although a part of the knitting is done by machinery, and a part by hand. The patentee is not, because he describes his

method of obtaining the tubular knit fabric to be to knit it by machinery, being bound to describe the best method, limited to that method of obtaining the fabric. The first claim is to the whip, or whip-handle, covered with a knit fabric, substantially as described. Assuming the patentee to be limited to a knit fabric put into a tubular form before it is begun to be applied to the whip, or the handle, the mode of putting it into such tubular form, provided it be knit, is of no consequence. It would seem, from the evidence, that the defendants resort to the extraordinary circuitous method of knitting by machinery a flat strip, with a selvage on each edge, and then removing the two selvages by hand, thus disclosing the loops which are to be interlooped by hand by means of a crochet needle. In both cases, the fabrics have the characteristics which distinguish knitted from woven fabrics, of being formed by the interlooping of loops with each other, and of being elastic in every direction.

The fact that the handles of whips had before been covered with leather tubes drawn over the same, and with woven fabrics, is no answer to the patent. The defendants, in so far as, in accordance with the Avery patent, they have made or sold whips covered, in whole or in part, by a covering made of threads of warp and weft interwoven, have not infringed the patent. But they have infringed it by making or selling whips covered, in whole or in part, with a knit fabric, substantially as described in the plaintiffs' patent. There must be a decree for an account, and an injunction, with costs. The question of the extent of their liability under such accounting will come up on the master's report.

STRONG (OGDEN v.). See Case No. 10,460.

Case No. 13,543a.

STRONG v. O'NEILL.[1]

District Court, S. D. New York. March 26, 1879.

NATIONAL BANKS—INSOLVENCY—STOCK ASSESSMENT—LIABILITY OF INSURANCE COMPANY—ULTRA VIRES.

[1. The fact that the New York statutes regulating the investments of insurance companies do not authorize them to invest in national bank stock does not render unlawful the taking of such stock by way of pledge, or in payment of a debt. Therefore, when such shares are transferred on the books of a bank from a stockholder to an insurance company, without notice to the bank in what manner they were acquired, it is entitled to presume that they were lawfully acquired; and the insurance company, after holding the stock and receiving dividends thereon, is estopped from setting up an unlawful acquisition for the purpose of escaping liability to an assessment on the subsequent insolvency of the bank.]

[2. There are no special reasons of public policy for exempting an insurance company, which acquires national bank stock in a manner forbidden by its charter, and receives dividends thereon for many years, from the operation of the rule that the defense of ultra vires cannot be interposed for the purpose of escaping the burdens of a completed transaction, after receiving the benefits thereof.]

[This was an action at law by Charles E. Strong, receiver of a national bank, against John P. O'Neill, receiver of the Continental Life Insurance Company, to recover an assessment on certain shares of the bank's stock held by the insurance company. A verdict was directed for plaintiff, and defendant moved for a new trial.]

J. L. Cadwalader, for plaintiff.

Wm. Dorsheimer, for defendant.

CHOATE, District Judge. This is an action brought by the receiver of a national banking association against the receiver of a life insurance company incorporated under the laws of the state of New York to recover an assessment laid pursuant to act of congress upon the stockholders of the bank, which had become insolvent. Upon the trial it appeared that in April, 1868, the Continental Life Insurance Company, of which the defendant has been appointed receiver, caused to be transferred to it on the books of said bank thirty six shares of the capital stock of said bank. That the same were obtained from one Grimwood, the former owner thereof, under the following circumstances: Grimwood was then a policy holder in the life insurance company. The amount of the premium on his policy was $1,048.60 of which $349.53 was charged against him as a loan, and the remainder, $699.07, was due in cash, and was at that time in arrear. Grimwood was also indebted to the company for interest on loans $61.95. Thereupon the company purchased of him the thirty six shares of the bank stock at $90 per share, crediting him with the premium and interest due as paid, and paying him $2,588.47, the balance of the purchase price. Immediately thereafter the stock was transferred in the usual manner on the books of the bank, and from the transfer to the time of the failure of the bank, in April, 1873, the company received its dividends as a stockholder. On the 31st of March, 1877, the defendant was duly appointed receiver of the life insurance company. Prior to his appointment the company paid the first assessment laid by the comptroller of the currency on this stock, being fifty per cent. of its par value. The claim in this suit is upon an assessment for the remaining fifty per cent. of the par value of the stock as held by the company.

The facts being undisputed, a verdict was ordered for the plaintiff, and this is a motion for a new trial on the ground that this direction was error. The only defense made is that the purchase of the stock was prohibited by the laws of New York relating to life in-

[1] [Not previously reported.]

surance companies, and that, therefore, the obligation which otherwise the company would have been under to pay the assessment cannot be enforced against it or the receiver. The laws of New York regulate the investments by life insurance companies of their capital and accumulated funds. The securities which they are allowed to invest in do not include the stocks of national banks, and therefore it must be conceded that this purchase was a violation of these statutes. The circumstances do not show that the transaction was, in its character, other than an investment of the funds of the company. The stock cannot be regarded as having been taken simply in discharge of a debt, for the principal part of the consideration was not so paid, but was paid with money which must be regarded as the accumulated funds of the company. There is nothing, however, in the statutes of New York which expressly prohibits a life insurance company from taking, under any circumstances, a transfer to itself of bank stock, or any other valuable property. The inhibition is against investing its capital or accumulated funds in any other than certain specified securities. But such a company is not prohibited from taking other property as collateral security for a debt, or indeed in satisfaction of a debt, and it would be a very narrow construction of the statutes, and one tending to the serious injury of that class of persons for whose benefit this restriction is imposed,—that is, the policy holders and their representatives,—so to hold. In a proper case, where the company cannot collect a debt in money, it is certainly for the interest of the policy holders that it should be allowed to receive any valuable property which the debtor has, and is willing to transfer as security for, or in satisfaction of, his debt. Nor is such a transaction expressly, or by implication, forbidden by the statutes. It is true that such an acquisition of property may be attended by possible future loss, as in this case, if this bank stock had been so received, the taking of it would have been accompanied by a contingent liability in case of the failure of the bank. But I do not think that this circumstance would bring such a case either within the letter or the spirit of the restraining statute, although it is a fact which may affect the duty of the managers of the company in dealing with the property when acquired, or the proper discretionary exercise of their powers as managers in determining whether or not they should accept the property at all. Now, in the present case, the bank had no notice that these shares were not lawfully and properly acquired by the life insurance company. A party dealing with a corporation may indeed be held to take notice that an act done by the corporation is absolutely, and under all circumstances, prohibited. But it is otherwise as to an act which it may or may not be authorized to do according to the existence or nonexistence of certain facts and circumstances peculiarly within the knowledge of the corporation itself. If there is any presumption as regards a third party dealing with the corporation on the faith of the act done, it is that the circumstances necessary to make the act lawful exist. Cooke v. State Nat. Bank of Boston, 52 N. Y. 96. The doing of the act, which is valid if certain circumstances exist, is a holding out by the corporation to those dealing with it that they do exist, and, ordinarily, a corporation would thereby be estopped to deny the existence of those circumstances as against a party who has, upon the faith of such representations, parted with value. Id. In the present case neither this bank nor its receiver has been at fault. They are not chargeable with notice that this was an investment of the capital or of the accumulated funds of the life insurance company. The bank has paid the company its dividends as a stockholder, and extended to it all the other benefits of ownership in the stock, on the faith that the transfer which released Grimwood from this contingent liability was lawful and proper. The defendant is therefore estopped to set up this defense, unless there is something in the nature of this corporation, or in the peculiar nature of the unauthorized act, which creates an exception in its favor.

As to the character of the defendant corporation, it is urged that life insurance companies are organized for the relief and protection of those who are helpless, and especially entitled to the protection of the legislature and the courts; that the policy holders, and those who succeed to their interests, do not choose the managers, and do not sustain the same relation to the corporation which stockholders generally do to corporations. It is also urged that banks are essentially trading and commercial corporations; that their stockholders, and those who deal with them, and thereby become creditors, take their stock, and deal with them, with full notice that this is their character; and that their investment in the stock, and other dealings in the securities of the bank, is at the risk of losses arising from commercial disaster. All this is very true, but it does not reach nor affect the present question. The doctrines of equitable estoppel are based on the theory that their application is essential to secure and promote fair dealings between the parties entering into business transactions with each other. They are the creations of the courts for the prevention of fraud, or such misleading of one party by another as would work an injury or injustice equivalent to a fraud, whether in fact so intended or not. They are, therefore, and must be, universal in their application, and no corporation which can transact the particular kind of business in respect to which the estoppel may arise can be held exempted from their wholesome operation, unless by express legislative enactment. It is true that the policy holders, and especially those who have by their death succeeded to their interests,

are entitled to all proper protection by legislatures and courts; but, like all other parties, they may suffer loss from the misconduct of those who, even without their votes, are chosen to manage their affairs. As against those parties, their protection and remedies will be ample and rigorously enforced. But they cannot be shielded against all possible misuse by these (their representatives) of the powers necessarily instrusted to them; and from enlarged considerations of public policy, and for the sake of preventing greater injustice to innocent parties, this protection must cease where, according to the doctrines of equitable estoppel, it would work such greater injustice.

The point, however, principally urged by the learned counsel for the defendant is that the contract made by this corporation in violation of the terms of its charter was ultra vires, and that it was void as against public policy, and that no such contract void as against public policy can be enforced by the court. The general prohibition of corporations from exercising powers not conferred on them by their charters undoubtedly rests on considerations of public policy, and the proper enforcement of such prohibition is of great importance to the public. There is nothing, however, in this case making the inhibited and unauthorized act in any sense more peculiarly against public policy than every other act done by a corporation without authority of its charter, or in violation of any other similar restraining act; and I think the weight of authority is that this defense of ultra vires cannot ordinarily prevail where the contract has been fully executed by the other party, and the corporation setting up the defense has received all its benefits and advantages, and avails itself of the unauthorized character of the acts, merely to protect itself from the liability imposed on it by the contract for securing to the other party to the contract those compensating advantages, the full consideration of which the corporation has enjoyed and still retains. That, as applied especially to executed or partly executed contracts, the defense of ultra vires is not an absolute defense, but one which is applied with a due regard to all the circumstances of the particular case, and to the proper protection of both parties, so far as is possible, from wrong and injustice. As expressed in the recent case of Whitney Arms Co. v. Barlow [unreported]: "The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong." See, also, Bissell v. Michigan, S. & N. I. R. Co., 22 N. Y. 258.

In the present case it would clearly not advance justice, and would accomplish a legal wrong, to allow this plea. The stockholders and the creditors of this bank have, by act of congress, the absolute liability of all the stockholders, to the amount of the par value of their stock, for their security in dealing with the bank as stockholders or creditors. By an act by which the terms of the act of congress absolutely released Grimwood, who, as the former owner of these shares, was bound to this extent, the life insurance company made itself apparently the holder of these shares, and so remained down to the time when this contingent liability of stockholders became absolute by the failure of the bank. This act, though unauthorized in fact by the charter of the company, was one which it might, under certain circumstances, lawfully do. It might become owner of the stock in satisfaction of a debt, or it might become pledgee of the stock as collateral, or, in either case, it could lawfully have the stock transferred into its name. As between itself and the former owner, the contract has been executed, and no movement has ever been made to have it vacated, annulled, or set aside. So long as the stock had any value, the company treated it as its own, and not Grimwood's and took its dividends for some five years. As between the bank and the corporation, it has also had and enjoyed all the benefits—and they have been valuable and substantial—of the transaction by which it became an apparent stockholder in April, 1868, and these benefits have all been conceded to show the faith of its having become such stockholder in fact. No case is cited which would justify the upholding of this plea of ultra vires against countervailing equities so strong.

It has been assumed, in dealing with the question, that no title to the shares vested in fact in the company by reason of want of authority to make the purchase, and it is clear that, even on this theory, the plaintiff is entitled to his verdict on the doctrine of equitable estoppel. It is not necessary to decide whether, as between Grimwood and the company, the title is to be deemed to have passed. It does not seem to me certain, notwithstanding the prohibition of the statutes of New York, that, where the directors of such a corporation purchase property which, by the charter, they are not allowed to purchase, that the title does not pass, in a case where the statute does not expressly declare that the title shall not pass. To hold that the title does not pass would in many cases expose the corporation and its helpless policy holders to greater loss and injury than they would otherwise suffer from the unauthorized transaction. In this case, where they have parted with their money, and have only a possibility of recovering it back from a purchaser perhaps insolvent, if the title to the property is not vested in the company, it is in a position where it may lose both the money and the property, for, if it has no title, it cannot sell the property, and so remedy, in whole or in part, the wrong already done to the policy holders. It may be, in such a case, the title should be deemed to pass, with the right on the part of compa-

ny to have the transaction annulled, if it so elect. But this question is not directly involved in the determination of this motion. Motion denied.

Case No. 13,544.

STRONG v. SMITH.

[3 McLean, 362.] [1]

Circuit Court, D. Indiana. May Term, 1844.

DEEDS—ACKNOWLEDGMENT—CERTIFICATE OF AUTHORITY—NOTICE—PARAMOUNT TITLE.

1. When a deed is executed out of Indiana, for land within it, and which is acknowledged before a justice of the peace, under the Indiana statute, the clerk of the county should certify as to the authority of the justice and not the secretary of state.

2. A deed not acknowledged, in Indiana, is valid between the parties, and when proved may be received in evidence. But such deed until properly acknowledged, though recorded, is not notice.

3. A deed valid between the parties, executed before an attachment is laid upon the land, and the deed being properly acknowledged and recorded, before the deed under the attachment, which was not recorded within twelve months, conveys a paramount title.

[Cited in Story v. Black, 5 Mont. 26, 1 Pac. 11.]

At law.

Mr. Smith, for plaintiff.

Wick & Barbour, for defendant.

OPINION OF THE COURT. This case is submitted to the court on a statement of facts. Both parties claim under Andrews. The lessor of the plaintiff's deed was executed in the state of Connecticut, 11th of January, 1840. The same day it was acknowledged before a justice of the peace, and certified by the secretary of state. It was recorded the 4th November, 1840. On 17th November, 1843, the clerk of the county, under the seal of the court, certified that the justice who took the acknowledgment was a justice, and it was again recorded in Indiana, in the proper county, the 27th November, 1843. The defendant claims under an attachment, by a deed from the sheriff, dated 13th of July, 1842, which was recorded the 24th of January, 1844. The land was attached after the date of plaintiff's deed, and sold 23d of January, 1840. The lessor of the plaintiff's deed was properly acknowledged in Connecticut before a justice of the peace, but the certificate of the secretary of state was not the proper evidence, under the Indiana statute, as to the authority of the justice. On this ground, it is presumed, the deed was certified with the seal and certificate of the county clerk in 1843.

In Doe on the Demise of Wayman v. Naylor, 2 Black [67 U. S.] 32, the court held, "An acknowledgment is necessary for the admission of a deed to record, but is not essential to its validity." "If the recorder records a deed which has not the statutory requisites to admit it to record, such deed is not entitled to the legal effects of a deed." Oliv. Conv. 274. The recording of a deed for land defective in a statute requisite, is not constructive notice of its existence to third persons. Carter v. Champion, 8 Conn. 594. A deed not acknowledged, or acknowledged defectively, if recorded in Indiana, would not be notice, but it is good between the parties, and, when proved, is admissible in evidence. The attachment was not laid upon this land until after it was conveyed to the lessor of the plaintiff. That conveyance was good between the parties, but, by reason of a defect in the certificate as to the justice, though recorded, it was not technically notice. This error being corrected the deed was again recorded, about two months before the defendant's deed from the sheriff was placed upon record. As the deed of the defendant was not recorded within twelve months from the time of its execution, and not until after the lessor of the plaintiff's deed was recorded, effect is given to the latter, unless it shall be shown to have been fraudulent. There is no pretence of this in regard to the plaintiff's deed. Upon the whole, we think the title of the lessor of the plaintiff is paramount to that of the defendant, and, consequently, the judgment must be entered in his favor.

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

Case No. 13,545.

STRONG v. SOUTHWORTH.

[8 Ben. 331; [1] 2 Nat. Bank. Cas. (Browne) 172.]

District Court, E. D. New York. Dec., 1875.

NATIONAL BANKS — STOCKHOLDERS — ASSESSMENT BY COMPTROLLER—DEMURRER.

A stockholder in a national bank demurred to a complaint of the receiver of the bank, who had sued to recover the amount of an assessment, laid by the comptroller of the currency upon the stockholders, to wind up the affairs of the bank alleging as a ground of demurrer that the complaint did not show that the assessment was needed by the receiver: *Held*, that the decision of the U. S. supreme court, upon this point, in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, that as to the necessity of an assessment and its amount "the determination of the comptroller is conclusive," was not obiter dictum, and therefore must control in this case, and the demurrer must be overruled.

[Cited in Stanton v. Wilkeson, Case No. 13,299; Young v. Wempe, 46 Fed. 355.]

[This was a bill in equity by Charles E. Strong, receiver of the Atlantic National Bank of New York, against James E. Southworth. Heard on demurrer.]

Nash & Holt, for complainant.

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

Charles O. Tracy, for respondent.

BENEDICT, District Judge. This case comes before the court upon a demurrer to the complaint. The complaint alleges in substance that on April 26th, 1873, the Atlantic National Bank of New York was a national bank duly organized and doing business, and on that day failed, and plaintiff was thereupon appointed receiver of its assets; that the comptroller of the currency has made an assessment upon the shareholders of the bank of one hundred per cent of their shares, and has directed suits to be brought to collect such assessments, and that defendant is a shareholder and has not paid the assessment. Judgment is demanded for the amount of the par value of defendant's stock. The defendant demurs. The only ground of demurrer here insisted on is, that the complaint does not show that one hundred per cent upon the shares of the bank is needed by the receiver, but simply avers that the comptroller of the currency has made an assessment of one hundred per cent upon the shares of the bank, and has directed actions to be brought to collect such assessment.

This question was considered by the supreme court of the United States in Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, and the supreme court there say: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it."

It is, however, insisted that this portion of the opinion is obiter and not binding upon this court. I cannot so consider it. The precise question before the court in Kennedy v. Gibson [supra] was whether the bill must contain an averment, that the comptroller of the currency had decided an assessment to be necessary, and directed the suit to be brought. The functions and duties imposed upon the comptroller by the statute were therefore the precise questions before the court. In deciding that his duties were, so to speak, judicial, in determining upon the necessity of an assessment and of suits to enforce it, the court necessarily decided that his determination on those points would be conclusive. I feel bound therefore by the decision of the supreme court, in that case, here to decide the complaint to be sufficient in respect to the allegation referred to.

STRONG (UNITED STATES v.). See Case No. 16,411.

Case No. 13,545a.

STRONG et al. v. WIGGINS.

[See 13 Fed. 418.]

Case No. 13,546.

STRONG MANUF'G CO. v. MERIDAN BRITANNIA CO.[1]

Circuit Court, D. Connecticut. 1876.

PATENTS—PRIORITY OF INVENTION.

In equity.

John S. Beach, for complainant.
O. H. Platt, for respondent.

BY THE COURT. This is a bill in equity, praying for an injunction and an account, and is founded upon a patent for an improved coffin handle, issued to Clark Strong on December 14, 1869, reissued to him on April 22, 1873, and assigned to the plaintiffs on July 7, 1873. That part of the patented device which is alleged to have been infringed consists of a tube, the ends of which are encircled by arms which are hinged to the coffin. The outer ends of the arms form rings which receive the ends of the tube. Tips are forced by pressure into the open ends of the tube, and thus tube, arms, and tips are fastened securely together. The third claim of the patent, which is alleged to have been infringed, is as follows: "Securing the handle, A, to the arms, B, B, by means of the tips, F, driven into the ends of the handle, substantially as set forth." The answer denies that the patentee was the first inventor of the alleged invention, and alleges that William M. Smith was the first inventor of the said improvement. The defendants also deny that they infringe the plaintiffs' patent.

The material question in the case is one of fact, and relates to the priority of invention, for I shall assume that the handles which are made by the respective parties are substantially alike in construction. It is conceded by the plaintiffs that the invention of Mr. Strong does not antedate June, 1869. Evidence was introduced by the defendants to show that their handle was not only invented, but sold, prior to that date; but it was proved to my satisfaction that the witness was mistaken in the impressions which he had in regard to the sale, and that in all probability the defendants' structure was not put into market until after June, 1869. It is equally clear that Mr. William M. Smith, the foreman in the coffin-trimming department of the defendants' business, conceived in the summer of 1868 the idea of manufacturing a tubular handle, the parts of which were to be put together and secured by pressure; that the models, tubes, and arms were made in the fall of that year; that a wooden machine was made in the same fall, by which the tips were forced into the tubes by mechanical pressure. The existence of this machine is clearly proved. I am also satisfied that in January, 1869, the invention had passed beyond the region of experiment, and had become embodied in a complete and perfect

[1] [Not previously reported.]

handle, fitted for use, and that a sample was upon exhibition in the show room of the defendants' factory for the examination of customers. It was at this time a perfected invention, capable of being used, and was in the same form in which it is now manufactured. The defendants were not then ready to manufacture the handles in quantities sufficient for the market, because they had not brought their dies to such a state of perfection that imperfect tubes would not be produced, but the invention had been completed.

The circumstances of the case do not require a determination of the exact time when the invention became perfected by Mr. Smith. It is sufficient that it was completed and was reduced to a practical form in or prior to the month of January, 1869. Let the bill be dismissed.

STROTHER (CRITTENDEN v.). See Case No. 3,394.

STROTHER (UNITED STATES v.). See Case No. 16,412.

STROTHER (WASHINGTON v.). See Case No. 17,233.

Case No. 13,546a.

STROUD v. HARRINGTON.

[1 Hempst. 117.] [1]

Superior Court, Territory of Arkansas. Jan., 1831.

PLEADING AT LAW—NON ASSUMPSIT—BURDEN OF PROOF—COMMON LAW—STATUTE.

1. At the common law, non-assumpsit put the plaintiff to the proof of all the material averments in the declaration, and where he relied on an indorsement, it was necessary for him to prove it.

2. By statute, the writing on which the suit is founded is receivable without proof of execution, unless the execution is denied on oath; but this does not embrace an indorsement where the suit is not founded on the indorsement, and in such case, without proof of execution, the plaintiff is not entitled to judgment.

[This was an action on a promissory note by Bartley Harrington against Adam Stroud.]

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

JOHNSON, J. This is an action of assumpsit, brought by Harrington, assignee of Benjamin Clarke, against Stroud, in the Clark circuit court. The declaration is founded upon a promissory note, executed by Stroud to Benjamin Clarke, with his name indorsed thereon by a blank indorsement. Stroud plead the general issue of non-assumpsit, and neither party requiring a jury, the cause was, by consent, submitted to the court. No evidence was adduced on the trial to prove the indorsement of the note by "B. Clarke," the payee thereof, and on that ground the defendant moved the court to enter a nonsuit against the plaintiff, which motion was overruled. The defendant then offered to introduce evidence to impeach the assignment or indorsement of the note; which motion was also overruled. A judgment was thereupon rendered for the plaintiff in the court below, for the amount specified in the note. The defendant moved the court for a new trial, which motion was overruled. From this judgment Stroud has appealed to this court. The only point we deem material to decide is, whether the court below erred in rendering a judgment without requiring proof of the indorsement of the note declared on, and in rejecting evidence to impeach the assignment. By the rules of pleading at common law, it is admitted that the plea of non-assumpsit denies all the material averments in the declaration, and puts the plaintiff to the proof of them; and that without proof of the indorsement, a recovery could not be had. But it is contended, that by our statute, the common law in this respect is changed; and that an indorsement of a note can only be denied by a plea verified by the oath of the party putting in the plea. Our statute is in the following words: "Whenever any suit shall be commenced in any court in this territory, founded on any writing, whether the same be under seal or not, the court before whom the same is depending shall receive such writing in evidence of the debt or duty for which it was given, and it shall not be lawful for the defendant in any such suit to deny the execution of such writing, unless it be by plea, supported by the affidavit of the party putting in such plea, which affidavit shall accompany the plea and be filed therewith at the time such plea is filed." Geyer, Dig. 250.

It is manifest that the indorsement of a note, unless the action is founded upon the indorsement against the indorser, is not embraced by the letter of the above-recited statute. It requires that a plea denying the execution of the writing upon which the suit is founded shall be accompanied by the oath of the party putting in such plea. What is meant by the execution of the writing? Unquestionably, the making, signing, and delivery of the note or bond. The indorsement constitutes no part of the execution of the note. Its only operation is to transfer it from one person to another after it has been duly executed. We are equally clear in the opinion that the indorsement of a note is not embraced by the spirit and intention of our statute, unless the action is founded on the indorsement against the indorser. The indorsers may be, and frequently are, strangers to the maker of the note, who cannot be presumed to know their handwriting. Suspicious circumstances may exist in relation to the assignment, and yet the maker is ignorant of the indorser's handwriting, and cannot safely deny it under oath. He is compelled to admit it, or swear to that of which he is ignorant. A doctrine

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

from which such consequences result cannot be admitted to be correct. The case of Mills v. Bank of U. S., 11 Wheat. [24 U. S.] 431, does not apply to the case before the court. Mills was sued as an indorser by the bank, and under a rule of court, in substance analogous to our statute, he was not permitted to deny his assignment unless he did so under oath. And we should not hesitate to apply the same rule under our statute. It was then erroneous, we think, to render judgment for the plaintiff in the court below, without proof of the indorsement of the note by Clarke, and on that ground the judgment must be reversed. Judgment reversed.

Case No. 13,547.

STROUD v. MISSOURI RIVER, FT. S. & G. R. CO.

[4 Dill. 396.] [1]

Circuit Court, D. Kansas. 1877.

CHEROKEE NEUTRAL LANDS — CONSTRUCTION OF TREATY WITH CHEROKEE NATION (14 STAT. 804) IN RESPECT TO RIGHTS OF ACTUAL SETTLERS — RIGHT TRANSFERABLE—MINERAL LANDS.

1. In the treaty between the United States and the Cherokee Nation of Indians, concluded July 19, 1866, ratified July 27, 1866, and proclaimed August 11, 1866 (14 Stat. 804), for the sale of a large tract of land known as the "Cherokee Neutral Lands," a preferable right was given to "actual settlers" to purchase, on certain terms, the land owned and personally occupied by them: *Held*, construing the treaty, as amended, that one who is an actual settler, within the meaning of the treaty, at the date of its ratification, and entitled to the benefit of its provisions, may, after that time, and before making proof under the regulations of the secretary of the interior, transfer his right to purchase the land to which he is entitled, and the grantee may make the required proof and purchase the land.

[Followed in Armsworthy v. Missouri River, Ft. S. & G. R. Co., Case No. 550.]

2. The land is not "mineral land" within the meaning of the treaty, because a coal deposit underlies it.

3. Whether the treaty, as finally amended, provides for one or two classes of settlers, discussed, but not decided.

This is a bill in equity, in which the plaintiff [James W. Stroud] claims to be one of the persons protected by the 17th article of the treaty hereinafter referred to, and in which he seeks to compel the defendant (who holds the legal title to the one hundred and sixty acres of land in controversy), to convey the same to him. All questions as to form of pleadings, sufficiency of tender, etc., are waived.

The case was submitted to the court on the following agreed statement of facts:

(1) That the real estate in controversy in this action, to-wit, the northeast quarter of section eighteen (18), township twenty-seven (27), range twenty-five (25), in Bourbon county, state of Kansas, is a part and parcel of a tract of about eight hundred thousand acres of land, known as the "Cherokee Neutral Lands."

(2) That said tract of land was ceded to the United States by the Cherokee Nation, or tribe of Indians, by treaty concluded July 19th, A. D. 1866, ratified July 27th, A. D. 1866, and proclaimed August 11th, A. D. 1866.

(3) That previous to and on August 11th, A. D. 1866, one Peter Teel resided upon said northeast quarter (¼) of section eighteen (18), township twenty-seven (27), range twenty-five (25), and on and before that date said Teel made improvements on said land of the value of over fifty dollars ($50), to-wit, of the value of fifteen hundred dollars ($1,500), and on said day owned and occupied said improvements for agricultural purposes, and that said land was not mineral land (except that there is a stratum of coal underlying a portion of said quarter section). That said improvements were on and covered each of the forty-acre tracts embraced in said quarter section in controversy in this suit.

(4) That said Teel and said plaintiff had not enjoyed then, or previous thereto, the benefits of the pre-emption laws of the United States, and that said Teel was entitled to pre-emption under the pre-emption laws of the United States.

(5) That a commission was duly and legally appointed to appraise said land according to the provisions of said treaty; and that said commission met, some time in the year 1866, and appraised said land at two dollars ($2) per acre, in the aggregate at the sum of three hundred and twenty dollars ($320); and said commissioners were authorized and directed by the secretary of the interior to hear and receive proof relative to the claim of settlers under the seventeenth (17th) article of said treaty and the amendments thereto.

(6) That after the making and proclamation of said treaty, and before said commissioners met, the plaintiff, James W. Stroud, purchased all the right, title, and interest of said Teel in and to said land, and the improvements thereon. and paid him a valuable consideration therefor, and received from him a good and sufficient deed thereto; that plaintiff purchased the same for agricultural purposes; and that plaintiff, James W. Stroud, was in the actual possession and occupancy of the same when the said commissioners met to appraise said land, and had not then or previous thereto enjoyed the benefits of the pre-emption laws of the United States, and said plaintiff was entitled to pre-emption under the pre-emption laws of the United States.

(7) The plaintiff, under the rules and regulations prescribed by the secretary of the interior, went before said commissioners and made proof of the facts and each of them hereinbefore stated, for the purpose of pro-

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

curing the privilege of purchasing said land under the provisions of said treaty; that this plaintiff made proof before said commissioners of the settlement of said Teel on said land prior to August 11th, A. D. 1866, and of the improvements thereon at said date, of the value of over fifty dollars ($50), of plaintiff's purchase from said Teel, and that Teel had not then, or prior thereto, enjoyed the benefits of the pre-emption laws of the United States; and of plaintiff's actual occupation and possession of said land when said commission met to appraise said land; and that said land was not mineral land, except as hereinbefore stated; and that plaintiff had purchased the same for agricultural purposes.

(8) That said commissioners and the secretary of the interior refused to allow this plaintiff to purchase said land, on the ground, as the plaintiff was by said commissioners informed, that the secretary of the interior had already decided that the right to purchase said lands, under the 17th article of said treaty and the amendments thereto, was personal to the settler who occupied said land at the date of the proclamation of said treaty, and that this plaintiff's purchase thereof was wholly void.

(9) That plaintiff then and there offered to pay said sum of three hundred and twenty dollars ($320), the appraised value of said land, to said commissioners, or to such person as said commissioners should designate; that said commissioners refused to accept said sum of three hundred and twenty dollars ($320), or any sum at all.

(10) That after the appraisal of said land, and after plaintiff had made his proof before said commissioners, as aforesaid, the secretary of the interior caused a patent for the land in controversy to issue from the United States to one James F. Joy; that afterwards said Joy sold and transferred the land in controversy to the said defendant, the Missouri River, Fort Scott and Gulf Railroad Company. It is agreed that Joy procured the title from the United States, as agent for the defendant.

(11) That said deed from said Teel to the plaintiff, James W. Stroud, for the land in controversy in this suit, was a quit-claim deed, duly and properly signed and delivered, but without acknowledgment; that said deed was never recorded by the register of deeds of the proper county; but that said plaintiff is now, and has been all the time since his purchase from said Teel, as aforesaid, in the open and notorious possession and occupancy of the land in controversy.

(12) The defendant has paid taxes on said land since the date of the transfer from said Joy, to-wit, from the 1st day of March, 1871.

Questions for Special Findings. To the Honorable Judges of the Circuit Court of the United States for the District of Kansas: Inasmuch as there are about two hundred persons residing upon said neutral lands, who claim under the provisions of the 17th article of said treaty and the amendments thereto, in all of which is involved the construction of some parts of said article, and many of which raise other questions under said article than those presented by the agreed facts in the foregoing case; and inasmuch as it is very desirable to have a rule of law established for the settlement of all these cases without prolonged and expensive litigation, the counsel for both parties hereto respectfully request your honorable court to construe and interpret the whole of said article and the amendments thereto; and in so doing to find upon the following questions, all of which are involved in some one or more of said cases:

(1) Was the right to purchase given to one or two classes of persons by the 17th article of the treaty and its amendments?

(2) Who must have the qualification of a pre-emptor; the original settler, his vendee, or both?

(3) Is the settler's (or his vendee's) right to purchase limited to the sub-divisions actually covered by his improvements, or do they extend to the whole quarter?

(4) Can the original settler make sale prior to his proof before said commissioners, and is such sale valid?

(5) In such case is a parol sale sufficient to pass the right to purchase to the vendee? and if not, can a parol sale be made good by a bill in chancery to which the original settler is made a party?

(6) Is it necessary that the original settler, or his vendee, should make or offer to make proof of his settlement before said commissioners? and is a general offer to prove up, and a refusal to allow him to do so, sufficient to secure his right?

(7) Does the fact of the land having coal on or underlying it make it mineral land within the meaning of the treaty? and does such fact destroy the settler's right to purchase? and what is the rule when the land is partly underlaid with coal, and all valuable for agricultural purposes?

(8) To whom is the appraised value of the land to be paid? and is the settler required to pay interest?

(9) Is the settler required to refund the taxes paid by the patentee, and legal interest thereon?

(10) To whom does the patentee look for the repayment of the original purchase money for said land, and interest thereon?

The undersigned would also venture to request that the findings and rulings of the court upon the questions above suggested be made in writing and filed—to the end that they may serve as rules of law in the settlement of other causes not in court.

Complainant claims title to the land in controversy under the 17th article of the treaty, and the amendments thereto, made by and between the United States and the Cherokee Nation or Tribe of Indians, July 19, 1866, and

proclaimed August 11, 1866; and the supplemental article to said treaty, proclaimed June 10, 1868.

The 17th article of said treaty is as follows: "Art. 17. The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the state of Kansas which was sold to the Cherokees by the United States, under the provisions of the 2d article of the treaty of 1835; and also that strip of land ceded to the Nation by the 4th article of said treaty which is included in the state of Kansas; and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said state. The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the commissioner of the general land office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council, and one by the secretary of the interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements. And the secretary of the interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidders, for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: provided, that whenever there are improvements of the value of fifty dollars ($50) made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning and in person residing on such improvements, shall, after due proof, under such regulations as the secretary of the interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal sub-divisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the secretary out of the proceeds of sale of said lands: provided, that nothing in this article shall prevent the secretary of the interior from selling the whole of said neutral lands in a body to any responsible party, for cash, for a sum not less than eight hundred thousand dollars."

The amendment affecting said article is as follows: "* * * 2d. Strike out the last proviso in article 17, and insert in lieu thereof the following: Provided, that nothing in this article shall prevent the secretary of the interior from selling the whole of said lands, not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre." 14 Stat. 804–807.

The supplemental article before referred to, or so much thereof as affects the rights of settlers, is as follows: "It is further agreed and distinctly understood that, under the conveyance of the 'Cherokee Neutral Lands' to the said American Emigrant Company, 'with all beneficial interests therein,' as set forth in said contract, the said company and their assigns shall take only the residue of such lands after securing to 'actual settlers' the lands to which they are entitled under the provisions of the 17th article and amendments thereto of the said Cherokee treaty of August 11th, 1866; and that the proceeds of the sales of said lands, so occupied at the date of said treaty by 'actual settlers,' shall enure to the sole benefit of, and be retained by the secretary of the interior as trustee for, the said Cherokee Nation of Indians."

Hill & Sallee, for plaintiff.

Wallace Pratt and Blair & Ferry, for defendant.

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

DILLON, Circuit Judge. The plaintiff claims to be one of the class of persons protected by the 17th article of the treaty, and files his bill in equity to enforce that right, insisting that the defendant holds the legal title to the one hundred and sixty acres of land in controversy in trust for him.

Under the agreed facts, the court is of opinion that the plaintiff is entitled, on the payment to the defendant of the appra sed price of two dollars per acre, without interest, and the amount of taxes on the said land paid by the defendant, with interest thereon at the legal rate of seven per cent per annum, to a decree that the defendant convey the land in question to him. The rights and equities of the government and the defendant company, as to the amount received by the defendant over the amount which was paid to the government for the land, viz., one dollar per acre, can be adjusted between them, and does not concern the plaintiff.

It is implied in the above conclusion, that we are of opinion that one who is an "actual settler," within the meaning of the treaty, at the date of its ratification, and entitled to its protective provisions, may, after that time and before making proof under the regulations of the secretary of the interior, transfer his right to purchase the land to which he is entitled, and that the grantee may make the required proof, and thus entitle himself to make the purchase at the appraised value. If the land had not been patented by the government, the grantee, after making the due proof of his grantor's right at the date of the ratification of the treaty, would be entitled to make the purchase, if not in his own name, then in the name of his grantor, who would hold it for the benefit of the grantee.

The 17th article of the treaty does not in terms require the settler to be in possession at the time of his purchase; but he must be

in actual occupancy at the date of the ratification of the treaty in order to be within its provisions. If thus in possession his right would descend to his heirs, and, in our judgment, it may be devised or conveyed if it was complete when the treaty was ratified.

The intention of the senate throughout to protect the "actual settler" is unmistakable, and accords with the uniform practice of the government in this respect. It was the rights of those who owned and personally occupied their improvements that the treaty sought to guard and secure. The actual settler must own the improvements in his own right and not for another, and he must personally occupy the improvements, or the land on which they are situate, for agricultural purposes, and he must thus own and occupy them at the date of the ratification of the treaty. If he was such an owner and occupier, the treaty intended to give him the preferable right to purchase. His rights were fixed; and no one is benefited by holding that he may not transfer his right when it is thus consummate. To hold otherwise would be to imprison the settler for the time without any advantage to the government, or any rightful advantage to any one else.

What we decide is, that if the right of the actual owner and occupier at the date of the ratification of the treaty to buy the land is complete, he may, after that, transfer to another his right in any mode which is effectual as between them, and the grantee succeeds to the grantor's rights in this respect. This court so held in Langdon v. Joy [Case No. 8,062], in which holding Mr. Justice Miller concurred.

The land in question was used by the settler for agricultural purposes, and is not "mineral land" by reason of a coal deposit underlying a portion of it. Lead and zinc, and perhaps other mineral deposits, were known to exist not far from, if not within, these "neutral lands," and it was lands containing such deposits that was meant by the word "mineral" as used in the treaty. In sales of the public lands in Iowa, Missouri, and Kansas, lands containing coal deposits have not been reserved by the government as "mineral" lands.

In this case the improvements were on and covered each of the forty-acre tracts constituting the quarter-section of land in controversy. It is clear, therefore, that the plaintiff's rights extend to each of the forty-acre tracts included in the one hundred and sixty acres claimed by the plaintiff.

What is said above, expressly or by implication, substantially answers all the questions submitted, except the question whether the treaty, as finally amended and ratified, provides for one or two classes of "actual settlers." This question is not necessarily involved in the present case, and as its solution is not unattended with difficulties, we do not now pronounce any definite opinion upon it. In the regulations of the secretary of the interior on this subject, he construed the 17th article of the treaty as providing for two classes of settlers, viz.: (1) Those who owned and personally occupied improvements for agricultural purposes, of the value of fifty dollars, at the date of the signing of the treaty, July 19, 1866. (2) Those who, after the signing (July 19, 1866), and before the ratification of the treaty (August 11, 1866), were actual settlers upon the land, having the qualifications of pre-emptors under the pre-emption laws of the United States.

The provisions of the first and second provisos, in respect of actual settlers, being in pari materia, must be taken and construed together; and thus regarded, the leading purpose of the second amended proviso seems to have been to secure the rights of those settlers mentioned in the first proviso by prohibiting a sale, by the secretary of the interior, en masse, which would cut them off—thus limiting, and not enlarging, the power previously given to this officer, and extending this protection to the settler from the date of the signing of the treaty July 19th, to the date of its ratification, August 11th; and the words in the second proviso, "to each person entitled to pre-emption under the pre-emption laws of the United States," if not intended merely as words of limitation on the power of the secretary to sell, mean probably no more than that the settler must have the qualifications of a pre-emptor as to citizenship of the United States, and be the head of a family, or a widow, or a single man over the age of twenty-one years, not owning three hundred and twenty acres of land elsewhere, etc., to be entitled to the benefit of the treaty. But the provisions of the pre-emption laws, as to extent and character of improvements, so far as they conflict with the express provisions of the first proviso of the 17th article of the treaty, in this regard, would be controlled by the provisions of the treaty.

We doubt whether the treaty, as amended, provides for two distinct classes, making separate provisions of a different character as to each class, as the secretary of the interior seems to have supposed. But we are not prepared to express any final opinion on the subject, and leave it open. On the payment of the purchase money and taxes, as above stated, into court for the defendant, the plaintiff may have a decree for the lands. Decree accordingly.

For further construction of the 17th article of the treaty, see Langdon v. Joy [Case No. 8,062].

Case No. 13,548.

In re STROUSE.

[1 Sawy. 605;[1] 11 Int. Rev. Rec. 182.]

District Court, D. Nevada. May 19, 1871.

INTERNAL REVENUE—PRODUCTION OF BOOKS—DISCLOSURES—HOW PROTECTED—CONSTITUTIONAL LAW.

1. Proceedings under the 14th section of the revenue act to compel the production of books, and giving of evidence before an assessor, are civil, and not criminal.

2. The examination of the books of a person under that section, is not an infringement of article 4 of amendments to the constitution of the United States, protecting persons from unreasonable searches, etc.

[Cited in Re Platt, Case No. 11,212.]

3. Disclosures so made, are protected by the act of February 25, 1868, and cannot be used against the person making them before any court or officer of the United States.

4. The person summoned before the assessor, must not only produce his books, but must submit them to examination, and testify concerning entries therein.

5. Section 14 of the act of June 30, 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 101), construed.

Attachment for contempt in refusing to permit examination of books by assessor of internal revenue, and refusing to testify before the assessor, in pursuance of the provisions of the internal revenue act.

Wm. S. Wood, U. S. Dist. Atty., for the United States.

H. K. Mitchell, for respondent.

HILLYER, District Judge. In this case Mark Strouse was summoned before the assessor to give testimony and produce his books relating to his business between the first day of May, A. D. 1869, and the thirtieth day of November of the same year. The proceeding was taken under the 14th section of the act of congress of June 30, 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 101).

At the time and place designated in the summons the respondent, Strouse, appeared with his books, but refused to permit any examination of them by the assessor, or to answer questions, upon the alleged ground that the books, if received in evidence, would criminate him, or would furnish a link in a chain of testimony which might criminate him. The assessor then applied for an attachment against said Strouse, by virtue of which he was brought before the judge of the district court and a hearing had.

The respondent asks to be discharged without compliance with the summons of the assessor upon three grounds: (1) That his answers and books would tend to criminate him. (2) That the examination of his books would infringe that article of the constitution of the United States which protects the people from unreasonable searches and seizures of their persons, houses and effects. Article 4, Amendments. (3) That he can only be compelled under the 14th section to produce his books, and cannot be required to submit them to the inspection of the assessor, or to testify from them.

As to the first ground it is true that, under the constitution of the United States, no man can be compelled to be a witness against himself in a criminal case. Article 5, Amendments. But it has been held by Judge Lowell of the Massachusetts district, and I think correctly, that this is not a criminal, but a civil proceeding. In re Chadwick [Case No. 2,570]. The respondent is charged with no crime. He has refused to be examined because he believed the examination to be illegal, and it is not to be presumed that any judge will punish a person for the assertion of what he, in good faith, believes to be a legal right, though shown finally to be an error. The law authorizes the assessor to summon the respondent before him to answer questions touching his returns and assessments.

It is no more a "criminal case" than summoning a witness to testify, or a bankrupt to appear before a register or judge and answer interrogatories. The answers of Mr. Strouse may be testimony which will increase his tax and thus be against himself, but he is a witness against himself in a civil proceeding having no element of a "criminal case."

This being so it was argued that the testimony given might be used against the witness on some future trial for the commission of a crime. I think this objection is no longer of any force since the passage of the act of congress of February 26, 1868 (15 Stat. 37), for the protection of persons making disclosures as parties, or testifying as witnesses. This act provides that disclosures and evidence obtained by means of any judicial proceeding from any party or witness, shall not be used against him in any manner before any court of the United States or any officer thereof. Judge Underwood, of the district of Virginia, holds the disclosures and evidence given under section 14, to be fully protected by this act. In re Phillips [Case No. 11,097]. And see, also, People v. Kelly, 24 N. Y. 83; and In re Meador & Bros. [Case No. 9,375]. Again, the constitutional protection applying only to criminal cases, congress would have power to change the old rule of evidence and require a witness to give evidence in a civil case, even though it did tend to criminate himself. This testimony, not being given voluntarily, might upon a trial of the witness for the crime, be excluded upon another well known rule of evidence regarding admissions.

Second. Upon the second ground that this requirement to produce the books is an unreasonable search, it need only be remarked

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

that the fourth amendment, supposed to be violated, like the clause of the fifth referred to above, is applicable to criminal cases only. The opinion of Judge Erskine in the Case of the Meadors cited above, leaves nothing to be said on this point.

Third. The third point is upon the construction of the 14th section. It was contended on the argument that the person summoned when he appeared and "produced" the books mentioned in the summons, had complied with the law, and could not be required to submit them to the inspection of the assessor, or to exhibit particular items to him. The language of the section is, * * * "it shall be lawful for the assessor to summon such person, his agent, or other person having possession, custody or care of books of accounts, containing entries relating to the trade or business of such person, or any other person he may deem proper, to appear before such assessor and produce such book, at a time and place therein named, and to give testimony or answer interrogatories under oath." * * * It is too plain for argument that no effect would be given to this language if the person summoned might, after producing the books, refuse to permit any examination of, or testify as to entries in them. The command of a subpœna duces tecum is that the witness "bring with" him certain described books or papers, but who ever heard of such witness contending that he had only to bring the books with him and need not exhibit or testify from them. The bankrupt act gives the court power in certain cases "to compel the production of books and papers," and I have never heard of a witness being excused from exhibiting the books or testifying to entries in them upon the ground that the law gave power to compel only the "production" of the books. In all these cases the only reason for producing the books is to use them as evidence, so far as they are competent upon the inquiry being made. This section is remedial, not penal, and must be liberally construed so as fairly to carry out the intention of the lawmaker. To do this the books must not only be produced, but the entries relating to the trade or business of the respondent must be exhibited and proper questions concerning them answered. It is not doubted that the assessor will discharge this delicate and somewhat disagreeable duty with all proper regard for the natural feeling of repugnance which every citizen engaged in business has, to disclosing his business affairs to third persons. The revenue law denounces heavy penalties against any assessor who shall be guilty of wilful oppression in the discharge of his office, and it must be presumed that he will do his duty—no more and no less.

It is ordered: That the said Mark Strouse, in obedience to the summons of the assessor, W. F. Myers, appear before said assessor forthwith, and answer under oath or affirmation concerning the trade or business of said Strouse, from May 1, 1869, to November 30, 1869, and give evidence according to his knowledge respecting his liability as a person subject to an excise duty or tax under the internal revenue laws of the United States; and, also, that he produce to the said assessor all books of accounts containing entries of purchases and sales relating to his trade or business, from May 1, 1869, to November 30, 1869, and exhibit such entries to said assessor, and answer touching the same, fully.

It is further ordered: That upon complying fully and fairly with the foregoing order, the said Mark Strouse be discharged from arrest. [The clerk, upon receipt of his fees therefor, will deliver a certified copy of this order to W. F. Myers, assessor.] [2]

Case No. 13,549.

STROUT v. The CUBA.[1]

District Court, S. D. New York. Sept. 14, 1861.

SALVAGE — RECAPTURE FROM ENEMY — CREW — RIGHT TO SALVAGE FOR RECAPTURE.

[1. The brig Cuba, valued with her cargo at $12,000 or $15,000, two days out from Trinidad for London, was captured by a Confederate cruiser, and four days thereafter recaptured by the master and crew, and brought safely to New York. *Held*, that salvage amounting to two-fifths the total value should be awarded, to be borne by the brig and cargo in proportion to their respective values, and costs to be paid out of the remaining three-fifths.]

[2. Capture by a public or private armed vessel of a belligerent power or by a pirate terminates or suspends the contract which binds a seaman to his ship, and rescue or recapture by the master and crew entitles them to salvage.]

[3. Capture by a Confederate cruiser in July, 1861, was capture by a belligerent, so far as the claim of the master and crew for salvage for recapture is concerned, whether the cruiser was, by the laws of the United States, technically a pirate or not.]

[4. The master and part owner of a brig which had been captured by a Confederate cruiser is entitled to salvage for recapture as against the other part owners. The Holder Borden (Case No. 6,600), followed.]

[5. Capture by a belligerent suspends the contract of affreightment, and recapture by the captain and part owner is not within his contract, either as master or carrier, and, since it is a personal service, entitles him to salvage as against the underwriters of the cargo. The Maria Jane, 1 Eng. Law & Eq. 658, distinguished.]

[This was a libel in rem against the brig Cuba and cargo by Daniel J. Strout, master and part owner, and by the crew, under a claim of salvage for recapturing her from the prize crew of a Confederate cruiser. The underwriters of the cargo appeared as respondents.]

Benedict, Burr & Benedict, for libelants.

A. F. Smith, for claimant.

SHIPMAN, District Judge. The facts, as they appear in the proofs in this case, are

[2] [From 11 Int. Rev. Rec. 182.]

[1] [Not previously reported.]

substantially as follows: The American brig Cuba, on the 2d of July, 1861, sailed from Trinidad, bound to London, with a cargo of sugar and molasses. Her officers and crew consisted of Capt. Daniel J. Strout; chief mate, James Babbidge; second mate, John Carroll; cook, Thomas Oliver; and John Carter, Charles Gasmer, and John Perry, seamen. Nothing unusual or important occurred on the voyage until early in the morning of the 4th of July, when a steamer was discovered bearing down for the brig. The steamer had the American flag flying, but proved to be the so-called privateer Sumter. She soon neared the brig, fired a shot across her bows, and ordered her to heave to. The brig immediately came to, and was boarded by a body of men from the steamer, armed with cutlasses and heavy navy revolvers. The leader of the boarding crew ordered the captain of the brig to go on board of the steamer, and take his papers. He did so, and on reaching the cabin of the steamer, was introduced to one Semmes, who was alleged to be the commander of the Confederate steamer Sumter. This person examined the captain's papers, and tore them all up, except the register, which he kept. After inquiring to whom the cargo belonged, he announced to Capt. Strout that he and his crew were prisoners of war. After some conversation between Semmes and his confederates, in which the disposition of the brig was discussed, and the proposition to send her, in charge of a prize crew, into Vera Cruz, was negatived, Semmes informed Capt. Strout that he should take her in tow, carry her into Cienfuegos, and sell the cargo and burn the brig. Capt. Strout was then ordered on board of his vessel, accompanied by five men from the steamer, one of whom was called a prize master, two were marines and two sailors. The steamer then took the Cuba, together with the Machias, another vessel, captured that morning, in tow, and started for Cienfuegos. This was about 11 o'clock a. m. They continued in tow till 4 a. m. next morning, when the hawser of the Machias parted and she went adrift; but the fact was not discovered on board the steamer till about an hour and a half after the occurrence. When it was found out that the Machias was gone orders were given by those on board the steamer for the Cuba to let go her hawser and make all sail till the Sumter came up again. The latter then left in pursuit of the Machias, and, after finding her, returned to the Cuba. By this time the sea was running so high that she could not fasten again to the Cuba, and Semmes gave orders to the prize master to take them into Cienfuegos. The brig stood for the last-named port. The prize crew were heavily armed with cutlasses and revolvers, and the crew of the Cuba, being unarmed, were permitted to have the liberty of the deck, and were required to assist in sailing the vessel.

Capt. Strout, who seems to have early formed the idea of baffling the enterprise of his captors, and, if possible of retaking his vessel, privately told his mates, and the others of his men who took their turn at the wheel, to let her fall off on her tacks as much as possible and not attract the notice of the prize crew. This was so successfully done that on the third day after they had parted company with the Sumter, they were twenty miles further off from the port to which they were ordered, than they were when they left the steamer. About this time the prize master appears to have become somewhat suspicious of Capt. Strout and his mates, and at the same time a little more distrustful of his own seamanship. He called Capt. Strout and his mates aft, and asked them to assist them in navigating the brig into Fernandina, Florida; at the same time assuring him that if he gave any more orders, or his men refused to work, he would shoot him. Capt. S. promised to assist the prize master through the Straits of Florida with the brig, and immediately put her before the wind, the prize master giving the course. This was the third day after the capture. On the next day, the 8th of July, and the fourth day after the capture, Capt. Strout and his crew having come to some general understanding to retake the brig, obtained complete possession of her in the following manner: The captain discovered that the prize master was asleep on the after-house, and immediately, with his mates and steward, went to securing the arms. They succeeded in obtaining possession of all, or nearly all, of the weapons. At this time, there were two of the prize crew, besides the master, asleep; one a marine, lying alongside the after hatch. The other marine was lying on deck, alongside the boat, with his head on a revolver wrapped up in a jacket for a pillow, reading. Capt. Strout appears to have secured the other arms without the observation of any of the prize crew, and immediately approached this marine, and jerked the pistol from under his head, demanding his surrender. He yielded at once. But several of the prize crew at this moment discovered that something was in the wind, and went for their arms, and finding them gone, two of them drew their sheath knives, one seized the axe, and all rushed aft, whither Capt. Strout had gone with the pistol he had just taken from the marine. The rush aft awoke the prize master. The mainsail was at this time down, and lying upon the boom; and the prize crew gathered on one side of it, and Capt. Strout and his crew on the other. The mates of the latter and the cook were armed with revolvers, and one of the men with a cutlass. Capt. Strout had a heaver. The prize crew had no arms except the two sheath knives and the axe. One of the prize crew attempted to jump over the mainsail, when Capt. Strout struck him with the heaver, and staggered him. He then ordered his mate to fire on them if they moved. They were then or-

dered by Capt. Strout to surrender, and they made no further resistance, but went forward, followed up by the captain and his crew. Capt. Strout had but two pairs of irons, one of which he put on the prize master, and the other on the most dangerous of the sailors. The rest were tied with marline.

These occurrences were all on the 8th. On the same day they fell in with the brig Costa Rica, which took off two of the sailors of the prize crew, and the Cuba then set sail for New York. Nothing else of importance occurred until the 13th or 14th of July, when the prize master (whose irons had been taken off at his urgent entreaty) repossessed himself of a pistol, and went into the maintop. He then called to Capt. Strout, and told him he wanted to speak with him and all his crew. The captain asked him what he wanted. He asked Capt. Strout if he intended to carry him to New York. He replied that he did. The prize master then said, "You won't carry me alive." Captain S. replied, "Then I will carry you dead." Capt. Strout immediately started below for a pistol, when the prize master called out, and threatened to shoot him if he went below. The captain then jumped below, got a pistol, and fired two shots at the prize master, who still remained in the top, one of which took effect in his arm, and the other struck near his head, in the main cross-trees. He then took him, dressed his wound, and put him in the after cabin under lock and key, and kept a guard over him until they reached New York, where the vessel arrived with all her crew and cargo safe, and her three prisoners, on the 21st of July.

The brig Cuba was owned at this time by parties in Boston and Maine, and by Capt. Strout. The latter owned one-sixteenth of her, having bought and paid for her, but never had any bill of sale of his portion. The other owners of the brig make no objection to an allowance of salvage for which this libel is filed. There is an appearance, however, for and on behalf of the foreign underwriters of the cargo, who have filed their claim, and insist: (1) That if salvage is allowed (and they do not seriously contest the claim of the mates and seamen of the Cuba to some salvage compensation), that allowance should not be one-half, as claimed by the libelants, and should not exceed one-eighth, or at most one-sixth. (2) That if salvage is allowed, no part of it can be adjudged to the captain, because he was part owner of the brig; and that, from whatever sum should be decreed by the court as salvage on the cargo, there should be deducted an amount equal to that to which the captain would have been entitled were his right not barred by his ownership.

Let us, before examining these two main propositions and the arguments urged in support of them, look for a moment at the grounds, if any exist, upon which salvage at all can be given in this case. Nearly all the answers that have been given to the often difficult question, "Who may be salvors?" have been clothed in the language of Lord Stowell's definition. He defines a salvor to be "a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship." Correctly understood, the accuracy of this definition will receive general assent. And it follows, of course, from it, that as a general rule no one, neither master, nor pilot, nor officer, nor seaman, nor passengers, can ever be entitled to salvage for services rendered their own ship in distress, so long as they are discharging those duties only which their relations to that ship impose upon them. Their duties vary, of course, according to their several relations. The duties of the master take a wider range than those of mates, and those of the mates wider than those of the seamen, while the duties of the passenger are much narrower than either. But even the latter is bound to assist in saving or relieving the ship; and so long as the services which he may render are within the line of his duty, he can claim no salvage compensation therefor. Let us glance here at some of the duties which do, and some which do not, devolve on a passenger on board of a ship in distress,—as correct views here will shed light on our path through the other branches of the discussion. The passenger is bound, when the ship is in danger, to render all ordinary assistance in his power; to relieve an exhausted seaman at that post of duty in which he is competent to stand; and to perform any service that he may able, without prolonging or increasing his danger. But clearly he is not bound to remain by the ship to the peril of his life, when he has an opportunity to escape; nor to go to the masthead in a storm, when he is not competent to the task; nor to assume the command and navigation of the ship in case the master is disabled. If a passenger does render these extraordinary services, entirely outside and beyond the scope of his duty, and such services substantially contribute to the saving of the ship and cargo, then he is entitled to some salvage compensation. The Branston, 2 Hagg. Adm. 3, note; The Salacia, Id. 269; Newman v. Walters, 3 Bos. & P. 612.

We naturally come now to inquire into the duties of the master, officers, and crew of a ship in distress; and upon a right view of these depends mainly the result of the case before us. The rules of maritime law, founded upon solid considerations, have carefully and rigorously bound up the interests of the mariner with the destiny of the ship committed to his care. His right to wages generally depends upon the ship's carrying freight, and her success in carrying freight depends upon her safety. When ship and cargo are

lost by a peril of the sea, his right to wages perishes with them. And no exertions, however hazardous, painful or long-continued, when performed in the line of duty which the law draws from his contract, can entitle him to any compensation therefor. But there are limits even to a sailor's duty to his ship; points beyond which the obligations which his contract imposes upon him cease to operate, and at which that contract is suspended or extinguished in judgment of law. In enumerating a few circumstances which operate to suspend or extinguish the contract of seamen, I shall confine myself to that class of cases which are germane to the one under consideration.

1. I regard it as well settled doctrine that capture by a belligerent suspends, if it does not terminate, the contract which binds a seaman to his ship. Clayton v. The Harmony [Case No. 2,871]; Phillips v. McCall [Id. 11,104]; The Friends, 4 C. Rob. Adm. 143; The Governor Raffaes, 2 Dod. 17, 18; The Florence, 20 Eng. Law & Eq. 609. Some of these authorities hold the contract of the mariner, in case of capture, to be dissolved and terminated; others regard it as only suspended. In the view I take of this case, this distinction is not of a controlling character. It makes no difference whether the capture is by a public or private armed vessel of the belligerent power, so far as its effect on the contract of the officers and crew is concerned.

2. It appears now to be settled law that capture by pirates equally suspends or extinguishes the contract of the mariner. That eminent admiralty judge, Dr. Lushington, has recently stated his views of the effect of such a capture, and, as his reflections are pertinent in several aspects of the present case, I quote them at some length. In the case of The Florence (decided in 1853) 20 Eng. Law & Eq. 609, he remarks: "The contract is for services of the mariner as mariner during a given voyage. The services are not defined in the contract. The duration is for a voyage or voyages, and sometimes for a specified time. In some special cases provision is made for the termination of the contract on the occurrence of other circumstances, as the sale of the ship, or the impossibility of getting a cargo. The services, though not defined in writing, are so by usage; and so is the duration of them in some cases, as in the case of shipwreck, capture, &c. In shipwreck the contract continues so long as a plank can be saved. By capture certainly, if there be no recapture, the contract is at once put an end to; and this, I apprehend, whether by an enemy or by pirates. And here I may observe that by their calling mariners are bound to incur a certain degree of danger, whether it proceeds from an enemy, or from pirates, or from the tempestuous state of the elements; but there is a limit to the risk to which any seaman is bound to expose himself. Human life is more valuable in the sight of God and man than any property, and, if it should so happen that the choice should be between them, there can be no doubt as to which should prevail." But whether a mere piratical capture, strictly speaking, suspends or dissolves the mariner's contract, in judgment of law, or not, is immaterial in the present inquiry, owing to the peculiar and novel circumstances which surround this case. Clearly, this capture suspended the contract, unless the duty of rescuing the Cuba from the hands of these armed men rose out of the obligations of that contract, and was binding upon her officers and crew. Now, what might be the duty of mariners in resisting an attack upon their vessel or rescuing her from a capture by ordinary pirates, those solitary rovers of the sea, who are not only unsupported by confederates, but are under the ban and outlawry of every civilized nation, and are liable to be seized by any and every vessel, public or private, that floats on the sea, and condemned to death by the courts of all nations, I will not stop here to inquire. The duty of the mariners on board of this brig is to be tested by the peculiar circumstances under which they were placed. And it makes no difference, so far as the present question is concerned, whether, in the eye of the criminal law of the United States, the captors of the Cuba are regarded as pirates or not. That question has no connection with the one under consideration. I am here considering only the single question of the obligations of the crew of the Cuba, under their contract as mariners. The steamer which captured this brig was not a solitary sea robber, acting without concert, or any considerable support, but one of a number of marauders which infest the seas in that quarter, having a common end in the plunder of American vessels, and acting under a common pretended authority. She was treated as a belligerent cruiser by one powerful nation, or, at least, held not to be a mere piratical craft, whose crew could be seized and put to death by the courts of that nation. When this brave young captain rescued his brig from the armed crew which the Sumter had put on board of him, she was in the vicinity where he might naturally fear that the very next vessel he should meet would attack and recapture him; and, though in sight of a fleet of war vessels of one of the most powerful nations on the globe, no assistance could be rendered him. She was in the neighborhood of a coast, too, where the inhabitants, for many hundred miles, were in sympathy with the captors, and who, if he had applied to them for assistance, would not only have refused it, but would have restored him and his crew, with the brig and cargo, to those from whom he had rescued her. I am decidedly of the opinion that, under such circumstances, no court, in view of the authorities I have already cited,

would hold that it was the duty of Capt. Strout and his crew, arising out of their contract as mariners, to rescue this brig from the prize crew. If it was not, then their contract was, at least, suspended by the capture.

The next inquiry is, are the captain and his crew entitled to salvage for the rescue? Passing for the moment the question as to the effect of Capt. Strout's ownership of one-sixteenth of the brig on his individual claim to salvage, I will briefly consider the general question. In the case of The Maria Jane, 1 Eng. Law & Eq. 661, the test of the right of a crew to salvage is held to be "whether the service be within the contract or not." In the case of The Florence, already cited (20 Eng. Law & Eq. 611), it is asked: "Then, if the mariner's contract be at an end, may he not be a salvor? He then becomes precisely in the situation which belongs to a salvor, according to Lord Stowell's description in The Neptune. 1 Hagg. Adm. 227. Why should he not be? Why should the owners of ships be deprived of such possible services, or the mariner of such possible reward?" This latter was the case of services rendered by mariners to their own ship after she had been abandoned. And the authorities generally hold that rescue, as well as recapture, confers the right to salvage, at least so far as recapture and rescue from belligerents are concerned, and also recapture from pirates. There is an intimation in a respectable modern author (Marv. Wreck & Salv. § 157) that rescue from pirates confers upon the crew no right to salvage. The author does not state the point with any positiveness, but simply remarks that "it is probable that such a claim would be denied." He cites no authority except articles 35, 36, and 37 of the "Laws of the Hanse Towns," and a glance at these articles will show that they have no significance in the present state of the mariner's relation to his ship in the eye of the law. It is true that those early laws required him to resist the attacks of sea rovers, and at the same time required that their wounds should be cared for at the expense of the ship and cargo by general average, and if he was disabled for life he should be supported as long as he lived in the same manner. But this point is not important. I have no doubt but a rescue from pirates merely entitles the rescuers to salvage; but, if I had a doubt on this point, it could not affect the result of this case, as I hold that under its peculiar circumstances the rescue so far as the merit of Capt. Strout and his crew are concerned, is equivalent to a rescue from beligerents; and, holding that their captors were pirates in the eye of the criminal law of the United States would not change the aspect of this case. The conclusion, then, is that the services which Capt. Strout and his crew rendered in this rescue of the brig and her cargo were not within their contract, but were voluntary and spontaneous, and are entitled to salvage compensation. They were services not required by their contract as mariners, but were wholly beyond the line of their duty. They voluntarily periled their lives for the benefit of the owners of this brig and cargo, and are entitled, upon every just principle, to compensation. And if we were called upon to analyze motives in such a case, we should find the devotion of these mariners to this brig and cargo sprung almost wholly from a single regard to the interests of the owners, unmingled with the instinct of self-preservation, which must always actuate rescuers from mere pirates. Their lives were probably safe so long as they submitted to their capture. They should be rewarded for the voluntary peril they have incurred.

It is proper that I should state here, that no captious or technical objections have been raised on this trial to the right to salvage generally, by the mates and crew, although that right has not been expressly admitted; but counsel acting for foreign, and in a measure unknown, parties, have interposed a legal objection to the recovery of salvage by the captain, on the ground that he was an owner of one sixteenth of the brig salved. This was a proper question to raise, and was pressed with great ability and ingenuity. The question does not seem to have been met in this direct form by any decided case to which my attention has been called, nor have I, after a somewhat diligent examination, been able to find one that decides the precise point.

It is urged that Capt. Strout would be excluded from salvage in the brig by the general rule of law that a joint owner or copartner can never charge the joint property for extraordinary services rendered in its behalf. It is not important to settle this naked point in this case, inasmuch as the coowners of the brig interpose no objection to any award of salvage which the court may think just and proper to make to the captain. But, as the point arises, I will examine it briefly. It is doubtful whether courts of admiralty apply the general rule above cited very rigidly to salvage cases. In the case of The Holder Borden, tried in the district court of Massachusetts in 1857, and reported in [Case No. 6,600], the doctrine that a master of a vessel and his crew might recover salvage out of property salved by them, and in which they were joint owners with other parties, is distinctly held. It is also held in that case that the owner of a vessel as owner is entitled to salvage for services rendered by his vessel in saving property in which such owner has a joint interest with others. The salvage services rendered in that case were rendered in behalf of a lot of oil, part of the cargo of the wrecked ship Holder Borden, and which belonged jointly to the owners of the Borden and to her officers and crew. The salvage services were rendered by the latter, the shipwrecked mariners of

the Borden. A part of the services were rendered by the crew (including the master of the Borden) on board the brig Delaware, and the latter was owned by Nathan Durfee, who was also joint owner with the salvors and the owners of the Borden in the property saved. Durfee, as owner of the Delaware, and the master and the crew of the Borden, were decreed salvage.

But this objection is leveled mainly at the claim of Capt. Strout to salvage on the cargo of the Cuba; and the case of The Maria Jane, 1 Eng. Law & Eq. 658, is cited. That was a very peculiar case, and although a remark of the judge would seem to favor the objection set up in this case now before us, yet I do not think the decision itself is to be so understood. The judge remarked that the peculiarity of the case distinguished it from all that had gone before it, and I do not think it closely resembles the case now under consideration. Mr. Lilly, whose servants the libelants were, in the case of the Maria Jane, was charterer in possession of the salved ship, and therefore quasi owner, and the owner of the whole cargo,—the ship being worth less than $3,000, and the cargo more than $30,000. It was the duty of Mr. Lilly and of his servants, the libelants, to relieve the ship which Mr. Lilly had chartered, laden, and of which he had the legal possession. It is indeed urged in the present case that it was the duty of Capt. Strout, if not to rescue this cargo, at least to stay by it; and, if it came again into his possession, to return it to the owners. But passing the improbability either of any voluntary release of this cargo by the captors, or of its restoration by any tribunals which would assume to adjudicate upon the capture, it is equally true that the master has the same duties imposed upon him in ordinary cases of belligerent capture. He must stay by, and if the property is restored, must return it to the owners. Phillips v. McCall [Case No. 11,104]. But this imposes on him no duty to imperil his life by rescuing the property from the possession of an armed force. It is as well settled that belligerent capture suspends the contract of affreightment as the contract of the mariner. This doctrine is explicitly laid down in several cases already cited, and is recognized by Mr. Justice Story in the case of The Nathaniel Hooper [Id. 10,032]. The same test must be applied to the right of salvage on the cargo as on the vessel in this case. Was the rescue within any contract of Capt. Strout, either as master or owner? Clearly not. The same vis major or over-whelming force which discharged him from his duty as master to rescue his ship discharged him as a common carrier by sea from rescuing the cargo. Of course he does not claim salvage as owner of the brig. The brig rendered no service, was in no way instrumental in saving it by rescue. Where owners of vessels as such are awarded salvage, it is where their vessels have been used potentially in the work of saving the property, and perhaps put in jeopardy. The vessel itself in such a case is in one sense a salvor. But here the service rendered was a mere personal one, and the deck of the Cuba was merely the theatre upon which the meritorious act was done. If this cargo had been transferred to the Sumter, together with Capt. Strout and his crew, and they had risen on the crew of the Sumter, overpowered them, and brought the cargo to New York, this objection would not have been urged. And yet I apprehend that Capt. Strout's duty to this cargo was no greater after the capture, and while on board the Cuba, than it would have been on board the Sumter in the case I have supposed. My opinion, therefore, is that the fact that Capt. Strout was owner of one-sixteenth of the brig does not bar his claim to salvage.

The only remaining question is at what rate salvage should be awarded. The only settled rule in the case is that it should be liberal. The libelants claim that one-half would not be too liberal in this case, as they were diligent from the hour of capture till that of rescue, in watching for an opportunity to recover the control of their vessel, and that they performed a perilous act in securing their object. That their conduct was meritorious and praiseworthy, I cheerfully concede. Capt. Strout was young, but vigilant, thoughtful, brave, and discreet; and every man of his officers and crew performed well his part. But the peril of their enterprise, though considerable, was not of the most imminent kind. There were seven of them, all with the liberty of the decks, and with opportunities for consultation. There were but five of the prize crew, and they appear to have been of indifferent character, both as to intelligence and spirit. Capt. Strout seemed to hold them in just contempt when he told their leader that he did not fear them nor their pistols. I think, as the value of the brig and cargo amounts to at least $12,000, and perhaps $15,000, that an award of two-fifths of the whole property salved will be fair; the whole costs to be paid out of the remaining three-fifths; the vessel and cargo to bear the same in ratable proportions on their respective values. The arms taken will be distributed to the captain and mate, unless some further objection is interposed.

STROUT (LOUISVILLE, The v.). See Case No. 8,542.

Case No. 13,550.

The STRUGGLE.

[1 Gall. 476.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

EMBARGO AND NONINTERCOURSE — BOND — CONDITION—REDELIVERY TO CLAIMANT.

1. A bond voluntarily given upon the delivery of property on bail, on application of the claimant, is good, although the condition does not exactly conform to the 89th sect. of the act of 2d March, 1799, c. 128 [1 Story's Laws, 653; 1 Stat. 695, c. 20].

[Cited in George v. Tate, 102 U. S. 571; Munks v. Jackson, 13 C. C. A. 641, 66 Fed. 574.]

2. Even if such bond were void, the court would, by attachment, enforce a redelivery of the property by the claimant.

See U. S. v. Woollen Cloth [Case No. 15,150]; The Nied Elwin, 1 Dod. 50.

[Cited in Bank of U. S. v. Brent, Case No. 910.]

3. The 89th sect. of the act of the 2d of March, 1799, c. 128 [1 Story's Laws, 653; 1 Stat. 695, c. 20], does not extend to delivery on bail, on seizures under other acts.

[Cited in Fifteen Pieces of Black Silk, Case No. 4,779.]

This was an appeal from the decree of the district court of Maine acquitting this vessel, against which an information was filed for a violation of the non-importation acts. Act March 1, 1809, c. 91, revived by Act March 2, 1811, c. 96 [2 Story's Laws, 1114, 1187; 2 Stat. 550, 651]. Pending the proceedings in the court below, the claimants [Thomas Lord and others] had obtained a delivery of the vessel, on giving bail for the appraised value.

At the hearing, at this term, the decree of the district court was reversed, and a decree of condemnation pronounced. After which, William Prescott of counsel for the claimants suggested, that before judgment was pronounced upon the bail bond, he wished to be heard, as it did not in the condition conform to the terms of the statute. Act March 2, 1799, c. 128, § 89 [1 Story's Laws, 653; 1 Stat. 695, c. 20].

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

STORY, Circuit Justice. I cannot say that I approve of the practice of an indiscriminate delivery of property seized, on giving bail for the appraised value. It is attended with many inconveniences, and often leads to frauds. In the exchequer in England, no delivery is allowed, unless the property be perishable, or the government officers have been guilty of laches and delays in the prosecution. In the admiralty a more liberal practice seems to prevail, but I believe it will be found, that the court does not lend an indulgent ear, unless some peculiar ground is laid for the application; and, indeed, a more liberal practice may well prevail in the instance court, because it is seldom that more than a lien on the property is sought to be enforced.

I do not consider the present case as governed by any statute provision. I have never considered the 89th section of the act of the 2d of March, 1799, c. 128 [1 Story's Laws, 653; 1 Stat. 695, c. 20], as reaching beyond cases within the purview of that act. Though the acts, on which this information is founded, refer to that act as to the mode of prosecution, it does not follow, that all the interlocutory proceedings of the court are to be governed by it. Even, however, under that act, it is not understood that a delivery on bail is compulsory on the court. It still rests in sound discretion, whether it will appoint appraisers.

But admitting this case to be completely within the act, I do not think that the learned counsel need give himself the trouble of an argument. The question is not new, and I am entirely satisfied, that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security. He accepts, or not, at his pleasure, and it would be grossly inequitable, if he might lie by until the close of the cause, receive and use the property, and then, by detecting an error in the bond, set the whole judgment of the court at defiance. In point of fact it is well known that these errors, if any, creep in through inadvertence of the officers of the court, and are not imposed upon the party.

Even if the law were otherwise, it would not avail the claimants. If the bail be not rightfully taken, they have the custody of the property or its proceeds, as mere stakeholders for the court; and I should have little difficulty in enforcing, by attachment, a re-delivery of the same to the court. Considering how appraisements are usually made, I presume the claimants would not elect so inconvenient a procedure.

Prescott waived any further motion to the court.

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

Case No. 13,551.

STRUVE v. SCHWEDLER et al.

[4 Blatchf. 23.] [1]

Circuit Court, S. D. New York. April 15, 1857.

COPYRIGHT—HOW SECURED.

Under section 4 of the copyright act of February 3d, 1831 (4 Stat. 437), in order to secure a copyright to a book, a printed copy of its title must be deposited in the proper clerk's

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

office, before its publication, and, within three months after its publication, a copy of it must be delivered to such clerk.

[Cited in Donnelley v. Ivers, 18 Fed. 594.]

[See Baker v. Taylor, Case No. 782.]

In equity. This was an application for a provisional injunction, to restrain the defendants [Frederick Schwedler and another] from the publication of a work called "Gustav Struve's Welt-Geschichte," or "Gustav Struve's History of the World," for which the plaintiff claimed to have obtained a copyright. The defendants, in their answer, set up that, as early as the year 1852, the plaintiff made an arrangement with one William Schluter, the printer of a German newspaper in New York, to print certain parts of the work; that, in pursuance of such arrangement, six volumes of the same were printed and published between the year 1852 and the 1st day of October, 1854; that, by the terms of the agreement, the plaintiff was to receive from Schluter, and did receive, during the publication thereof, ten dollars per sheet for the manuscript of the work, and was also to participate in some degree in the profits of the sales; and that the work was put on sale immediately on its first publication, and so continued until April, 1856, when Schluter became unfortunate in business and made an assignment of his property for the benefit of his creditors, including the edition of the work then on hand, and also the stereotype plates of the same. He had also previously given a chattel mortgage upon the same to one Sebastian Schovadderbeck, to secure a large indebtedness. The property was subsequently sold under the assignment and mortgage, at public auction; and the title of the defendants was derived from that sale. It was also shown that the copyright of the plaintiff was not taken out for the work until the 26th of April, 1856.

NELSON, Circuit Justice. Besides the apparent title of the defendants to the edition of the six volumes of the history in question, derived under the agreement of Schluter with the plaintiff, and the printing and publication in pursuance thereof, there is another objection to the injunction asked for, to which no answer has been given. By the 4th section of the copyright act of February 3d, 1831 (4 Stat. 437), it is provided, that no person shall be entitled to the benefit of it, unless he shall, before publication, deposit a printed copy of the title of his book in the clerk's office of the district court of the district in which the author resides, and shall, within three months from the publication of the book, deliver a copy of it to the clerk of the said district. In this case, neither of these steps was taken till some years after the publication, and after two editions had been printed, and the greater part of them sold. The motion for the preliminary injunction must, therefore, be denied.

Case No. 13,552.

STRUVER v. The RODERICK DHU.

[N. Y. Times, Nov. 29, 1854.]

District Court, D. New York. Nov. 28, 1854.

BILL OF LADING—SHORTAGE OF CARGO—EVIDENCE.

[The wharf being the place of delivery, evidence that 38 hogsheads of sugar, the full number called for by the bill of lading, were placed thereon, will exonerate the ship, as against evidence that only 37 hogsheads were received at the consignee's storehouse, whither his own cartmen conveyed them.]

[This was a libel by Charles Struver against the bark Roderick Dhu to recover the alleged shortage of cargo.]

Wright & Lane, for libellant.

Benedict, Scoville & Benedict, for claimant.

BY THE COURT. This suit is brought to recover the value of a hogshead of sugar alleged to have been shipped on board of the bark, but not delivered to the plaintiff. This was one of a parcel of thirty-eight hogsheads. It is admitted that thirty-seven of them were safely delivered, as also another parcel of seventeen, and the question is only as to the one remaining. This depends upon the question, where was the place of delivery? It is very evident that the wharf was the place. The parcel of seventeen was delivered there, and sold by the consignee to be taken from thence, and the consignee sent his own cartmen to the wharf to get the thirty-eight, and if they were safely delivered there, even if a loss occurred between the time when they were landed and the time when they were taken away, yet the carrier is discharged. The libellant's clerk says that only thirty-seven were received by the consignee, and that he was on the wharf and counted only thirty-seven. But two witnesses are brought who say that six days after the arrival of the bark, and after all the other sugar had been taken away, and only a short time before the libellant's cartmen came for them, they counted the thirty-eight hogsheads on the wharf. I think that as the wharf was the place of delivery,—as the consignee sent there to receive the sugar,—the evidence is sufficient to show that they were all landed, that the libellant had notice that they were there, and that they were all there when the cartmen went down. If all the cartmen had been introduced, and had said that they had only carted away thirty-seven, it might go to show that these two witnesses were mistaken; but only one is brought up, and he says that only thirty-seven were receipted for at the storehouse; and that is not inconsistent with their testimony. As the evidence before me is very satisfactory that all the hogsheads were on the wharf just before the cartmen were sent to take them away, it is sufficient to satisfy me that the

contract in the bill of lading was performed on the part of the bark. Libel dismissed with costs.

Case No. 13,553.

STUART et al. v. BOYER.

[41 Hunt, Mer. Mag. 74.]

District Court, S. D. New York. Jan. 25, 1859.

SHIPPING—LOSS OF CARGO—PROOF OF RECEIPT.

This was a libel filed [by Robert L. Stuart and others against Herman Boyer] to recover the value of 18 boxes of sugar belonging to the libellant, and alleged to have been put on board lighters belonging to the respondent, to be carried to Brooklyn from the ship Greenland, then lying at quarantine, but alleged not to have been delivered. The bills for landing the sugar called for 3,225 boxes. There were two lighters engaged in the transportation, and receipts for 3,225 boxes were produced on the part of the libellant, all of which were admitted by the respondent to be correct, except two, one for 510 boxes, and one for 408 boxes, which he claimed to have been altered after their signature by the master of the lighter; the first by the addition of the words "and ten," and the second, by the addition of the words "and eight." The mate of the Greenland was examined by deposition, and testified that those words were written before signature. The master of the lighter, who was examined in court, testified that they were not there when he signed them. The general character of both these witnesses for truth was not impeached. The master of the other lighter, who signed a receipt immediately under the receipt for the 510, testified that when he signed he examined the other receipt, and it was then but 500. As to the other receipt, it was in evidence that the lighterman was directed to bring only 400. The mate of the Greenland testified that after the 400 were put on board, and the receipt for that number drawn up, eight more, which had been used on deck as a staging, were put on the lighter, and the receipt altered in this respect before signature. It was testified by several lightermen that the eight boxes were not so loaded as testified by the mate, but that they were put on the lighter to make up the 400, and before the boxes were counted by the mate and the lightermen. It was also testified by several witnesses, contradicting both the mates of the Greenland, that two boxes of sugar were lost overboard from the ship while being loaded on the lighter.

HELD BY THE COURT (BETTS, District Judge) that on the evidence the libellant has not shown that the respondent received on board of his lighters the 18 boxes claimed in the libel, and he is not, therefore, liable for their value.

Case No. 13,554.

STUART v. COLUMBIAN INS. CO.

[2 Cranch, C. C. 442.] [1]

Circuit Court, District of Columbia. Nov. Term, 1823.

MARINE INSURANCE—TIME POLICY—DESTINATION—INSURABLE INTEREST—PLEADING—DEMURRER—PRACTICE—INSTRUCTION TO JURY.

1. If a policy of insurance be made for six months on a vessel, stated in the policy to be then "bound on a voyage from Georgetown to Madeira, and a market between Cape Finisterre and Naples, with liberty, after the expiration of six months, to freight or trade for six months more on a premium of five and a half per cent.

2. The risk for the second six months is upon time only, and the vessel having performed the voyage described in the policy in the first six months, had a right to go to Brazil.

3. If evidence be given on both sides, and be complicated, the court will not compel the plaintiff to join in demurrer to the evidence, nor will they undertake to say what facts the party offering to demur, ought to admit as inferences from the evidence.

4. Nor will they compel the other party to join in demurrer, upon his offering to admit all the inferences which the court should say the jury could reasonably infer from the evidence.

5. The court will not instruct the jury upon a part of the evidence only.

6. The owner of a vessel, who has contracted to sell her for a certain sum, and to make a title to the vendee upon payment of the price, has an insurable interest to the full extent of the value of the vessel, and not merely to the extent of the price for which he has contracted to sell her.

This was a policy of insurance upon the schooner Eleanor H. Semmes, Alexander Semmes, master, for six months from the 17th of May, 1821, "now bound on a voyage from Georgetown to Madeira, and a market between Cape Finisterre and Naples, with liberty, after the expiration of six months, to freight or trade for six months more on a premium of five and a half per cent. on payment being made therefor." The first six months expired, and the policy was renewed agreeably to the terms provided. The plaintiff [Levin Stuart], who was the builder and owner, had given Captain Semmes a bond conditioned to give him a title to the vessel upon payment of $1260.

Jones & Hewitt, for plaintiff, claimed for a total loss upon the policy for the second six months.

Mr. Taylor, for defendants, contended: 1st, that the policy was upon the voyage, as well as upon time, and that the loss was not in the course of the voyage described; 2d, that the vessel was not seaworthy, not having sufficient crew, stores, and water; and, 3d, that the plaintiff had no interest in the vessel.

After the reading of a number of depositions on the part of the plaintiff, and one on the part of the defendant, and examination of several witnesses on the part of the plaintiff

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

respecting the competency of the master and crew, boats, water, &c., and the circumstances of the loss, Swann & Taylor, for the defendants, offered to demur.

Jones & Hewitt, for plaintiff, objected that there was parol evidence on both sides; that the inferences to be drawn were to be drawn from complex and perhaps contradictory testimony; and that they required the defendants to admit that the loss happened on the voyage insured, and by a peril insured against, without fraud, and that the vessel was seaworthy.

THE COURT (THRUSTON, Circuit Judge, absent) said, that as there was contradictory evidence, and the inferences were to be drawn from such complicated parol evidence, they would not compel the plaintiff to join in the demurrer.

The defendants' counsel then offered to admit all the inferences which the court should say the jury could reasonably draw from the testimony and evidence offered by the plaintiff. But the court, for the reasons aforesaid, still refused to compel the plaintiff to join in the demurrer.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the policy, for the second six months, was on time only, and that, as the vessel actually performed the voyage described in the policy, she had a right, afterwards, to go to Brazil, &c., and that the loss was within the policy.

THE COURT also refused to instruct the jury that it was not competent for them to infer, from the evidence, that the vessel was seaworthy, and refused to give any instruction on the question whether the register alone was prima facie evidence of the plaintiff's interest in the vessel, because there was evidence that he built her and retained the legal title in himself as security for the unpaid purchase-money; and refused to instruct them that it was not competent for them to infer, from the evidence, that the plaintiff had an insurable interest in the vessel, but instructed them that the plaintiff must show some insurable interest.

The defendants then prayed the court, that if, from the evidence aforesaid, the jury should be of opinion that the vessel was of the value stated in the policy, and that the plaintiff's interest was not more than $1260, and that the said Alexander Semmes had an equitable interest in the said vessel in the residue of her said agreed value, the plaintiff could not recover more than the said sum of $1260.

Which instruction THE COURT (nem. con.) refused to give, but instructed the jury that the interest of the plaintiff, under the contract between him and the said Semmes, as set out in the condition of the bond given in evidence, entitled him to insure the entire interest and value of the said vessel.

The defendants took four bills of exceptions. Verdict and judgment for plaintiff, $3780. No writ of error was prosecuted.

Case No. 13,555.

STUART et al. v. GREENLEAF.

[Brunner, Col. Cas. 77;[1] 3 Day, 311.]

Circuit Court, D. Connecticut. 1809.

NOTES—INDORSEMENT BEFORE MATURITY—PAYMENT TO PAYEE—PRESUMPTION.

Whether in an action by an indorsee of a negotiable note against the maker, a discharge by the payee shall be available as a defense until it be shown by the maker that the receipt was given before the indorsement was made.

This was an action by [Robert Stuart and Hamilton Stuart] the indorsees of a promissory note against [David Greenleaf] the maker. The note was made in the state of New York, and was, by the laws of that state, negotiable. It was payable to John I. Staples & Son, and by them indorsed to the plaintiffs.

The defendant offered in evidence two receipts, signed by John I. Staples & Son, for two hundred dollars each, which he contended ought to be allowed in part on the note, unless the plaintiffs could prove that it was assigned to them before the receipts were given.

The plaintiffs contended that the onus probandi lay upon the defendant; that every indorsed note was presumed to have been indorsed the day it was made, or at any rate before it became due, unless the contrary were shown. And of this opinion was LIVINGSTON, Circuit Justice.

EDWARDS, District Judge, was of a contrary opinion, and strenuously contended that the onus probandi lay upon the plaintiffs.

It afterwards appeared that the case was with the plaintiffs on other grounds.

Daggett & Bristol, for plaintiffs.

The District Attorney, for defendant.

NOTE. Indorsement of Note—Presumption as to.—It is a legal presumption that the indorsement of a note was antecedent to its becoming due. Pettis v. Westlake, 3 Scam. 538, citing case in text.

STUART (LATHROP v.). See Case No. 8,113.

STUART (PETROCOKINO v.). See Case No. 11,041.

STUART (PRESTON v.). See Case No. 11,398.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 13,556.

STUART et al. v. SHANTZ et al.

[6 Fish. Pat. Cas. 35; 29 Leg. Int. 332; 2 O. G. 524; 9 Phila. 376; Merw. Pat. Inv. 125.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 14, 1872.

PATENTS — CONSTRUCTION UPON DIFFERENT THEORIES—LICENSE—PLEADING—EFFECT OF ADMISSIONS IN ANSWER.

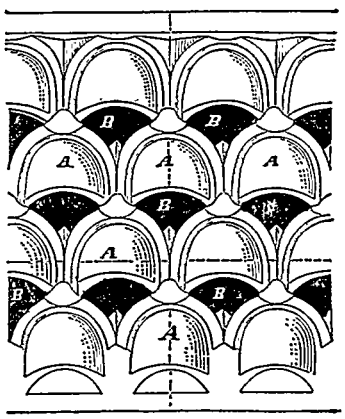
1. Where the defendants do not in their answer deny that they have been engaged in the manufacture and sale of guard-plates, in every material particular of construction and effect like the one described in complainants' patent, but deny merely that their guard-plates produce the effect of directing the radiant heat downward toward the floor, which is claimed by complainants as a peculiar merit of their patented guard-plate, the complainants might fairly have regarded the answer as admitting the fact of infringement.

2. A license under a patent, other than the one sued upon, can have no independent efficacy in protecting the defendants. If such patent is for the same invention as the patent sued upon, and of earlier date, it renders the patent sued upon void. If not for the same invention as the patent sued upon, it can confer no right to appropriate that invention.

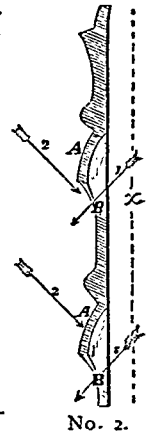
3. In the patent for an "improved guard-plate for stoves," granted to Stuart & Wemys, May 18, 1868, the inventor proposed to permit the passage only of those rays of heat from a stove-cylinder, which have a downward direction, thereby causing them to impinge upon the floor, and upon objects somewhat above it, upon the hypothesis that their function in heating an apartment would thus be more effectually performed; and the construction and operation of his mechanical device was adapted to that end. In the patent issued to W. L. McDowell, April 28, 1863, the inventor proposed to prevent the horizontal radiation of heat from the fire-box of the stove, and thus avert the danger of burning combustible substances in its vicinity, and to allow the heated air to pass only outward and upward. His contrivance was adapted in its structure and operation to effectuate this purpose. *Held*, that the devices of the Stuart & Wemys patent and the McDowell patent are constructed upon different theories, and intended for the production of different primary results. They fall into different categories, and are distinguishable from each other in form, design, and mode of operation.

4. The utility of complainants' invention seems to be demonstrated by the fact that its manufacture in large numbers was justified by the public recognition of its merits.

In equity. Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 80,235] for an "improved guard-plate for stoves," granted to complainants [David Stuart and others], as assignees of David Stuart and Alexander Wemys, July 21, 1868. The defendants [Enos Shantz and others] set up in defense a license under a patent granted William L. McDowell, April 28, 1863. The case therefore turned mainly upon the question of substantial identity between the inventions shown in these two patents, as affecting the validity of the patent of complainants. The nature of the two inventions is set forth in the opinion.



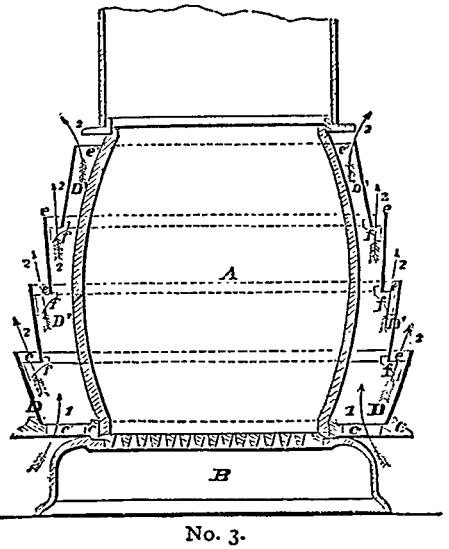
No. 1.



No. 2.

The above engravings represent the complainants' device. B, B, are openings partially covered by the guard-plates A, A, by which the rays of heat are deflected downward in the direction of the arrows, 1, 1.

The following engraving represents the McDowell device, in which the heated currents pass upward through the openings e, e, as shown by the arrows 2, 2:



No. 3.

C. Howson and Furman Sheppard, for plaintiffs.

Frank Wolfe, for defendants.

McKENNAN, Circuit Judge. The complainants are assignees of Stuart & Wemys, of letters patent for an "improved guard-plate for stoves," dated July 21, 1868, with the infringement of which the defendants are charged. It is not denied in the answer that the defendants have been engaged in the manufacture and sale of guard-plates, in

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 125, contains only a partial report.]

every material particular of construction and effect, like the one described in the patent; but they deny merely that their guard-plates produce the effect of directing the radial heat downward toward the floor, which is claimed by the complainants as a peculiar merit of their patented guard-plate. The complainants might, therefore, fairly have regarded the answer as admitting the fact of infringement. Not so treating it, they have produced ample proof, that the guard-plates made by the defendants are substantial imitations of their own; and so that their rights have been infringed.

In justification of this infringement the defendants set up a license from W. L. McDowell, to whom letters patent, dated April 28, 1863, were granted, and allege that, in the construction of their guard-plates, they have conformed to the method indicated in that patent. It is unnecessary, however, to consider this license, because it can have no independent efficacy in protecting the defendants. If Mr. McDowell's invention is not the same as that of Stuart & Wemys, he could confer no right upon any one to appropriate the invention of the latter. If both are identical in principle, construction, and operation, the patent of Stuart & Wemys is void, because it is subsequent to McDowell's, and the defense of respondents is complete, irrespective of the license. The only material inquiry then is, whether the patent of McDowell describes the same invention described and claimed in the patent of Stuart & Wemys.

Two objects are aimed at in the complainants' invention: (1) The concealment of the fire-pot of the stove; and (2) the direction of the radiant heat downward toward the floor. These objects are effectuated by the employment of a guard-plate consisting of a series of projections or deflecting shields, united by ornamental tracery, and so arranged as to leave open spaces, above and outward, from which the projections extend. The fire-pot is thus concealed from view, and the horizontal and upward radiation of heat is intercepted, only those rays which have a downward direction being allowed to pass freely through the chimneys. This is very concisely stated by Dr. Cresson, in his deposition, in which he says: "In the complainants' patent, I find the fire-pot surrounded by a shield with perforations. These perforations are shielded with a projecting cover or roof, which conceals the fire-pot from the eye, when looked at from a distance of several feet above the floor, and cuts off a majority of the rays of radiant heat, which would otherwise be given off in an upward direction or above a horizontal line; at the same time they permit the rays of radiant heat, that will pass through these openings, to impinge upon the floor and upon objects somewhat above it. The radiant rays that I refer to are those given out by the fire-pot itself. These covers to the openings act, at the same time, as reflectors of a portion of radial heat, giving it a downward direction."

The object of the McDowell invention is avowedly different. In his specification, he says: "In nearly all the stoves in common use, especially those having cast-iron fire-boxes or cylinders, the heat is permitted to radiate horizontally, and the said cylinders being generally kept red-hot, there is consequently danger of their charring or 'setting fire' to one's clothing, or any combustible substance in its vicinity. The stoves used in railroad cars, especially, are generally subject to this very objectionable feature. To obviate this objection in a perfect manner, and without preventing the required diffusion of the radiating heat through the air around the stove, is the object of my invention."

This object is accomplished by "making the fender of a series of deflectors, consisting of short, hollow frustrums of cones, or other suitable forms of sheet metal, and arranging them around the outer side of the fire-cylinder or box, so as to be supported together upon the said perforated supplementary top plate of the base, leaving sufficient spaces between the said deflectors, and between the latter and the stove, for the hot air to pass obliquely outward and upward from the cylinder or fire-box, into the surrounding external air."

These devices are distinguishable, therefore, not only in their form of construction, but also just as essentially in their intended mode of operation and the effects to be produced by them. In the one case the inventor proposed to permit the passage only of those rays of heat from a stove-cylinder which have a downward direction, thereby causing them to impinge upon the floor and upon objects somewhat above it, upon the hypothesis that their function in heating an apartment would thus be most usefully and effectually performed, and so he adapted the form, construction, and operation of his mechanical device to that end. On the other hand, it was proposed to prevent the horizontal radiation of heat from the fire-box of a stove, and thus avert the danger of burning combustible substances in its vicinity, and to allow the heated air around the stove to pass only obliquely outward and upward into the external atmosphere, and the inventor devised a mechanical contrivance peculiar in its structure and mode of operation to effect his purpose. Constructed, therefore, upon different theories, and intended for the production of different primary results, and with peculiar mechanical adaptations, the inventions in question fall into distinct categories, and so are distinguishable in form, design, and mode of operation from each other.

Of the efficiency of the complainants' invention, either in the light of its practical success, or of the conformity of its alleged mode of operation to the scientific laws

which govern the radiation of heat, it is scarcely necessary to speak. Its utility seems to be demonstrated by the fact that its manufacture in large numbers, was fully justified by the public recognition of its merits and its preferential use, while but a very small number of the McDowell improvement has ever been made or sold. It may, therefore, be assumed that the effects claimed to be produced by it are produced to a useful and valuable extent. There may be scientific reasons for denying the positive agency of the shields in deflecting the radiant heat, which is projected against them toward the floor, but this is true only in a narrow sense and by a very literal interpretation of the patent. They certainly serve the inventor's purpose of intercepting upward and horizontal radiation, and permitting the escape only of those rays which have a downward tendency. Understood in the sense which the inventor's theory indicates, they exert at least a passive agency in directing the heat to the floor, where it is most available for proper dissemination through the apartment to be heated. A decree will therefore be entered for an injunction and an account.

STUART, The JOHN. See Case No. 7,427.

Case No. 13,557.

In re STUBBS.

[4 N. B. R. 376 (Quarto. 124).] [1]

District Court, D. Maine. Dec. 20, 1870.

BANKRUPTCY — ASSIGNMENT UNDER STATE INSOLVENT LAW—LIABILITIES OF ASSIGNEE—COSTS AND EXPENSES.

1. Where an assignment by a debtor of all his property to an assignee for the benefit of his creditors under a state law, is avoided by one of his creditors by procedings under the bankrupt law [of 1867 (14 Stat. 517)], it was held that the assignee under the state law is liable to the assignee subsequently appointed under proceedings in bankruptcy for all the property and proceeds thereof in his hands, and has no right to deduct any compensation for his own services in executing the trust as assignee under such state law.

[Cited in Re Kurth, Case No. 7,948; Hunker v. Bing, 9 Fed. 279.]

2. Also, that the proceedings, had under the state law, were in fraud of the bankrupt act, and the court in bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operations of the bankrupt law.

[Cited in Re Cohn, Case No. 2,966; Gardner v. Cook, Id. 5,226; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486; Platt v. Archer, Id. 11,214.]

I, Charles Hamlin, one of the registers of said court in bankruptcy, do hereby certify that in course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the opposing parties, to wit: Mr. Sweden S. Patten, who appeared for himself, and Charles P. Stetson, Esq., assignee of said Stubbs in bankruptcy. September 30th, 1870, said bankrupt made an assignment of all his property to Sweden S. Patten, of Bangor, under the provisions of chapter 70 of Revised Statutes of the State of Maine, and said Patten took possession of same, and sold a portion of said property, to wit: goods in store; and collected certain accounts, in all amounting to one hundred and ninety-two dollars and forty-four cents, which amount said Patten now has in his hands. Afterwards, to wit: on the 11th day of October, 1870, on petition of his creditors, said Stubbs was decreed a bankrupt under the law of the United States, and by order of the judge of the United States district court, said Patten was enjoined from making further sale of said goods, etc. Said Patten afterwards delivered all property of said bankrupt's estate in his possession to Charles P. Stetson, Esq., assignee in bankruptcy of the estate of said Stubbs, and said Stetson, assignee as aforesaid, this day demanded of said Patten said one hundred and ninety-two dollars and forty-four cents received by said Patten from sale of goods, and collections from accounts, after he was appointed assignee under the laws of said state, but said Patten refuses to pay said money to said Stetson, and claims that there should be set off and deducted by him certain charges for expenses incurred by him as assignee under said state laws as aforesaid, and for his services, an account of which charges is hereto annexed, viz.:

Estate of Asa N. Stubbs to S. S. Patten, Dr.

1870.		
Oct. 4,	To cash paid insurance on stock	$ 13 50
" 8,	To cash paid Lizzie Pond	5 00
" 12,	To cash paid Bangor Democrat for assignee's notice	2 00
" 12,	To cash paid cartman	25
" 13,	To cash paid Augusta Stubbs for services in store	2 50
" 13,	To cash paid Asa N. Stubbs, 14 days services	42 00
" 13,	To cash paid A. G. Wakefield, Att'y, for advice, etc., in case in probate court	5 00
" 13,	To cash paid services of myself in taking and extending stock and other services in sale of goods, and in probate court	50 00
For expenses in probate court charged in probate court by Judge Godfrey, according to Chap. 70, R. S. of Maine		50 00
		$170 25

The question presented for decision is, whether and what, if any, of above charges can be allowed to said Patten? No question is made as to the reasonableness of any of the charges except the last, for expenses in probate court. I was of the opinion that said Patten should pay over to said Stetson, as assignee in bankruptcy, the amounts collected by him, without any deduction claimed by him in his said account. And the said par-

[1] [Reprinted by permission.]

ties requested that the same should be certified to the judge, for his opinion thereon.

FOX, District Judge. The proceedings had, under the state law were in fraud of the bankrupt act, and the court in bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operation of the bankrupt law.

The decision of the register is approved. Vide Bartlett v. Bramhall, 3 Gray, 257.

STUCKEN (GRAHAM v.). See Case No. 5,677.

Case No. 13,558.

STUDER v. GLENN.

[3 Cranch, C. C. 650.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

APPRENTICE—INDENTURES—EXECUTION.

The father, with the consent of his son, fifteen years old, bound him to Glenn, as an apprentice. The son signed and sealed the indentures, but was not named as a party therein, nor was there any covenant on his part. The court refused to discharge him.

Mr. Hewitt had obtained a rule on the defendant, to show cause why Morris Studer should not be discharged from the service of the defendant, as an apprentice; at the return of which rule, he contended that the indentures were void, because there was no covenant on the part of the son. That the father could not bind him without his consent; and his signing and sealing the indentures, which contained no covenant on his part, was no evidence of his consent. The law of Virginia requires that he should be taught reading and writing; but, by these indentures, he is only to be taught ciphering. King v. Inhabitants of Arnesley, 3 Barn. & Ald. 584; Mary Highton's Case, 8 East, 25; Dowle's Case, 8 Johns. 328.

THE COURT (nem. con., but CRANCH, Chief Judge, doubting) refused to discharge the apprentice, he having been fifteen years old at the date of the indentures, and having signed and sealed them, although they contain no covenant on his part.

Case No. 13,559.

STUDLEY v. BAKER et al.

[2 Lowell, 205.] [2]

District Court, D. Massachusetts. March, 1873.

SALVAGE—SETTLEMENT WITH OWNERS—RIGHT OF CREW TO PARTICIPATE—AMOUNT OF COMPENSATION.

1. If the owners of a vessel which has performed a salvage service make a settlement with the owners of the property saved, and receive the salvage, the crew may recover from them a due share of the reward by libel in admiralty.

[Cited in McConnochie v. Kerr, 9 Fed. 51; The Olive Mount, 50 Fed. 564; McMullin v. Blackburn, 59 Fed. 179.]

2. Where a coasting schooner rendered such a service to a frigate, and a sum of money was paid by the United States to the owners of the schooner, who signed a receipt for owners, master, and crew, *held*, the crew were entitled to a share, although the owners testified that they did not consider the services of the crew in making the settlement.

3. Where the principal service had been performed by the vessel acting as a lighter, and the actual work of lightering had been done by men from the vessel in distress, the owners and master of the lighter were allowed three-fourths of the salvage, and the crew one-fourth.

[Cited in McConnochie v. Kerr, 9 Fed. 59.]

The libellant [Leonard Studley] alleged that in January, 1870, he engaged as mate on board the schooner Harriet Gardner for the general coasting service from port to port in the United States during the season, at monthly wages, and served therein until the times after mentioned. That, on the 6th of October, 1870, the schooner, with the libellant on board, fell in with the frigate Guerriére ashore on a dangerous shoal in Vineyard Sound and in great peril; that the schooner and her crew assisted the frigate by carrying out an anchor and by lightering her, being employed in the service for two days, and being exposed to peril and hardship; that, by this aid, with that of other vessels, the frigate was saved; that there was awarded and paid, by the government of the United States, to the two defendants [J. K. Baker and another] who were the owners of the schooner, and one of whom was the master, the sum of $3,500; that the services were salvage services, and the sum assessed was paid for such services, and the libellant was entitled to his share thereof; but the respondents refused to pay him any thing. The answer set up a want of jurisdiction in admiralty; admitted that the money was paid the respondents, but alleged it was not for salvage, nor for any services of the libellant, but for the use of their vessel, and for damages and expenses accruing to them alone as her owners, in respect to the lightering, &c. There was evidence that the schooner was of about fifty tons register, and carried on this occasion a master, mate, and cook; that, seeing the frigate in distress, about ten miles off, they went alongside, and were asked to help in carrying out an anchor; that the master said he had no crew, and the officer replied that the frigate had plenty of men, and he ordered thirty-five or more to go on board the schooner, and these men did most of the work. How much the libellant actually did was in dispute; but it was not denied that he was ready to do whatever was required, and that he assisted more or less in managing the schooner. A very heavy anchor was put

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

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

on board, and the schooner was somewhat damaged by collision with the frigate, without any fault on her part. She was delayed about thirty days in repairing the injuries. R. B. Forbes, Esq., acted as agent for the government in settling with the respondents for their compensation; and a letter from that gentleman was read as part of the res gestæ, in which he suggested to the respondents a basis of settlement, to which they assented, and according to which the payment was made. From this letter, it appeared that the respondents were paid several specific sums for repairs, for demurrage,—including wages and board of crew and loss of employment of the schooner,—and for injury to cargo; and, besides these, there were two items, as follows: Value of services lightering, $540; ditto, carrying out anchor, $1,000. The total was $3,535, the odd dollars being for interest after the adjustment was arrived at. For this sum, one of the respondents gave a receipt, expressed to be for the owners, master, and crew of the schooner. The owners testified that they did not consider the libellant at all in the settlement.

G. Marston, for libellant.
J. M. Day, for respondents.

LOWELL, District Judge. The question of jurisdiction is an interesting though not a difficult one. I shall examine it at some length, because the reported cases, though unanimous, are not numerous; and the point has been thought worthy of argument in the case. Admiralty courts are so peculiarly well fitted to deal with salvage, that cases of that sort are very rarely brought elsewhere. Judge Peters once said that he should be much disposed to consider the jurisdiction exclusive, and that he had never seen the report of such a case at common law. Brevoor v. The Fair American [Case No. 1,847]. A few years after these remarks were made, there was a case in which a single salver recovered a verdict and judgment at law for salvage, no question of jurisdiction being raised. Newman v. Walters, 3 Bos. & P. 612. There is one case in equity, arising out of the refusal of Judge Betts to take jurisdiction in admiralty (see One Hundred and Ninety-Four Shawls [Case No. 10,521]) in which the owner of goods was permitted to maintain a bill against the agent of alleged salvors to pay the salvage, if any, and redeem the goods (Cashmere v. De Wolf, 2 Sandf. 379). The court, in that case, say they would not take jurisdiction if an admiralty suit were pending. In another case, in equity, connected with the same transaction, the jurisdiction was denied. Frith v. Crowell, 5 Barb. 209. In the same court that had upheld the jurisdiction in equity, a very learned and able opinion was soon after given by one of the judges against the existence of such a jurisdiction at common law; but the case was decided on a different point. Sturgis v. Law, 3 Sandf. 456, per Paine, J. A question of salvage appears to have been involved in the case of Peck v. Randall, 1 Johns. 165; but in a way that presented no difficulty, and no question was raised on this point.

In 1853, the court of queen's bench decided that one of the crew of a vessel that had performed a salvage service could not maintain an action against the owners of the property benefited; because no promise to pay could be implied. They said, very truly, that in the admiralty courts the proceedings were independent of contract. Lipson v. Harrison, 2 Wkly. Rep. 10. This decision virtually ousts the jurisdiction of common-law courts, excepting in those few cases in which a contract could be proved. If the question, for instance, were to arise, whether a promise might not be implied to pay the master of the salving vessel, the answer would be, that the master is not the agent of the crew in such a business; and, it having been decided, as we shall see presently, that the courts of common law have no jurisdiction of a suit by the crew against the master for a share of salvage, they would be obliged to say, I think, that they could not award the salvage to the master. In Lipson v. Harrison, the learned judges said that Newman v. Walters, ubi supra, was the only case on the subject; and they evidently doubted whether they could have jurisdiction under any circumstances.

The courts of common law recognize a lien in salvors so long as they retain possession of the goods saved; and there are several cases in trover which decide this point. Hartfort v. Jones, 1 Ld. Raym. 393; Baring v. Day, 8 East, 57; Baker v. Hoag, 7 N. Y. 555. But whether they would, at the present day, pass upon the amount due for salvage, by leaving to the jury the sufficiency of any tender that may have been made, I do not undertake to say. See the remarks of Judge Betts in Raft of Spars [Case No. 11,528].

Reported cases, at law, for distribution of salvage are equally rare with those on the general subject. In the exchequer in England, in 1862, the judges decided that such an action would not lie; and they all said they had never heard of such a case. They commented on the great embarrassments which would surround an attempt to settle such a question at law. Atkinson v. Woodhall, 1 Hurl. & C. 170. A similar course of argument concerning the analogous case of a suit for prize-money is found in the opinion of Story, J., in Maisonnaire v. Keating [Case No. 8,978]. In this country, two actions have been brought and sustained at law for a share of salvage; but in the former there was no question of jurisdiction raised, and in the latter there was decisive evidence of a contract which might found an action of assumpsit. Blake v. Patten, 15 Me. 173;

Hawkins v. Avery, 32 Barb. 551. I have cited all the cases of any importance that are known to me at law or in equity; and they leave the jurisdiction of these courts in much doubt

That a court of admiralty has such jurisdiction, I cannot entertain the slightest doubt. The liability of the defendants does not rest on a promise, express or implied, so much as on the duty of the owners to pay the men their wages, and whatever else is due them by virtue of their employment in the vessel and of the incidents of the voyage. The amount is not liquidated, and can be conveniently ascertained only by a court of admiralty, which distributes salvage according to its own views of propriety and justice. The money, in this case, was taken by the defendants upon a trust which may sometimes be enforceable at law or in equity, and always in admiralty. Indeed, a suit for distribution of salvage is really a salvage suit, and is always so denominated by good pleaders.

A salvage suit may be instituted against the property saved, or the owner of the property, if he has accepted it cum onere; or it may be brought by the owner against the salvors for restitution of his property after payment of salvage. Post v. Jones, 19 How. [60 U. S.] 150. So it may be brought by part of the salvors against the others for a distribution. Such a suit was entertained by Judge Davis in this court as early as 1807. Jewett v. Hill [unreported]. In 1828, in the Southern district of New York, a like action was brought by an owner against the master, who had received salvage money abroad, and had sent it home. Waterbury v. Myrick [Case No. 17,253]. Betts, J., said that he had no doubt of the jurisdiction, but should not make it a point of decision, because it was not properly pleaded. He could not, in fact, avoid making it a point of decision; because consent cannot give jurisdiction of the subject-matter, though it may of the parties.

In 1830, Judge Davis made a decree for the libellant in another similar case, though without recording any opinion. Cook v. Ellery [unreported]. In 1831, there was a case before the same judge, exactly like the one at bar. It was a libel by some of the crew against the master of their vessel, alleging that they had picked up two logs of mahogany, and that the defendant had sold them, and had paid nothing to the libellants. The answer insisted that the libellants had been paid their wages, and that, as they had incurred no risk or labor, they ought not to have salvage. But salvage was decreed. Fernald v. Two Logs of Mahogany [unreported]. In 1839, the jurisdiction was sustained by Judge Ware in a careful opinion; in which, however, this point is treated as clear. The Centurion [Case No. 2,554]. In 1852, Judge Sprague decided such a case in the same way. Coombs v. Dow [unreported].

In England, it is possible that the exercise of this function may have fallen into disuse with so many other of the proper powers of the admiralty. Such would seem to be the bearing of the remarks of Dr. Lushington, in giving judgment in The Hope, 1 W. Rob. Adm. 267, and in The Britain, Id. 45, note. If so, it has long since been restored by statute. I have not followed out this inquiry, because it is of no practical importance here. If it were so, it is certainly remarkable, and testifies very strongly to the difficulties attending the exercise of the jurisdiction at law, that no case was known to the learned judges of the exchequer to have been brought at law, even when the powers of the admiralty court were in abeyance. I suppose the remedy must then have been in equity.

It having been agreed by counsel that the decision should not be delayed to make the other salvor a party, but that he should be settled with on the basis of the decree, I proceed to consider the merits of the case. It is plain that the $1,540 was paid as salvage. Mr. Forbes says so in his letter, as plainly as he could say it, without using the word "salvage." It is so much for services in carrying out an anchor and in lightering. The services were of the character of salvage; and the compensation was such as to indicate beyond mistake that it was so understood, because it was more than five times the value of the use of the vessel for a month, as allowed in the same settlement. Then the receipt was for owners, master, and crew; and no explanation of those words is possible, except that it was salvage, because the United States had no occasion to pay the master and crew any thing unless as salvors. It was said that the government had overlooked the crew, and had made payment only for the use of the vessel; but the receipt negatives this conclusively, and so does the whole aspect of the case. It would be most improbable that the United States should undertake to settle the case in parcels; and the owners ought not to be presumed to be looking after their own interests only. But it is not needful to go into presumptions, because it is perfectly plain that it was the intent of both parties to adjust the compensation for the whole salvage service. The respondents may have thought that the two men were not to be considered; that they had earned nothing, and ought not to put forward any pretensions. This is what their evidence means; that, though they have settled with the government, yet they have not settled for the libellant, because he never had any claim on the government. They have assumed to settle the whole case, and to give a receipt binding on the libellant; and they, at least, are not to be heard to deny their own authority, or to say that if the libellant has a right to any thing, they are not the persons from whom to recover it.

Nor is it any less certain that every man on board a salving vessel, who is ready to do what he can, is to share in the remuneration. The whole matter depends on a large and liberal policy, which looks almost as much to the general interests of commerce as to individual deserts. Those owners of ships whose crews are engaged in salvage always receive something, whether they can prove any actual damage to their voyage or not. The only difficulty is in the distribution. Considering that it is true, as set up by the owners, that the use of their vessel was chiefly as a lighter worked by the men of the Guerrière, and that no great labor or hardship was imposed on the libellant, and that the owners have been at all the trouble of obtaining the money from the United States, I think it would be fair to give a somewhat larger share than usual to the owners. Taking them to have received by this time, including interest, about $1,600, I divide it into eighths, of which the libellant and the other man would be entitled to one, or $200 each. Decree for libellant for $200 and costs.

STUDWELL v. The E. H. COFFIN. See Cases Nos. 4,309 and 4,310.

STUMP (BURKHOLDER v.). See Case No. 2,165.

Case No. 13,560.

STUMP v. DENEALE.

[2 Cranch, C. C. 640.] [1]

Circuit Court, District of Columbia. April Term, 1826.[2]

WILLS—CHARGING REAL ESTATE WITH DEBTS—"ESTATE"—CONSTRUCTION.

1. The question whether the testator intended to charge his real estate with his debts, is to be decided by a careful consideration of the whole will.

2. The word "estate" will apply to real or personal estate, or to both, according to the manner in which it is used in reference to the respective clauses of the will.

3. The following clause of the will did not charge the real estate: "I am security for my brother James for two sums of money, for which I hold a deed of trust on his property, sufficient, I hope, to pay the same; and I do direct that my estate shall not be sold to pay those debts until the property so deeded, shall be sold, when my estate must be charged for any deficiency."

This was a bill in equity, by the executors of John Stump, against the heirs at law and executrix of George Deneale, to charge his real estate with the balance of a judgment at law, recovered by the plaintiffs against the testatrix, amounting to $5,000, and interest and costs upon a contract in which the testator, George Deneale, was surety for his brother, James Deneale; the said sum being the balance due after deducting from the amount of the judgment the net proceeds of the sales of James Deneale's property, in Virginia, under a decree of a court of chancery, in that state, upon the deed of trust mentioned in the will of George Deneale. All the material facts stated in the bill were admitted in the answer, and the principal question was, whether the real estate was, by the will, bound for this debt.

Hewitt & Swann, for plaintiffs, relied upon the words of the will, "when my estate must be charged with the deficiency," and cited Roberts, Wills, 405.

Mr. Mason, for defendants, contended, that, from the context and the whole tenor of the will, the word "estate," in that clause, must be confined to his personal estate, and cited Lambert's Lessee v. Paine, 3 Cranch [7 U. S.] 133: "That this word, when coupled with things that are personal only, shall be restrained to the personalty. Noscitur a sociis."

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The bill seems to be imperfect, neither charging that there was any real estate, nor praying an account or discovery of real estate; and perhaps there is some irregularity in the proceedings. However, supposing the proceedings to be regular, and the bill amended, &c., the principal question is, whether the real estate is, by the will, bound for this debt?

The testator, in his will, says: "I will and bequeathe to my beloved wife, Mary Deneale, all and singular my estate, both real and personal, during her natural life, for the uses and purposes following, that is to say, for the purpose of raising and educating my children until they respectively arrive at the age of twenty-one years; and it is my will and desire that each of my children, as they respectively attain the age of twenty —— years, shall become entitled to an equal proportion of my estate, both real and personal, subject to their proportion or charge of one third of the same, to be retained by my wife, for her support and maintenance, during her life; but I do hereby authorize and empower my said wife to make any of them advances of their proportion, if their merits and good conduct shall warrant the same. And I further recommend to my wife to sell all the negroes that I shall die possessed of, for such term of years as their respective ages shall warrant to them a support when free. Item, I do hereby direct that an appraisement only of my estate be made, and that no sale of furniture shall take place. I, at this time," (February 13th, 1815,) "am not indebted to any person, and propose to continue so. I

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

[2] [Affirmed in 1 Pet. (26 U. S.) 585.]

am security for my brother James, for two sums of money, for which I hold a deed of trust on his property, sufficient, I hope, to pay the same, and I do direct that my estate shall not be sold to pay those debts until the property so deeded shall be sold, when my estate must be charged with such deficiency." These are the only clauses in the will in which the word "estate" is used. He then makes his wife and son his executors, and says, "I do hereby direct that they shall not give security, as my own debts do not demand it."

It seems evident, that when he meant to include the idea of the realty, in the word estate, he added the word "real." Thus, he twice used the expression, "my estate, both real and personal," when it is evident he was contemplating a disposition of his whole estate; and three times he used the word "estate" when it is equally evident that he was contemplating only the ordinary fund out of which the debts of a deceased person are to be paid. That fund is the personal estate. It is evident, also, from his will, that he thought his personal estate would be more than sufficient to pay his debts, including his responsibility for his brother. He directs that an appraisement, only, of his estate should be made. The appraisement alluded to must have been that appraisement of the effects of a deceased person, which is required by law. But the law requires an appraisement of the personal estate only. Having thus used the word estate in reference to the personal estate only, he immediately proceeds to state that he is not indebted, and intended to continue free from debt; that he was bound for a debt of his brother whose property he held in trust, and hoped it would be sufficient to pay the debt; and directs that his own estate should not be sold to pay it until the deficiency of his brother's property should be ascertained. What kind of estate of his own was it that he then had in contemplation, and which he directed not to be sold? Unquestionably, that estate which is the natural and ordinary fund out of which the debts of deceased persons are to be paid, and which could be sold by his executors, namely, the personal estate. This inference is strengthened by the circumstance that he had just used the word "estate" in reference to the personal estate only, as is evident from his connecting it with the word "appraisement." The estate, then, which he directed should not be sold, was the personal estate. But, in the same sentence, after saying that his estate should not be sold until a certain event should happen, he goes on to say that when that event shall have happened, then his estate must be charged. What estate? Certainly the same estate which he had forbidden to be sold until the event should happen, namely, the personal estate. But it is uncertain whether he meant to charge any part of his estate. If the will creates a charge upon any part of the estate, it must be by the words, "when my estate must be charged with any deficiency." These words may be merely declaratory of a fact; and as they evidently have reference to the personal estate, it is a fair inference that he did not mean, thereby, to create any charge upon his estate. His object seems to have been rather to restrain his executors from volunteering the payment of his brother's debt before it should be ascertained whether it would not be paid out of the funds which his brother had provided for its payment, than to create any new charge upon his own estate. Men do not act without a motive; and we do not see any for the testator's charging his real estate for the debt of his brother, who had already provided a fund for its discharge, which the testator hoped would be sufficient, and when the testator's personal estate was, by him, deemed sufficient to make good the deficiency, if there should be any. This construction of the will is strengthened by the consideration, that, in the former part of the will, he had made a disposition of his real estate entirely inconsistent with the idea of charging it with his brother's debt. He devised it to his wife, for her life, for the support of his children; and it is one of the soundest rules of construction that a will should be so construed, if possible, as to give effect to every part.

Again, by directing that his executors should not give security for their administration, he seems to show a disposition not to give any additional security for the debt of his brother. The word "estate" is, often, after the death of a person, used, by metonymy, for the executors or administrators. Thus, we say that "the estate of such a person is indebted to us," or "we are indebted to the estate," or, "we will charge the estate with such a sum," &c. Here it is evident that we use the word "estate" as if it stood in the place of the deceased person. But the correct and simple mode of expressing the idea would be to say that the executor is indebted to us, or the executor must be charged with such a sum, &c. In this sense we think the testator used the word estate in that clause of his will in which he says, "when my estate must be charged with any deficiency." He is contemplating an event which might take place after his death, and uses the word estate as a substitute for himself, or for his executors. If he had been speaking of the same event as happening in his lifetime, he would probably have said, "when I must be charged with any deficiency." He considers the debt as solely the debt of his brother until the deficiency should be ascertained, when he himself would be the debtor for such deficiency. This seems to be the only idea he meant to convey. He directs that his own estate shall not be applied to the payment of his brother's debt until the deficiency of his brother's estate should be ascertained, when he admits

that his own estate will be debtor for such deficiency.

It is true that there are many cases in which the word "estate" in a will, has been holden to convey real estate, even in fee-simple. But the clear doctrine resulting from all the cases upon the subject, is, "That although the word 'estate,' taken independently of the context, by its own force denotes, not only real as well as personal estate, but the highest degree of real estate, and the word 'property,' carries, of itself, both real and personal property; while the word 'effects' is generally and properly applicable to personal estate only; yet that all these words, (and indeed every other form of expression whereby a testator declares his will in respect to the disposition of his property,) submit to the rule which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole will." 1 Roberts, Wills, 413.

This rule is exemplified in the case of Woollam v. Kenworthy, 9 Ves. 137. There the testator, after directing that his debts should be paid out of his personal estate, gave certain legacies; and having a real estate in land, and a real estate in a rent-charge, devised the latter to his wife for life, and, after her death, to trustees to sell, and after giving some more legacies, directed that as and for the moneys to be received from the sale of the rent-charge, and also the moneys to arise from a sale of his household goods and furniture, plate, linen, china, beds, and bedding, and from all other his estate and effects of what nature or kind whatsoever or wheresoever; the same should, in the first place, be liable and subject to, and charged with the payment of the before-mentioned legacies; and the residue of such moneys to arise as aforesaid, he directed to be divided and applied as therein mentioned. In that case (which is more analogous to the present than any other we have seen) Lord Eldon held, that by the words "from all other his estate and effects of what nature or kind soever, or wheresoever," no real estate, other than the rent-charge, was liable to be sold for the purposes of the trust, or for the payment of the legacies. This construction resulted from the intention of the testator gathered from the consideration of the whole will. This is the only general rule upon the subject, and is applicable to all cases of construction of wills.

By this rule, for the reasons before given, we are of opinion that the lands of the testator are not charged, by the will, for the debt due to the plaintiffs, and that the bill must be dismissed.

Bill dismissed.

Affirmed in supreme court of the United States, January term, 1828, 1 Pet. [26 U. S.] 585. Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171.

[See Cases Nos. 3,785 and 3,786, and 8 Pet. (33 U. S.) 526, 529.]

Case No. 13,561.

STUMP v. ROBERTS.

[Brunner, Col. Cas. 224;[1] Cooke, 350.]

Circuit Court, D. Tennessee. 1813.

WITNESS—INTEREST—DISQUALIFICATION—BAILMENT—SALE BY BAILEE—TITLE.

1. A witness, though he be interested, if his interest is equal either way, is competent to testify.

2. A sale by a bailee of personal property intrusted to his care does not pass the title to the same, on the rule that no man can part with a better interest than he has.

This was an action of trover to recover the value of a negro man named Dave. It appeared in evidence that the negro in question had been purchased by the plaintiff of William Roberts, one of the defendant's sons, who had executed to the plaintiff a bill of sale therefor. Whereupon the defendant introduced the son to prove that Dave was the property of the defendant, and that he had been sold without any authority from him.

Mr. Dickinson, for plaintiff, objected that William Roberts, the son, was not a competent witness because of his interest in this suit; and also upon the ground that he should not be permitted to destroy his own deed or prove his own turpitude. 2 Bac. Abr. 584; 2 Term R. 63; 4 Term R. 678. But it was answered by—

Whiteside and Cooke, for defendant, that he was not so immediately to be a gainer or loser by the event of the suit as to exclude the testimony, particularly as his interest was equal. 1 Peake, Ev. 102; 1 Hen. & M. 154; 2 Call. 232; 1 Strange, 35; 1 Term R. 164; 4 Term R. 480. Neither can he be excluded upon the ground of his being estopped by his own deed. That rule only applies to papers of a highly commercial character, and even then the rule has been much relaxed. 7 Term R. 604; 1 Peake, Ev. 128; 1 Hen. & M. 154.

TODD, Circuit Justice. There is a great clashing in the decisions upon what shall and what shall not exclude a witness; but I consider the present question settled by the modern adjudications. The case of Jordaine v. Lashbrooke, 7 Term R. 604, in principle settles both the objections that have been made to the admission of the testimony of William Roberts; and when I add to this the determination of the court of appeals of Virginia, 1 Hen. & M. 154, and a decision of the supreme court of Connecticut reported by Day, I feel prevented by precedent from declaring this witness to be incompetent. But I am perfectly satisfied that these cases have been properly adjudged. The witness offered has an equal interest each way; and I can see no solid reason nor any good authority for saying that he shall be estopped from giving evidence by his own deed. This is not one of those cases where such a rule ever obtained.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

M'NAIRY, District Judge. I feel a considerable aversion to the admission of the evidence offered, principally upon the ground that a witness ought not to be permitted to show his own turpitude. I am not satisfied that the testimony ought to be received, nor do I feel any conclusive opinion either way, but I am most inclined to reject it.

Objection overruled by a division of the court.

The defendant then proved by the witness aforesaid and other testimony that the negro in question belonged to him; that in the year 1808 William Roberts, who then resided near Nashville, wrote to his father who lived near Lexington, in Kentucky, to send him Dave to assist him in making powder, and that he would pay his father Dave's hire. Dave was sent accordingly; and on the morning he started the defendant's wife proposed to the defendant that Dave should be given to William, but he refused. The negro remained about two years in the possession of William before he sold him to the plaintiff, during which time he was generally considered as the property of William Roberts, but some persons had heard him say that Dave belonged to his father.

Dickinson urged that, as between the father and an innocent purchaser without notice, it ought to be presumed that this was a gift to the son (1 Hayw. 97; 2 Hayw. 72), and that upon the general doctrine of bailment the right of the defendant was divested. The son had a special property in the negro, and might have sued any person in his own name for a violation of that property. And if he could sue any person who trespassed upon his possession, there can be no reason why he might not sell; because a recovery against a third person of the value of the negro would be as much a divestiture of the defendant's title as a sale. 2 Bl. Comm. 449, 452; 2 Saund. 47, note b.

But it was answered by the defendant's counsel that when a man parts with a limited qualified property in a thing, he does not thereby part with the general right of ownership; and that a mere breach of trust by a bailee could not deprive the real owner of his right. Stump stands in the same situation with William Roberts upon the ground that no man can part with an interest which he has not, and because a purchaser buys the title of the vendor. Hardin, 531.

TODD, Circuit Justice. How far a bailee may dispose of property intrusted to his care has frequently been a matter of doubt. My own opinion is that it will not confer upon him the right to sell. When one man hires or loans his property to another he does not part with his right to it, nor will his title be injured by any sale which may be made by the bailee. It is so understood in the country generally; because no man when he hires or loans his property, either to make profit thereby, or from a spirit of accommodation, imagines that by doing so he is liable to forfeit his claim altogether, if the person to whom he hires or loans it chooses to act dishonestly. It would be most absurd to suppose that if the real owner parts with a limited, qualified, and conditional right to his property, a subsequent purchaser, through the means of a breach of trust on the part of the bailee, can divest him of the thing so intrusted altogether. If such were the law no man would be safe, and it would at once sap the foundation of all spirit of accommodation. The proper inquiry, therefore, will be, was this a gift? If the jury believe it was, then the sale to Stump is legal, and will vest him with a good title. But if from the whole of the evidence the jury should be of opinion that Dave was hired or loaned to William Roberts, the title of the defendant cannot be considered as divested by his sale to the plaintiff. Hardin, 531. It is true as has been argued by the counsel for the plaintiff, that where a father sends property to his son or son-in-law, and says nothing about the way in which he is to have it, the law will presume it to be a gift; but the presumption only holds in the absence of proof showing a contrary intention.

M'NAIRY, District Judge. The question presented to the consideration of the court is a new one, and possesses considerable difficulty. As a general rule it is unquestionably true that the possession of personal goods is to be considered as evidence of title; and it seems to me that, except in cases where the possession has been acquired by fraud or felony, a purchase bona fide made of the person in possession will confer upon the purchaser a good title. This opinion, however, is expressed with considerable hesitation, and I am by no means clear that it is correct. I entertain no decided opinion upon the question.

The jury found for the defendant.

Case No. 13,562.

In re STUPP.

[11 Blatchf. 124;[1] 18 Int. Rev. Rec. 18.]

Circuit Court, S. D. New York. April 25, 1873.

EXTRADITION—JURISDICTION TO TRY THE CRIME—TREATY WITH PRUSSIA—CRIMES COMMITTED BY PRUSSIAN SUBJECT IN BELGIUM.

1. The extradition convention, of June 16, 1852 (10 Stat. 964), between the United States and Prussia, for "the mutual delivery of criminals, fugitives from justice," in certain cases, provides, that the contracting parties shall, on requisition, deliver up to justice all persons who, being charged with the crimes therein specified, "committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other." S., alleged to be a native of Prussia, and since his birth and still a subject of the king of Prussia, was arrested in the United States, for extradition to Prussia, charged with having committed, at Brussels, in Belgium, "and within the

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

legal jurisdiction of Prussia," crimes specified in said convention. It was alleged, that, inasmuch as such crimes were, at the time they were committed, punishable by the laws of Belgium, S., being, when they were committed, a subject of Prussia, was, by the laws of Prussia, subject to be punished for said crimes in Prussia; that a prosecution against him therefor had been commenced in Prussia, and a warrant of arrest therefor had been issued against him by the proper judicial tribunal in Prussia having jurisdiction thereof; and that, immediately after committing the crimes, he had fled from the justice of Belgium and Prussia. There was no extradition treaty between the United States and Belgium: *Held*, that the case was one within the said convention.

2. The provisions for extradition contained in the treaties and conventions for that purpose between the United States and foreign countries, considered, as bearing on the meaning of the word "jurisdiction," used therein.

3. Out of seventeen of those treaties and conventions, which are now in force, all but one provide for the delivery of persons charged with crimes committed within the "jurisdiction" of one party, who shall seek an asylum within the "territories" of the other.

4. Consideration of the treaties between the United States and foreign countries, respecting the jurisdiction of the United States over crimes committed in those foreign countries, and of the laws of the United States passed in pursuance of the provisions of those treaties, and to carry them into effect, and of the practical execution of those laws.

5. Consideration of the laws of the United States respecting the jurisdiction of the United States over crimes not committed within the physical territory of the United States, other than laws passed in pursuance of treaties, as showing an assumption by the United States of jurisdiction over offences committed outside not only of the physical territorial limits of the United States, but outside of the quasi territorial limits of the United States, such as an American vessel on the high seas, and outside of territorial limits granted by treaty.

At law.

Edward Salomon, for the German government.

William F. Kintzing, for prisoner.

BLATCHFORD, District Judge. This case presents a question which, so far as I am aware, has never been adjudicated in the United States, nor in any of the countries with which the United States has treaties containing provisions for the extradition of persons charged with crimes. The language upon which that question arises, is found in numerous treaties between the United States and foreign countries, and in some treaties between Great Britain and other countries in Europe. I have, therefore, bestowed upon the matter a good deal of attention, for the purpose of arriving at a conclusion, not only satisfactory to myself, but one which, in view of the importance of the question, might be supported by reasons which should commend it as a proper decision.

On the 29th of November, 1872, the secretary of state, on the application of the minister plenipotentiary of the German empire, issued his certificate, commonly called a "mandate," which sets forth, that, pursuant to the first article of the convention between the United States and Prussia, and other states of the Germanic confederation, of the 16th of June, 1852, the said minister had made application to the government of the United States for the arrest of Joseph Stupp alias Carl Vogt, charged with the crimes of arson, murder and robbery, and alleged to be a fugitive from the justice of the German empire, and that it appears proper that he should be apprehended, and the case examined in the mode provided by the acts of congress of August 12, 1848 (9 Stat. 302), and June 22, 1860 (12 Stat. 84), and then states, that, to the end that the officers to whom the mandate is directed may cause the necessary proceedings to be had in pursuance of said acts, in order that the evidence of the criminality of the said accused may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may issue for his surrender, pursuant to said convention, the facts above recited are certified.

This mandate was presented to a duly authorized United States commissioner, and, at the same time, a verified complaint in writing was made by Mr. Johannes Roesing, the consul general of the German empire. This complaint sets forth, that Mr. Roesing is, ex officio, "consul general of each of the states composing the German empire, that the kingdom of Prussia is one of the states composing said empire, and this complainant is, ex officio, the consul general of said kingdom at said city of New York, for the United States of America; that, as this complainant, from official evidence in his possession, and other reliable information received, is informed and believes, one Joseph Stupp alias Carl Vogt, a native of the said kingdom, and since his birth and now a subject of the king of Prussia, did, on or about the first day of October, in the year eighteen hundred and seventy-one, at the city of Brussels, in the kingdom of Belgium, then being a subject of Prussia, as aforesaid, and within the legal jurisdiction of Prussia, feloniously, and with malice aforethought, kill and murder another person, to wit, the Chevalier Dubois de Bianco, and did there and then feloniously, maliciously, and wilfully set on fire and burn the house of another person, to wit, the dwelling-house of said, the Chevalier Dubois de Bianco, then occupied by him, the said Chevalier Dubois de Bianco, and did then and there further feloniously and forcibly take from the person of another, to wit, from the person of said Chevalier Dubois de Bianco, by violence, money and personal property of large value, to wit, of the value of six hundred thousand francs, equal to about one hundred and twenty thousand dollars, of the coin of the United States. And the complainant further shows, that he is familiar with the laws of Prussia, and that, by said laws, it is expressly provided, that a Prussian subject, who, in a for-

eign country, has committed a crime of the nature above charged against said Joseph Stupp alias Carl Vogt, and which is punishable by the laws of the place where it was committed, may be prosecuted and punished in Prussia for such crime. And this complainant further says, on information and belief, that the said crimes of murder, arson and robbery, above charged against said Joseph Stupp alias Carl Vogt, are and were, at the time of their commitment, punishable by the laws of the kingdom of Belgium, where they were committed, and that said Joseph Stupp alias Carl Vogt then was, and now is, by the laws of Prussia, subject to prosecution and punishment for said crimes in Prussia, he being, at the time of their commitment, a Prussian subject, as aforesaid. And this complainant further says, on information and belief, the same being founded upon official communications received from the proper officers of the kingdom of Prussia, that a prosecution has actually been commenced at Cologne, in the kingdom of Prussia, against said Joseph Stupp alias Carl Vogt, and a warrant of arrest has been issued by the proper judicial tribunal having jurisdiction thereof, in order that he might be apprehended and tried, and, if found guilty, might be punished for the said crimes of murder, arson, and robbery, above stated, and with which he is charged in said proceedings. This complainant, therefore, on his oath, complains and charges, that the said Joseph Stupp alias Carl Vogt did, on or about the first day of October, 1871, commit the crimes of murder, arson, and robbery, within the jurisdiction of Prussia. And this complainant further shows, on information and belief, that, immediately after the commission of said crimes, said Joseph Stupp alias Carl Vogt fled from the justice of Belgium and Prussia, and now is, and may be found, within the United States of America; that efforts have been made by the government of Belgium to obtain the surrender and extradition of said Joseph Stupp alias Carl Vogt, in order that he might be tried for said crimes in Belgium; but that said efforts have failed, and his surrender to Belgium by the government of the United States has not been effected, because no treaty for the surrender of criminals exists between the United States and Belgium. And this complainant further shows, that, upon the application of the government of Prussia, the executive department of the government of the United States has issued its mandate, which is herewith presented, for the arrest and examination of said Joseph Stupp alias Carl Vogt, charged with the crimes aforesaid, with the view to his extradition and surrender under the treaty between the United States and Prussia, of June 16th, 1852. This complainant, therefore, prays, that a warrant may issue for the apprehension of the said Joseph Stupp alias Carl Vogt, charged as aforesaid, that he may be brought before a proper judge or commissioner of the United States, to the end that the evidence of his criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain said charge, under the provisions of said treaty, the same may be certified to the secretary of state of the United States, that a warrant may issue for the surrender of said fugitive, under the provisions of said treaty, and that such other or further steps may be taken, or proceedings had, as may be in accordance with law and justice, and the provisions of said treaty."

This complaint was sworn to on the 7th of December, 1872. Upon it a warrant was issued by the commissioner, on the 9th of December, 1872, reciting the contents of the complaint, and the issuing of the mandate, and directing the marshal of this district to apprehend the prisoner and bring him before the commissioner who issued the warrant, to the end that the evidence of his criminality might be heard and considered. He was arrested and brought before the commissioner on the 10th of April, 1873, and the proceedings were adjourned until the 12th, the prisoner being, in the meantime, committed to the custody of the marshal. On the 12th the proceedings were again adjourned to the 15th, and on the 15th they were again adjourned to the 22d.

On the 15th of April, a petition was presented, on behalf of the prisoner, to me, as sitting in the circuit court for this district, setting forth that the prisoner was restrained of his liberty by the marshal, in pursuance of said warrant, and that the warrant was issued upon the said complaint, and reciting the contents of the complaint, and then averring that the prisoner is not a subject of the king of Prussia, and is not guilty of the charge, and that, admitting the truth of all the allegations against him, he is not amenable to the laws of the kingdom of Prussia, and that the crime which is alleged to have been committed was not committed within the jurisdiction of the kingdom of Prussia, but was committed in Belgium, and that, under the extradition treaty between the United States and Prussia, no crimes are included except those occurring within the territorial limits of the respective governments, and that neither within the spirit nor the letter of the treaty can either government make any demand upon the other for the surrender of an alleged criminal who has committed any crime or offence in a foreign country. The petition prays for a writ of habeas corpus, directed to the marshal, to produce the body of the prisoner, and for a writ of certiorari, directed to the commissioner, to certify the proceedings.

This petition was sworn to on the 14th of April. On the 15th of April, both of the writs were granted. They were made returnable before this court, on the 16th. On that day returns were made to both of them, and the body of the prisoner was produced. The return to the writ of habeas corpus sets

forth the warrant and the commitments endorsed thereon, as the cause of the detention of the prisoner, and the return to the certiorari sets forth all the proceedings that have taken place before the commissioner.

The sole question involved is, as to whether this is a case falling within the treaty between the United States and Prussia. It becomes necessary, therefore, to look at the terms of the treaty. The treaty was concluded on the 16th of June, 1852 (10 Stat. 964), and is a special extradition convention between the United States and Prussia, and other states of the Germanic confederation, for "the mutual delivery of criminals, fugitives from justice, in certain cases." The preamble of the treaty sets forth, that "whereas, it is found expedient, for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly, and, whereas, the laws and constitution of Prussia, and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States." That is all that is important in the preamble. The first article of the convention proceeds to say, "that the United States and Prussia, and the other states of the Germanic confederation included in, or which may hereafter accede to, this convention, shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, * * * or arson, or robbery, * * * committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other." Then follows, in the same article, the usual provision which is found in all of our extradition treaties, "that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." The third article is as follows: "None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." The fourth article is in these words: "Whenever any person, accused of any of the crimes enumerated in this convention, shall have committed a new crime in the territories of the state where he has sought an asylum, or shall be found, such person shall not be delivered under the stipulations of this convention, until he shall have been tried, and shall have received the punishment due to such new crime, or shall have been acquitted thereof." These are all the provisions of the convention which seem to have any bearing on the question under discussion. This convention was proclaimed by the president on the 1st of June, 1853. Under a provision inserted in it, for the accession of other states of the Germanic confederation, it has been acceded to by the Free Hanseatic City of Bremen, and the governments of Mecklenburg-Strelitz, Wurtemberg, Mecklenburg-Schwerin, Oldenburg, and Schaumburg-Lippe.

The question involved in this case turns upon the meaning of the language of the first article of the treaty, that the contracting parties agree to mutually "deliver up to justice all persons who, being charged with," certain crimes "committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other," as that language shall be interpreted, in view of the entire language of the treaty, including the provisions of the third and fourth articles, and the language of the preamble, that the convention is entered into "for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively," and in order "that persons committing certain heinous crimes, being fugitives from justice," shall, under certain circumstances, be reciprocally delivered up.

For the purpose of arriving at a satisfactory conclusion, it will be useful to consider three classes of subjects, developed in treaties and laws of the United States, as throwing light on the intention of the United States, as one of the contracting parties, in the language used in the convention in question. The first subject is—prior and subsequent extradition treaties made by the United States, containing similar language. The second subject is—prior and subsequent treaties between the United States and foreign countries, respecting the jurisdiction of the United States over crimes committed in those foreign countries, and, also laws of the United States passed in pursuance of such treaties, and to carry them into effect. The third subject is—prior and subsequent laws of the United States respecting the jurisdiction of the United States over crimes not committed within the physical territory of the United States, other than laws passed in pursuance of the treaties last referred to.

The first treaty, providing for extradition, which the United States ever made, and the only one which it made for a long period, was the treaty with Great Britain, of the 19th of November, 1794 (8 Stat. 129), which was a general treaty, covering a large number of subjects, the 27th article of it containing the provision for extradition. That provision was in force for the period of twelve years only, when it expired by its own limitation. From that time down to the year 1842, a period of thirty-six years, this coun-

try had no extradition treaty with any foreign nation. The 27th article of such treaty with Great Britain, of 1794, was a very brief provision, to this effect, that the parties agreed that they, "on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other." Thus, very much the same language was used in this first treaty with Great Britain, that is used in the later treaty with Prussia.

The next treaty on the subject was the treaty with Great Britain, generally known as the "Ashburton Treaty," of the 9th of August, 1842 (8 Stat. 576). That treaty is a general treaty, the 10th article of which contains a provision for extradition. The language is substantially the same as in the treaty of 1794. It provides that the parties shall "deliver up to justice all persons who, being charged with" murder and other offences specified, "committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other." The change from the treaty of 1794 consists in the addition of the words, "or shall be found." The treaty of 1794 says, "shall seek an asylum within any of the countries of the other." The treaty of 1842 says, "shall seek an asylum, or shall be found, within the territories of the other."

The next treaty on the subject of extradition was the first special convention the United States ever made with any country for the delivery of criminals. It was made with France, on the 9th of November, 1843 (8 Stat. 580). That special convention adopted a form of expression, both in the preamble and in the article for extradition, which has been followed as a model, substantially, in all the special conventions which have been since entered into by the United States with foreign countries, for extradition, all of which contain preambles in substantially the same language as the one with Prussia, now under consideration. This convention with France, of 1843, which is the one still in force between the United States and France, says, in its preamble, that the parties have "judged it expedient, with a view to the better administration of justice, and to the prevention of crime, in their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up." The first article provides, that the "contracting parties shall, on requisitions made in their names, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found, within the territories of the other." That language of the first article is substantially contained in all the special extradition conventions, and in all the other treaties in which there have been provisions for extradition, which have since been made.

The next treaty is the one with the Hawaiian Islands, of the 20th of December, 1849, which is a general treaty (9 Stat. 981), the 14th article of which contains a provision for surrender by the parties, of "all persons who, being charged with" certain specified crimes, "committed within the jurisdiction of either, shall be found within the territories of the other."

Next in order of time comes the convention with Prussia, already referred to.

The next treaty after that was a special extradition convention with Bavaria, made on the 12th of September, 1853 (10 Stat. 1022). It is peculiar in its language. Like all the other special extradition conventions, it contains a preamble, but that preamble differs from those to which I have already referred, in stating, that the parties, "actuated by an equal desire to further the administration of justice, and to prevent the commission of crimes in their respective countries, taking into consideration that the increased means of communication between Europe and America facilitate the escape of offenders, and that, consequently, provision ought to be made in order that the ends of justice shall not be defeated, have determined to conclude an arrangement destined to regulate the course to be observed in all cases, with reference to the extradition of such individuals as, having committed any of the offences hereafter enumerated, in one country, shall have taken refuge within the territories of the other." In the first article, it is agreed, that the parties shall "deliver up to justice all persons who, being charged with" certain specified crimes, "committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other." Thus, the words, "committed within the jurisdiction of either party," are introduced in the first article, while, in the preamble, it is said, that the extradition is to be of "such individuals as, having committed" certain offences "in one country, shall have taken refuge within the territories of the other." This convention, it may be remarked, contains, in its third article, the provision in regard to not delivering up citizens or subjects, and, also, in its fourth article, the provision in regard to new crimes committed in the territories of the country where the party is found.

Two years after this special convention with Bavaria, a special convention was made with Hanover, January 18, 1855 (10 Stat. 1138), which is identical in language with the convention with Bavaria. No others have ever been made on that model.

The next one in order is a treaty with the Swiss confederation, a general treaty (11 Stat. 593), in which, in the 13th article, there is a provision for extradition. That treaty was made on the 25th of November, 1850, and proclaimed on the 9th of November, 1855. It has no preamble. It contains a provision for the

extradition of "persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum, or shall be found, within the territories of the other."

The next in order is a treaty with the two Sicilies, of the 1st of October, 1855 (11 Stat. 651), a general treaty, the 21st article of which, in its provision for extradition, is peculiar in its language, in providing, "that every person who, being charged with, or condemned for, any of the crimes enumerated in the following article, committed within the states of one of the high contracting parties, shall seek asylum in the states, or on board the vessels of war, of the other party, shall be arrested and consigned to justice, on demand made, through the proper diplomatic channel, by the government within whose territory the offence shall have been committed." This treaty is no longer in force, because the kingdom of the two Sicilies has been incorporated into the kingdom of Italy, and there is a very recent extradition treaty between the United States and Italy, which supersedes the Sicilian treaty.

The next in order is a special extradition convention with Austria, made on the 3d of July, 1856 (11 Stat. 691). It is the same, in language, as the convention with Prussia, now under consideration.

The next is a special extradition convention with Baden, made January 30, 1857 (11 Stat. 713). That, also, is just like the one with Prussia.

The next is a special extradition convention with Sweden and Norway, of the 21st of March, 1860 (12 Stat. 1125). That, also, is like the one with Prussia, in the particulars under consideration.

The next is a general treaty with Venezuela, of the 27th of August, 1860 (12 Stat. 1159), the 27th article of which contains provisions for delivery, similar in terms to those contained in the convention with France, before mentioned.

The next is a special extradition treaty with Mexico, of the 11th of December, 1861 (12 Stat. 1199). It is like the special convention with France, in its language, in the particulars already referred to, and not different, in substance, from the one with Prussia.

The next is a general treaty with Hayti, of November 3, 1864 (13 Stat. 727), in which the terms of the extradition provision (article 38) are the same as in the treaty with the Swiss Confederation.

The next is the treaty with the Dominican Republic, of February 8, 1867 (15 Stat. 488), the 27th article of which provides for extradition, in the same terms as the provision in the treaty with the Swiss Confederation.

The next is the special extradition convention with Italy, of March 23, 1868 (15 Stat. 629). It is substantially like the one with Prussia, in the particulars referred to, except that there is no provision in it for the non-delivery of subjects or citizens.

The next, and the last, is the special extradition convention with Nicaragua, of June 25, 1870 (17 Stat. 815), which is just like the one with Italy, in the particulars mentioned.

The summary of all these treaties, of which there are seventeen, exclusive of the treaty of 1794, with Great Britain, is, that in eight of them, which are special extradition conventions, (that is, those with France, Prussia, Austria, Baden, Sweden and Norway, Mexico, Italy, and Nicaragua,) there is a recital, in the preamble, that the object of the treaty is "the prevention of crime within the territories and jurisdiction of the parties respectively," by the delivery up of "persons who are fugitives from justice." It further appears, that, in fourteen treaties or conventions, (of which eight are these special extradition conventions,) the provisions as to delivery are for the delivery of persons charged with crimes committed within the "jurisdiction" of one of the parties, who shall seek an asylum, or shall be found, within the territories of the other. This provision is found in fourteen subsisting treaties of the United States, namely, those with Great Britain, France, the Hawaian Islands, Prussia, the Swiss Confederation, Austria, Baden, Sweden and Norway, Venezuela, Mexico, Hayti, the Dominican Republic, Italy, and Nicaragua, six of them being general treaties, with no previous recital in a preamble. Then there are the special cases to which I have alluded —the conventions with Bavaria and Hanover, which, in their preambles, speak about preventing the commission of crimes "in their respective countries," and about offences committed "in one country," and then provide for the delivery of persons charged with crimes committed "within the jurisdiction of either party," who "shall seek an asylum, or shall be found, within the territories of the other." Then there is the treaty with the two Sicilies, which contains the peculiar language which I have recited. It thus results, that, out of eighteen treaties, (or seventeen, excluding the one with Great Britain, of 1794,) all but one provide for the delivery of persons charged with crimes committed within the "jurisdiction" of one party, who shall seek an asylum within the territories of the other.

The second subject to which I referred was —prior and subsequent treaties between the United States and foreign countries, respecting the jurisdiction of the United States over crimes committed in those foreign countries, supplemented by laws of the United States passed in pursuance of the provisions of those treaties, and to carry them into effect. As I remarked before, the first special convention made between the United States and any country, for extradition, was that with France, made on the 9th of November, 1843, and contains the declaration, that it is made for the purpose of reaching persons committing crimes within the territories and jurisdiction of the one party, who shall become fugitives from justice, and shall seek an asylum, or be found, within the territories

of the other party. The second special convention was that between the United States and Prussia, of the 16th of June, 1852. It becomes important, therefore, to see whether there was anything at those dates, 1843 and 1852, in the treaties and legislation of the United States, which can throw light upon the meaning of the United States, in using the language it did in its treaties with France and Prussia, and in the subsequent treaties which have followed the language of those treaties.

On the 7th of May, 1830, the United States made a treaty with the Ottoman Porte, commonly called Turkey (8 Stat. 409), which contains a provision, in the fourth article, that citizens of the United States committing an offence in Turkey "shall not be arrested and put in prison by the local authorities, but shall be tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks." No law of the United States was passed to carry that provision into practical effect until the year 1848. Meantime, before the extradition convention with Prussia was made, and on the 3d of July, 1844, a treaty was made between the United States and China (8 Stat. 596), the 21st article of which provides, that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary, of the United States, thereto authorized, according to the laws of the United States." In view of those two treaties, one made in 1830, and the other in 1844, the congress of the United States, on the 11th of August, 1848, passed an act (9 Stat. 276) entitled, "An act to carry into effect certain provisions in the treaties between the United States and China, and the Ottoman Porte, giving certain powers to ministers and consuls of the United States, in those countries." That act was passed four years before this treaty was made with Prussia, and it gives to the commissioner and the consuls of the United States, (the chief functionary of the United States in China at that time being called a commissioner and not a minister,) appointed to reside in China, power to try, in the manner provided in the act, all citizens of the United States charged with offences against law, that is, against the law of China, committed in the dominions of China. The 2d section of that act provides, "that, in regard to crimes and misdemeanors, the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offences against law, which shall be committed in the dominions of China, including Macao, and, upon conviction, to sentence such offenders in the manner herein authorized; and said functionaries and each of them are hereby authorized to issue such processes as are suitable and necessary to carry this authority into execution." The act also extends the laws of the United States, so far as is necessary to execute the treaty, over all citizens of the United States in China, so far as such laws are suitable to carry the treaty into effect. It also authorizes the consuls of the United States in China to arrest any citizen of the United States charged with committing in China an offence against law, and to try him, and, on conviction, to punish him by fine or imprisonment; and, in cases of murder, and insurrection or rebellion against the Chinese government, with intent to subvert the same, to punish the offence with death, by executing the convict, if the commissioner shall issue a warrant for the purpose. The act also gives the same powers to the minister resident and consul of the United States in Turkey, in reference to crimes committed by citizens of the United States in Turkey, under the treaty of May 7th, 1830. It is to be noted, that this act was passed on the day before the act of the 12th of August, 1848, was passed (9 Stat. 302), which is one of the acts under which the proceedings in the present extradition case are taking place. This act of August 12th, 1848, prescribes the course of procedure in the United States under extradition treaties, and provides for the issuing of a warrant and the holding of an examination, with a view to extradition, where complaint is made, charging "any person found within the limits of any state, district or territory, with having committed, within the jurisdiction of any such foreign government, any of the crimes enumerated or provided for by any such treaty or convention." These treaties and the act to carry them into effect were in force when the convention with Prussia was made, in 1852.

A treaty was also made between the United States and Borneo, on the 23d of June, 1850, but not proclaimed until the 12th of July, 1854 (10 Stat. 910), the 9th article of which provides, that, "in all cases where a citizen of the United States shall be accused of any crime committed in any part" of the dominions of the sultan of Borneo, "the person so accused shall be exclusively tried and adjudged by the American consul, or other officer duly appointed for that purpose." It does not appear that any law of the United States has been passed to carry this provision into effect.

Then, a treaty was made with Siam, on the 29th of May, 1856 (11 Stat. 684), the 2d article of which provides, that "criminal offences will be punished, in the case of American offenders, by the consul, according to American laws."

Then came a treaty with Japan, of June 17, 1857, (11 Stat. 723), the 4th article of which provides, that "Americans committing offences in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws."

On the 29th of July, 1858, another treaty was made with Japan (12 Stat. 1056), the

6th article of which provides, that "Americans committing offences against Japanese shall be tried in American consular courts, and, when guilty, shall be punished according to American laws."

These treaties with Japan and Siam, of 1856, 1857 and 1858, made necessary a further act of congress. and an act was passed, on the 22d of June, 1860 (12 Stat. 72), covering the provisions of the treaties with China, Japan, Siam, and Turkey, in reference to criminal offences, and superseding the act of August 11th, 1848. This act of the 22d of June, 1860, contains substantially the same provisions which were embraced in the act of August 11th, 1848, applied to offences committed by citizens of the United States in China, Japan, Siam and Turkey, and providing for the jurisdiction of such offences by the ministers and consuls of the United States in those countries. This act has been put into practical execution. It appears, by the diplomatic correspondence of the United States, that one David Williams was tried and convicted in the consular court at Shanghai, for piracy and murder, in robbing and killing three Chinese. The United States minister to China, on the 23d of November, 1863, issued a warrant for his execution. On the 1st of March, 1864, a few hours before the time fixed for his execution, he committed suicide. One James White was tried and convicted in the consular court at Shanghai, on the 23d of November, 1863, of the murder of Samuel Webster. A warrant was issued for his execution, but he broke jail and escaped, owing to the insufficient means provided for taking care of prisoners. A third, and more remarkable, case was that of John D. Buckley, who, on the 22d of May, 1863, murdered, at Shanghai, John McKennon, a citizen of the United States, and the master of an American merchant ship. After the offence was committed, Buckley, under another name, took passage, at Shanghai, for Havre, in France, on board of a French vessel. The vessel stopped at Nagasaki, in Japan. The American consul at Nagasaki applied to the French consul there, for permission to arrest Buckley. The French consul arrested Buckley and put him in the French prison, at Nagasaki, and the vessel went to France without him. The French consul laid the case before the French minister in Japan. He declined to surrender Buckley to the American minister in Japan, on the ground, that, under the extradition treaty between the United States and France, the surrender of the fugitive must be made by the French government at home, on the demand of the American government; but he offered to send Buckley to France, to await a demand there. The American minister in Japan then arranged to arrest Buckley when he should be discharged from the French custody in Nagasaki, and to send him to Shanghai, to be delivered to the American consul there, and the captain of a British government steamer agreed to take Buckley to Shanghai under guard, when he should be arrested. This was early in January, 1864. Shortly afterwards, Buckley surrendered himself to the American consul at Nagasaki, and was sent to Shanghai in such British government steamer. He was tried at Shanghai for the murder, on the 1st of February, 1864, before the American consul general, and four associates, and was convicted and sentenced to be hung. The United States minister in China, on the 11th of March, 1864, issued a warrant for his execution, and he was hung at Shanghai, on the 1st of April, 1864. The proceedings in Buckley's case were approved by the president. Dip. Cor. 1864, pt. 3, pp. 392–419, 440, 474, 478, 479.

On the 14th of February, 1867, a treaty was made between the United States and Madagascar, (15 Stat. 492), the 5th article of which provides, that citizens of the United States shall, as to criminal offences committed by them in Madagascar, be under the exclusive criminal jurisdiction of their own consul only, duly invested with the necessary powers. By the act of July 1, 1870 (16 Stat. 183), the Act of July 22, 1860, before mentioned, is, so far as it is in conformity with the stipulations of the said treaty with Madagascar, extended to that country, and to any country of like character, with which the United States may thereafter enter into treaty relations.

Such are the law and the facts in regard to these treaty provisions, the acts of congress thereon, and the practical execution of them, in respect to the jurisdiction specially conferred, by treaty, upon officers of the United States, in regard to crimes committed by citizens of the United States. wholly out of the physical territory of the United States, and not on board of vessels of the United States.

The third subject to which I referred was —prior and subsequent laws of the United States respecting the jurisdiction of the United States over crimes not committed within the physical territory of the United States, other than laws passed in pursuance of treaties, as showing an assumption by the United States of jurisdiction over offences committed outside, not only of the physical territorial limits of the United States, but outside of the quasi territorial limits of the United States, and outside of territorial limits granted by treaty.

We are entirely familiar with the jurisdiction exercised over offences committed on vessels, a vessel being regarded as a part of the country whose flag she bears. There are many acts of the kind passed by the congress of the United States. One is the act of April 30, 1790 (1 Stat. 113), the 8th section of which provides: "That, if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state,

murder or robbery or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, * * * every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and, being convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

But, the United States has gone further. There is a statute passed on the 18th of August, 1856 (11 Stat. 61), the 24th section of which provides, that a person who takes a false oath before a secretary of legation or consular officer of the United States in a foreign country, shall be deemed guilty of perjury, and "may be charged, proceeded against, tried, convicted, and dealt with, in any district of the United States, in the same manner, in all respects, as if such offence had been committed in the United States." This language plainly recognizes it to be the fact, that, under such circumstances, the offence is not committed in the United States. The jurisdiction in such case, therefore, is not assumed upon the theory that the offence is committed within the territory of the United States, or within the quasi territory of the United States, or within territory as to which jurisdiction is conferred by a treaty between the United States and a foreign power, and the act is not confined to an offence committed by a citizen of the United States. The jurisdiction is entirely outside of any such support.

So, in the Act of June 22, 1860, before referred to, it is provided, by the 30th section (12 Stat. 78), that the consuls and commercial agents of the United States, at islands, or in countries, not inhabited by any civilized people, or recognized by any treaty with the United States, shall have authority to try offences and misdemeanors committed by citizens of the United States, and punish them by fine or imprisonment. This provision does not rest on any theory of territory, or quasi territory, or on any jurisdiction conferred by treaty. It apparently rests on the same principle on which the statute of Prussia, referred to in the present case, is founded—the right of a state to punish its own citizens, in respect of crimes committed by them abroad, even in places where it has no physical territorial jurisdiction, no quasi territorial jurisdiction, and no treaty jurisdiction. There may be other acts of congress bearing on the subject, but those cited are sufficient to illustrate the principle on which the claim for extradition in the present case is rested.

The statute of Prussia provides, that there may be prosecuted and punished according to the criminal law of Prussia, a Prussian who, in a foreign country, has committed an act which, according to the laws of Prussia, is to be considered a crime or misdemeanor and which is punishable by the laws of the place where it has been committed, with the restriction, that there shall be no prosecution if the court of the foreign country has adjudicated on the act, and an acquittal or punishment has taken place; or if, according to the laws of the foreign country, the time limited for prosecution or punishment has expired, or the punishment has been remitted; or if, according to the laws of the foreign country a request of the injured person is required, and such request has not been made.

The acts of the congress of the United States recognize, therefore, the principle of punishing, by the laws of the United States, offences committed by citizens of the United States outside of the physical territory of the United States, and outside of a vessel bearing the flag of the United States, and outside of any place which can be called the quasi territory of the United States, by virtue of a treaty It follows, that the United States recognizes and did recognize, when this convention with Prussia was made, a jurisdiction to try offences, at least when committed by citizens of the United States, which extends to offences committed outside of the physical territory of the United States. Hence, there was and is a subject-matter, recognized by the United States, for the operation of a distinction between the word "jurisdiction" and the word "territories," when those two words are used in treaties, in juxtaposition, and yet in contrast.

In this connection, it is not inapt to remark that the language used in this treaty with Prussia, and in the other treaties between the United States and foreign countries, is also found in various treaties between European countries, in regard to extradition. In the extradition treaty between Great Britain and France, of February 13th, 1843, the preamble states, that the parties "have judged it expedient, with a view to the better administration of justice, and to the prevention of crime within their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, shall, under certain circumstances, be reciprocally delivered up." The treaty then provides, that the parties shall "deliver up to justice persons who, being accused of" the crimes specified, "committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found, within the territories of the other." The treaty of May 28th, 1852, between Great Britain and France, provides, that they shall "deliver up to each other, reciprocally, any persons, except native subjects or citizens of the party upon whom the requisition may be made, who, being convicted or accused of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territories of the other

party." In the treaty between Great Britain and Denmark, of April 15th, 1862, the preamble says, "with a view to the better administration of justice, and to the prevention of crime within their respective territories and jurisdictions," and the provision is for the delivery up to justice of persons who, being accused or convicted of certain crimes "committed within the jurisdiction of the requiring party, shall be found within the territories of the other." So, too, in the treaty between Great Britain and Prussia, of March 5, 1864, the same language is found as that just cited from the treaty between Great Britain and Denmark.

The question, then, arises, whether there is anything in the language of this treaty with Prussia, and of other treaties containing like language, or in the rules of interpretation laid down in any decisions which have been cited on the subject, to restrict the operation of the distinction to which I have referred, between the word "jurisdiction" and the word "territories," and to prevent the giving to the word "jurisdiction" an enlarged meaning, equivalent to the words, "authority, cognizance, or power of the courts." Prussia gives such construction to the word "jurisdiction," as used in the treaty with her, by the very fact, that, having established by law the jurisdiction referred to, she demands the extradition of this prisoner. There certainly is nothing in the language of the treaty that requires any such restriction, because, in the first article of the treaty, where the agreement for delivery is found, the language is, specifically, that those persons shall be delivered up, who have committed the designated crimes within the "jurisdiction" of the requiring party, and shall be found within the "territories" of the other party. If it had been intended to limit the extradition to cases of crimes committed within the "territories" of the requiring party, it would have been easy to say so, as in the treaty with the Two Sicilies, where the designation is, crimes "committed within the states of one of the high contracting parties." But, there being a subject-matter for the operation of a meaning to the word "jurisdiction," beyond the meaning of the word "territory," we find that the preamble to the treaty uses the words "territories and jurisdiction," stating the object of the treaty to be "the prevention of crime within the territories and jurisdiction of the parties respectively." It cannot be predicated of this language, that the word "territories" and the word "jurisdiction" are used as synonymous words. It is a reasonable construction, that the word "jurisdiction" is ampler in its scope than the word "territories," and that the two words, used in juxtaposition in both the preamble and the first article, are used in contrast and in different senses.

The principle of enlarged jurisdiction, to which I have referred, is recognized by judicial authority. In Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 568, 569, Chief Justice Taney says, that the states of the Union "may, if they think proper, in order to deter offenders from other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction." In Re Tivnan, 5 Best & S. 645, 679, Chief Justice Cockburn says: "An offence may be cognizable, triable and justiciable in two places, e. g., a murder by a British subject in a foreign country. A British subject who commits a murder in the United States of America may be tried and punished here by our municipal law, which is made to extend to its citizens in every part of the world."

Some authorities were cited on the hearing, as having a bearing on the question involved, and as tending to a contrary conclusion from that which seems to me the proper and necessary one in this case. The first one is the opinion of Attorney-General Charles Lee, in 1798 (1 Op. Attys. Gen. 83), on a question arising under the extradition provision in the treaty with Great Britain of 1794. That treaty used the language, before cited, that persons shall be delivered up to justice, who, being charged with crimes "committed within the jurisdiction" of either party, shall "seek an asylum within any of the countries of the other." In his opinion, the attorney-general suggests, that that language means, that the crime must be committed within the territorial jurisdiction of the one nation, and that the person charged with the crime must seek refuge in the territorial jurisdiction of the other nation. On looking into the opinion, it appears, that the demand was made for persons charged with "murder or piracy." The attorney-general states, that it did not appear whether the offence was committed within the jurisdiction of England or any of the British dominions, or on the high seas. He says, that the criminal tribunals in the United States are fully competent to try and punish persons who commit murder on the high seas, or piracy; and he refers to the statutes of the United States on that subject. In that case, one of the offenders was a citizen of the United States, and all of them were in the custody of its officers of justice; and the attorney-general says, that, as the offenders are triable in the courts of the United States, and are in the custody of its laws for trial, he deems it "more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts." It is very clear, that the prisoner in the present case cannot be tried in the United States, for the crimes with which he is charged.

The next case cited is the opinion of Attorney-General Cushing (8 Op. Attys. Gen. 215), which relates to the case of a person whose extradition was asked for by the French minister. He was charged as an accomplice in

a robbery. The papers did not state where the crime was committed, and the attorney-general remarks, that the papers did not allege that the crime was committed in France, and that it ought to appear that the acts of complicity were committed by the party while actually in France. The point raised in the present case was not involved in that case. As it was subsequently made to appear that the offence had been committed in France, and as the person was thereupon surrendered (8 Op. Attys. Gen. 306), the case has no bearing upon the present question.

The most important case cited is the case of the pirates of the American schooner Joseph E. Gerity, decided, on habeas corpus, by the court of queen's bench, in England, in 1864. In re Tivnan, 5 Best & S. 645. That was a case where a demand was made by the government of the United States, for the extradition of the prisoners, as being "charged with piracy on the high seas, within the jurisdiction of the United States." The British government issued a mandate for their arrest. They were arrested and brought before a magistrate, and evidence was taken as to the charge. After that, a writ of habeas corpus was issued, and the prisoners were brought before the court of queen's bench. It was contended, for them, that the case was not within the treaty of August 9th, 1842, between Great Britain and the United States. That treaty provides, that the parties shall, on mutual requisitions, deliver up to justice all persons who, being charged with the crime of "piracy," or other specified crimes, "committed within the jurisdiction of either" of the parties, shall seek an asylum, or be found, within the territories of the other. It was claimed, by the United States, in that case, that the crime was committed within the jurisdiction of the United States. It was committed on the high seas, on board of an American vessel, which had sailed from Matamoras for New York, by persons who sailed on board of the vessel as passengers. The case was argued before four judges of the court, on the construction of the treaty, and the prisoners were discharged by the concurring judgment of three of the four judges, Judges Crompton, Blackburn and Shee being in favor of the discharge, on the ground that the case was not within the treaty, and Chief Justice Cockburn dissenting. It is apparent, from an examination of the remarks of the three judges who concurred in discharging the prisoners, that the case is not one in point on the present question, and that the prisoners were discharged on the ground that the crimes with which they were charged were, in fact, within the jurisdiction of Great Britain as well as of the United States, and that the word "jurisdiction," in the treaty, meant the exclusive jurisdiction of one party as against the other party, and did not mean a jurisdiction which was shared by both of the parties. That is the ground on which the men were discharged. Mr. Justice Crompton says, in his judgment, speaking of the language of the statute of Great Britain on the subject (6 & 7 Vict. c. 76), which is the language of the treaty: "Looking at the preamble, which, at all events, can be used as a key to the statute, we find these words in it, 'persons who, being charged with the crime of murder, &c., or piracy, &c., committed within the jurisdiction of either of the high contracting parties.' This looks as if persons within the jurisdiction of one of the parties, and not of the other, were intended, 'should seek an asylum or should be found, within the territories of the other.'" "'Asylum,' means a place where the matter may not be tried. The statute then provides for the delivery up to justice of any person charged with the crime of murder, &c., or with the crime of piracy, &c., committed within the jurisdiction of the United States of America, who shall be found within the territories of her majesty. 'Committed within the jurisdiction of the United States of America,' I own, appears to me to mean, within the peculiar jurisdiction of the United States, and would not be properly used, if the common jurisdiction of every maritime nation in the world were meant." He then says, that the case before them is a case of piracy by the law of nations. He adds: "Is this a piracy within the words of the statute? It is to be within the jurisdiction of the United States; but does that mean within the jurisdiction which the whole world shares with them?" He then goes on to make an observation which clearly shows that he did not intend to lay down any principle which would cover a case like the present one. He says: "It must mean, where they have a peculiar jurisdiction; although, whether that would apply to all cases where we have jurisdiction in foreign countries, we need not determine. * * * It is very difficult to my mind to suppose that two of the great maritime nations of the world meant to give up their power of trying pirates wherever caught. * * * These persons are not pirates of one nation or another, but pirates against every nation." The remarks of Mr. Justice Blackburn show that he took the same view of the case, and was in favor of the discharge of the prisoners on the same ground. He says, that, looking at the words alone, "committed within the jurisdiction of either of the high contracting parties," they mean crimes committed within the jurisdiction of one party, and not within a common jurisdiction. Quoting the words, "committed within the jurisdiction of the United States," he says: "Does that mean within the jurisdiction of one party exclusively? I do not say how that would be in the case of a murder committed within the United States by a British subject, over whom we have a personal jurisdiction. * * * This is a question of piracy, which does not depend upon any personal, but on general jurisdiction. * * * Piracy, under the law of nations, is

an offence against all nations, and punishable by all." Mr. Justice Shee, after remarking, that the offence charged was piracy on the high seas, a crime "by the law of nations, justiciable wherever the offender may be found," says: "The persons whose apprehension and extradition are contracted for by the treaty, and authorized by the act of parliament, are persons 'fugitive' from the justice of the United States, and 'seeking an asylum,' that is, (but for the treaty and the act of parliament) safe in the asylum of the territories of our queen, because not liable to be arraigned before her tribunals. The words, 'surrender,' 'deliver up to justice,' mean deliver, from an asylum or place of safety, up to justice, that is, to the ministers of justice of the United States, by whose courts only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the act of parliament, and by the light which the words 'fugitive,' 'seeking an asylum,' 'surrender,' 'deliver up to justice,' afford, the words, 'within the jurisdiction,' must, as I think, mean, within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively, but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a state should have admitted, in a public treaty, the possibility of its unwillingness or inability to do justice, by binding itself to surrender to the justice of another state persons charged with the commission of crimes which it would be the duty of both to punish, and over which both would have jurisdiction." As, therefore, it is not pretended, in the present case, that the United States has any jurisdiction to punish the crime charged, the ground upon which the court of queen's bench discharged the prisoners before it, is a ground entirely different from any which could be urged in the present case. The dissenting opinion of Chief Justice Cockburn in the case, in favor of holding the prisoners, contains some observations quite apposite to the present question. He says: "It is said, and with truth, that the primary and original mischief which the statutes of extradition meant to prevent, was that of persons committing crimes in one state, and escaping beyond the reach of the law of that state, and so enjoying impunity; and it is also contended, that, for that purpose alone were those statutes passed. That that was their primary and principal object I entertain no doubt, but that that was the only one I entertain great doubt; for, it is impossible not to see, that the mischief which it is the object of all civilized states to prevent, is not limited to such cases. An offence may be cognizable, triable, and justiciable in two places; e. g., a murder of a British subject in a foreign country. A British subject, who commits a murder in the United States of America, may be tried and punished here by our municipal law, which is made to extend to its citizens in every part of the world. * * * If, therefore, I find the language of a statute large enough to comprehend both instances, it would be highly inexpedient to restrict it to one alone."

Under the treaty of 1842, between the United States and Great Britain, the United States has recognized its obligation to deliver up to Great Britain persons charged with the commission, on the high seas, on board of British vessels, of offences made crimes by the statute law of Great Britain, and not offences against the law of nations. In the case of In re Sheazle [Case No. 12,734], in 1845, subjects of Great Britain had committed, on board of a British vessel, on the high seas, the crime of piracy, as created by act of parliament, and not piracy under the law of nations. The discharge of the prisoners was sought, on habeas corpus, but it was held, that the case was one within the treaty, and they were remanded to custody, a warrant having already been issued by the department of state for their delivery to the authorities of Great Britain. In the case of In re Bennett, 11 Law T. 488, in 1864, a person charged with having committed the crime of murder, on board of a British vessel, on the high seas, was committed for extradition by a United States commissioner in New York, after an examination. The case of In re Tivnan was there cited, but was held to have no application, on the ground that murder on the high seas, committed on board of a British vessel, was not an offence within the concurrent jurisdiction of both the United States and Great Britain.

In the present case, the language of the treaty is broad enough to cover the extradition asked. When force and meaning are given to the words "fugitives from justice," "deliver up to justice," and "seek an asylum," which are found in this treaty, certainly where the person whose extradition is sought cannot be tried or punished in the territory where he is found, for the crime charged, no reason exists why any court should strain after a construction which would prevent the delivery up of the person to a jurisdiction where he may be tried for the offence, provided the language of the treaty fairly covers the case.

This treaty, and other treaties like it—and nearly all the extradition treaties which we have are modeled upon this treaty with Prussia, and on the previous one with France—are not liable to abuse. In the first place, under this treaty with Prussia, citizens of the United States need not be surrendered. The dignity and authority of the United States are further preserved by the provision, that a person is not to be surrendered who has committed a new crime in the United States, until he has been tried here for it, and been convicted, and suffered the punishment due to it, or been acquitted. Moreover, giving full force to the expressions, "fugitives

from justice," "delivered up to justice," and "seek an asylum," it is not to be supposed that any person will be delivered by the United States in a case where the United States has jurisdiction to punish him for the offence charged. Furthermore, the construction contended for on the part of the government of the German empire may, it is quite evident, be very necessary, in order to enable the United States to execute the laws to which I have referred, extending its jurisdiction over crimes committed outside of the physical, or quasi physical, territory of the United States. The case of Buckley, who escaped into French jurisdiction, is an instance. It might have been necessary, if he had not voluntarily surrendered himself, to demand his extradition by France, on the ground that the offence was committed within the jurisdiction of the United States. Other cases may be supposed, as likely to arise under the acts of August 18th, 1856, and June 22d, 1860, to which I have referred.

The objection may be suggested, that, although the United States has no treaty with Belgium, and would not surrender the prisoner to Belgium, yet the German government may do so, and thus a result may be accomplished indirectly which could not be accomplished directly. But no suspicion as to the good faith of the German government can be indulged; and it is expressly set forth, in the treaty with Prussia, that the laws of Prussia forbid her to surrender her own citizens to a foreign jurisdiction. It is, undoubtedly, on that principle, that Prussia, while she refuses to surrender her own citizens to a foreign jurisdiction, enacts just and proper laws to punish them herself for crimes committed by them in foreign territory.

On this view of the subject, in all its relations and bearings, I am entirely satisfied, that the present case is within this treaty, and that the writs ought to be discharged, and the prisoner be remanded to the custody of the marshal.

NOTE. After this decision was made, the examination in the matter, before the commissioner, was proceeded with, and resulted in a commitment of the prisoner, to await the issuing of a warrant for his surrender. The secretary of state submitted the question involved to the consideration of the attorney-general, who gave the following opinion: "Department of Justice, Washington, July 21st, 1873. Hon. J. C. B. Davis, Acting Secretary of State: Sir, I have the honor to acknowledge the receipt of your communication of the 7th instant, in which you submit for my official opinion the following question: 'Carl Vogt, a Prussian citizen, charged with the commission of the crimes, murder, arson and robbery, committed in Brussels, in the kingdom of Belgium, is found a fugitive in the United States. Can the German government, under the provisions of the treaty for the extradition of criminals, concluded between the United States and Prussia and other states, June 16th, 1852, rightfully demand the surrender by this government of the fugitive Vogt, in order that he may be tried and punished in Prussia for the offence which he is alleged to have committed in Belgium?' Those parts of the preamble and treaty applicable to this question are as follows: Preamble: 'Whereas, it is found expedient, for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and, also, to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia, and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States.' Article 1: 'It is agreed, that the United States and Prussia, and the other states of the Germanic confederation included in, or which may hereafter accede to, this convention, shall, upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other.' You state, that 'the surrender of Vogt is claimed by the German government on the ground that he is a Prussian and a subject of the emperor of Germany; that, by the law of Prussia, at the date of the conclusion of the extradition treaty between the United States and Prussia and other Germanic states, 16th of June, 1852, a Prussian subject, who committed certain crimes (among which those with which Vogt is charged are included) within the territory of another nation, and beyond the territories of Prussia, was, nevertheless, subject to be tried and punished in Prussia. This is, also, now the law of the German empire.' The following appears to be the only point in controversy—whether or not, according to the true intent and meaning of said treaty, the crimes committed by Vogt in the kingdom of Belgium were committed within the jurisdiction of Germany. To affirm that the jurisdiction of Germany, by virtue of its own laws for the punishment of crimes, extends over the territory of Belgium, is necessarily to hold that the same jurisdiction extends to France, Great Britain, and the United States, and, indeed, to every nation and country of the world. Manifestly, the words, 'committed within the jurisdiction,' imply that the crimes named in the treaty may be committed without the jurisdiction of the parties thereto. But, if the crimes committed in Belgium were committed within the jurisdiction of Germany, then it follows, as Belgium is as independent of Germany as any other nation, that it is impossible for crimes to be committed outside of the jurisdiction of the German empire. I think, too, that the treaty clearly contemplates that the fugitive claimed must be a person escaping from the jurisdiction of the party making the claim to the jurisdiction of the other party—recognizing two distinct and independent jurisdictions. But, if the claim of Germany is correct in this case, Vogt is as much within her jurisdiction now as he was when the crimes charged upon him were committed, for, the laws under which she claims have as much force within the United States as they have in Belgium. The laws of Germany, which provide for the punishment there of crimes committed elsewhere by her subjects, imply, ex necessitate, as a condition for the exercise of that power, that such guilty subjects must come, or be conveyed, from a foreign place or jurisdiction where the crimes are committed, to some place where they can be taken or received and held by German au-

thority. Germany has an unquestioned right to punish her subjects, if she chooses, for crimes committed in Belgium or the United States; but, it would not be proper, therefore, to say, that Belgium and the United States are within her jurisdiction; but, it would be proper to say, that she has made provisions to punish her subjects for crimes committed without as well as within her jurisdiction. I am quite clear, that the words, 'committed within the jurisdiction,' as used in the treaty, do not refer to the personal liabilities of the criminal, but to locality. The locus delicti, the place where the crime is committed, must be within the jurisdiction of the party demanding the fugitive. Stress is put upon the supposed difference in the meaning of the words 'territory' and 'jurisdiction,' and it is argued, that the latter is more comprehensive than the former term. This is not necessarily, but probably, so; but, it does not follow that Belgium is within the jurisdiction of Germany. All nations have jurisdiction beyond their physical boundaries. Vessels upon the high seas, and ships-of-war everywhere, are within the jurisdiction of the nations to which they belong. Limited jurisdiction by one nation upon the territory of another is sometimes ceded by treaty, as appears from the treaties between the United States, Turkey, China, Siam, and other powers. Constructive jurisdiction may, possibly, exist in special cases, arising in barbarous countries, or uninhabited places; so that effect can be given to the word 'jurisdiction,' as meaning more than territory, without holding that Germany has jurisdiction over crimes committed in Paris, London, or Washington. Local claims or definitions cannot be allowed to govern this case. When nations discuss and treat of their respective jurisdictions, they do not refer to those duties and responsibilities which a government imposes upon its own citizens, but they contemplate those portions of the earth, and places upon its surface, where they have, respectively, sovereign power, or in other words, the right of government. To recognize the claim of Germany in this case would establish a precedent which might lead to serious international complications. We have no extradition treaty with Belgium, but we have with Great Britain, like that under consideration. Suppose Vogt had committed the crimes with which he is charged in England instead of Belgium, and the British authorities, contemporaneously with Germany, had demanded his extradition on that account, could the United States deny that the crimes were committed 'within the jurisdiction' of Great Britain, and not 'within the jurisdiction' of Germany? Could not Great Britain justly complain, if, after the murder of her citizens and the destruction of her property by the fugitive, her claim to him for the purposes of justice should be denied by the United States, and he should be turned over for trial to Germany, where there is no evidence of his guilt, and where his friends and sympathizers, if he has any, may be supposed to be. Law-writers generally define the jurisdiction of a court to be the power to hear and determine a cause, and it is argued, that, as, by the laws of Germany, her courts have power to hear and determine the case of Vogt, therefore, his crimes were committed within her jurisdiction. One conclusive answer to this view is, that the word 'jurisdiction,' in the treaty, is not used with reference to governmental power over the subjects of judicial procedure, but with reference to the territory and places in which that power may be exercised. Again, the courts of Germany have never had the power to hear and determine the case of Vogt. Jurisdiction over a subject is one thing. That is conferred by law. Jurisdiction over the person is another. That is a fact which has never existed in this case. Whether the courts of Germany will or not hereafter acquire jurisdiction in Vogt's case depends upon facts hereafter to arise. Germany and the United States intended that the convention in question should be 'strictly reciprocal;' but, if Germany can rightfully demand the delivery up by the United States of her citizens or subjects for crimes committed in Belgium, the convention is not reciprocal; for, the United States cannot demand of Germany the delivery up of their citizens for crimes committed in Belgium. There is not a single crime enumerated in the treaty for the commission of which outside of this country the United States can claim one of their citizens from Germany; and there is not only no probability that congress will ever pass an act to that end, but its constitutional power to do so is doubted. Reference has been made to the act of congress of August 18th, 1856, which declares that perjury committed before a secretary of legation or consular officer of the United States in a foreign country, may be prosecuted and punished in this country, as though committed here; and this, it is said, shows that the United States, as well as Germany, claim an extraterritorial jurisdiction. There seems to be no point in this reference. According to international law, the domicil of an ambassador, minister extraordinary, or consul, is a part of the territory he represents, for many purposes; but, independent of this, the question here is not whether a sovereign country may not punish persons coming into its hands for crimes committed in another sovereignty, but the question here is, whether a crime committed upon the admitted territory, and within the exclusive government, of an independent nation, is committed within the jurisdiction of another nation. To facilitate the punishment of crime is desirable, but the United States cannot, with dignity and safety, admit that any foreign power can acquire jurisdiction of any kind within their territory by virtue of its local enactments. Objection is made to this construction of the treaty, on the ground that it will make the United States an asylum for European criminals. But, this objection is not matter of law, nor is it true as matter of fact; and, if it was, the United States, as an act of comity, may deliver up a fugitive from justice, or the subject may be regulated by an extradition treaty as comprehensive as the parties thereto see proper to make it; or, if it should appear necessary, congress might possibly interpose by legislation. To recognize the claim to jurisdiction accompanying the requisition in this case may open the door to confusion and controversy as to claims of jurisdiction in other respects, made, under their local laws, by foreign governments. The plain and practical rule upon the subject seems to be, that the jurisdiction of a nation is commensurate with, and confined to, its actual or constructive territory, excepting changes made by agreement, and to this effect are the authorities. Three of the judges of the queen's bench, in Tivnan's Case, 5 Best & S. 645, upon application by the United States for Tivnan, charged with the crime of piracy committed upon an American ship on the high seas, and a fugitive from justice in England, made under our extradition treaty of 1842 [8 Stat. 576], with Great Britain, held, that the words 'within the jurisdiction,' in said treaty, meant, within the exclusive jurisdiction of the United States, and did not apply to cases of piracy on the high seas, as the person charged therewith was justiciable in any country where he was found. Chief Justice Cockburn, in his dissenting opinion, thought that the term 'jurisdiction' meant, the area, whether by land or water, over which the law of a country prevails, and said that 'it is admitted that a ship is part of the territory of the state, or, at all events, that this ship' (referring to the one on which the piracy was committed) 'was within the jurisdiction of the United States, so as to come within the statute.' Thomas Allsop, a British subject, was charged as an accessory before the fact, to the mur-

der of a Frenchman in Paris, in 1858, and escaped to the United States, and, as he was punishable therefor by the laws of Great Britain, the question as to whether he could be demanded by Great Britain of the American government, under the extradition treaty of 1842, was submitted to Sir J. D. Harding, queen's advocate, the attorney- and solicitor-general, Sir Fitzroy Kelly, since chief baron of the exchequer, and Sir Hugh McC. Cairns, since lord chancellor, and they recorded their judgment as follows: 'We are of opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under that treaty.' Forsyth's Cases, p. 368. This is a decision exactly in point, and of high authority. Phillimore, in his work on International Law, volume 1, page 413, says: 'There are two circumstances to be observed, which occur in these and in all other cases of extradition: (1) That the country demanding the criminal must be the country in which the crime is committed; (2) that the act done, on account of which his extradition is demanded, must be considered as a crime by both states.' Wharton, in his work on the Conflict of Laws, section 957, says: 'The only admissible restriction of the term "jurisdiction" is, to treat it as convertible with "country," and to hold that no requisition lies for an offence not committed within the country of the requiring state. And this view is not without support in those expressions of the treaties which speak of the persons claimed as "fugitives," and as "seeking an asylum" in the state on whom the requisition is made, implying, as it were, a change of country.' David Dudley Field, Esq., in his Outlines of an International Code (page 93), speaking of an article proposed on extradition, says: 'The article in its present form defines the right of extradition as it is now recognized, and extending only to crimes committed within the jurisdiction of the demanding nation. It may be thought desirable to extend the rule to offences against the law of a nation committed beyond its jurisdiction, which it would have power to punish if the offender comes within its jurisdiction.' Attorney-General Lee, in construing the 27th article of the treaty of 1794 [8 Stat. 129] with Great Britain, says, that it was 'confined expressly to persons who are charged with murder or forgery committed within the jurisdiction of either nation, and who seek refuge in the other, meaning their territorial jurisdiction respectively.' 1 Op. Attys. Gen. 83. Our extradition treaty of 1843 with France provides for the delivery up of persons charged with certain crimes committed within the jurisdiction of the requiring party, and Attorney-General Cushing held that a requisition by the French government upon the United States for a fugitive under this treaty must show that the crime was committed by the fugitive while actually in France. 8 Op. Attys. Gen. 215. Courts in this country have held, that, under section 2, art. 4, of the constitution, providing for the reclamation, by one state upon another, for fugitives from justice, the requisition must show that the crime was committed within the territory of the requiring state. Ex parte Smith [Case No. 12,968]; Ex parte Heyward, 1 Sandf. 701. I have carefully read the elaborate opinion of Judge Blatchford, upholding the jurisdiction of Germany in this case, transmitted in your letter, but, with diffidence and regret, I am compelled to dissent from his views. They do not appear to me to be sound in principle or sustained by authority. Able writers have contended that there was a reciprocal obligation upon nations to surrender fugitives from justice, though now it seems to be generally agreed that this is altogether a matter of comity. But, it is to be presumed, where there are treaties upon the subject, that fugitives are to be surrendered only in cases and upon the terms specified in such treaties. Conformably to what is above stated, I make a negative answer to your question. I have the honor to be very respectfully, your obedient servant. Geo. H. Williams, Attorney-General." The department of state, in reply to the application made by the German minister for the extradition of the prisoner, addressed to him the following communication: "Department of State, Washington, 25th July, 1873. Sir: In reply to the application made by you, on the 2d instant, in behalf of the government of Germany, for the extradition, under the treaty of June 16, 1852, between the United States of America and Prussia and other states of the Germanic confederation, of Stupp alias Carl Vogt, an alleged criminal, I have the honor to state that the case has received the serious consideration of this government, and has been submitted to the department of justice for the opinion of the legal advisers of the government. I have also felt it due to the importance of the question, and a proper act of courtesy to your government, to submit all the papers to Mr. Fish, and to take his instructions regarding the disposition of the case. It appears that the crimes of which Stupp alias Vogt is accused were committed in Brussels, in the kingdom of Belgium, without the territory, and outside of the jurisdiction, of the states parties to the treaty. The preamble of the treaty declares its object to be 'the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively.' It does not propose to regulate the administration of justice, or the prevention of crime, in other territories, or within the jurisdiction of other states, than those parties to the treaty. The first article of the treaty provides for the delivery up to justice, by the parties respectively to the treaty, of persons charged with certain enumerated crimes, 'committed within the jurisdiction of either party.' The crimes charged against Stupp alias Vogt are such as are enumerated in the treaty, and, had they been committed within the territories and jurisdiction of either of the states, parties to the treaty, there would be no hesitancy or delay on the part of this government in the delivery of the alleged criminal. They were not, however, committed within the territories or jurisdiction of Germany, but, as I have already noted, within the territory and jurisdiction of Belgium, with which state no treaty of extradition with the United States exists. The opinion of the law department of the government, therefore, is, that the case of Stupp alias Vogt is not within the contemplation and provisions of the treaty. The heinous nature of the crimes charged against Vogt has inclined this government to seek some construction of the treaty which might justify the surrender of the alleged criminal, for the purpose of subjecting him to an impartial trial, and to the punishment, which, if guilty, he so richly merits. But it is forced to the conclusion that the treaty does not contemplate crimes committed elsewhere than within the territorial and exclusive jurisdiction of the parties thereto, and does not provide for the surrender of persons charged with crimes committed outside of such jurisdiction. Anxious as is this government, at all times, to aid in the administration of justice and the prevention of crime, and desirous as it has ever shown itself to be to comply with the wishes of the government which you so ably represent, it is with great regret that it finds itself constrained by the terms of the treaty in this case, and that it cannot grant the warrant of surrender which is asked. I avail myself of this occasion, &c., J. C. B. Davis, Acting Secretary." The prisoner not having been delivered up within two calendar months after his final commitment, an application was, under the fourth section of the act of August 12, 1848 (9 Stat. 302), made to Judge Blatch-

ford, on notice to the secretary of state, to discharge the prisoner out of custody, and he was discharged.

[Subsequently a treaty of extradition was concluded with Belgium, and Stupp was arrested upon demand of the Belgian authorities. He sued out a writ of habeas corpus, but upon the hearing on the return the writ was discharged, and he was remanded to the marshal. Case No. 13,563.]

Case No. 13,563.

In re STUPP.

[12 Blatchf. 501.] [1]

Circuit Court, S. D. New York. May 18, 1875.

EXTRADITION — HABEAS CORPUS — CERTIORARI — CRIMINALITY OF ACCUSED—AUTHORITY OF PRESIDENT.

1. The provisions of the Revised Statutes of the United States, in regard to the issuing of writs of habeas corpus and certiorari by the courts and judges of the United States, examined.

[Cited in Re Coleman, Case No. 2,980.]

[Cited in Re Snell, 31 Minn. 111, 16 N. W. 692.]

2. Where a person is held in custody under a commitment by a commissioner, for surrender under a treaty of extradition, both writs may properly be issued.

[Cited in Ex parte Perkins, 29 Fed. 908.]

3. On the returns to such writs, in such a case, it is not the duty of the court, nor has it the power, to revise the decision of the commissioner on the question of fact as to the criminality of the accused.

[Followed in Re Vandervelpen, Case No. 16,844.]

4. After a commitment of the accused for surrender, and even after his discharge on habeas corpus has been refused, the president may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of criminality; but the statute gives no right of appeal or review on the merits, to be exercised by any court or judicial officer.

[Cited in Re Thomas, Case No. 13,887. Followed in Re Wahl, Id. 17,041. Cited in U. S. v. Brawner, 7 Fed. 87; Re Byron, 18 Fed. 723; U. S. v. Doherty, 27 Fed. 733.]

5. The court issuing the writ of habeas corpus must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused.

[Cited in Castro v. De Uriarte, 12 Fed. 251.]

6. But, the court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion; nor, if there was legal and competent evidence of facts before the commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court to hold the proceedings illegal, and to discharge the prisoner, because some other evidence was introduced which was not legal or competent, but was held to be so by the commissioner, and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of fact from that at which the commissioner arrived.

[Cited in Re Wiegand, Case No. 17,618; Re Fowler, 4 Fed. 317; Re Morris, 40 Fed. 824.]

7. The provisions of the 2d section of the act of August 12th, 1848 (9 Stat. 302), and of the act of June 22d, 1860 (12 Stat. 84), and of section 5271 of the Revised Statutes of the United States, in regard to documentary evidence from abroad, in extradition cases, examined.

8. Section 5271 of the Revised Statutes prescribes further requisites, beyond those prescribed by the 2d section of the act of 1848, in respect to the admissibility in evidence of copies of the depositions on which an original warrant of arrest was granted in the foreign country, and supersedes the 2d section of the act of 1848.

[Cited in U. S. v. Claflin, Case No. 14,799; Re Fowler, 4 Fed. 308.]

9. But, the act of 1860 is not affected by the Revised Statutes, and is still in force, and applies to all depositions, documents and papers from abroad offered in evidence in extradition cases, except the depositions on which an original warrant of arrest was granted in the foreign country.

10. Copies of certain depositions from abroad in this case, taken subsequently to the date of the original warrant of arrest issued abroad, held admissible under the act of 1860, and as constituting, with oral evidence taken before the commissioner, legal testimony, tending to prove the criminality of the accused, and materials for a decision of the commissioner on the question of fact, as to the criminality of the accused.

11. The case being one under a treaty with Belgium, in respect to offences committed in Belgium, the certificate of the minister resident of the United States to Belgium, purporting to be made under the act of 1860, which permits such officer to certify that the documents from abroad are properly and legally authenticated, so as to entitle them to be received in evidence of the criminality of the accused by the tribunals of the foreign country from which the accused escaped, certified that they were legally and properly authenticated, so as to entitle them to be received in evidence in support of the criminal charges mentioned therein, and for similar purposes mentioned in the 2d section of the act of 1848, and omitted the words "by the tribunals of Belgium." The documents were from the records of the tribunals of Belgium, and were authenticated by functionaries of Belgium: *Held*, that this was a sufficient compliance with the statute.

[Joseph Stupp, alias Carl Vogt, was charged with the crimes of murder, arson, and robbery, as having been committed in Brussels, in Belgium. He escaped to the United States. At the time there was no extradition treaty between Belgium and the United States, but Prussia made a demand on the United States for the extradition of Stupp, on the ground that he was a Prussian subject, and, as such, could be tried for the alleged offenses in Prussia, the offenses having been committed within the "jurisdiction" of Prussia. Stupp was arrested, and, while in the custody of the marshal, sued out a writ of habeas corpus before Judge Blatchford, in the

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

circuit court for the Southern district of New York. Upon the hearing, Judge Blatchford decided that the offenses were committed within the jurisdiction of Prussia. The writ was discharged. Case No. 13,562. Pending the issue of the warrant for surrender, the secretary of state submitted the question to the attorney general, who gave an opinion that the case was not within the jurisdiction of Prussia, and that the prisoner ought not to be surrendered. Upon this opinion the government refused the surrender of Stupp. Subsequently a treaty of extradition was concluded with Belgium, and Stupp was thereafter again arrested upon demand of the Belgian authorities. He again sued out a writ of habeas corpus, and the case is now heard upon return to the writ.]

John D. Townsend and Theodore Aub, for prisoner.

Frederic R. Coudert, for the Belgian Government.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

BLATCHFORD, District Judge. The prisoner has been committed to the custody of the marshal of the United States for this district, by a United States commissioner, to await the issuing by the president of a warrant for his surrender to the authorities of Belgium, under the treaty of extradition with that country, concluded March 19th, 1874 [18 Stat. 804], on a charge of having committed the crimes of murder and arson, at Brussels, in Belgium, on the night of the 1st, or the morning of the 2d, of October, 1871. He has been brought before this court on a writ of habeas corpus, and the proceedings which took place before the commissioner have been brought before this court on a writ of certiorari.

The power to issue writs of habeas corpus is given to this court and its judges by section 751 of the Revised Statutes. Section 752 enacts, that such writs are to be granted "for the purpose of an inquiry into the cause of restraint of liberty." Section 757 provides, that the person to whom the writ is directed shall certify the true cause of the detention of the person detained. Section 760 provides, that the person detained "may deny any of the facts set forth in the return, or may allege any other fact that may be material in the case." Section 761 provides, that the court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." Section 716 provides, that this court shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.

As the prisoner in this case was in custody under the authority of the United States, within section 753 of the Revised Statutes, the power and duty of issuing the writ of habeas corpus existed; and, as the petition for such writ showed that the prisoner was held under a commitment made by a United States commissioner, as the result of proceedings under a treaty for extradition, it was proper to issue the writ of certiorari to the commissioner, to bring such proceedings before the court. This was necessary, in order to ascertain whether the commissioner had jurisdiction of the case. How far the court will revise the proceedings before the commissioner is another question.

It is contended, for the prisoner, that, whatever may have been the law or the practice, prior to the enactment of the Revised Statutes of the United States, it is now the duty of the court, and it has the power, to examine into the merits of this case, on the returns to the writs it has issued. Section 722 of the Revised Statutes provides, that the jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of title 13 of those statutes, (and which title embraces the jurisdiction in regard to the writs issued in this case,) and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but, in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, and punish offences against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts, in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 760 of the Revised Statutes, in addition to the provision before cited from it, enacts, that the return to the writ of habeas corpus, and all suggestions made against it, may be amended, before or after the same are filed, "so that thereby the material facts may be ascertained." It is urged, that the intention of the enactments cited in regard to the proceedings on the writ of habeas corpus is, that the court shall ascertain the facts on which the party is claimed to be held in custody, and shall then decide, as an original question, whether he ought to be held in custody thereon, without reference to the decision of the commissioner.

The language used in sections 760 and 761 of the Revised Statutes is substantially borrowed from the 1st section of the act of February 5th, 1867 (14 Stat. 385). That act was

passed to extend the power of the courts and judges of the United States, in granting writs of habeas corpus, to cases not provided for by previous legislation. The 14th section of the judiciary act of September 24th, 1789 (1 Stat. 81), restricted the power of the courts of the United States to issue writs of habeas corpus, in cases of prisoners in jail, to such as were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. The act of March 2, 1833 (4 Stat. 634, § 7), extended the power to prisoners committed for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof. The act of August 29, 1842 (5 Stat. 539), extended the power to subjects or citizens of a foreign state, domiciled therein, confined under any authority or law, or process founded thereon, of the United States, or of any one of them, for any act done or omitted under any alleged authority claimed under the order of any foreign state, the validity and effect whereof depend upon the law of nations. The act of 1867 provided, that the several courts and judges of the United States, within their respective jurisdictions, in addition to the authority already conferred by law, should have power to grant writs of habeas corpus in all cases where any person might be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. It further used this language: "The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed, in a summary way, to determine the facts of the case, by hearing testimony and the argument of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty." The various cases enumerated in the said acts of 1789, 1833, 1842 and 1867, as cases in which writs of habeas corpus may be issued, are specified in section 753 of the Revised Statutes. It is thus seen, that sections 760 and 761 of the Revised Statutes borrow from the act of 1867 what they contain as to denying the facts set forth in the return, and as to alleging other material facts, and as to amending the return and the suggestions made against it, so that thereby the material facts may be ascertained, and as to the proceeding in a summary way to determine the facts of the case, by hearing the testimony and arguments, and make such provisions applicable to all cases of habeas corpus, as well as to those enumerated in the act of 1867. The provision, that the court is "thereupon to dispose of the party as law and justice require," is not found, in those words, in the act of 1867, or in any enactment in regard to writs of habeas corpus, prior to the Revised Statutes. But neither those words, nor any other language in the sections of the Revised Statutes relating to the writ of habeas corpus, can, when properly construed, be regarded as intended to have the effect, or as having the effect, of prescribing to the court any different rules of decision, in disposing of a case on habeas corpus, from those which were the proper rules of decision in disposing of such case prior to the enactment of the Revised Statutes.

The provision of section 757 is, that, as a return to the writ of habeas corpus, the true cause of the detention of the person detained shall be certified. Wherever the person is detained by virtue of process, the cause of his detention is the process. In the present case, it is the commitment by the commissioner, which carries with it the warrant of arrest; and the certiorari introduces the documents and papers put in evidence, and the oral testimony. The "facts" set forth in the return to the habeas corpus are not the particulars of the evidence on which the commitment was granted. Those "facts" are, the statement that there was a warrant of arrest issued by the commissioner in a case of extradition, and an examination into evidence of criminality, and a decision, and a commitment to await surrender. When the various sections of the Revised Statutes speak of denying the "facts" set forth in the return, and of alleging any other material "fact," and of ascertaining the material "facts," and of determining the "facts" of the case, they have no reference to the merits of the evidence which was put in before the commissioner, as tending to the conclusion of criminality. Where a person is held on process on a final judgment, after conviction, on a trial on an indictment, and a habeas corpus is issued, the return to the writ states, as the cause of his detention, the process, and, either on such return alone, or by the aid of a certiorari, the final judgment, the conviction, the fact of a trial, and the indictment, are brought before the court. These are the "facts" of the case, on the habeas corpus. The particulars of the evidence which led to the conviction are no part of such facts. In determining, on habeas corpus, the "facts" of the case, the court does not determine what were the facts of the transaction which constituted the crime of which the party was convicted. It only determines whether there was an indictment, a trial, a conviction, a final judgment, a sentence and process of execution, and jurisdiction of such proceedings. It does not

retry the case. So, in the present matter, to determine the "facts" of the case is not to retry the matter on the evidence, and determine what were the facts and particulars of the transactions constituting the alleged crimes.

The most recent case on the subject of habeas corpus, in the supreme court of the United States, is that of Ex parte Lange, 18 Wall. [85 U. S.] 163, at the October term, 1873. In that case, that court issued to a circuit court of the United States a writ of certiorari to bring before it the proceedings in the circuit court under which the petitioner was restrained of his liberty, and at the same time it issued a writ of habeas corpus to the marshal to produce the body of the petitioner. In the opinion delivered by the supreme court, care is taken to say, that the supreme court has authority to issue the writ, and to examine the proceedings of the circuit court, so far as may be necessary to ascertain whether the latter court has exceeded its authority, but that the supreme court disclaims any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise. What is meant by ascertaining whether the circuit court has exceeded its authority, is shown by the fact, that the opinion states, that the supreme court proceeds to examine the case as disclosed by the returns to the two writs, to ascertain whether it appears that the court below had any power to render the judgment under which the petitioner was held, which was a final judgment on a conviction on an indictment. Certainly, it cannot be successfully contended, that these provisions of the Revised Statutes, in regard to habeas corpus, have the effect to authorize a court of the United States which has no direct power given to it to review the final judgment of another court of the United States in a given case, to review such judgment on the merits, under the indirect authority of a habeas corpus. Yet, the general language of the Revised Statutes in regard to the proceedings on a habeas corpus, that authority is given to inquire into the cause of restraint of liberty, and to ascertain the material facts, and to determine the facts by hearing the testimony and arguments, and thereupon dispose of the party as law and justice require, is as applicable to a case where a party is in custody under process issued on the final judgment of a court of the United States, on a conviction on an indictment, as it is to a case where a party is in custody under any other process.

Nor is there anything in the provisions of section 722 of the Revised Statutes which requires any different rule to be applied to the decision of the present case from that which would have been applicable in the absence of that enactment. Under that section, the jurisdiction conferred on this court, in this case, by the provisions of the Revised Statutes in regard to habeas corpus, is required to be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. Such jurisdiction is to be exercised in conformity with the laws in regard to proceedings in extradition cases, and in conformity with the laws in regard to the appellate jurisdiction of this court, as well as in conformity with the laws in regard to writs of habeas corpus. But, section 722 manifestly has reference not to the extent or scope of jurisdiction, or to the rules of decision, but to the forms of process and remedy. The laws of the United States are fully suitable to carry into effect the jurisdiction of this court in this case, and they are adapted to the object of such jurisdiction, and they are not deficient in any provision necessary to furnish suitable remedies to exercise and enforce such jurisdiction.

In the case of In re Henrich [Case No. 6,369], it was held, by this court, that, if a commissioner, sitting in an extradition case, assumes, on evidence which he regards as proving the charge of criminality, to commit the accused person for surrender, a court of the United States, or a judge thereof, can, on writs of habeas corpus and certiorari, review such evidence, and come to the conclusion that the evidence fails to support the charge, and thereupon discharge the accused from custody. In the opinion delivered in that case it was stated, in substance, that such was held to be the law of this court, because it was the judgment of the distinguished justice of the supreme court (Mr. Justice Nelson), who was then the presiding justice of this court; and, therefore, it was held, that the court would look into the evidence upon which the judgment of the commissioner rested, and would pass upon its weight as well as its competency. But, the court proceeded to say: "It should be understood, that, in the exercise of this power of revising, on habeas corpus, the judgment of the commissioner, this court will not reverse his action upon trifling grounds, or for mere errors in form. When designated by the court, he is fully empowered to hear and decide the questions of criminality, and, where he has legal evidence before him, this court will not reverse his judgment except for substantial error in law, or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence." In the opinion in that case, various earlier extradition cases, arising in this district, are cited, wherein it was distinctly held by various judges, that, on habeas corpus, the decision of the commissioner on the question of fact could not be reviewed. Those cases were In re Veremaitre [Case No. 16,915], before Judge Judson, in the district court; In re Kaine [Id. 7,598], before Judge Betts, in the circuit court; In re Heilbronn [Id. 6,323], before Judge Ingersoll, in the district court; and Ex parte Van Aernam [Id. 16,824], before Judge Betts, in the circuit court. In the case last cited, the view was held, that the circuit court could

not sit in review on the merits of the decision made by the commissioner, either on the facts or the law. The crime charged was uttering and publishing, in Canada, a forged draft, knowing it to be forged, with intent to defraud the party from whom the accused obtained money on the draft. The point taken, on the habeas corpus, was, that the false making of the draft was not a forgery, but was only a fraud, and, therefore, that the draft was not a forged draft. The court say: "If the commissioner had no legal jurisdiction over the case, or, if the mandate of the president under which the prisoner is more immediately confined, was issued without warrant of law, it is the duty of the court to discharge him. It is not disputed that the commissioner was empowered to inquire whether the crime of which the prisoner was accused had been committed by him, nor is it disputed that legal evidence was laid before him tending to prove the accusation, nor is it disputed that the commissioner, on the facts so placed before him, found that the prisoner had committed the offence. The exception to his action is, that he misjudged in point of law, and that the crime was not established by the evidence. If so, this, manifestly, was an error of judgment on the part of the commissioner, but it does not show that he had no jurisdiction. And, if the case were now before the court on writ of error or appeal, the decision of the commissioner would be a legitimate subject for its investigation. * * * In my view of the subject, this court, on the return before it of a writ of habeas corpus, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offence subjecting him to imprisonment; and whether the commissioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively in this case, on both those inquiries, and, therefore, decide that I have no authority, under this writ, to review the justness of the decision of the commissioner. The president, therefore, had due authority for the warrant issued by him for the extradition of the prisoner. The court, if acting as the committing magistrate, in this instance, might have doubted whether the law, properly interpreted, would support a charge of forgery for the fabrication of the draft in question, and might have declined to commit the prisoner on the charge; but it possesses no authority to rejudge that point, on this writ. The farthest the court could go, under this writ of habeas corpus, after ascertaining that there was legal proof before the magistrate, tending to support the accusation, would be to bail the prisoner, if this particular case were bailable." The clear purport of these views is, that the court may inquire whether the commissioner had jurisdiction over the case, whether he was authorized to institute an inquiry into the crime, and whether he had before him legal evidence tending to prove the accusation, but that it can go no farther, and act as a court of review, as if it had before it a writ of error or an appeal, under an affirmative jurisdiction to review the case by such means. This was, also, the view of Judge Ingersoll, in Re Heilbronn [supra], where he says: "Where there is any legal evidence before the commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it, or to render it ineffectual, at least not till the expiration of two calendar months after it shall have been issued. In such a case, no one can revise the opinion of the commissioner, but the president. The president has that power. If he should be of opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If he should be of opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the commissioner."

The opinion delivered by Mr. Justice Nelson in Re Kaine, 14 How. [55 U. S.] 147, shows, that the grounds upon which he proceeded in holding that Kaine ought to be discharged were, that the commissioner had no jurisdiction of the case, because there had been no preliminary mandate from the president, and because the commissioner was not an officer authorized to hear the case, and because there was no competent evidence, that is, no legal evidence, before the commissioner, the only evidence being depositions which Mr. Justice Nelson regarded as not having been properly authenticated. These grounds are repeated by him in Re Kaine [Case No. 7,597]. He went, in that case, no farther.

The view thus taken was extended by the remarks made in Re Henrich, as before cited. But, in that case, the court did not discharge the prisoner. In the case of In re Farez [Id. 4,644], the question was wholly one as to the jurisdiction of the commissioner, and the prisoner was discharged on the ground that the warrants which he originally issued for the arrest of the prisoner were void. Subsequently, in regard to the same person, in the case of In re Farez [Id. 4,645], this court, held by myself, discharged him after he had been finally committed for extradition by a commissioner, on the sole ground that the commissioner, in the proceedings before him, had erred in excluding the testimony of the prisoner, when offered in his own behalf; but the discharge was only from the final commitment, and he was held under the original warrant of arrest, in order that the examination might be proceeded with de novo before the commissioner. This ruling was in accordance with the view held in Re Henrich. The court not only examined the question of the jurisdiction of the commissioner, and the question whether he had before him legal and competent evi-

dence, but it went farther. Afterwards, in Re Farez [Id. 4,646], on a habeas corpus before the circuit judge, in this court, in the case of the same prisoner, his discharge was sought on the ground that, in pursuance of the previous decision in the case, he ought to have been wholly discharged and ought not to be held on the original warrant of arrest, and, farther, that there were other errors for which he ought to be discharged. The court examined the grounds alleged against the jurisdiction of the commissioner, and held that he had jurisdiction, and that the prisoner was properly held under the warrant, and that the examination, which was in progress, must proceed. But the judge intimated a doubt as to whether the prior decision, discharging the prisoner from final commitment because of the error in excluding his testimony, was correct. He says: "If, on the examination, error occurs, by the exclusion of testimony which was admissible, it may be that the proceeding in that respect can be reviewed on habeas corpus. Such was Judge Blatchford's opinion. * * * I find nothing in the acts of congress, or in any rule of law with which I am familiar, which made it necessary that Judge Blatchford should go one step further than he did, if, indeed, it be true that a habeas corpus can be issued at all for any such purpose."

It thus appears, that the only case in which the rule announced in the case of In re Henrich as the proper one, has had any operative effect for the benefit of a prisoner, was that of Farez; and that the propriety of the rule and of its application to that case, was doubted at the time by the circuit judge.

The case of In re Macdonnell [Case No. 8,771] came before the circuit judge subsequently, on writs of habeas corpus and certiorari. The prisoner was under arrest, in proceedings for extradition, on a warrant issued by a commissioner, and the examination was in progress. The questions examined by the court went solely to the jurisdiction of the commissioner, on the ground of alleged defects on the face of the warrant of arrest and of the complaint on which it was issued, and on the face of the preliminary mandate issued by the president. It was urged, that the commissioner had received in evidence a document which was not legally admissible, but the court declined to consider that question at that time, and said: "If that suggestion were well founded, it would not defeat his jurisdiction." The proceedings in the Case of Macdonnell resulted in his final commitment by the commissioner to await his surrender by the president. The case then came before this court, held by the circuit judge and myself (In re Macdonnell [supra]), upon writs of habeas corpus and certiorari. In disposing of the case, the court first examined questions which went to the jurisdiction of the commissioner, and then proceeded to consider the allegation that the commissioner had received certain incompetent evidence, consisting of depositions. It held that such depositions were admissible, as being properly certified under the acts of congress on the subject, and as being made, by such acts, admissible in evidence. Those were depositions taken abroad before a warrant of arrest was issued abroad, and were depositions upon which such warrant of arrest abroad was issued. Supplemental depositions, taken abroad after the warrant of arrest abroad was issued, had been received in evidence by the commissioner. It was contended that there was error in admitting them in evidence, but the court held that, even though they were inadmissible, their reception furnished no ground for the discharge of the prisoner. In the opinion of the court, delivered by the circuit judge, these observations are made on this subject: "The arguments urged upon our attention proceed very much upon the assumption, which is entirely erroneous, to wit, that, in this proceeding, under the writ of habeas corpus, we are sitting as an appellate tribunal. That is not our relation to the commissioner. A judge issuing a writ of habeas corpus, or a court issuing a writ of habeas corpus, in these cases, is exercising an independent and original jurisdiction, with a right to inquire, doubtless, whether the prisoner is legally held. What shall be the scope and extent of that inquiry, has been very much controverted in the courts of this circuit. We say, on that subject, first, that we are not sitting as an appellate tribunal, for the purpose of reviewing the proceedings before the commissioner, as upon allegation of error. * * * The question to be determined, upon habeas corpus, in these cases, is, as we apprehend—is the prisoner rightly held, or is he to be discharged? If the commissioner, having acquired jurisdiction of the subject-matter, and of the prisoner, commits an error in the reception of evidence, it does not follow, by any legal rule, that his proceedings are to be held for naught and void for error. The prisoner may, nevertheless, be legally held." The opinion then proceeds to recite the foregoing adjudications in this circuit as to the power and duty of the court, on habeas corpus and certiorari, to entertain the question of the sufficiency of the evidence before the commissioner to warrant the commitment for surrender, and arrives at the conclusion, that notwithstanding what was said in the Henrich Case, and what was done in the Farez Case, the question whether, in an extradition case, the court is at liberty, on habeas corpus, to weigh the evidence before the commissioner and inquire whether it would have reached the same conclusion, and, if it would not, to discharge the prisoner, is still open for consideration. The question was not, then, definitely passed upon, but, assuming that an inquiry into the evidence could be made by the court, the court held, on the evidence in that case, that the commitment of the prisoner for extradition was justified.

The question thus referred to is presented

in this case, and is now to be decided. It is contended, for the prisoner, that this court, on these writs, is to examine into the merits of this case, as fully as if the proceedings had originally been instituted before it.

The treaty with Belgium provides (article 6) that a preliminary warrant shall be issued by the president, for the apprehension of the fugitive, "in order that he may be brought before the proper judicial authority for examination," and that, "if it should then be decided, that, according to the law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases." In the treaty with Prussia, of June 16, 1852 (10 Stat. 965), the language of article 1 is, that "the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." The language of this treaty with Prussia implies that, if the examining magistrate deems the evidence sufficient to sustain the charge, and so certifies to the president, a warrant of surrender must issue, much more strongly than does the language of the treaty with Belgium. Yet, in the case of this very prisoner, when his surrender was asked under the treaty with Prussia, for the same alleged offences of murder and arson that are involved in the present case, after the examining commissioner had committed him for extradition, and this court had, on writs of habeas corpus and certiorari, held the commitment to be legal, and the proceedings had been certified to the president, the president refused to issue a warrant of surrender. In re Stupp [Case No. 13,562]. In that case, his refusal was based upon the construction of the treaty. It is not to be doubted that he might, under like circumstances, properly base his refusal upon want of sufficient evidence of criminality. His refusal was in the exercise of an undoubted right. Whether he would have authority to order and enforce the surrender of a fugitive, after his discharge on habeas corpus subsequently to his commitment by a magistrate for surrender, it is not necessary now to consider. Action, such as was lawfully had in the Case of Stupp, shows that the decision of a court on habeas corpus in an extradition case, that the prisoner is lawfully held, is not binding on the executive in reference to the same question of law. Nor could it be binding on the executive if, on the writ, the prisoner were declared to be lawfully held on the facts and merits of the case. The 1st section of the act of August 12, 1848 (9 Stat. 302), which is re-enacted as section 5270 of the Revised Statutes, provides, in substance, that, if, on the hearing before the magistrate who issues the warrant of arrest, he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of the foreign government, for the surrender of the accused, according to the stipulations of the treaty, and he shall issue his warrant for the commitment of the accused to the proper jail, there to remain until such surrender shall be made. The 3d section of said act, which is re-enacted as section 5272 of the Revised Statutes, provides, in substance, that it shall be lawful for the secretary of state to order the person so committed to be delivered to the foreign government, to be tried for the crime in question. Under these provisions of law, the president has undoubtedly the right to refuse to surrender the accused, even though a warrant of commitment for his surrender is issued by the examining magistrate, and his certificate that the evidence is sufficient to sustain the charge is laid before the president, although the president would have no right to surrender the accused, in the absence of such certificate. The provision of the statute, that, with the certificate that the magistrate deems the evidence sufficient to sustain the charge, he is also to certify to the secretary of state a copy of all the testimony taken before him, indicates, that the executive discretion which the president has a right to exercise as to surrendering or not surrendering the accused is to be exercised on a consideration of the testimony in the case.

The statute gives no right of appeal or review to be exercised by any court or judicial officer. The finding of the magistrate and the testimony are not to be certified to any court or judge, but are to be certified to the secretary of state, as an executive officer representing the president in respect to extradition matters and intercourse with foreign governments. After such certificate, finding the evidence sufficient and reporting the testimony, is made, the president may or may not order the surrender. In practice, the executive has claimed and exercised the right, under such circumstances as have been shown, to refuse a surrender, even on a point as to which, on habeas corpus, it was judicially held, in the particular case, that a surrender was proper. Everything in the statute indicates that no review of the decision of the committing magistrate on the facts was contemplated, other than a review by the executive. The chief justice of the supreme court of the United States may be the examining and committing magistrate. It could never have been intended, that, under a writ of habeas corpus, any judge of the

United States, or even one judge after another, as long as the prisoner should remain in custody, should re-examine the facts in the case, until, in the end, some one of them should differ in opinion with the chief justice as to the force of the testimony, and should discharge the prisoner. As was said in Re Macdonnell [supra]: "If the judge, or the court, in these cases where extradition is sought, is at liberty, on habeas corpus, to weigh the evidence before the commissioner, and inquire whether they would have reached the same conclusion, the result is, that the finding of the commissioner, and the finding of successive courts and judges issuing successive writs of habeas corpus, so long as judges can be found, instead of having any force or effect, can be assailed, and assailed again, until at last, perhaps, some doubting mind may be found, who will say, 'I would have reached a different conclusion upon the evidence,' and thereupon discharge the prisoner. To that view of the duty of the court, touching the weight of evidence before the commissioner, we cannot subscribe."

In full conformity with these views, the great purposes of the writ of habeas corpus can be maintained, as they must be. The court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But, such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion. Nor, if there was legal and competent evidence of facts before the commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court, on habeas corpus, to hold the proceedings illegal and to discharge the prisoner because some other evidence was introduced which was not legal or competent, but was held to be so by the commissioner and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of fact from that at which the commissioner arrived. In other words, the proper inquiry is to be limited to ascertaining whether the commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender, without any legal evidence.

These principles we regard as in harmony with the current of decisions made by the supreme court, as cited in the case of Ex parte Lange, 18 Wall. [85 U. S.] 166, and with the doctrine laid down in that case, and as drawing the proper line of distinction between what can and what cannot be reviewed on habeas corpus, in a case where no affirmative direct power of review is given to the court issuing the writ, other than what is implied in the power to issue such writ, and where a power of review is substantially given by statute to, and in practice exists in, the executive department of the government.

Under these principles, the proceedings before the commissioner in this case must be examined.

It is contended, for the prisoner, that there was no legal evidence before the commissioner, of the commission of either of the crimes charged, on the ground that none of the documents or papers produced from Belgium were proved in such manner as to be admissible in evidence.

The 2d section of the act of August 12th, 1848 (9 Stat. 302), which was entitled, "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," was in these words: "In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." The act of June 22, 1860 (12 Stat. 84), provided as follows: "In all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of an extradition case under the second section of the act entitled, 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders,' approved August twelfth, eighteen hundred and forty-eight, such depositions, warrants and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in the said second section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this act." It was held by this court, in Re Henrich [Case No. 6,369], that the effect of this act of 1860 was to enlarge the class of documentary evidence which might be adduced in support of the charge of criminality, be-

yond that authorized by the 2d section of the act of 1848, so as to admit any depositions, warrants, or other papers, which were so authenticated that the tribunals of the country where the offence was committed would receive them for the same purpose. The 2d section of the act of 1848 provided for the admission in evidence only of copies of the depositions on which an original warrant of arrest in the foreign country was granted, and required that such copies should be certified under the hand of the person issuing such warrant, and should be attested upon the oath of the party producing them to be true copies of such original depositions, and then allowed such copies to be received in evidence of the criminality of the accused. The act of 1860 provided for the admission in evidence of any depositions, warrants, or other papers, or copies thereof, on the hearing of an extradition case under the 2d section of the act of 1848, and enacted that they should be received in evidence for the purposes mentioned in said 2d section, that is, to show the criminality of the accused, if they should be legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused should have escaped; and further enacted, that the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country should be proof that any paper or other document so offered was authenticated in the manner required by the act of 1860. Such being the state of the statute law, the Revised Statutes of the United States, approved June 22d, 1874, enact, in section 5271, as follows: "In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested, upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section." Section 5271 is the only section of the Revised Statutes which relates to the subject of evidence in extradition cases. By section 5596 it is provided, that all acts of congress passed prior to the 1st of December, 1873, any portion of which is embraced in any section of the Revised Statutes, are repealed. Some portion of the 2d section of the act of 1848 is embraced in section 5271 of the Revised Statutes. The subject-matter of both sections is the same, namely, the admissibility in evidence of copies of the depositions on which an original warrant of arrest was granted in the foreign country. That is the subject-matter of both sections, and the only subject-matter of either. The 2d section of the act of 1848 prescribed two requisites in respect to the copies of such depositions, and only two, to wit, that they should be certified under the hand of the person or persons issuing such warrant, and should be attested upon the oath of the party producing them to be true copies of the original depositions. Section 5271 prescribes a third and additional requisite, besides prescribing the two above named, to wit, that the copies shall be authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped, and also provides a mode of proof in regard to such authentication. But, if we turn to the act of 1860, we find that its subject-matter is not, nor is any portion of it, embraced in section 5271 of the Revised Statutes. The entire subject-matter of section 5271 is taken from the 2d section of the act of 1848, and no part of it is taken from the act of 1860. It is true, that the third and additional requisite, before referred to as found in section 5271, appended to the two requisites found in the 2d section of the act of 1848, is a requisite the language of which is borrowed from the act of 1860, and is there found appended to a different subject-matter. But, in no proper sense, is any portion of the act of 1860, that is, any portion of its subject-matter, embraced in section 5271. Consequently, by virtue of section 5596, section 5271 is not in force in lieu of the act of 1860, although it is in force in lieu of the 2d section of the act of 1848. Moreover, section 5596 refers to "all parts of such acts not contained in such revision," as "having been repealed or superseded by subsequent acts, or not being general or permanent in their nature." The expression, "all parts of such acts," means, all parts of acts passed prior to December 1st, 1873, any portion of which is embraced in any section of the revision; and the purport of the provision is, that, if any portion of a particular act is embraced in any section of the revision, the parts of the same act which are not contained in the revision have been repealed or superseded by subsequent acts, or were not general and permanent in their nature. But, this leaves unaffected the acts no portion of which is embraced in any section of the revision; and, in a subsequent part of section 5596, it is expressly enacted, that all acts passed prior to December 1st, 1873, "no part of which are embraced in said revision, shall not be affected or changed by its enactment." These provisions of section 5596 qualify the general language of section 5595, to the effect that the preceding 93 titles embrace the general and permanent statutes of the United States in force on the 1st of December, 1873,

as revised and consolidated. If there be a general and permanent statute which was in force on the 1st of December, 1873, and no part of it is to be found in the Revised Statutes, it is to be regarded as still in force. There is nothing inconsistent with the provisions of section 5271 in regarding the act of 1860 as still in force. The act of 1860 applies to all depositions, documents and papers, except those referred to in section 5271, namely, depositions on which an original warrant in the foreign country was granted, and section 5271 applies solely to the latter depositions. It cannot be said that section 5271 embraces the entire subject of the documentary evidence to which the statutes in force when the Revised Statutes were enacted related, because, the subject of the 2d section of the act of 1848 is transferred bodily to section 5271, while nothing of the subject of the act of 1860 is transferred to that section. Therefore, it cannot be said that the act of 1860 is repealed by implication, especially, as the declaration, in section 5596, as to what is repealed, does not include the act of 1860. It may very well have been true, that the designation of any depositions, in the act of 1860, had the effect to make admissible, under that act, depositions on which an original warrant of arrest was granted abroad, on a compliance only with the requisites prescribed in the act of 1860, and without a compliance with the requisites which had been prescribed in the 2d section of the act of 1848. But, congress have now provided, by section 5271, that the depositions on which an original warrant of arrest was granted abroad shall be admissible only on a compliance with the terms of that section, while it has left the act of 1860 to be in force, and to apply to all the subject-matter covered by it, except the depositions mentioned in section 5271. The court has no right, in view of the precise terms of the statute law, to read section 5271 as if all there is in it that is taken from the 2d section of the act of 1848 were out of it, and as if, in the place of that, there were inserted in it the subject-matter of the act of 1860.

The verified complaint in this case, made by the consul of Belgium, at New York, has annexed to it an original warrant for the arrest of the accused, issued by M. Giron, examining judge of the tribunal of first instance at Brussels, on the 27th of April, 1872. It purports, on its face, to be issued "upon the documents in the case, and on motion of the king's attorney, bearing date the 14th of October, 1871." It does not specify what the documents referred to are, nor are there any documents annexed to the complaint, or referred to in it, as being the documents referred to in the warrant.

There is, also, in evidence a copy of what may be called an indictment or accusation of the accused by the court of appeals at Brussels. This paper is in the form of a decree dated June 6th, 1872, which states, that the court has "seen the documents of the proceedings instituted by the examining judge of the court of the first instance, of Brussels," but it does not state what those documents are. It also states, that the court has heard the report made on the subject to the court of indictments by the deputy attorney general, to the purport that the attorney general of the court of appeals of Brussels "has seen the documents in the case, and the order of arrest issued the 31st of May, 1872, by the council chamber of the tribunal of the first instance, of Brussels," against the accused, but what those documents are is not stated. The order of arrest is afterwards set forth, and is not the same order of arrest first above referred to. The decree goes on to state, that the attorney general states that there exists against the accused charges sufficient to justify his indictment, for having committed the crimes charged in this proceeding, that those crimes are provided for and made punishable according to the provisions of certain specified articles of the Penal Code, and that the attorney general prays the confirmation of such order of arrest, and the commitment of the accused for trial. The decree then states, that the clerk has read to the court "all the documents in the case," but what they are is not stated. The decree then goes on to confirm the order of arrest of May 31st, 1872, and to commit the accused for trial, and to direct an indictment to be drawn up.

There are also put in evidence 86 documents, all of which purport to be copies taken from the records of the clerk's office of the tribunal of first instance, at Brussels. All of them bear the attestation of the deputy clerk of such tribunal, and his signature is verified by M. Giron, the judge who issued the warrant of arrest of April 27th, 1872. The signature of M. Giron is verified by that of M. Pulzeys, the general secretary of the ministry of justice at Brussels; and the signature of M. Pulzeys is verified by that of Leopold Orban, a councillor in the ministry of foreign affairs of Belgium. Of these 86 documents, 55 are of dates from October 14th, 1871, to April 26th, 1872, that is, prior to the date of the order of arrest of April 27th, 1872; 7 others are of dates from April 29th, 1872, to May 30th, 1872, that is, prior to the order of arrest of May 31st, 1872; and 24 others are of dates subsequent to June 6th, 1872. A large portion of these 86 documents are copies of depositions. None of them were specifically offered in evidence as copies of the depositions on which either of the orders of arrest before referred to was granted. They are not certified under the hand of any person to be such copies, nor are they attested upon the oath of any person to be such copies. There is, therefore, not a full compliance with the requirements of section 5271 in respect to any of them. But, if it be proper to hold, in re-

spect to such of them as bear dates anterior to the issuing of the warrant of arrest of April 27th, 1872, that those depositions must be regarded as the depositions on which that warrant was issued, so that they were not properly receivable in evidence, because of a non-compliance with the requirements of section 5271 in regard to the certificate and the oath therein required, there remain the 31 documents and depositions which bear date on and after April 29th, 1872, and the indictment or accusation, before mentioned. These papers must all of them be regarded as papers offered and receivable in evidence under the act of 1860, and as not falling under section 5271. Each of them has appended to it a certificate in this form, made by the minister resident of the United States to Belgium: "I, John Russell Jones, minister resident of the United States to Belgium, do hereby certify, that Leopold Orban, whose signature is subscribed to the foregoing paper, is, and was at the date of the same, a councillor in the ministry of foreign affairs of Belgium, and to any documents by him so signed and sealed, full faith and credit is and ought to be given; and I do hereby certify, that the foregoing document is legally and properly authenticated, so as to entitle it to be received in evidence in support of the criminal charges mentioned therein, and for similar purposes mentioned in the second section of the act of congress entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders.'" Each of the certificates bears the signature of the minister resident of the United States to Belgium, and the seal of the legation of the United States, and each is dated October 9th, 1874.

It is objected to this certificate, that it is defective in omitting to say that the document to which it refers is authenticated so as to entitle it to be received in evidence by the tribunals of Belgium. The certificate does substantially so say. The officer certifying is a local officer, accredited as minister resident to Belgium. It is only as the principal diplomatic officer of the United States resident in Belgium, that he is authorized, in this case, to make any certificate, inasmuch as the accused escaped from Belgium. The papers certified came from the records of the tribunals of Belgium, and are authenticated by functionaries of Belgium, and the plain intendment of the certificate, in saying that the document is authenticated so as to entitle it to be received in evidence in support of the criminal charges mentioned therein, is, that it is authenticated so as to entitle it to be received in evidence by the tribunals of Belgium, in support of the criminal charges mentioned therein. It is only in respect of evidence entitled to be received by those tribunals, that the minister resident to Belgium has any power to make a certificate of authenticity, and the criminal charges mentioned in the documents, and in support of which it is certified that the documents are entitled to be received in evidence, are charges of crimes against the laws of Belgium, and are charges cognizable by those laws.

The Revised Statutes were approved by the president and became a law on the 22d of June, 1874, but they were not accessible in a printed form until early in March, 1875. The certificates to the documents from abroad, in this case, were obtained in October, 1874, and the papers were put in evidence in December, 1874, and January, 1875. The proceedings took place with reference to the statutes as they were before the Revised Statutes were enacted, and were entirely regular in that view. It is satisfactory to be able to conclude that there is nothing in the Revised Statutes which affects the operation of the act of 1860, except in respect to the particular depositions named in section 5271; for it cannot be supposed that, if the attention of congress be now directed specially to the legislation on the subject, it will repeal the act of 1860, or will allow section 5271 to continue to have the operation which it must have in respect to depositions on which an original warrant abroad was granted, when the 2d section of the act of 1848 had no such operation after the enactment of the act of 1860. On the contrary, as the act of 1860 was intended to enlarge the class of documentary evidence which might be adduced in support of the charge of criminality, and as it is not known that any reason existed for legislation to afford less facilities for the admission of documentary evidence, and as a review of the legislation leads properly to the inference, that, athough section 5271 of the Revised Statutes is plain, as to its meaning, as it stands, the putting it into such form as makes it apply solely to the subject-matter of the 2d section of the act of 1848, and throw greater restrictions around the admission of the depositions named in that section, was an inadvertence, it is presumed that the inclination of congress will be so to amend section 5271 as to restore the law to the condition in which it was before that section was enacted.

Besides the documents thus properly received in evidence, there was considerable oral testimony taken before the commissioner. He had, therefore, legal testimony before him, other than the depositions taken prior to the issuing of the first warrant, on which to pass judgment in respect to the criminality of the accused. Such evidence contains testimony tending to prove the death of the deceased, his death by violence, the simultaneous burning of articles in the room where he died, the simultaneous stealing from the safe in the same room of securities to a large amount in value, the flight of the accused to England the same night, the previous poverty of the accused,

his possession of money in England, his previous acquaintance with the deceased and familiarity with the premises, a previous quarrel of his with the deceased, the flight of the accused to this country, and the tracing to his possession, while here, of securities shown to have been in the safe of the deceased at the time of his death. On these points and others bearing upon the question of criminality, testimony legally admitted contains materials for a decision of the commissioner on the question of fact, as to whether there was before him such evidence of criminality, as, according to the laws of this place, would justify the apprehension of the accused and his commitment for trial, if the crimes charged had been committed in this place. The commissioner having decided such question of fact, his decision cannot, on the principles before stated, be reviewed by this court, on habeas corpus. The writ must, therefore, be discharged, and the prisoner be remanded to the custody of the marshal.

WOODRUFF, Circuit Judge. I concur fully in the views stated by Judge BLATCHFORD in the foregoing opinion, and in the result.

Case No. 13,564.

In re STURGEON.

[1 N. B. R. 498 (Quarto, 131);[1] 2 Am. Law T. Rep. Bankr. 7.]

District Court, D. Kentucky. 1868.

BANKRUPTCY—ADVISER OF ASSIGNEE—DISCHARGE—PETITION.

1. Neither court nor register can be the general adviser of assignees as to their acts.

2. No opinion will be given on abstract questions certified to the judge by the register.

[In the matter of Edward T. Sturgeon, a bankrupt.]

BALLARD, District Judge. The questions certified by the register in this case could not, it seems to me, have arisen in the course of the proceedings before him. Neither the register nor the district judge is the general adviser of the assignee. What the assignee is to do with notes and accounts which he has been ordered to sell, and which he has not been able to sell, he must ascertain from his own attorney. When he applies "for a settlement of his accounts and for a discharge from all liability as assignee," it will then be time enough for the court to say what is to be done with the notes and accounts which he has not been able either to collect or sell. I therefore decline to give any opinion on the first question certified at this time.

The second question certified, if I understand it, is this: Can a bankrupt obtain his discharge who has never filed his petition therefor? The question is entirely abstract and I decline to answer it.

It appears that in this case the second and third meetings of creditors were ordered on application of the assignee, but still the register asks should this be done when the assets in the hands of the assignee, including the fifty dollars deposited by the bankrupt, will be insufficient to pay the costs of the proceeding. Manifestly the question asked is abstract, and consequently is not answered.

[1] [Reprinted from 1 N. B. R. 498 (Quarto, 131), by permisison.]

STURGEON (UNITED STATES v.). See Case No. 16,413.

Case No. 13,565.

In re STURGES et al.

[8 Biss. 79;[1] 16 N. B. R. 304; 10 Chi. Leg. News, 33.]

District Court, N. D. Illinois. Oct., 1877.

BANKRUPTCY — COMPOSITION WITH CREDITORS — VOLUNTARY PAYMENTS.

Where a creditor accepted a failing debtor's offer of compromise, but with a proviso that no other creditor should receive better terms; and the debtor afterwards voluntarily paid some of his other creditors in full: *Held*, that this did not vitiate the settlement.

In bankruptcy.

S. Sibley, for bankrupts.

Lyman & Jackson, for claimant.

BLODGETT, District Judge. This is an application for a re-examination of a claim proven by the Matthiesson & Hegeler Zinc Co. against the estate of Frank Sturges & Co. in bankruptcy. The claimant insists that in the fall of 1871, the bankrupts were indebted to it in the sum of $4,897.70, on an open account for goods before then sold and delivered to them: that bankrupts sought a composition with their creditors on the basis of fifty cents on the dollar of their indebtedness, and the claimant agreed to accept said terms of composition on condition that no greater sum was to be paid any other creditor. They allege, however, that the bankrupts did pay a larger sum to Phelps, Dodge & Co., and other creditors, whereby claimant became entitled to the payment of the balance of the indebtedness so compromised. Sometime in November last, the firm was adjudicated bankrupt, and this claim is now proven for $3,573.84, being for one-half the original indebtedness, and interest since December 8, 1871, the time when the composition settlement was made.

The proof shows that soon after the great fire in this city on the 9th of October, 1871, the firm of Frank Sturges & Co., who had for many years before that time been engaged in business here as wholesale dealers in metals, found themselves unable to pay

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

their debts in full. They offered to pay all creditors, whom they owed over $100, fifty cents on the dollar in full settlement of their respective demands. The creditors all accepted the proposition, and were settled with, and have been paid upon the proposed basis. Among the creditors were the present claimants, who agreed to the terms offered, but with the written understanding "that none of the other creditors, including banks, should receive better terms."

There is no proof showing or tending to show that the bankrupts paid more than fifty per cent. at the time of obtaining this composition, to any of their creditors to whom they owed over $100, with the exception of a firm in Burlington, Iowa, whose claim amounted to $113, and, on learning this fact, the claimants expressed themselves as entirely satisfied with this last transaction —the amount being so small. There is, however, no doubt but what, while negotiating for their settlement, the firm held out to all their creditors that they should consider themselves morally bound to pay in full as soon as they were able. The settlement at fifty per cent., however, was to be a legal acquittal of their indebtedness, and the only obligation to pay the balance was the moral one which any honorable debtor feels or ought to feel.

There is no proof that any creditor was paid more than this claimant in order to effect the settlement, nor that any false statements in regard to the assets and liabilities of the firm were made in order to obtain the settlement.

It does appear from the proof that after the settlement, and after the firm resumed business, and during the latter part of 1872 and the first half of 1873, the firm paid several of their old ante-fire creditors in full, including the Northwestern National Bank, Phelps, Dodge & Co., of New York, Morehead & Co., of Pittsburgh, and others.

The payments to the bank were made, to a considerable extent, by turning out paper, while that to Phelps, Dodge & Co. was made by the way of a sale of a valuable lot and building in this city, owned by Mr. Sturges, which was heavily mortgaged. Phelps, Dodge & Co. assumed the mortgage, and applied the old balance on the amount paid for the equity.

The firm of Morehead & Co. received their payment by way of a trade, in which they took a house and lot in this city belonging to Mr. Lee, one of the firm, and a part of the balance of the old debt was applied on the purchase money. One of the other firms has since received some payments to apply on the old debt by means of extra commissions on business transacted with or for them. All these payments were made after the firm was legally released from the obligations to make them, and no doubt, were made in pursuance of the intention expressed by the firm to pay all their debts as fast as able. The financial panic of September, 1873, and the subsequent depression in business, has prevented the consummation of this laudable purpose.

The claimant, as well as many others of the firm's old creditors remains unpaid, except as to the sum accepted in composition.

This court has recognized the principle too frequently to require authority, that when a debtor seeks a settlement with his creditors at less than the amount due them, a payment to one, of more than the amount held out as the sum to be paid all, vitiates the transaction and authorizes each creditor to collect his entire debt, or at least, so operates in favor of the creditors imposed upon. But the creditors here make out no such case. What the debtors paid after being legally released, were mere voluntary payments, which could not have been enforced, and although it might seem more in accordance with our ideas of the principles of justice and fair dealing, that when the debtors found themselves able to apply any of their means in payment of their old canceled obligations, they should have done so pro rata, and treated all their creditors alike by making a general dividend; yet I cannot see that their failure to do so, revives the old debts, and makes them liable for the payment of these old debts.

Men released from their debts by the statute of limitations, or as this firm was by a legal composition, may have peculiar personal reasons for acknowledging their moral obligations to one creditor, and afterwards paying him in full, which do not apply to all their creditors, and it would be a harsh rule to say that because a man recognized his moral obligation in one case, it revives a canceled legal obligation toward all his old creditors.

This would make it dangerous for men to recognize moral obligations, for while all debts may be equally binding legally, we know that all men recognize a higher degree of moral obligation to pay some than they do others.

The claim should be expunged.

STURGES (BANK OF CLEVELAND v.). See Case No. 861.

Case No. 13,566.

STURGES v. COLBY et al.

[2 Flip. 163;[1] 10 Chi. Leg. News, 395; 7 Am. Law Rec. 48; 3 Cin. Law Bul. 643; 18 N. B. R. 168.]

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

BANKRUPTCY—SUBSCRIPTIONS, WHEN LEGAL OBLIGATIONS—BURDEN OF PROOF.

1. Subscriptions in aid of college endowments become fixed and legal obligations as soon as the college performs its undertaking.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

2. Thus becoming valid contracts they may be proved in bankruptcy.

3. Whenever the subscriptions are settled by giving promissory notes, every presumption of law favors the validity of the transaction, and the onus of proof is on the one denying it, if he would impeach it.

[This was a suit by Stephen B. Sturges, assignee of Hubbard Colby, bankrupt, against Hubbard Colby, Denison University, and others.]

Durlam & Seyman, for complainant.
Bishop & Adams, for Denison University.

WELKER, District Judge. This was a proceeding by the assignee to settle and have declared the liens of the different lien holders on the bankrupt's estate, and the amount and priority of such liens, and for a sale of the property. The Denison University was made a party defendant, and called upon to answer and state the amount of its claim and the nature thereof. To this the university answered, setting forth its claim and mortgage to secure the same as hereinafter stated.

After the coming in of this answer, the plaintiff filed a supplemental petition setting forth that a portion of the debt secured to the university was a gift voluntarily made by Colby while insolvent, and should be set aside as to creditors, it being a subscription to the university endowment fund.

To this supplemental petition the university answered: (1) Denying the charge of insolvency. (2) If the facts stated in the supplemental petition were true as to the insolvency, the consideration of so much of the university claims as are founded on subscriptions to its funds, as in its answers set forth, was sufficient and valid.

The character of the subscription will appear in the subsequent statements in this opinion. By the answers of the university it is seen that disclosures are called for both by the original and supplemental bills. These answers being responsive to the requirements called for by the petition, no testimony is needed to sustain the answers. It will be seen that to set aside a portion of the university's claim the supplemental petition alleges that ever since 1864 Colby has been insolvent. This is denied, and it is denied that he was insolvent in January, 1872, or before that time. The answer to the supplemental petition then states in substance that in the fore part of the year 1865 the university, through its agents to carry out more fully the objects of its organization, proceeded to raise an endowment fund of $100,000, and Colby subscribed $2,000; and at great expense said university proceeded until the full sum of $100,000 was subscribed and raised. That said Colby examined said subscriptions and fund raised, and found and agreed with this defendant (university,) and represented to and agreed with the other subscribers to said fund that said $100,000 had been raised. And, therefore, said Colby, in satisfaction of his subscription, in November, 1866, gave his note for $2,000, dated November 1, 1866, at two years, with interest annually from November 1, 1866. Said Colby induced others to settle their subscriptions to said fund.

Said $2,000 note was taken in payment of said Colby's subscription. That in consequence of said subscriptions, greatly increased expenses and extension of facilities have been entered upon by said university.

That in January, 1872, the university was in need of a new building and sought subscriptions for it, and Colby subscribed $500, and paid down $100. The building was built on the strength and faith of this and other subscriptions.

That March 27, 1872, Colby made a loan of said university of $7,500, part of said endowment fund, and gave the mortgage set out and attached to the answer to the original bill. Of this $7,500, the sum of $2,052 was for amount due on said note of $2,000 given in settlement and satisfaction of said original subscription; and $400 was for the second subscription, being the one of $500. The balance to make said $7,500 loan was advanced in cash, being $5,048. Both of said subscriptions were in manner aforesaid satisfied, settled and discharged.

The facts of the case being as before stated, we will proceed and see what the law as applicable to this state of facts is. In Ohio it is the policy of the law to promote and favor the interests of education.

In 16 Ohio State, on page 27 (Ohio Wesleyan Female College v. Higgins) Judge Scott, in giving the opinion of the court, says: "It has at all times been the declared policy of this state to favor and promote the interests of education and the general diffusion of knowledge among the people. To this fact the provisions of the constitution itself, our system of school laws and acts providing for the incorporation of institutions of learning, bear ample testimony." On page 28, the court further say: "This subscription then was authorized by law. It was evidently intended by the maker that the managing officers of the corporation should rely upon it as a part of the means and resources of the institution. It was but reasonable that they should rely upon the solemn pledge thus given, and incur liabilities upon the faith of it. And that such liabilities were in fact incurred, the petition distinctly avers."

The question here raised is not a new question in courts of bankruptcy. It was before the United States court in and for the district of Delaware, and was decided about the year 1875 in the case of Capelle v. Trinity M. E. Church [Case No. 2,392]. The following is the syllabus of the case: "A claim was proved by a church corporation, founded upon a verbal promise by a bankrupt to M. that he (the bankrupt) would pay $800, if M. would subscribe a portion of the

indebtedness due from the church to M., the promise being subsequently publicly announced in the church in the presence of the congregation. It appeared by the proof that the expenses had been incurred by the trustees of the church upon the faith of the subscriptions generally, though not that any definite expenditure was made on the faith of this particular subscription. Held, that the promise was founded on a good legal consideration upon two alternative grounds. It is one of two mutual promises for the benefit of the church, each being the consideration of the other, and the claim provable by the beneficiary; and, secondly, as a promise to the church, partly upon which expenses were incurred, it would sustain an action of assumpsit, and might be proved in bankruptcy."

See, also, Amherst Academy v. Cowls, 6 Pick. 427, particularly as to consideration and burthen of proof, notes being given.

The case of Farmers' College v. Executors of McMicken, 2 Disn. 495, is another Ohio authority supporting the claim of the university.

In this case it is distinctly held: "1st. A gratuitous subscription, to pay certain moneys toward a particular stated fund to be raised for the endowment of certain professorships in a college, become a fixed legal obligation as soon as the college has performed its undertaking and raised the required amount of reliable subscriptions. 2d. Such subscription to the college to do an act if the college will perform a prescribed duty on its part, if accepted, makes the contract complete."

In Williams College v. Danforth, 12 Pick. 541, it is so held more strongly than in the Farmers' College Case, if possible; and is the case of a college, and in substance is like the endowment subscriptions for Denison University.

We will cite no more authorities, but will say in conclusion that if the claim of the university was founded upon the original subscriptions, it would be good according to the authorities.

But in this case, the university's claim is well fortified. If there was ever any doubt, that is obviated by the fact that the original subscription was settled, satisfied, and paid by note of $2,000 ten years ago. Then that note was settled by a new note given on this loan.

The $500 subscription was also settled by a note being given and entering into this $7,500 loan. After such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it. See 6 Pick. 431, opinion of Parker, C. J.

Let a decree be entered for the amount of the money in favor of Denison University.

STURGES v. DENISON UNIVERSITY. See Case No. 13,566.

STURGES (FOSDICK v.). See Case No. 4,956.

Case No. 13,566a.

STURGES v. The MARY STAPLES et al.

[Betts' Scr. Bk. 561.]

District Court, S. D. New York. Oct. 20, 1857.

PRACTICE IN ADMIRALTY—COSTS—PART OWNER—DEMAND FOR SECURITY.

The libelant [Daniel L. Sturges], owning one-eighth of the brig, filed his libel, alleging that the majority owners were about to send her on a voyage to which he had objected, and refused to give him a bond for her safe return. On the libel being filed and the vessel seized, the bond demanded by the libel was given by the majority owners, and the vessel discharged from custody. The libel was filed before any actual demand of the bond was made by the libelant of the other owners [Horace Staples and others], and they claimed that he was not entitled to recover costs against them.

Benedict, Burr & Benedict, for libelant.
Beebe, Dean & Donohue, for respondents.

HELD BY THE COURT: That a part owner has a right to protect his interest by admiralty process against the employment of the property against his dissent, until security is given him to the value of his interest that the vessel shall be safely restored to her home port. That his title to the appropriate remedy to maintain this right is not dependent upon any demand of the security from his co-owners. On his dissent to their putting her upon any particular voyage, their authority as representatives of the majority interest becomes suspended in that respect until they give him the indemnity appointed by law. That the libelant was not bound, therefore, to demand of the other owners the fulfillment of the duty cast upon them by law. That the submission of the majority owners to the requirement of the suit is tantamount to a decree of the court in his favor, and carries with it a right to costs, as an incident of the result. The discretion of the court to grant or withhold costs, since the act of congress of February, 1853 [10 Stat. 161], must be regarded as rescinded in effect. Decree for libelant for costs.

Case No. 13,567.

STURGES v. MAXWELL.

[Nowhere reported; opinion not now accessible.]

STURGES v. The MAZEPPA. See Case No. 11,271.

Case No. 13,568.

STURGES v. STETSON.

[1 Biss. 246; [1] 3 Phila. 304; 15 Leg. Int. 404; 2 Wkly. Law Gaz. 342.]

Circuit Court, S. D. Ohio. Oct. Term, 1858.

RAILROAD COMPANIES—STOCK—FRAUDULENT ISSUE—CHARTER—CONVERTIBLE BONDS—EXECUTORY CONTRACT.

1. The sale of stock in a railroad company by the directors at a less rate than the price fixed in the charter, is a fraud upon the law and the stockholders.

[Cited in Fosdick v. Sturges, Case No. 4,956; State Ins. Co. of Missouri v. Redmond, 3 Fed. 767; Flinn v. Bagley, 7 Fed. 787; Taylor v. South & N. A. R. Co., 13 Fed. 155.]

[Cited in Fitzgerald v. Fitzgerald & Mallory Const. Co., 59 N. W. 870; Jackson v. Traer, 64 Iowa, 477, 20 N. W. 767; Oliphant v. Woodburie Coal & Min. Co., 63 Iowa, 338, 19 N. W. 214.]

2. The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void. Stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares.

[Cited in Foster v. Seymour, 23 Fed. 66.]

[Distinguished in Wood v. Whelen, 93 Ill. 163.]

3. Stock can be created only by contract—there must be an agreement to take it.

4. A power given to the directors by the charter to sell the property of the company or notes and bonds belonging to it, does not apply to the capital stock, nor does the power to determine the time and terms of payment of subscriptions for stock have any reference to its price.

[Cited in Kitchen v. St. Louis, K. C. & N. Ry. Co., 69 Mo. 230.]

5. The case is different in principle from the sale of stock on execution or under the charter on default of payment, in which case the gain or loss is that of the delinquent stockholder, the other stockholders not being in any way affected.

6. It is not necessary that the charter contain a prohibition against taking subscriptions at less than the charter price.

7. Although to an innocent holder the company would be liable for stock thus issued, these facts constitute a good defense to an action upon an executory contract for the purchase of such stock.

At law.

Goddard & Stanberry, for plaintiff.

Worthington & Matthews, for defendant.

McLEAN, Circuit Justice. This action is brought on a promissory note for $24,000, made to plaintiff by defendant, dated February 4th, 1853, and payable on demand. The questions before the court are raised by the ninth plea, which states that the Hillsboro and Cincinnati Railroad Company, on the 31st of January, 1853, was engaged in the construction of its line of road from Cincinnati to the Ohio river, at or opposite Parkersburg, in Virginia; that its capital stock, under various acts of the legislature, was five millions of dollars, and was divided into shares of fifty dollars each; that the subscriptions of stock were regularly under the control of the board of directors for the time being, yet that neither the board of directors nor the company had power by their charter, or by the laws of the land, to issue and dispose of stock at less than fifty dollars per share; that the plaintiff, being a dealer in railroad stocks, entered into an unlawful scheme and device, with the board of directors, that they should execute to him a bond for $750,000, payable in January, 1858, without interest, and within four years from date, convertible into fifteen thousand shares of stock, at fifty dollars each; and that the said bond should be sold and delivered to the plaintiff for $521,677, payable on the call of the company, which sum was less by $228,333 than the amount of the shares purchased by him; and the plea further averred that the plaintiff, on the 4th of February, 1853, still holding six hundred shares of the above purchased stock, of which he represented himself to be the lawful holder, induced the defendant to purchase the same, and as a consideration for which he gave the promissory note on which the action is founded; and the power of the directors to issue the stock by the charter or under the laws of the state, at less than fifty dollars for each share, is denied.

To the special plea a general demurrer was filed. In the original act of incorporation, the capital stock was limited to three hundred thousand dollars, to be divided into shares of $50 each. The sum of one hundred and fifty thousand dollars was required to be subscribed, before the structure of the road should be commenced. In a subsequent act, this sum was reduced to one hundred thousand dollars.

The 12th section authorizes the directors to require payment of capital stock subscribed, by installments, as they shall think fit; and if the installment shall remain unpaid for sixty days after the time required, the board may collect the same by suit, or shall have power to sell the stock at public auction. By the 15th section, the directors are authorized to mortgage the capital stock, to secure the payment of money borrowed.

The act of 1849 increased the capital stock to nine hundred thousand dollars; and the amendatory act of 1851 increased it to five millions of dollars. By a special act of 5th of February, 1851, the company was authorized to sell its bonds, issued for loans, and its notes and certificates, payable in money or property received as donations, or in payment of subscriptions to its stock, above or below par.

By the 5th section of the original act, the affairs of the company were vested in seven directors, a majority of whom were authorized to act; and, by the 6th section, it is declared that the directors may determine,

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

"the times and terms of payment of stock."

There appears to be nothing in the various legislative acts that constitute the charter of this company, which is not common to other railroad companies chartered in this state. In the consideration of this case, it is necessary to ascertain the nature of the contract between the directors and the plaintiff. Was there a sale, or a subscription of stock, or both? When the parties came together, with a view to this transaction, there is no pretense to say that the fifteen thousand shares were stock. They constituted a part of the capital stock, as provided in the charter, but in no other sense were they stock. The corporate powers of the company were conferred for the express purpose of creating stock as a means of constructing the railroad. As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock, stock. In a legal point of view, it is important to call things by their right names. This is especially necessary when the effect of the exercise of corporate powers is to be determined.

Stock can be created only by contract, whether it be in the simple form of a subscription or in any other mode. There must be an agreement to take the stock, and nothing short of this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called capital stock in the charter, because the corporate capacity to create it is given. The term stock, as used in the charter, before it is taken by subscription, means nothing more than a power in the directors to receive subscriptions for stock.

The plea sufficiently shows that there was no sale of stock to the plaintiff, which had been previously issued, but an attempt to create the stock and sell it at the same time, as one transaction; and it appears that the discount of nearly one-third of the shares purchased, was a part of the contract of subscription; and this presents the great question in the case, whether the directors had power to issue the stock for less than its par value.

If it is not admitted in the argument, it is not controverted, that the commissioners who, before the organization of the company, received subscriptions of shares, had no power to receive them for less than the amount stated in the charter. But it is said that the subscription of the plaintiff was not received by the commissioners, but by the board of directors, who exercised all the powers of the corporation; and among others, the power of sale over its property; that the sixth section of the charter gives them express power over the stock, "to determine the time and terms of payment."

As capital stock is not property until it shall be subscribed for, the power given to the directors in the charter, to sell the property of the company, does not apply to the disposition of capital stock; and it seems to be clear that the power to determine the time and terms of payment of subscriptions of stock, can have no reference to its price. The charter declares the shares of the capital stock shall each be fifty dollars; and it would be contrary to all known rules of construction to say that a provision that applies only to the payment of stock subscribed, shall be so construed as to repeal the provision that fixes the value of each share.

There may be many instances where land is purchased for a depot, or for other purposes connected with the road, or where work has been done on the road, or rolling stock furnished for it, a subscription for stock may be given, by the directors, in payment. But, whether land, labor, property or money be received in payment, the principle is the same. The directors may regulate the time and terms of payment, but they have no power over the price of each share.

In declaring that the capital stock should be divided into shares of fifty dollars each, the law was designed to give the same permanency to the limitation of the shares, as to the limitation of the capital stock. A subscription procured of fifteen thousand shares, amounting to the sum of seven hundred and fifty thousand dollars, with the understanding that it should be discharged on the payment of about one-third less, was a fraud upon the law and upon the stockholders. The term fraud is here used in no other sense than as an act done without the authority of law, and against the provisions of the charter, and this epithet legally applies, however innocently the act may have been done by the directors.

In regard to the price of the shares, the directors have no greater power over it than the commissioners had. They were both the instruments of the law, and were alike bound by its provisions. If power had been given to either to exercise a discretion so vital to the success of the scheme, as to vary the price of shares, it would have destroyed all confidence in the enterprise. The plaintiff seemed to have been convinced of this, from the plan adopted to receive from the company the first bond for seven hundred and fifty thousand dollars, to give to the act an appearance of fairness on the books of the company. It is essential to the success of any enterprise which involves the expenditure of money, that the contributors should be placed upon an equal footing in regard to the money paid. In this case the plaintiff received in stock $228,333 more than he paid for. This was a fraud on the stockholders who had paid in full for their shares.

It is said the directors had power to secure the payment of loans, by mortgage on capital stock. This is admitted. In the 16th section of the first act it is provided, that to secure the payment of money and the interest thereon, borrowed, "the directors may pledge, by mortgage or otherwise, their en-

tire road, fixtures, and equipments, with the income and resources thereof, together with the capital stock."

What was meant by the capital stock in this provision? Does it refer to the stock named in the charter, and for which no subscription has been made? Such stock is a legal fiction. It is not in esse, and, as such, cannot be a subject of mortgage. What security under the mortgage could it afford? It is, at least, nothing more than a right to subscribe for stock, which is common to all persons; and every one who does subscribe, confers a favor on the company. The power given to the directors to pledge the capital stock was, undoubtedly, intended to cover the capital stock, which was owned by the stockholders, and was property that might be mortgaged at the time.

It is admitted that stock may be sold on execution after judgment against a stockholder, under the statute, or it may be sold at auction, under the charter, for default of payment, at less than its nominal value. In either case the stock being property may be sold, as other personal property, for what it may bring. On a sale at auction, or execution, nothing is sold but the interest of the stockholder, and the purchaser acquires only his right.

If the stock has been paid for in part only, the new owner must pay the installments required under the rules of the company; and if he fail so to do, the stock may be again sold. The same rule of procedure applies where the stock is sold on execution. In neither case is it important that the stock should sell for the amount paid on it. If it sell for more it is the gain of the delinquent stockholder; if for less, it is his loss. But, by the sale, the interest of the other stockholders is not affected. If the stock has been paid in full, and it sell for half the amount so paid, the sale is valid and the interests of the other stockholders remain unaffected. The stock, like other property, being subject to the claims of creditors, is liable to loss on forced sales.

But such a procedure is altogether different in principle from the act of taking subscriptions of stock. It is said there is nothing in the charter which prohibits the directors from taking subscriptions of stock for less than fifty dollars a share.

No such provision was necessary. The duties of the directors are plainly pointed out in the charter, and as their powers were wholly derived from that instrument, it was not necessary to prohibit them from doing that which the charter did not authorize them to do. The charter fixed the rates at which the shares should be subscribed. This is matter of law, and is no more subject to the discretion of the directors, than it was to the discretion of the commissioners, who first received subscriptions.

From the authority given to the directors to sell "notes, bonds, scrip, and certificates for the payment of money or property, which the company had previously received, as donations, or in payment of subscriptions to the capital stock," above or below par, an argument is drawn that stock may be disposed of to subscribers for less than fifty dollars a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds, or other instruments for the payment of money, be transferred at less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious; and this was the reason for the above provision. Without it, the sale of the bonds, &c., would have been illegal.

A certificate of stock was issued to the plaintiff for fifteen thousand shares, amounting to the sum of seven hundred and fifty thousand dollars, of which only five hundred and twenty-one thousand six hundred and seventy-seven dollars were paid, which was less for the shares than the price fixed by the charter, by two hundred and twenty-eight thousand three hundred and three dollars. This sum, distributed among the share-holders at the time of the transaction, will show the loss they sustained; and if this be a correct construction of the powers of the directors, they may continue to reduce the price of stock, at every subsequent subscription, down to five or ten dollars a share, distributing the loss upon prior stockholders. The last subscribers, at whatever rate, would stand on an equality as to future dividends, and in all other respects, with the previous subscribers for stock, who had paid in full for their shares. The injustice of such a scheme requires no demonstration. It is in conflict with the charter.

[Such has been the depression of railroad enterprises in this country, that I can readily conceive many stockholders who have largely subscribed and paid for stock might be willing to sacrifice their stock to complete the road; and such a high and patriotic motive, prompted by considerations of the public interests, is not to be condemned. But such an arrangement could only be carried out legally, if at all, by a voluntary acquiescence, in the surrender of a part or the whole of his stock, by every stockholder.] [2]

From the high character of the individuals who compose this company, I feel bound to say that in my judgment, their error has arisen from a misconstruction of their corporate powers. But the principles of law apply to the act, and not to the motive, where no moral turpitude is involved. I think the subscription of the plaintiff, as made, was void.

[Whatever right the plaintiff may have against the defendant arises from the sale to him of the six hundred shares of stock in controversy. The stock was to be transferred to the defendant on the payment of the note on which this suit is brought. Under the de-

[2] [From 15 Leg. Int. 404.]

murrer, any defect in the plea is open to the objection of the plaintiff. And he takes exception to the averment of value in the plea, as it is laid under a videlicet, and is, therefore, not material.] [2]

The averment in the plea is that the directors issued, or caused to be issued to said plaintiff, certificates for said fifteen thousand shares of said company's capital stock at fifty dollars a share· that is to say, at par value, dollar for dollar.

[2] [It is difficult to find, on a nice point of pleading, uniformity of decision. It is said that the office of a videlicet is to show that the party does not undertake to prove the precise facts alleged. But if the averment be material, he is obliged to prove it, though it be laid under a videlicet. Where the declaration stated an usurious agreement, on the 14th of the month, to forbear and give day for payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was non-suited; it being held by Lord Mansfield at the trial, and afterward by the court in bank, that the day from whence the forbearance took place was material, though laid under videlicet. Steph. Pl. 294; Grimwood v. Barrit, 6 Term R. 460; Hardy v. Cathcart, 5 Taunt. 2. Mr. Stephens says in his Pleadings (page 294) all material facts must be truly laid, as a videlicet, in such a case, can give no help. There is a class of facts not going to the substance of the action, which may become material allegations, and must be proved; but such facts, when laid under a videlicet, need not be proved. A videlicet will not avoid a variance or dispense with the exact proof in an allegation of a material matter. It is admitted, when time is material, and an impossible time is alleged, the pleading is demurrable. But where a material averment is made under a videlicet, it does not disperse with the exact proof of the fact laid. The objection is that the averment of value in the plea, as to the stock, is material; but, being laid under a videlicet, it is not necessary to prove it on the trial, and therefore it is not material. If the averment be material, and it is laid under a videlicet, still it must be proved as laid, according to the authorities, and consequently, on demurrer, it must be taken as true. As before remarked, there are many things connected with the essential parts of a case which, if laid without a videlicet, must be proved, but which need not be proved if laid with a videlicet.] [2]

This action is in the nature of a bill in equity for the specific execution of a contract, and the defendant may avail himself of any matter in defense, which goes to impair or make void the contract.

[In this view of the case, it is proper to refer to the averments of the ninth plea which the demurrer admits to be true. It is charged in that plea that the plaintiff entered into a corrupt agreement, through which he obtained the certificate for fifteen thousand shares of stock from the company, at a sum near one-third less than the price per share fixed by the charter; and that to induce the defendant to subscribe for the six hundred shares he represented himself to be the lawful owner of such stock.] [2]

Whatever doubts may arise from the conflicting decisions in the courts of England and of the United States, in regard to fraud, and whether certain transactions are fraudulent per se, or are only evidence of fraud, being void or voidable, there would seem to be little doubt of the character of the case as made out in the plea, and which the demurrer admits. The allegations of fraudulent acts by the plaintiff in the procurement of the stock, are coupled with a want of power in the directors so to issue it.

[This case is said to be similar to that of Schuyler's. On some points they are alike; on others they differ. In Schuyler's case the stock of the railroad had all been issued. The certificate of stock was a forgery, signed by the agent of the company, transferred to the bank on which the money was loaned. The court held that the assignee of the certificate took only the equitable right of the assignor, as a legal transfer could only be made on the books of the company; and as the certificate was forged, there was no equity in the holder.] [2]

The subscription of stock by plaintiff for less than the price of the shares fixed in the charter, was void, as against law and the power of the directors. But the stock procured by the plaintiff was open for subscription, and from the bond executed to him by the company for seven hundred and fifty thousand dollars, convertible into stock, and which he converted into stock, the books of the company represented a fair and legal transaction; and in the hands of an innocent holder of the stock so issued, the company would, I suppose, be held liable. While the law clothes a corporation with the powers of an individual to make contracts, it gives to it no immunity to practice frauds upon innocent persons. But the defendant has never received the stock assigned to him by the plaintiff. It was assigned to him as stated in the plea, and left in the trust company, to be delivered on the payment of the note sued on. But on a discovery of the frauds alleged in the plea, he refused to pay the note, and the question now is, whether he shall be compelled to carry out the contract for the stock.

If it be admitted that the defendant, on application to the company, or by legal coercion could obtain a recognition of his right to the six hundred shares of the stock, on the books of the company, is he bound to take such a course? If on a full knowledge of the facts set up in his plea, the defendant takes the stock, he holds it subject to the right of the

[2] [From 15 Leg. Int. 404.]

[2] [From 15 Leg. Int. 404.]

stockholders, prior to the subscription of the plaintiff, to have it reduced to the charter value of the shares. This would take from him nearly one-third of his shares.

The contract of the plaintiff is executory. He occupies a point which gives him the option to pay the money, and carry out the contract, or to stand on the matters in bar. which he has set up in his plea. He has taken the latter ground, and it is for the court to say whether it is maintainable.

[This stock was purchased from the plaintiff by the defendant at less than its par value; but a stockholder may sell his stock at any price he may think proper. Such sale affects no one's interest but his own. In this respect it is like all other property over which the owner may exercise his discretion.] [2]

The defendant seems to have done nothing to preclude him from the defense set up in his plea, which stands admitted by the demurrer, and which. in my judgment, is a sufficient answer to the action.

The demurrer is overruled.

Consult Otter v. Brevoort Petroleum Co., 50 Barb. 247; also, Cases Nos. 4,956 and 13,569.

Case No. 13,569.

STURGES v. STETSON.

[See Case No. 13,568.]

STURGES (UNITED STATES v.). See Case No. 16,414.

Case No. 13,570.

STURGES et al. v. VAN HAGEN.

[6 Fish. Pat. Cas. 572; [1] 4 O. G. 579.]

Circuit Court, N. D. Illinois. Oct., 1873.

PATENTS—SUIT TO DECLARE VOID—FIRST INVENTOR—FORM OF DECREE.

1. Letters patent granted Isaac Van Hagen, April 25, 1871, for "improvement in machines for punching and stamping metal," held to be null and void, and ordered to be canceled and returned to the secretary of the interior.

2. Form of decree in declaring a patent void, and ordering the same canceled, under section 58 of the act of July 8, 1870 [16 Stat. 207].

In equity. Final hearing on pleadings and proofs. Suit brought under section 58, act of July 8, 1870, by Frank Sturges, Oliver H. Lee, and William S. Potwin, assignees of Frederick M. Huntington, of his interest in the patent granted him September 3, 1872, for "improvement in machines for punching and stamping metals," No. 131,004, against Isaac Van Hagen, the patentee and owner of the patent granted him April 25, 1871, for "improvement in machines for pressing and stamping sheet-metal," No. 114,068, to set aside the said patent granted Van Hagen. Van Hagen and Huntington had been employed at the same time in the shop of Sturges & Co., and both claimed to have then made the invention. Van Hagen applied for a patent, and received it in June, 1871. Afterward, Huntington applied for a patent on the same machine, was put into interference with Van Hagen, and was finally declared by the patent office, the first inventor, and a patent issued to him September 3, 1872. The facts in relation to the interference are stated in the opinion of the commissioner, in the case of Huntington v. Van Hagen, 2 O. G. 116. After the grant of the patent to Huntington, it was assigned to Sturges & Co., who brought suit to set aside the patent of Van Hagen.

The following is the decree of THE COURT:

This cause having come on to be heard upon the bill of complaint, answer, and replication herein, and the proofs, documentary and written, taken and filed in said cause, now, therefore, on consideration thereof, and on motion of N. C. Gridley, counsel for complainant, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the letters patent of the United States of America, No. 114,068, bearing date April 25, A. D. 1871, and issued to the said defendant, Isaac Van Hagen, be, and the same is hereby revoked, vacated, and declared null and void, and of no effect, and that the said defendant Isaac Van Hagen, be, and is hereby divested of all right and interest he had, under and by virtue of said letters patent, in and to the "improvement in machines for punching and stamping metal," therein described.

And it appearing to the court, from admissions of the parties made on the hearing, that said defendant is the sole owner of said patent, it is further ordered, adjudged, and decreed that the said defendant, Isaac Van Hagen, do, within sixty days from the date hereof, surrender and deliver up to the clerk of this court the said letters patent No. 114,068. And thereupon the said clerk shall write with ink across the face of said letters patent the words, "Revoked, vacated, and declared null and void by the circuit court of the United States of America for the Northern district of Illinois," and shall then transmit the said letters patent, so canceled, properly enveloped, to the "secretary of the interior of the United States of America, Washington, D. C." And it is further ordered, adjudged, and decreed that the record of the said letters patent No. 114,068 be canceled, quashed, and annulled.

And it is further ordered that the clerk of this court, after the expiration of sixty days from the date hereof, do transmit to the secretary of the interior, Washington, D. C., a certified copy of this decree.

And it is further ordered, adjudged, and decreed that the said complainants do recover of the defendant their costs and disbursements in this suit to be taxed.

[2] [From 15 Leg. Int. 404.]

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

Case No. 13,571.

STURGESS v. BANK OF CLEVELAND.

[3 McLean, 140;[1] 1 West. Law J. 207.]

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

JUDGMENT—LIEN—WHEN IN EFFECT—MORTGAGE—RECORD—OHIO STATUTE.

1. A judgment has relation to the first day of the term, and from that time constitutes a lien on the lands of the defendant, which lie within the jurisdiction of the court.

[Cited in Norfolk State Bank v. Murphy, 40 Neb. 735, 59 N. W. 709.]

2. A mortgage, under the act of 1831, takes effect only from the time it is left for record.

3. The statute makes the recording of the mortgage a part of its execution.

4. The mortgage first recorded, will create a paramount lien to one of prior date, which has not been recorded.

5. The peculiar provisions of the statute, would seem to preclude an equitable mortgage, which had not been first recorded.

At law.

Swayne & Payne, for the lessor of plaintiff.

Mr. Andrews, for defendant.

BY THE COURT. The fee to the land in controversy being vested in one Vantine, he mortgaged it to the defendants on the 8th of June, 1839. The mortgage was left for record the 2d of July following. Vantine still continued to occupy the premises, after the mortgage, under a lease from the defendants. At July term, 1839, Sturgess obtained a judgment in this court against Vantine for $3,820. The court commenced on the first day of the month. An execution was issued on the judgment, which being levied on the premises in dispute, was sold to Sturgess, who holds the marshal's deed. At the time the judgment was entered, there was no notice of the mortgage, but plaintiff's counsel had notice of it before the levy and sale.

On this statement of facts, the question arises, which of the parties have the prior lien. The 7th section of the act relating to the recording of deeds, of the first of June, 1831, provides, "that all mortgages executed agreeably to the provisions of this act, shall be recorded, &c. and shall take effect from the time when the same are recorded. And if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented shall be the first recorded, and the first recorded shall have preference." [Laws 1831, vol. 29, p. 348.] This statute introduces a new principle as to mortgages. Prior to it, the recording of a mortgage operated only as a notice to subsequent purchasers, but under the statute the mortgage takes effect only from the time it is recorded. Before this, the instrument has no validity as a mortgage. This is controverted by the defendant's counsel, who insists that such an instrument may take effect, as an equitable mortgage, before it is recorded. That even where a mortgage is defectively executed, still it may create an equitable lien against a subsequent purchaser with notice. And that an unrecorded mortgage, under the above statute, must at least be considered of equal validity to one defectively executed.

The case of Bank of Muskingum v. Carpenter, 7 Ohio, 21, which was in chancery, arose on a mortgage, dated in 1816, which had but one witness, the statute requiring two; but being prior to the judgment, under which a lien was asserted, was held to create a prior and equitable lien. The act of 1831 could have had no effect upon that instrument. In Magee v. Beatty, 8 Ohio, 396, which was also in chancery, the question was raised whether a mortgage of a date prior to the judgment, though not recorded, created a paramount lien. The mortgage was left for record with the recorder before the judgment, and the judges divided on the point whether that, under the act of 1831 created a lien. In 1838 an act [Gen. Laws Ohio, vol. 36, p. 62] was passed declaring that the lien commenced, under the act of 1831, from the time the deed was left for record. This, in the opinion of the two judges who gave a different construction to that act, removed the difficulty. If the declaratory act gave a different construction to the act of 1831, from that which its words required; and created a lien under that act which did not before exist, it is very clear that effect could only be given to the declaratory act from its passage. But there would seem to be little doubt that the true construction of the act of 1831, created a lien from the time the deed was left for record. In doing this the mortgagee did all he could do, and all the law required of him, to constitute notice.

In this case the judgment, having relation to the first day of the term, created a prior legal lien to the mortgage, which was left for record the day after, and the question is whether the mortgage having been signed some days prior created an equitable lien. At the time the judgment was entered the plaintiff had no notice of the mortgage, but he had notice before the levy and sale. The act of 1831 declares that the mortgage "shall take effect from the time it shall be recorded." It cannot, therefore, as a mortgage, take effect before it is recorded. And if the effect depends upon the recording of the instrument, the recording of it is a part of its execution. That the legislature have the power to prescribe the form of a deed, and say when it shall take effect, is undoubted. This view excludes the notion that an unrecorded mortgage may create an equitable lien, under the above act. The act declares that the mortgage "first presented shall be first recorded, and the one first recorded shall have preference." Now suppose the

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

junior mortgage shall be first presented and recorded, shall it not have the preference? The statute so provides, and this excludes any equitable lien under the mortgage prior in date, but not recorded. There would seem to be no fallacy in this construction of the act.

The case of Lake v. Doud, 10 Ohio, 415, it is insisted is in opposition to this construction. It is true the court in that case say, "this although not a legal, is an equitable mortgage, and may be enforced in equity; and will be preferred when of prior date to a subsequent judgment." And the court refer to the above cited case of Bank of Muskingum v. Carpenter as sustaining the position stated. Now on general principles this view is correct, but it is not sustainable under the act of 1831. And the court seem not to have adverted to the peculiar provisions of that act. But the case did not turn on that point. The deed which was set up against the mortgage the court say, "could not have been executed in good faith, and that it was fraudulent and void as to creditors and subsequent purchasers."

There is no difference between a general and special lien, which can affect this question. Equity, in a proper case, would direct a prior general lien to be first asserted against any property not included in the special lien, in order that both liens might be satisfied. A general lien is a charge on all the real estate of the party, and a special lien only on the part specified. Each lien is equally good from its date, and no other preference except that which rises from priority can be given.

In the case under consideration, the judgment having been entered one day before the mortgage was left for record, has the prior and paramount lien. Judgment for the lessor of the plaintiff.

[NOTE. In 1840 the Bank of Cleveland was plaintiff in a bill of equity against Sturgess and others to enjoin the latter from selling on execution the property of Vantine in satisfaction of the judgment obtained against Beebee, Vantine, and others. The application for an injunction was overruled. Case No. 861.]

Case No. 13,572.

STURGESS et al. v. CARY et al.

[2 Curt. 59.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

AVERAGE—VOLUNTARY BEACHING — SELECTION OF PLACE.

1. A court of equity has jurisdiction to take an account of a general average loss, and decree contribution among those entitled to receive and bound to pay.

2. If a vessel, at anchor, is dragging towards the shore in a gale, but is in imminent danger of beating to pieces on rocks before reaching the shore, and to avoid this danger the master voluntarily slips the cables and allows the vessel to be thrown on the beach, whereby the cargo is saved, this is a general average loss, though no selection was made of a place of stranding.

[Cited in Shoe v. Low Moor Iron Co. of Virginia, 46 Fed. 128.]

[Cited in Emery v. Huntington, 109 Mass. 436.]

This bill in equity was filed by [Lathrop L. Sturgess and others] citizens of the states of New York and Connecticut, owners of the bark Vernon, and certain insurance companies incorporated by laws of New York, and doing business in that state, against [Thomas G. Cary and others] the owners of the cargo of the bark, citizens of the state of Massachusetts, to obtain an adjustment of a general average loss and payment, by the defendants, of their contributory shares.

The case made in the bill was, in substance, as follows:—"Your orators allege that on the tenth day of February, A. D. eighteen hundred and fifty-three, the said Sturgess, Clearman, George Bulkley, and Walter Bulkley, were owners of a certain vessel—a bark called the Vernon—and that the said several corporations were insurers thereon, to the full amount of her value, against the perils of the seas, and other perils in the policies of insurance mentioned; that on the tenth day of February, said vessel was laden with a cargo of cotton and merchandise, owned by, and consigned to, the said several defendants, as appears by the bills of lading, here in court produced, and made a part of this bill; that on said tenth day of February, said vessel set sail and departed from Appalachicola, in the state of Florida, bound for Boston aforesaid; that on the night of the first day of March then next ensuing, said vessel was in Massachusetts Bay, in a heavy gale, and was driven with great force and violence on to a rock, and, after striking for some time, beat over into deep water; that then both anchors were let go with about thirty fathoms of chain, when breakers were discovered under the stern; that said vessel rode at her anchors till daylight, dragging a little every time she struck,—at daylight it was discovered that said vessel was inside some of the Cohasset rocks, so called; that about nine o'clock a. m., said vessel commenced to drag and strike very heavily, when more chain was payed out to prevent her stern from striking on a rock; that said vessel was thrown with great force and violence on the rocks, beat over, and was exposed to the full fury of the sea, which struck heavily on her broadside; that said vessel was then, and the cargo on board of her, was also in imminent danger of being totally lost and destroyed by the action of the wind and sea; and that the master thereof, after consulting with his officers, deemed it expedient for the safety of said vessel and cargo and the lives of those on board, to slip the cables and run her ashore; that, accord-

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

ingly, the cables were slipped, and the vessel run ashore on to the beach. Your orators further allege that, afterwards, the cargo on board said vessel was safely landed and delivered to the said defendants respectively, and that the said vessel was afterwards got off, and the damage occasioned by her being so voluntarily stranded, repaired. Your orators further allege that said vessel, her freight and cargo, were in imminent danger, and would, in all probability, have been totally lost, if the cables had not been slipped, and said vessel run ashore as aforesaid; and that by the said voluntary stranding, the same were saved and preserved to the respective owners thereof. Your orators further allege that by the said voluntary stranding, great damage was done to said vessel, and heavy expenses incurred in consequence thereof, and in getting her off and repairing said damages, and that the owners of said vessel are entitled to demand and receive of the owners of her cargo their respective proportions of the damage, loss, and expenses so incurred,—the same being a sacrifice made and incurred by the owners of said vessel for the common benefit of the vessel, cargo, and freight, and all interested therein. Your orators further show that in consequence of the damage suffered by said vessel as aforesaid, the owners thereof abandoned the same to the said corporations, the insurers thereon, and that said corporations accepted said abandonments, and paid the sums by them respectively insured, and thereby became assignees of, and subrogated to, all the rights of the owners of said vessel, to demand and receive a contribution from the owners of the said cargo, for the damages, losses, and expenses so incurred for the general benefit. Your orators further show that on the thirtieth day of July last past, they caused to be prepared a general average adjustment, showing the amount of the losses, damages, and expenses incurred by reason of the said voluntary stranding, and of the apportionment thereof upon the said vessel, her cargo and freight, and the several owners thereof, and that by said adjustment it appeared that the said Thomas G. Cary ought to pay the sum of three thousand and seventy-two dollars and seventy-six cents; the said Pliny Cutler, the sum of thirteen hundred and sixty-eight dollars and sixty-nine cents; the said Goddard and Prichard, the sum of six hundred and seventy dollars and fifty-four cents; the said Charles H. Mills and Company, the sum of twenty-seven hundred and sixty-eight dollars and one cent; the said O. Eldredge and Company, the sum of eight hundred and thirteen dollars and thirty-eight cents; the said George Howe, the sum of twenty-three hundred and fifty-four dollars and twelve cents; and that the said William Amory is entitled to receive the sum of ninety-one dollars and ninety-nine cents, as will appear by reference to said adjustment, here in court to be produced, and said several defendants were then respectively requested to pay the sums from them due as aforesaid."

The answer admitted: "That, as they are informed and believe, in the early part of March, said barque, in the course of her said voyage, was overtaken in Massachusetts Bay by a heavy gale or violent storm, accompanied with snow, by means of which she was in the night time driven with great force and violence upon, over, and into the midst of certain rocks, called the Cohasset rocks, on the coast of Massachusetts; that upon attempting to anchor her, whilst in this situation, it was found by those on board that her anchors would not hold, and after beating for some time upon the rocks, dragging her anchors, she was, by the violence of the storm, forced upon the shore and involuntarily stranded; that if, as alleged in said bill, her cables were slipped, of which these defendants are wholly ignorant except as informed by said bill, it was only, as they are informed and believe, when dragging her anchors, she was driving broadside on with great force and violence upon the rocks, and exposed to the full fury of the sea, and when it was ascertained, that she must inevitably be beaten to pieces upon the rocks or stranded by the irresistible force of the winds and waves. And these defendants wholly deny that the stranding of said vessel was, to the best of the information and belief of these defendants, in any degree the effect of the agency of her master and crew, and that any sacrifice was by them made of said vessel, for the sake of the cargo of these defendants on board, and aver that, from the aforesaid perils of the sea, said vessel was and would have been cast on shore or beat to pieces on the rocks and wholly lost, notwithstanding all efforts of those on board, and, without the alleged act of slipping the cables attached to the anchors of said vessel, as stated in said bill. And these defendants admit that afterwards, said vessel, so involuntarily driven and forced on shore as aforesaid, was, as they are informed and believe, fortunately got off and repaired; and that the goods of these defendants laden on board said vessel, were landed and delivered to them respectively; but aver that a considerable portion of said goods was damaged, and their value thereby greatly impaired by the common perils and injuries to which they were subjected, as well as said vessel. And these defendants further admit, that on or about the thirtieth day of July last past, the complainants caused to be prepared a general average adjustment, showing the amount of the losses, damages, and expenses incurred by reason of the injury to, and repairs and getting off of said vessel, and of the apportionment thereof upon the said vessel, her cargo and freight, and the several owners thereof, and demanded of these defendants the several sums therein and in said bill set forth as the contributory shares of hese defendants respectively, towards said losses, damages, and expenses;

but whether said general average adjustment is upon the theory that these defendants, as owners of the said cargo, are bound to contribute to said losses, damage, and expenses, well and properly made up, these defendants do not know, being wholly ignorant of the value of said vessel and freight, the amount of said damages, losses, and expenses, and not being satisfied with the value affixed to their said cargo, or the allowance thereon made for sea-damage thereto; but these defendants then refused and now refuse to pay the whole or any part of the said sums then and now demanded of them, on the ground that said damage, losses, and expenses, were not incurred by any voluntary sacrifice of said vessel for the safety of their said goods on board her laden, but were occasioned remotely and immediately by the inevitable and irresistible force of the winds and waves."

The master, Christopher Fay, testified as follows:—"I was master of the bark Vernon, from Appalachicola to Boston, in February, 1853. We got into Massachusetts Bay on the last day of February. March first commenced with fresh breezes and snow. At two, p. m., made Nauset Beach, and run along the beach. At four, p. m., off Cape Cod, double reefed the topsails, and reefed the foresail, furled the mainsail and topgallant-sail. At five, p. m., Cape Cod light bore south-west, about seven miles distant. Steered west-north-west until ten, p. m., made a light bearing west-south-west, hauled up to north-west, but finding the water shoaling, hauled up north-by-west. Wind at this time hauling to the eastward, braced up sharp and commenced making sail, when broken water was seen on the lee bow; put the ship in stays, but she refused to come round. The topsails were braced sharp back, but before she got stern way on her she struck, and after striking for some time, beat over into deep water. Let go both anchors, and when thirty fathoms of chain was paid out, breakers were discovered under the stern. We rode until daylight, dragging a little every time she struck. At daylight, found we were inside of some of the Cohasset rocks; a ship ashore about two miles to the southward, and another to the eastward. At nine, a. m., the ship commenced to drag and strike very heavy; paid out on the chain, to keep her stern from striking on a rock. For the safety of the ship and cargo, and lives on board, slipped both chains, and let her come in on the beach. At eleven o'clock, I communicated with the shore. At noon, launched the life-boat overboard, and got a line from the ship to the shore, to land the crew, who kept watch on the beach all night. Previous to slipping the chains, the vessel was thrown with great force and violence on the rock, beat over, and lay exposed to the fury of the sea, striking heavily on her broadside; and fearing that if we held on in this position by her anchors, she would go to pieces, I concluded, after consulting with the officers, for the preservation of the cargo, vessel, and lives of all on board, to slip the chains and let her go on the beach. After procuring assistance from the shore, they proceeded to land and save the cargo and materials of the vessel. If I had held my anchors, the ship, in all human probability, would have gone to pieces. My judgment was, that by slipping my chains and making sail on the ship, we should probably be able to save ourselves, the ship's materials, and cargo. We had no pilot, and no opportunity of getting one. I had lights set, and set off rockets and blue lights several times during the night,—the signals usually used for pilots. I had no idea of saving the ship, but only the materials of her, at the time I slipped."

Interrogatory for defendants: Q. "How far were you from the beach when you slipped?" A. "I should judge five or six cables length from the beach. It was not blowing very heavy at the time, but there was every appearance it would. There was a heavy sea running, and the wind was right on shore. There was no way of getting out, either on one tack or the other. I consulted my officers; we slipped our cables between ten and eleven in the forenoon. I considered the vessel would be lost, whether we slipped or not. There were not many people on the beach,—only ten or twelve. We got ashore in our own boat. There was a vessel ashore each side of us. They called it Scituate Beach where we got ashore, to the southward of the Glades."

The testimony of the master was, in all particulars, confirmed by that of the mate.

Mr. Choate and F. C. Loring, for complainants.

Mr. Fletcher, contra.

CURTIS, Circuit Justice. This is a suit in equity, brought by the owners and underwriters of the bark Vernon, against the owners of the cargo of that vessel, to obtain from the latter contribution in general average. The material facts are, that the bark, having a cargo of cotton and other merchandise on board, belonging to the defendants, and bound to Boston, came into Massachusetts Bay, and on the night of the first day of March, 1853, in a heavy gale of wind got on to the Cohasset rocks, let go both anchors and rode till daylight, striking occasionally, and dragging a little every time she struck. In the morning the vessel began to strike more heavily, dragging at the same time, and soon after was thrown with great violence on a rock, beat over and lay exposed to the fury of the sea, striking heavily on her broadside; and the master, fearing that if the vessel held on by her anchors in that position, she must go to pieces, after consulting with his officers, concluded, for the preservation of the cargo and lives on board, to slip the chains, and let her go on

the beach. This was done, and the result was that the vessel and cargo were both saved, though both were damaged, and a heavy expense incurred to get the vessel off.

These are the facts, as testified to by the master and mate, who are the only witnesses. And the question is, whether they present a case for contribution by the cargo, in general average?

The requisites of such a claim are, a common peril, a voluntary sacrifice to avert that peril, and present safety from that peril thereby attained. That a common peril was impending over this vessel and cargo, as well as the lives of those on board, cannot be doubted. The danger was, that the bark would beat to pieces on the rocks, while holding on by her anchors. And the sacrifice made was, to cast the vessel on the beach. This was voluntary, for the chains were purposely slipped, with the design to have the action and force of the sea drive the vessel ashore; which was done. There was, therefore, a voluntary sacrifice of the vessel, by casting her on the beach, and the cargo was thereby saved from the peril, then impending over it, of being washed out of the vessel when dashed to pieces on the rocks. It was argued that the vessel was dragging ashore when the cables were slipped; and that act only hastened the stranding, without in any manner modifying it; and that therefore this case was distinguishable from those in which the master, by making sail on his vessel, had selected a place of stranding, less dangerous than the mere action of the wind and sea would have carried the vessel upon. But this argument loses sight of the distinction between the peril of going to pieces, while holding on by the anchors among the rocks, and the peril of stranding on the beach. The vessel was dragging her anchors towards the shore; but she was also lying on her broadside among rocks, striking heavily, and exposed to the fury of the sea. Though dragging towards the shore, the danger was, that she would go to pieces before reaching it. This was the immediately impending peril; that of stranding on the beach was more remote, and practically it was very different, as the event proved. This last peril the master elected to encounter, to avoid the first. It is quite true that the vessel, as well as the cargo, were in more danger of destruction, while at some distance from the shore, and beating on the rocks, than by going on the beach. And that, in some sense, it cannot be said the vessel was sacrificed, when she was relieved from the greater peril by being stranded. But in the sense in which this word is used in the law of general average, the stranding of the vessel was a sacrifice. The fact, that the peril impending over the ship and cargo would have destroyed both, if not averted, so far from being inconsistent with a claim of this kind, is a necessary prerequisite to the voluntary act of the master; and what is denominated a sacrifice means, not that its subject is destroyed, or even subjected to a greater danger than it was already in, but that it is selected to suffer alone, and thus avert the common peril. In support of these views, it is necessary only to refer to the two cases of Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331, and Barnard v. Adams, 10 How. [51 U. S.] 270. It is impossible to distinguish the first of these cases from that at bar. In that case, the vessel dragged her anchors in a gale, struck on a shoal, thumped so heavily that the vessel was in danger of going to pieces while holding on by her anchors, and the master slipped his cables and ran her ashore. The vessel was lost, the cargo saved. This was adjudged to be a case of general average contribution. The fact that the vessel was lost was urged in opposition to the claim. "Quia nihil contributur nisi salvâ nave." The court held otherwise. In the case at bar the vessel was saved; but the right to contribution does not depend on the amount of damage done by the stranding.

My opinion is, that the complainants have a claim for contribution, and no doubt is felt that there is jurisdiction in equity to enforce it. 1 Story, Eq. Jur. § 490; Abb. Shipp. 507; Doane v. Keating, 12 Leigh, 391.

[Reference was made to a master, and, upon the coming in of the report, one exception was taken, which was allowed. Case No. 13,573.]

STURGIS, In re. See Case No. 13,565.

Case No. 13,573.

STURGIS et al. v. CARY et al.

[2 Curt. 382:[1] 18 Law Rep. 387.]

Circuit Court, D. Massachusetts. May Term, 1855.

AVERAGE—COMMISSION TO SHIP-OWNER—LOCAL USAGE.

1. The rule laid down in Barnard v. Adams, 10 How. [51 U. S.] 270, that the ship-owner is entitled to a commission upon the amount contributed for in general average, is not founded on a local usage, but upon the law merchant; and a particular local usage in contravention thereof is not binding on those, who have entered into no contract with reference to such usage.

[Cited in brief in Howard v. Great Western Ins. Co., 109 Mass. 387.]

2. The right to receive contribution in general average is not founded on contract, but in a principle of equity.

[Approved in Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 666.]

[Cited in Marwick v. Rogers (Mass.) 39 N. E. 781.]

[This was a bill in equity by Lathrop L. Sturgis and others against Thomas G. Cary and others to obtain contribution in general average. It was held that the complainants

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

had a claim, and reference was had to a master. Case No. 13,572. The cause is now heard on exceptions to the master's report.]

F. C. Loring, for exception.
R. Fletcher, contra.

CURTIS, Circuit Justice. At the last term, the complainants had a decree, that they were entitled to contribution from the respondents, towards a general average loss, and the cause was referred to a master to take an account, and report the several sums to be contributed by the defendants. [Case No. 13,572.] He has now made his report, and one exception has been taken thereto; which raises the question whether the owners of the vessel are entitled to charge, among the items to be contributed for in general average, a commission of two and one half per centum on the amount of the general average loss, to be paid to the owners of the vessel and freight, as a compensation for collecting the contributory shares. This charge was disallowed by the master, upon the ground that the decision of the supreme court of the United States in Barnard v. Adams, 10 How. [51 U. S.] 270, allowing a similar charge, rested upon a local usage in New York, and that it appeared in evidence before him that the usage in Boston was, not to allow such a charge. The language of Mr. Justice Grier, in delivering the opinion of the court in that case, is susceptible of the interpretation put upon it by the master, and the statement of the case in the printed report does not show how the point arose, or upon what facts it came before the court. I have procured a copy of the record, and find that at the trial in the circuit court no evidence of any usage, local or general, was offered; that the presiding judge instructed the jury, as matter of law, that the charge was correct, and that this instruction was excepted to. The supreme court sustained this ruling. I must take it therefore to be settled, by an authority which is binding on this court, that under the general law merchant the ship-owner has the right to make this charge, and upon this state of the law, a question, not without difficulty, arises in this case; it is whether the local usage in Boston, not to allow such a charge, can control the rights of these complainants.

There is no doubt that contribution is to be made, and the items which form the amount to be contributed, are to be ascertained and allowed, according to the law of the place where the adjustment is required by law to be made, which in this case was Boston, the port of destination. But does a local usage of that particular port, in opposition to the general rule of the law merchant, form one of the legal rules for adjusting a general average loss at that port? Local usages sometimes have a binding effect, even when they are not in conformity with general rules of law, provided they are not unreasonable in themselves. But this effect is allowed to them, upon the ground that parties have the right to renounce the benefit of a rule of law, and to contract in reference to a different rule; and where the usage is so general that the parties must be presumed to have contracted in reference to it, or where it so affected the subject-matter of the contract, that both were reasonably bound to know the usage, their consent to be bound by it and to waive the rule of law is implied in many cases. But these, so far as I know, are all cases of contract; and I cannot understand how the necessary foundation of a presumed consent, can be laid in any other case. But this right to contribution does not arise from contract. It depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned. Emerigon says (volume 1, p. 587): "Equity requires that they whose effects have been preserved by the loss of another's merchandise, should contribute to the damage," and he cites a passage from the Digest which places the right solely upon the ground of its equity. In Deering v. Earl of Winchelsea, 2 Bos. & P. 270, 1 Cox, 318, Lord Chief Baron Eyre examined this subject of contribution with much ability, and came to the conclusion that "the bottom of contribution is a fixed principle of justice, and is not founded on contract." So Mr. Justice Story has declared (1 Story, Eq. Jur. § 490), speaking of general average: "The principle upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law." This being so, I cannot perceive upon what ground I can declare that these complainants have consented to waive the benefit of a rule of law, which I must consider exists in Boston, as well as in New York, and all other ports in the United States. It is true, this rule is said by the supreme court to rest upon the usage and custom of merchants and average brokers. But the same might be said of a large part of those rules of the commercial law which are as well settled and as constantly administered by the courts, as any statutes enacted by the legislature. It seems to me also, that if, as the supreme court declare, it is a duty thrown on the ship-owner, by the common disaster, to collect and pay the contributions, a usage not to indemnify him for discharging this troublesome duty, would not be consistent with the principle which requires contribution to be made; and it would be difficult to sustain its reasonableness. See Eager v. Atlas Ins. Co., 14 Pick. 141; Gallatin v. Bradford, 1 Bibb, 209; Kendall v. Russell, 5 Dana, 501; Jordan v. Meredith, 3 Yeates, 318.

It was urged that a commission of two and one half per cent. on the whole amount of the general average contributions, to be paid in every case, was a disproportional, and in many cases would be an excessive charge. This may be sometimes true, as it is sometimes true in all business in which a fixed rate of commission is paid pro opere et labore. But the prac-

tice of merchants to make and receive compensation for services by a fixed rate of commission is almost universal, and must be deemed to be on the whole, just and equal in its general operation, or it would not have thus obtained. It may be added also, that it has been adopted by the legislation of this country in a great many cases.

It was also objected, that in the adjustment presented to the master by the complainants, this charge was set down as to be allowed to the complainants' agents. It was explained, that the complainants, residing in another state, did not personally attend to this business, but employed agents to do it for them, and this was the reason of the form of the charge. It does not seem to me that the form is important. The allowance is to be made to the complainants for their services; if they choose to specify, when they claim it, that these services were rendered by them through agents, and, therefore, ask that it may be allowed for the services of their agents, instead of saying for their own services through their agents, there is a deviation from the true form, but the substance is not materially wrong.

The exception to the master's report must be allowed, and the report corrected by adding this item.

Case No. 13,574.

STURGIS v. COLBY.

[The case reported under above title in 18 N. B. R. 168, is the same as Case No. 13,566.]

Case No. 13,575.

STURGIS v. The EDWARD.

[N. Y. Times, Feb. 5, 1863.]

District Court, D. New York. Feb. 5, 1863.

SALVAGE—CONTRACTS—EXCESSIVE COMPENSATION—SERVICE.

[1. Salvage contracts will be set aside not merely in case of fraud or extortion, but where the compensation is excessive.]

[2. A contract to pay $2,000 for towing a bark which had lost her rudder from her place of anchorage off the Highlands below Sandy Hook, where she was in no immediate danger, to New York, *held* to be so excessive, as to require the annulment of the contract. The court, however, considered it a salvage service, and allowed $1,000, being the amount which the master first offered to pay.]

[This was a libel by Russell Sturgis against the bark Edward to recover for salvage services performed under contract.]

Benedict, Burr & Benedict, for libelant.
Platt, Gerard & Buckley, for claimants.

BY THE COURT. On the morning of the 4th of November, 1861, the bark Edward was lying at anchor off the Highlands below Sandy Hook. She had been on a foreign voyage, and was bound into the port of New-York. In coming into the neighborhood of the Highlands, the wind blowing fresh to the eastward, she crossed a shoal, touched bottom, and carried away her rudder, breaking or pulling out the hanging gear attached to the stern-post. She had no means of steering, and it does not appear that those on board could repair or supply the loss. The wind had shifted to the westward, and was blowing off shore. She lay at anchor in three or four fathoms of water, in this helpless condition, but in no imminent danger. She had sent a small boat, with the mate, to Sandy Hook for aid, which was met by the libelant's tug, the Achilles. While the Edward lay in this condition, with a signal of distress flying, she was sighted by the Achilles several miles off, the latter being in that vicinity, in the course of her regular business, as a tug, looking for a tow. She bore down for the Edward, and on coming close to her, the captain of the Achilles inquired of the captain of the Edward if he wanted any assistance. He replied that he did, and inquired what he would charge to take him to New-York. After some conversation between the captains about the value of the Edward, in which the captain of the latter said she was worth $7,000 or $8,000, or that her owners had been offered that sum for her previous to her last voyage, the captain of the Achilles offered to take her to New-York for $3,000. The captain of the Edward offered $1,000. Finally, after some further conversation between them, the captain of the tug said he would not take the Edward up for less than $2,000. This sum the captain of the Edward agreed to pay, and upon these terms the hawser was put out, and the bark towed to New-York. During this conversation another steamtug was in sight, and the captain of the Achilles called the attention of the captain of the Edward to that fact, and told him if he did not want the Achilles he could take the other tug, to which the captain of the Edward made no reply. The towing was done in the usual way, only with a longer line than is common, owing to the absence of any steering apparatus on the bark. The time occupied in the towage was not longer than is usual in towing vessels by this tug from that point. The Achilles is a large and powerful tug, built and manned at great expense. The bark was afterward sold for $4,000.

Although the Edward was in no immediate danger, as already stated, yet it was hazardous for her to lie there in her helpless state. An easterly blow of any severity would have compelled her to pay out the whole length of her chain in order to hold her, and her pilot testifies that this would carry her stern into the surf. She was an old vessel, and would have probably gone to pieces, if she had thumped much on the bottom, in a rough sea like that she would have encountered in the shoal water where she lay, with a strong easterly wind. Under these circumstances, with another tug in sight of her flag of distress, no doubt ready

to compete for the job, the captain of the Edward, with his crew and a Sandy Hook pilot on board, deliberately entered into the contract upon which this libel is founded, and by the express terms of which the tug was to receive $2,000 for the service rendered in towing the bark to New-York.

The sum stipulated to be paid was not only out of all proportion to the actual service rendered, but was greatly in excess of that demanded by any probable contingencies likely to be encountered in its performance. I have had some doubts whether this contract ought to be disturbed, for there does not appear to have been any fraud or extortion on the part of the captain of the tug; and it is somewhat questionable whether the court is called upon to relieve the owners of the Edward from the effect of the folly and stupidity of her master. But on the whole, the language of the decisions seems to hold not only that such contracts must be free from fraud and extortion, but also that the consideration should not be excessive. The consideration of this contract was certainly excessive, and yielding to the force of the decided cases, I hold that the agreement must be disregarded.

I think this was a case of salvage, and therefore to be liberally rewarded; and as the captain of the Edward volunteered to offer $1,000 for the service, and that service was successfully performed, I award that sum, with costs. Let a decree be entered accordingly.

Case No. 13,576.

STURGIS v. The JOSEPH JOHNSON.

[26 Betts, D. C. MS. 10; 19 How. Pr. 229.] [1]

District Court, S. D. New York. June, 1860.

WHAT ARE SALVAGE SERVICES—TOWING DISABLED VESSEL—COMPENSATION—USAGE.

[1. The services rendered by a tug in towing into New York harbor, under circumstances involving no special danger to lives or property, a steamer whose machinery was disabled by a collision, and which was drifting out to sea in a storm, *held* a salvage service, but not of any extraordinary merit, for which $1,000 was sufficient compensation, the time employed being but four or five hours.]

[2. There is no custom or usage of binding obligation whereby steam-tugs in New York harbor are obliged to render towage services to each other without compensation, when found disabled and in need of assistance within their common field of employment.]

[3. The value of a tug which is constructed and maintained for the purpose of rendering aid to vessels in distress is not a controlling element in determining the amount of a salvage award, where she was not sent for because of her great power or special adaptation for the purpose required, but where, in the usual course of her business, she offered her services to a disabled vessel, which might have been equally well served by other vessels of less power.]

[This was a libel by Russell Sturgis, owner of the steam tug Achilles, against the steamboat Joseph Johnson (John A. Parks, claimant), to recover compensation for alleged salvage services.]

BETTS, District Judge. On the 10th of March, 1855, at nine or ten o'clock in the morning, the steam tug Achilles came up to and spoke the steamboat Joseph Johnson in a disabled condition adrift at sea, several miles south east of Sandy Hook point, and five or ten miles off from the Jersey beach or shore, and inquired whether she required assistance. A reply was given from the steamboat to the effect that she wanted help, but that her master was then on board a schooner in sight, four or five miles off, and the tug was requested to go to the schooner and get the captain of the steamboat from her, and return with him to the steamboat. This was done in about an hour, and on the return of the tug back with the master of the disabled steamboat, a hawser was passed from the tug to the steamer, secured to the latter, and she was taken in tow, and carried by the tug to her wharf in New York within a period of four to five hours from the time the tug returned to her, without further loss or damage of consequence to either vessel.

The tug was a vessel of great strength and steam power. She had cost about $46,000, and was built for and employed in the business of towing vessels from and into New York and giving them aid in distress in this port and off this coast when required. The steamboat Joseph Johnson was also a steam vessel engaged in the same employment on this station, but of much less force and value than the Achilles, and estimated by the proof to be before her accident on this occasion worth from seven to twelve thousand dollars. On the evening previous to the 9th of March the Johnson and schooner Henrico met off the Jersey shore below Sandy Hook, going in opposite directions; and a collision occurred between them in which the steamboat was seriously injured; and both vessels, after getting extricated from each other, anchored for the night from one-half a mile to a mile from the shore. The smoke pipe of the steamboat was carried away, and also some of the wheel arms and buckets of one of her wheel houses, and part of the same wheel house, and one end of her main shaft was thrown out of its bed. The bowsprit was broken off, and some damage done to the upper joiner work. She was disabled from using her steam power, and was left in an unmanageable condition. During the night she and the schooner commenced drifting out to sea, the Johnson dragging her anchor, and had got nearly into deep water, and out of the control of the anchor. The schooner's cable had parted, and she had drifted four or five miles farther out to sea than the Johnson at the time the Achilles came up to them. When the vessels separated, after the collision, the master of the steam-

[1] [19 How. Prac. 229, contains only a partial report.]

boat and one of her firemen remained on board the schooner. The wind was blowing fresh off shore N. W. or N. of W. at the collision, and continued in that direction during the night, and also the next day, when the two vessels were discovered by the Achilles, and she went to them. The state of the wind and of the weather during the preceding time, and whilst the Johnson was in tow of the Achilles, as well as the peril of the Johnson, and the difficulties or danger to the Achilles in getting to and towing her, are subjects of irreconcilable and mere differences of opinion between the witnesses in the cause. The depositions of twenty-one witnesses have been read in the cause, exhibiting in a marked manner the discrepancies of opinions and statements usually accompanying narratives of sea services, especially of a salvage or collision character, in which the parties testifying have personally participated or are specially concerned in interest or feeling. I do not deem it important to rehearse this evidence at large, or dissect or compress it in explanation or support of the grounds upon which the decision in this case is founded.

The defence to the demand of a salvage reward made in the libel is placed by the claimant upon three propositions: (1) That the service rendered by the Achilles was one of towage merely, if at all entitled to compensation; (2) that the reward was limited to $150 or $200, by agreement with the officers of the Achilles, provided her owner, when consulted, should require any pay; and (3) that, by the usage and custom of this port, steam tugs render gratuitously aid and assistance in towing each other reciprocally within the harbor in case of being disabled or injured in pursuing their business in this port.

On the part of the libellant the claim is pressed as a salvage service of eminent merit and peril, and deserving an exemplary reward. I think, according to the clear doctrine of the law maritime, the services rendered in this case were of a salvage character, and that the libellant is entitled to compensation for them upon that principle. A reference to a few leading authorities, it appears to me, demonstrates this point. Dr. Lushington, in one of the most recent cases, remarks, in respect to the distinction between a salvage and towage service and the claims of a steamship which had performed a service to a vessel disabled and in distress, that "taking her in tow cannot by possibility be compared to an ordinary towage service." The Charles Adolphe, Swab. 153. In that case the steam vessel came in aid of the salved vessel when in the hands of a first class of salvors, and only aided in towing her a short distance, but that was held to be clearly a salvage service by the steamer.

So Lord Stowell, in the first case before him of a claim to salvage for towage by a steam packet, awarded a salvage compensation to her for towing a vessel in a situation of apprehension, though not of actual danger, chiefly upon considerations of public policy in encouraging vessels of that description to render themselves to the assistance of vessels in distress. The Raiker, 1 Hagg. Adm. 246. And it appears that a salvage reward will be allowed for towage by a steamer when her services are accepted, but not called for by a sailing vessel where the towage is a long distance or under circumstances of high advantage to the vessel towed. The Meg Merrilies, 3 Hagg. Adm. 346, and note. And, since the doctrine has been thus introduced and recognized, cases have largely multiplied in the English and American courts in which salvage rewards have been allowed to steamers specially called on, coming casually to the relief of vessels stranded or in want of assistance at sea as if allotted to the business of towage or wrecking as a stated employment; and the question of jurisdiction over the claim is not made to depend upon the circumstances that the service of a steamer is indispensable or critical in this particular instance, or whether in its performance any thing more is done by the steamer than to apply her functions in towage of the vessel relieved. The Versailles [Case No. 6,365]; The Independence [Id. 7,014]; The Reward, 1 W. Rob. Adm. 174; Marv. Wreck & Salv. c. 15.

The question of jurisdiction over the subject-matter in the admiralty courts is one independent and distinct from that of the quantity of merits or reward. I am clearly of opinion, therefore, that the defence offered in law to the action that the libellant does not establish a case of salvage, but only one of quantum meruit pro opere et labore, and that of a very humble character, is not maintainable, and that the libellant is entitled to compensation as a salvor. I think, also, the other branches of the defence are equally untenable. The evidence offered by the claimant of the Joseph Johnson to prove an agreement by the officers of the Achilles to perform the service for a sum not exceeding $150 or $200 is met and repelled by a superior weight of testimony on the part of the libellant. The court cannot fail to discern that each class of witnesses is subject to inferences which naturally conduce to give a strong coloring and bias to the opinions or impressions formed by them respecting the occurrences which took place, and particularly in regard to declarations or admissions stated to have been made upon the one side or the other; but, to my judgment, the fair and natural conclusion from the depositions as a whole is that no bargain or understanding existed between the parties as to the price or sum for which the Achilles undertook the relief of the Joseph Johnson. And much less is there any satisfactory foundation in the proofs for the last point of defence that, by custom and usage

in this port, this class of steam vessels engaged in towing vessels to and from sea or about the harbor are bound to relieve each other by gratuitous towage, whenever they may be found disabled, and requiring assistance within their common field of employment. Very probably, individual instances exist where the service has been rendered without charge, but no obligation of law is shown which exacts it as a right due to one strange vessel from another. If it assumes in any contingency the aspect of a right or privilege, it is one of imperfect obligation, and out of the cognizance of courts of justice.

Great efforts have been put forth on the part of the libellant to enhance the service rendered in this case to one of extraordinary merit and value. The peril of this undertaking by the Achilles is represented as imminent on account of the violence of a gale prevailing at the time, the hazard of closing with the Johnson to attempt her relief, and that the exposure of the Joseph Johnson to founder immediately or be driven to sea without hope of rescue to her or her crew, unless instantly relieved, was such that the interposition of the Achilles must be regarded by the court as the sole means of the preservation of the ship and the lives of those on board her. Representations of this character cannot fail to create embarrassments in the minds of those to whom they are addressed and who are required to act under their influence without the advantage of experience to aid in rectifying exaggerations which might be palpable to nautical men. Judges of admiralty courts are especially exposed to misapprehensions and misjudgments in dealing with subjects foreign to their personal experiences, and relating to incidents well calculated to bear a semblance of deeper importance than intrinsically belong to them, and are, besides, given in evidence by witnesses whose opinions and conclusions the judges cannot be supposed to appreciate or scrutinize with reliable justness and accuracy. The English admiralty judges acknowledge feelingly the perplexities presented by this description of cases, although their duties are relieved and largely corrected by the aid of nautical assistants (The Princess Alice, 3 W. Rob. Adm. 138); and those called to administer the maritime law in the American courts have not that auxiliary to lean upon as a guide to their decisions. I do not propose to scan the voluminous depositions in this cause in verification of this criticism upon its complexion. Suffice it to say that it is as variant and clashing respecting the state of the weather and the peril and meritoriousness of the services rendered as the imagination of the witnesses and their power of expression could well be supposed capable of picturing. The endeavor of the court will be to estimate the subject upon the facts explicitly proved with very limited and guarded reliance upon the coloring given by the respective witnesses to their mere opinions and impressions. I think, then, if the case proved amounts to more than a mere technical salvage, he should also be rewarded in a degree with a view to considerations of public policy, and a due encouragement to steam tugs to offer themselves promptly for the relief of vessels disabled and in danger within the route of their usual employment.

The Joseph Johnson was adrift and totally unmanageable, with a strong wind blowing off shore, when approached by the Achilles. She was in sight of the shore in full daylight, off the mouth of her home port, and in the path of numerous vessels of all denominations passing in and out the harbor day and night, and many of them devoted to the business of searching for and aiding others requiring assistance. Such at the time was the situation. She and her colleague, of like force, were both outside the Hook and along the shore, in pursuit of that description of business. This was withdrawing her from a condition of hopeless destruction as if overcome by her disaster in a remote part of the world, and no means of rescue to look for other than what she was able to supply within herself. Her hull was also sound, and she was in no immediate peril of foundering because of any inability of withstanding the ordinary action of the waves. She was only deprived of self-moving power. This was manifested on her examination after arrival in port. Now, looking to the facts alone attending the action of the Achilles, do they in their naked bearing indicate anything beyond a prompt and skilful application of the capacity of the ship to the service sought to be performed, and that too without any manifestation at the time by her master or pilot in their acts that her undertaking was extraordinarily perilous to her or of imminent necessity to the Joseph Johnson? Without insisting upon taking instant hold of the latter, and urging the hazard of delay, she went off without objection by her master or pilot a distance of 4 or 5 miles to the schooner Henrico, and expended an hour in getting from on board her the master of the Joseph Johnson, and bringing him back to his vessel, and then, in his presence and apparent concurrence, threw a hawser to the Johnson, and proceeded directly into the harbor with their tow. There was no exhibition by the salvors of any apprehension of immediate peril to the tow or the Achilles in the operation, or that the exigencies of the Johnson demanded special activity or precautions. The state of the Johnson was unquestionably one of danger, and constituted the interposition and recovery by the Achilles an act of salvage, but no way attended with circumstances of extraordinary meritoriousness in personal efforts or exposure of life or property by the salvors.

The demand of a moiety of the value of the Johnson, as a meet reward for the assistance

afforded her, seems to me founded upon the highly wrongful representations of the state of the wind and the sea, and upon possible exposures which might have resulted to the Achilles from those causes, more than upon clear proof of acts of actual necessity and peril performed by the salvors; and that the ingredient in the service set forth as the commanding one entitling the libellant to an extraordinary rate of compensation is the value of the Achilles, and the merit of her owner in devoting her to this description of employment. Had the Achilles been sought for and engaged in this service by the Johnson because of her superior strength and power and ability to give assistance which a vessel of inferior force could not supply, no doubt her owner might properly avail himself of such fact to enhance his reward. Lord Stowell remarks upon the effect facts of that character may fitly have in fixing the reward to be awarded a steamship, leaving her harbor to fulfill a call of that character. He allowed her £200 for going from Dover to the Downs, and remaining with the vessel, watching her all night, towing her the next day to Ramsgate (a distance, as far as can be computed from a map of small scale, about equal to the towage of the Joseph Johnson). The ship had been aground, and was worth £12,500. But I do not perceive that the consideration of the value of a tug constructed and actually pursuing this very business can justly be made a controlling element in estimating her services when she has not been sent for because of that particular quality, nor was it shown to be indispensable to enable her to render the relief she afforded. She is rather to be regarded as in the market seeking that class of business with other competitors upon the recommendation of her superior qualities. She derives her encouragement and profits in the market from the reputation of her higher qualifications for the service. When, then, in her ordinary routine of seeking business, she undertakes the aid of a crippled vessel, I can perceive no principle of law which entitles to a quantum meruit for this particular greater than would be earned by her if worth less than half her cost to her, providing she was, notwithstanding such value, able to perform the work. Had the steamship Vanderbilt or Persia or Adriatic chanced to have fallen in with the Joseph Johnson, and given the same assistance afforded by the Achilles, I cannot suppose any court would measure the amount of compensation to either of those liners beyond what would be a competent reward to the Achilles for the same service, it being within the scope of her ability to perform equally well, when they were not required to go out specially to render the aid, and were not sought to give it because of their extraordinary power and capacity.

I think, on the facts before the court, one thousand dollars is an adequate reward for the salvage service rendered in this case, and direct a decree to be entered in favor of the libellant for that sum, with costs to be taxed.

[The cause came again before the court on the question of attorney's fees. Case No. 13,576a.]

Case No. 13,576a.

STURGIS v. The JOSEPH JOHNSON.

[26 Betts, D. C. MS. 74.]

District Court, S. D. New York. 1860.

PROCTORS' FEES IN ADMIRALTY — DISCRETIONARY ALLOWANCES.

[1. The rate of compensation of proctors in admiralty, like that of attorneys and solicitors in common-law and equity courts, is controlled by the statutes in force at the time the right to costs accrues, or at the time of taxation.]

[2. The act of February 26, 1853 [10 Stat. 161], regulating costs, fees, etc., in the federal courts, took away the power of the district court sitting in admiralty to tax, at any greater rate than those prescribed, costs for legal services, whether rendered as proctors eo nomine, or as "counsel," or otherwise; and those courts no longer have power to award an additional sum to libelants, in the court's discretion, under the name of a counsel or proctor's fee.]

[This was a libel by Russell Sturgis against the steamboat Joseph Johnson (John A. Parks, claimant), to recover for salvage services. The court heretofore awarded salvage in the sum of $1,000. Case No. 13,576. The cause is now heard on motion of libellant's proctors for the allowance of a proctor's fee, to be paid by the claimants.]

BETTS, District Judge. The action in the above-entitled cause was prosecuted in this court on a claim of salvage, and upon full hearing, pleadings, and proofs in the cause the court decreed that the libellant recover $1,000 salvage, with costs to be taxed. The court is now moved, on reading the affidavit of the libellant, together with a notice in writing in the name of his proctors, addressed to the proctors of the claimant in the action (both papers filed together in court June 27, 1860), that a reasonable and proper counsel fee be allowed to the proctors for the libellant in this cause, to be paid by the claimant herein. These papers assume two positions,—one of fact, and the other of law. First, that it is within the cognizance of the court before whom the trial in question was had that the services rendered by the proctors in conducting the prosecution, and the expenditures incurred by the libellant in the progress of the suit, are largely beyond all recompense secured the libellant by the salvage reward adjudged him for the services bestowed by him in the case, the taxable costs allowable to him for attendance of witnesses, the preparation of the cause out of court, and the compensation of his counsel in managing the litigation from its inception to the close; and, secondly, that he is entitled by law to apply to the court, and have awarded him by order, under the name of counsel fees, such sums of mon-

ey, beyond the salvage compensation decreed to him upon the case made out on the trial, as will make up the deficiency of damages ordered in the cause. The judgment on this motion will be limited to the inquiry whether the relief asked for can be granted merely as an augmentation of costs, allowable at the discretion of the court. If the libellant failed to recover the full amount of compensation he was entitled to recover upon the proofs on trial, the misjudgment of the court in that award should be corrected by appeal. There is no doubt of full authority in the appellate court to correct any undervaluation of those services made by the inferior tribunal. It seems that the court was not convinced by the testimony, or reasonings upon it, given upon the hearing, that the libellant had shown himself justly entitled to a compensation over the sum of $1,000, together with taxable costs, and the object of the present application is, under the appellation of counsel fees, to have the court grant a further remuneration to the libellant. I do not enter into an examination of the foundation of the usages in admiralty courts to impose additional damages, extraneous to actual recoveries, on the subject-matter of litigation, under the denomination of counsel fees, because it appears to me the authority has always been exercised under the notion that in the particular of giving costs in admiralty causes, especially in maritime torts heard in prize, or on the instance side of the court, the discretion of the court was unlimited by any legislation or rule of practice. The Appolona, 9 Wheat. [22 U. S.] 379; Carter v. Insurance Co., 3 Pet. [28 U. S.] 319.

The substantial question in the present case is whether it is longer left in the United States courts, at the discretion of the court, to allot costs between the parties, and if now the power is not positively limited or regulated by law. It may be remarked, in this connection, that the practice in the federal courts of awarding ad libitum recompenses to one litigant party, at the expense of the other, under the name of counsel fees, never seems to have been governed by any principle of jurisprudence which could be invoked as a rule to guide a subsequent appropriation. The cases above cited illustrate the position. One is a bald grant of $500 counsel fees, in the cause; the other, with somewhat fuller specification, as "counsel fees at Charleston and Washington, $1,150." Neither case affords any instructions pointing out criteria proper to be observed in measuring donations of that character, but may be inflated or circumscribed, according to the impulse of the presiding judge.

I am of the impression that congress adopted the existing legislation in respect to costs to obviate the uncertainties attending that practice, and in some degree, also, the mischief very liable to follow so indefinite a method of bestowing gratifications upon suitors at the heel of a litigation. Congress has permitted the entire subject of costs to rest in a very dubious and obscure condition from the organization of the government. Betts Adm. Prac. p. 120; Ben. Adm. Prac. § 550; 2 Conk. Adm. Prac. c. 14, pp. 777, 778. The ruling idea had palpably been that costs comprised an element of positive charge and recovery between suitors; but the solicitude to make the mode of apportioning costs and that of levying them conform in the United States courts to the special provisions in state laws, and the usages of state courts, resulted in destroying all unity in either respect in administering the law as a federal system, and, indeed, in affording practical utility to the principles. The topic in relation to the correlative law of costs in the federal and local courts of this state in causes at common law, criminal and equity jurisdiction, has been ably examined and commented upon by the presiding judge of this circuit, Oct., 1851 [District Attorney's Fees, Fed. Cas. Append.], and May, 1852 [Costs in Civil Cases, Fed. Cas. Append.]; and his remarks in those decisions apply with equal force and justness to the indefinite and unsatisfactory condition of the subject in the court of admiralty, attended with the further discrimination that the latter court has never been but temporarily subject to regulation by state law or usages in regard to fees since the adoption of the constitution of the United States. Betts, Adm. Prac. p. 120, § 21; Ben. Adm. Prac. § 550; 2 Conk. Adm. Prac. c. 14; Dunl. Adm. Prac. 102, 103. Its proceedings were originally declared by congress (Sept. 29, 1789) to be according to the course of the civil law (1 Stat. 93, § 2), and, by an after amendment of that law (1 Stat. 276, § 2), restricting the character of the jurisdiction of the admiralty courts to be "according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law," and repealing, in other respects, the totality of the act of September 29, 1789 (Act May 8, 1792, § 8), the state laws or usages would rarely supply any proceedings or analogies of aid in the practice of admiralty courts. By the act of March 1, 1793 [1 Stat. 332], under the title of "An act to ascertain the fees in admiralty proceedings in the district courts of the United States," which continued in force, and by that act and the subsequent act of March 1, 1796 (Id. 451), to the end of the next session following the latter act, the costs which might be taxed or adjudged a counselor or attorney were specifically designated and limited; and, because the act purported to ascertain and fix the fees in admiralty proceedings, it was generally accepted as embracing all practitioners in admiralty. These provisions were revoked, and others, of larger allowance, were substituted, by the act of February 28, 1799 (1 Stat. 625), and in language too explicit to admit of question that the pro-

visions applied to district attorneys alone, not to proctors or advocates of private suitors. Costs, however, were taxed and adjudged to proctors of private suitors in affinity to the tariff of fees enumerated in the statute of 1789, and the allowances specified by congress for similar services to district attornies, when the same services were rendered in private actions; those allowances to district attorneys by congress being adopted by the courts as a reasonable rate of fees and compensation for similar services to advocates and proctors in suits between individuals.

I have not been able to find any act of congress from 1793 to 1847 which assumes to prescribe directly the rate of fees to be adjudged or taxed in actions in rem or personam in which the United States are not directly a party concerned. The supreme court never executed the power in that behalf conferred upon them by, and clearly implied in, the act of congress of August 23, 1842, § 6 (5 Stat. 518). If the act of March 3, 1847, is to be understood as a law absolutely governing costs and expenses between private suitors in proceedings in admiralty against ships and vessels, its provisions can in no way aid the present application, as the manifest purpose of the act is to inhibit attorneys and proctors from recovering the usual rate of taxable fees, instead of clothing the court with power to augment their compensation for services in a suit beyond a standing tariff of taxable costs, or such as may be obtainable under any custom or usage. 9 Stat. 181. In this condition of the law of costs, congress passed the act of 1853, entitled "An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes." 10 Stat. 161. I was called upon by an appeal from a taxation of costs to libellants in a suit in rem and personam, prosecuted in this court immediately after the approval of that act (February 26, 1853), to determine the applicability of that statute to the existing practice of the court in allowing counsel fees in favor of the party prevailing in the cause against his opponent.

The principle involved with the questions of taxation arising in that cause was essentially the same presented in this case,—that is to say, whether the court had a discretion to grant, in the name of counsel fees, a money allowance or recompense to the libellants beyond the sum decreed in damages. No formal opinion was drawn up in detail in support of the points ruled in that decision, but, as I shall adhere, in substance, to the judgment then declared, I shall make those conclusions the basis of the present order.

1. The manifest intent and policy of the act were to apply this law of costs to all the inferior courts of the United States, both in public prosecutions in relation to the fees of the law officers of government, and to attorneys and officers of court in private actions. Such purpose and policy the courts will carry out fairly, and, the act being remedial, it must have a liberal interpretation, so as best to subserve its objects. The doctrine that legislative restrictions to pre-existing fee bills in the state tribunals apply strictly in all courts or cases coming within the purview of the enactment is enforced in the local courts. The rate of compensation is controlled by the statute in force at the time the right to costs accrues, or at the time of taxation. Supervisors of Onondaga v. Briggs, 3 Denio, 173; Brooklyn Bank v. Willoughby, 1 Sandf. 669. This rule is positive in common-law cases, where costs are the creatures of statutory appointment (3 Denio, 173), and the principle equally prevails in equity and admiralty courts, which are supposed to possess an inherent right to award costs, independent of statutory grant. A statute necessarily controls absolutely the rate of fees allowable by usage or express grant in suits prosecuted within the jurisdiction of all the federal courts, because the usage has the power of law only for the reason that it imports the assent of the lawgiver. It accordingly makes no difference that costs in the admiralty courts in their origin were bestowed at the discretion of the courts. That was matter of usage or acquiescence, and never could be regarded as barring or impeding the entire power of the legislature over the subject, or securing to the courts the slightest authority in contravention of the will of the legislative power.

The claim that the act of congress does not limit the compensation or fees to be taxed to counsel, and therefore the court has the same discretion over that matter since the statute, as existed prior to its passage, is obviously untenable, because, the whole subject of fees being under the direction of the legislative authority, a law of general limitation and restriction will be of like efficacy to rescind all allowances of costs transcending its restrictions, as if a specific prohibition of items were enacted, and counsel eo nomine are not known in the admiralty practice. The functions of that office in courts of common law and equity are performed by advocates in the civil and maritime courts, and, in strictness, the grade of advocate is only another denomination of proctor; the latter officer becoming, by his appointment in the early time of the courts, the proxy of the principal party, and in that capacity dominus litis. Clerke, Prac. (by Hall) tits. 7, 8; Betts, Adm. Prac. 9, 11. Dunl. Adm. Prac. p. 72. In the respective forums the attorney and proctor are the stamen of the various orders of practitioners, and are subdivided in name and functions for convenience, or pursuant to the usages of the tribunals in which they practice. Jac. Law. Dict. vide "Attorney," "Proctor," etc. In the act of March 1, 1793, congress evidently regard "the counsellor or attorney in the district court" one and the same person

in allotting fees for the services of the officer in admiralty and maritime proceedings. 1 Stat. 332, § 1; Id. 625, § 4. This is in consonance with the course of the civil law as administered in ecclesiastical, equity, and maritime courts generally, who regard advocates and counsellors of correspondent grades and employments, so far as their duties differ from those of proctors; the former having in charge the law of the case in contestation, and the latter the facts. Woods, Inst. Civ. Law, bk. 4, c. 1, §§ 3, 4; Constetts' Practice of the Spiritual or Ecclesiastical Courts, pt. 2, § 2. Advocates, however, in the latter courts, being primarily assigned rather to the special service of the church, to maintain its property and rights (Crowell's Law Dict.), than to the aid of private suitors. This was the civil-law practice and of all orders of canonical courts, from which the more modern admiralty and maritime course of procedure has been derived. It came into use under various modes of authorization. Officers who stood as representatives of parties litigant therein took the appellations of proxies, promoters, barristers, advocates, etc., almost indifferently, although in origin the class were proxies or promoters, commissioned by some public act in court, or before notaries public out of court. The same agents, with especially like powers, were introduced into courts of law (1 Fitz. N. B. 25c; 1 Reeves, Eng. Law, 13, 4 Reeves, Eng. Law, 169; 3 Bl. Eng. Law, 25; Crabb, Eng. Law, 118, 351, 366; 1 Rich. Prac K. B. 37) under the name of apprentices, attorneys, barristers, sergeants, advocates, and counselors (Crabb, Eng. Law, § 190), and in the chancery courts as solicitors (Wyatt. Pr. Reg. 305). To all appertained essentially like privileges and powers, and each was rewarded for his services by the party whom he represented, per honorarium, or compulsorily, and by stated fees, or by adequate rates of compensation, to be assessed and adjudged under the supervision of the courts. This cursory allusion to the intermediary men recognized as holding official places almost immemorially in the various courts of justice under the English jurisprudence will be sufficient to indicate the objects within the contemplation of congress when legislating upon the legal rights of those persons in respect to their principals, which the courts are authorized to uphold and enforce upon the footing of the official relationship and acts of these officers in court.

These suggestions will supply a satisfactory clue to the purposes congress had in view in the law in question. It was to regulate the fees and costs to be allowed attorneys in the federal courts. It accordingly places the law of costs to be taxed and assessed therein upon a fixed basis. It names attorneys, solicitors, and proctors. They are the only officers who can institute or defend civil actions in the United States courts. The attorney at common law, the solicitor in equity, and the proctor in admiralty. They represent their respective classes, and take in their separate names, the fees appointed and authorized to be taxed against suitors in the several courts, and it is enacted that the same shall be in lieu of the compensation theretofore allowed to those officers, and that no other compensation shall be taxed or allowed, leaving, however, to those officers the right to contract with their employers for further reasonable compensation; and then proceeds to appoint and designate a specific tariff of such costs, and, by the fifth section of the act, repeals and abrogates all laws and regulations incompatible with that act. In my judgment the provisions of the statute in this respect are explicit and imperative. It forbids all taxation of costs other than those enumerated upon its face, and all discretionary allowances are prohibited in unmistakable language. The inhibition covers all claims for the services, and it is of no moment, therefore, whether the person who renders the services officiates as counsel or proctor, if those were to be regarded under this law as distinct officers, and performing different functions in conducting the business of the court. From what has been before stated, however, the term "proctor" in this act embraces counsel or advocates who may represent a suitor in a proceeding in a court of admiralty on the instance side thereof. If that were otherwise, the application in this cause, being in the name of the proctors to the suit, for an allowance to them, as proctors, of a reasonable counsel fee in the cause, the question is precise and definite, whether the officer who has taxable costs assigned him in compensation for his services in the suit can have granted to him an additional compensation in the same capacity, at the discretion of the court. I am clearly of the opinion that he cannot, and the motion accordingly is denied.

Case No. 13,576b.

STURGIS et al. v. The OREGON.

[9 Betts, D. C. MS. 18.]

District Court, D. New York. March 3, 1847.

ADMIRALTY JURISDICTION—REMEDY AT LAW—SALVAGE SERVICES—LOCAL LIENS.

[1. Libellants rendered services to a vessel on the rocks, and furnished materials in aid thereof. They, however, had no possession of the boat as salvors, and did not undertake on the footing of salvage services, but only upon the employment of the owners to act in their aid. Libellants had no joint concern or interest in such services or materials, and were not jointly employed. The services were rendered in the port of New York, but, more than 12 days before the commencement of the suit, she left the port and state. *Held*, that libellants had a competent remedy at law, and the matter was not within the admiralty jurisdiction.]

[2. A lier acquired under the New York statute by rendering services or furnishing materials to a vessel in distress in a port of the state is lost if she depart from the port and state

more than 12 days before commencement of an action to enforce the same.]

[This was a libel by Russell Sturgis and William Boardman against the steamboat Oregon (George Law and Anson P. St. John, claimants), to recover compensation for services and materials furnished to her.]

Before BETTS, District Judge.

It appearing to the court, upon the pleadings in this cause, that the libel is filed to recover compensation for services rendered by the libellants to the steamboat Oregon in April, 1846, the said boat being on the rocks in Hurl Gate in this port, and also for materials supplied in aid of such services, the said boat then being in actual charge and possession of her owners, master and crew; and it appearing to the court, upon the pleadings and proofs, that the libellants had no possession of said boat as salvors, and did not undertake in this behalf on the footing of salvage services, but on the employment of the claimants and owners to act in their aid in the matter; and it further appearing to the court that the said boat is owned in the city of New York, and that her regular employment at the time was that of a passenger boat between this city and Stonington, in the state of Connecticut, and that after the services in the pleadings mentioned had been rendered by the libellants, and materials furnished, and more than twelve days before this suit was commenced, the said boat left this port for another, and also left the state of New York; and it further appearing to the court, upon the pleadings and proofs, that the libellants had no joint concern or interest in such services or materials, and were not jointly employed by the claimants and owners, and that they make no common title to a decree in this behalf: It is therefore considered by the court that the libellants, on the case made by the pleadings and proofs, have a competent remedy thereon at common law, and that the matter thereof does not appertain to the jurisdiction of this court in admiralty. And it is further considered by the court that, if the libellants under the local law acquired a lien for such services or materials, or any part thereof, they are not entitled to enforce the same against the said boat by a joint action; but it is further considered by the court that, if such lien ever existed in their behalf, because of such services rendered or materials supplied, it was lost or removed by the departure of said boat afterwards out of this state, and by her departure from this port, where such indebtedness was contracted, to another port, more than twelve days before the commencement of this action:

Wherefore it is ordered and decreed by the court that the libel in this behalf be dismissed, with costs to be taxed.

[On a reargument of this cause, the motion that the libellants have their remedy in this court in an action in rem was overruled and denied, but without costs. Case No. 13,577.]

Case No. 13,577.

STURGIS et al. v. The OREGON.

[9 Betts, D. C. MS. 140.]

District Court, S. D. New York. April 12, 1847.

MARITIME LIEN—SALVAGE—LOCAL LIEN.

Before BETTS, District Judge.

A reargument of this cause having been ordered, on motion of the advocates for the libellants [Russell Sturgis and William Boardman], on the question whether this court has not jurisdiction in rem of the subject-matter of the action, although the services sued for were not salvage services, and although no lien attached for them or the materials supplied the boat by virtue of the local law, and the same having been fully argued by Mr. Cutting for the libellants, and by Mr. S. Sherwood for the claimants, and due deliberation being had of the premises, it is considered by the court that the matters of claim put forth in the libel, according to the facts and circumstances in proof in this case, are not a lien on said steamboat, and are not entitled to a maritime privilege as against her which can be enforced in a court of admiralty. It is therefore considered by the court, that this court has no jurisdiction over the subject-matter in an action in rem. Wherefore it is ordered and decreed by the court that the motion that the libellants have their remedy in this behalf, notwithstanding the decree rendered herein on the third day of March last [Case No. 13,576a], be overruled and denied, but without costs.

STURGIS (SMITH v.). See Case No. 13,111.

Case No. 13,577a.

STURGIS v. The VICKERY.

[23 Betts, D. C. MS. 115.]

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

SALVAGE—CHARACTER OF SERVICES—TOWAGE—PRINCIPLE OF COMPENSATION.

[1. The owner of a steam tug was under contract with several marine insurance companies to give her services, on their request, to vessels in need of aid, at $15 per hour. *Held*, that the owners of vessels and cargoes so aided could not avail themselves of this contract, further than as evidence of what might be regarded as a reasonable reward for the services rendered, when no price is fixed.]

[2. Services rendered by tugs which are maintained for the purpose of aiding vessels in distress as a business and for profit are not to be regarded as entitled to the same high moral merit with those rendered by a vessel which goes out of her course of business upon a call of humanity, and on an emergency, to give relief, primarily from motives of benevolence; and the reward is not to be measured on the principle of salvage, but rather on that of a quantum meruit, giving a reasonable consideration for the benefits realized, measured by the circumstances of risk and labor attending the transaction.]

[3. Services of a tug in bringing into New York a bark anchored in severe weather on the south shore of Long Island *held* to be a towage service only, but of extra quality, as being performed in cold and tempestuous weather, and therefore entitled to compensation at $25 per hour.]

[This was a libel by Russell Sturgis against the bark Vickery to recover as for salvage services.]

BETTS, District Judge. Early in March, 1856, the steam tug Titan, owned by the libellant, was despatched by him from this port to the relief of the bark Vickery, at anchor off the south shore of Long Island Sound, near East Hampton. The tug was kept in the harbor for towage and wrecking services, and, when not engaged upon special services, or on fixed agreements, was generally stationed in, or running about or near, the harbor, in pursuit of business; took vessels in tow out or into the port at a compensation usually rating from $10 to $25 per hour for the period she was actually employed with, or in going to, the tow, when sent or called to her aid. This rate was, however, subject to variation according to the hazard or difficulties of the services. The libellant was under a standing contract in writing with several marine insurance companies of this city to give the aid of the tug, at their request, to any vessels or cargoes in her vicinity, and in need of her aid, at a fixed rate of compensation per hour. The master of the bark, when she was brought to anchor on the occasion in question, sent a pilot to the city, to her owner or consignee, who had policies upon her and her cargo in one or more of those companies, giving notice of the situation of the bark, and stating that the severity of the weather rendered it important they should send a steam tug to assist the bark in getting into port. Notice was immediately given by them to the libellant, who had the tug made ready promptly, and dispatched through the Sound, and brought the bark into port the day after going out for her. For this service, and the injury sustained by the tug in rendering it, the libellant seeks by this action to recover a salvage compensation of $2,500. The defence, on the part of the owners of the bark and cargo, insist he is entitled to a towage compensation alone, and proffer payment of the sum of $15 per hour therefor, being the price stipulated between the libellants and the insurance companies for like services. The relationship created between the owner of the tug and underwriters under like stipulations has been on previous occasions brought to the consideration of the court, and it has been adjudged that, in respect to such underwriters, the compensation to the owner of the tug was limited to the rate fixed by that agreement. The same rule will be applied in this case, in so far as concerns the interests of those parties; but other claimants on this defence can avail of that contract no further than as evidence tending to show what might be regarded a reasonable reward for the service, when no price is fixed between the parties.

The main point which the parties contested most strenuously, as being of deep concern to shipowners and freighters, in contradiction to the claims of owners of steam tugs, is whether the relief supplied by the latter class of vessels, in aid of the navigation or rescue of other craft in distress, is to be ranked as entitled to be rewarded on the principle of salvage compensation, or only that of work and labor. In ordinary parlance, and, limitedly, in a legal sense, every assistance given by a tug which enables another vessel to effect what she could not do by her own means of locomotion or resources may be denominated a salvage, inasmuch as it contributes to, although it may not be indispensable to, her safety or advantage. Towage may thus be appropriately classified with acts of salvage. It is very generally a prominent, if not the paramount, ingredient in a meritorious salvage service. Still the nature of salvage service seems always to claim, as a discriminating ingredient, an element of a higher character than mere physical labor or nautical skill,—a high moral aim, actuated by a benevolent purpose, reaching beyond a mere consideration of profit and gain,—when persons, in view of the exigency of another, under an exposure of his person or property, promptly and earnestly places himself or his property in peril to furnish help to those who need it. Chancellor Kent says the equitable doctrine of salvage came from the Roman law, and was adopted by the admiralty jurisdiction in the different countries of Europe, and, whether it be a civil or war salvage, it is equally founded on the principle of rewarding individual spontaneous and meritorious services, rendered in the protection of the lives and property of others on the sea, or wrecked on the coast of the sea. 3 Kent, Comm. 245. The action of salvage became a specialty favorably countenanced by the leading jurists of the English admiralty, essentially because the claimants under it were clothed with higher qualities than merely able, skilful laborers and operators, seeking pay as bailees for hire, but had, from motives of good will, overlooked their own individual hazard, and devoted themselves to the help of others. The William Beckford, 3 C. Rob. Adm. 355; The Hector, 3 Hagg. Adm. 90; The Industry, Id. 203. It is true that cases of a greatly lower grade of merit are compensated under the appellation of salvage services, but most palpably, in very many instances, where the facts distinguish them by no perceptible lines from acts justly beneficial to the party from whom the remuneration is demanded. It is perhaps of no practical importance that the nomenclature of causes should be preserved with scrupulous exactness, and therefore, as the

law is now administered in this description of actions, it is indifferent whether parties giving supplies to a vessel at sea in need of them, or helping her out of difficulties by towage, be rewarded under the name of salvors, or paid a quantum meruit for their work and labor. The modern decisions certainly give no countenance to the notion that the compensation awarded for services will in the maritime courts be any way augmented because they, in their effect, partake of a salvage quality, but yet, in reality, are no more than towage or pilotage, or acts of ordinary work and labor. The value of this principle becomes more and more important as in the progress of maritime adventure the means of affording relief to vessels wrecked or in distress, is becoming a systemized business, and is no longer left to the chance interposition of those who may happen to witness the suffering or peril of others, and voluntarily abandon their own pursuits to furnish assistance to them. Steamboats, and other craft adapted to that exigency, are fitted up, and becoming organized in companies, or by single managers, along the coast, and in the vicinity of hazardous routes of navigation, in pursuit of towage, wrecking, or to supply relief, in stores, equipments, or seamen, to vessels in distress, and undoubtedly realize an encouraging remuneration in that as a regular employment. They are no more impelled to this by motives of benevolence or obligations of moral merit than are whalers or pilots on perilous voyages incident to their special callings. The true interpretation of a reciprocal obligation of such parties to each other must be, it seems to me, that, when no express contract is made between them, one is entitled to receive, and the other is bound to pay, a reasonable consideration for the benefits realized, measured by the circumstances of risk and labor attending the transaction, but without reference to any further merit in the motives to the act than belongs to the reputation of performing worthily a business exposed, in its nature, to bodily hazard and suffering. Like other vocations demanding skill, resolution, and address, that of a wrecker, pilot, or tower aiding vessels at sea, crippled, in danger, or cast ashore, eminently calls for those qualities, and they are to be implied as being offered and warranted by those who enter into either employment, and hold themselves out to the public as fitted to perform it. In every engagement of persons devoted to a special pursuit or profession, for the exercise of their particular skill, the gist of the consideration inducing their employment by others is that their ability in that calling, and readiness to exercise it to their full capacity, will be faithfully bestowed, and in the manner best calculated to benefit their employer. No extra merit is imputed to them in so doing, and no foundation is thereby laid for exacting an extraordinary compensation.

It matters not then, in reality, whether the services in this instance take the name of salvage or towage, they are, in my judgment, to be compensated upon one and the same principle,—that of being rendered in the regular pursuit or profession of the libellant, and on the basis of a quantum meruit alone. It would no doubt tend to bring this class of claims to a more appreciable and practicable standard could it become generally understood that vessels of the character of the Vickery are not entitled to rank with one going out of her course of business, upon a call of humanity and on an emergency, to give relief, and primarily from motives of benevolence, but rather within those seting up a public offer of their services for hire, at a rate of allowance adapted to their nature, as an open and regular pursuit. In that case all reference to high moral merit will justly be laid out of consideration, and the tug will be regarded as making claim to what she has actually earned, and is reasonably entitled to and no more than the amount for which she might be hired in the business, according to the usual compensation paid and received at the place for that order of service.

Notice was given the libellant, on the part of some of the insurance companies entitled by contract with him to the use of the vessel, that the Vickery was at anchor off the south shore of Long Island, and they wanted his aid in towing her into this port. He immediately dispatched the tug in obedience to the call, and she rendered efficient and prompt assistance in towing the bark into the harbor. The owners of the vessel, and others having freight on board, were also benefited by the act, although they were not parties to the contract with the libellant. I am of opinion that the transaction amounted to no more than a towage service, and extra in quality only in respect to being performed in cold and tempestuous weather, and that the sum of $25 per hour for the period the tug was engaged in going out to the Vickery, remaining with her until she was prepared for towage, and towing her to her berth in this port, is an adequate compensation for that service alone; but the time the tug was detained in consequence of grounding on her return passage through the Sound is not to be computed within that period. She, however, rendered further services which did not fall within her duty as a tug. She assisted in raising the anchors of the Vickery under circumstances of considerable difficulty and labor. She supplied hawsers for the towage, and bestowed labor and aid in placing the bark in a condition safe and proper for towing in the state of the weather and navigation, and a proper compensation to the libellant for these particulars is to be ascertained and allowed.

A reference must be had to a commissioner to ascertain and report the amount justly chargeable for those particulars, and also to ascertain and report the proportion of the gross amount payable by the respective claimants,

—that is to say, to make the insurance companies holding a contract with the libellant for the services of his boat in their behalf liable only at the rate of $15 per hour for the time, and the other claimants answerable for the balance of the entire sum awarded. The libellant to recover full costs to be taxed.

STURM (LATSON v.). See Case No. 8,115.

Case No. 13,578.

STURTEVANT et al. v. The GEORGE NICHOLAUS.

[Newb. 449.] [1]

District Court, E. D. Louisiana. Nov., 1853.

SALVAGE—QUASI DERELICT—SAVING LIFE—PROPERTY—DEVIATION—AMOUNT OF COMPENSATION—ASSIGNMENT.

1. When a vessel at sea meets with another, on board of which the greater part of the crew are dead, and the rest rendered entirely helpless by disease, it is the duty of the master of the first vessel to interrupt his voyage to take the necessary steps to preserve the lives of the sick, imposed by natural law and the commands of christianity.

2. Such a stoppage or interruption is not such a deviation as would discharge any insurance or render the master civilly or criminally responsible for any subsequent disaster to his vessel.

3. There is no obligation upon the master to lie by, or delay the progress of the voyage for the purpose of preserving property. This would discharge the underwriters from future responsibility.

4. The maritime law and commercial usages do not prohibit the master from deviating under such circumstances, in the exercise of a sound discretion to save property that is imperiled.

5. When a part of the crew of a vessel at sea are dead, and all the rest physically and mentally incapable of providing for their own safety, this is not what is known as derelict, but quasi derelict in the admiralty.

6. In a case like the present, one-third clear of all expenses of the property saved was decreed a liberal allowance.

7. The assignment of a claim for salvage divests the lien originally existing in favor of the salvor, and confers no right upon the assignee to claim reimbursement in a court of admiralty.

[Cited in The Champion, Case No. 2,583; The R. W. Skillinger, Id. 12,181; The Napoleon, Id. 10,011; The Sarah J. Weed, Id. 12,350.]

8. The lien for towage is also divested by an assignment of the claim.

[This was a libel for salvage by A. C. Sturtevant and others against the bark George Nicholaus.]

Durant & Hornor, for libelants.

Benjamin, Micou & Finney, Moise & Randolph, and M. M. Cohen, for interveners.

McCALEB, District Judge. The libelants in this case claim a salvage compensation for services rendered to the bark George Nicholaus, of Hamburg They allege that they are the master and crew of the bark Sarah Bridge, of Portland, Maine: and that on the 8th of October last, while on a voyage from Bordeaux to New Orleans, and when they were about forty miles south by east from the South West Pass, they descried a bark under very short sail, and apparently deserted or unmanageable. Her sails were flapping in the wind, and she steered as if no one was at the helm. Believing her to be in distress, they hove to on the Sarah Bridge until the bark came down near them, and they discovered that she was the George Nicholaus, of Hamburg. There was a man on the forecastle, who hailed and begged them to come on board, saying that all on board the George Nicholaus, except himself, were dead. They immediately hove to the Sarah Bridge, and sent the mate, Patrick Cass, and three men, to ascertain the condition of things on the bark. They found four persons alive, but three of them were insensible, and no communication could be held with them, and from the man who had hailed them, they learned that the George Nicholaus had sailed from Navy Bay, on or about the 9th of September, 1853, and was bound to Cardenas, in the Island of Cuba: that shortly after she went out of port all hands fell sick with Chagres fever, and that the captain died when she was eleven days out, and eight of the crew had also died before the time when she was descried by the libelants. These facts were obtained from the man who hailed the Sarah Bridge, and who was found in an extremely feeble condition, and seemed to be somewhat out of his mind, in consequence of sickness and exposure. The log was not written up, and the chronometer was out of order. The bark was in a desperate condition, and would soon have been lost by the action of the winds and waves. The libelants took possession of her, and placed on board Patrick Cass, the mate, and a sufficient number of the crew of the Sarah Bridge to manage and bring her into this port, where she arrived on the 9th of October last.

The service rendered by the salvors was certainly meritorious, but unattended by extraordinary exertion. There was danger incurred in consequence of the existence of a malignant disease on board the George Nicholaus. The extent of that danger can only be estimated by the mortality among those on the ship from the time she left Navy Bay. It is true that no evidence has been adduced to prove that the disease was of a contagious character; but from the facts before it, the court is not at liberty to say that no danger was incurred by the salvors who went into the hold of a vessel evidently infected with a disease, which, within a very few days, had proved fatal to almost every human being on board. The promptitude with which assistance was rendered, also deserves to be favorably noticed. It was a case which called for those very offices of humanity which were performed with alacrity and zeal by the salvors. The saving of life is an ingredient in a

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

salvage service which is always highly estimated by the courts. The mere preservation of life, it is true, this court has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the animus displayed in the first instance. The Aid, 1 Hagg. Adm. 84. It was, indeed, the duty of the master of the Sarah Bridge to interrupt his voyage for the purpose of taking on board the survivors of the crew of the George Nicholaus, in their suffering state, for the safety of their lives. It was a duty imposed upon him by the first principles of natural law—the duty to succor the distressed, and it is enforced by the more positive and imperative commands of christianity. The stopping for this purpose could not be deemed a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel, occasioned thereby. But, beyond this, there was no supervening or imperative duty. The master was under no obligation to lie by in order to save property, or to delay the proper progress of the voyage. Any stoppage for such purpose would, of itself, amount to a deviation; and any going out of his course for such a purpose, being wholly unauthorized, would discharge the underwriters from all future responsibility. But the maritime law, looking to the general benefit of commerce, upon a large and comprehensive policy, does not prohibit the master, under such circumstances, from deviating to save property in distress, if he deems it fit in a sound exercise of his discretion. As between himself and his owners, the usage of the commercial world has clothed him with this authority; and in return for such extraordinary hazards, it has enabled the owners to partake liberally in the salvage awarded for the meritorious service, when it is successful. The Boston [Case No. 1,673].

This is certainly not what is known in the admiralty law, as a case of derelict. It is rather what has been denominated by the courts, a quasi derelict. The vessel was not abandoned, but the evidence shows that those on board of her were both physically and mentally incapable of doing anything for their own personal safety. She was certainly in a situation of extreme danger and distress. She was entirely at the mercy of the winds and waves, and a few hours of stormy weather, would, we may reasonably conclude, have sealed her fate. I have already stated that the service rendered by the salvors, was not attended by extraordinary exertion. But, to use the language of Mr. Justice Story, in the case of The Boston [supra]: "I should be sorry to lay down any doctrine, by which it should be supposed, that if, in a meritorious case of salvage, derelict or quasi derelict, there was subsequently no great hazard or labor of an exhausting nature, the salvage was therefore subject to great diminution. I should fear, that such a doctrine would be found as mischievous in practice, as it would be unjust in principle." Upon questions of this nature, a large discretion must of necessity, belong to the public tribunals. It is of great importance, as far as it can be done, to avail ourselves of fixed rules and habits in the performance of a delicate duty, and not to deviate from them, except upon urgent occasions. The rule of salvage in cases of derelict usually is (as has been often said), to give one half, and it has rarely been below two-fifths, of the property saved.

Regarding this as a case of quasi derelict, I am disposed to award a liberal compensation to the salvors, and believe that the proportion of one-third, will be a fair allowance. A case similar to the present was not long since decided by Dr. Lushington, sitting in the high court of admiralty in England. It was a suit instituted by the master, second mate and one seaman, belonging to the American bark Tartar, for salvage. The Tartar, whilst on her voyage from Calcutta to Boston, in latitude 13° north, and longitude 46° west, fell in with a brig with a signal of distress, which proved to be the Active, of the burden of 170 tons, laden with sugar, from Pernambuco to Hamburg. The master of the Tartar, on boarding the brig, found that shortly after she had left Pernambuco, the yellow fever had broken out on board, and had already destroyed seven hands of a crew consisting originally of eleven, including the master: that the master was then actually dying; that of three remaining, one had lost the use of his right arm, and that none of them were acquainted with navigation. In these circumstances the master of the Tartar expressed his wish and readiness to render them any assistance, stating at the same time that he could not compel any of his crew to come on board a ship situated as the Active was. On his return to the Tartar, the second mate and one seaman immediately volunteered, and having been put on board, they succeeded in bringing the ship and cargo safely to Falmouth. The master died soon after they came on board. The value of the ship, freight and cargo, was agreed at £4,300 No opposition was offered to the merit of the salvors, and Dr. Lushington, after stating the circumstances and commenting briefly on the high nature of the services, gave the sum of £1,500, and apportioned £500 to the mate, £400 to the seaman, and £600 to the master of the Tartar, to meet any claims of the owners, for whom no appearance had been given. Here it will be seen that something more than one-third was awarded, and although the value of the property saved is greater than in the case now before the court, it will also be seen that the circumstances under which the services were rendered were such as to enhance the compensation beyond what I feel it my duty to allow in the present instance. The

value of the property saved in this case, as appears by the account sales rendered by the marshal, is $4,500. Of this sum I award $1,500 to the salvors free of all costs and charges.

Before I proceed to apportion this amount to the salvors, it becomes necessary to decide certain questions of law which were pressed upon the attention of the court in the arguments of the proctors at the bar. It appears by an assignment on the record, that the first mate of the Sarah Bridge, Patrick Cass, has transferred his claim for salvage to Appleton Oaksmith of New York, and the consideration of the assignment is stated to be the sum of $150. It is contended by the proctor of a portion of the salvors, that Patrick Cass, the mate of the Sarah Bridge, is no longer before the court, his lien for salvage having been extinguished by payment; and that the transferee of his claim has no right, in virtue of the assignment, to demand from a court of admiralty reimbursement of the sum advanced.

This proposition in law involves no intrinsic difficulty. An assignment of a claim for salvage, divests the lien which originally existed in favor of the salvor, and consequently confers no right in the assignee to claim a reimbursement in a court of admiralty. The reasoning of Judge Conkling of the Northern district of New York in the case of Patchin v. The A. D. Patchin [Case No. 10,794], though a case of seaman's wages, is equally applicable to the claim of a salvor. "It was correctly urged by the counsel for the petitioner," says the court, "that in cases arising ex contractu, the admiralty jurisdiction depends on the nature of the contract; and it is true, also, that this jurisdiction is not always confined to the immediate parties to the contract. Thus a bottomry bond is assignable and may be enforced in the name of the assignee. But bottomry is an express hypothecation, and binds the ship to the lender and his assigns. So also is a bill of lading assignable, or rather negotiable, and the holder may in this country maintain an action in the admiralty upon it in his own name. But the quality of negotiability is given to this instrument by law for the benefit of trade, and its transfer, moreover, carries with it the title of the goods shipped and of course the right to maintain a suit upon it for their value in case of their loss. This right of the mariner to proceed against the ship in specie, is conferred upon him for his own exclusive benefit. It arises by implication, and exists independently of possession. Its object is the more certainly to secure to him the hardly earned fruits of his perilous and useful services. When, therefore, his wages are paid, no matter by whom, the design of the privilege is answered; and to say the least, it is very questionable whether he would be benefited by the capacity to transfer it to another; for if this power would sometimes enable him to obtain immediate payment, it would also expose him to imposition through his credulity and proverbial improvidence. * * * Implied liens are admitted with unsparing caution by the common law. Being allowed for the benefit of trade, they are limited to that object, and are held also to be strictly personal. The right of lien depends on the actual possession by the person claiming it, of the goods to which it is attached; and if he parts with the possession, the lien is irretrievably lost. In the absence of any authority to the contrary, I am of opinion that the mariner's lien ought in like manner to be considered as restricted to its design, and as merely personal. The petitioner cannot justly complain of being denied the privilege of maintaining a suit in rem in the admiralty; the ordinary forms of remedy in favor of an assignee of a chose in action, are open to him in common with all others."

While I consider the reasoning of the court in the case here cited in all respects applicable to the lien in favor of a salvor, and while I am clearly of opinion that the intervening libel of Mr. Oaksmith, the assignee of the claim of Patrick Cass, must be dismissed for want of jurisdiction in this court to entertain it, I am equally clear in the opinion that the object which the proctor had in view in urging his objection to the recognition of the claim, cannot be accomplished in this case. The objection has been presented on behalf of the master of the Sarah Bridge, and was doubtless pressed upon the attention of the court with the hope that, if successful, it would have the effect of causing the share of the mate, who appears from the evidence to have been the principal salvor, to enure to the benefit of the master and the other co-salvors. Such a result would by no means follow, and certainly under the circumstances of this case, would be justified upon no principle of law or equity. There has been no forfeiture of the claim of the mate in consequence of any fraud, embezzlement or other malpractice, which calls for his punishment at the hands of the court; and while his co-salvors are entitled to a full reward for their respective services, they have no right to demand the amount of remuneration which is justly due for his skill, trouble and exertions.

It is also proper for me to remark that the assignment in this case has not been regarded by the court as a criterion by which the share of the master was to be determined in the mode of distribution. It will be seen that he is entitled to more than the amount set forth as the consideration of the assignment. This overplus he must be permitted to receive upon the final distribution, while the balance of his share will enure to the benefit of the owners of the George Nicholaus, or more properly to the holders of the bottomry bond. It is to them the assignee, Mr. Oaksmith, must look for reim-

bursement of the amount advanced. At any rate this tribunal can give him no relief.

The intervening libels filed on behalf of the survivors of the crew of the George Nicholaus, must also be dismissed. It is unnecessary to decide whether or not their contract with their own vessel was dissolved by the death of the master and the balance of the crew; for admitting that it was, there is no evidence upon the record to show that they rendered any service which would justify this court in awarding them a compensation in the nature of salvage. All the evidence adduced shows, on the contrary, that they were physically incapable of rendering any assistance to the salvors. They were utterly unable to do anything either for their own personal safety or for the safety of the vessel.

The intervening libel of Mr. Oaksmith for towage, must also be dismissed for the reasons already given for refusing to entertain jurisdiction of his claim as assignee of Patrick Cass. It is founded upon an assignment which destroys the original lien, and this court has no power to grant relief. In order to render the mode of distribution clearly intelligible, I shall present the share of the mate as it would have appeared in the absence of any assignment. He will be permitted to receive, however, only the amount over and above the $150, the consideration of the assignment. From the very liberal allowance awarded to the master of the Sarah Bridge must be deducted the sum of $20, for pilotage due to the intervening libelant, John Perrin. The costs of court will be deducted from that portion of the proceeds of the property which will accrue to the owners of the George Nicholaus, or more properly to the holders of the bottomry bond; for the sum which may remain after the payment of all necessary costs and expenses, will necessarily be absorbed by the claim of the holder of the said bond.

I have stated that I should award one-third of the value of the property to the salvors. That value is ascertained to be $4,500. The third of that sum will be $1,500. Of this amount I shall award the usual proportion of one-third to the owners of the Sarah Bridge, $500 leaving the sum of $1,000 to be distributed among the salvors, viz: the master, mate and six seamen, $1,000. This amount I shall divide into twenty shares of $50 each, to be apportioned as follows: To the master I shall award nine shares amounting to $450, from which sum will be deducted pilotage, $20; to the mate, four shares, $200 ($50 only to be actually paid); to the seamen, McClelland, who remained constantly on board the George Nicholaus, I shall award two shares, $100; and to each of the other seamen, five in number, I shall award one share, as follows: to Wm. H. Smith, $50, to David Graves, $50; to John Hall, $50; to Patrick Powers, $50; to John De Pape, $50.

Recapitulation.

Aggregate amount of salvage.....			$1,500
Owner's proportion, one-third....		$ 500	
Master's	" including pilotage	450	
Mate's	"	200	
McClelland's	"	100	
Smith's	"	50	
Graves's	"	50	
Hall's	"	50	
Powers's	"	50	
De Pape's	"	50	
			$1,500

Case No. 13,579.

STURTEVANT v. GREENOUGH.

[3 App. Com'r Pat. 319.]

Circuit Court, District of Columbia. June 9, 1860.

PATENTS—PRIORITY—INTERFERENCE—APPEAL—EXCEPTION.

[1. The abandonment of a perfected invention or the fact that it fell into disuse cannot affect the question of priority.]

[Cited in Berg v. Thistle, Case No. 1,337.]

[2. Where the reasons of appeal in an interference case take no exception to the claim of the appellee upon the ground of forfeiture by laches, the court cannot consider such question.]

[3. Priority of invention of an improvement in shoe-pegging machines, consisting in a feeding device, awarded to Greenough.]

Appeal by B. F. Sturtevant from a decision of the commissioner of patents awarding priority of invention to I. I. Greenough on an interference declared upon an improvement in shoe-pegging machines.

MERRICK, Circuit Judge. The present controversy is limited to the question of the priority of one of the several improvements upon shoe-pegging machines invented by the appellant over a like improvement invented by the appellee. The particular device consists in that arrangement of parts, by familiar contrivances, by which the hammer is made to descend, each time a peg is driven, a little below the stationary rest, so as to take off from the stationary rest the pressure of the shoe, and to transfer it to the hammer itself, in order that, by a suitable lateral movement of the hammer and awl, the shoe may be urged or fed forward the required distance to meet the next descending stroke of the awl and peg driver. The controversy is not as to which of the contestants first invented a machine capable of pegging shoes, but is confined to the inquiry: Which first invented the feed improvement in question? This being the nature of the question, it is not material for us to consider whether the pegging machines previously invented by Greenough and others were very successful pegging machines, so as to be extensively used in the trade. If these pegging machines existed, and there was need of a feed apparatus for their further development, and a feed apparatus was contrived capable of acting, and which was put on a pegging machine and did act, to the extent of pegging

some dozen soles upon a last, then it is a matter of no consequence, so far as there is question of the invention of that improvement, whether or not, for any other cause, the machines fell into disuse. If the invention was completed, then, in the language of Lord Brougham, it is one of the greatest errors that can be committed, in point of law, to say with respect to such an invention that it signifies one whit whether it was completely abandoned, or whether it was continued to be used down to the date of the patent; it is totally immaterial, I mean, to the question of priority. So the supreme court, in the case of Gaylor v. Wilder, 10 How. [51 U. S.] 477, repudiate the idea that an omission to try the value of an article by proper tests, or an omission to bring it into public use, can affect the question of priority. So, too, Judge Story in Bedford v. Hunt [Case No. 1,217], holds it to be the true interpretation of the statute that a patent may be defeated by showing that the thing secured by the patent had been discovered and put in actual use prior to the discovery of the patentee, however limited the use or the knowledge of the prior discovery might have been.

The invention of Greenough is admitted by the appellant, upon the uncontradicted testimony of A. H. Hook, to have been made in the fall of 1854, between October and December, and to have been put upon a shoe-pegging machine; and it is also admitted that he used it in pegging several dozen shoe soles. It further appears from his models, drawings and specifications that the invention now claimed is the same identically, in form as well as in substance, as it was in 1854–55. It is moreover substantially the same as the improvement patented to the appellant. This being so, all the arguments drawn from the cases in which imperfect experiments have been made and afterwards abandoned can have no application as tests of patentability or completeness of invention. For if the contrivance is in a patentable shape now, it was necessarily in a patentable shape in 1854–1855, as it has remained unchanged throughout that period. That it is in a patentable shape now is not gainsayed nor could it be without stultifying the patent already granted to the appellant for the same identical thing, and the argument urged by the appellant that the device is incomplete and unpatentable without the combination of some apparatus for presenting the portion of the shoe to be pegged perpendicularly to the piercing and driving parts is equally applicable to his own patent; for in the machine there described as well as in Greenough's there is no provision whatever made for tilting the shoe so as to compensate at the points of presentation to the awl and hammer for the curvature in the sole. In the very nature of things, such a contrivance, however important to the successful operation of pegging machines, is independent of the feed operation, and a substantive matter, notwithstanding the fact that a felicitous arrangement for combining the two appertions of feeding and tilting might and probably does form the ground of a patentable improvement, and may materially influence the adoption of pegging machines in the trade.

The foregoing considerations sufficiently unfold the reasons why, without minute references to the testimony, I am constrained to overrule the several exceptions taken by the appellant to the decision of the office. The nonuse of Greenough's invention for a period of five years, and his neglect in not applying for a patent during those years, and not until more than a year had elapsed after the grant of a patent to the appellant, would have been very important, if not controlling, considerations in the present aspect of the case. But inasmuch as among the reasons of appeal is found no exception to the claim of the appellee upon the ground of forfeiture of his rights by laches, and want of reasonable diligence in presenting his claim, I am, upon this appeal, precluded from going into that question, the general principles for the determination of which will be found in the case of Ellithorpe v. Robertson [Case No. 4,409], decided by Judge Morsell; the case of Belson v. Spear [unreported], by Judge Dunlop; the case of Wickersham v. Singer [Case No. 17,610], by myself; and in the case of Kendall v. Winsor, 21 How. [62 U. S.] 329, where the supreme court say that an inventor "may forfeit his rights as an inventor by a willful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others." That question, however, I am debarred from considering in the present case, and advert to it here mainly to prevent my remarks in the preceding portion of this opinion upon the effect of negligence in its application to the mere question of priority from being misunderstood, or being drawn into a precedent in connection with the facts of this case, when the question of abandonment or forfeiture from laches is properly submitted.

Now, therefore, finding no error in the decision of the commissioner of patents upon the points presented by the reasons of appeal, and the office response to those reasons, I thereby certify to the Hon. Philip F. Thomas that after having appointed a time and place for hearing said appeal, and both parties having argued the cause in writing, by their respective counsels, I have fully considered the premises, and affirm his judgments.

Case No. 13,580.

STURTEVANTS v. ALTON.

[3 McLean, 393.] [1]

Circuit Court, D. Illinois. June Term, 1844.

MUNICIPAL CORPORATIONS—CONTRACT FOR GRADING STREETS—INCIDENTS OF POWER.

1. A corporation having power to grade streets, &c., necessarily has power to make contracts respecting the same, in regard to the work to be done, and the compensation to be paid.

[Cited in Gause v. Clarksville, Case No. 5,276.]

[Cited in brief in Taber v. Cincinnati, L. & C. Ry. Co., 15 Ind. 467. Cited in Bicknell v. Widner School Tp., 73 Ind. 504; City of Williamsport v. Com., 84 Pa. St. 500.]

2. Under the power to establish post offices and post roads, congress have adopted the mail regulations of the Union, and punish all depredations on the mail. The same principle applies to the exercise of powers by a corporation.

3. Where a principal power is given, every incidental power necessary to give effect to the principal one, is included.

At law.

Wm. L. Lincoln, for plaintiffs.

Logan & Lincoln and Mr. Bailey, for defendant.

McLEAN, Circuit Justice. This action is brought on the following bond: "Know all men by these presents, that the city of Alton acknowledges itself to be indebted unto G. & N. Sturtevant in the full and just sum of seven hundred and seventy-eight dollars and eighty-three cents; which sum, the said city of Alton hereby obligates itself to pay to the said G. & N. Sturtevant, their executors, administrators and assigns, with interest thereon at seven per centum per anum, on the 1st of March, anno domini, 1844, in specie or its equivalent, and for the payment of said sum of money, with the interest accruing, the faith and revenue of said city is hereby irrevocably pledged. In witness whereof, the mayor of said city, with the clerk of the common council of said city of Alton, by order of said common council, have hereunto set their hands, and affixed the seal of said city of Alton, this 2d June, 1841." Signed by the mayor, &c.

Several special pleas have been filed by the city, some of which are objectionable in point of form, but as the object of the corporation is to test the validity of the contract, no other question will be considered.

It is objected that the corporation had no authority to enter into the contract. This bond, it seems, was given in discharge of a bond which had been given by the town of Alton, under its former act of incorporation. That bond is stated to have been executed, "in part consideration of Sloo, Kemble and Perkins' entering into a bond conditioned for the grading and improving Peoria street, in the town of Alton, as designated in said condition, and for no other consideration." "It is alleged that that supposed writing obligatory was given without any lawful or competent authority." And it is contended, that if the first bond was void, the second, which was given in lieu of it, is also void. A deed of confirmation of a void instrument is not good. But, if there be a meritorious consideration, the second bond may be enforced.

The first act incorporating the town of Alton, of 20th February, 1833, provides, in the first section, "that the trustees of the town may grant, purchase and receive, and hold property, real and personal, within the said town and no other, (burial grounds excepted), and may lease, sell and dispose of the same for the benefit of the town, and shall have power to lease any of the reserved lands which have been appropriated by the original proprietors to the use of the town, and may do all other acts as natural persons; may have a common seal," &c. The fifth section declares, "that the board of trustees shall have power, by ordinance, to levy and collect taxes upon all real estate within the town, not exceeding the one half of one per centum upon the assessed value; to establish night watches; light the city; improve the navigation of the river within the town; to regulate and license ferries; to erect and regulate public wharves, &c.; to open and keep in repair streets, avenues, lanes, &c.; and, from time to time, to pass such ordinances as to carry into effect the objects of this act." The seventh section gives power to the corporation, "to regulate, grade, pave and improve the streets, avenues, &c., and to extend and widen the same." The thirty-first section of the act of the 21st July, 1837, entitled "an act to incorporate the city of Alton," provides, "that the common council elected under such act, shall be deemed in law successors to the trustees to the town of Alton, to all intents and purposes; and all obligations and contracts entered into by the trustees of Alton, shall be carried into full effect by the common council of the said city of Alton." [Laws 1837, p. 27.] In this latter act, full authority is given to the city corporation to carry out the contracts of the trustees under the former act, and this bond being within the power thus given, the only question is, whether it is founded on a valid consideration.

An instrument under seal purports a consideration, and this principle applies as strongly to a corporation, acting within its powers, as to a natural person. But if we look beyond the bond now before us, to the consideration on which it was given, it is sustainable. The power of the trustees, under their act of incorporation, was ample to improve the streets and alleys of the town, and to enter into contracts for that purpose. For where a corporation is authorised to do that which can only be accomplished by a contract, it has power not only to make the contract, but to carry out in all its details, the principal power given. Congress "have power to establish post offices and post roads," by the constitution, and in carrying out this princi-

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

pal power, the mail operations of the Union are regulated. Postmasters are appointed and their duties prescribed; mail contractors and carriers of the mail are regulated, and provision is made for the punishment of all depredations on the mail. This power is considered as an incident to the principal power; and every one must see that without its exercise effect could not be given to the main power. The same principle holds in relation to a corporation. It has power to pave streets, widen them, &c.; consequently it may make contracts for such improvements. It has power to levy a tax, consequently it has power to appoint an assessor and collector. The trustees of Alton had power to do these things. They in their contract stipulated the price at which certain improvements should be made, and the evidence of this contract was in writing, under the seal of the corporation. For aught that appears, the consideration on which the first bond was given by the trusteees, had been duly performed at the time it was executed. If this were not so, there is no pretence that the work was not done before the bond now in question was executed.

From the recital of the first bond, in the record, it is seen that the first was executed, for grading and improving a street in the town within the power of the corporation. Upon the whole, we see nothing which can invalidate the bond now before us, and consequently the demurrer to the pleas is sustained. Judgment.

STUTSON v. JORDAN. See Case No. 6,959.

Case No. 13,581.

In re STUYVESANT BANK.

[5 Ben. 566; [1] 6 N. B. R. 272.]

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

BANKRUPTCY—TRUSTEE AND RECEIVER—INCOMPATIBLE INTERESTS.

1. At the first meeting of creditors in this case no assignee was chosen. The creditors resolved to appoint a trustee. The trustee named had been appointed receiver of the estate of the bankrupt by a state court, and, as such receiver, had taken possession of such estate, and still held it. Such proceedings were one of the grounds on which the adjudication of bankruptcy passed. One of the committee of creditors named, consisting of three persons, was president of a bank, which was a creditor, and claimed to be paid in full, by preference. *Held*, that the position of the receiver was such as to be incompatible with his being appointed a trustee in these proceedings.

2. The president of the bank, also, ought not to be one of the committee of creditors.

3. The resolution appointing the trustee and the committee of creditors would not be confirmed, and as no assignee had been chosen, the court would appoint an assignee.

[Cited in brief in Re Cooke, Case No. 3,169.]

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

In bankruptcy.

Dudley Field, for Mr. Archer.
Charles Tracy and G. L. Walker, opposed.

BLATCHFORD, District Judge. Being of opinion, on the papers before me in this case, that the interests of the creditors of the bankrupt will not be promoted by the appointment of Mr. Archer as trustee, I must decline to confirm the resolution to that effect.

One of the grounds on which the bank was adjudged a bankrupt by this court was, that, being insolvent, it procured and suffered its property to be taken on legal process, with intent, by such disposition of its property, to defeat and delay the operation of the bankruptcy act [of 1867 (14 Stat. 517)], and suffered and procured a receiver of all its property and effects to be appointed by a state court, and surrendered possession thereof to such receiver. Mr. Archer was appointed such receiver, and is such still. All the property which belonged to the bank passed into his hands as such receiver, he thereafter claiming the legal title to it, by transfer, and claiming to hold it as against all the world. Such of it as remains in his hands he claims to hold by the same title. The proceedings in bankruptcy were commenced on the 23d of December, 1871. If Mr. Archer is ever to account to this court, or to its proper officer, for what was the property of the bank, he must account for it as it stood on that day. It must be administered as of that day, and from that day, according to such principles of administration as may be determined by this court. It appears that Mr. Archer has, since that day, been dealing with the property which came into his hands as receiver, as having the legal title to it, collecting moneys and paying them out. For these acts he must, if he is to account to this court at all for them, account to a trustee or assignee to be appointed by this court. It is not proper that he should, as trustee, be plaintiff and, as receiver, be defendant, in respect to these matters. Moreover, nothing can pass from him as receiver, of which he is now in possession, to any trustee or assignee to be appointed by this court, unless he voluntarily surrenders it, or is compelled to do so by proper legal proceedings. It appears that he does not intend to so surrender it, nor does he intend, if confirmed, as trustee, by this court, to cease acting as receiver. He announces that he intends to act both as receiver and as trustee, and have his acts authorized by the state court which appointed him receiver and by this court. This is a position of incompatibility which this court cannot permit one of its officers to occupy. If he is to be trustee under the bankruptcy act, appointed by this court, he must look to this court alone as the source of his authority. If he is to hold and administer, as receiver, under the state laws, the property which he received as receiver, he must so adminis-

ter it without looking to this court for any authority or direction. If he is to administer such property as a trustee appointed by this court, he must so administer it without looking to the state court, or to any other court but this court, for authority or direction. The emphatic language of Judge Woodruff, in the case of In re Bininger [Case No. 1,420], shows how utterly impossible it is for this court to permit Mr. Archer to occupy, at one and the same time, the two inconsistent positions of a receiver under the state law and a trustee or assignee appointed by this court. He says: "The design and purpose of the bankrupt law is, that the property of insolvents shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against devices to establish false claims, fictitious debts and illegal or inequitable preferences, which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say—we can devise a better or safer or more economical mode of reaching the same final result. If it were true, it would be only saying—we will resort to an expedient to defeat the bankrupt law, and our reason therefor is, that we think our plan is wiser and better than that which congress has seen fit to prescribe. But, the administration of the property under a receiver in such a suit does not necessarily accomplish the same result. It is not necessary to enlarge upon this, to anticipate all possible differences, but reference may be made to various provisions of the bankrupt law, such as, requiring the surrender of securities, as a condition of participation in the bankrupt's estate (section 20); excluding claims deemed fraudulent under the act (sections 22, 39); denying to creditors who have received or taken securities, with reason to believe in the insolvency of the debtor, and for the purpose of obtaining a preference, any share of the estate (section 23). * * * These subjects would find no place in the administration of the estate under the state laws, through a receiver. There are, also, summary means of investigation and inquiry peculiar to the bankrupt law, and not known to the other proceeding. So, too, the subject of making dividends from time to time is committed to the determination of creditors (section 27); several classes of debts are declared entitled to a preference and to payment in full in priority to others (section 28); and special modes of determining disputed caims are provided (section 6). There are, doubtless, other differences between the administrations under the bankrupt law and by a receivership under the state laws, but the above are sufficient to show that the two are wholly inconsistent, and that the latter defeats the former."

There is another objection to confirming the proceedings of the creditors in regard to a trustee. They have undertaken to select a committee consisting of three creditors. It is to be taken, that they desire such committee to consist of three persons. Their action, under the act, is a unit, and their resolution must be confirmed as a whole, or not at all. One of the three persons they name, to constitute the committee of creditors, is Mr. Bull, president of the New York Savings Bank. That bank claims, under a provision in the statutes of New York, to be entitled to a preference, and to payment in full, in priority to others; and, by its proof of debt, filed in these proceedings, it claims to have such statutes of New York applied in its favor, by so preferring its claim, in distributing the assets of the bank under the bankruptcy act. This claim of preference is contested by creditors of the bank who are unsecured, and who claim no preference. Under these circumstances, it is manifestly improper that Mr. Bull should be one of the committee of creditors, under whose "direction," according to section 43 of the act, the estate of the bank is to be wound up and settled.

The register certifies to the court, that the first meeting of creditors herein has been finally closed; that, at such meeting, there were some votes cast for an assignee, but there was no choice of assignee; and that the register made no appointment of assignee, there being an opposing interest. It is provided, by section 13 of the act, that, if no choice of assignee is made by the creditors at the first meeting, the judge, or, if there is no opposing interest, the register, shall appoint one or more assignees. The case, therefore, has arisen, where, the resolution nominating a trustee not being confirmed by the court, it becomes the duty of the court to appoint an assignee. The objections to the confirmation of Mr. Archer as trustee apply equally to an appointment of him as assignee, although three-fourths in value of the creditors whose claims were proved nominated him as trustee. I appoint John H. Platt, Esquire, as assignee of the bankrupt.

[For a subsequent proceeding in this litigation, see Case No 13,582.]

Case No. 13,582.

In re STUYVESANT BANK.

[6 Ben. 33;[1] 7 N. B. R. 445.]

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

BANKRUPTCY—EXAMINING WITNESS AS TO ESTATE OF BANKRUPT—RIGHT OF WITNESS TO HAVE COUNSEL.

1. In an examination of a witness respecting the estate of a bankrupt, on the application of a creditor, other creditors have not the right to in-

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

tervene and to interpose objections to questions put.

2. In such an examination a witness is not entitled to counsel, even though his examination may establish a liability on his part to the bankrupt's estate, and must be compelled to answer questions respecting his transactions with the bankrupt.

[Cited in Re Comstock, Case No. 3,080.]

In this case, a witness, who had been president and afterwards receiver of the bank, was under examination, at the instance of John Mack, a creditor. Questions were put to the witness touching advances made to the bank by him during his presidency thereof. In the course of this examination, the witness was asked to state specifically when and in what way a loan of $50,000 to the bank, to which he had testified, had been paid by him, or if he had any book or memoranda by which he could determine. Counsel appearing on behalf of W. R. Barr, another creditor, objected to the question. The register disallowed the objection, and the witness declined, by advice of counsel, to answer. The same counsel, appearing also as counsel for the witness, claimed to be recognized as such, and insisted that, inasmuch as the whole line of the examination pointed towards an assumed liability of the witness himself to the bankrupt, and his answers might tend to establish that liability, the witness was entitled to counsel. The register having decided that, under the ruling of the court in Fredenburg's Case [Case No. 5,075], the witness was not entitled to counsel, certified the above questions to the court, with his opinion, that, in an examination of a witness respecting the estate of a bankrupt, on the application of a creditor, other creditors have not the right to intervene and to interpose objections to questions put; that the claim of counsel to appear for the witness was untenable, and could not be considered stronger because his examination might establish a liability on his part to the bankrupt's estate; and that the question put to the witness, being in the regular line of investigation concerning an important and large transaction with the bankrupt, was one which the creditor was entitled to have answered, and the witness should be compelled to answer it.

By JAMES F. DWIGHT, Register: [2][I, James F. Dwight, register of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, viz.: O. H. P. Archer, a witness summoned on the application of John Mack, a creditor, was under examination before me on the 3d day of April, 1872. In the course of his examination the following testimony was taken: Q. (9) "Can you state more specifically when and in what way the actual payment of fifty thousand dollars was made by you, or have you any book or memoranda by which you can determine?" Dudley Field, Esq., appearing on behalf of Wm. R. Barr, a creditor, objects to the question, on the ground that the witness has not been asked at all yet when the payment was made, and further, that the question is incompetent, unmaterial and improper. The register rules, that in this examination the creditor, Barr, has not the right to intervene, and that the objection cannot be allowed. To which the attorney for said creditor excepts, and desires that the question may be certified to the court, as to whether this creditor can intervene. The question is allowed, and the witness is directed by the register to answer it. The witness says: A. "I decline to answer, by advice of counsel." Mr. Dudley Field appearing also as counsel for Archer, the witness, claims to be recognized as such, and insists that inasmuch as the whole line of examination points toward an assumed liability of the witness himself to the bankrupt, and his answers may tend to establish that liability, the witness is entitled to counsel. The register decides that under the ruling of the court, in Re Fredenburg [supra], the witness is not entitled to counsel, and that Mr. Field cannot be recognized as such. Mr. Field, as attorney and counsel for Wm. R. Barr, prays that the question may be certified to the court, as to the correctness of the register's ruling. Mr. Tracy for the examining creditor, Mack, desires that the question may be passed upon by the court as to whether the witness shall be compelled to answer question No. 9, and prays that the matter be certified to the court.

[In accordance with the request of the parties, the said questions are certified to the judge for his action, and under the rule of the court I state the following:

[1st. In regard to the first point, raised, I do not think that other creditors have the right to intervene and to interpose objections to questions put. These examinations are allowed by the bankrupt act [of 1867 (14 Stat. 517)], for the purpose of gaining information concerning the estate of the bankrupt; information in which all the creditors have a common interest; and to allow one creditor the right to interpose objections to the course of examination by another, would only hamper the examining creditor, while affording no benefit to any, and would be productive only of confusion and delay. The only person who would properly have an "opposing interest" in such an examination, would be the bankrupt himself, and to him is preserved and allowed the right of cross examination.

[2d. In regard to the second point.—The claim of Mr. Field to appear as counsel for the witness: (entirely apart from the fact that the application does not come from the witness himself,) the proposition seems to me entirely untenable. The rights and obligations of a witness are not one thing when he is before a court and jury, and another when

[2] [From 7 N. B. R. 445.]

being examined in chambers before a register. He does not occupy such an anomalous position that would entitle him to assistance in one case, that would not even be claimed for him in another. This point has already been passed upon in the Case of Fredenburg [supra], and in Re Feinburg [Case No. 4,716]. Nor can the claim be considered stronger because the examination of the witness may establish a liability on his part to the bankrupt estate. The very end and aim of an examination might be to establish precisely such a liability, (which right of examination is passed upon by the court in Re Earle [Id. 4,244], and in Re Fay [Id. 4,708]) and however much such person under examination might need legal assistance and counsel when a party to proceedings in another forum, it could certainly not be allowed to follow him into the stand and take position by his side when he is called as a witness.

3d. I think the witness should be compelled to answer question No. 9. Section twenty-six of the act gives to creditors the right to examine the bankrupt upon all matters relating "to the disposal or condition of his property; to his trade and dealings with others, and his accounts concerning the same; to all debts due to or claimed from him; and to all other matters concerning his property and estate, and the due settlement thereof according to law," and the court may in like manner require the attendance of any other person as a witness.

[The bankrupt act gives the fullest power to creditors to get at all the facts connected with a bankrupt estate, and this question being in the regular line of investigation concerning an important and large transaction with the bankrupt is one which the creditor is entitled to have answered. Which facts, questions certified, and opinion, are respectfully submitted this 8th day of April, 1872.] [2]

BLATCHFORD, District Judge. I concur in the views of the register.

[For a prior proceeding in this litigation, see Case No. 12,581.]

Case No. 13,583.

In re STUYVESANT BANK.

[See Case No. 12,919.]

Case No. 13,584.

In re STUYVESANT BANK.

[See Case No. 12,919.]

STUYVESANT BANK (SIXPENNY SAV. BANK v.). See Case No. 12,919.

STUYVESANT, The GERARD. See Case No. 5,356.

STYLES (LYLES v.). See Case No. 8,625.

[2] [From 7 N. B. R. 445.]

Case No. 13,585.

SUAREZ v. The GEORGE WASHINGTON.

[1 Woods, 96.] [1]

Circuit Court, D. Louisiana. Feb. 20, 1871.

SHIPPING—BILL OF LADING—FREIGHT—CARRIAGE BY PURSER—BAILMENT.

"A." was the purser of a steamship about to sail from New Orleans to New York. A package marked with his name was delivered to him for which he gave a bill of lading, whereby he agreed to deliver the package to L. in New York, on payment of the value thereof, and in default of payment to return the package to the consignor. The bill of lading indicated that freight had been paid on the package, but no freight was in fact paid or tendered, nor was there any agreement or expectation that freight was to be paid The package was not placed on the ship's manifest nor stowed with the other freight. "A." was not authorized to sign bills of lading. He delivered the package to the proper person in New York, but neglected to collect its value. *Held*, that the package was delivered to "A." as the bailee of its owner and was not delivered to the steamship, and that the latter was not liable for its value.

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

In admiralty.

E. W. Huntington, for libellant.

T. J. Semmes and Robert Mott, for respondent.

WOODS, Circuit Judge. On the 31st of July, 1868, E. S. Allen, the purser of said steamer signed and delivered the following receipt: "New Orleans, July 31, 1868. Received in good order and condition from P. Manich on board steamer George Washington, one box said to contain 6,000 cigars, marked E. S. Allen, to be delivered to Mr. E. S. Lagram in New York on his payment to Mr. T. Masich of ($660) six hundred and sixty dollars, or in case of nonpayment by him, for me to return said cigars to Mr. F. Masich, New Orleans. (Signed) E. S. Allen, Purser." Freight collected. The libel alleges and the proof shows that Masich was only the agent of libellant in the matter; that the box actually contained 6,000 cigars; that they were the property of libellant; that they were conveyed to New York and there delivered without the collection of said sum of $660. Libellant claims that he has a lien on the steamer for the said sum, and that her owners are jointly and severally liable to him for that amount.

The respondent Moulton answers by way of defense: 1. That Allen did not receive the box of cigars or give the receipt as agent of the owners of the steamer, but undertook to carry said box to New York and deliver it to Lagram as a personal favor to Lagram; and no freight was paid or agreed to be paid thereon, of which Masich had notice when he delivered the box on board the steamer. 2. That the acts of said Allen in the premises were done out of the scope of his employ-

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

ment, and without the knowledge and consent of respondents, and that he was not authorized to sign receipts and bills of lading for freight shipped on board the steamer.

This case turns upon the question: Did the shipper deliver the box to Allen as his bailee or did he deliver it to the steamer through Allen acting as the agent of the steamer? Upon this point Allen testifies: That about July 25, 1868, while in New Orleans, he received from Lagram, who was then in New York, a letter asking him to bring on a case of cigars from Mr. F. Masich. About that time Masich applied to him personally in New Orleans; stated that he had received a letter from Lagram informing him, Masich, that he thought he, Allen, would bring on the box, and asked him if he would do so, and deliver the box to Lagram. He told Masich he would. He considered the transaction a personal one between Masich, Lagram and himself. At Masich's request he signed the receipt as purser of the steamer in order that Masich might effect an insurance upon the box. He did not intend to sign the receipt as purser of the steamer, and Masich understood the reason of his so signing. No freight was paid or agreed to be paid on the box. He was not authorized to sign and never did sign receipts or bills of lading for freight except for specie, when he had express orders to do so. No application was made to the office of the steamer's agent, which was customary, and the only place where freight engagements were made. The box was not on the ship's manifest, nor stored with the other cargo of the ship, but put in the bath room as a personal matter of his own.

This testimony is entirely uncontradicted, and there is no evidence whatever to show that freight on the box was ever paid, tendered or agreed to be paid. These facts clearly establish the character of the transaction, and show that the box was delivered to Allen on his own account, and not as agent or purser of the steamer. Masich clearly so understood the transaction; otherwise, why did he apply to Allen personally and inquire whether he would take the box? He must have known that if he desired to send the box as freight, the steamer would take it, and was bound as a common carrier to take it. The circumstances clearly establish that the purpose of the application to Allen was to get the box transported by him as a friend of Lagram, without the payment of freight, and perhaps also to secure his services in collecting from Lagram the price of the package. It is within the observation and experience of almost every one that the officers and passengers on steamers frequently take small packages, for carriage and delivery, as a personal favor to the sender, on which no freight is paid or expected to be paid. It would be a great injustice to the steamer to hold her responsible for the safe delivery of such parcels. There is nothing to distinguish this case from the class just mentioned, except the fact that Allen signed a receipt as purser. But he testifies he had no authority so to do, and that he did it at Masich's request in order that he might get insurance on the box, and that Masich so understood it.

The case is that Lagram and Masich attempted to get the box carried to New York without the payment of freight. Masich delivered the box to Allen who became his agent or the agent of his principal: Having failed to receive pay for his goods, through the neglect of Allen, he is now seeking to recover their value from the steamer, with which he never made any contract of affreightment, and to which he neither paid, nor agreed to pay, nor tendered any freight. The record further shows that Allen had no authority to sign receipts or bills of lading, and that the steamer had an agent at New Orleans charged with that duty.

The law says that the principal is bound by all the acts of his agent within the scope of his authority, which he holds him out to the world to possess. It is clear that the signing of the receipt was not within the scope of the authority conferred on the purser by his employers. So says the testimony. Did they nevertheless hold him out to the world as having such authority? There is nothing in the record to show that they did either expressly or by recognizing his acts in signing receipts, nor does it appear from the testimony that it is by any means a universal custom or even general custom with lines of steamers having agents, to authorize the purser to sign receipts or bills of lading. The act of the purser in signing the receipt in this case was therefore beyond the scope of his authority, nor had he been held out to the world as having such authority. His principals could not therefore be bound.

The libel must be dismissed at costs of libellant. Decree accordingly.

Case No. 13,586.

The SUCCESS.

[7 Blatchf. 551.] [1]

Circuit Court, D. Connecticut. Sept. 20, 1870.

CHARTER PARTY—DELAY IN SAILING—MEASURE OF DAMAGES.

1. Where a vessel is chartered on a time charter, for a voyage, the time to be paid for at a specified rate, her obligation to her charterer is, that she will sail without unnecessary delay, and proceed, with all reasonable dispatch, to her destination.

[Cited in The Giulio, 34 Fed. 911; The Coventina, 52 Fed. 157; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 544.]

2. The conditions of the contract, the nature of the cargo, and the object of the voyage, may all be considered in determining what is reasonable.

3. The rule of damages, in a suit in admiralty, brought by the charterer against the vessel, for a breach of that obligation, is, that the libellant

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

is entitled to the difference between the fair market value of the cargo at the port of destination on the day when the cargo ought to have been delivered, and its value at the time when the vessel arrived, and made, or was in readiness to make, such delivery.

[Cited in Page v. Munro, Case No. 10,665. Cited in brief in Schmidt v. The Pennsylvania, Id. 12,464; The Caledonia, 43 Fed. 686.]

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

In admiralty.

John T. Wait and Jeremiah Halsey, for libellants.

James A. Hovey, Abiel Converse, and Lafayette S. Foster, for claimant.

WOODRUFF, Circuit Judge. 1. The title of the libellants to a decree in this case does not depend upon any doubtful question of law, nor was there any serious difference between the counsel for the respective parties, on the hearing, in respect to the rules governing the rights of the parties.

The claimant's vessel was under charter to the libellants for a voyage. She was fully laden for that voyage on the morning of the 1st of April, 1865, with potatoes, apples, and other produce, bound for Norfolk, via Fortress Monroe, for a market. The agreement of the parties specified no time for sailing, nor any time for arrival. The obligation which, in such case, is implied by law was, that she would sail without unnecessary delay, and proceed, with all reasonable dispatch, to her destination; and the conditions of the contract, the nature of the cargo, and the object of the voyage, may all be considered in determining what is reasonable. The contract was a time contract, and not a contract for the voyage in gross. The libellants agreed to pay for the time consumed therein, at a specified rate. The master had, therefore, no right to consume more time than was reasonably necessary, and, by delay, increase the earnings of the vessel at the expense and loss of the libellants. The cargo was perishable. This was a further reason why time should not be wasted. The cargo, as is charged in the libel and admitted in the answer, was shipped for a market. The libellants were, on this ground, also, entitled to all the advantage which reasonable dispatch would secure to them in the market for which the vessel was bound. These are special reasons for the application of the rule in this particular case; and, irrespective of such special reasons, the rule is general, as to contracts for transportation where no time is mentioned, namely, that they must be performed within a reasonable time. The contested question here is, therefore, so far as relates to the right of the libellants to recover, one of fact, to be determined by the weight of the evidence.

It was found by the district court, that the master of the vessel unreasonably and unnecessarily delayed her sailing after she was laden; that he increased that delay by selecting the most circuitous and least advantageous of the two routes to her destination, without reasonable cause; and that her departure from New York was needlessly delayed, after she had reached that port, on the route selected. In those conclusions, after a careful consideration of the testimony, aided by the arguments of counsel, I concur. I shall not review the evidence, but it is proper to say that, to my mind, the preponderance is in accordance with those findings. In cases of this sort, there is usually more or less conflict, and it is not difficult for parties interested to form and express opinions tending to exempt them from liability. The master of the vessel is not only contradicted, in important particulars, by both the libellants and their supercargo, but his own explanations of his delay at New London are unsatisfactory, and inconsistent with other testimony, with the state of the wind and weather, and with the experience of at least one other vessel; and even the master himself, in substance, admits, that there was no reasonable excuse for so great detention in New York.

Without, however, going into detail, I deem the conclusion fully warranted, that, had the vessel sailed as soon as she reasonably might, and had she proceeded with due dispatch, she would have arrived as soon as the 10th of April, and probably before that day. The failure of duty in this respect was, therefore, a breach of contract, and entitled the libellants to recover their damages.

2. No exception to the assessment of damages by the commissioner, to whom it was referred to take proofs and make the computation, is urged in this court. Such exceptions as were formally taken below were withdrawn in the district court when the final decree was moved for. The rule of damages prescribed by the court to the commissioner, for his guidance in making the assessment, was the difference between the price at which the libellants had contracted for the sale, or at which it might have been made on the 10th of April, and the price at which it was actually made, and the loss on such of the produce as perished by decay, where that decay was clearly traced to the unreasonable delay.

Before the 10th of April, the libellants had made a contract for the sale of the goods, upon condition that they should arrive on or before that day, and, as they failed to arrive, the proposed purchasers refused to receive them at the price stipulated.

Probably, the rule thus stated was not intended by the court below to charge the vessel with any special damages, by reason of the fact that the libellants had negotiated that sale, but only to suffer the fact of this particular sale, negotiated as it was only two days before the 10th, to be considered in reference to the question—what was the market value on the day the vessel should have arrived? If a sale had been negotiated on the

4th of April, conditioned on her arrival on the the 10th, and that was found to be the day on which she should have arrived, but, between the 4th and the 10th, the market price had fallen off, it would hardly be claimed, I think, that the loss of that special contract furnished a rule of damages.

The commissioner here has found specially the contract of sale and its price, but he has also expressly found that that price was the fair market price of the articles on the 10th of April. His assessment conforms, therefore, in fact, to the rule which gives to the libellants the difference between the fair market value on the day when the vessel should have delivered her cargo, and the value at the time when she in fact arrived, and made, or was in readiness to make, such delivery; and this rule is not claimed to be erroneous.

That, in such cases, the libellants are entitled to interest, has been often denied. But the question is not material here, since, although the commissioner computed the interest, the court awarded even less than the principal sum reported as damages. The parties having stipulated for value, and discharged the vessel from custody, agreeing upon such value at $5,000, the stipulators were decreed to pay, in discharge of their stipulation, that amount only, with costs.

The decree must be affirmed, with costs.

SUCCESSION OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the decedents.]

SUCKLEY (HITNER v.). See Case No. 6,543.

Case No. 13,587.

SUCKLEY v. SLADE.

[5 Cranch, C. C. 123.] [1]

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

PLEADING AT LAW—PLEAS.

The defendant had pleaded the statute of limitations in due time, and had also demurred to the whole declaration. The court permitted him to withdraw his demurrer, and to let the plea of limitations remain.

Debt [by George Suckley against Henry C. Slade] upon a bond, conditioned to pay one third of the debt of Charles Slade.

The defendant had demurred to the whole declaration, and had pleaded, in due time, the statute of limitations of twelve years.

Mr. Jones, for defendant, now moved to strike out the demurrer, leaving the plea of limitations to stand as his only plea.

Mr. Marbury, for plaintiff, contended that the defendant could not plead and demur at the same time, and that therefore the whole pleading is a nullity and must go together, and then it would be too late to plead the statute, as the plea-day had long since passed. The pleading being inconsistent, there is no plea, nothing to which the plaintiff can reply. The statute must be pleaded at length, and by the rule-day; and cannot be amended. Merryman v. State, 5 Har. & J. 425; Wall v. Wall, 2 Har. & G. 79; State v. Green, 4 Gill & J. 381; State v. Boyd, 2 Gill & J. 365; Waterfall v. Glode, 3 Term R. 305.

Mr. Jones, in reply, cited the statute of limitations of 1715 (chapter 23, § 6), that no bond shall be good or pleadable if it be of twelve years' standing. Carroll v. Waring, 3 Gill & J. 491, 499; Piatt v. Vattier, 9 Pet. [34 U. S.] 415.

THE COURT (CRANCH, Chief Judge, doubting, not having had time to look into the cases cited, but inclined to concur with the court) permitted the defendant to withdraw his demurrer, and leave the plea of limitations, as a plea filed in due time.

[See Case No. 13,588.]

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

Case No. 13,588.

SUCKLEY v. SLADE.

[5 Cranch, C. C. 617.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

LIMITATION OF ACTION—"BEYOND SEAS."

A person in Alexandria county, D. C., is not "beyond seas," within the meaning of the act of limitations, in regard to persons residing in Washington county. The residence of the defendant in Alexandria county may, therefore, be added to his residence in Washington county, so as to enable him to plead, in Washington, the Maryland statute of limitations of "twelve years' standing," to a bond.

Debt [by George Suckley against Henry C. Slade] on a bond in the penalty of $9,794, dated 18th of April, 1820, conditioned to be void upon the defendant's paying to the plaintiff one-third of the debt due by the defendant's father to the plaintiff if he himself should not pay the whole debt on or before the 1st of January, 1822.

A verdict was taken for the plaintiff, subject to the opinion of the court, upon the following state of the case: On the trial of this cause it was agreed that the following state of facts be submitted to the court as if found by the jury in the shape of a special verdict. The contract upon which the suit is brought is as set forth on oyer. It was executed, at the time it bears date, in Alexandria county, D. C. That at said date, and from that time to the institution of this suit, the plaintiff resided in, and was a citizen of, the state and city of New York. That from the date of said contract, and until the year 1824 or 1825, the defendant was a resident of Alex-

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

andria. In 1824 or 1825 he removed to Fairfax county, in Virginia, where he resided until 1829 or 1830, when he removed to the county of Washington, where he has since resided. That while the defendant so resided in Alexandria and Virginia, he was in the habit of occasionally visiting the county of Washington during each year. That the plaintiff was in the habit of visiting the District of Columbia once or twice a year, spring or fall, from 1818 to 1824, on business, and remaining, at each visit, in said district for several days, part of which he spent in the county of Washington, and the residue in the county of Alexandria. In particular, that in April and September, 1822, he so came into the said district, and both of said counties, and continued in the said district several consecutive days, and in Alexandria from the 5th to the 9th of April, 1822. And if upon such state of facts the court shall be of opinion that the plaintiff is entitled to recover, then judgment to be entered for the plaintiff; and, if for the defendant, then judgment for the defendant.

The question submitted was, whether, under the circumstances so stated, the plea of the act of limitations of Maryland, 1715, c. 23, § 6, "that the debt" was "above twelve years' standing," was a good defence to this action.

R. S. Coxe, for plaintiff, contended that the condition of the bond was for a continuing guaranty, and, therefore, the statute of limitations did not apply to the case; and that it was incumbent on the defendant to show that he had resided in Washington county the whole twelve years. That Alexandria county, being governed by a different code of laws, was to be considered as foreign to Washington county. That the defendant, while residing in Alexandria county, is to be considered as "absent out of this province," (within the meaning and true construction of the Maryland act of November, 1765, c. 12, § 2,) when the cause of action accrued, and that he could not be considered as present in the province, within the third section of that act, until he came into the county of Washington.

R. J. Brent, for defendant, cited the case of Bank of Alexandria v. Dyer [Case No. 847], in this court, at March term, 1838, in which this court decided that Alexandria county was not "beyond seas," within the true construction of the Maryland act of limitations, which decision has been since affirmed by the supreme court, in the same case (14 Pet. [39 U. S.] 141).

[See Case No. 13,587.]

THE COURT (MORSELL, Circuit Judge, contra) rendered judgment for the defendant, upon the case stated, being of opinion that the time of the defendant's residence in Alexandria may be added to his residence in Washington, so as to give him the benefit of the Maryland statute of twelve years' limitation.

SUDHOFF (Putnam v.). See Case No. 11,483.

Case No. 13,589.

The SUE.

[Blatchf. Pr. Cas. 361.] [1]

District Court, S. D. New York. May, 1863.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured as prize, March 30, 1863, at sea, off Little River inlet, by the United States steamer Monticello, near the coast of North and South Carolina, and were sent to this port for adjudication. The writ of attachment and the monition were duly served, and were returned April 28 thereafter, and proclamation and default thereon were taken in open court. The vessel's papers, found on board of her on her capture, were a certificate of British registry, dated at Nassau, N. P., February 21, 1862, showing that she was owned by Augustus John Adderly of that place; a shipping agreement, dated March 16, 1863, showing that she was bound on a voyage from Nassau to Beaufort, N. C., and back to Nassau and other port or ports; and her clearance at the same port, dated March 16, 1863, for the same destination, with the cargo and the bill of lading thereof on board. The master, the mate, and the cook were examined in preparatorio as witnesses, and testified that the vessel was captured off the coast of South Carolina, about 35 miles to the south of Wilmington; that she was English-owned, and was bound for any Confederate port she could, reach; that they knew of the blockade of the ports along the coast; and that all understood that the vessel was destined to run the blockade. The case admits of no question, on the proofs, that the vessel was, when seized, intentionally engaged in an attempt to violate the existing blockade of the coast. A decree of condemnation of the vessel and cargo is, accordingly, rendered.

Case No. 13,590.

SUFFOLK BANK v. LINCOLN BANK.

[3 Mason, 1.] [2]

Circuit Court, D. Maine. May Term, 1821.

BANKS—BANK-BILLS—HOW PAYABLE.

1. The holder of bank-bills is entitled to be paid in specie the amount of the bills, upon a demand within the usual banking hours of the bank.

[Cited in Reapers' Bank v. Willard, 24 Ill. 437.]

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

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

2. He is not obliged to take foreign gold or silver coin at the bank count, but the payment must be by weight.

3. A bank is bound to keep its money counted, or weighed, or to employ servants sufficient to count it or weigh it, so as to pay all demands made within the usual bank hours.

4. A bank holding the bank-bills of another bank and demanding payment of the same at the banking house of the latter, is not bound to receive its own bills in payment, but may demand specie.

5. A fortiori it is not bound to receive other bank-bills, or a draft in payment.

Assumpsit. This action was brought for the recovery of about $3,000, together with the additional damages of two per cent. per month, authorized by the laws of Massachusetts, in cases where any bank shall refuse or neglect to pay its bank-bills in specie on demand. The facts were as follows: A runner or agent from the Suffolk Bank, established at Boston, presented at the banking house of the Lincoln Bank at Bath, their bank-bills to the amount above stated for payment, and early in the morning, and very soon after the commencement of the usual banking hours. The cashier immediately offered to pay the amount in bills of the banks in Boston, and among others, partly in those of the Suffolk Bank, or by a check or draft on a bank in Boston; both of which proposals were declined by the agent, who demanded payment in specie. The cashier then began to count out small pieces of silver change. It occupied him until near the hour of closing the bank, to count in this way, about five hundred dollars. He tendered no gold, and no silver of a larger denomination than one quarter of a dollar, and no more of that, than would have amounted in the whole to one thousand dollars, which could not have been counted at the rate at which the cashier was counting, within the bank hours of the day, which were from nine o'clock a. m., until one o'clock, p. m. The agent offered to take the specie at the count of the bank, but the cashier declined so to deliver it; and the agent being unable to procure the specie, left the bank with his bills, a very short time before the closing of the bank. The Suffolk Bank treated these facts as a case of refusal or neglect to pay the bills, and commenced the present action accordingly.

Mr. Longfellow, for plaintiffs.

Ames & Whitman, for defendants.

STORY, Circuit Justice (charging jury). The act of Massachusetts (St. 1809, c. 38) under which this suit is brought, declares, that, "if any incorporated bank shall refuse or neglect to pay on demand, any bill or bills by such bank issued, such bank shall be liable to pay to the holder of such bill or bills after the rate of two per cent. per month on the amount thereof, from the time of such neglect or refusal, to be recovered as additional damages in any action against the bank for the recovery of the said bill or bills." It is the duty of every bank to pay its bills in specie on demand, if such demand is made at the bank within the usual banking hours, and the omission to pay under such circumstances, is a neglect or refusal within the meaning of the act. There is no pretence to say, that a bank has a right to delay the holder of its bills, day after day, while its officers can count out change so as to make up the amount in the smallest species of coin in their own way. Every bank is bound either to have its specie counted or weighed, and ready for delivery, or to have servants sufficient to count and weigh it, and pay it out for all demands made during the usual banking hours. I do not say, that if a very large demand be made just before the closing of a bank, so that a reasonable time may not exist to count, weigh, or deliver it, an omission to pay until the next day would, under such circumstances, be unjustifiable. Perhaps it may be, as the business of banks requires, that they should be closed at certain hours, in order to preserve regularity and correctness in their books and proceedings, that the law would, if the banking hours were reasonably extensive, allow some indulgence in this particular. But on this point, I give no opinion, as it is not necessary in the present case, and there may be strong ground to assert the strictness of the general law as to demands and payments.

Then what are the circumstances of the present case? A demand was duly made at the bank by the agent, for payment at an early hour, and quite early enough, if the cashier or the bank officers had used ordinary diligence, to have enabled them to pay any sum, however large, which the bank could be called upon to pay (for the bank hours must be presumed to be regulated by such considerations), and certainly to pay so small a sum as that now in controversy. It is said in the first place, that the cashier offered to pay the amount in Boston bills, or by a draft on Boston. But this constitutes no legal excuse. Every bank is bound to pay specie for its bills, and nothing else is a good tender. Every other arrangement is a matter of courtesy, and not of right. The Suffolk Bank was not bound even to have received its own bills in payment, if such bills to the full amount had been (and they were not) offered. It might have been unkind and harsh treatment; but still the law does not compel the Suffolk Bank to receive its own bills in payment of bills, which it holds of another bank, at least not under circumstances like the present.

In the next place, it is said, that there was in fact no delay or refusal to pay, because the cashier was employed in counting the specie, and he had a right to full time for such a purpose. Now as matter of prudence, it may be admitted to have been proper for the cashier to count his specie before delivery; but as matter of right, his

conduct cannot be justified, if his intention was thereby unreasonably to delay payment to the agent, and thus to create an impossibility of his receiving the amount on that day. I go farther and hold, that if in fact, by such conduct, the payment of the amount on the day of demand was necessarily defeated, it comes within the provision of the act, whether there was a wrongful intention or not. It was a neglect to pay, and occasioned by the want of due diligence on the part of the officers of the bank. The jury will consider, if necessary, in their view of the case, whether the cashier did not intentionally count over the small change for the mere purpose of delay and to avoid payment. The circumstances are so strong to lead to this conclusion, that little more is necessary than to recapitulate them.

But this point is the less necessary to be considered, because by the laws of the United States, foreign gold and silver coins are not a tender except by weight. The cashier therefore has no authority to make a tender of them by the bank count; and it is obvious, that if payment had been made by weight, the whole business might have been transacted in a very few minutes.

But what seems decisive in the case is, that in point of fact, no tender was made of the amount of the bills. The demand was of the whole amount of 3,000 dollars; there was no count of any specie even to the amount of 1,000 dollars. It has been intimated that each bank-bill should have been separately presented for payment and separately paid. But there is no foundation in law for that suggestion. The holder had a right to demand the whole at once as an aggregate sum, and the bank was bound to pay the whole. Then as there was a due demand, and no money to the amount paid, or tendered in payment, what ground can there be to say that the bank has not refused or neglected payment of its bills? The agent did not waive the receipt of the money, but on the contrary offered to receive it at the count of the bank, and was suffered to depart without payment.

These are the views of the law as applicable to the facts, which I deem it proper to present to the jury. But I am willing to put the case as it was put in the argument, upon somewhat narrower grounds;—first, whether the sum in controversy might not have been reasonably paid within the banking hours of the day, on which it was demanded; secondly, whether there was not an unreasonable delay of payment on the part of the officers of the Lincoln Bank; and thirdly, drawing the legal conclusion from the other points, whether, under all the circumstances, there was not, on the part of the Lincoln Bank, a refusal or neglect to pay the bills within the true sense of the act.

Verdict for the plaintiffs with the two per cent. damages.

Case No. 13,591.

SUFFOLK BANK v. MERRILL.

[Cited in Case of Snow, Case No. 13,143. Nowhere reported; opinion not now accessible.]

Case No. 13,592.

SUFFOLK BANK v. MERRILL.

[Cited in Sumner v. Marcy, Case No. 13,609, and in Ex parte Snow, Id. 13,143. Nowhere reported; opinion not now accessible.]

SUFFOLK BANK (MESNER v.). See Case No. 9,493.

SUFFOLK INS. CO. (POTTER v.). See Case No. 11,339.

SUFFOLK INS. CO. (WILLIAMS v.). See Cases Nos. 17,738 and 17,739.

SUFFOLK MANUF'G CO. (HAYDEN v.). See Case No. 6,261.

SUKELEY (JOHNSON v.). See Case No. 7,414.

Case No. 13,593.

SULIVAN v. BROWNE.

[2 Wash. C. C. 204.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PRACTICE AT LAW—RULE TO TRY.

Where no declaration or plea has been filed, a rule to try or non pros. cannot be enforced.

In this suit, which was marked for trial at a preceding term, though neither declaration nor plea was filed; a rule to try or non pros. was entered.

Meredith now moved to enforce the rule, and read a case from Dallas's Reports in the supreme court of Pennsylvania, in which the rule was enforced, though no plea was put in.

BY THE COURT. The rule is in the alternative, that the plaintiff shall try the cause, or be nonsuited. He has a right to say he will try, rather than be nonsuited; and how can we accept his offer to try, when the cause is not in a state for trial? To say that he shall be nonsuited, unless he do what the court will not permit, is to take away the alternative. Were the plaintiff to offer to file a declaration now, still the cause could not be tried without a rule to plead, and a plea filed, and jury struck, or venire issued; but under another rule of this court, made in 1806, all rules to plead, are to be given from month to month in the clerk's office; and were we to allow a rule to be taken here, we should violate that rule.

Meredith then moved for a rule on defendant to plead in a month.

BY THE COURT. As the rule laid down in 1806, seems strangely to have been neg-

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

lected, or may not generally have been known, we will permit this innovation on the standing rule, during this term; but in future motions of this sort will be refused.

SULIVAN v. BROWNE. See Case No. 13,593.

SULLIVAN (DEXTER v.). See Case No. 3,868.

Case No. 13,594.

SULLIVAN v. HIESKILL.

[Crabbe, 525;[1] 4 Pa. Law J. 171; 2 Pa. Law J. Rep. 383.]

District Court, E. D. Pennsylvania. Dec. 7, 1843.

BANKRUPTCY—PREVIOUS ASSIGNMENT — STATE INSOLVENT ACT.

L. made a voluntary assignment to H., with preferences; subsequently he took the benefit of the insolvent laws of Pennsylvania, and again made an assignment to H., as required thereby; afterwards he was declared a bankrupt, on his own petition, in this court. Under these facts the assignee in bankruptcy could not recover from H. the property passed to the latter by the previous assignments.

This was a motion to take off a nonsuit. It appeared that on the 30th October, 1841, Henry Lewis made a general assignment to the defendant [Thomas Hieskill] for the benefit of certain preferred creditors; that in January, 1842, he applied for the benefit of the insolvent laws of Pennsylvania; and that, on his discharge in February, 1842, the defendant was appointed his assignee, as required by those laws. Under these assignments the defendant came into possession of all Lewis's property, including that for the value of which this action was brought. In March, 1843, Lewis filed his petition in this court for the benefit of the bankrupt law [of 1841 (5 Stat. 440)], and on the 29th April, of that year, was declared bankrupt. The plaintiff [John T. S. Sullivan], was appointed assignee in bankruptcy, and thereupon brought this action of trover for the value of certain machinery of Lewis's then in defendant's hands under the assignments before mentioned.

The case came on for trial on the 7th December, 1843, before RANDALL, District Judge, and a jury, and was argued by Sullivan, for the plaintiff, and by Perkins, for the defendant. The plaintiff was nonsuited, with leave to move to take the nonsuit off.

RANDALL, District Judge. On the 30th of October, 1841, the bankrupt made a voluntary assignment of all his estate to the defendant, for the benefit of certain of his creditors in the first instance, and on the 13th of January, 1842, he applied to the court of common pleas, of the county of Philadelphia, for the benefit of the insolvent laws of the state of Pennsylvania. On the 5th of February, 1842, he was discharged, and the defendant appointed his assignee, according to the provisions of those laws. Under these assignments the defendant obtained possession of and sold the property of Lewis, who, in March, 1843, filed a voluntary petition for the benefit of the bankrupt law, and was, on the 29th of April, decreed a bankrupt. The plaintiff, having been appointed his assignee, brought his action of trover to recover from the defendant the value of the property received by him under the voluntary assignment, on the ground that such assignment was fraudulent and void, as containing preferences contrary to the provisions of the bankrupt law. At the trial of the case, after hearing the plaintiff's evidence, a nonsuit was imposed, with leave to the plaintiff to move to take it off, should he think proper to do so. That motion having been made is now to be disposed of.

It is argued that the assignment of the 30th October, 1841, being contrary to the provisions of the bankrupt law, passed no interest in the property to the assignee, and by the express provision of that act, is utterly void and a fraud upon the law, which declares that the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the property attempted to be assigned as part of the assets of the bankrupt. It is also said, that the assignment under the insolvent laws vested no interest in the defendant, because, as to the petitioner, the first assignment was binding on him, and he had no property to assign, and because the insolvent laws of the state were suspended during the existence of the bankrupt law.

As to the voluntary assignment, no doubt it was utterly void and a fraud upon the bankrupt law; it passed no property to the assignee, and in Thomson v. Dougherty, 12 Serg. & R. 448, it was held by Judge Duncan, that a fraudulent assignment, void as to creditors, was binding on the assignor and all persons claiming under him; that the property passed out of him, and could not be recovered by his assignees under a subsequent assignment, valid for other purposes, although it might be reached by creditors, and sold under executions on judgments obtained subsequently to both assignments. But this doctrine was re-examined by the whole court, in Englebert v. Blanjot, 2 Whart. 240, and it was then held, that in case of a void assignment, either from fraud or otherwise, the title to the property remained in the assignor so far as was necessary to protect the interests of his creditors, and that a subsequent assignee under the insolvent laws had a right to sue for, and recover the property from the original assignee. The reasons for this decision, as given by Chief Justice Gibson, are to my mind conclusive of this motion, unless there is force in the objection, that the insol-

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

vent laws were suspended during the existence of the bankrupt law.

The Case of Eames [Case No. 4,237], decided by Judge Story, which has been referred to, must be taken with reference to the case before the court. It was there said that as soon as the bankrupt act went into operation, it, ipso facto, suspended all action upon future cases under the state insolvent laws, when the insolvent persons were within the purview of the bankrupt act; but the learned judge spoke in reference to state insolvent laws having the effect of the bankrupt law when it discharged the debtor from the obligation of prior contracts. Now the insolvent laws of Pennsylvania have no such effect. They merely protect the person from imprisonment, and do not affect the contract; indeed, they expressly provide (Act June 16, 1836, § 40; Dunl. Laws, 3d Ed., p. 724), that "the real and personal estate acquired by any debtor, after his discharge, as aforesaid, or in which he shall thereafter become entitled to any interest, legal or equitable (except such as may be by law exempted from execution), shall be subject to his debts, engagements, and other liabilities, in like manner, and in all respects, as if such discharge had not taken place." The assignment under the state insolvent laws is for the equal benefit of all the creditors; and in the present case, the proceedings were consummated long before the application was made for the benefit of the bankrupt law; that application was voluntary, and indeed, for aught that appears in these proceedings, the petitioner was not a person liable to be declared a bankrupt against his will.

Whether, then, we consider this as an assignment by process of law, or a voluntary assignment for the equal benefit of all the creditors, according to the principles laid down by the circuit court of this district in Ex parte Dudley [Case No. 4,114], and in Anon. [Id. 467], the property vested in the assignee under the state insolvent laws, and the plaintiff cannot recover in this action.

The motion must, therefore, be dismissed.

Case No. 13,595.

SULLIVAN et al. v. INGRAHAM.

[Bee, 182.] [1]

District Court, D. South Carolina. March 23, 1802.

SEAMEN—EMBEZZLEMENT OF CARGO—CONTRIBUTION.

It is a general rule that all the crew must contribute to make good the amount of articles of the cargo embezzled. But proof will be admitted to shew the innocence of some.

[Cited in Spurr v. Pearson, Case No. 13,268; Joy v. Allen, Id. 7,552; Edwards v. Sherman, Id. 4,298.]

[This was a libel for wages by Sullivan and others against Nathaniel Ingraham.]

BEE, District Judge. It is admitted that the wages sued for are due; but the defendant alleges that certain articles of the cargo to the value of nearly 200 dollars have been embezzled; and he contends that this sum should be deducted. The loss is admitted, but it is said that as the mate and steward, with three other seamen, were on board at the time it happened, they must contribute to make good the amount. It appears that the vessel to which these men belonged put into Cork in distress, and that while she was under repair, a part of the cargo was put into a lighter alongside, and there secured as far as possible by lock and key. The only way in which these articles could be got at was through a scuttle of the forecastle where the men slept. It was also evident that the theft could not have taken place in the daytime, as the workmen, two customhouse officers, and the mate were constantly on board. A harbour watch of two seamen at a time, was constantly kept; but neither captain nor mate took part in it. Neither mate nor steward slept where the men did. They were aft, with the captain. Three seamen were shipped at Cork, for the voyage. They worked on board for some time as labourers, and went ashore at night, till two or three nights before the vessel sailed, when they slept on board. The captain has paid off these men, without any deduction for the barratry now complained of.

The question is, who are to be answerable for it? The general doctrine is that all are answerable, inasmuch as all in their turn have charge of the vessel, and must be presumed to assist, at least not to be ignorant of, a theft on board. In the case of The Fanny Ormond [unreported], decided here, one hundred pieces of nankeen had been stolen, of which three were found in the chest of one of the seamen. His guilt was, of course, clearly established; but the court was of opinion that others must have been concerned, since no single man could have secreted so much without aid and connivance. Accordingly, all were decreed to contribute to make good the loss. In that case, however, the mate does not seem to have been implicated. The court upon these occasions will always endeavour to distinguish between the innocent and the guilty, and, to do this, will rely even upon presumptive proof, if it be sufficiently strong. No other offers here. It appears that these goods must have been taken in the night; that the seamen alone kept the watch, and that the articles stolen could not have been got at, except through a scuttle in their berth. The mate and steward never slept in that part of the ship, and both of them are men of excellent character, as the captain swears, who is an impartial witness The presumption in favour of these two is as strong as could be required. It is otherwise as regards the three Irish seamen, for they slept on board two or three nights before the vessel sailed, and had their turn of

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

watch duty. They are, therefore, liable for the actions of the others; for there is no proof offered that the goods were stolen before they slept on board.

I decree that all the men belonging to the vessel, except the mate and steward, contribute, pro rata, towards making up this loss; and that each party pay his own costs.

SULLIVAN (MILLER v.). See Case No. 9,592.

Case No. 13,596.

SULLIVAN et al. v. PORTLAND & K. R. CO. et al.

[4 Cliff. 212.] [1]

Circuit Court, D. Maine. April Term, 1874.[2]

COURTS — FOLLOWING STATE DECISIONS — LIEN — RAILROAD COMPANIES — PREFERRED STOCK — MORTGAGE — SETTING APART FUND — USURY — STATUTE OF LIMITATIONS.

1. Where the supreme court of the state in which the circuit court is held, has decided that the foreclosure of a mortgage, under the law of that state, was bona fide, and in conformity with the state law, such judgment must be held as furnishing the rule of decision to the federal court, except perhaps upon the question, whether the law of the state, providing for such foreclosure, was constitutional.

2. The term lien includes every case in which personal or real property is charged with the payment of a debt.

3. Equity acknowledges liens which cannot be enforced at law; but an equitable lien, though not necessarily creating a property in a thing, must amount to a charge upon it, so that it may be recognized and enforced in a court of justice.

4. Certificates of stock, known as old preferred stock, were issued by a railroad corporation. Persons holding the certificates were promised ten per cent interest by the corporation which issued them, but they were not secured by any mortgage or collateral. Other mortgages were subsequently put upon the road, and the trustees of the second mortgage took possession of the road, and held it long enough, under the state law, for their title to become absolute, as against the mortgagors in trust for the respective holders of the second-mortgage bonds. They then formed themselves into a new railroad corporation, under the state law, to carry on the business of the road. About two years after the certificates above named were issued, the stockholders of the old corporation authorized the directors to waive, in behalf of the company, their existing right to redeem at pleasure, and make the road irredeemable until eighteen years after, provided the holders of the certificates should empower the trustees to pay four per cent of the stipulated interest to the treasurer of the corporation, to be held and appropriated, as far as might be, to the payment of the interest of such holders of preferred stock as should surrender their old certificates and receive new six per cent ones. Nothing was done by either party to carry out the proposal of the stockholders to waive their right to redeem the first mortgage, until about a year after it was made, when the directors voted that the new certificates should be issued to holders of preferred stock for the amount surrendered, promising six per cent instead of ten, as in the old certificates. The claim of the complainants was founded upon the issue of the original certificates, coupled with the relinquishment of the four per cent promised to the holders of certificates under the first mortgage, which was remitted subject to the stipulation of the old corporation, that the amount should be held by the treasurer, to be applied to the interest promised the preferred stockholders. Bill in equity to set aside the foreclosure, and to recover the four per cent interest remitted by the holders of the first mortgage certificates in favor of such holders of preferred stock as accepted the stockholders' proposal. *Held*, these contracts were not obligatory on the old corporation, because they stipulated a higher rate of interest than then permitted by the law of the state, which was six per cent.

5. It made no difference that the contract specified in the old certificates, that the four per cent annual interest remitted in excess of the legal rate should be held by the treasurer, to be applied to the payment of interest to such of the holders of preferred stock as should adopt the proposal of the stockholders, because both agreements rested in executory contract, and contemplated a rate of interest not permitted by law.

6. Ten years had elapsed from the date of the indorsement upon the certificates, before the trustees of the second mortgage conveyed the property to the new corporation, and no steps were taken to set apart the same, or any part of the same, to be applied as stipulated in the proposal of the stockholders. Seventeen years elapsed from the indorsement on the certificates issued under the first mortgage, and nothing was done by the holders of those certificates to require either the old or new corporation to make any such payment, or set apart the four per cent remitted for the purpose claimed in the bill of complaint. *Held*, the claim against the old corporation was barred by the statute of limitations.

[See Badger v. Badger, Case No. 718.]

7. All that portion of the claim which arose before the conveyance under which the new corporation claimed to hold, was therefore invalid. *Held*, that the complainants could not recover that part of their claim arising six years next before the filing of the bill of complaint, because the conduct of the parties to the stipulation indicated that they regarded it as of no effect, and as nothing was done to show that the new corporation, in accepting their title, assumed any obligation in that particular.

8. The contract for the ten per cent was usurious, and the contract to apply the excess in the manner contemplated by the indorsement of the first mortgage certificates, would not constitute a lien which could be enforced at law, or in equity, against a subsequent purchaser of the mortgaged property.

9. The unexecuted promise did not constitute any vested interest in the corporate estate, real or personal.

10. Slight evidence may be sufficient in equity to show an assignment or setting apart in equity of a fund in a case like the present; but here there was no evidence whatever.

11. If the agreement for the setting apart of the four per cent was valid, the remedy for the breach of it was against the old corporation.

12. Acquiescence in the course pursued by the old corporation in this respect was laches on the part of the complainants.

13. Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statute of limitations which govern courts of law in such cases. In other cases they act upon the analogy of the limitation at law.

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

[2] [Affirmed in 94 U. S. 806.]

14. There is also a defence, peculiar to courts of equity, founded on the lapse of time and staleness of the claim, where no statute of limitations governs the case. In such case, courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting, or long acquiescence, in the assertion of adverse rights.

Bill in equity [by Richard Sullivan, trustee, and others, against the Portland & Kennebec Railroad Company and others], to set aside a foreclosure of certain trustees of a second mortgage upon a railroad, and to recover certain remitted annual interest by the holders of the certificates under the first mortgage—such remittance of interest having been made in favor of such holders of preferred stock as would accept a proposal of the stockholders to empower certain trustees to pay four per cent of the interest named in the certificates, to the treasurer of the company, to be applied in payment of interest to such holders of preferred stock as would surrender their old certificates and receive new six per cent ones instead. The respondents were incorporated on the 1st of April, 1836, with all the rights, privileges, and immunities incident to corporations, and subject to the liabilities and duties prescribed in the act passed in the same year concerning corporations, and they were authorized and empowered by their charter to locate, construct, and maintain a railroad, commencing at a point in the city of Portland, and thence passing through the towns of North Yarmouth, Freeport, Brunswick village, and Topsham to Gardiner village, thence to Hallowell village, thence to Augusta village, on the west side of Kennebec river. Due location of the railroad was made as authorized, and the corporation made four mortgages upon the same, to enable them to construct and equip the railroad, and to discharge the indebtedness which they incurred to effect those objects:—By the mortgage, dated April 30, 1850, called the Yarmouth mortgage, they conveyed that portion of the railroad between North Yarmouth and Portland to Reuel Williams, John Patten, and J. B. Carroll, as trustees, to secure $202,400, advanced to the company by contributors, for which the corporation issued to the contributors certificates creating a lien upon the railroad for the payment of the principal and ten per cent annual income. Advances were also made by sundry cities, towns, and individuals, for which loans the corporation, on Nov. 1, 1850, mortgaged the whole line of the railroad to the commissioners of the sinking fund, which advances amounted to $800,000. Bonds were also issued by the company on Oct. 17, 1851, to the amount of $230,000, and the corporation mortgaged the railroad to John Patten, Joseph McKeen, and M. S. Hagar, to secure the payment of the principal and interest of the same to the holders. Contributors, secured by the first-named mortgage, were, by the terms of the certificates, entitled to ten per cent annual interest, but the stockholders of the corporation, on the 7th of October, 1852, authorized the directors to waive, in behalf of the company, their existing right to redeem, at pleasure, the road from North Yarmouth to Portland, and to make the same irredeemable until November, 1870, provided the holders of the said certificates should authorize and empower the trustees to pay over four per cent of the stipulated annual interest to the treasurer of the corporation, for the use and benefit of the company, to be held and appropriated, so far as might be required, or as the same might go, to the payment of interest to such of the holders of preferred stock as should surrender their old certificates and receive such new six per cent certificates in their stead. They, the stockholders, also voted at the same meeting, that in case such an arrangement should be effected with the said contributors, that the amount, so paid into the hands of the treasurer, should be by him reserved and appropriated, so far as it might be required, or as the same might go, to the payment of the three per cent semi-annual interest, to such of the holders of the preferred stock as should so surrender their old certificates, and receive such new six per cent certificates in lieu of those surrendered.

The funds obtained from those sources were insufficient to complete the enterprise, and the corporation, on the 15th of October, 1852, made another issue of bonds to the amount of $250,000, and mortgaged the railroad to the same trustees, to secure the payment of the same, which bonds were known as the second-mortgage bonds. Nothing was done by either party in execution of the proposal of the stockholders of the corporation, to waive their existing right to redeem the first or Yarmouth mortgage at pleasure, and to make it irredeemable for the period mentioned in that vote, until March 4, 1853, when the directors voted that whenever the arrangement contemplated by that proposal should be completed, the president and treasurer should be authorized to issue new certificates to holders of preferred stock for the amount surrendered, promising six per cent annual interest instead of the ten per cent promised in the old certificates, and that such new certificates should entitle the holders thereof to all the privileges and benefits of the votes constituting the said proposal. Power to issue such certificates to such of the holders of preferred stock as should surrender their old certificates and accept such new certificates, was conferred upon the president and treasurer of the company at the meeting of the directors, held July 16, 1853, and the directors also voted that the holders of such new certificates should be entitled to a lien upon the four per cent annual interest, to be paid to the treasurer by the trustees of the said contributors, pursu-

ant to the original proposal of the stockholders. Such holders of the old certificates never did any thing, so far as appears, to signify their acceptance of the proposal of the stockholders, until Sept. 1, 1853, when the first new six per cent certificate was issued by the directors of the company. All the other six per cent certificates were executed subsequent to that date, within the same year. By the terms of the certificates the company waived their right to redeem the mortgage until the time mentioned in the proposal, and in consideration thereof the respective holders of the surrendered certificates covenanted to direct the trustees to pay over to the treasurer four per cent of the annual interest promised by the old certificates, it being stipulated in the certificate that the four per cent should be held by the treasurer, in trust, to be applied as provided in the original vote and proposal of the stockholders. Special authority was conferred upon the old corporation, by the act of the legislature of April 1, 1856, to let or lease their railroad, franchise, and property for hire, or to contract for the running and managing of the same, with any individual or other railroad corporation, for a term of years; and the act also provided that the lease or contract so made with such individual or corporation, should be deemed valid and binding. Sp. Laws 1856, p. 734. Pursuant to that authority and the vote of the directors of Aug. 18 1856, the president of the corporation entered into an arrangement with the trustees of the holders of the second-mortgage bonds, whereby the trustees were authorized to take possession of the railroad upon certain conditions, of which the fourth was that they should pay five per cent semi-annually on the mortgage to the trustees of the contributors, for building the Yarmouth part of the railroad. Express authority was conferred upon the trustees by that agreement, not only to take possession of the railroad, but also to hold the same until the interest due upon the bonds should be paid, subject to the terms and stipulations therein set forth. New statutory regulations were passed by the legislature on the 15th of April, 1857, providing for the foreclosure of certain mortgages given to secure the payment of bonds and coupons issued by railroad corporations. Sess. Acts 1857, p. 44.

Actual possession of the railroad was taken by the trustees named in the second mortgage on Sept. 1, 1857, under the agreement, but the earnings of the railroad proving quite insufficient to accomplish the contemplated objects, or to meet the specified conditions of the agreement, it was treated as inoperative at the end of the first year. Interest upon the second-mortgage bonds was payable semi-annually, and by reason of the non-payment of the same for a long period, and for a large amount, more than one-third in amount of the bondholders, on April 15, 1859, made due application to the trustees named in the mortgage, requesting them to take the necessary steps to foreclose the mortgage, and the trustees having complied, in all respects, with the request of the petitioning bondholders, subsequently in the same year took possession of the railroad, franchise, and furniture, and having observed and fulfilled the requirements of the law in such case made and provided, and having continued in the possession and enjoyment of the mortgaged property for the purpose of foreclosure, more than three years from the time such possession was taken for that purpose, the title of the trustees to the mortgaged property became absolute, as against the mortgagors in trust for the respective holders of the second-mortgage bonds. Absolute title to the mortgaged property, as against the mortgagors, having become vested in the trustees named in the second mortgage, in trust for the respective bondholders, the latter, on Nov. 5, 1862, formed and organized themselves, pursuant to the general law of the state, into a railroad corporation, under the name of the Portland and Kennebec Railroad Company, and adopted by-laws, and elected the necessary officers to constitute the association a legally established and duly organized corporation, and they were the other corporation respondents named in the bill of complaint. Accrued interest to a large amount was due and unpaid to the bondholders under the mortgage of Oct. 17, 1851, and it appeared that the trustees named in the mortgage on the 1st of September, 1860, at the request of the holders of the bonds, took possession of the railroad, franchise, and furniture, for the purposes specified in section 2 of the act of the legislature, giving such authority, and they continued to hold such possession until the 1st of January, 1864, when an arrangement was made by and between the holders of the first-mortgage bonds and the new corporation, by which the former consented that the trustees named in that mortgage should give up the possession of the railroad, then held in their behalf, to the new corporation formed and organized in the manner already described. Sess. Acts 1857, p. 44, § 3. Full possession of the railroad was accordingly surrendered to the new corporation, and the surviving trustees named in the second mortgage, one having deceased, on the 1st day of January, 1864, conveyed to the new corporation all the right, title, and interest they held thereon, in trust, by virtue of the second mortgage as foreclosed for the said breach of condition.

A. G. Stinchfield and Strout & Gage, for complainants.

J. H. Drummond, A. Libbey, and J. W. Bradbury, for respondents.

CLIFFORD, Circuit Justice. Two principal questions are presented for decision by

the claim of the complainants. They contend that the foreclosure of the second mortgage, under which the new corporation claim title to the mortgaged property, was illegal and void.

But, whether so, or not, they claim that they and all others holding the six per cent certificates are entitled to recover their proportion of the four per cent annual interest so remitted and paid over to the treasurer, whether paid during the possession of the old or the new corporation, as the latter, as the complainants insist, took their title, if any, with notice of all the said votes, stipulations, agreements, and alleged liens, and of the alleged trusts, imposed upon the old corporation by virtue of the arrangement, and they also pray for an account and for an injunction, as set forth in the bill of complainant.

Since the decision of the state court in the case of the old corporation against the new one, it must be assumed that the foreclosure was bona fide, and in strict conformity to the state law, as the decision in that case, whether the judgment be held to be a legal bar to the present suit or not, must be regarded as furnishing the rule of decision to the federal courts in all such respects, as it is plain that every objection now taken to the foreclosure, except perhaps the one that the state law already referred to, providing for a foreclosure in such cases, is unconstitutional, was fully presented to the state court, and was by that court directly overruled. Kennebec & P. R. Co. v. Portland & K. R. Co., 59 Me. 20. Viewed in that light, it is quite clear that the only questions of much importance now open for decision in the case are as follows: (1) Whether the state law providing for foreclosure, as applied to this case, is a constitutional law. (2) Whether the claim of the complainants that the new corporation is liable to them in this suit for the four per cent annual interest, remitted by the holders of the Yarmouth certificates, and paid over as heretofore explained, can be sustained.

Construe the prior law of the state as it was construed by the state court in that decision, and it is obvious that the first proposition of the complainants cannot be sustained, as the later statute does not differ, in the particular mentioned, from the prior law which was in force at the date of the mortgage.

Beyond all doubt, it was competent for the state court to construe the prior law, and it is equally clear that the law as construed by the state court, furnishes the rule of decision in the federal courts; and if so, it follows that the latter act is not repugnant to the former, and if not, every possible ground of complaint is removed, which is all that need be said upon the subject. Kennebec & P. R. Co. v. Portland & K. R. Co., 59 Me. 47.

Grant all that, and still it is insisted by the complainants that their claim for the four per cent annual interest remitted by the holders of the Yarmouth certificates is still open, and that the claim is unaffected by that decision, or by the foreclosure of the second mortgage, or by the deed of conveyance under which the new corporation hold their supposed title to the mortgaged property.

Grave doubts are entertained whether any branch of the proposition can be sustained, but it may be well to inquire, in the first place, whether the claim could be sustained as against the foreclosure and the title of the new corporation as derived from the deed of conveyance given by the trustees named in the second mortgage, even supposing that the claim is wholly unaffected by the decision of the state court, affirming the validity of the foreclosure. Certificates of stock known as old preferred stock were issued by the corporation to the amount of $240,000, of which $200,000 are outstanding, and unredeemed. Persons holding such certificates were promised ten per cent annual interest by the corporation which issued the certificates, but such certificates of stock were not secured by mortgage nor by any collaterals of any kind, the holders relying entirely upon the promise of the corporation. All of the claim of the complainants is founded upon that issue of certificates of stock, coupled with the relinquishment of the four per cent of the annual interest promised to the holders of the Yarmouth certificates, and which they remitted subject to the stipulation of the old corporation, that the amount remitted should be held by the treasurer, in trust, to be applied, if required, to the payment of the annual interest promised to the preferred stockholders. Made as all these contracts were with the old corporation, it becomes important to inquire to what extent they were obligatory upon the promisors, as the new corporation did not acquire any title to, or possession of, the mortgaged property prior to the date of their deed of conveyance from the trustees named in the second mortgage. Throughout that period, and to the 11th of March, 1870, the legal rate of interest in the state was six per cent, and the law of the state provided that, in any action brought on any contract whatever, on which there is directly or indirectly taken or reserved, a rate of interest exceeding the legal rate, the defendant may, under the general issue, prove such excessive interest, and that it shall be deducted from the amount due on such contract. Rev. St. 1840, p. 317; Rev. St. 1859, p. 322; Sess. Acts 1870, p. 95.

Valid contracts for a higher rate of interest than six per cent may be made since the passage of the last-named "act concerning the rate of interest," but both these contracts were made nearly seventeen years before that act was passed, when, beyond

all doubt, the whole excess beyond six per cent was unauthorized by law, and might have been avoided as usurious. Both parties knew that the rate of interest stipulated in the two contracts was unauthorized by law, nor can it make any difference that the corporation promised, in the indorsement upon the old certificates, that the four per cent annual interest remitted in excess of the legal rate should be held in trust by the treasurer, to be applied to the payment of interest to such of the holders of preferred stock as should adopt the proposal of the stockholders, as both agreements rested in executory contract, and contemplated the payment of a rate of interest not authorized by law.

Ten years and more elapsed from the date of the said indorsement upon the said certificates, before the trustees named in the second mortgage conveyed the mortgaged property to the new corporation, and throughout that period the four per cent annual interest was remitted, or was not claimed, by the holders of the Yarmouth certificates, without any steps being taken by the corporation to set apart the same, or any part of the same, to be applied as stipulated in the said proposal of the stockholders. Nor were any steps taken within that period, or ever afterwards, to the filing of the bill of complaint by the holders of the preferred stock, to enforce that stipulation or to secure the benefit of it in any way whatever. Seventeen years and more had elapsed from the date of the indorsement on the Yarmouth certificates to the filing of the bill of complaint, during all of which time nothing was done by the holders of those indorsed certificates to enforce any such claim, or to require either the old or the new corporation to make any such payment, or set apart the four per cent annual interest so remitted, or any part of the same, for any such purpose as that now claimed in the bill of complaint. Tested by these considerations it is undeniable that the claim against the old corporation, if any they ever had, was barred by the statute of limitations before the present suit was instituted, and that all that portion of the claim which arose prior to the date of the conveyance under which the new corporation claim to hold title, may be dismissed without further remark. Rev. St. 1857, p. 510.

Suppose that is so, still it may be suggested that the claim of the complainants, arising within six years next before the filing of the bill of complaint, is not barred by the statute of limitations, which presents the question whether the new corporation ever became liable to fulfil the stipulation contained in the indorsement upon the Yarmouth certificates, that the four per cent annual interest, so remitted by the holders of the old certificates, should be held by the treasurer of the corporation, in trust, to pay interest to such of the holders of the preferred stock as should accept the beforementioned proposal of the stockholders. Undoubtedly they took their title subject to the rights secured to other parties holding prior mortgage rights, such as holders of bonds or certificates secured by prior mortgages, but the new corporation may well contend that the complainants do not stand in any such relation to their title, as their claim is not secured by mortgage, and as nothing was ever done, either by the complainants or by the old corporation, to set apart the amount promised under that stipulation, or any part thereof, as a fund to be appropriated to that object. Had such a designation of the fund been made by the parties to the stipulation, much weight would be due to the allegation of the bill of complaint, that the new corporation took their title with notice of the claim of the complainants.

But in view of the facts as they existed at the date of the conveyance, it is difficult to see how that allegation can avail the complainants, as the conduct of both parties to the stipulation clearly indicated that they concurred in regarding it as inoperative and of no effect, as nothing had been done, or claimed to be done, to show that the new corporation, in accepting their title, assumed any obligation whatever in that behalf. Notice is alleged in the bill of complaint, but it is expressly denied in the answer, and there is no proof upon the subject, except what may be inferred from the relation which the corporators of the new corporation, or some of them, previously bore to the promisors in the stipulation. Direct proof that the new corporation had notice that the complainants made any such claim, at that date, is entirely wanting, nor can it be maintained even if they had knowledge of the said votes and stipulations, that those votes and stipulations, without more, are sufficient to constitute a lien which was binding and operative, as against the new corporation, for the amount claimed in this suit.

Sufficient has already been remarked to show that this suit is brought to set aside the foreclosure, and to recover the four per cent annual interest remitted by the holders of the Yarmouth certificates, in favor of such holders of preferred stock as accepted the aforesaid proposal of the stockholders of the old corporation. Instituted as the suit was, solely for these two objects, nothing need be said in respect to the right of the holders of the Yarmouth certificates to recover the principal of their loan, and six per cent interest thereon, as no such issue is involved in the record. Attention, therefore, must at present be confined to the claim of the complainants to recover the four per cent annual interest remitted by the holders of the Yarmouth certificates. Unless it can be held that the arrangement between the old corporation and the holders of the Yarmouth certificates amounted to a

valid lien in favor of the complainants, it would seem to be clear that the claim cannot be supported, as it plainly could not be as against the old corporation, and it must be admitted that the new corporation took the absolute title to the mortgaged property, subject only to any legal rights previously vested in other individuals or corporations. Difficulties of an insuperable character stand in the way of the theory assumed by the complainants, that the votes and stipulations referred to amount to a lien upon the four per cent annual interest, so remitted and paid over to the treasurer.

(1) Because the contract to pay ten per cent, of which the four per cent was a part, was usurious, and as such was unauthorized by law.

(2) Because the contract was merely executory, and did not, without more, amount to a lien, even if the contract was legal, as the interest remitted was never set apart to be applied to the described object.

(3) Because the remedy of the party, if the contract was binding, was at law for the breach of it, as the interest, when received, was immediately mingled with the earnings of the railroad, and paid out to meet current expenses

(4) Because the party interested acquiesced in that disposition of the interest for more than seventeen years without complaint, including the whole period of the pendency of proceedings for foreclosure, and for more than seven years after the conveyance by the trustees named in the second mortgage, to the new corporation.

(5) Because both parties to the stipulation in question, up to the date of the conveyance to the new corporation, treated it as a mere executory contract, never indicating by any recorded act that they regarded it as constituting a lien upon any particular fund.

(6) Because the whole claim of the complainants against the old corporation is barred by the statute of limitations.

(7) Because the whole claim of the complainants for the application of the four per cent-annual interest is barred by the proceedings of foreclosure.

(8) Because the new corporation took their title, divested of all claims which were illegal, or which were barred by the statute of limitations or by the foreclosure proceedings.

(9) Because the decision of the state court, affirming the validity of the foreclosure proceedings, is a complete answer to the whole claim of the complainants for the four per cent annual interest so remitted and paid over to the treasurer of the old corporation.

(10) Because the complainants were guilty of laches in asserting their claim, having delayed to take any steps to enforce it for more than seventeen years from the time the stipulation was executed.

(11) Because they have been guilty of laches in asserting their claim against the new corporation, having delayed to make the claim for more than seven years since the new corporation acquired their title under the foreclosure and the deed of conveyance from the trustees named in the second mortgage.

(12) Because the complainants were not authorized to institute or prosecute the suit, as it does not appear that the corporation ever refused the same, or to adopt the necessary measures to protect their rights, if any they had, in respect to the claims set forth in the bill of complaint. Mozley v. Alston, 1 Phil. Ch. 790; Foss v Harbottle, 2 Hare, 461.

Enough has already been remarked to show that the contract for ten per cent annual interest was usurious, and that the contract of the promisors to apply the excess in the manner contemplated by the indorsement on the Yarmouth certificates would not constitute a valid lien which could be enforced in law or equity against a subsequent purchaser of the mortgaged property.

Such a contract, even if legal, being merely executory, would not, without more, amount to a lien which could be enforced against a subsequent purchaser of the mortgaged property, as the unexecuted promise did not create any vested interest in the corporate estate, real or personal. Liens may be created by statute or by express contract between the parties, or they may arise from usage, or be implied from the dealings or business relations between the parties, in which latter class of cases the lien is generally displaced by the surrender of the possession. Taken in its widest sense, it is doubtless true that the term lien includes every case in which personal or real property is charged with the payment of a debt; but the question in this case is, whether enough was ever done to charge the mortgaged property with any such obligation. Statute liens depend upon the construction of the statute, and contract liens depend upon the terms of the contract; but the inquiry in this case is, whether sufficient was done to effect the purpose of the parties. Equity indubitably acknowledges liens which cannot be enforced at law, but an equitable lien, though not necessarily creating a property in the thing, must amount to a charge upon it, in order that it may be recognized and enforced in a court of justice. Ex parte Foster [Case No. 4,960].

Obligations of the kind are frequently binding between the parties when they are of no avail against a subsequent purchaser or attaching creditor. Slight evidence may be sufficient, in equity, to show an assignment or setting apart of the fund in a case like the present; but in this case there is no such evidence whatever. On the contrary, the case shows that for eleven years the four per cent was received by the old corporation, without ever recognizing any such obligation, and the amount so received was constantly mingled with the other earnings of the railroad, and paid out to meet current expenses. It is indispensable to the validity of such a lien, say the supreme court, that there should

be a distinct appropriation of the fund and an agreement that the creditor shall be paid out of it, and it is clear that nothing of the kind appears in this case. Wright v. Ellison, 1 Wall. [68 U. S.] 22; Morton v. Naylor, 1 Hill [N. Y.] 583; Hoyt v. Story, 3 Barb. 262; Burn v. Carvalho, 4 Mylne & C. 690; Watson v. Wellington, 1 Russ. & M. 602.

If the agreement was binding, the remedy of the party for the breach of it was at law against the old corporation. Insurance Co. v. Bailey, 13 Wall. [80 U. S.] 621; Hipp v. Babin, 19 How. [60 U. S.] 271.

Acquiescence in the course pursued by the old corporation, in mingling the remitted interest with the other funds of the corporation, and in paying out the same to meet the current expenses of the corporation, without any attempt to institute any proceedings to protect their supposed rights, was gross laches on the part of the complainants. Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statute of limitations, which governs courts of law in like cases, and this rather in obedience to the statute than by analogy. In many other cases they act upon the analogy of the limitation at law, as where a legal title would, in ejectment, be barred by twenty years' possession, courts of equity will act upon the like limitation, and apply it to all cases of relief brought upon equitable titles or claims, touching real estate. Wagner v. Baird, 7 How. [48 U. S.] 258; Moore v. Greene [Case No. 9,763]; 2 Story, Eq. Jur. (8th Ed.) 1520; Farnam v. Brooks, 9 Pick. 243.

But there is a defence of the kind, peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. Badger v. Badger [Case No. 718]. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. 2 Sugd. Vend. (7th Am. Ed.) 899; Roberts v. Tunstall, 4 Hare, 257; Jenkins v. Pye, 12 Pet. [37 U. S.] 241; Harwood v. Railroad, 17 Wall. [84 U. S.] 81; New Albany v. Burke, 11 Wall. [78 U. S.] 107. Long acquiescence and laches by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which appeal to the conscience of the tribunal exercising jurisdiction in the case. Pecuniary prejudice, of a serious character, must have been occasioned to the new corporation by the delay of the complainants to set up their claim, as the new corporation in the mean time discontinued and abandoned a portion of the original location, and located and constructed a new route instead, and effected a connection not before existing, between their railroad and another railroad which form a continuous line from Augusta to Boston.

Nothing in the nature of an excuse for the delay appears in this case, but both parties, throughout the whole period mentioned, treated the stipulation as inoperative and of no effect.

Self-evident as the seventh proposition is, nothing need be added in its support.

Nor is any argument necessary to uphold the eighth proposition, as the plainest principles of justice would forbid, in view of the circumstances, that the new corporation should be held to pay any claim which is illegal as against the old corporation.

Having shown that the complainants had no valid lien upon the mortgaged property, it follows that the decision of the state court is a complete answer to the whole claim under consideration, as it conclusively affirms the validity of the foreclosure, overruling every objection to it set up in the present suit.

Laches is a good defence, for the reasons set forth in the tenth proposition, which requires no further discussion.

Nor is any further discussion of the eleventh proposition required, as it is fully supported by the authorities already cited, to which one or two more may be added. Hovenden v. Lord Annesley, 2 Schoales & L. 636; McNight v. Taylor, 1 How. [42 U. S.] 168; Smith v. Clay, Amb. 645.

Much discussion of the twelfth proposition is unnecessary, as it is quite clear that those which precede it are sufficient to show that the bill of complaint must be dismissed. Suffice it to say that no steps were taken to secure the co-operation of the old corporation before the suit was instituted, nor does it appear that any request in that behalf was ever made by the complainants. Dodge v. Woolsey, 18 How. [59 U. S.] 341; Bronson v. Railroad, 2 Wall. [69 U. S.] 301; Ang. & A. Corp. (4th Ed.) § 341.

Bill of complaint dismissed, with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 94 U. S. 806.]

Case No. 13,597.

SULLIVAN v. REDFIELD et al.

[1 Paine, 441;[1] 1 Robb, Pat. Cas. 477.]

Circuit Court, D. New York. Sept. Term, 1825.

PATENTS—PLEADING—INJUNCTION — IMPROVEMENT —SPECIFICATIONS—TOW-BOAT.

1. On an application for an injunction to restrain the infringement of a patent right, it should be stated in the bill, or by affidavit, that the complainant is the inventor; and the bill must be sworn to. It is not sufficient that he swore to this fact when he obtained his patent.

[Cited in Young v. Lippman, Case No. 18,160; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. 895.]

2. To obtain the injunction, the case should be such as to leave little if any doubt in the minds

[1] [Reported by Elijah Paine, Jr., Esq.]

of the court, as to the validity of the patent; especially if it rests upon the complainant's own showing without any opposing testimony.

[Cited in Thomas v. Weeks, Case No. 13,914; Wirt v. Hicks, 46 Fed. 71.]

3. The act of the 15th of February, 1819 [3 Stat. 481], does not alter the principles on which injunctions are granted, but merely extends the jurisdiction of the circuit courts to parties not before falling within it.

[Cited in Cochrane v. Deener, 94 U. S. 782; Root v. Lake Shore & M. S. Ry. Co., 105 U. S. 192.]

4. The established rules which govern courts of equity, on such applications are, that where there has been an exclusive possession of some duration, under the patent, an injunction will be granted without putting the party previously to establish the validity of his patent at law. But where the patent is recent, and it is attempted to be shown that the specification is bad, or otherwise that the patent ought not to have been granted, the court will not take the decision upon itself, but will send the party to establish his patent at law.

5. A patent for an improvement should describe the machine in use, that it may be known in what the improvement consists.

[Cited in Whitney v. Emmett, Case No. 17,585.]

6. One had patented, "a new and useful improvement in the steam tow-boat," but the specification did not mention the invention as an improvement, but simply described a tow-boat: *Held*, that the specification was broader than the patent, and therefore bad.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 483.]

7. The invention should be so clearly described, as to enable the public to put it in use.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 484.]

8. The specification described the invention as "consisting essentially in attaching the packet to the steam-boat, with ropes, chains, or spars, so as to communicate the power of the engine from the towing vessel to the vessel taken in tow, and kept always at convenient distance, the manner of applying the power, varying with the circumstances in some measure:" *Held* bad for uncertainty, and as describing a well known natural power, and not an invention.

[Cited in Hovey v. Stevens, Case No. 6,745; Webster Loom Co. v. Higgins, Id. 17,342.]

This was an application for an injunction against the violation of a patent right.

The complainant stated in his bill, that having ascertained by a course of experiments, that the resistance of the water against the bow or head of a vessel, when moving, is greatly diminished by keeping her as close in the wake after another vessel as possible with convenience, and perceiving the result to be favourable to a new and useful application of steam to the conveying of passengers in a separate boat from the engine, he, on the 4th of December, 1816, obtained a patent "for a new and useful improvement in the steam tow-boat," the specification of which was as follows: "I claim as my invention, the application of steam engine power, placed in one vessel to the towing or drawing after her another vessel, for the purpose of conveying thereon passengers or merchandise, or either of them, being a new application of a known power. The manner in which this application may be made, varies with the circumstances in some measure, but essentially consists in attaching the packet to the steam-boat, with ropes, chains, or spars, so as to communicate the power of the engine from the towing vessels to vessels taken in tow, and kept always at convenient distance. The advantages attending this improvement are, that lighter and less expensive vessels may be used; the steam engine-boat may be of a smaller size; and the engine may rest on a frame bearing on her whole extent, but constructed separately from the boat; that any kind of steam engine may be used and applied, especially those of high pressure and lighter construction, without exposing the passengers and merchandise to danger; and there will be more comfort, quiet, and safety in the packet-boat; and it is obvious there may be by means of two or more boats, a convenient separation of the passengers, paying different prices. John L. Sullivan." The bill further stated, that the complainant endeavoured to introduce his invention into use as soon as possible, by putting it into practice and otherwise deriving a revenue therefrom; and particularly, that on his proposal a company was formed and incorporated in the state of Georgia, to navigate the river Savannah with steam tow-boats, to whom a prolongation of the time of the patent or exclusive privilege for such navigation, was granted by the state of South Carolina, and that the company purchased complainant's patent-right, paying him 5,000 dollars; that the success of the company was so great as to induce the formation of other companies in other states; that the state of Massachusetts granted him an extension of his term to encourage the introduction of tow-boats on Connecticut river; and that he continued his experiments on Merrimack and Charles rivers, for the purpose of improving in the art. The bill further stated, that the exclusive privilege of Livingston and Fulton had prevented the complainant from introducing his invention in this state, which he had ever been desirous of doing, until the late decision of the supreme court, declaring those privileges unconstitutional; such a decision as complainant had spent much time and money in endeavouring to procure, but without success. That as soon as possible after this decision, he tried to introduce his invention into New-York, by offering it for sale, and endeavouring to form companies, and by publications in the newspapers. The bill then charged, that the defendants [Redfield and Seymour] and others had associated for the purpose of building and running the steam tow-boat Commerce and safety barge Lady Clinton, for the express purpose of separating the passengers from the boat carrying the engine, in the mode devised by complainant, and for which he had an exclusive right; and that those boats had in June last, been put in use between New-York and Albany, under

the command of the defendant Seymour, who had thus usurped complainant's privilege, intercepting and preventing the emoluments thereof, which late disastrous accidents on board of steam-boats on the common plan, had rendered more sure, valuable, and important. The bill concluded with a prayer that the defendants might be restrained by injunction from using said boats. The motion was argued on the matters contained in the bill only.

H. D. Sedgwick and R. Sedgwick, for complainant.

C. D. Colden and S. P. Staples, for defendants.

THOMPSON, Circuit Justice. The application in this case is for an injunction to restrain the defendants and their associates from navigating the steam boat Commerce and safety barge Lady Clinton, which the bill alleges they are doing in violation of a patent right of the complainant. The application comes before the court on notice of the motion duly served. The defendants have appeared by their counsel, but have read no affidavits, or shown any thing in opposition to the motion, except what arises upon the bill itself. Nor has the complainant fortified his application with any thing except what is contained in his bill. It is presumed that the bill has been sworn to, though even that does not appear. Under this state of the case, an objection has been made, which may be considered in some measure as a question of practice, viz.: Whether the bill should not be accompanied by an affidavit, that the complainant believes himself to be the original inventor of what he claims under his patent. The bill in this case does not allege, that the complainant is the original inventor; so that admitting it to have been sworn to, there is no verification under oath, that he believes himself to be the original inventor. That it is material to his claim, that he should be the inventor, cannot be denied. It is the only ground upon which the patent right can be sustained.

It is said, however, on the part of the complainant, that the oath required to be made by the patentee, before he can obtain his patent, is at least prima facie evidence that he is the inventor or discoverer. The weight that ought to be given to this oath may depend on circumstances. The court will certainly not presume that the patentee, when he made the oath, did not believe himself to be the true inventor or discoverer. But the question it not whether at that time he was under such belief, but whether he is still under that belief when he seeks to enforce his patent right. In the present case the patent was granted in the year 1816, and the patentee may since that time have obtained such information respecting the invention, that he could not now swear that he believes himself to be the inventor of what he claims; and there may be some question whether the established practice of the court does not require such an affidavit, when application is made for an injunction. Among the rules of practice adopted by the supreme court of the United States, for the courts of equity, in February term, 1822, it is by the 33d rule provided, that "in all cases where the rules prescribed by this court or by the circuit courts do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England." And in the case of Hill v. Thompson, 3 Mer. 624, decided in the year 1817, Lord Eldon said, that when in future an injunction is applied for ex parte, on the ground of a violation of a right to an invention secured by patent, it must be understood, that it is incumbent on the party making the application to swear, at the time of making it, as to his belief that he is the original inventor. For although when he obtained his patent he might very honestly have sworn to his belief of such being the fact, yet circumstances may have subsequently intervened, or information have been communicated sufficient to convince him, that it was not his own original invention, and that he was under a mistake, when he made his previous declaration to that effect. We think there is great good sense in this rule, and that it applies with peculiar force to a case where the patentee has slept for a great length of time upon his naked patent right without carrying it into practical use. The present case, however, cannot be considered as coming strictly within this rule. The application is not altogether ex parte. It is made on notice of the motion, and has been resisted by counsel, and was open to the hearing of opposing affidavits. We do not therefore mean to dispose of the application upon this point; although we think the reason and good sense of the rule is applicable to the case, and would suggest it as fit and proper to be adopted in all cases where the bill does not allege the complainant to be the original inventor.

Whether the complainant's patent is good and valid so as ultimately to secure to him the right he claims, is not a question for decision upon the equity side of this court. That is a question which belongs to a court of law, in which the parties have a right of trial by a jury. The equity jurisdiction exercised by the court over patents for inventions is merely in aid of the common law, and in order to give more complete effect to the provisions of the statute under which the patent is granted. And this jurisdiction should, of course, never be exercised but upon the supposition, that the applicant for the aid of the court, has a right, which has been infringed by the party against whom the injunction is prayed. It is not a matter of course to grant an injunction upon the mere exhibition of the patent, and an allegation that it has been infringed. The patent may be, upon a trial at law, prima facie evidence of the right. But in order to warrant an interference by injunction, there ought to be but little, if any doubt

in the minds of the court as to the validity of the patent, especially where the case rests entirely upon the complainant's own showing, without any opposing testimony.

It has been urged on the part of the complainant, that under the provisions of the act of congress of the 15th of February, 1819 [3 Stat. 481], the patent itself gives to the patentee a right to claim the interference of this court by injunction. That act declares, "that the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors, the exclusive right to their respective writings, inventions, and discoveries. And upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, &c. on such terms and conditions as the said courts may deem fit and reasonable." This act does not enlarge or alter the powers of the court over the subject matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this act it had been held, that a citizen of one state could not obtain an injunction in the circuit court for a violation of a patent right against a citizen of the same state, as no act of congress authorized such suit. [Livingston v. Van Ingen, Case No. 8,420.] This act removed that objection, and gave the jurisdiction, although the parties were citizens of the same state. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent rights, the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this act.

In support of the present application, much reliance has been placed upon the case of Livingston v Van Ingen, 9 Johns. 507, decided in the court of errors of this state. But a little consideration will show there is no analogy between the two cases. The right of Livingston and Fulton was founded upon acts of the legislature, which were clear and unambiguous. And if those acts were considered valid and constitutional, no doubt could exist as to the right. There were no facts in dispute, nor could any arise, upon which it was requisite for a jury to decide. There was, therefore, no necessity, or propriety, in sending the parties into a court of law to establish their right. That right depended solely on the constitutionality of the statutes under which it was claimed. This question belonged exclusively to the court, and not to a jury to decide; and which question, if sent to a court for trial, would, according to the course of the courts of this state, come back again for ultimate decision to the tribunal where it then was. And independent of this, Livingston and Fulton had been in the actual and exclusive enjoyment, and practical exercise of their right for at least three years.

It will be in vain to look for the circumstances in the present case to support the analogy. The right, in point of law, is, to say the least, doubtful. Some of the questions involved in the inquiry are exclusively for a jury; and the allegations in the bill, as to the practical exercise and enjoyment of the right claimed, are vague and ambiguous. In what particulars the complainant's application is open to these objections, will hereafter be noticed. We would not be understood as having formed, nor do we mean to express, any decided opinion upon the validity of the patent. We only notice the objections to it, so far as may be proper and necessary to regulate our judgment in determining, whether such a case is presented as to entitle the complainant to an injunction, according to the course and principles of courts of equity in like cases. The rule in the English court of chancery, on this subject, is: That where a patent has been granted, and there has been an exclusive possession of some duration under it, the court will interpose its injunction, without putting the party previously to establish the validity of his patent at law. But when the patent is recent, and upon an application for an injunction, it is endeavoured to be shown, in opposition to it, that there is no good specification, or otherwise, that the patent ought not to have been granted, the court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial; but will send the patentee to law, and oblige him to establish the validity of his patent in a court of law, before it will grant him the benefit of an injunction. 3 Mer. 624. And we are not aware of any decisions in the courts of the United States, or in those of any of the states, which are at variance with this rule. We will proceed then briefly to notice how far it applies to the present case: and first, as to the objections taken to the patent and specification.

We have not the patent before us; and all that the bill states of its contents is, that on the 4th day of December, 1816, the complainant obtained letters patent "for a new and useful improvement in the steam tow-boat." This grant presupposes the knowledge and use of a steam tow-boat, of which the patentee does not claim to be the inventor, but his patent is for an improvement in such steam tow-boat. The bill sets out the specification, and so far as it contains a description of the complainant's invention, is as follows: "I claim, as my invention, the application of steam engine power, placed in one vessel, to the towing, or drawing after

her, another vessel, for the purpose of conveying thereon, passengers, or merchandise, or either of them, being a new application of a known power. The manner in which this application may be made, varies with the circumstances in some measure, but essentially consists in attaching the packet to the steam-boat, with ropes, chains, or spars, so as to communicate the power of the engines from the towing vessel to vessels taken in tow, and kept always at convenient distance." This specification is obviously broader than the patent. The latter is for an improvement in the steam tow-boat; and the former contains a description of the steam tow-boat itself; of which the complainant claims to be the inventor, according to his specification. The patent and specification are connected together and dependent on each other for support. The specification should maintain the title of the patent. The latter should not indicate one thing and the former describe another, as the subject of the grant. Gods. Pat. 102–106; 2 Barn. & Ald. 350. Both the language and the policy of the act of congress require that the specification should be clear, plain, and intelligible, so that others may be taught by it to make, or do the thing for which the patent is granted. The object of the specification is to inform the public, after the expiration of the term for which the patent is granted, what the invention is: and it ought, therefore, to put the public in possession of whatever is necessary to the use and enjoyment thereof. Does this specification contain any such certainty of description? It states that the manner in which the power is to be applied, varies with the circumstances in some measure. Nothing could be more vague and uncertain than this description. But it adds, "that it essentially consists in attaching the packet to the steam-boat with ropes, chains, or spars; so as to communicate the power of the engine from the towing vessel to vessels taken in tow, and kept always at convenient distance." On the argument much stress was laid on the word "attaching." It was said to signify a fixed and solid union between the two boats, which distinguished it from the ordinary towing in common use, which was called connecting the two boats by some temporary fastening. We are not aware of any such distinction between the two terms, as to draw after it such important consequences. The legal construction would be the same if the word "connecting" had been used instead of "attaching."

The patentee cannot surely claim as his invention the towing of one boat after another. But the manner of attaching the two together would seem to be the right he asks to have secured to him. If he has discovered any important improvement in this respect, it should have been described in the specification with more certainty and precision. To say that the two boats must be so attached as to be kept always at convenient distance, does not seem to be that full explanation which, after the expiration of the patent, would leave the public much wiser than they were before. What is a convenient distance, and the particular manner of attaching the one to the other, will still have to be ascertained by experience. If, according to the patent, the invention claimed is an improvement in the steam tow-boat, the specification, to be complete, should describe the one previously in use, that it might be seen clearly in what the improvement consisted, as the patent cannot cover more than the improvement claimed. These are some of the objections to the patent itself, which present such strong doubts in the mind of the court, as to its validity, that it is deemed improper to interpose an injunction until the validity of the patent has been tried at law.

Nor has there been such a possession and enjoyment of any right claimed under the patent, as to induce the court to grant the injunction on that ground. The bill contains no direct allegation that the invention has, at any time, been carried into practical operation by the patentee, or any other persons under his authority. The exertions and attempts stated to have been made for this purpose are unimportant, unless attended with success. The several acts of state legislatures alleged to have been obtained, do not show any practical use of the invention, nor can they, with propriety, be considered as showing possession of the right claimed. The only part of the bill which affords an inference that the patentee has carried his invention into practice, is that which states, that a company has been formed in Georgia to navigate the river Savannah with steam tow-boats; that they have paid him five thousand dollars for his patent right, and that the success of the company was so great as to induce the formation of other companies in other states. It is perhaps reasonable to infer, that it was intended here to state, that the success which the company met with consisted in profitably navigating the Savannah river with steam tow-boats. But, admitting this to be the inference, there is no time stated when it was put in operation. And the practical use of the invention may be too recent and questionable to call for the protecting power of an injunction. In the case of Hill and Thompson, when Lord Eldon adopted the rule before referred to on this subject, the patentee had had his patent right in operation for about eighteen months; yet this was considered too short a period to justify a continuance of the injunction. We are accordingly of opinion that the motion must be denied.

Case No. 13,598.

SULLIVAN et al. v. SULLIVAN et al.

[Brunner, Col. Cas. 642; 21 Law Rep. 531; 3 Wkly. Gaz. 126.] [1]

Circuit Court, D. Massachusetts. 1856.

TRUSTS—VENDOR AND PURCHASER—ADEQUACY OF PRICE—DEED—LONG ACQUIESCENCE—EQUITY PLEADING—FRAUD.

1. An assignment by a cestui que trust, of an equitable interest by way of contingent remainder for a valuable consideration, passes the interest of the assignor, and renders the assignee capable, as cestui que trust, of releasing the trustees.

2. A conveyance to a parent by a child recently of age is prima facie valid, and it is incumbent on the party attacking it to show undue influence; such a conveyance is not viewed as a sale, but rather as family arrangement, the validity of which does not depend on the adequacy of the price.

3. A general allegation of fraud and duress is not sufficient.

4. Long acquiescence and lapse of time is a good ground against permitting a deed to be impeached as fraudulent.

[Cited in Badger v. Badger, Case No. 718.]

This was a suit in equity wherein John L. Sullivan, in his own right and as guardian of his daughter Emily Sullivan, an insane person, is complainant, and the representatives of William Sullivan and Jonathan Amory, who are deceased, together with Thomas Russell Sullivan and Elizabeth Sullivan, children of the complainant, were made defendants. The bill stated that John L. Sullivan and Elizabeth, his wife, in her right, being seized of certain lands which it was advantageous to sell, and Elizabeth being insane, and consequently incompetent to join in their conveyance, two resolves were passed by the legislature of the state of Massachusetts, the first in 1809 and the second in 1810, whereby William Sullivan and Jonathan Amory were empowered to sell and convey these lands, first giving bond to the judge of probate to invest the proceeds of such sales in personal estate, in their names, in trust, to permit John L. Sullivan, the complainant, to take the income during the joint lives of himself and his wife, then to permit the survivor of them to take the income during the residue of his or her life, and upon the decease of the survivor to transfer the capital to the heirs of the said Elizabeth. The bill further stated that the two trustees sold lands from time to time under this power, and received upwards of fourteen thousand dollars; but did not invest the same as their trust required, nor pay John L. the income. That Elizabeth, the wife of John L., died on the 16th day of April, 1854, leaving three children, who were living, and her only children, when the said resolves were passed, viz., the complainant Emily and the defendants Thomas R. and Elizabeth, who are entitled to the trust fund after the decease of John L., their father. That Jonathan Amory died in 1828, and the defendant William Appleton was appointed his administrator. That William Sullivan died in 1839, and Richard Sullivan and William Appleton were his duly qualified executors. The bill charges that the pretense that John L., Emily, Thomas R., or Elizabeth ever released the trustees from all accountability is unfounded; that neither of them ever executed such release; and that if any deeds purporting or pretending to release the trustees were ever executed by them or either of them, "the execution thereof was obtained by duress and fraud." The bill prayed for an account, and for the appointment of trustees and the investment of the trust fund.

[2] [The answer of Richard Sullivan and William Appleton, among other things contains the following:

["These defendants further say that they have been informed and believe that the moneys so received, or a part thereof, were originally invested by the said trustees in certain personal estates at the special instance and request of the said John L., and in such manner as he considered most for the interest of himself and his family; and that the investments were changed from time to time, but never without his consent and request; and that, he being embarrassed at the time, the said trustees, or some one of them, allowed him to appropriate the same to his own use from time to time, or applied the same to payment of his debts in times of great urgency and at his earnest solicitation, and to save him from bankruptcy, and upon his promise and assurance that the said trust funds should be replaced, and they be indemnified from and against all liability on account thereof; and, in proof thereof, these defendants pray leave to refer to a certain bond of indemnity, signed and sealed by the said John L., bearing date the twenty-sixth day of August, A. D. eighteen hundred and sixteen, and by him delivered to the said Sullivan and Amory, which is in the words and figures following, to wit: (Then follows the penal part of the bond.) 'Whereas, the aforesaid Jonathan, Junr., and William, executed divers conveyances, transfers, and assignments, in virtue of the resolve which is hereto adjoined, and of other resolves before that resolve passed; and have in their trust and agency done such acts, matters and things from time to time as the said John L. hath conceived to be most beneficial in the premises; and as some of the acts by them done as aforesaid may not have been in conformity with said resolves, and it being the wish and intention of the said John L. completely to indemnify and save harmless the said

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission. 3 Wkly. Gaz. 126, contains only a partial report.]

[2] [From 21 Law Rep. 531.]

Jonathan Amory, Junr., and the said William Sullivan, and their respective heirs, executors, and administrators, against all losses, claims, and demands and damages, of whatsoever name or nature, which may happen, arise, be made or exist against the said Jonathan, Junr., and William, and their respective legal representatives aforesaid, in consequence of the acts or omissions of the said Jonathan, Junr., and William, or either of them, in the premises: Now the condition of this obligation is such that if the said John L. shall at all times hereafter completely indemnify and save harmless the said Jonathan, Junr., and the said William, and their said respective legal representatives, against all claims, demands, losses and damages, of whatsoever name or nature, which may arise, happen or accrue out of or from their agency, in each, all, or any of the aforesaid resolves, or otherwise in their agency in the aforesaid matters and things, then this obligation shall be void, otherwise shall remain in full force, power and virtue. Jno. L. Sullivan. (L. S.) Signed, sealed, and delivered in presence of W. P. Mason, D. N. Bradford.'

["This defendant, the said Sullivan, further says, and the said Appleton believes it to be true, that after the date and delivery of the said bond, the said John L. continued to be in embarrassed circumstances, and made frequent applications to the said William Sullivan, and Jonathan Amory, Jr., and to this defendant, Richard Sullivan, for relief and assistance by way of loan, endorsement, or otherwise; and they, or some one of them, did from time to time render him assistance, but he wholly neglected to repay the trustees the moneys received by him belonging to said trust fund; and afterwards the said William, Richard and Jonathan refused to render him further assistance, unless he would restore the same, or give them satisfactory indemnity against their liabilities as trustees; and on or about the twenty-fifth day of May, A. D. eighteen hundred and twenty-one, the said Thomas R. Sullivan and Elizabeth Sullivan, two of the children of the said John L., being of age, the said John L. made known to them his situation in relation to the said trust fund, and the circumstances under which the same had been appropriated to his use, and requested them to exonerate the said trustees from all liability therefor, so far as they were interested; and in compliance with said request, and upon the consideration that the said John L. was thereby released and exonerated, pro tanto, from his liability and promise to restore said fund, and of future advances and assistance to be made to him by the said William, Richard and Jonathan, they, the said Thomas R. and Elizabeth, did, on the seventeenth day of August, A. D. eighteen hundred and twenty-one, execute and deliver to the said William and Jonathan, Junr., a full release and discharge of all claims whatsoever which they had or might have against them by reason of their being trustees as aforesaid, and by reason of anything done, or omitted to be done by them, in the execution of said trusts, which said deed of release is in the words and figures following, to wit: 'Know all men by these presents, that we, Thomas Russell Sullivan and Elizabeth Sullivan, children of John L. Sullivan, of Boston, in the state of Massachusetts, and Elizabeth his wife, being fully apprised that Jonathan Amory and William Sullivan, of said Boston, trustees, under a certain act or resolve of the legislature, of the state aforesaid, have, at the request of our said father, paid over or applied to his use the proceeds of sales of real estate by them sold under the trust aforesaid: Now, to the end that said Jonathan and William, and their legal representatives, may be discharged from accountability by reason of any of their doings as aforesaid, and in consideration of one dollar to each of us paid, the receipt whereof we do hereby respectively acknowledge, do hereby release, acquit, and discharge and forever remit to them, the said Jonathan and William, their heirs and legal representatives, all claim, demand, actions and causes of action, which we or either of us have, or are or may be at any time hereafter entitled to have, against them, or either of them, by reason of any act, matter or thing, which they, or either of them, have done or performed, suffered or permitted, under the trust aforesaid; so that neither we, nor either of our respective heirs, executors and administrators, shall have any claim or demand, action, suit, or process, in law or in equity, whatsoever, against them or either of them; but that, on the contrary, this release and discharge shall be a perpetual bar against all manner of actions or suits, at law or in equity, which may, in our right, be commenced or instituted against them, or either of them, as aforesaid; and as such, the same may be pleaded, and shall be held a complete bar. And we do hereby further covenant, each of us for ourselves and our respective legal representatives, with the aforesaid Amory and Sullivan, and each of them, and the legal representatives of each of them, that we, our heirs, executors, and administrators, respectively, will make and execute such further release and discharge whenever thereto, by them, or either of them, requested, as they, or either of them, may or shall hereafter request. In testimony whereof, we, the said Thomas R. Sullivan and Elizabeth Sullivan, have hereunto set our hands and seals this seventeenth day of August, A. D. eighteen hundred and twenty-one. (Signed) Thomas R. Sullivan. Elizabeth Sullivan. The words, "against them or either of them as aforesaid," being first interlined. Also, the word "Boston," 1st page. In presence of us. (Signed) Witness: John P. B. Storer. James Sullivan.'

["And these defendants say that they are informed and believe and allege, that when the said deed was executed, the said Elizabeth was perfectly sane and intelligent, and capable of appreciating the circumstances of the case, and the interest she was to relinquish; that she and the said Thomas R. were made acquainted with all the facts necessary to form a judgment as to the reasonableness and propriety of their executing the same, and that they did so freely, voluntarily, and of their own accord, and for the considerations before stated, and none other. And these defendants expressly deny that said deed of release was executed by the said Thomas R. and Elizabeth, or either of them, under circumstances of fraud or duress, and insist that the same was done by them freely and voluntarily, and for a good and valuable consideration. This defendant, the said Richard Sullivan, further says, and the said Appleton believes it to be true, that after the execution of the said deed of release, the said William Sullivan advanced other sums of money to the said John L., and expended large sums of money for the support and education of his wife and children, none of which were ever repaid by the said John L. or any other person; and on or about the twenty-seventh day of September, A. D. eighteen hundred and twenty-six, the said Emily Sullivan being of full age, she and the said Thomas, for the consideration therein recited, executed and delivered to the said John L. a deed of assignment of all their residuary interest in said trust fund. which said deed is as follows, to wit: 'Whereas, John L. Sullivan, heretofore of Boston, in the county of Suffolk and state of Massachusetts, at present residing in the city of New York, Esquire, heretofore obtained in the legislature of Massachusetts the passing of certain resolves, respectively bearing date seventeenth day of June, one thousand eight hundred and seven, and the second day of March, one thousand eight hundred and ten, in and by which said resolves, Jonathan Amory, at the time called junior, but not now junior, and William Sullivan of said Boston, Esquires, were authorized and empowered to make and execute, in due form of law, deeds of conveyance of any real estate whereof the said John, and Elizabeth his wife, were seized in her right, and were required to give bond to the judge of probate in the county of Suffolk, to invest the proceeds of such sales in personal estate, to pay the income thereof to the said John and Elizabeth during their joint lives; and to the said John for life, he surviving her; and to her for life, she surviving him; and, after the decease of both of them, to transfer the principal to her heirs at law; and whereas, in pursuance of this authority, the said Amory and W. Sullivan, at said John L. Sullivan's request, conveyed unto Israel Thorndike, by deed dated the seventeenth day of November, eighteen hundred and nine, said Elizabeth's right to certain lands situate on Summer street in Boston, part of her late father's estate, for the consideration of eight thousand seven hundred and fifty dollars; and to Samuel Hastings an undivided twentieth of estate in Newbury street, on the sixth of January, in the same year, for the consideration of three hundred dollars; and to Wm. Sawyer and Joseph Thomson, land on Charlestown Square, on the eighteenth of April, eighteen hundred and sixteen, for the consideration of three thousand dollars; and to Thomas J. Goodwin, land on Main street, in Charlestown on the nineteenth day of December, eighteen hundred and eighteen, for the consideration of twenty-three hundred dollars; amounting in all to fourteen thousand three hundred and fifty dollars, to which sum of fourteen thousand three hundred and fifty dollars the children of said Elizabeth will be entitled, on the decease of both of them, the said John L. and Elizabeth: Now, know all persons, that we, Thomas Russell Sullivan, of Keene, in the state of New Hampshire, clerk, and Emily Sullivan, of Albany, in the state of New York, single woman, two of the children of said John L. and Elizabeth, for and in consideration of one dollar to each of us respectively paid, and for divers other good and valuable considerations, consisting of advances made in anticipation of our residuary right in said trust fund, do hereby give, grant, alien, sell, and convey and assign unto the said John L. Sullivan, all our right, title, interest and estate in the said trust property now in the hands of Jonathan Amory (heretofore called Jonathan Amory, Junior,) and William Sullivan. To have and to hold all the same trust property in whatever manner the same has been or may be invested, unto him, the said John L. Sullivan, fully and absolutely discharged from all claims at and demands of us or either of us. And we do hereby authorize and require of the said Jonathan Amory and William Sullivan, to account with the said John L. Sullivan, our father, for the same property by them, so held in trust; and to pay over the same to him to the same effect in law or equity as they might, should or could account with and pay over to us. Meaning and intending hereby for the considerations aforesaid to enable the said John L. Sullivan, our father, to negotiate with the said Jonathan and William as to the same property in any manner which he may deem to be beneficial to him; intending, also, hereby to discharge the said Jonathan and William from all accountability to us respectively in the premises, so that they account with and satisfy the said John L. Sullivan; and we also hereby constitute and appoint the said John L. Sullivan our attorney, irrevocable in the premises, with full power to execute any deed or deeds, instruments or writings whatsoever, which we could or might execute in the premises, hereby declaring all acts done by our said father in the premises as obligatory as though done by us personally. In witness

of all which we have hereunto set our hands and seals the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and twenty-six. Thomas Russell Sullivan. (Seal.) Emily Sullivan. (Seal.) Signed, sealed and delivered in presence of (signed) A. Wright, (signed) F. Alexander, (signed) Angelica Gilbert, Jr., (signed) Richard T. Treat, Witnesses to the signature of Emily Sullivan.'

["And on or about the thirtieth day of said September, the said John L. executed and delivered to the said William Sullivan and Jonathan Amory, a deed of release and discharge of all the interest in the said fund which he had, or to which he was entitled under said last mentioned instrument for the purpose of finally closing the said trust, and disposing of all the present and residuary interest of the said John L., Elizabeth, Thomas R. and Emily in the fund, and releasing the said trustees from all liability on account thereof, the said Elizabeth and Thomas R. having previously released their interest, which said last mentioned deed is in the words and figures following, to wit: 'Whereas an assignment has been made to me of a certain trust fund now in the hands of Jonathan Amory, heretofore called Jonathan Amory, Junr., and William Sullivan, names in the resolves which are referred to in the foregoing assignment to me, John L. Sullivan, formerly of Boston, now of the city of New York, Esquire, as appears by the aforegoing instrument: Now, know all men by these presents, that I, the said John L. Sullivan, for and in consideration of one dollar to me paid by said Jonathan and William, and in consideration of my indebtedness to them for divers payments by them heretofore made for me, and at my request to the full amount, and more than the aforesaid sum of fourteen thousand three hundred and fifty dollars, do hereby remise, release, and forever quitclaim unto them and their heirs and assigns, all my right, title, interest, claim and demand in the afore described trust fund; the whole whereof has been invested and employed by my order and direction, and with my full assent, and portions thereof withdrawn by me from time to time, for my necessary uses and purposes. And I do hereby, as matter of justice and right to said Jonathan and William, declare them to be absolved and released from their said trusts. The full amount and more than the amount of all the said trust fund having been applied to my use and at my request. And I do covenant with the said Jonathan and William, and their heirs, executors and administrators, that no suit, claim or process whatsoever, in law or equity, shall ever be instituted against them for or on account of the use and application of the aforesaid fund so created and vested through their agency, at my request, intending hereby fully and absolutely to end and close this concern of trustship forever. In witness of all which I have hereunto set my hand and seal this thirtieth day of September, in the year of our Lord one thousand eight hundred and twenty-six. (Signed) John L. Sullivan. (Seal.) Signed, sealed and delivered in presence of Angelica Gilbert, Jr. Richard S. Treat.'

["This defendant, the said Richard Sullivan, further says, and the said Appleton believes it to be true, that when the said deed was executed by the said Thomas R. and Emily, she was perfectly sane and intelligent, fully capable to appreciate the circumstances of the case, and the valuable interest thereby assigned; that they have been informed, and believe and so allege, that she and the said Thomas R. were made acquainted with all the facts necessary to form a judgment as to the reasonableness and propriety of their executing the same, and that they did so voluntarily and of their own accord, and for the considerations therein stated. And these defendants expressly deny, upon their knowledge, information and belief, that the said deed was executed by the said Thomas R. and Elizabeth, or either of them, under circumstances of fraud or duress, and insist that the same was done by them voluntarily and knowingly, and for a good and valuable consideration. And these defendants say that, by the said several deeds, the said John L., Thomas R., Elizabeth and Emily, for good and valuable considerations did assign, remise, release, and forever quitclaim unto the said William Sullivan and Jonathan Amory, all their respective interest, present or reversionary, in and to said trust fund, and all claims and demands which they or either of them had or could have against them, the said Sullivan and Amory, on account of anything done or omitted to be done by them in the care, management and disposal of said trust fund, or in any wise in relation thereto; and these defendants insist upon said releases and claim the same benefit thereof as if they had pleaded the same. And these defendants say that for many years after the said Emily executed said deed in the year eighteen hundred and twenty-six, she continued to be of sane and intelligent mind, and was well acquainted with all the circumstances relating to said trust fund, and the nature and effect of her said deed, and that to their knowledge or belief she never repudiated the same, or denied her obligation under the same, or pretended to have any claims or demands upon the said trustees on account thereof; and these defendants submit to the judgment of this honorable court, whether, after so many years perfect and entire acquiescence therein by the said Emily, during which time she was sane and intelligent and able to act herself, it is competent for any person being, or pretending to be her guardian, to set up and maintain in her behalf this present suit."][2]

Mr. Hutchins, for complainant.

Mr. Choate and F. C. Loring, contra.

[2] [From 21 Law Rep. 531.]

CURTIS, Circuit Justice. It was properly conceded by the complainant's counsel at the hearing, that John L. Sullivan, in his own right, and independent of the claims of his children, could not have the aid of a court of equity to compel the representatives of the trustees to replace this trust fund. Because he not only consented to and participated in whatever breaches of trust were committed, but was from time to time the recipient of the trust property, and, with a knowledge of all the facts, released the trustees from accountability, and bound himself to save them harmless against all claims. Beyond all question therefore, he cannot now complain of those breaches of trust.

The right of his daughter Emily to an account requires a distinct examination. It appears that she executed an instrument, bearing date on the 27th day of September, 1826, which purported to convey to her father all her right to the trust fund, authorizing and requiring the trustees to account with the father, and empowering them to negotiate with him for such disposition of the trust funds as might be satisfactory to him. It further appears that immediately after the execution of this deed, the father received from one of the trustees the sum of twenty-five hundred dollars, and finally released them from all accountability; and this assignment by Emily, and release by John L., her father, and her acquiescence in the assignment down to the year 1842, when she became insane, and the acquiescence of John L., her father and guardian, down to the filing of this bill in December, 1854, are set up and relied on by the answer as a bar to the claim on behalf of Emily, for an account of the trust fund. To this it is replied by the complainant that nothing passed by the deed which Emily executed, because she had then no interest. It is not strictly true that she had then no interest. Her right to participate in the trust fund was contingent on her survivorship of her mother. But it was such an expectancy as is recognized by a court of equity as a subject for a valid contract, the specific execution of which may be decreed, or if the instrument of assignment be properly drawn the assignee may be placed by it in the same situation as the assignor was, and substituted to all the rights which the assignor could in any event have. Even a court of law considers the deed of an expectant heir in the lifetime of his ancestor, accompanied by a covenant of warranty, as effectual to pass the title which subsequently descends on the heir, that title enuring by way of estoppel to the assignee. Trull v. Eastman, 3 Metc. [Mass.] 121. And undoubtedly a court of equity, which in many cases treats that as done which was agreed to be done, will not allow a less effectual operation to such a covenant. And I consider it to be settled that an assignment by a cestui que trust of an equitable interest by way of a contingent remainder in either realty or personalty, made for a valuable consideration, is effectual to pass the interest of the assignor, and substitute the assignee in place of the assignor as to all the rights which in any event might or would have accrued to the assignor. In Varick v. Edwards, Hoff. Ch. 382, the vice-chancellor reviewed the decisions on this subject, and it is quite unnecessary to restate them here. I apprehend there has been no real question on this point for many years; but in recent times the question has been much agitated whether an assignment of an expectant interest, either vested or contingent, made by way of gift, without any valuable consideration, would enable a mere volunteer to claim the aid of a court of equity. In Meek v. Kettlewell, 1 Hare, 464, decided by Vice Chancellor Wigram, in 1842, it was held that a voluntary assignment of an expectant interest in a trust fund did not create a trust in favor of the assignee which a court of equity would enforce, and this decision was affirmed on appeal, by Lord Chancellor Cottenham, in 1843. 1 Phil. Ch. 342. In Kekewich v. Manning, Vice Chancellor Wigram repeated this decision; but on appeal, after a very elaborate examination of the authorities, and a very attentive consideration of the principles of equity appropriate to the question, Lord Cranworth and Sir J. L. Knight Bruce, lords justices, decided that such an assignment, though voluntary, was a complete alienation, and created a trust enforcible in equity by the assignee. 12 Eng. Law & Eq. 120, Dec. 1851. This decision professes to overrule Meek v. Kettlewell, which I infer from Voyle v. Hughes, decided by Vice Chancellor Stuart in 1854 (23 Eng. Law & Eq. 271), is no longer law in Westminster Hall.

The distinction between an application by a volunteer to a court of equity, to enforce a promise to create a trust, and to enforce a trust already created, on which the present English doctrine rests, was recognized in Neves v. Scott, 9 How. [50 U. S.] 211; Id., 13 How. [54 U. S.] 268. And my opinion is that the assignment now in question, if merely voluntary, was yet sufficient in point of law to create a trust in favor of John L. Sullivan, by his daughter Emily, as it respects all her rights and interest in the trust fund, which a court of equity would enforce in his favor, provided the assignment was not rendered invalid by some extraneous cause. And that consequently, by virtue of such an assignment, if otherwise valid. John L. Sulivan became the cestui que trust, and as such, capable of releasing the trustees; and, further, that as he became the cestui que trust as respects Emily's share, and as he had already consented to the breaches of trust, of which complaint is now made, he is thereby, as well as by his subsequent release under seal, by which he obtained the further sum of twenty-five hundred dollars, debarred from now complaining of those

breaches of trust. See Nail v. Punter, 5 Sim. 555.

So that it only remains to inquire whether the assignment from Emily Sullivan to John L. Sullivan, her father, was a valid transaction. It purports, on its face, to be made in consideration of one dollar, "and divers other good considerations, and valuable considerations, consisting of advances made in anticipation of our residuary right in said trust fund." It is not stated in the deed to whom the advances were made. In point of fact they were made to the father. For though it appears that moneys were furnished to the children of John L. by his brother, William Sullivan, one of the trustees, yet it is quite apparent, I think, that they were the free gift of the uncle to his nieces and nephews, and were not intended by way of advancement on account of their expectant interest in the trust fund. Prima facie, therefore, as well as upon the proofs, the assignment from Emily to her father appears to have been made without any valuable pecuniary consideration. If this transaction had been between strangers, it would have been the duty of the court to set it aside; for an assignment of an expectant interest by way of remainder requires for its support not only a valuable consideration, but the payment by the purchaser of the full market value of the interest conveyed. But a transfer of an expectant interest by a child to a parent is not viewed by a court of equity as the sale of the interest, but as a family arrangement, the validity of which is not to be tested by an inquiry whether an adequate price was paid. In Bellamy v. Sabine, 2 Phil. Ch. 439, the master of rolls said: "It has often been decided that in such transactions between a father and son the ordinary rules which are applied to the acts of strangers are not to regulate the judgment of this court. In such cases apparent inadequacy of consideration, and the circumstance that the property is reversionary, have but little weight. Fraud will indeed vitiate these, as well as all other transactions; but arrangements between members of the same family to assist their several objects, or relieve their several necessities, are affected by so many peculiar considerations, and are influenced by so many different motives, that they have been wisely withdrawn from the influence of the ordinary rules by which this court is guided in adjudicating between other parties." The case of Tweddell v. Tweddell, Turn. & R. 1, and the authorities upon which it proceeded, establish this distinction. See, also, Wallace v. Wallace, 2 Dru. & War. 452. The supreme court, in Jenkins v. Pye, 12 Pet. [37 U. S.] 141, proceeded on this distinction, which must be considered as firmly settled, both in America and in England. But I apprehend there is an important difference between the English law and our own, in respect to the proofs required to be made by a parent who takes a voluntary conveyance from his child. It is agreed that such transactions are to be watched with much jealousy, for the purpose of detecting the operation of any undue influence, for which the relation of the parties affords means and opportunity; and it is also agreed that if ignorance of the rights conveyed, or undue influence is detected, the conveyance is to be set aside. But it seems to be settled in England that when a father obtains, by donation from a child recently come of age, a large pecuniary benefit, the burthen of proving that the transaction was righteous falls on the person taking the benefit. In Hoghton v. Hoghton, 11 Eng. Law & Eq. 134, the master of the rolls reviewed the authorities, and held that to be their effect. In Jenkins v. Pye, 11 Pet. [36 U. S.] 241, the supreme court had many of these decisions before them, and without expressing an opinion upon the existence of such a rule in England, distinctly and pointedly refused to establish it in the equity jurisprudence of the United States. The passage is too long to be here quoted; but the rule there laid down, and which the court must follow is, that such a conveyance is prima facie valid, and that it is incumbent on the party who denies its validity, to prove such an undue influence as requires the court to avoid the gift, and restore the parties to their former condition.

It follows that the assignment from Emily Sullivan to her father, John L. Sullivan, which is set up in the answer, is prima facie valid; and that it is incumbent on her guardian, who would impeach it, to allege in his bill and support by his proofs such facts as are sufficient to render the deed invalid. I say to allege such facts in the bill, for I apprehend it is always true, that when an answer sets up as a bar a deed which is prima facie valid, and the execution of which is admitted, the complainant can avoid that bar only by charging in his bill, and supporting by his proofs, such extraneous facts as render the deed invalid. Now this bill contains no such charge. It says that if Emily ever executed a release purporting to discharge the trustees from accountability, it was obtained by fraud and duress. But the instrument now in question is not such a release. And if it were, I should have much difficulty in holding that such a general charge would be sufficient to let the complainant in to prove that particular kind of fraud which a court of equity lays hold of as undue influence. It is not necessary to set forth minute facts, still less circumstances which tend to establish them; but the general rule is that particular acts of fraud must be stated. Mydleton v. Lord Kenyon, 2 Ves. Jr. 391, and note a; Munday v. Knight, 3 Hare, 497. It must be remembered, also, that if undue influence of a parent over a child was exerted in this case, it was by the complainant himself. It can hardly be supposed that the complainant by this general charge of fraud intended that he himself committed it. He has not charged by whom it was committed, or

what was its nature or character, still less in what acts it consisted. I think it would be very unsafe to rest a decree on so vague an allegation. But if this difficulty were overcome, I should still decline to investigate the merits of this transaction, because the lapse of time, and the death or alienation of mind of the principal parties, have rendered it a most hazardous task to attempt such an investigation, and have supplied the respondents with a ground of defense which, in my judgment, is impregnable. This deed of assignment from Emily to her father was executed in 1826. In 1828 Jonathan Amory died. In 1839 William Sullivan died. Emily continued sane until 1852; and down to that time there is no allegation in the bill, and no evidence that she ever felt or expressed any wish, or considered that she had any right to avoid the assignment. Her acquiescence for twenty-six years is complete, and was terminated only when she became incapable either of acquiescence or objection. It is said that her mother survived until 1854, and consequently her right continued to be contingent, and by way of remainder only, till that time. This is true. But it is also true that if the deed of assignment was voidable for undue influence, or any other extraneous cause, it was competent for her at any moment to file a bill to have it decreed to be void and delivered up to be canceled. And not only so, but as entitled even contingently to a remainder, she could have had the aid of a court of equity to protect the fund, and secure her rights therein; there being this distinction between acquiescence at law and in equity, that at law the right of the remainder man is treated as accruing only when the particular estate is terminated and his possessory right begins; while in equity the owner of even a contingent remainder in personalty may file his bill for the protection of the trust fund against breaches of trust which threaten its existence; and consequently as soon as he discovers such breach of trust, being sui juris, he begins voluntarily to delay proceedings. Andrew v. Wrigley, 4 Brown, Ch. 125. No explanation of this acquiescence is given or attempted by the bill. The case stands, therefore, upon the fact of such acquiescence for twenty-six years, the insanity of the complainant at the end of twenty-six years, and her consequent inability to restrain these proceedings which she may know to be unfounded, and the death of both of the trustees, and the consequent impossibility of obtaining from them such explanations and facts as might change the whole face of the transactions.

When we remember that what is to be investigated is a family transaction, that it involves and depends upon the particular circumstances of the parties, and the private and personal views and motives growing out of those circumstances, I think it must be admitted that an attempt to investigate it, after the lapse of twenty-eight years, and the death or inability of the complainant and the trustees, would be far too hazardous an enterprise for a court of equity to attempt. And I take it to be clearly settled that no such attempt is to be made. In Jenkins v. Pye, already referred to, the supreme court held that after the lapse of eighteen years, and the death of the principal parties, the court ought not to interfere. Mr. Justice Catron differed with the other members of the court on some points, but he held the lapse of time to be fatal to the bill, and cites many authorities to the point. Many more might be cited, but I will refer only to McKnight v. Taylor, 1 How. [42 U. S.] 161, and Bowman v. Watten, Id. 189, and Roberts v. Tunstall, 4 Hare, 257, where the recent English cases are stated. Let a decree be entered dismissing the bill with costs.

Fraudulent Conveyance—Relief Barred by Long Acquiescence. See Badger v. Badger [Case No. 718], citing above case.

Case No. 13,599.

SULLIVAN v. UNION PAC. R. CO.

[3 Dill. 334; 9 West. Jur. 32; 1 Cent. Law J. 595; 9 Am. Law Rev. 365.] [1]

Circuit Court, D. Nebraska. 1874.

DEATH BY WRONGFUL ACT—ACTION BY FATHER—DOCTRINE OF MASTER AND SERVANT—TIME OF DEATH.

1. Where a servant is killed on the spot, by the wrongful act of the defendant, the master may recover for the loss of service. Where the death does not immediately ensue, but afterwards takes place, the master is not limited in the estimate of his damages to the period of the servant's death.

[Cited in The Charles Morgan, Case No. 2,618; Holmes v. Oregon & C. Ry. Co., 5 Fed. 79; The Garland, Id. 925; The E. B. Ward, Jr., 17 Fed. 459; The Harrisburg v. Rickards, 119 U. S. 205, 7 Sup. Ct. 142.]

[Cited in Conners v. Burlington, C. R. & N. Ry. Co., 71 Iowa, 496, 32 N. W. 465; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 412. Disapproved in Grosso v. Delaware, L. & W. R. Co., 50 N. J. Law, 322, 13 Atl. 233.]

2. Such a case distinguished from one for an injury to the servant himself. Without a statute, an action for such injury does not survive the death of the person injured, and cannot be brought by his representatives or next of kin.

[Cited in Davis v. St. Louis, I. M. & S. Ry. Co., 53 Ark. 117, 13 S. W. 801.]

3. The English and American cases, as to the remedy of a father for the loss of the services of his infant child, whose death has been caused by the wrongful act of another, commented on.

Demurrer to petition. The petition represents that the plaintiff [Daniel Sullivan] is father of one James Sullivan, who was an employé of the defendant at $2.00 per day, which was received by the plaintiff; that his said son was 17 years of age; that, while in the service of the defendant, he

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 9 Am. Law Rev. 365, contains only a partial report.]

was, by its negligence, "caught between the cars of the defendant and was fatally bruised and wounded, from which he died within six hours." The facts, intended to show that the death of the son was caused by the fault of the defendant, are fully stated in the petition, but it is not necessary to refer to them at length. The plaintiff claims as damages, the value of his son's services from the date of his death until he would have become of age, and also $20 for medical services, $10 for nursing, and $250 for burial expenses, amounting, as alleged, to the sum of $3,412 for which judgment is asked. Demurrer on the ground that the petition shows no cause of action.

Redick & Ferguson, for plaintiff.

A. J. Poppleton and E. Wakely, for defendant.

DILLON, Circuit Judge. The plaintiff sues in virtue of his relationship of father, for the loss of the services of his minor son, and for special damages, which were occasioned by his alleged wrongful death through the negligence of the defendant. There is no statute in Nebraska giving such an action, and counsel concede that, at the time the present cause of action arose, there was no statute in the state like Lord Campbell's act (9 & 10 Vict. c. 93). This action must be maintained, therefore, if at all, on general or common law principles. In commencing our inquiries, let us ascertain the exact character of the action. When a minor child is injured by the tort of another, pecuniary damages result to his father as master entitled to his services, as well as to the child itself. Hence two distinct actions may be brought. One by the parent or master for the loss of services, and another by the child, by its next friend or guardian, for the injury to itself. These are familiar and undisputed principles. But in the latter case, if the child should die in consequence of the injury, the cause of action did not, by the common law, survive, and by that law, no right of recovery, for the damages resulting from the death, existed in favor of his personal representatives or next of kin. It was to remedy this defect in the law, that is, to give an action to the personal representatives, where death ensued from the wrongful act of another, that Lord Campbell's statute was passed. This is manifest both from its recital and its provisions. It did not provide for the case of masters, and their rights are not touched by it.

Is it then, a principle of the common law, that where the death of the servant immediately ensues from the wrongful act of another, there is no remedy for the master, and that where it ensues therefrom afterwards, the master's loss cannot be estimated beyond the period when the death occurred? Such a principle cannot be vindicated on considerations of reason, justice or policy, and I could only consent to recognize it upon being satisfied that it was one of the rules of the common law, so long and so well settled, that the courts are bound to accept and apply it until it is changed by legislative action.

If the child of the plaintiff had, by the wrongful act or neglect of the defendant, been disabled from work, but not killed, it is clear that the plaintiff would have his action for the loss of service. Fort v. Union Pac. R. Co., 17 Wall. [84 U. S.] 553. So if the child thus injured was disabled from work thereby, and remained disabled for a year and then died, it is also clear, and has been several times decided, that the father or master could recover for the loss of his services down to the date of the death. Hyatt v. Adams, 16 Mich. 180; Baker v. Bolton, 1 Camp. 493.

The negative of this proposition has never been judicially asserted. But if the injury, caused by the tort of defendant is so great that death ensues immediately, does the law deny the master or parent all remedy, when, if the injury had been less, there would be, as we have just seen, a remedy, at least to some extent? And when death ensues, whether sooner or later, does that limit the time down to which the loss must be estimated? The consequences of the injury where death happens, affect the father until the child would become of age, and to give damages only until the death, is to recognize the right of the father to compensation for the injury to him, but to stop part way in measuring the compensation.

It is evident, that since the father is entitled in law to the services of his child until majority, and since the wrongful act which causes the death of the child deprives him of such services, we have here the damage and pecuniary injury which, on general principles, give a right to compensation. If such right does not exist, it is on the wrongdoer to show why. No attempt is made, and the attempt cannot be successfully made, to show that, justly, the father in such case should have no compensation, or only a partial compensation, down to the date of the death. Accordingly, the civil law, and the French and Scotch law, recognize the right to maintain actions like the one at the bar.

To defeat the right of action, reliance is placed by the defendant solely upon the proposition, that the common law doctrine, as Lord Ellenborough is reported to have expressed it, in the case hereafter adverted to, is, that "in a civil court, the death of a human being cannot be complained of as an injury." Baker v. Bolton (1808) 1 Camp. 493. It may be observed, that strictly the complaint of the plaintiff is not for the death of his son, but for the wrongful act, which, by producing the death, was the cause of his pecuniary damage. This is, perhaps, what Lord Ellenborough means, and I now proceed to inquire whether this is a doctrine of the common law, established so early and so firmly as to be binding upon the American

courts, and to be changed only by the legislature.

This makes it necessary to refer to the English decisions. This I shall do with all possible brevity, and shall then notice the leading American cases upon the subject. Whoever examines the cases critically, will, I think, come to the conclusion that an American court, in a state where the question is untouched, is at liberty to adopt a rule which is consonant with its sense of justice, and is not bound to regard the doctrine contended for by the defendant as binding upon it. The earliest case upon the subject is Higgins v. Butcher, Yel. 89. The plaintiff's wife died of an assault and battery upon her by defendant, and plaintiff brought an action for the damages. The views of the court are thus expressed by Tanfield, J.: "If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost." Obviously, the denial of the master's right is here placed upon the ground that the death of the servant having been feloniously caused, the private injury is merged in the public offense. This would not apply to any case in which the act producing the death, though negligent, was not criminal, and at this day would not be a ground on which to defeat a private remedy otherwise existing.

But the leading case to establish the doctrine maintained by the defendant is the nisi prius case of Baker v. Bolton, before mentioned, decided by Lord Ellenborough, in 1808. The plaintiff and his wife were upset while travelling on a stage coach of the defendants, and both were injured, and the wife died in about a month. The plaintiff, inter alia, sought to recover damages in respect of the loss of his wife's services, and Lord Ellenborough directed the jury that "the damages, as to the plaintiff's wife, must stop with the period of her existence," and the reason given was that "in a civil court, the death of a human being cannot be complained of as an injury." He cites no cases and enters into no discussion, and does not profess to rest upon precedent. The case was determined in 1808, and if it is the origin of the doctrine contended for by the defendant, it was decided at so late a period as not to be binding upon the courts of this country as part of the common law. I admit that it does hold the doctrine that the date of the death of the servant limits the period to which the loss of the master must be estimated.

The direct question did not again arise in England until as late as 1873, when Osborn v. Gillett, L. R. 8 Exch. 88, came before three of the judges of the court of exchequer. Two of the barons against one dissenting, there held that a master cannot maintain an action for a tortious act which caused the immediate death of the servant, and this holding, as far as it was placed upon precedent, was rested upon Baker v. Bolton. The opinions cover the whole ground, and it seems to me that the better reasons were with the dissenting baron. The majority felt bound by Baker v. Bolton, but, as above suggested, it has no such authoritative force in this country. Whether the case was carried up on error does not appear. If it were, the judgment might well be affirmed, and yet an American court would be at liberty to decline to accept and apply its doctrine. It is noticeable that no attempt was made by the majority to vindicate the doctrine they felt bound to follow.

The earliest and leading American cases are Carey v. Berkshire R. Co. and Skinner v. Housatonic R. Co. (1848) 1 Cush. 475. One of these actions was by the plaintiff as widow, for the loss of the life of her husband, and the other by a father for the loss of service of his infant son, whose death was caused by the negligence of the company. Is it not a little remarkable that the court treats the cases as involving the same principle, although the wife has no legal right to the services of her husband, nor common law right to recover for his death? And following Baker v. Bolton, the court decided that in neither of the cases could the action be maintained.

Another case is Eden v. Lexington, etc. R. R. Co. (1853) 14 B. Mon. 165, in which the husband sued for loss of services of his wife, who was instantaneously killed by the alleged tortious act of the defendant. The case seems justly open to the criticism of Bramwell, B. in Osborn v. Gillett, supra. Liability was denied except for damages down to the time of the death on the strength of Baker v. Bolton, and the common law rule asserted in that case is supposed, by the judge delivering the opinion, to rest on the untenable ground that the public wrong merges the private injury.

In a similar action the supreme court of Michigan held that the husband could recover damages down to the death of the wife, but not beyond that event. This ruling was in accordance with what the court regarded as the common law rule, declared in Baker v. Bolton, and is quite at a loss to discover its reason or philosophy.

On the other hand, in Ford v. Monroe, 20 Wend. 210, where the plaintiff's son was killed, there was a recovery for loss of services down to the period when he would have become of age, but the right to recover to this extent seems to have been assumed without question. The question was not decided in Pack v. Mayor, etc., of New York, 3 Comst. [3 N. Y.] 489, 493; and was expressly reserved by the court of appeals in Whitford

v. Panama R. Co. (1861) 23 N. Y. 465. But in Green v. Hudson River R. Co. (1866) 2 Keyes [*41 N. Y.] 294, the court of appeals followed the doctrine of Baker v. Bolton. See Plummer v. Webb [Case No. 11,234].

The authentic evidence of what the common law is, must be found in the judicial reports. It will be seen that all the cases, English and American, on this subject, rest upon the nisi prius decision, in 1808, of Lord Ellenborough in Baker v. Bolton. Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that it ought not to be followed in a state where the subject is entirely open for settlement. It would be different if the rule had been settled in England by a long course of decisions, made prior to the settlement of this country, as in that event the courts here would find it more difficult to reject it.

In view of the tenor of the cases, some of which, however, are not well considered, and all of which rest upon Baker v. Bolton, it requires some courage to disregard them; but as the rule they assert is incapable of vindication, and cannot be shown to be deeply rooted in the common law, my judgment is, that I am free to decide the rights of the parties without applying it.

With an amendment, in one respect, the petition sufficiently sets forth that the death of the son was caused by the negligence of the defendant, its servants and agents. Demurrer overruled.

NOTE. The foregoing case was, at the instance of the circuit judge, certified by the judges to the supreme court, where it is still pending. Whether the view above taken will be adopted by the supreme court, admits of course of doubt, but the subject is of sufficient interest to justify the insertion of the opinion, whatever may be the result in the appellate tribunal. The above case has, at least, served to call the attention of the profession to the subject which has recently been much discussed in the law periodicals. 1 Cent. Law J. 597; 2 Cent. Law J. 117, 128; West. Jur. for January, 1875.

The main, if not the only objection which has been made to the doctrine, is that it disregards a settled rule of the English common law.

If the question is not concluded by previous adjudications, it seems to be admitted on all hands that the view taken in the opinion in Sullivan's case, is, on principle and reason, correct. Let us see how the question stands. The civil law, and the French and Scotch law, founded upon it, give the right to such an action, notwithstanding the death.

So in the courts of admiralty, which are not bound by the common law adjudications, whatever they may be on the point under consideration, and are free to decide according to natural justice, concur in holding that actions like the present are maintainable. Cutting v. Seabury [Case No. 3,521]. But it is contended that if the wrongful act is so great as to take life at once, then the master has no right and no remedy against the wrong-doer. Certainly, those who contend that there is any such anomalous and unreasonable exception to the general principles of the law, ought to make out a clear case showing it. The cases, English and American, all rest upon the nisi prius decision of Lord Ellenborough on Baker v. Bolton, the facts of which are confessed to be "loosely stated" (L. R. 8 Exch. 100, per Kelly, C. B.), and in which his lordship gives no reasons and cites no authorities for the proposition which he advances —a proposition, which, as shown above, had no application to Sullivan's case. No prior case to that effect can be found in the English books, unless Higgins v. Butcher, Yel. 89, be so regarded, and if so, it proceeded on the now exploded doctrine that the felony drowned the private action. (White v. Spettigue, 13 Mees. & W. 603; Evans v. Walton, L. R. 2 C. P. 615; Osborn v. Gillett, L. R. 8 Exch. 88.) So that it remains true that the English law reports contain no prior case supporting the doctrine of Baker v. Bolton. It is also true that no prior case can be found in the English books laying down a contrary doctrine. Is the conclusion a just one, because no previous cases can be found, that Lord Ellenborough must be assumed to have declared a correct and well-known principle of the common law? If any such principle of law was well known and established, the law reports or treatises of eminent lawyers would contain evidence of it. But there is no case declaring the broad principle asserted by Lord Ellenborough, nor is it asserted in the elementary works. On the contrary, Mr. Smith, in his excellent work, assumes the contrary. Mast. & Serv. (3d Ed.) 139.

The American cases generally follow Baker v. Bolton. But there are decisions the other way. Shields v. Yonge, 15 Ga. 349; James v. Christy, 18 Mo. 162; Ford v. Monroe, 20 Wend. 210; Plummer v. Webb [Case No. 11,234]. It is, however, conceded that the current of American decisions is otherwise, but they all rest upon the authority of Baker v. Bolton, or the principle which is there declared. By those who conceive it to be the duty of a court to decide according to the greater number of adjudicated cases, the conclusion in Sullivan's case will be regarded as erroneous. But by those who consider the law to be a science founded upon reason, and by those who, while they reverence precedents, will not slavishly follow them, it may, perhaps, be concluded that the court was right in refusing to carry into a new region an anomalous and indefensible principle of law, resting on so slight and questionable a foundation as Baker v. Bolton, without any prior, authentic evidence or memorial of its existence.

Case No. 13,600.

SULLIVAN et ux. v. WINTHROP et al.

[1 Sumn. 1.] [1]

Circuit Court, D. Massachusetts. May Term, 1829.

WILLS — PECUNIARY LEGACY — WHEN PAYABLE — INTEREST — EXCEPTIONS — PAYMENT PRO TANTO — EXECUTORS.

1. Interest commences on a pecuniary legacy at the expiration of one year from the decease of the testator, whatever may be the posture of the estate, unless some other period is specified in the will.

[Cited in Hamilton v. McQuillan, 82 Me. 209, 19 Atl. 167; Loring v. Woodward, 41 N. H. 393; Davison v. Rake, 45 N. J. Eq. 767, 18 Atl. 753; Esmond v. Brown (R. I.) 25 Atl. 653. Cited in brief in Vermont State Baptist Convention v. Ladd, 58 Vt. 100, 4 Atl. 634.]

2. The cases of infant children not otherwise provided for, and of adopted children under age, not otherwise provided for, are exceptions to the general rule.

[Cited in brief in Howland v. Howland, 11 Gray, 475. Cited in Howard v. Francis, 30 N. J. Eq. 448.]

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

3. Executors may at their discretion pay over legacies at any time within the year.

4. Where the executors invested certain sums, less than the whole amount of the legacy, in the name of the legatee; *held*, that this was a payment of the legacy pro tanto, and that the interest accruing upon these sums, within the year from the time of such investment, belonged to the legatee.

[Cited in brief in U. S. v. Bayard, 4 Mackey, 312; Allen v. Tarbell, 65 Vt. 151, 26 Atl. 65.]

Bill in equity, the object of which was to ascertain the right of the plaintiffs to interest on a legacy of 20,000 dollars, bequeathed her by the will of Mrs. Sarah B. Dearborn. There being no important facts in dispute between the parties, the cause was set down for a hearing by consent upon the bill and answers, and was argued by William Sullivan, for plaintiffs, and by Hubbard, for defendants.

The bill was in substance as follows:—That Mrs. Sarah Bowdoin, while she was the wife of the late James Bowdoin, Esq., did, with his consent, adopt Sarah B. Sullivan, one of the complainants, as her child from an early age, and educated and maintained her as such, until the time of her marriage with said George; and continued to treat said complainant as her child up to the time of her own decease. That on the 18th of July, 1812, said Sarah Bowdoin, being a widow and having a large real and personal estate, made her will That on the 10th of November, 1813. Mrs. Bowdoin, in contemplation of marriage with Henry Dearborn, Esq., entered into articles of agreement, which provided among other things, that the will of Mrs. Bowdoin should not be revoked by the marriage. That the marriage was solemnized on the same 10th day of November, and that the testatrix Mrs. Dearborn died on the 23d day of May, 1826, and that her will was proved on the 12th day of June following (Thomas L. Winthrop and Richard Sullivan, Esqs., the respondents, being the executors, and being trustees of $20,000 given by the will to Mrs. Sarah B. Sullivan). That in the month of July, 1826, the complainant, George Sullivan, asked payment of the executors and trustees of the interest on $20,000, and on the 25th of July $600 were paid, for which a receipt was given in these terms. "Received of Thomas L. Winthrop and Richard Sullivan, Esqs., trustees of Mrs. Sarah B. Sullivan, my wife, the sum of six hundred dollars, to be charged in account as interest money on the fund bequeathed to Mrs. Sullivan by the late Mrs. Dearborn. New York, 25 July, 1826. George Sullivan." That in August, September, and November, 1826, Messrs. Winthrop and Sullivan, the defendants, as trustees under the will, invested in mortgage and otherwise $20,000 in trust for Sarah B. Sullivan; and that the same trustees received the interest and income of the funds from which that investment was made from the testatrix's decease to the time of such investment and ever since. That the complainants had demanded the interest on said $20,000 from the time of the decease of the testatrix, but the trustees had declined paying it, because James Bowdoin, the residuary legatee, claimed to have the whole income and interest of the testatrix's estate for the year following her decease. The complainants charged that the intention of the testatrix was, that the said Sarah B. Sullivan should have the income of said $20,000 from the time of her decease, and that the trustees, and the said residuary legatee, knew this to be her intention. That the executors paid the legacies given by the will, within the year following the testatrix's decease, and did assent to the execution of the will, by making the investment to the use of the complainants, and paying a part of the interest within the year.

The answers of the defendants were made separately, and admitted the principal facts stated in the bill; not admitting, however, that Mrs. Sarah B. Sullivan was ever formally adopted by the testatrix as her child, or that it was intended by the payment of the $600 to the complainants to decide on the right of the residuary legatee;—as evidence of which the following receipt was introduced: "Boston, Nov. 17, 1826. Received of the executors of the last will of the late Mrs. Sarah Bowdoin Dearborn, deceased, $472.67, which sum, with $600 received in July last, appears to be the amount of interest to the 24th Nov. inst. on the two legacies of $20,000 each, bequeathed by Mrs. Dearborn to my wife, Sarah Bowdoin, and my son, James Bowdoin; and I hereby promise and agree, that if it be found on investigation that the legatees abovenamed are not legally entitled to interest as paid over from the day of the decease of the textatrix, and Mr. Webster should so decide, in such event I hereby authorize the said executors, who are also trustees to the abovenamed legatees, to deduct the aforementioned sums of $600 and $472.67 from the interest money now accruing on sums invested, or which may hereafter accrue, when the said legacies shall be fully placed on interest, or any part of said sums according to law, or as said Webster shall decide may be (Signed) George Sullivan."

The clause in the will of Mrs. Dearborn, giving the said $20,000 to Mrs. Sarah B. Sullivan, appears in the opinion of the court. The marriage articles, referred to in the bill, recite among other things, that Sarah Bowdoin "had conveyed and transferred all her property, real and personal, unto Thomas L. Winthrop and Richard Sullivan, in trust; to pay over the income and interest to her use during coverture, and in case said Henry Dearborn shall survive said Sarah, then forthwith upon her decease, to convey and transfer the same, by good and sufficient instruments of conveyance, to such person or persons as she may have appointed, and to whom she may have devised the same, by

her last will and testament," "such will to be construed according to the most obvious meaning and intent, as expressed therein, without regard to technical or formal inaccuracies therein."

William Sullivan, for complainants, contended:

(1.) That the will and the marriage articles were to be taken together, and constituted but one instrument. That the will provided who should take, and how much; and the articles provided when the bounty should be taken. That the will would have been revoked by the marriage, if not protected by the articles. That in consequence of the marriage contract, the will became a testamentary appointment by a feme covert, and its validity and effectiveness depended upon the articles. That the respondents, Messrs. Winthrop and Sullivan, were to be regarded in relation to this matter solely in the light of trustees, and not as executors. They were not called upon in this suit to execute a will, but to perform a trust. Middleton v. Crofts, 2 Atk. 661; Southby v. Stonehouse, 2 Ves. Sr. 611; Sugd. Powers, 331; Bradish v. Gibbs, 3 Johns. Ch. 548; Osgood v. Breed, 12 Mass. 525. That if the will and the marriage articles were so to be taken together as contended for, then the only question was when the bounty should be enjoyed, and this was repeatedly provided for in the articles. Besides which the condition of the estate (the whole being invested and productive); the relations which the parties sustained to each other; the absence of all claims on the estate which could impede an immediate distribution and settlement, show conclusively the intention of the parties who had the power to order a disposal. That the respondents (trustees) show by their conduct, that they thus understood the intentions of Mrs. Dearborn. They paid the legacies generally within the year. They made investments within the year to the use of Mr. Sullivan, the complainant; and if they were to be considered merely in the light of executors, they thus assented to the claim of the complainants, and could not now retract that assent. 1 Rop. Leg. 505.

(2.) That, although it was admitted to be the general rule of law, that executors shall be allowed one year in which to pay pecuniary legacies, and that interest was to commence from the end of that year, still it was contended that this rule was made solely for the protection of executors, and the general benefit of the estate administered upon, to protect executors from improvident and erroneous payments, to enable them to obtain a competent knowledge of the situation of the property, to pay off debts and effect abatements if the assets were deficient. That it was a rule which the executors might waive if they thought fit, and that it was their duty so to waive it whenever an immediate settlement and distribution could be effected. That it was neither equitable nor reasonable that a rule, made for the protection of executors and the benefit equally of all persons interested in an estate, should be so applied by the executors, without any necessity on their part, as to benefit the residuary legatee at the expense of all the other legatees. But, however general might be the application of this rule when no time of payment was fixed by the testator, yet when his intentions on this point were plainly expressed or could be satisfactorily inferred, and the rights and convenience of the executors admitted of their observance, they must govern. That, in the case before the court, such was the situation of the property that it might be immediately and conveniently distributed; and the condition of the estate, the relation of the parties to each other, and the acts of the executors plainly indicated what was considered to be the intention of the testatrix. But if the marriage articles were to be received as explanatory of the will, then the intention of the testatrix was fully expressed by the terms, "forthwith upon Mrs Bowdoin's decease." Sitwell v. Bernard, 6 Ves. 539; Entwistle v. Markland, Id. 528; Stuart v. Bruere, Id. 529; Fearns v. Young, 9 Ves. 549; Gibson v. Bott, 7 Ves. 89; Hutchin v. Mannington, 1 Ves. Jr. 366. That, in connexion with these circumstances, the particular relationship which the complainant, Mrs. Sullivan, bore to the testatrix was to be taken into consideration, as presenting a substantial reason for the intention of the testatrix, that the legacy left to her should bear interest from the time of the testatrix's decease.

It was further contended by Mr. Sullivan that this bequest, under the circumstances, might be considered an annuity, in which case a year's interest would be payable to the annuitant at the expiration of one year from the decease of the testatrix.

Hubbard, for respondents, contended:

That the law was perfectly settled, that where a legacy is given generally out of the personal estate, and no time specified for the payment of it by the testator, it was not payable until the end of a year from the death of the testator, and that interest was not to be allowed upon it until after that period. Bird v. Lockey, 2 Vern. 745; Smell v. Dee, 2 Salk. 415; Bilson v. Saunders, Bunb. 240; Maxwell v. Wettenhall, 2 P. Wms. 26; Lloyd v. Williams, 2 Atk. 109; Beckford v. Tobin, 1 Ves. Sr. 310; Hutchin v. Mannington, 1 Ves. Jr. 366; Bourke v. Ricketts, 10 Ves. 333; Wood v. Penoyre, 13 Ves. 326; Pearson v. Pearson, 1 Schoales & L. 10; Eyre v. Golding, 5 Bin. 475; Shobe v. Carr, 3 Munf. 10; Lupton v. Lupton, 2 Johns. Ch. 628; Van Bramer v. Hoffman, 2 Johns. Cas. 200. That, this general principle being clear, the question was whether there was any thing in the case at bar to exempt it from the operation of the principle.

That this was not an annuity, but a general devise of a sum of money to be laid out in a particular manner. That it was a legacy by the terms of it, and the trust was to cease on the death of the husband, when the widow and her children might spend the principal immediately if they pleased. Chief Justice Tilghman says, in Eyre v. Golding, 5 Bin. 475: "There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the former case, the legacy, not being payable till the end of a year from the testator's death, carries no interest for that year; but in the latter, the first payment of the annuity must be made at the end of the first year." That no intention of the testatrix, that interest should be paid on this legacy from the time of her decease, could be fairly inferred from any expressions used in the marriage articles. That there was nothing in the case to prove that Mrs. Sarah B. Sullivan was an adopted daughter of the testatrix, legally speaking; nor could the reason, which governs the payment of interest to a child, upon a legacy from its parent, during the first year after the parent's decease, be applied in this case, viz. the obligation of the parent to support the child. The complainant in this instance was married long before the decease of the testatrix, and was living entirely independent of her. That no assent of the executors to the payment of interest could be inferred, taking all the circumstances of the case into view, nor would such an assent now avail the complainants.

STORY, Circuit Justice. On the 18th of July, 1812, Mrs. Sarah Bowdoin made her will, and, among other bequests, made the following: "I give and devise to my beloved, affectionate, worthy niece, Mrs. Sarah Bowdoin Sullivan, wife of George Sullivan, Esq., of, &c. (who are the plaintiffs), for and during her natural life, all my real estate in Milk street, &c.; and at her death I give the said estate to her second son, James Bowdoin Sullivan, &c. &c." "I give and devise to Thomas L. Winthrop, Esq., and Richard Sullivan, Esq., of, &c. (who are named executors of her will), and their heirs, in trust, for my said affectionate niece, Mrs. Sarah Bowdoin Sullivan, the sum of 20,000 dollars, to her and her children for ever. It is not for want of regard or attachment to George Sullivan, Esq., husband to my said niece, that I give the said 20,000 dollars in trust for her during her marriage state, but only on account of the uncertainty of all human events; therefore, it is intended as friendship to him, as well as to his said wife." The testatrix then proceeds to bequeath to Mrs. Sullivan her household furniture, and wines, and part of her family linen, wearing apparel, jewelry, plate, &c. &c. The testatrix in November, 1813, in contemplation of a marriage with General Henry Dearborn (which soon afterwards took effect), entered into certain marriage articles, to which he was a party, one principal object of which was to secure the disposition of her property in conformity to her said will. In these articles reference is made to the will, and it is added: "Such will to be construed according to the most obvious meaning and intent of her, said Sarah, as expressed therein, without regard to technical or formal inaccuracies therein." I will only remark in passing, that these words can have no effect to change the construction to be put by the court upon the bequests and devises in the will, since they express no more than the law itself would imply in cases of this nature. Nor does it make any difference in the construction of this will, that it now has effect in virtue of these articles, and not proprio vigore. It must be still construed, in the same manner as it originally was designed to be, as a will; for otherwise, the same paper would at different times, though unaltered, require different interpretations.

Mrs. Dearborn died in May, 1826, leaving General Dearborn her survivor. After her decease, the executors proved the will and took out administration upon her estate. Some time afterwards a question arose between the plaintiffs and the executors, whether the legacy of 20,000 dollars to Mrs. Sullivan was to carry interest from the death of the testatrix, or from a year after her death. It was finally submitted by them to the decision of the Hon. Daniel Webster, who decided that the legacy carried no interest until after the year. By the consent of all parties, and especially of the residuary legatee and devisee (who is one of the defendants in the present bill), that award is now surrendered as a defence; and the cause is agreed to be decided in the same manner, as if it had never been made. All consideration of it may, therefore, at once be laid out of the case.

There are some circumstances alluded to in the bill and answers, which are relied upon by the parties, but upon which I shall not dwell, because they do not, in my judgment, touch the merits of the present controversy. Such, for instance, is the suggestion, that Mrs. Sullivan was adopted as a daughter by Mrs. Dearborn, being in fact a grand niece. Such an adoption is denied by the answers, and is not established in point of fact; and the language of the will discloses sufficiently, that the legacy is to her as an "affectionate niece," and not, as a daughter, the main or exclusive object of her bounty. Again, the payment of money by the executors within the year to Mr. Sullivan, in part of the interest or income on the 20,000 dollars, is relied on. But that payment under the circumstances of this case cannot be conclusive upon the residuary legatee; and indeed is yielded up as conclusive by the subsequent receipt and agreement of Mr. Sullivan himself.

Then again, the fact, that the personal estate of the testatrix yielded a full interest or income within the year, or sufficient at least to meet the interest upon the pecuniary legacy of Mrs. Sullivan, is not material; for her right does not depend upon the actual posture of the estate in this particular; but upon the general principles of law. Neither is it material, whether the testatrix owed many debts or none; or whether the funds or assets were within the immediate reach of the executors, or time must elapse before they could be got in. In Gibson v. Bott, 7 Ves. 89, 95, Lord Eldon said: "In the common case of debts and legacies the same rule (as to interest) is applied to cases, where the debts cannot be arranged for ten years, and where there are no debts, and the money is immediately tangible in the funds." And in Pearson v. Pearson, 1 Schoales & L. 10, Lord Redesdale observed, that the legacy is payable out of a fund, which is yielding profits, makes no difference. "Nothing," said he, "can be more settled than that a man's saying, 'I direct all my stock to be applied to the payment of legacies,' will not make those legacies bear interest one moment sooner than they otherwise would. Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies." And he stated a case, where the fund did not become disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death. There are many cases to the same effect, and it would be a waste of time to go over them. Gibson v. Bott, 7 Ves. 89, 92; 1 Hov. Supp. 42; note to 1 Ves. Jr. 366; Wood v. Penoyre, 13 Ves. 325, 333; Toll. Ex'rs, B. 3, c. 4, p. 324; 2 Hov. Supp. 7, note to 7 Ves. 89; 2 Rop. Leg. c. 15, p. 172 et seq. Webster v. Hale, 8 Ves. 410, is a strong application of the principle; for, there, interest was denied upon a legacy until after one year, although the testator directed it to be paid to the legatee "as soon as possible."

The present is not the case of an annuity, (though it has been suggested at the bar, that it may possibly so be construed,) for that supposes an annual sum payable for years or life, and not, as here, a gross sum bequeathed to the use of Mrs. Sullivan and her children for ever. The bequest is of the 20,000 dollars, and not of the mere income of that sum for a limited period. It is a final and absolute gift of the principal. I agree, that, in the case of an annuity, interest runs from the death of the testator; for otherwise the annuitant would not receive any payment for the first year, and the intention of the testator is presumed to be, that the annuitant should receive for every year. Gibson v. Bott, 7 Ves. 89, 97; Eyre v. Golding, 5 Bin. 472; Toll. Ex'rs, B. 3, c. 4; Fearns v. Young, 9 Ves. 553; Houghton v. Franklin, 1 Sim. & S. 392; Storer v. Prestage, 3 Madd. 167. Nor is this the case of a specific legacy of property or funds earning interest. If it were, I agree, that whoever is entitled to the specific property or fund is entitled to the income or increment, as an adjunct. Barrington v. Tristram, 6 Ves. 345; 2 Rop. Leg. c. 15, p. 173; Id. (White's Ed.) p. 188, c. 20, § 1; Sleech v. Thorington, 2 Ves. Sr. 560, 562; Raven v. Waite, 1 Swanst. 553; Webster v. Hale, 8 Ves. 410; Kirby v. Potter, 4 Ves. 748, 751.

But this is the case of a pecuniary legacy; and no time of payment, and no interest, are provided for by the terms of the will. The general rule certainly is, that, where no time of payment is provided for by the terms of the will, a pecuniary legacy is payable at the end of the year after the testator's death, and not before. Lord Hardwicke, in Beckford v. Tobin, 1 Ves. Sr. 308, stated the rule as clear in chancery, and said, it was taken from the ecclesiastical court, which gave the executor a year to get in the estate, and pay the legacy, before he should be compelled to account. Lord Redesdale, in Pearson v. Pearson, 1 Schoales & L. 10, attributes the same origin to it. But whatever may be the origin of the rule, it is irrevocably fixed as a general rule, and is not now open to controversy. It doubtless was founded in the convenience of having a fixed period, applicable to cases in general, which, if it operated injuriously upon some legatees, was beneficial to others; and it reduces to a certainty, what might otherwise be a fluctuating exercise of discretion in the executor, or the court, and involve the parties in a protracted litigation upon the nice investigation of the circumstances of each particular estate. As a corollary from this rule, it has been as constantly held, that interest is not payable upon any pecuniary legacy (unless provided for by the will) until after the year is elapsed; or, if the will fixes a period for payment, until that period is elapsed; for interest cannot be claimed except for a demand actually due, and from the time it becomes due. Sitwell v. Bernard, 6 Ves. 520, 529. That such is the general rule, is admitted on both sides in the argument at the bar, and indeed is established by numerous authorities. 1 Hov. Supp. 143, 144; 2 Rop. Leg. c. 15, p. 172; Id. (White's Ed.) c. 20, p. 184; Heath v. Perry, 3 Atk. 101; Hearle v. Greenbank, 3 Atk. 695, 716; Lloyd v. Williams, 2 Atk. 108; Maxwell v. Wettenhall, 2 P. Wms. 26. It is not unimportant to notice, that it has been fully recognised by the supreme court of Massachusetts in Dawes v. Swan, 4 Mass. 208.

There are exceptions, however, to the general rule. One is, when a legacy is given by a parent to an infant child, who is otherwise unprovided for; for then, upon the presumed intention of the parent to fulfil his moral obligation to maintain his child, interest will be allowed from the death of the testator as a maintenance for the child, where no other fund is applicable for such maintenance. And this is equally true, whether a future

time is fixed for the payment of the legacy, or no time is fixed for it by the will. But if other funds are provided for the maintenance of the child, then interest is only allowable as in other cases. Heath v. Perry, 3 Atk. 101; Mitchell v. Bower, 3 Ves. 287; Harvey v. Harvey, 2 P. Wms. 22; Crickett v. Dolby, 3 Ves. 10; Lowndes v. Lowndes, 15 Ves. 304; Lambert v. Parker, Coop. 143; Cary v. Askew, 1 Cox, Ch. 244; 2 Rop. Leg. (White's Ed.) p. 192, c. 20, § 4. The same doctrine, which applies to parents, is also applied to testators placing themselves in loco parentis; though perhaps upon the cases the distinction is sometimes very nice, if not evanescent, as to what constitutes the assumption of such a relation. Acherley v. Wheeler, 1 P. Wms. 783, and Churchill v. Speake, 1 Vern. 251, are supposed to have proceeded upon this ground; as Beckford v. Tobin, 1 Ves. Sr. 309, and Hill v. Hill, 3 Ves. & B. 183, most assuredly and satisfactorily did. But the exception is not allowed in favor of a legatee standing in the relation of a wife, or natural child, or grandchild, or niece, as such, any more than in favor of a stranger, unless there can be farther engrafted upon it a parental relation assumed by the testator. Haughton v. Harrison, 2 Atk. 329; Crickett v. Dolby, 3 Ves. 10; Stent v. Robinson, 12 Ves. 461; Lowndes v. Lowndes, 15 Ves. 301; Perry v. Whitehead, 6 Ves. 544, 546; and Lupton v. Lupton, 2 Johns. Ch. 614, are fully in point. And whoever wishes to go more fully into this matter, will find all the cases well summed up in Mr. White's late and very valuable edition of Rop. Leg. in chapter 20 of the second volume. Now, I have already suggested, that it is not made out upon the face of the present will, or otherwise, that Mrs. Dearborn did at the time of the will stand to Mrs. Sullivan in loco parentis. She was doubtless a favorite niece; but Mrs. Dearborn's bounty appears to have extended, upon the face of her will, very liberally to others standing in the same or other near relations. But, what is most material to consider is, that Mrs. Sullivan was at this time married; and her husband is still living, and it is not pretended (and indeed, if one might travel out of the record, or consult the answers, it could not be pretended), that he was not able to maintain her. It is not asserted (and from Mr. Bowdoin's answer, I am led to presume, that the fact was otherwise), that she was not at that time of age. She certainly was much beyond that period at the time of the testatrix's death. Now, the principal ground, upon which interest is allowed to children and other persons, to whom a testator stands in loco parentis, is, that they are infants, and require a maintenance. No case can be produced, (as I believe,) where interest has been given in favor of a female married legatee, having a competent maintenance; or in favor of an adult child; for the law supposes an adult capable of maintaining himself. In Raven v. Waite, 1 Swanst. 553, it was expressly held by Sir Thomas Plumer, master of the rolls, upon full argument, and under strong circumstances, that a female married adult legatee was not entitled to interest, until after the lapse of the year from the testator's death. His ground was, that it had never been allowed in favor of any adult legatee; and he added, "Neither reason nor authority extends the exception to adults."

But independently of this stringent decision, which has never been questioned, and is, indeed, completely sustained by Lowndes v. Lowndes, 15 Ves. 301, there is a circumstance furnished by the present will, which repels strongly any presumption, that the testatrix intended to provide for an immediate interest; and, in the absence of such presumption, would induce the court not to decree it. I allude, not to the specific legacies of household furniture, &c., given to Mrs. Sullivan, but to the life estate given to her in the real estate in Milk street. This is an immediate devise; and from the very terms of the will and marriage articles the estate may be presumed to be valuable; and in some of the answers it is stated to be quite valuable. How valuable I do not say; though I observe Mr. Bowdoin estimates it at the large sum of $40,000. But whatever might be its value, the court cannot but see, that it is a fund capable in its own nature of yielding an income; and it is in this view only, that I rely on it.

But it is argued by the counsel for the plaintiffs, that assuming the general rule to be, as it is here stated, still it is inapplicable to the present case. First, it is said, that, here, there were few or no debts due from the estate of the testatrix, and therefore it was the duty of the executors to make immediate payment of the legacy; and if so, they ought to be presumed immediately to assent to the legacy, and to appropriate the funds accordingly. But it was just as much their duty to pay all other legacies as this; and just as much their duty to take care of the interest of the residuary legatee, as of the general legatees. They had a right to time to make inquiries, to arrange the funds, and to deliberate on the point, out of what portion of the personal estate the legacies could be most conveniently paid. But the rule, as to payment of legacies, does not, as we have already seen, depend upon the posture of the particular estate, whether there are debts to be paid or not, or assets to be got in or not. Gibson v. Bott, 7 Ves. 89, 95. It stands upon a broader principle of public convenience. If there are not assets in the hands of the executors at the end of the year, still interest runs from that period. If there are assets, the law does not compel the executors to pay legacies within that period. It leaves the subject, where it can best be left, to the discretion of those, who are the chosen trustees or agents of the testator to administer his estate. The law aims not so much to do exact justice in the particular

case, as to administer a safe and steady general justice, meeting the mass of cases. In Sitwell v. Bernard, 6 Ves. 520, 539, Lord Eldon said: "Where an estate is given in various legacies, and the residue is given, it is a rule of convenience, that authorizes this court to say, (for there is no language in the will for it,) that those legacies shall be payable at the end of a year from the death of the testator; because, as a general rule, it may be taken, that the personal estate may be collected within a year; though in many instances that falls enormously to the prejudice of the residuary legatee." The truth is, that the law does not consider the legacy for the purposes of the will as due before the end of the year; and therefore the executors are not bound to pay it before it is due; but may exercise their discretion.

Then, again, it is said, that the marriage articles provide for an immediate distribution of her estate according to the will. But I can read no more in the articles than a general direction, that the estate shall be distributed according to the will upon the decease of the testatrix. This can only mean in a reasonable time; and does not supersede the general rules of legal interpretation. The case of Webster v. Hale, 8 Ves. 410, where interest was denied, had a far more pressing injunction. The law cannot deal with such niceties of expression for any practical purposes, and therefore excludes them from its view.

Then, again, a constructive or positive assent to the legacy by the executors is relied on; but that goes no further than to provide a legal remedy, and not to hasten the time when the legacy is due or payable.

Then, again, a particular class of cases is relied on, as furnishing an exception to the rule, as to interest, and allowing it from the death of the testator, where the court have endeavoured to collect the intention from the language of the will. I allude to that class of cases, under which Sitwell v. Bernard, 6 Ves. 539; Entwistle v. Markland, Id. 528; Stuart v. Bruere, Id. 529; Fearns v. Young, 9 Ves. 549; Gibson v. Bott, 7 Ves. 89; Hutchin v. Mannington, 1 Ves. Jr. 366, and Angerstein v. Martin, 1 Turn. & R. 232, fall. But that class chiefly respects cases, where a residue is given to one for life with remainder over. There are no circumstances in the present case, which bring it within the reach of the principles of those decisions, and it is therefore unnecessary to discuss them.

Upon the whole, in every view, in which I can consider this case, after the very learned and able arguments, with which I have been furnished, and which have so much aided me in arriving at a satisfactory conclusion, my judgment is, that upon this legacy Mrs. Sullivan was not entitled to any interest until a year after the death of the testatrix. The general rule established for a great length of time is against the allowance. The present case is not within any known exception to that rule. I am not bold enough to make a new one; and must content myself on this, as on many other occasions, not in doing what I might wish in the particular case, but what the law requires from one, whose duty it is merely to expound it.

But there is one circumstance in the case, which materially affects the application of the rule in the present case. It appears, that the executors did in point of fact within the year invest six thousand dollars in their own names as trustees of Mrs. Sullivan, and also, upon her written request and upon security given by her husband, did loan to him the farther sum of three thousand dollars, making in the whole an investment in fact upon her account of $9,000. Now it appears to me, that this was equivalent to the payment of so much of her legacy. It was an appropriation of so much to her exclusive account, and discharged the estate of the burthen pro tanto. In the case of such a payment within the year directly to a legatee, there can be no doubt, that the subsequent income of the sum so paid must belong to the legatee. It appears to me, that the appropriation of the sum in the hands of the trustees of Mrs. Sullivan for her use, and on her account exclusively, is not distinguishable in principle from the case of payment.

It has been already stated, that Mrs. Sullivan could not claim interest until after the year; and the executors could not be compelled to pay the legacy until that period. But it by no means follows, that, as a matter of discretion, the executors were not at liberty to pay the legacy within the year. There would be no breach of duty in so doing. They might, if they had seen fit, have invested the whole $20,000 for Mrs. Sullivan exclusively in stock within the year; and if they had, she would from the time of the investment have been entitled to the income. In Pearson v. Pearson, 1 Schoales & L. 10, 12, Lord Redesdale said: "The executor may pay the legacy within the twelve months; but he is not compelled so to do. He is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets, he is to pay from the end of the twelve months, whether the assets have been productive or not." And in the recent case of Angerstein v. Martin, 1 Turn. & R. 232, 241, Lord Eldon said: "I know of no case, which prevents executors, if they choose, from paying legacies or handing over the residue within the year; and if it is clear, currente anno, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." The same doctrine is found in elementary writers. See 2 Rop. Leg. (White's Ed.) p. 188, c. 20, § 2. But it is sufficient for my guidance, that it is founded in reason and has the authority of such extraordinary judges as Lords Eldon and Redesdale to support it.

My opinion, therefore, is, that whatever in-

terest or income accrued within the year upon the nine thousand dollars invested or lent on account of Mrs. Sullivan, she is entitled to, and it does not fall within the residuum.

The decree will be framed upon these principles; and it will then be referred to a master to settle the amount due in conformity thereto. Under all the circumstances, I shall apportion the costs equally between the plaintiffs and the defendants, and that portion, which falls on the executors, is to be paid out of the estate.

SULLIVAN MACHINE CO. (AMERICAN DIAMOND ROCK-BORING CO. v.). See Case No. 298.

SULLIVAN RAILROAD CO. (HALL v.). See Case No. 5,948.

SULSOR (HAYS v.). See Case No. 6,271.

Case No. 13,601.

The SULTAN.

ROBERTS et al. v. The SULTAN.

[6 Adm. Rec. 112.]

District Court, S. D. Florida. May 25, 1858.

SALVAGE—AMOUNT—DEDUCTION.

[A ship laden with cotton and corn in bags ran ashore upon Conch Reef with dangerous shoals on both sides ahead and astern. She was lightened, heaved off, and brought to port by the aid of 12 wrecking vessels, carrying 108 men, employed four days and nights. The vessel was worth $14,000; the cargo, $113,000. *Held*, that $23,000 was a reasonable salvage, but should be reduced $5,000 for the failure of the wrecking master to make careful soundings, resulting in an ineffectual effort to heave the vessel off in a wrong direction.]

[This was a libel in rem by Richard Roberts and others against the ship Sultan and cargo for salvage.]

Winer Bethel, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This ship, laden with 2,386 bales of cotton, and 6,000 bags of corn, bound from New Orleans to Liverpool, during the night of the 9th of May inst., ran ashore upon Conch Reef. After striking, she slued about half around, and drove up into three feet less water than she drew, and remained stationary, irregular patches of shoals or rocks lying on both sides and ahead, and but eleven feet of water, at the distance of half the ship's length astern. She drawing seventeen feet. The ship lay in a perilous situation in any wind, but with the wind from the south or southeast, her peril would have been much greater. Soon after daylight, in the morning, the ship was boarded by Roberts and his associates, who offered their assistance to the master, who accepted it; and they proceeded to carry out an anchor, and lighten the ship. They lightened the ship of 1,560 bales of cotton, and after carrying out two more anchors, heaved the ship off, and brought her to this port. Twelve wrecking vessels, of the aggregate tonnage of 917 tons, carrying in all 108 men, were employed four days and nights, in rendering this service. The value of the ship may be estimated at $14,000, and the cargo at $113,000; making the aggregate value of ship and cargo $127,000. I think, that $23,000 would be a reasonable salvage, but for the following considerations:

We have shown, that the ship was hemmed in by shoals, and that her situation was such as to call for a minute and accurate knowledge of the position and size of the shoals and of the channels, which could only be acquired by complete soundings and a careful inspection in order to extricate her, in the shortest possible time, from her perilous position. And after these were ascertained, there would have been an opportunity for the exercise of the very best judgment and skill, in rescuing the ship. The master confiding in the skill and ability of Roberts, as an experienced licensed wrecker, entrusted to his judgment the planting of the anchor, and the business of lightening the ship. Roberts caused soundings to be made, and carried the anchor out on the starboard bow, and attempted to get the ship off by lightening and heaving on that anchor. The result, in the end, proved that the ship could not be heaved off in that direction, and an anchor was carried out astern, by which the ship was heaved off. It was a nice operation; for the ship could not be heaved astern any more than half her length, without striking a shoal on which there were but eleven feet of water, and unless the ship floated upon being heaved thus far astern, the experiment would fail. It, however, succeeded. The ship floated, the bow dropped off to the starboard, and the ship was saved. Roberts erred in not causing more minute and careful soundings to be made before he adopted the plan of heaving the ship off to the starboard before she had been heaved half her length astern. Had more complete soundings been made, he would have known the bottom better, and his good judgment would have directed him, at an earlier period in the history of the transaction, to the proper course to rescue the ship. There is not the least reason for imputing to Roberts or his associates either fraud or that kind of gross neglect of duty which is tantamount to fraud, and which works a forfeiture of all salvage. His error was wholly of the head, not the heart, and grew out of his imperfect knowledge of the bottom. He thought the soundings were sufficient, and that he was possessed of a sufficient knowledge of the bottom to enable him to decide upon the proper plan to rescue the vessel. He was mistaken. He did not possess a sufficient knowledge of the bot-

tom, and it was his duty to have made more minute and careful soundings. For this neglect of duty, I think that the salvage ought to be diminished $5,000 from which it otherwise should be, and that $18,000 is a reasonable salvage to allow.

Case No. 13,602.

The SULTANA.

[1 Brown, Adm. 13.] [1]

District Court, D. Michigan. Feb., 1857.

SEAMEN—WAGES—CLERK OF A STEAMBOAT.

The clerk of a steamboat is a mariner, and entitled to a lien for wages.

Libel for wages. Libellant was hired and served during the autumn of 1856 as clerk of the Sultana, and claimed a lien for his wages.

WILKINS, District Judge. The clerk of a steamboat is a mariner, within the meaning of the law conferring a lien for wages. Curt. Merch. Seam. p. 5, and notes; The Prince George, 3 Hagg. Adm. 376; 2 Bouv. Law Dict. p. 405; Mills v. Long [Sayer, 136], referred to in 2 Dod. 105; Wilson v. The Ohio [Case No. 17,825]; Fland. Mar. Law, 354; Ross v. Walker, 2 Wils. 264; Trainer v. Superior [Case No. 14,136]. Decree for libellant.

Case No. 13,603.

The SULTANA.

[1 Brown, Adm. 35.] [1]

District Court, D. Michigan. March, 1858.

MARITIME LIEN—REPAIRS—AUTHORITY OF MARSHAL TO ORDER REPAIRS.

The marshal has no authority, as such, to direct repairs to a vessel beyond what are necessary to her preservation while in his custody; but if repairs are furnished upon the order of the master, the fact that he was, without the knowledge of the libellant, holding the vessel as custodian for the marshal, will not prevent a lien attaching.

[Cited in The Young America, 30 Fed. 790.]

Libel for dockage and repairs. It appeared that the Sultana was brought to the dock about the 5th of December, A. D. 1856, and was taken in on the 8th under a contract between the master and the libellant.

Wm. Gray, for libellant.

J. S. Newberry, for claimant.

WILKINS, District Judge. There is no doubt that the contract in this case was within the scope of the master's authority, and that the dockage was necessary, within the meaning of the law. The vessel had been seized under process of attachment on December 1st, and at the time she entered the dock was in custody of the marshal, who had constituted Captain Appleby ship-keeper, to hold possession of the vessel while awaiting the further action of the court. Appleby was known to libellant as master of the vessel; he was not known to him as the deputy of the marshal. He evidently made the contract with libellant as master, and not as ship-keeper, as he had no right to do so in the latter capacity. Tyler, the deputy marshal, who had made Appleby ship-keeper at his own request, took possession of the vessel himself on the 15th of January, while she was still in libellant's dock.

At the time the contract was made and the vessel entered the dock, libellant had neither actual nor constructive notice that Captain Appleby had any authority from the marshal to hold possession of the vessel for him. Such being the case, the court will hold the vessel liable for the dockage and repairs furnished up to the 15th of January, when Tyler, the known deputy of the marshal, took possession of her. From this time libellant had notice that the vessel was in the custody of the law, and the subsequent repairs furnished by him constituted no lien. It is not within the power of the marshal to contract for repairs that are not absolutely necessary to the preservation of the vessel while in his custody. It is his duty simply to keep the vessel as he receives her, and he has no authority to expend money for alterations or repairs for the purpose of completing her equipment for navigation.

The third and fourth items of libellant's account, amounting to $1,750, are disallowed, and a decree granted for the residue. Decree for libellant.

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

SULZBERGER (UNITED STATES v.). See Case No. 16,415.

SUMMERL (MORRIS v.). See Case No. 9,837.

SUMMERL (VANDERWICK v.). See Case No. 16,845.

Case No. 13,604.

In re SUMMERS.

[3 N. B. R. 84 (Quarto, 21).] [1]

District Court, W. D. Texas. 1869.

HOMESTEAD—"HEAD OF FAMILY"—"CITIZEN"—TEXAS STATUTE—BANKRUPTCY.

1. An unmarried man, a bankrupt, having orphan children bound to him under the apprentice laws of Texas, and keeping house, hiring servants, and conducting a household, claimed a homestead of one hundred acres, as head of a family, by the laws of Texas. The assignee set apart the same, but afterwards made a motion to have the award set aside as unauthorized. *Held*, that the bankrupt was not entitled to such homestead as head of a family.

2. Amount thereof set aside, and fifty acres ordered to be set apart to him as a citizen, under the Texas laws, not to exceed in value five hundred dollars.

[1] [Reprinted by permission.]

[In the matter of C. M. Summers, a bankrupt.]

DUVAL, District Judge. The question presented in this case arises upon a notice made by John C. West, assignee, to have the homestead allowance of one hundred acres, which he had allotted to the bankrupt under a mistake as to the facts, set aside, and that the same be held subject to the claims of his creditors. The bankrupt was thereupon required to submit himself for examination touching this matter. In reply to interrogatories propounded to him, he states, under oath, that he has never been married. He declares further as follows: "I am the head of a family, and have kept house and owned slaves for years before they were set free, and still keeping house when I filed my petition. I have orphan children bound to me under the apprentice laws, by the county court of Falls county. I had, at the time of filing my petition, hired servants on my premises. I have and keep up all the usual appurtenances of a homestead, supplying provisions and conveniences for my servants, and carrying on my household matters, in all respects, as the head and support of a family, except that I have no wife. I am permanently settled, and regard myself as responsible for the maintenance and care of the orphan children above named. My claim for the exemption was made in good faith, and by the advice of my attorneys, after a fair statement of all the facts."

The bankrupt assumes that the above state of facts constitutes him the head of a family, and authorizes him to claim the constitutional homestead exemption. In this I think he is mistaken. Had the bankrupt adopted the orphan children spoken of by him, in the mode prescribed by the statutes of Texas, my conclusion would be different, but he seems only to have had them apprenticed to him. This apprenticeship did not invest the children with any right or interest in the estate of the bankrupt, or entitle him, as having "a family," to a homestead exemption, within the intent and meaning of the constitution.

The constitutional provision is, that "the homestead of a family, not to exceed two hundred acres of land (not included in a town or city), or any town or city lot or lots, in value not to exceed two thousand dollars, should not be subject to forced sale for any debts hereafter contracted," etc. According to my understanding of this provision, and in so far as it has been construed and acted upon by the supreme court of this state, the right to a homestead resulting from the having "a family," depends either on the fact of marriage, or, in default of marriage, upon the charge and protection of others adopted as children, or of those who, by reason of kindred, have some interest in and claim to the premises of the person with whom they reside. An unmarried man may, from charity or other motives, take into his house and maintain any number of children not related to him in any way, and yet he would not, as I conceive, have such "a family" as was contemplated by the constitution, in order to entitle him or them to a homestead exemption. The decisions of the supreme court of this state, in regard to the question as to what shall be considered a family, with respect to the colonization and immigration laws, do not, I think, apply to the constitutional homestead provision. The policy and objects of the two are widely different.

While it is my opinion, therefore, that the bankrupt, under the facts of this case, cannot claim a homestead under the constitutional provision, I see nothing to prevent him from doing so as a citizen or single man, by virtue of the act of the 26th January, 1839 [Laws Tex. 1838-39, p. 113], which is still in force, as has been decided in the supreme court in the case of Cobbs v. Coleman, 14 Tex. 594. This act provides, among other things, that from and after its passage, "there shall be reserved to every citizen or head of a family in this republic, free and independent of the power of a writ of fieri facias, or other execution issuing from any court of competent jurisdiction whatever, fifty acres of land, including his or her homestead, and improvements not exceeding five hundred dollars in value," etc. The constitution of the state made provision for heads of families, or rather as to the "homestead of a family," and as to them this act of 1839 may be regarded as virtually repealed. But its other provisions remain intact and in full force. While I do not think, therefore, that this bankrupt can properly claim the one hundred acres as being the "homestead of a family" under the constitution, it is my opinion that he is entitled as a "citizen" of this state, to fifty acres, as secured by the act of 1839.

The motion of the assignee is therefore sustained, and he is directed to set aside the exemption of one hundred acres heretofore allowed to the bankrupt, and to restrict the same to fifty acres, including his homestead and improvements, or so much thereof as will not exceed in value the sum of five hundred dollars.

A different conclusion has been reached under a similar provision in the courts of Georgia.

SUMMERS (KNOX v.). See Cases Nos. 7,913 and 7,914.

SUMMERS (McINTOSH v.). See Case No. 8,827.

SUMMERS (THOMAS v.). See Case No. 13,912.

SUMMERS (UNITED STATES v.). See Case No. 16,416.

Case No. 13,605.

SUMMERS v. WATSON.

[1 Cranch, C. C. 254.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

COVENANT—INJUNCTION BOND.

Covenant will not lie on the condition of an injunction bond.

Covenant, on the condition of an injunction bond against the defendant as surety.

Motion by Mr. Taylor, for defendant, to appear without bail, on the ground that bail could not have been required if the plaintiff had brought an action of debt on the bond; and that covenant will not lie on the condition of a bond. The defendant does not covenant or promise to perform the condition, but may pay the penalty if he chooses. By the act of assembly, the plaintiff has a right to hold to bail in an action of covenant if he has a right of action of covenant. But here he has no right of action of covenant.

THE COURT were of opinion that covenant will not lie on the condition of this bond.

[See Case No. 17,289.]

SUMMERS (WATSON v.). See Case No. 17,289.

Case No. 13,606.

The SUMMIT.

[2 Curt. 150.] [2]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

COLLISION — RULES OF NAVIGATION — VESSELS ON FISHING GROUNDS.

1. The ordinary rules of navigation, designed to prevent collisions, are binding on fishing vessels, while engaged on their fishing grounds.

2. Damages denied for want of preponderating proof, in a great conflict of evidence.

[Cited in The Worthington & Davis, 19 Fed. 839; The Max Morris, 28 Fed. 884; The Alhambra, 33 Fed. 77.]

In admiralty.

Whiting & Russell, for appellants.

Mr. Scudder, contra.

CURTIS, Circuit Justice. This case has been held under advisement for some time, on account of the difficulty I have found in arriving at a judgment thereon. It is a cause of collision which occurred in the Bay of St. Lawrence between two fishing vessels called the Jubilee and the Summit, and by which the former with her fare, was destroyed. When the collision occurred, the Summit was sailing closehauled on the wind, and had her larboard tacks aboard. The Jubilee had her larboard tacks aboard, and her sails set so as to lie close to the wind, but whether she was, and for some time before had been, sailing with the wind full, is the question of fact upon which there is an irreconcilable conflict of evidence. If both vessels were closehauled on the wind, it was the duty of the Summit, which was on the larboard tack, to give way and avoid the Jubilee. If the former was sailing close to the wind, and the Jubilee had the wind free, it was the duty of the Jubilee to keep clear of the Summit. These rules are applicable to fishing vessels, on their fishing grounds, and a deviation from them, producing a collision, must subject the vessel thus in the wrong to a claim for damages. It was stated by the counsel, that one reason why this appeal has been prosecuted is, that it is deemed important to obtain a decision of this court upon the question, whether the rules of navigation, designed to prevent collisions, are applicable to fishing vessels while sailing on their fishing grounds. It is said there is a difference of opinion among those engaged in this business, on this question; and that these rules are frequently disregarded. No reason has been assigned why they should not be applied to such vessels, when so engaged, and none has occurred to my mind. When it is remembered that, in pursuit of some kinds of fish, great numbers of vessels are frequently assembled in close proximity to each other, all in eager pursuit of their prey, and necessarily sailing in all conceivable relative courses, it is apparent there is unusual need of some suitable rules of navigation to avoid collisions. The ordinary rules have been found by experience to be the best and most convenient. I have no hesitation in declaring them to be applicable to fishing vessels, in common with all vessels, and when engaged on the fishing grounds as well as elsewhere. But it is necessary for the libellants to satisfy the court by preponderating evidence, that the facts existed which would impose on the Summit the duty of giving way to the Jubilee. It is not uncommon, in cases of collision, to find all on board one vessel, testifying differently upon material facts, from those on board the other vessel. But it is rare indeed that such a conflict of evidence exists, as I find in this case. This collision occurred within a few yards of another fishing vessel called the Shade, which was lying to, her hands being engaged in fishing, and within plain view of seven other fishing vessels, which were in different directions from the place of collision. Eleven persons who were on board those other vessels have been examined on behalf of the libellants, and ten in behalf of the claimants. They not only differ, but upon the most palpable and material points they flatly contradict each other. The witnesses for the libellant swear with positive-

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

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

ness, and assign reasons for, and means of knowledge of the correctness of the statement, that the wind was west south-west. Those of the claimants testify with equal positiveness, and upon reasons assigned and sworn to, that the wind was west north-west.

The libellant's witnesses say the Jubilee, for fifteen minutes before the collision, and down to the moment of the collision, had been sailing as close to the wind as she could lie. The claimants, that she had been sailing about three points free, until just before the collision, when she luffed up close to the wind, which brought her across the bow of the Summit and caused the collision.

I have read this voluminous evidence and compared it, with the hope that I might be able to come to some satisfactory conclusion, upon such leading facts as would be sufficient to determine the cause. I have also repeatedly examined, with much attention, the briefs of the evidence furnished by the counsel, and which, it is but just to them to say, evince not only a most attentive study of the proofs, but great ingenuity, and a thorough comprehension of the cause. It would occupy too much space to detail the evidence, or to place on paper the different aspects in which I have viewed it, and the different facts which seem to me entitled to weight, on the one side and on the other. And the result is, that I am not able to say that I think the libellant has made the fault of the Summit appear, by that preponderance of evidence necessary to charge that vessel with the damages arising from the collision.

Case No. 13,607.

In re SUMNER.

[10 Ben. 34.] [1]

District Court, N. D. New York. June, 1878.

BANKRUPTCY — DISCHARGE — FORMER DECREE — CONVEYANCE IN FRAUD OF CREDITORS — PROVISION FOR WIFE.

1. A creditor of a bankrupt opposed his discharge, on the ground that he had made a conveyance of real estate to his wife, with intent to hinder, delay and defraud creditors, and introduced, as evidence, the record of a decree in a suit in a state court, between such creditor, as plaintiff, and defendants, of whom the bankrupt was one, declaring such conveyance void, as against the plaintiff, as made with intent to hinder, delay and defraud creditors: *Held*, that such decree was not conclusive, as an adjudication between the same parties, establishing the fraudulent character of the conveyance.

2. The conveyance was held by this court, on the facts, to have been made with intent to make a provision for his wife, in fraud of his creditors.

[In the matter of Charles Sumner, a bankrupt.]

M. W. Cooke, for bankrupt.

J. Van Voorhes, for Bump.

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

WALLACE, District Judge. Bump, a creditor of the bankrupt, opposes his discharge, upon the ground that the bankrupt, on the 12th of June, 1873, made a conveyance of real estate to his wife, with intent to hinder, delay and defraud creditors. The specifications set up other grounds of opposition to the discharge, which the proofs do not sustain.

The opposing creditor produces the record of a decree in an action in the supreme court of this state, wherein he was plaintiff, and the bankrupt was one of the defendants, whereby the conveyance to the bankrupt's wife is declared void, as against the plaintiff, as made with intent to hinder, delay and defraud creditors; and he now insists that this decree is conclusive here, as an adjudication between the same parties, establishing the fraudulent character of the conveyance.

I am of opinion that no such effect can be given to the decree, for the reason that the parties and the subject matter are not the same in this controversy as in the action in which the judgment was rendered, within the meaning of the rule which pronounces a judgment conclusive as evidence between the same parties, upon the same matter, directly in issue in another court. In this proceeding, all the creditors of the bankrupt are parties in interest, and, although the opposition to the discharge is directly upon the intervention of Bump alone, the result affects all the creditors of the bankrupt. If the former action had resulted in favor of the bankrupt, the judgment, surely, would not be conclusive in his favor against any creditor other than Bump who might oppose a discharge, on the ground that the conveyance in question was fraudulent. The judgment against the bankrupt, therefore, would not be conclusive in favor of such creditor. Yet, in effect, such would be the result, if the judgment operates as is now contended. If the judgment had been in favor of some other creditor, Bump could not avail himself of it here. If it had been in favor of the bankrupt and against such creditor, it would not conclude Bump here.

Again, the right now sought to be determined is one quite collateral to that which was the subject of the former action, and depends upon different considerations. A conveyance may be fraudulent as to one creditor and not fraudulent as to another; and it would be necessary for this court to examine the evidence and consider the case, before it could determine whether or not the transaction pronounced fraudulent by the judgment is one which this court would deem fraudulent for the purpose of a discharge in bankrupt; and it would be a most illogical deduction to say that such a judgment is conclusive if this court is satisfied with its correctness, while unconclusive if not satisfactory. If the judgment had been in favor of the bankrupt, Bump could still

be heard to say that the bankrupt had made a conveyance which deprives him of the right to a discharge; and, as he would not be estopped in that case, the bankrupt is not estopped now because the judgment was adverse to him.

Passing to the case upon its merits, as shown by the proofs, I am constrained to differ from the register, and am of opinion that the conveyance from the bankrupt to his wife was fraudulent as to creditors.

Without attempting to discuss the evidence, it must suffice that it has impressed me with the conviction that the bankrupt's circumstances were not such, at the time of the conveyance, as to render the transaction one consistent with an honest purpose towards his creditors. If he is to be believed, he was possessed of means to pay the obligations on which he was primarily liable, and have an ample surplus. But he had assumed liabilities for a large amount, as the surety of others; his property, which was mainly in real estate, bought upon speculation, was considerably encumbered, and the value of his interests was mainly represented by the general rise in the value of real estate since his purchases, which were all of recent date. His homestead, which he proposed to settle on his wife, and which he estimated as worth from $25,000 to $30,000, at the time of the conveyance, was mortgaged for $12,000, being within $2,000 of what it had cost him; and this circumstance affords a fair and significant exhibit of his financial status generally. The transfer of other real estate to his son, without any substantial consideration; the delay intervening between the time when he divested himself of title to the real estate and the transfer to his wife, and the delay in recording the conveyance; and the intimate business relations between Brewer, for whom he was surety, and who soon failed, and himself, all tend to throw some light on his intent in the transaction, which was, in my view, to provide for his wife and son against contingencies which he perhaps did not regard as serious, but which he foresaw as possible in the near future.

A discharge is denied.

Case No. 13,608.

The SUMNER.

[1 Brown, Adm. 52.] [1]

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

SALVAGE—DUTY OF SALVORS—FORFEITURE—EMBEZZLEMENT.

1. In stripping an abandoned vessel of her apparel and furniture, salvors are bound to the exercise of reasonable care, and gross neglect or wanton injury of the property saved works a forfeiture of all claim for salvage, and renders them liable for the damage.

2. It is the duty of salvors to land the property saved at the nearest port of safety, and see that it is properly cared for.

3. Where salvors stripped a vessel, having her name and port painted on her stern, and carried the property saved directly past her home port: *Held*, they were guilty of embezzlement, and forfeited their right to compensation.

Libel for the possession of two anchors and chains, a set of sails, and running rigging, being part of the outfit and apparel of the schooner Charles Sumner. Answer by the officers and crew of the schooner Norway, that on a voyage from Buffalo to Milwaukee they discovered the Sumner upon Lake Erie, about 25 miles from Pte au Pelée, in distress, on her beam ends, and apparently deserted. On boarding her, they found her loaded with staves, but capsized and full of water. They made fast to the wreck, and by means of hawsers from the mast-heads, made fast to those of the wreck, righted her, and endeavored to pump her free of water, and to lighten her by raising her chains, and removing same, with her anchors on board the Norway; but, failing in this, stripped her of her tackle, apparel, and furniture, put them upon the Norway, and carried them to Newport, upon St. Clair river, where they were seized by the marshal. That immediately thereafter they filed a libel for salvage against the property, and they now claim they are entitled to a reasonable salvage thereon. Libellants thereupon filed an amendment to their libel, under rule 52, in the nature of a replication, setting forth that the officers and crew of the Norway had embezzled the property, and were endeavoring to carry it out of the district, when it was seized by libellants' instructions. That they were also guilty of gross negligence in removing the property from the vessel, and in the subsequent care of it, permitting it to be stolen and wantonly injured. The Charles Sumner left Detroit upon a voyage down Lake Erie; off Roudeau she commenced leaking, and, notwithstanding the exertions of the crew, filled with water and capsized. The crew thereupon took to their boats, came ashore, and went to Detroit for a tug, which was obtained and sent to her assistance. Her name and home port, "Detroit," were painted upon the stern of the Sumner. On reaching the wreck it was found stripped of everything movable; her rigging had been cut in some seventy places, her canvas torn, and her blocks split and otherwise damaged. There had been fine weather for several days before. The schooner could have been towed easier with her sails and rigging than without them, and there seemed to be no necessity for stripping her. The Norway had been seen a day or two before working at the wreck, but she made no signal for assistance; and, after lying by her from three in the afternoon until four the next morning, left her. When the tug found her she was easily bailed out, and towed to a port of safety. The Norway had passed by

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

Detroit with the property on board, and was seized on the way to Lake Huron. The rigging of the Sumner was found so badly cut and abused as to be nearly worthless, except for junk.

Alfred Russell, for libellants.
Ashley Pond, for salvors.

WILKINS, District Judge. I am satisfied from the proofs, and especially from the testimony of Wm. McKay and James McBride, master of the Sumner, that the officers and crew of the Norway are not entitled to salvage, under all the circumstances exhibited. The Sumner was not derelict. Her master and crew left her for the purpose of obtaining a tug, animo revertendi. The crew of the Norway, without rendering any assistance, unnecessarily destroyed and injured the furniture and rigging of the Sumner, left her exposed to thieves and marauders, and used no efforts to place her in a safe position. Their conduct showed a disposition to plunder rather than to save. The Norway was on her way to Chicago, and yet, knowing from the name and port painted upon the stern that she belonged to Detroit, surreptitiously passed that port with the valuable apparel and furniture of the Sumner on board. Her duty, even if the name of the vessel relieved was unknown, was to stop at the first port of safety, and see that the property she had on board was properly cared for. By not doing so her master and crew showed clearly an intention to embezzle the property saved, and thereby forfeited all claim to salvage. The property described in the libel will, therefore, be delivered to the libellants, who are also awarded damages in the sum of $200, with costs. Decree for libellants.

NOTE. That misconduct of salvors forfeits their claim, see The Mulhouse [Case No. 9,910]; Nickerson v. The John Perkins [Id. 10,252]; The Island City, 1 Black [66 U. S.] 121; The Boston [Case No. 1,673]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Flinn v. The Leander [Case No. 4,870]; James v. The Sarah A. Boice [Id. 7,183].

Case No. 13,609.

SUMNER v. MARCY.

[3 Woodb. & M. 105.] [1]

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

CORPORATIONS—ULTRA VIRES—FOREIGN CORPORATION—EFFECT OF JUDGMENT AGAINST—INDIVIDUAL LIABILITY OF SHAREHOLDERS.

1. Where a corporation was chartered for sawing and manufacturing wood, and allowed a capital of $150,000, one half personal and half real estate, it cannot legally invest money in a bank for the purpose of carrying on the business of banking. Nor can it buy shares in such an institution to more than double its authorized capital of personal property, and bind the corporation or members for the payment of promissory notes given therefor.

[Cited in Marbury v. Kentucky Union Land Co., 10 C. C. A. 393, 62 Fed. 351.]

[Followed in New Orleans, etc., Steamship Co. v. Ocean Dry-Dock Co., 28 La. Ann. 173.]

2. Where an action is instituted in New York against such a corporation chartered in Massachusetts, to recover such notes and to secure property of the corporation situated in the former state, but no notice given to the corporation in the latter state, the recovery is not probably binding on the corporation or its property in Massachusetts, and certainly cannot be enforced against it or its members individually, without a new judgment in the latter state. If its president, living then in New York, appeared to defend the suit there, but abandoned it without a hearing and opinion on the legality of the transaction, the judgment ought not to affect the members in Massachusetts in their individual capacity, who had no notice or opportunity to defend the action in New York.

[Cited in Sawyer v. Gill, Case No. 12,399.]

3. Where members, in their private capacity, are by statute made responsible for debts of a corporation, it can be only in the mode and under the facts specified in the statute; and to prevent the recovery in such a case in Massachusetts, on the New York judgment, a member will be allowed a temporary injunction against the action, so as to affect his property individually.

4. The judgment, recovered in New York, in order to reach the property situated there, is entitled to no more force in Massachusetts than in New York, and there it does not bind the members individually; and when recovered like this, without actual notice to the corporation in Massachusetts, its validity at all in the latter place is questionable.

[Cited in Tenney v. Townsend, Case No. 13,832.]

5. If a member of such a corporation objects and protests against a measure, which is within its competency, he is still not exonerated individually from the debts consequent on it, unless he seasonably sells out or withdraws as a member.

This was a bill in chancery [by William H. Sumner against William L. Marcy] praying for an injunction to stay proceedings in a certain action at law pending in this court by the respondent against the East Boston Timber Company, and that action had been instituted at this term in the name of Marcy, by a service on the defendant, as a member of said company, and is founded on a judgment recovered against that company in the state of New York in May, 1840, for $68,000. Certain property of that company, then situated in the state of New York, was attached and sold on the execution that issued on the judgment, and the company having become insolvent, no proceedings were had in this state on the judgment to enforce the balance till the commencement of the action before referred to in March last. This was done with a view to recover judgment here against the company, and then collect the balance from the private property of the defendant and others, members of the company, and liable by the laws of Massachusetts to respond for the legal judgments recovered against it in this state.

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

But, though a member of the East Boston Timber Company, the complainant avers that he is not liable for said judgment, because the drafts and obligations which constituted the ground for the above judgment recovered in New York, belonged to the City Bank, of Buffalo, and were the originals or renewals of originals executed by said company for a large number of shares purchased in that bank under a vote of it passed in 1838; and which shares, if not entirely owned at that time by the bank, stood pledged to it by J. May, the president thereof, and the bank had full notice of the objections made to the powers of the company to buy or pay for the shares legally. It further averred that the bank failed in 1840, and its effects, including these obligations, were placed in the hands of William L. Marcy, as public receiver, and the judgment on them was recovered in his public capacity as receiver: that, in the trial which preceded said judgment an appearance was entered by the president of the company, and J. S. Talcott, Esq. was employed as counsel. The latter assented to a verdict for the plaintiff, subject to exceptions to be filed and argued, raising the question whether said company had not exceeded its legal powers in purchasing the bank shares before named, and in executing obligations therefor; but said counsel, not being paid for attention to the suit, abandoned it, and judgment was rendered on the verdict without those exceptions being filed or decided on by the proper court in New York. The bill next set out that the plaintiff was entirely ignorant of the suit, or those obligations, till long after the judgment rendered upon them against the company. That the defence against it was well founded on the part of the corporation, and is more especially so by the complainant, who, as a member at the time of the vote by the company to purchase the bank shares, protested against the legal power of the company to do it, for the purpose, as then averred, of getting the control of the bank and thus obtaining loans and facilities in carrying on their works, part of which were conducted in the state of New York, in the neighborhood of Buffalo, where the bank was doing business. It then averred that the complainant resisted the purchase as illegal, and, as a member and director, voted against it in all stages; and hence, he prays that the further proceeding here to recover a judgment in Massachusetts on the judgment rendered in New York be enjoined against, so far as respects him and his liability as a member to contribute towards the payment of it. The cause came on to a hearing for a temporary injunction, without any pleadings, at this term. The books of records of the company were put in as evidence, with the charter and the affidavit of Talcott, their counsel in New York, and the affidavit of Joseph C. Broadhead, one of their agents employed in said bank as its vice president. The substance of this procedure, so far as material, will be given in the opinion of the court.

B. R. Curtis, for plaintiff.

B. Sumner and Goodrich, for respondent.

WOODBURY, Circuit Justice. I cannot bring my mind to doubt the propriety of at least a temporary injunction in this case, as to further progress in the action at law in behalf of the respondent, so far as it may be prosecuted to affect the complainant. The first objection to it, on the face of the proceedings, is that the parties are not the same, and hence the complainant has no right to ask it. But this is overcome fully by the admitted fact, that the complainant is not only one of the members of that company, and interested in its corporate property, if any remains, but, by the laws of Massachusetts (Rev. St. c. 38, § 30), has a still deeper interest, by being made responsible in his individual capacity for any judgments recovered in this state against the company, and not satisfied by the property belonging to the corporation. Indeed, his only chance of defence, if the company is negligent or unfaithful in resisting illegal claims, and his only mode to repel and defeat judgments for such claims against it, which would bind him, is by applying originally and being allowed to defend in its behalf; or if judgments have already passed against the company, without his knowledge, and against which no defence can now be made, either in its behalf or for the benefit of its innocent shareholders, the only remaining remedy is probably by a bill, as in this case, to enjoin against further proceedings in the suit at law on the New York judgment. The latter mode, under the facts in this case, seems most speedy and effectual in the first instance, as a temporary security, till inquiry and consideration can be had as to other modes of redress, if any permanent relief should, on full examination, appear proper.

The respondent denies any illegality in the grounds of the judgment already obtained, either as regards the company or the complaint. Hence the next step is to investigate how that matter stands under the present aspect of the case. Firstly. Had the company legal authority to purchase and give notes and drafts for these shares in the City Bank of Buffalo? Secondly. If it had this power as a corporation, is the complainant exempt, by his opposition and protest against the purchase, from being legally held to discharge such judgment as can legally be recovered in this state against the company for the purchase money? As at present advised, my views are in favor of the complainant on the first point, but not on the second. I think the company transcended its legitimate powers in buying the shares, but do not think that a stockholder can, in law, be exonerated from his statutory responsibility, in cases

generally, however much he may individually resist or protest against a purchase. If he still continues a member, not selling out or abandoning his membership before the purchase, and the purchase is found to have been legal, the legal consequences must attach to him, however indisposed he was towards the transaction. He must not remain a member, in such a case, and take the benefit of the purchase. If he does, he must bear its burthen, as imposed by law, when the purchase is legal.

The reasons which influence me to the conclusion that the purchase here was illegal, are these: This company was authorized to act as a corporation for purposes connected with timber, and not banking. Its business, as described in the charter, was to "saw and vend lumber and manufactures from wood." Its whole capital was but $150,000—half personal and half real estate. This happened in 1834, and in 1837 the proposition was first introduced by S. White, its president, to purchase shares in the City Bank, at Buffalo. The illegality of such a purchase for the avowed purpose of getting the virtual control of the bank, by owning $168,000 of the capital, out of $400,000, and thus effecting loans to the company by conducting the bank through its agents, as well as thus violating its charter in another respect, by the investment of so large a sum, viz.: $168,000 in these shares, when their authorized capital was only $150,000, and but half of that in personal estate—was fully exposed by the complainant, and discussed at various meetings before the purchase. But in 1838, a vote at a meeting of the stockholders having passed to purchase the shares, they were bought, in that year, by the directors, and drafts and notes were given for the consideration; a part of which, or the renewals of them, constituted the grounds of the judgment afterwards recovered against the company, in New York. The shares were chiefly bought of John B. May, the president of the bank, but with the knowledge of the officers of the bank, (when the notes were delivered to them for May's obligations and pledge of this same stock,) what the consideration of them was, and what objections had been made by the complainant to their validity.

It thus becomes necessary to decide whether the bank would have been bound to suffer for their invalidity without this knowledge and notice. Though such a result seems just, without positive knowledge or notice, when the whole transaction is by statute unjustifiable and the notes and drafts are signed by the agent of the company, as agent. Hence, his authority ought to be inquired into; and, the more especially, when the amount was so large and unusual. Otherwise, all risk seems to be assumed. Chit. Bills, 32; Bayley, Bills, 72; 5 Taunt. 792; [Mechanics' Bank of Alexandria v. Bank of Columbia] 5 Wheat. [18 U. S.] 337; 7 Barn. & C. 278. Tracing this affair onward, the company, after the purchase, proceeded to elect one of its agents vice president of the bank, and to control its operations till the failure of both the bank and the company, in 1840. All these facts were proved by their agent, the vice president, and there was no contradictory testimony to be weighed on any point. On the face of this transaction, there can be no doubt that the purchase of these bank shares—for such purposes—was a most dangerous experiment by a timber company. The legal objections, that it related to a matter not within its corporate powers, and went in amount entirely beyond its own authorized capital, are fatal to the validity of it. Such a company was not created for carrying on banking business, either in Massachusetts or elsewhere. And though in the course of its collections and sales it might take, on execution for a debt, a bank share, that would be a mere incident to a legitimate power of collecting its debts. Even then it would be taken to sell again, and not for the purpose of making such an investment permanently, and of thus embarking or aiding in the business of banking. The avowed powers of the company, in the charter, were the sawing and vending of lumber and manufactures of wood, and not of making paper money, or borrowing and lending money, as a branch of business. A principal power or grant, conferred by a statute or charter, is not to be construed to carry, as an incident, anything not implied in the principal—not usually appurtenant to it, and not possessed of a similar character. Beatty v. Knowler's Lessee, 4 Pet. [29 U. S.] 152. Nor can it include anything which would have been refused as a principal. Or anything, on the most liberal construction justifiable, which is not necessary and proper to carry the principal express powers into effect. 2 Kent, Comm. 298; 9 Conn. 180; 5 Conn. 560; [Head v. Providence Ins. Co.] 2 Cranch. [6 U. S.] 127; Beatty v. Knowler's Lessee, 4 Pet. [29 U. S.] 152; 15 Johns. 383; 15 Wend. 259; Hunter v. Marlboro [Case No. 6,908]; Slark v. Highgate Archway Co., 5 Taunt. 792; 2 Cow. 667, 678.

Now, although the company might be obliged to borrow some in carrying on its legitimate business, it is too far-fetched to hold that in order to do it they are authorized to obtain acts of incorporation, and engage in banking, or to unite with others in that business in institutions already in existence, so as to be able in this way to lend to themselves. If they can lawfully embark in the business of the bank, and purchase its shares in order to facilitate loans from it, they can lawfully embark in any business which the lenders of money follow, and which may appear likely to further the loans desired. Thus, if a lender be a manufacturer of cotton, they may engage in that; or a maker of patent medicine, or an adventurer in the whale fisheries, they may engage, also, in such branches of business. And by a parity

of reasoning the whole limitations and character given to a company in its charter for sawing and manufacturing wood, may be prostrated, and an act of incorporation for one object may be converted into one practically for all objects.

The cases which tend to sustain the views opposed to such a latitude of construction, may be seen in the citations before made, and in all our writers on constitutional law—in the debates in congress on the constructive powers of the general government for the last half century, and in the various decisions of the supreme court, relating to that class of questions. The whole doctrine of sound constitutional construction of all political charters rests on a like basis; and must, in my view—as thus construed by many jurisprudents—serve to sustain the limitations above named, as imposed on charters for business. Such, likewise, is the express limitation on the granted powers in the constitution of the United States, having, doubtless, been introduced as proper from an analogy to the rule in respect to private charters. But, beyond this, the company in so large a purchase violated virtually, if not in terms, the provision of its charter restricting its capital stock to $150,000 and its personal property to half that amount, and to this extent, for the purposes of the business authorized, and for no other business. This provision is in the second section of the charter, and is in terms, as well as spirit, prohibitory and imperative:—"Be it further enacted that no corporation may lawfully hold and manage such real estate not exceeding $75,000 in value, and such personal estate not exceeding $75,000 in value, as may be necessary and convenient for the purposes aforesaid."

After all this, it cannot be equitable that the plaintiff should be subjected to pay the judgment recovered in New York, which could have been successfully defended by the company, or its agents there, had due attention been continued by them to the action, till a final hearing. That judgment is not binding in this state, without suit, even on the corporate property, and whether it can be defeated here now by the company, or not, after its neglect in New York, (and which it is not necessary at this time to decide,) it certainly is not just to allow such a judgment to be perfected here so as to bind, individually, a member of the corporation who did not know of this suit in New York before judgment, and hence, could not defend it; but who protested, originally, against the legality of the demands there sued, and resists them now. His only remedy may be such an injunction as is now prayed for. At least it is conscientious and fit he should have it temporarily, till others can be attempted, or this one further examined before made perpetual. This course comes fully within the rule laid down by Chief Justice Marshal, in Marine Ins. Co. v. Hodgson, 7 Cranch [11 U. S.] 333, "that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." The complainant himself could not have availed himself of this defence in New York, because he was not in person sued there, nor notified of the suit against the company. Nor was the company, as a corporation, his agent there, and he bound by its acts and neglect, as might be the case when it is sued here—a place where the company is incorporated and can be duly notified. Another reason for this conclusion is, that a judgment recovered in New York does not bind the members there, individually, like one recovered here; and hence the company, when sued there, may not be considered by law to act as their agent to affect them, individually. But the judgment there is generally held to bind only the property of the company situated there, or attached there. Unless defended there by the company and tried fully, it is certainly questionable in equity, whether it binds even the company or its property in this state, much less a member individually. Mayhew v. Thatcher, 6 Wheat. [19 U. S.] 129. It is a species of proceeding in rem, as to the property there, but usually charges neither the person nor property situated in another state. Williams v. Preston, 3 J. J. Marsh. 600; 1 Mo. 517.

Without conclusively settling this point now, it has often been decided that if no notice appears on the record to have been given to the defendant living in another state, and he does not actually get it and come in, he is not bound by the judgment. Harrod v. Barretto, 1 Hall, 155, and 2 Hall, 302; 8 Cow. 311; 6 Pick. 232, 354; 4 Conn. 380; 6 Conn. 508; 8 Johns. 194; 1 Ham. [Ohio] 206; 5 Wend. 148; 6 Wend. 447; Thurber v. Blackbourne, 1 N. H. 242. But even when appearing and defending and hence bound in law, it may be in equity that if the point now raised was not considered and adjudicated there, that judgment should not, on sound general principles, bar even the parties to it, as to what was not adjudicated, unless gross neglect to put in and prosecute the defence on that point existed and should operate against them. Burnham v. Rangeley and Greely v. Smith [Cases Nos. 2,176 and 5,749]. But no reason whatever exists, either in law or equity, why it should bind others, not parties and not guilty of such neglect, unless they are bound by mere operation of law, as privies in contract, or estate, or by express statute. Downs v. Fuller, 2 Metc. [Mass.] 135. When members of corporations are so

bound by judgments against corporations, it is, as a general rule, only to the extent of their corporate property. They are not bound in their private estates at all, except where made so by express statutes; and then, of course, only in strict conformity to such statutes. Now, the statute of Massachusetts, which renders members of corporations liable in their private capacity to answer judgments against the corporations, makes them liable only when judgments are recovered in this state; or in other words when the execution on them can be executed here. Hence, the respondent is not obliged, as a party or a privy, to pay individually the judgment recovered in New York, while remaining merely as one recovered there.

But, it is argued, that although the judgment there does not admit an execution to be there sued out on it and levied on a member's property, living out of New York, as it can run only within the limits of that state, yet in their action on it here, that judgment must be deemed to have the same effect as if recovered here, and hence no resistance can be made to it here, by injunction or defence, which could not be made to a domestic judgment recovered in this state. Were this proposition correct it would operate very strongly against the complainant's prayer in this bill. But there are two answers to it: Firstly. In New York, members of corporations are not, in their private capacity, liable at all for judgments recovered against the corporation. Nor are sureties there responsible for judgments against their principals, without a separate action against them and an opportunity thus enjoyed by them individually to defend against the claim. 4 Hill, 522; 5 Hill, 121. In the state of Maine, also, the suit to charge a member individually is nominally against the bank, but his property is attached and he is notified and defends if he pleases. Even in Massachusetts, the members individually are considered as guarantees or sureties, and allowed to recover contribution as such. 10 Pick. 123. Though, in the first instance, they are bound by the judgment here against the corporation. 8 Pick. 455; 14 Pick. 68; 3 Metc. [Mass.] 44. But the second answer is more decisive, and is, that a judgment recovered in one of the United States does not have the same effect in another state as a judgment would recovered in the latter, but as one recovered in the former. Such is the fair construction of the words used in the act of congress. Hampton v. McConnel, 3 Wheat. [16 U. S.] 235; 3 Story, Const. 183. Such too, is the plain requirement of principles. If all the force is given to a judgment in another state which it would have at home, no cause of complaint exists; and, to give it more, would change and transcend its import as well as essence. If it is not conclusive at home on third persons, why should it be elsewhere? If it does not at home bind private property, when recovered against a corporation, why should it abroad?

It is urged, likewise, against this injunction, that the party asking it must have been guilty of no neglect himself, and that here the complainant has been so guilty. Protheroe v. Forman, 2 Swanst. 227. But there has been no neglect by him pointed out, unless it be to defend in New York. It is to be remembered, however, that the suit there was a statutory one, without any notice to the company, much less its members here, and was brought merely to secure property lying within the limits of that state. It is a sort of proceeding in rem. The appearance there was procured by the president residing there at that time, and choosing to answer for purposes there, and not by a vote or order by the company here, and the counsel there abandoned the cause, because not properly paid by the company or any of its agents. No evidence is offered that the company here knew of the existence of that suit, much less its members or directors here. Story, Confl. Laws, §§ 457, 461, 546, 549. So far then as regards the company and its property here, probably, and, a fortiori, its members here individually, it was a suit there without notice, a judgment without summons or appearance, and, by reason, as well as adjudged cases, void. See cases cited in Suffolk Bank v. Merrill, Maine Dist., May term, 1848 [unreported]; Thurber v. Blackbourne, 1 N. H. 242; 15 Johns. 121; 1 Camp. 65; 2 Scott, N. R. 138; 9 Dowl. 27; [The Mary] 9 Cranch [13 U. S.] 144; 3 Wils. 303; 11 Adol. & E. 179; Buchanan v. Rucker, 9 East. 192; 1 Man. & G. 288. Now it is certain that a member, individually, would not have been allowed to defend there against an action thus situated, it being a local proceeding to affect the corporate property situated there, and not to affect a private member living in another state. 2 Paige, 402. The whole concern was in hopeless insolvency, and from the long lapse of time since, without any proceedings here, probably no remedy or prosecution here was then contemplated. Indeed, there was such a practical de facto dissolution of the company here, that any remedy or relief seemed hardly feasible; and no blame surely can attach to a member for not making a defence, in New York, against a claim of which he had no notice, and by the judgment on which there he or his property could not probably be bound here, either in justice or law. The courts in New York, if resorted to, could not have enjoined against using their judgments in the courts of the United States, in Massachusetts, any more than the courts of the United States can enjoin against proceedings in state courts. [Diggs v. Wolcott] 4 Cranch [8 U. S.] 179; [M'Kim v. Voorhies] 7 Cranch [11 U. S.] 279.

It is said, in further objection, that after a judgment at law has been recovered, no relief will be given. Lane v. Williams, 6 Ves.

798. But that means a judgment at law against the party applying for an injunction, and on a ground for which a defence was open in the suit at law and negligently omitted. 3 Daniel, Ch. Prac., 1840. Neither of these facts existed here, as we have already seen.

It has been objected, also, that before issuing this injunction, the complainant should be required to pay into court the amount of the judgment recovered against the company. But that would be oppressive when that judgment is not against him personally, nor against the corporation of which he is a member, so as to bind him personally, till further proceedings are had on it in this state and judgment recovered here upon it.

In this condition of things, the utmost which seems proper is, to require a bond from him not to change the state of his private property while these proceedings are pending, so as to render it less exposed to be levied on by any execution issuing in this state against the company. On filing such a bond, I think a temporary injunction should issue; and when the answer is filed and further evidence adduced, it can be decided on new motions, whether this injunction ought to be made permanent or be dissolved.

Case No. 13,610.

SUMNER v. MOORE.

[2 McLean, 59.] [1]

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

EXECUTION — APPRAISEMENT — SHERIFF'S DEED — COLLATERAL ATTACK—DEATH OF DEFENDANT.

1. A vague levy on land may be rendered certain, by the appraisement, in which it is particularly described.

2. The sheriff's deed being certain, cannot be avoided, collaterally, by a defect in the levy.

3. The deed is the act of the sheriff, and is taken in connection with his return.

4. However irregular a proceeding may be, the title of the purchaser cannot be affected by it, unless the proceeding was absolutely void. If only voidable the title must stand.

[Cited in Howard v. North, 5 Tex. 290; Sydnor v Roberts, 13 Tex. 598.]

5. If an execution be issued on a dormant judgment it is irregular, and the execution may be set aside, on motion; but a title, under a sale, on such execution is good.

6. Where a levy has been made, the sheriff may go on and sell, though the decease of the defendant occur subsequently to the levy. If, however, the defendant die before the levy, the judgment must be revived.

[Cited in U. S. v. Drennen, Case No. 14,992.]

7. Prior to the act of February, 1824, the venditioni exponas might issue either to the old or new sheriff, either of whom could sell the property levied on.

At law.

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

LEAVITT, District Judge. This is an action of ejectment; and the case is submitted to the court upon a statement agreed upon by the parties. The facts presented in the statement, and the papers to which it refers, on which the plaintiff claims title to the premises in controversy, are these: John Brown, then of Scioto county, Ohio, being seized in fee of the land in question, on the 23d of October, 1823, made his will, devising his real estate to his wife, Hannah Brown; and, dying soon after, his will was duly admitted to probate in said county. Hannah Brown, on the 16th of February, 1825, made her will, devising her real estate to her grand-daughter, Minerva E. B. Lucas; and died some time prior to the 2d of August, 1827; and her will was, also, duly admitted to probate in said county. Minerva E. B. Lucas, since the death of Hannah Brown, has intermarried with, and is now the wife of, the lessee of the plaintiff. The defendant claims title under a deed from Jacob P. Noel, who was a purchaser of the premises at sheriff's sale. The facts connected with this sale, as presented to the court, are as follows: At August term, 1822, of the court of common pleas of Scioto county, two judgments were rendered in said court against the said John Brown; one in favor of John Smith, and one in favor of Peleg O. Whitman. Several writs of fi. fa. et lev. fa. having issued on said judgments, on which no levy was made, new writs issued 21st July, 1823; on these the sheriff returned that he had levied on 48 acres and 89 hundredths, part of fractional sections 13 and 14, township 1, range 21; and part of southeast quarter of section 10, township 1, range 21; and, also, 72 acres and 77 hundredths, part of southeast quarter, section 10, township 1, and range 21; which are the lands claimed by the plaintiff. After several writs of venditioni exponas had issued, some of which were returned, "Not sold for want of bidders," and others, "Not sold for want of time," on the 4th of December, 1824, new writs of ven. ex. issued; one of which was returned by the sheriff, "Defendant dead"—the other was not delivered to the sheriff. No other process was taken out till the 27th of January, 1830; when a vendi. issued on Whitman's judgment, and the sheriff returned thereon, a sale of the 72 acres and 77 hundredths tract, to one Elias K. Hitchcock; and, as to the other tract, "Not sold for want of bidders." At the March term, 1830, of the common pleas of Scioto county, the proceedings of the sheriff were submitted to the court; the sale was confirmed, and a deed ordered to be made to the purchaser. It also appears that the sale and appraisement of said tract was subsequently set aside by the court, and a new appraisement ordered. And on the 26th of July, 1832, other writs of vendi. ex. issued, which were placed in the hands of the then sheriff of Scioto county, return-

able to September term, 1832; and at that term, the sheriff returned a new appraisement of the land, describing it by metes and bounds; and, also, returned that he had sold the lands to Jacob P. Noel. At the same term a motion was made for the confirmation of said sale; and, the motion having been entered on the journal of the court, was continued till the succeeding term. At that term the sale was confirmed by the court, and an order entered requiring the sheriff to convey to Noel, the purchaser.

It is insisted by the counsel for the plaintiff, that the proceedings, on the judgment against Brown are void, on several grounds; and that, therefore, the sheriff's deed vests no title in Noel.

First: It is contended that the levy is a nullity, on account of the vagueness and uncertainty in the description of the land levied on. It seems to be a well settled principle of law, that a levy must describe the land with such certainty as to apprize the purchaser of what he is buying, and enable the sheriff to put him in possession of the specific property sold. And it is clear that the levy in question, in this respect, is defective. But this is a defect which may be supplied. 3 Ohio, 274; 5 Ohio, 524. And the court is of opinion that the second appraisement of the land, in which it is described by metes and bounds, cures the defect in the levy. The sale was made, and confirmed by the court, under this appraisement; and the deed was ordered to be made with reference to it. But, if this defect in the levy had not been thus supplied, it could not be invalidated in this collateral manner. The authorities on this subject fully support the position, that after a proceeding of this nature, not absolutely void in itself, has been examined, and adjudicated upon, by a court having jurisdiction of the matter, it cannot be inquired into, except in some direct proceeding instituted for that purpose. The statute of Ohio, in force when the proceedings, under the executions referred to, passed in review before the court of common pleas of Scioto county, required the court carefully to examine them, and, if satisfied, that the sale had been conducted according to law, to cause the clerk to make an entry on the journal to that effect. This was done, in relation to the proceedings in question, with more than usual deliberation. The motion for the confirmation was made and entered upon the journal, at September term, 1832, stating the appearance of the parties by counsel; it was continued till the next term, and then disposed of by the entry of an order confirming the sale, and directing the sheriff to execute a deed. This inspection of the proceedings under the executions, and the judgment of confirmation which followed, are clearly judicial acts, within the jurisdiction of the court, which can not be collaterally drawn in question. In the case of Thompson v. Tolmie, 2 Pet. [27 U. S.] 162, the defendant claimed title to the premises by virtue of a purchase at a commissioners' sale, under the law of Maryland, relative to the division of intestate estates, in certain cases. It appeared that the statute had not been complied with, as to several important particulars. But the court sustained the sale, and laid down the law applicable to the case to be: that where proceedings are collaterally drawn in question, and it appears, upon the face of them, that the subject matter was within the jurisdiction of the court, they are voidable only; and that errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. And in the case of Vorhees v. Bank of U. S., 10 Pet. [35 U. S.] 471, the question was, whether certain proceedings, under the attachment law of Ohio, were to be regarded as void, on the ground of irregularity. There had been an order of court for the sale of property; a sale had been made, and was confirmed by the court; and, although it appeared that several important requisitions of the statute had not been complied with, the court held that the sale could not be impeached by any indirect proceeding. The principle is laid down by the supreme court, that where a court has performed a judicial act, within the scope of its jurisdiction, the regularity of its proceedings cannot be collaterally impugned, especially where the rights of innocent purchasers are involved. Upon the authority of these cases, and of others, in which analogous principles are sanctioned, the court could not hesitate to sustain the levy upon the real estate of Brown, if its defects had not been supplied by the return of the new appraisement.

Second: It is strenuously urged by the plaintiff's counsel that, as there was a suspension of execution upon the judgments, from December, 1824, till January, 1830, a period exceeding five years; and no revival of the judgments by scire facias, all process subsequently issued, and all the proceedings had thereon, were wholly void. The principles settled in the cases already referred to, apply also to this exception. However irregular the proceedings may have been, the court cannot, in this form, correct those irregularities. They have been submitted to, and adjudged of, by a tribunal clothed with power by the statute to pass upon them. The court has caused it to be entered upon its journal, that those proceedings have been conducted agreeably to law; the sale by the sheriff has been pronounced to be a legal and valid sale; and an order has been entered authorizing the sheriff to make a deed to the purchaser. Upon the faith of this procedure the purchaser has paid his money, and has entered into the possession of the property. Can he now be disturbed in that possession? In the case before referred to—Vorhees v. Bank of U. S. [supra]—the court say: The purchaser is

not bound to look beyond the decree, when executed by a conveyance, if the facts, necessary to give jurisdiction, appear on the face of the proceedings; nor to look further back than the order of the court. And, in [Thompson v. Tolmie], 2 Pet. [27 U. S.] 163, it is said, if the jurisdiction was improvidently exercised, or, in a manner, not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction. And, again, where a court has jurisdiction of a cause, it has a right to decide every question that arises in the cause; and, whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court. Id. 169. The effect of an execution issued upon a judgment, after it has become dormant by lapse of time, has been a subject of frequent adjudication; and it has been settled that, though an execution thus issued is irregular, it is not a nullity; though voidable, not absolutely void. In the case of Jackson v. Rosevelt, 13 Johns. 102, the language of the court is: The objections that it (the sale) took place long after the return day of the execution, and that it did not appear that a levy had been made before the return day, and that the execution had not been issued until more than a year and a day after judgment, can not affect the sale. And, in the same case, referring to 8 Johns. 361, it is said, this court decided that, in an action of ejectment against a purchaser under a sheriff's sale, the regularity of the execution could not be questioned; and that if an execution issues after a year and a day, without a revival of the judgment by sci. fa., it is only voidable at the instance of the party against whom it issued. 3 Caines, 270. In Jackson v. De Lancey, 13 Johns. 550, a scire facias had issued to revive a judgment, but being served on a wrong party, the service was held to be a nullity. It was the same thing, says the chancellor, as if execution had issued, and the lands been sold, on a dormant judgment, without any revival by scire facias. Still (he continues,) I take the law to be that even the omission altogether of the scire facias, will not, as of course, render void a sale under execution. An execution issued on a judgment, after a year and a day (the time limited in the state of New York, within which an execution must issue, or the judgment becomes dormant) without revival, has been held to be voidable only, and a justification to the party under it, until set aside. And a case is referred to by the chancellor, reported in Heister v. Fortner, 2 Bin. 45, in which it was held, that a judgment revived by scire facias, after a year and a day, upon one nihil only, which is the same as no summons, may be set aside for irregularity, or reversed on error; but the irregularity can not be noticed collaterally in another suit. In Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328, a ship had been sold under executions issued within ten days after judgment, contrary to the express prohibition of the act of congress; but no writ of error was taken out; and the court held, that if the executions were irregular, the court, from which they issued, ought to have been moved to set them aside. "They were not void, because the marshal could have justified under them; and, if voidable, the proper means of destroying their efficacy had not been pursued." And in another case ([Wheaton v. Lexton] 4 Wheat. [17 U. S.] 506) involving the validity of a marshal's sale of real estate, under an execution, the language of the court is: "The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal." This doctrine has been expressly sanctioned by the supreme court of Ohio. In the case of Green v. Cutright, Wright, 738, it is said by the court: "The party against whom process of execution issues, after it has lain five years, may have it set aside on motion, and put his adversary to his scire facias to revive the judgment; but the writ, so issued, is not void." And the case of Allen's Lessee v. Parish, 3 Ohio, 190, is regarded as sustaining the same doctrine. The question there was, whether a sale of lands upon execution is valid without an appraisement; and it was held that this irregularity did not render the sale void, and that the sheriff's deed, vested in the purchaser, not being a party to the judgment, a good and valid title to the lands sold under the execution. In the same case, the court recognizes it as the doctrine of the English courts, that any irregularity in the proceedings of a sheriff, in selling, will not affect the purchaser's rights, provided the sheriff had an execution authorizing him to levy, and did, in fact, levy and sell.

Third: We proceed now to the examination of the third exception taken to these proceedings by the plaintiff's counsel, namely, that after the death of Brown, the judgment debtor, there was a suspension of all right to proceed upon the judgments; and that all the process issued, and proceedings had, subsequent to his death, were mere nullities. On this point, the doctrine seems to be well settled, that an execution is an entire thing; and that, if land be levied on, in the lifetime of the judgment debtor, the sale may proceed after his death. The levy upon the property, by execution, is regarded, in the eye of the law, as an appropriation of it for the payment of the judgment, and vests in the judgment creditor an interest, which is not affected by the death of the judgment debtor. If the execution be levied after the death of the defendant, it is clear that such levy is a mere nullity; and, for the obvious reason, that the death of the party, by operation of the law, brings about

a change in the ownership of the property. In the case of Massies' Heirs' Lessee v. Long, 2 Ohio, 290, this subject is very fully investigated, and the court consider it as well settled, that if the defendant die, after execution is sued out and levied, the execution proceeds as if the death had not taken place. This principle is indisputable; and, applied to the case before the court, is conclusive against the plaintiff, on the last mentioned point.

Fourth: Another objection is taken to the proceedings in question. It is contended that the writs of ven. ex., issued subsequently to the expiration of the official term of the sheriff who made the levy, should have been executed by him, and not by the new sheriff. It may be remarked here, that in no possible aspect of the case, could it make any difference, so far as the rights of the judgment debtor are concerned, whether the process was executed by the sheriff, in office when the levy was made, or by his successor. In the opinion of the supreme court of Ohio, Fowble v. Rayberg, 4 Ohio, 56, prior to the act of February, 1824, the sale would be legal, whether made by the old or new sheriff. Until the enactment of that law, the practice was variant in different parts of the state. That statute, however, expressly provides, "that no venditioni exponas shall hereafter be directed to, or executed by, any sheriff whose term of office may have expired," &c. As this provision was applicable to, and governed the proceedings in the case before the court, it is clear there was no irregularity in placing the writs of vendi. in the hands of the new sheriff for execution.

The exceptions to the defendant's title being overruled by the court, judgment is accordingly entered in his favor.

Case No. 13,611.

SUMNER et al. v. PHILADELPHIA.

[5 Leg. Gaz. 332; 6 Am. Law T. Rep. 476; 18 Int. Rev. Rec. 145; 9 Phila. 408; 30 Leg. Int. 329.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 6, 1873.

HEALTH—QUARANTINE REGULATIONS—OFFICERS—UNREASONABLE DETENTION — LIABILITY OF MUNICIPAL CORPORATION FOR DAMAGES.

1. Quarantine officers may act wisely in detaining an entirely innocent ship, if for any reason, by permitting her to come up, there would be a chance of a panic arising; but it cannot be doubted, that the municipality whose servants took this responsibility would be bound to compensation.

2. The board of health of the city of Philadelphia are ministerial, not judicial, officers. The discretion vested in them as quarantine officers is a reasonable, not an absolute, one; and that whether the detention of a vessel was proper or not must be gathered from the facts of the case.

3. The vessel in question having been detained an unreasonable length of time, damages against the city are awarded.

At law.

Henry Flanders and David W. Sellers, for plaintiffs.

George D. Budd and Charles H. T. Collis, City Sol., for defendant.

Report of referee, confirmed October 6th, 1873, by McKENNAN, Circuit Judge:

This is an action on the case brought by the owners of the brig Home against the city of Philadelphia, wherein damages are claimed for the alleged illegal detention of said brig by the board of health at quarantine during the summer and fall of 1870, and other alleged injuries growing out of the same matter. Under an agreement made by counsel, May 21st, 1872, the case was referred to me, with the provision that my opinion and judgment in the case should have the same force and effect as a judgment on a special verdict.

No questions arise for my determination in the pleadings, as it was agreed that any possible objection to the form of action on the one side, or to the giving in evidence of matters of justification under the general issue on the other, should be waived, and the case heard on the merits, irrespectively of the pleadings. Much evidence was produced before me on both sides orally, and depositions taken on behalf of plaintiffs under a commission, were also submitted. The case was ably and carefully argued by Messrs. Henry Flanders, and D. W. Sellers, for plaintiffs, and Messrs. George D. Budd, and C. H. T. Collis, city solicitor, for the city. There was, however, no serious conflict of testimony, though from the necessary circumstances of the case there is some contradiction in the evidence on certain points. Except in one particular, however, these contradictions are unimportant, and I have little difficulty in determining what are the actual facts of the case so far as the history of the transaction is concerned. The determination of some questions, however, which are quasi matters of fact, has been more difficult, involving, as it does, an examination from the scientific testimony, &c., adduced, an investigation into the cause and nature of the infection of yellow fever, especially in the particular epidemic of that disease at the quarantine station in 1870. In determining these matters I have felt some doubt, from the nature of the case, and from the widely varying opinions of medical men on the subject, but I think that it will be found that my conclusions on this question sufficiently approximate the truth for the special matters involved in this case, even if I be in error in some of the general views reached. The questions of law arising upon the facts present still more

[1] [30 Leg. Int. 329; 6 Am. Law T. Rep. 476; 9 Phila. 408; 18 Int. Rev. Rec. 143,—contain only partial reports.]

difficulty, but my decision of them will be the subject of review, and will be doubtless corrected should I err.

First. As to the facts. The brig Home arrived in the Delaware river about the 26th of June, A. D. 1870, and at the Lazaretto, the quarantine station of the port of Philadelphia, on the 29th of June, 1870. She was a vessel of two hundred and sixteen tons register, hailing from New York, but arriving from Black river, Jamaica. Her carco consisted of logwood, but she had besides on board, but not on her register, thirteen bales of sail clippings. These appear to have been the private property of the master. The vessel was then about thirteen years old, built in Nova Scotia, her class No. 2. She had been refitted some three or four months previously, but was in a very filthy condition at the time of her arrival. She had no bill of health. The master, Thomas H. Phillips, had died on board on the 24th June, 1870. Notwithstanding the denials made by the crew, I am entirely satisfied he died of yellow fever, and so decide. The steward had also been sick of the same disease, but had recovered. The crew, at sailing, consisted of nine men, one colored boy, and a passenger from Kingston, Jamaica. Of this number, three—Griffiths, second mate, and Elliott and Pierre, of the crew—were taken down with the yellow fever within a few days of the arrival of the Home at quarantine. Griffiths absconded from quarantine June 30th, the day after his arrival, and died at his home, in Philadelphia, on July 6th. Elliott was taken sick at quarantine on July 2d, and recovered. Pierre was taken sick July 8th, after release from quarantine, and died in the municipal hospital in Philadelphia. Besides, the pilot, Stephen Bennett, who had been five days on the Home (from June 25th to 30th), was taken sick at Wilmington, on his way to the breakwater, July 2d, and died in Philadelphia, whither he came, on July 6th. These cases were, undoubtedly, yellow fever, and were seen and examined by competent physicians, and I cannot see that there can be a possible doubt that in each case the disease was contracted from the Home. This makes it a matter of absolute certainty that she was an infected ship.

By orders of Dr. Thompson, the Lazaretto physician, the vessel was put in quarantine, and, by resolution of the board of health, ordered to be cleaned, fumigated, and disinfected. She took up, at first, a position about four hundred yards from the quarantine landing. The diagrams accompanying the report of the board of health (which was by both sides agreed to be given in evidence) show very satisfactorily the several positions of the vessel. In the disinfection of the vessel, the removal of the cargo was necessary. As the cargo consisted of logwood, which appears to be a substance not capable of retaining or propagating infection, and is so classed in the quarantine laws, hereinafter to be referred to, it was ordered to be unloaded in barges or lighters. About the 11th of July three barges or lighters came down to the Lazaretto, and discharge of cargo commenced. The first lighter (name unknown) received the deck load of logwood, and on July 13th left, without permission, for the city (for the quarantine authorities claimed the right of detaining the lighters also), and came up to the logwood wharf on Windmill Island, opposite the city. No sickness seems to have affected her crew, or to be traceable to this lighter or her crew or cargo. On the 13th or 14th of July the hatches of the vessel were opened for the removal of the cargo, and on the 15th Dr. Thompson permitted her to be brought up to the government wharf, lying somewhat lower down the river than the quarantine wharf, to facilitate unloading. This second position is also well shown by the diagrams attached to the report of the board of health. This government wharf adjoins a government store house, and about one hundred and forty yards to the northwest of it is a public house known as Pepper's. At about four hundred yards, and further to the west, is the house known as Miller's. The quarantine buildings lie some two hundred yards to the northeast of this second position of the Home, and Dr. Thompson's house some hundred and fifty yards from it, in the direct line from the Home to the hospital building. The prevailing wind was from southwest, blowing directly from the Home towards the quarantine buildings.

The Lazaretto had been unhealthy during the spring and early summer; it lies low, and is surrounded in great measure by marsh. There had been unusual overflows also, and, resulting therefrom, considerable malaria, and consequently intermittent fever, mostly of a mild type, had prevailed that season in the vicinity of Lazaretto. Up to this time, however, the yellow fever had been confined, as before mentioned, to the crew and pilot of the brig Home. At this time, however, the disease suddenly appeared among the crews of the barges moored alongside of the brig, the inhabitants of Pepper's House, and of the Lazaretto. This outbreak seems clearly not to have been due to any contagion with the crew of the Home. They had mostly scattered before this, and no case can be traced to contact with either those who themselves had or had not yellow fever. Besides, the general view of medical experts seems to be that yellow fever is not contagious in any degree whatever, and this view, of which the learned Dr. La Roche, recently deceased, was the celebrated exponent, is entirely borne out by all the facts of this epidemic. Nor can this epidemic, in my opinion, be attributed to local causes at the quarantine grounds. The overflows had passed,

and the persons who had suffered from malarious fever, improved; nor is there any evidence of outbreaks of yellow fever in this latitude from any such indigenous cause, except in a few alleged cases in large cities, where there were other distinct elements of foulness and infection apart from mere malaria; even these cases are somewhat doubtful, but granting, as seems indeed probable, that the outbreak of yellow fever in Swanson street in this city in the end of August, 1870, was owing to local causes, no analogy can be found between the condition of Swanson street and the Lazaretto. The Lazaretto is well and carefully and neatly kept, in order and scrupulous cleanliness. The population of the vicinity is in the neighborhood of one hundred souls; and while, from the location, it is liable to ordinary malaria, there is absolutely nothing to render it a place where yellow fever could be generated. But we do not have to look far for the cause of this outbreak of disease. The hatches of the Home were opened about the 13th or 14th of July. By this, the confined, foul, infected air accumulated in the hold of the vessel since it left the West Indies was let loose, and slowly blew and spread over the quarantine grounds and vicinity. The evidence is strong of the distinct, powerful and fetid effluvia perceived by the witnesses to proceed from the brig when passing to leeward of her. The first victims were the persons employed in the barges moored alongside the brig, and who were actually employed in unloading the logwood from the hold. Five out of six of these persons had the fever. These persons also lived and slept on the lighter until removed to quarantine hospital. Next were the inmates of the Pepper House, situated nearest to the second position of the Home, although not directly in the course of the prevailing wind from the vessel, which blew rather directly over quarantine; the earliest taken of this family, however, had been down to see the vessel at the wharf, or had passed directly across the current of air blowing from her on their way to and from quarantine. Lastly, the inmates of the quarantine grounds were attacked. I am entirely satisfied from the evidence that this yellow fever epidemic came entirely from the foul, infected air in the hold of the Home, forced by the prevailing winds on the adjacent shores, and I so decide. This is in entire accordance with Dr. La Roche's view of the usual course of yellow fever infection. The discharge of the cargo was finished July 19th, and the disinfection and cleansing of the vessel was proceeded in, under the direction of the authorities of quarantine. The bundles called "filthy rags" by Dr. Thompson, but which other witnesses speak of as clean sail clippings, were seized by the United States custom house authorities as not in the manifest. They were regarded as dangerous, as having been in the cabin of the captain, who had died of yellow fever, and were therefore burned on the government wharf, by order of the board of health.

The cargo of the brig, as above mentioned, had been discharged into the three barges or lighters above mentioned. One, name unknown, had gone up into the city, and no ill consequences seem to have prevailed among her crew, probably owing to the portion of cargo taken by her being the deck load, and her having left before the opening of the hatches. The other barges the quarantine authorities assumed the right of detaining there were the Kirkpatrick and the Madison. Most of their crews had yellow fever; they were treated at the quarantine hospital; the plaintiffs were obliged to pay their board, &c., at the hospital; also demurrage, &c., to the owners of the lighters; to recover these amounts is part of plaintiffs' claim.

While this epidemic was running its fatal course at the Lazaretto, the cause of the infection—the Home—had been under Dr. Thompson's, the Lazaretto physician's, directions, cleansed and fumigated. This, of course, could not be done until discharge of cargo. From the nineteenth July, the date of the accomplishment of this, until August 4th, when, by a mistake as to the orders of the board of health, she was permitted to come up to the city, covers therefore a period of some fifteen days for her disinfection.

We now come to the circumstance of the release of the brig Home, and of her being permitted to come up to Philadelphia, and then sent back to Lazaretto by the board of health. This seemed, at the first blush, a very important element in the case; but, as will be seen from the light afterwards thrown upon it, has not materially affected my decision. I am entirely satisfied that this permission of the vessel to come up was an error on the part of the quarantine officers, based on a supposed order of the board of health which had no real existence. The minutes of the board of health make it clear there was no such order. Both the quarantine master, Gartside, and Dr. Thompson, were then sick, and died shortly afterwards of the fever. One of them said, or was understood to say, that an order had come down. From their illness, and the confusion at quarantine caused by the ravages of the fever, no search was made for the order; but Dr. Taylor, who had just come down to take charge, permitted her to go up. Whether an order for the release of one of the barges was mistaken for an order to release the brig, or whether the mistake occurred from the commencement of the delirium of the fever, seems doubtful, but there can be no doubt it was a mere mistake. When she reached Windmill Island, August 5th, 1870, the board of health ordered her immediate return to quarantine. The consignees and captain of the vessel declined to do this, and the board of health, by John E. Addicks, the health officer, took possession of the Home, and took her back to quarantine on August

8th, 1870. Here she was anchored at a point somewhat higher up the river than the Lazaretto, and well out in the stream. The consignees and master threatened and spoke of abandonment in consequence of this seizure, but certainly, as a matter of fact, no abandonment took place, for somewhat later the consignees sent a watchman down to the vessel, and afterwards a second watchman. After her return to quarantine, the vessel seems to have been again whitewashed, and her pumps cleansed with carbolic acid. The yellow fever prevailed for some short time longer at quarantine, but in its new position no infection can be traced to the Home, except one case hereafter to be mentioned. No infection seems traceable to her while at Windmill Island, but all the evidence is that the outbreak of yellow fever in Swanson street, in the latter part of August, was entirely sporadic. When the Home first moved down to her new position above the Lazaretto, she was in charge of two men placed on board by the board of health. Kugler testifies that both these men, Smith and Wilson, were sick, but neither appears to have had distinctively yellow fever. Mr. Addicks attributes this to their not being allowed to go below deck. The watchman sent down by consignees succeeded them about August 18th, when they became sick. About the same time a man named Carpenter, a new nurse at the Lazaretto, was sent aboard to help pump; he was taken with yellow fever; but his disease may have been contracted possibly from a new focus of infection at the Lazaretto, which Dr. Taylor thinks was established there, by the number of cases there treated and not from the Home. While in the charge of the watchman sent by the consignees, the Home was robbed. She had, besides her own ropes, &c., a great deal of extra hawser and some extra canvas. All this was stolen. How the robbery occurred seems doubtful. We have a second-hand account given to Kugler by the watchman, that he had been violently boarded up in the cabin by the robbers. In any event, this watchman was promptly discharged by Cook, the captain of the Home, and a new one employed. For this loss the plaintiffs claim damages. As to the condition of the vessel when returned to Lazaretto, there seems some conflict of testimony. Dr. Taylor thinks she had ceased to be an infecting cause, though prudence demanded her longer detention; but Dr. Goodman perceived a peculiar odor from her hold, and considered her not clean. On the whole, I am not satisfied that she was on the 4th or 8th of August properly cleansed and disinfected. In fact there had been up to that time but some fifteen days from the discharge of her cargo to clean her.

The Home was then detained at quarantine, in spite of repeated appeals for her release, until November 2d, when her discharge was ordered,—nearly three months. She was at last released, November 7th. When this occurred she was found to have sustained serious damage from opening of seams, &c., from exposure to the sun, which necessitated recaulking. It was in evidence that this might have been prevented by constant washing of the deck or by spreading tarpaulins. There was no evidence before me as to how much of this damage occurred prior to, and how much after, August 4th, the date prior to which plaintiffs admitted the detention to be lawful, and there was no satisfactory evidence as to the condition of the vessel in this respect on her arrival. Kugler, the steward, describes her as very rusty when she reached quarantine. During the whole period of the detention the plaintiffs engaged a new master, Captain James Cook, who remained in Philadelphia, urging her release, and making daily visits to quarantine to see after the vessel; for his wages and expenses here plaintiffs claim to recover, as also for Mr. Currier's expenses in a journey to Philadelphia to see after his brig. During her entire detention application seems to have been made almost daily for her release, and no definite refusal given or period fixed, but the plaintiffs seem to have been in constant expectation of an immediate liberation during all this time. During this period an application was made by plaintiffs for permission to take the vessel up to Port Richmond, load her with coal, and then take her north, the plaintiffs pledging themselves not to stop at the city or to delay the loading. This application was made formally in writing, and was met with a verbal refusal. Mr. Currier testifies that he then applied for permission to take in coal or ballast from lighters at the Lazaretto and sail north. This request appears to have been verbal and informal, and was informally refused, Mr. Currier says. Mr. Steele, the chairman of the Lazaretto committee, does not remember this request, and thinks such an application as the last mentioned would have been granted. But I thing the weight of the evidence is that such an application was made, and either refused, or, more probably, neglected. As before mentioned, before the vessel was finally released, the owners were compelled to pay bills for hospital, &c., for lighters, crews, watchmen, provisions, towage of vessel to Windmill Island, &c., for which, as paid under compulsion, plaintiffs claim to recover.

This closes the history of the facts. With regard to the application of the law to them, it may first be premised that it seems undisputed that the board of health are the servants of the city of Philadelphia, entrusted by acts of 1854 [Laws Pa. 1854, p. 305] and 1855 [Laws Pa. 1855, pp. 89, 391] with the same functions as by the acts of 1818, &c., the former independent board of health had. The act of 1859 [Laws Pa. 1859, 400], making the board nonelective, makes no change in its relations to the city. There is therefore no question but that the action is well brought against the city of Philadel-

phia, and if the old board as a body politic would have been liable, the defendants are liable here. On the other hand, there is no allegation of malice, or corruption, or improper motive, against the board of health, and if they have erred they have done so honestly. Further, a decision in plaintiffs' favor by no means implies that the board of health have not on the whole acted wisely and for the public good. Public officers must often take the responsibility of acting outside of law in cases of emergency, and their action may cause private injuries, which require compensation in damages, and yet their action may be highly commendable in a public point of view. The blowing up of buildings to stop conflagrations, and many other takings of private property for public use, are familiar illustrations of this; and it can well be conceived that in view of the excitability of the public mind, and the panic that readily arises on any apprehension of the approach of pestilence, quarantine officers might act wisely in detaining an entirely innocent ship, if for any reason, by permitting her to come up, there would be a chance of panic arising; but it cannot be doubted in any such case, the municipality whose servants took this responsibility would be bound to compensation.

It was contended, however, for the city, that under the act of June 29, 1818 (City Digest, pp. 19, 20), the board of health have an unlimited discretion in all cases where their jurisdiction attaches (as it cannot be fairly disputed it did to the Home in this case); that the words of the act, "shall be detained such further time as the board of health may deem necessary," gave them an absolute discretion in the matter, for an abuse of which they would be individually liable, but the city in no event responsible. The counsel for defendants also argued, by way of illustration, that the board of health could not be restrained by injunction from detaining a vessel. No authority was cited to sustain this position, and in my view it is untenable. The board of health are ministerial, not judicial, officers; and, as well argued by counsel for plaintiffs, the analogy to this case is truly found in those cases in which powers are given to municipal bodies with responsibility for its mode of exercise —avoidable damage requiring compensation; such as Commissioners of Kensington v. Wood, 10 Barr [10 Pa. St.] 95, an action for damages resulting from the grading and paving of Penn street, because the arrangement of level caused a flow of water on plaintiff's premises; Erie City v. Schwingle, 10 Harris [22 Pa. St.] 385; Commissioners, etc., of Northern Liberties v. Northern Liberties Gas Co., 2 Jones [12 Pa. St.] 318; Pittsburgh v. Grier, 10 Harris [22 Pa. St.] 65.

Were these quarantine authorities the servants of the commonwealth, they would be personally responsible for injuries to private property, but, being the servants of a municipality, that body is liable for their acts. If the doctrine of eminent domain or the right of taking property for public use is called in to justify defendants, it requires, in all such cases, compensation; and their being no special method of obtaining redress prescribed, a common law action in the case is appropriate. As counsel for the plaintiff very ably argued, if it is claimed that the act authorizes without compensation, the detention of vessels or taking of property (which such detention clearly amounts to), further than the necessity of quarantine requires, just so far would the act be unconstitutional, as taking private property for public use without compensation. No such construction, however, should be put on the law, for it is clear to me it is intended to authorize a detention, so long as it shall reasonably be deemed necessary. See U. S. v. Russell, 13 Wall. [80 U. S.] 628; Bishop v. Mayor, 7 Ga. 200.

Quarantine proper, the detention of a foul or infected vessel, and the proper disinfection and cleaning of her, is eminently beneficial for the individual trader, as well as for the public. But if we go beyond this, and allow that the quarantine officers should have an absolute discretion, not subject to revision or responsibility save in case of misfeasance, there is strong danger of the rights of the individual being sacrificed to an imagined public necessity. The trader would be placed in a most unhappy position, and there would be practically no restraint upon the most arbitrary and unreasonable detentions. Nor would this construction be even beneficial to the defendants. It would certainly be far better for the city's commerce to have it known that though in certain cases, where suspicion existed, vessels would be detained at quarantine, yet, in all cases where injustice was done, it would be compensated, than for vessel owners to be under apprehension of an arbitrary and unlimited detention by an irresponsible board. I decide, therefore, that the discretion vested in the board of health is a reasonable, not an absolute, one, and that we must, upon the evidence, judge whether or not the detention was in fact proper, or rather when, if at any time, it ceased to be so.

Now, to apply my conclusions as to the law, to the facts as I have ascertained them.

First. I am entirely clear that plaintiffs are entitled to recovery for the detection of the lighters and every expense resulting to them from this detention; also, for the board, &c., of the crews of the lighters at the quarantine hospital, which they were compelled to pay. The act of assembly gives no right whatever to detain lighters, even if infected. The learned counsel for the city endeavored to show that the lighter coming down to Lazaretto from the city, and

proposing to return, should be treated as a "vessel from a domestic port"; but this is certainly a very strained construction, and by examining the act on the question of discharge of cargo, it is easy to see the meaning. It is provided that if the cargo be of a nature not capable of retaining infection, "it may be conveyed immediately to the city in lighters." Logwood is included in dye-wood, and is defined in the act as non-infectious. Now, under this act, it was either absolutely the duty of the board of health, if the act be mandatory, to allow the logwood constituting the cargo to be transferred to the city in lighters, or, if the words are permissive merely, they might have refused to allow the cargo to be placed in lighters, and ordered it to be unloaded on the dock at the Lazaretto. But when it once was in the lighters, they had lost their entire control of it, and of the lighters, it is hard to see how they ever acquired jurisdiction. I must, therefore, treat the detention as entirely unauthorized, and allow the plaintiffs' claim for demurrage paid by them to the owners of the barges; there is no reason to suppose that this is more than was justly due, and having been actually paid by plaintiffs, the onus was on defendant to show that it was excessive, which has not been done. In deciding that this detention of the lighters was unauthorized, I must not be understood as condemning the action of the board of health in the matter. Although the evidence is strongly preponderating that yellow fever is not contagious in any degree, and that the cargo discharged in the lighters was non-infectious, yet, in view of the illness and death of so many of the lighter's crew, and of the unreasoning panic which might have prevailed had these barges with their crews, sickening from the infectious wind blowing from the Home, to which they had been exposed, come up to the city, I am not prepared to say that the board did not act wisely in detaining them; but then this must clearly be allowed for as a taking of private property for public use, and compensatory damages given to the plaintiffs. As to the expenses of the crews of the lighters, it is not denied the plaintiffs were compelled to pay these bills before the vessel was released. The case, therefore, stands as if the city were suing the owners of the Home for the board, expenses, &c., of the crews of these lighters at quarantine hospital; this claim would be for damages of the most indirect character. There certainly is no obligation of the kind implied in the chartering a lighter, and if the city can make the owners of the Home pay for the nursing, &c., of these men because they caught yellow fever while unloading her, it is hard to see why an infected vessel should not be bound for every damage or injury which could result to any one whom the disease might attack. This could not be set up unless it was held that owners of vessels who were so unfortunate as to have been attacked by disease became thereby tort feasors if their ships were brought into port. Even if the men themselves could have sued the owners of the Home for damages, it could not be argued that the action could be maintained by a hotelkeeper, with whom a person who had caught the infection had lodged, and who had not paid his board. I must, therefore, allow this claim as presented by plaintiffs. The sixth section of the act of 1818, allowing claim for expenses, clearly only applied to the crew of the vessel. Of course, the bills the plaintiffs were compelled to pay for provisions supplied to the lighters by the board of health, during the detention, must follow the same rule, the detention being unlawful. Counsel for the city stated also, and one of the witnesses, Mr. Steele, testified that the city had sustained great damage from the epidemic of yellow fever at the Lazaretto, contracted from the Home, but it seems rather thrown in as a make-weight than intended to be set up as a set-off to plaintiffs' claim, and, in fact, was too indefinite in shape to call for any decision from me upon it. And in no event could such a claim be maintained. Disease must, unless under very exceptional circumstances, be viewed in law as the act of God; and, when a vessel so unfortunate as to be infected comes to a quarantine station, she comes just where she ought to come. A claim could as well be maintained by a hospital for damages by reason of its nurses, &c., contracting disease from a patient.

I have stated already that from the evidence I am satisfied that the release of the brig Home on August 4th was a mistake merely, and is to be simply treated as such, and ought not to prejudice the defendant's rights. It is clear, however, that as it was a mistake solely of the city's officers, the expenses directly incurred by plaintiffs in consequence thereof must be refunded. These are the expenses of towage of the vessel to the city paid by plaintiffs, and the expenses of towage back to Lazaretto, which plaintiffs were, to procure the release of the vessel, compelled to refund the city. I therefore allow to the plaintiffs these amounts as claimed.

To return now to the main question, as to the plaintiffs' claim for damages for the detention of their vessel after August 4th, I have stated my view, that this is to be decided on its merits; that the board of health are ministerial, not judicial, officers; and that their discretion is a reasonable, and not an absolute, one; but as to the fact whether the detention of the vessel after August 4th was reasonable, I cannot go so far as plaintiffs claim. I concede to plaintiffs that the detention of vessels must be for cleansing, and that a detention for a longer period than is required for the proper purification of a vessel and a reasonable period of delay to

test the fact of her being clean would not be justifiable; but I am not prepared to say that a period of three weeks can be laid down as a limit within which vessels must be cleansed, nor will the custom of other ports have any but an indirect bearing on this point. The evidence shows that the time required for purification depends upon the age and condition of the vessel; that a ship as old and filthy as the Home required a long period to clean, and probably could never be pronounced absolutely clean; her purification would be but relative at best. Then there were actually but fifteen days from the discharge of her cargo until her mistaken release on August 4th. There is also positive evidence (Dr. Goodman's) that she was not a clean, unoffending vessel on her return to Lazaretto, August 8th, and there are further several doubtful cases of sickness arising after that time, and one clear case of yellow fever, that of Carpenter, who was taken sick August 18th, but who may have contracted the disease at quarantine. I must, therefore, decline to consider the Home as entitled to be released August 4th, and her detention, thereafter, unlawful. This detention actually lasted, however, up to November 7th. The resolution was passed November 2d, but she was detained until the bills were paid, November 7th, a period of nearly three months. Now, on the same principle, I am bound to decide that the detention of the Home during so long a period was unnecessary as an unreasonable exercise of discretion, and therefore unlawful, and to be compensated in damages. In fact, it does not appear that any real danger could have been apprehended from the Home for so long a period, certainly nothing was done to cleanse her after the whitewashing, &c., done when she first came back to the Lazaretto. Her detention would seem rather to have been a matter of policy, that inasmuch as she was publicly known as infected with yellow fever, it was more prudent not to permit her up until, from the lateness of the season and the disappearance of the Swanson street epidemic (which, as before mentioned, was proved to have arisen from sources unknown, but entirely distinct from any traceable to the Home), in the end of September, the public fear of yellow fever had died away. In fact, Dr. La Roche says, in his report on the yellow fever in 1870 (page 23): "She was, though apparently clean and disinfected, as a matter of precaution, ordered back to the quarantine station, where she was taken by the health officers, and remained at a proper distance from the buildings and under strict surveillance till the close of the quarantine season, when she was released."

Now, it must be conceded that, however wise, as a matter of public policy, it may have been to detain a clean vessel, yet such a detention cannot, as regards the owners of the vessel, be treated as a reasonable one within quarantine powers, but must be treated as a taking for public use, for which compensation is due. On evidence given before me, I have considered that the detention for a period beyond August 8th was justifiable, and it is somewhat hard to fix a point where, in this view, it ceased to be so. Allowing, however, a week after the return to Lazaretto, for a fresh cleansing, and some two weeks longer for a reasonable delay to test her condition, I think it may fairly be said that on the 2d of September she should have been released. If Carpenter's and the other reputed slight cases were due to infection from the brig, they would seem, from their appearing from 15th to 18th, to have been contracted from 8th to 12th, the time she was being whitewashed and having pumps cleaned. This would make two weeks delay from 18th appear reasonable. I therefore allow the claim for demurrage from September 2d, until her release, November 7th, including the five days during which she was detained, after the order for her release was given, to compel the payment of the bills which I have decided were not justly due. This decision makes it unnecessary for me to discuss at length the question of the liability of defendants for demurrage, &c., during the period from refusal of the board of health to permit her to take in ballast from lighters at Lazaretto; but I am clear that on this ground, also, I must award the plaintiffs demurrage, &c., from the date of the application. The words of the act, on this point, are: "Provided, that such ship or vessel, after she shall have been thoroughly cleansed and purified, if no malignant disease appear on board, may be allowed to take in freight at the Lazaretto by means of lighters, and proceed to sea." From their connection, following the clause that the vessel shall be detained to such further time as the board deem necessary, I am disposed to consider this proviso as mandatory, and as giving the vessel this as a privilege or right.

As I have held in my review of the evidence, I am satisfied that Mr. Currier made the request to members of the board verbally, and was verbally refused. There is nothing in the act to require a formal written application. The request which Mr. Currier made formally was informally refused; he was simply told that the board would not consent, and there does not appear any formal entry of this refusal even on their minutes. Mr. Currier does not seem to have received any intimation that, to secure this permission, he should make formal application in writing. The other application, to go up to Port Richmond to take in coal, and go immediately to sea, would seem to have been a sufficiently reasonable one, in view of the "apparently clean condition" of the vessel in the end of August or beginning of September, but was not within the peremptory words of the act; in any event, had a formal reply been made to this letter by the board of health, offering permission for the

brig to be loaded from lighters at the Lazaretto, the city would have been freed from liability on this ground. The period of this request and refusal is not definitely ascertained, but it is not far, I think, from September 1st, so that I think I am, on this ground, also right in fixing that as a period for the beginning the allowance of demurrage.

The view I have taken of the detention with regard to the claims for demurrage applies with the same force to expenses necessarily incurred by plaintiffs in care of their vessel during the same period. I therefore allow their claim for the wages and support of watchman from September 2d; also for captain's wages and board. Some question was made as to the captain's rate of board at Arch Street House being too high, but no evidence was offered in support of this point, and it was shown that it is a usual place for masters of vessels to stop. I can see no reason why the expenses of the master's trips to and from Lazaretto to Philadelphia during the same period should not be allowed; it was necessary he should be, from time to time, in both places, to see after the vessel at Lazaretto, and to urge her release with the health officer and board of health here. From much of these charges the board of health could have freed themselves, had they made up their mind how long the vessel was to be detained. Had they told the owners in the end of August, the vessel must remain two months longer, the master's board and wages during those two months, and his traveling expenses might have been saved. The claim for expenses of owners coming to the city in August and November is not allowed. I have held that in August the vessel was rightly detained, and Mr. Currier's journey in November was induced by her release, not by her detention, and there is no evidence he would not have come on at whatever time she was released. Besides, the city is already charged with a master's wages expressly engaged to look after the vessel. No evidence was given to support the claim for "commission, $38," and it is disallowed.

Three points remain still open: The claim for value of rags destroyed on the government wharf; the claim for sails, rope, &c., stolen; and the claim for damages to the vessel from exposure to sun.

First, as to the rags. I must disallow this claim on several grounds: First, the rags appear not to have belonged to the owners of the vessel, but to have been the private property of the deceased Captain Phillips. Secondly, they were seized by the United States custom house officers as not on the manifest, and even if they had not been on this ground confiscated, they were subject to a duty of an amount, not shown in evidence, which might have absorbed their value. The evidence is doubtful as to their character; some witnesses called them clean clippings; Dr. Thompson, filthy rags. Rags are materials capable of retaining infection, and almost impossible to disinfect. Dr. Thompson considered their destruction necessary, and although there is no provision in the act of assembly for the destruction of infected articles, yet I think it cannot be maintained that infected rags would have any value, so that damages could be obtained for their destruction. Dr. Thompson considered them infected, and they had been certainly in the cabin of the captain, who had died of yellow fever.

Second, as to the robbery of the sails, hawsers, &c. The plaintiffs' claim is for an amount of upwards of twelve hundred dollars expended to replace the lost articles, &c. This amount would seem, in any event, somewhat too large, as not making sufficient allowance for the probably deteriorated condition of the articles stolen; but as I propose to reject the claim, it is unnecessary for me to go into that question. I am entirely satisfied that there was no abandonment. It is true that the consignees and master threatened to abandon when the board of health sent the brig back to quarantine; but it clearly appears that this intention was reconsidered, and never carried into effect, since, at the notification of the board of health, the consignees sent down a watchman to take care of the brig. That the facts on which my conclusion that there was no abandonment is based may clearly appear, I insert, as requested, copies of the resolution of the board of health as to the request to the consignees to send a watchman, and of the notice sent to the consignees by Mr. Addicks, the health officer.

The resolution was as follows: "Resolved, that the health officer be directed to notify the consignees of the brig Home that he returned her safely to the Lazaretto on Saturday night; that she is there at their risk; and that they be requested to send a person or persons to take care of and watch her, in lieu of two men stationed on board by the health officer for that purpose." Passed August 9th, 1870.

The letter of Mr. Addicks is as follows: "Philadelphia, August 9, 1870. Messrs. Knight & Son, No. 120 North Delaware Avenue—Gentlemen: As consignees of brig Home, I hereby inform you, as I told you on Saturday, the 6th inst., at the custom house, that on that day I had received from the board of health instructions to have the brig taken to the Lazaretto forthwith; both you and the captain declined to obey my order to do so. I found the brig at east side of Windmill Island, abandoned. I placed a pilot and four men aboard, and towed her down to the Lazaretto, at which place she was anchored at about 9 o'clock, p. m. I further placed two men aboard as watchmen. All the expenses incurred are charged to you and the owners of the brig Home.

I now further notify you, by direction of the board of health, that you send down at once proper persons to take charge of the vessel, as she now remains at the Lazaretto at your risk, or all persons concerned as her owners. Respectfully, John E. Addicks, Health Officer."

The watchman was sent down, in compliance with this letter. This act seems to me distinctly a waiver of the threatened abandonment, and a resumption of charge of the brig. It was during the period while the brig was under the care of this man, sent by the consignees, and after the departure of the two men placed on board by the health officer, that the loss occurred. The manner of its occurrence is certainly doubtful; the watchman related that he had been forcibly boarded up in the cabin while the vessel was robbed; the captain engaged by the owners, Cook, however, concluded to remove him, and replace him by another, immediately upon the loss occurring; this would certainly argue that he thought there had been at least negligence on the part of this watchman. There was no reason to doubt that the owners might have placed additional force on board the vessel for its protection, if they desired; in fact, they were notified to send a person or persons, and it was well argued for the city that as the owners employed a master and one watchman, with whose wages and expenses they charge the city, it was for them to employ also such other servants as to make their property secure. On the other hand, counsel for plaintiffs contended that the rule of quarantine forbidding persons going on board the brig from coming to Philadelphia rendered it impossible for the consignees or master to visit the brig and ascertain what was necessary; that it was the act of the board of health placing the brig in this situation, and it was their duty therefore to see she was properly protected. They sought also to apply the analogy of tow-boat cases, where the tug, having the guidance and direction, is made responsible to the towed for accidents befalling them. It seems to me this analogy is unsound, because in this case there was not, in fact, an absolute resignation or giving up the management of the brig to the board of health by its owners; on the contrary, a certain care and superintendence of it was still taken by them; to make the analogy apply, the injury to the towed vessel would have to be by robbery or something similar, which its own crew might fairly be expected to provide against. It seems to me, on the whole, a case of concurrent negligence. Without denying that perhaps the negligence of the board of health was greater than that of plaintiffs, since they were acquainted with the state of the river as to police, &c., and should have made proper provision for the protection of vessels detained by them, yet I cannot but impute some negligence to plaintiffs, through their servants and agents, the consignees and master and watchman—First, in plaintiffs' injudicious choice of a watchman; second, in not sending a sufficient number of watchmen to properly protect their vessel, or applying for leave to send them; third, in the watchman, in negligently keeping his watch and suffering himself to be boarded up in the cabin while the brig was robbed. In this I may be in error, but the master was certainly of this opinion, since he dismissed the watchman. Were this case in admiralty, the rules of maritime law would compel an apportionment of the damage according to the degree of negligence proved against each party; but as it is in a common law court, contributory negligence shown in the plaintiffs precludes their recovery. I believe the robbery occurred during the period when I have considered the detention justifiable; but that does not alter the position of the parties in this particular, since, though defendants would, if the detention were unjustifiable at the time of loss, be held to a stricter rule of diligence, yet, in either event, in an action on the case contributory negligence on the part of plaintiffs conducing to the loss would prevent their recovery. The plaintiffs' claim for reimbursement for the loss of the sails and hawsers must, therefore, be disallowed. No proof was given for the item 28, bending sails, and I do not see how it could be allowed if proved.

The remaining claim is for damage to the vessel by the opening of the seams, by reason of exposure to the sun at quarantine, which necessitated recaulking, at an expense of $200. There was a further claim for $47.35 for damage to the boat, which, however, was excluded, as not being shown in any way to be the consequence of the detention. It was contended against the allowance of the claim for caulking, that this damage could have been prevented by frequent washing of the decks or spreading of tarpaulins. The first was impossible, without there had been a larger force on board, and the second became impracticable after the sails were stolen. Besides, the rule of the quarantine, which prevented the master from visiting the vessel, rendered it impossible for him to judge properly what ought to be done to guard against this evil, and a watchman, sent down from the city, would probably be ignorant of what measures were necessary for the purpose; and if a larger force had been employed on board the vessel, the wages and expenses I would have allowed them would probably have been as much as this claim for scraping and caulking. It is more difficult to say how much should be allowed, and to adjust the amount of injury of this kind, due to the detention I have held unlawful. On the whole, I decide to allow half the amount claimed, or $100, treating the rest of the injury as resulting during the voyage and the lawful detention. To sum up, therefore, I award the plaintiffs:

Bill of expenses to get the vessel back to Lazaretto	$ 62 50
Hospital, T. White	7 75
" T. Doggett	5 00
Watchman, 66 days, September 2d to November 7th, at $1.50	99 00
Proportion of provisions bill for watchman	34 83
Hospital, Elliott and Sylvester	14 80
" Carpenter and Houghton	39 06
" Thomas Doggett, Jane Doggett	27 00
Towage to the city $15, labor 4 men $16.80	31 80
Captain's wages, from September 2d to November 7th, 2 months and 5 days, at $80	173 66
Board of captain, 9½ weeks, at $12	114 00
Travelling expenses, proportion, say two-thirds	13 96
Demurrage from September 2d to November 7th, 2 months and 5 days, on 216 tons, at $2.50 per ton per month	1,170 00
Amount paid owners of lighters for demurrage of barges	384 00
Caulking	100 00
	$2,273 36

Interest from November 7th, 1870, is allowed on this amount.

I presume that costs follow the report. These I compute as follows:

Attorney fee and writ	$ 22 40
Clerk	7 25
Crier	1 00
Commission	6 00
Certificate of record to referee	10 00
Referee's fee, as suggested by counsel	250 00
Printing report	49 70
	$346 35

R. L. Ashhurst, Referee.

SUMNER (WHEELER v.). See Case No. 17,501.

SUMNER, The W. A. See Case No. 4,288.

Case No. 13,612.

The SUN.

[1 Biss. 373; [1] 1 Am. Law Reg. (N. S.) 277; 4 West. Law Month. 75; 9 Pittsb. Leg. J. 308.]

District Court, D. Wisconsin. Dec. Term, 1861.

SHIPPING—PUBLIC REGULATIONS—PLEADING—ANSWER.

1. A vessel propelled in whole or in part by steam is not liable to a penalty for transporting goods, wares, and merchandise, without inspection of the hull and boilers under the act of congress of August 30, 1852 (10 Stat. 61). The penalty is alone for transporting passengers.

2. Answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts.

In admiralty.

J. B. D. Cogswell, U. S. Dist. Atty., for the United States.

W. P. Lynde, for respondent.

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

MILLER, District Judge. By the information this propeller was seized by the collector at the port of Milwaukee, on the 6th of October, 1861, for the following causes:

1st. That on the 20th of September, 1861, the propeller did transport goods and passengers from Milwaukee to Goderich, in Canada, without first having complied with an act of congress, approved July 7, 1838 (5 Stat. 304), entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and the act of August 30, 1852 (10 Stat. 61), entitled "An act to amend an act," &c., in this, that the hull of said propeller had not been inspected pursuant to the provisions of the ninth section of the last act within one year prior to the 20th of September, 1861. For each of said violations a penalty of five hundred dollars is claimed.

2nd. That on the 28th of September, 1861, the vessel did transport goods and passengers from the port of Goderich to the port of Milwaukee, without inspection of her boilers, and for each violation of the act a penalty of five hundred dollars is claimed.

Respondent answers that the vessel was licensed at Buffalo, and was employed in the business of commerce and navigation between the ports of Chicago and Milwaukee, on Lake Michigan, and the port of Goderich, in Canada. That the hull and boilers of the vessel were inspected at the port of Chicago, and certificate issued on the 19th of September, 1860, and on the 8th of September, 1861, before the certificate had expired, respondent caused an application to be made to the inspectors at Chicago, for the inspection of the hull and boilers of the propeller; and on the 28th of the same month a second application was made.

At the time of the first application the inspectors were absent from Chicago, and at the time of making the second application the inspectors had not the pumps and necessary machinery for making the inspection, and one of the inspectors was then absent. The propeller was inspected at Chicago, on the 8th of October following, when a certificate was issued by the inspectors; and there are no local inspectors on Lakes Huron and Michigan.

To the answer, the district attorney filed exceptions: that respondent has not fully and distinctly answered the libel, and the matters set forth are immaterial and irrelevant. Before considering the exceptions, it may be proper to inquire what the respondent should answer to. The libel is intended to charge that the propeller is liable to a penalty of five hundred dollars, for carrying goods, &c., and a like penalty for carrying passengers from Milwaukee to Goderich, and similar penalties for carrying goods and passengers from Goderich to Milwaukee, without having been first inspected, as required by the acts of July 7, 1838, and August 30, 1852.

The act of July 7, 1838 (5 Stat. 304), enti-

tled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," directs in section 2: "That it shall not be lawful for the owner, master, or captain of any steamboat, or vessel propelled in whole or in part by steam, to transport any goods, wares, or merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section the owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, the one half to the use of the informer, and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States, having jurisdiction of the offence." The act then directs the appointment and duties of inspectors of hulls and boilers of such boats and vessels.

The act approved August 30, 1852, is an act to amend the act of July, 1838. The first section directs: "That no license, register, or enrollment under the provisions of this or the act to which this is an amendment shall be granted, or other papers issued by any collector to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment." The whole object and scope of the last act was to provide for the better security of the lives of passengers, and it provides a full and perfect system for the inspection of the hulls and boilers of vessels propelled in whole or in part by steam, and carrying passengers. By the section of the act above quoted, the penalty prescribed in the second section of the act of July, 1838, is continued as to vessels navigated, with passengers on board, without complying with the terms of the act in regard to inspection. The penalty in the act of July, 1838, for transporting goods, wares, and merchandise on vessels not inspected, is not embraced in the act of August, 1852; and by this last act all parts of laws heretofore passed, which are suspended by, or inconsistent with the act, are repealed. That provision in the act of July, 1838, was outside of the object of the act, and in the subsequent act it is entirely omitted. In this respect the two acts are inconsistent, and the provision of the last act must prevail. This is a penal statute, and it must be construed literally. The respondent is not required to answer that part of the libel of information claiming a penalty for transporting, on this propeller, goods, wares, or merchandise, without previous inspection of her hull and boilers.

The exceptions to the answer will have to be allowed, with leave to amend. The answer neither denies nor confesses the charges. The respondent must fully and explicitly answer the several articles of the libel. He must deny the several articles, or confess and avoid them by a proper allegation of facts.

[3] [By the answer, the propeller was licensed at the port of Buffalo Creek, on the 5th of April, 1861. There is no allegation that since then she has been transferred to any other port. It is also alleged that her hull and boilers were inspected at the port of Chicago on the 19th of September, 1860, and that, before the certificate expired, and again on the 28th of September, 1861, application was made to the inspectors at Chicago for inspection, which was not done for the reasons stated. It is not alleged that the application was in writing, as the law requires, nor does it appear that the inspectors at Chicago had any official right to perform the duty. By section 9 of the act of August, 1852, inspectors were directed to be appointed at Buffalo, which was the port where this propeller belonged. The inspectors are to perform the services required of them by the act, within the respective districts for which they shall be appointed; and, by the twelfth specification of the section, the board, when thereto requested, shall inspect steamers belonging to districts where no such board is established. If this propeller belongs at the port of Buffalo Creek, it is questionable whether a certificate of inspection at the port of Chicago should be adjudged a compliance with the law. But this subject can be more maturely examined hereafter.] [3]

Case No. 13,613.

The SUNBEAM.

[Blatchf. Pr. Cas. 316.] [1]

District Court, S. D. New York. Jan., 1863.[2]

PRIZE — OVERWHELMING NECESSITY — BURDEN OF PROOF — FALSE DESTINATION — CONTRABAND GOODS.

1. Where it is claimed that a vessel was compelled to attempt to enter a blockaded port by an overwhelming necessity, arising from injuries received at sea, and the loss of fuel, water, and provisions, the burden lies upon her to establish the necessity.

2. Ignorance of the master as to his cargo, and as to any of it being contraband of war.

3. False destination on the vessel's papers.

4. Vessel and cargo condemned for an attempt to violate the blockade, and to supply to the enemy articles contraband of war.

In admiralty.

---

[3] [From 1 Am. Law Reg. (N. S.) 277.]

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

[2] [Affirmed in Case No. 13,615.]

BETTS, District Judge. This vessel was captured September 28, 1862, at sea off New Inlet, North Carolina, by the United States man-of-war State of Georgia, and was brought into this port for adjudication. A libel was filed against her October 17 thereafter, and an attachment and monition were issued thereon, returnable on the 4th of November, demanding the condemnation of the vessel and cargo. Due service was made of the process, and the return was filed in court by the marshal November 4, 1862. On the same day Mr. Archibald, the British consul, resident at this port, intervened officially for the owners of the vessel and cargo, as being British subjects, and claimed the prize as their property. The proctor for Mr. Archibald also interposed, December 30 thereafter, a claim on behalf of Joseph Greenwood, of England, through his attorney in fact, as the owner of eighteen bales of worsted stuff goods captured on board the said vessel, asserting that they were lawfully shipped as his sole property on a voyage from Liverpool to Matamoras, in Mexico. He also denies in his claim that they were subject to the control of the master of the vessel, and avers that the consignment was in the sole charge of the agent and attorney in fact of the claimant, and further denies that they were lawful prize of war. Although these claims are amplified as pleadings, for the purpose of including other matters, they can only enure to effect a general issue of prize or no prize. On the 27th of December, 1862, Henry Lafone, also a British subject, resident in England, intervened, by his attorney in fact, with leave to file his claim as of the return day of the process, November 4, 1862, and claimed to be sole owner of the vessel and of the whole of her cargo at the time of her seizure. The test oath to this claim is subscribed and sworn to by the attorney in fact. The vessel was British built, and was registered at London January 19, 1858. Her shipping articles were dated at the same port August 1, 1862, for a voyage from Liverpool to Halifax, thence, if required, to any ports and places in British North America and the United States, the West Indies, the Bahamas, and Matamoras, and back to a final port of discharge in the United Kingdom, not exceeding twelve months. On the 1st of August, 1862, the vessel cleared from Liverpool for Halifax, with a bill of health, for a voyage to Matamoras, and at Halifax, on the 6th of September, 1862, she took a further clearance for Matamoras. The outward manifest of the cargo from Liverpool represented it all as deliverable to order at Matamoras, except one consignment of casks of hardware, deliverable there to named consignees. A very large proportion of the shipment consisted of military supplies, equipments, and materials, and was contraband of war in character, if destined for any rebel port in the southern states, or for the use of the enemy. The vessel sailed from Halifax September 14th, and was captured on the 28th of the same month, about a mile off Cape Fear inlet, North Carolina, early in the morning, heading directly into the port of Wilmington. She was arrested by the United States blockading squadron stationed at that place. The prize did not approach the vessels when first descried from them, or make any signal of a desire to speak them, but endeavored to avoid them, until she was brought to by repeated shots directed by them against her, and so near by as to put her in imminent danger, and once to actually hit her.

The lawfulness of the capture is resisted by the defence by the usual exceptions taken in like suits to the competency of the court to take cognizance of the alleged cause of capture: (1) That no lawful blockade existed. (2) That the claimants had no legal notice of it. (3) That the captured vessel was neutral property, destined to a neutral port, with a lawful cargo on board. And it is finally and most essentially insisted, with urgent earnestness, that the proximity of the vessel to Wilmington, the place of her seizure, was caused by her perilous condition at the time, brought about by stress of weather, and by her necessity therefrom for immediate succor; that she had been compelled to deviate from the voyage she was prosecuting on encountering a violent gale of wind at sea, which disabled her equipments, destroyed her coal and water and provisions, and drove her to seek the nearest and most instant relief in port. The entire evidence shows the vessel to have been arrested close in shore, heading directly into the port of Wilmington, then watched and beleaguered by a strong United States naval force; and, accordingly, the only question demanding consideration in the case is whether the excuse of necessary deviation set up by the defence is credibly supported by the evidence produced in the cause. The legal questions put forward by the claimants have been so repeatedly adjudged by the court during the progress of prize suits through the court during the past year that it will be of no service to repeat the reasons on which those decisions were founded. This case will, accordingly, be determined on the assumption that Wilmington was at the time of this capture under a state of legal and efficient blockade by the United States; that the master and owner of this vessel and cargo had notice and knowledge of such blockade; and that there was nothing in the fitment, ownership, or destination of the vessel or cargo which affords to either any exemption in law from arrest for the cause alleged in the libel. The case then resolves itself into a question of fact alone,—whether the vessel was, when seized, pursuing an honest voyage, according to the representations on her papers, or was really fitted out for trade with the enemy, and was attempting to enter the port of Wilmington, North Carolina, with intent to

evade the blockade then in force there. This inquiry is to be answered by a just application and appreciation of the facts and circumstances put in evidence before the court on the hearing of the case. The position of the vessel immediately at the mouth of the harbor, at an early hour of the morning (she having run during the night, under steam, close along shore), and her shaping her course for its entrance, are facts stated plainly in the proofs. This situation is sought to be justified by her condition of distress, and by the allegation that she was compelled to make the harbor because of injuries received at sea, and the loss of fuel, water, and provisions in consequence. If that justification is not made out by the proofs, the culpability of the act is most palpable. The burden of proving the existence of the overpowering necessity alleged by the defense is cast by law upon those who set it up.

The first criminating act directly affecting the voyage from Halifax occurred in the deviation the vessel made from the true course of her declared voyage towards Matamoras. The time, place, extent, and cause of the deviation are not given with satisfactory uniformity or clearness by the witnesses who testify to the occurrence, and to many of them the fact that the regular course had been departed from was not known until the capturing vessels came in sight and were pursuing her. Some of her crew, the evening preceding, when her sails were being furled, supposed that her voyage to Matamoras had been completed by the arrival of the vessel at that port, and were unaware she had turned out of her course until they found she was trying to enter Wilmington. The second mate says that the vessel was sailing, to the time of her capture, towards Matamoras, so far as he knew. Two logs were kept on the ship,—one the ship's log, and the other by the first engineer of the vessel. The narrative of the gale, or hurricane, as it is denominated, is described in sufficiently strong terms as to its suddenness and violence in the two logs, but neither one specifies its duration, or what, if any, injuries to the ship, her tackle or lading, were experienced from it, or whether the navigability of the vessel was in any way arrested or impeded by it. This gale came on, as would appear by the entries, early on Saturday morning, the 19th of September, and the engineer's log represents that his part of the vessel, which was most affected by the storm, was entirely cleaned up and relieved from its effects the next day, Sunday. Yet it was on the 28th, eight days afterwards, that she was attempting to get into Wilmington. The evidence also shows that the steam functions of the vessel were only used as an aid to her navigation, and generally only in leaving or making port, or in approximating land. Otherwise, sails were the general propelling power employed during the voyage. It is not proved that the capacity of the vessel to continue her course was at all interrupted by the occurrence of the storm, or that her safety or her sailing qualities were in any way impaired or endangered. But the more material fact is that no note is entered in either log that the vessel changed her direction because of the storm, or that distress or peril of any kind on board rendered a deviation necessary. Indeed, the log shows that the vessel held about a uniform course of southwest, or southwest-by-west, or southwest-by-south, during the 16th, 17th, 18th, and 19th of September, retaining the general bearing, and under a northeast wind standing towards the coast up to the time of this gale; and no suggestion is entered on either log that the vessel was off the proper course to Matamoras, or was driven by the storm from the one she meant to pursue. The entries of the vessel's log from the 20th of September, the day after the storm, during the 21st, 22d, 23d, 24th, 25th, 26th, and 27th, when the log ends, note the vessel as running the same general southwesterly direction, with a northeasterly wind, down to her capture. The proofs in preparatorio also are that the true course was adhered to until the day previous to the capture. The master testifies that he was heading the ship right on the land when the gun was fired to bring her to; that he was then actually within a mile of being inside the port of Wilmington; that this was about 5½ o'clock a. m. on a dark, rainy morning; that after the gale of the 19th of September, which did the vessel some damage, he beat along down the coast; and that on the evening before the capture he altered the vessel's course, and stood in for Wilmington. Other witnesses prove that three shots were fired, one of which hit the Sunbeam before she came to and surrendered, she having got under the guns of the enemy's fortification, which opened fire for her protection.

I shall not, however, further pursue the analysis of the proofs in preparatorio, to demonstrate that the statements made by the officers of the vessel are reserved, inconsistent, and unreliable with respect to the prize and her doings from Halifax to Wilmington. The chart taken on board the vessel, having delineated on it carefully the route she pursued from Cape Sable to Wilmington, with her progress day by day distinctly entered, and evidencing great care and accuracy in keeping the record, proves, beyond all reasonable doubt, the subterfuge and falsity of the pretence that the vessel was disabled in her navigation by the storm of the 19th and 20th of September. It moreover demonstrates that the Sunbeam, at the time of the storm, deviated at right angles from the course she was then running, broad on towards the coast, and continued in that new direction for at least one degree of longitude; that then, in about the latitude of Montauk, 41° north and longitude 69° west, she bore off at right angles, parallel to the preceding course from which she had deviated on the 19th; that thence she pursued her way southwardly

along the coast, registering on the chart day by day the line and relative distance of her movement, the general trending of it being inland, and more decidedly so on the 25th of September, when she arrived opposite to Albemarle Sound, somewhere between Currituck Inlet and New Inlet. Thence her bearing, during the two succeeding days, was more broadly upon the coast. The delineation and registry of the course terminated on the 27th of September, near the point of her capture on the morning of the 28th, where she met and was seized by the blockading squadron. This record, made evidently by the navigator of the vessel with marked care and intelligence, supplies to my mind most persuasive proof that the line of navigation followed after the storm was not induced by any physical necessity in respect to the vessel, her equipments or her crew, but was wholly voluntary, and in fulfilment of the plan and purpose of the voyage from its outset.

As before intimated, the log of the vessel supplies no facts calling for or excusing the wide departure of the vessel from the destination which the claimants allege to have been the true voyage contemplated. Indeed, no evidence is given that the direction of the vessel at the commencement of her course, near Cape Sable, was the usual and proper one for a voyage to Matamoras; and if, of itself, it imports no positive fault that her direction was so significantly landwards, it would at least seem to demand from the officers of the ship an explanation of the reasons or rules of navigation which rendered such position and bearing suitable and proper. The diagram of her actual movements, as above referred to, affords a strong suspicion that the actual destination of the vessel was to some port north of Cape Florida. That suspicion is augmented on the production of the maps and charts found on board of a vessel. She had a general English chart, including only the United States ports on the west side of the Atlantic, and two American charts, from the United States Coast Survey, —one from Cape Fear to St. Catharine's Island, and the other from Albemarle Sound to Cape Fear. There is, prima facie, a flagrant improbability that a vessel of this burden, complement of crew, and cargo, would be despatched from Liverpool on a destination to Matamoras, in Mexico, supplied with no nautical guide, by map or chart, and without being in charge of navigators personally familiar with that portion of the route independently of the aid of such guidance. The ignorance of the master in respect to the lading of the vessel, and to whom or for whom any part of it was being transported, gives ground for suspicion that there is studied reserve or false representation as to the real state of facts in relation to the lading and condition of the vessel, and the actual aim and business of her voyage, and that these were well known to the officers on board, and were concealed in the vessel's papers and in the proofs in preparatorio. It is singular that the master only knew of there being one gun and two rifles on board, whilst the mate, the engineer, and others, knew that she brought four mounted cannon from Liverpool, and had them on deck until the storm, when three of them were thrown overboard by the crew, or, as some of the witnesses suggest, were blown overboard by the tempest. It is, likewise, in a degree remarkable that the master had no knowledge that the vessel was carrying any cargo that would be contraband of war, if intended for an enemy port, excepting one hundred and forty tons of gunpowder, and some brandy, lead, and shoes; whereas, on the breaking up of her cargo by the order of this court, she was found also stowed with nine cases of swords, four hundred and ninety-seven boxes of fixed ammunition, five boxes of percussion caps, fifty cases of Enfield rifles, large quantities of pig-lead, and one hundred and thirty-nine boxes of boots, besides other materials manifestly destined for military uses. It seems, also, to be doubtful, upon the claims filed, who is the true owner of the prize property. Lafone interposes and files his test oath, swearing that he is the owner of the vessel and the entire cargo; and Mr. Greenwood also claims, under a like test oath, to be the sole owner of eighteen bales of woolen stuff goods,—a portion of the cargo; the two claims evincing a want of that clear discrimination of title to property which is rightfully to be expected in the contestation of a suit prosecuted against it for being unlawfully transported to an enemy port, in violation of the belligerent rights of the libellants. Besides, I think that the proofs bear hard to show that the allegation of distress or peril set up as justifying the open deviation of the vessel from a destination to Matamoras is groundless and false, inasmuch as other vessels came in sight after the storm of the 19th of September, and were not spoken, nor was any signal displayed by the Sunbeam denoting that she was in distress, and she proceeded through several degrees of latitude southerly, down the coast, within a distance rendering it easy for her to have gone into open ports had there been real cause for her to seek relief therein. Without entering into an elaborate analysis and discussion of the numerous particulars in proof, I find, as the result of my consideration of the case, that the representation of the voyage of the Sunbeam, stated in the vessel's papers and on the preparatory examination to have been from Halifax to Matamoras, was simulated and illusive in point of fact, and that the true object of the voyage was to proceed to Halifax to a blockaded port in one of the seceded states, and to deliver there the cargo to the use of the enemy, and in violation of the blockade there existing.

I am satisfied that the evidence in the cause naturally leads to and demands such

conclusion, and I therefore pronounce for the libellants that the vessel and her cargo be condemned and forfeited for an attempt to violate the blockade of the port of Wilmington, North Carolina, wilfully, and well knowing of such blockade, and to supply to the enemy articles contraband of war.

[This decree was affirmed, on appeal, by the circuit court. Case No. 13,615. For a motion to stay a sale of the property, see Id. No. 13,614.]

Case No. 13,614.

The SUNBEAM.

[Blatchf. Pr. Cas. 638.] [1]

Circuit Court, S. D. New York. May 19, 1863.

PRACTICE IN ADMIRALTY—APPEAL IN PRIZE CASES —STAY OF EXECUTION.

1. In this case the prize property was condemned in the district court, and a sale of it was ordered. The claimant appealed to this court from the decree of condemnation, and then applied to this court to stay the sale, which was in progress, on the ground that the appeal operated to remove the cause into this court, and thereby deprived the district court of jurisdiction to issue an execution or to make a sale of the property under the decree of condemnation in that court. This court ordered the sale to be stayed, and all proceedings under the decree below to be set aside.

2. The 12th section of the act of July 17, 1862 (12 Stat. 608), and the 4th section of the act of March 25, 1862 (12 Stat. 375), considered.

3. There is nothing in either of these acts which changes the general rules of practice that no sale can take place under a decree of condemnation in the district court, duly appealed from; that a decree thus appealed from is not a final decree; and that after the appeal, the cause, with the res, is in this court, and subject to its jurisdiction alone.

4. The first section of the act of March 3, 1863 (12 Stat. 759), respecting sales of prize property condemned notwithstanding an appeal, relates solely to decrees of condemnation to be thereafter made.

Prize.

NELSON, Circuit Justice. This is a motion made by the advocates for the owners and claimants of the steamer Sunbeam and cargo to stay a sale of the property by the United States marshal, which is advertised to be made. It appears from the papers that the vessel and cargo were condemned as prize in the district court on the 19th of January last, and that a venditioni exponas was ordered [Case No. 13,613], which was issued accordingly, and under which the marshal is now proceeding to make the sale. An appeal from the decree below was taken to this court within the time prescribed by law, and duly perfected. It is claimed by the advocates for the claimants that this appeal operates to remove the cause into the appellate court, and thereby deprives the district court of jurisdiction to issue an execution, or to make a sale of the property under the decree of condemnation in that court. That such is the effect of the appeal is admitted, unless the practice is changed by recent acts of congress.

The first act referred to is the twelfth section of the act of July 17, 1862 (12 Stat. 608), entitled "An act for the better government of the navy of the United States." That section provides, among other things, as follows: "And whenever a final decree of condemnation shall have been made, or any interlocutory sale has been ordered, the property shall be sold by the marshal, pursuant to the practice and proceedings in admiralty, and the gross proceeds of such sale shall be forthwith deposited with the assistant treasurer of the United States at or nearest to the place where such sale is made, and the money so deposited shall remain in the treasury of the United States until a final decree of distribution, or until a decree of restitution shall be made, and a certified copy thereof be furnished, upon which the costs of court and the lawful charges and expenses shall be paid, and the balance distributed according to said decree: provided, that the annual salaries of the district attorneys, prize commissioners, and marshals shall, in no cases, be so increased under the several acts for compensation in prize, as to exceed in the aggregate the following sums, and any balance beyond the several sums shall be paid into the treasury, viz: district attorney, $6,000; prize commissioners, $3,000; marshals. $6,000." I see nothing in the words of this provision that is either ambiguous or doubtful. The entire section, which is a long one, relates chiefly to the regulation of the sales of prize property by the marshal, under decrees of condemnation, or by interlocutory orders, and to the costs, charges, and disbursements of the several officers connected with these proceedings in the course of the litigation. The provision relating to decrees of condemnation, or to interlocutory orders of sale, is incidental to the main purpose of the section, to wit, the regulation of the sales, and of the costs, charges, and disbursements. It provides that in the case of a final decree of condemnation, or of an interlocutory order of sale, the property shall be sold by the marshal according to the usual practice in admiralty, and the gross proceeds be deposited with the assistant treasurer, and remain there until a final decree of distribution, or until a decree of restitution. A reference to the fourth section of the act of March 25, 1862 (12 Stat. 375), will help to explain the provision. That section provided that, in case of a final decree of condemnation, the property should be sold by the marshal, and the gross proceeds be deposited in court, and that thereupon the prize commissioners, under the direction of the court, should proceed to take the requisite evidence, and report the same to the court, to the end that a final decree might be made determining what

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

public ships were entitled to share in the prize, &c.; and it was made the duty of the clerk of the court to transmit to the treasury the moneys so deposited in court, together with a certified copy of the said decree, after deducting from said moneys the costs of court and the charges and expenses, as provided. Now, the twelfth section of the subsequent act of July 17, 1862, provides that the gross proceeds of the sale shall be deposited by the marshal with the assistant treasurer, and shall remain there until a final decree of distribution, or until a decree of restitution, and a certified copy is to be furnished to enable the government to make distribution among the captors. The act of March 25, 1862, and that of the 17th of July following, both of them, speak of a final decree of condemnation before the sale, and of a final decree of distribution after the sale.

I have heretofore had the fourth section of the act of March 25, 1862, before me for consideration, and then held that no sale could take place under a decree of condemnation in the district court duly appealed from; that a decree thus appealed from was not a final decree, within the meaning of the act; and that, after the appeal, the cause, with the res, was in the appellate court, and subject to its jurisdiction alone. There is nothing in the twelfth section of the act of July 17th creating any new rule in this respect. It is supposed that the words, "or until a decree of restitution," after the words, "final decree of distribution," in the twelfth section, are inconsistent with the idea that the term "final decree of condemnation," used in the section, means the ultimate decree in the cause. But the obvious answer is that this phrase, in the connexion in which it is found, refers to the case where the property has been sold on an interlocutory order, and where the final decree is a decree of restitution. As the funds will be in the treasury, a certified copy will be as necessary in the case of restitution as in the case of condemnation; and both decrees must be final decrees. The first part of the clause provides for the case of a sale after the final decree of condemnation; the other, for the case where a sale has taken place before the final decree, and where by it restitution is ordered. I think it quite clear that, under this act of July 17, 1862, as well as under the act of March 25th preceding, no execution can issue, nor any sale of the prize property be lawfully made (except on an interlocutory order), until after a final decree of condemnation, by which the case is finally disposed of. A decree regularly appealed from is not a final decree, in any sense of the term; and I must assume that the framers of the provision well understood the meaning of the terms used.

The first section of the act of March 3, 1863 (12 Stat. 759), provides "that whenever any prize property shall be condemned, in any district or circuit court, &c., it shall be the duty of the court to order a sale thereof, and no appeal shall operate to prevent the making or execution of such order." This provision of the act, as well from its terms as from the nature of the subject-matter to which it relates, and upon which it operates, is prospective. In all cases where appeals had already been taken from decrees of the district court, the whole case had passed from its jurisdiction to the appellate court. The res was in that court, and subject to its jurisdiction. There was no longer any valid or operative decree in the court below; and any proceedings affecting the res must take place in the court above. This state of the case must, doubtless, have been well known to the framers of the law, and hence the operation given to the act is entirely prospective.

I am satisfied that the execution in this case, for the reasons above stated, furnishes no authority to the marshal to make a sale of the property in question, and therefore I shall, to prevent its sacrifice, order the sale to be stayed, and all proceedings under the decree below to be set aside.

[The decree of the district court rendered in Case No. 13,613 was affirmed. Id. 13,615.]

Case No. 13,615.

The SUNBEAM.

[Blatchf. Pr. Cas. 656.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ATTEMPT TO ENTER BLOCKADED PORT—NECESSITY—CONTRABAND CARGO—NOTICE OF BLOCKADE.

1. Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

2. False and simulated papers as to the destination of the vessel.

3. The pretence that the vessel sought the blockaded port in distress overruled.

[Cited in Stokely v. Smith, Case No. 13,473.]

4. Part of the cargo was an innocent shipment, and neither the owner of it nor any of his agents were implicated in the fault of the vessel. But, in case of a blockade, the general rule is that the deviation of the vessel into the blockaded port is presumed to be in the service of the cargo, and that the owner is bound by it, except in the absence of notice of the blockade at the time the vessel sailed. In this case there was no such want of notice.

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

[This was a libel in prize against the steamer Sunbeam and cargo. There was a decree for the libelants in the district court (Case No. 13,613), from which this appeal was taken. For a motion to stay the sale of the property, see Id. 13,614.]

NELSON, Circuit Justice. This steamer was captured in the act of entering the port of Wilmington, North Carolina, a blockaded port, on the morning of the 28th of Sep-

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

[2] [Affirming Case No. 13,613.]

tember, 1862, by the United States steamer State of Georgia. She belongs to H. Lafone, a merchant of Liverpool, and a British subject, who is also owner of all the cargo except eighteen bales of merchandise, worsted stuffs, belonging to J. Greenwood, of Bradford, England, their manufacturer. The cargo belonging to Lafone consists of powder, lead, arms, boots, shoes, &c., and was put on board at Liverpool in August, 1862. The bales of worsted stuffs were shipped at the same time and place through agents of the manufacturer and owner. The ostensible destination of the vessel was to Matamoras, Mexico. She started on her voyage from Liverpool on the 6th of August, reached Halifax on the 5th of September, left that place for Matamoras on the 14th of the month, and on the 28th was captured, as already stated, while entering the port of Wilmington. The pretext set up for the deviation and the entrance into that port is the disabled condition of the vessel from a storm encountered on the voyage on the 19th of September, eight days before the capture. Without going over the evidence, I deem it sufficient to say that this storm and its effects upon the vessel are greatly exaggerated, and do not furnish a satisfactory excuse for her position at the time of the capture. There are also many facts and circumstances in the case tending strongly to the conclusion that the voyage to Matamoras was simulated, and that the original destination was to one of the ports of the Confederate States.

It has been strongly argued that the owner of the worsted stuffs was ignorant and innocent of the fault of the master, and that the master was not the agent of that part of the cargo, which was shipped in the usual way, with a separate and distinct bill of lading, invoice, &c., and that it should not be held responsible for the deviation of the ship into a blockaded port. I am inclined to think, upon a full consideration of the evidence bearing upon this part of the case, that, in point of fact, this was an innocent shipment, and that neither the owner nor any of his agents were implicated in the fault of the vessel. But the general rule seems to be, that, in case of a blockade, the deviation of the vessel into the blockaded port is presumed to be in the service of the cargo, and that the owner is bound by it, except in the absence of notice of the blockade at the time the vessel sailed. In this case the vessel sailed from Liverpool on the 6th of August, 1862, some months over a year after the establishment of the blockade of the ports of the state of North Carolina. The fact was well known at Liverpool, and, indeed, in all England, at the time the ship sailed. Decree below affirmed.

SUNBEAM, The (ULRICH v.). See Case No. 14,329.

SUNBERG (UNITED STATES v.). See Case No. 16,417.

Case No. 13,616.

SUNDAY v. GORDON et al.

[1 Blatchf. & H. 569.] [1]

District Court, S. D. New York. Feb. 8. 1837.

SHIPPING — MASTER'S TORTS — SEAMEN — CUSTOM — PARTIES.

1. The owners of a vessel are not liable for personal torts committed by a master without their knowledge or approval.

[Cited in Taylor v. Brigham, Case No. 13,781. Disapproved in Gabrielson v. Waydell, 67 Fed. 344.]

2. Passengers and seamen who are carried to a port different from the one agreed upon, may maintain an action in admiralty for damages.

3. Slight credit will be given to the unsupported evidence of a witness who testifies to admissions obtained by him from a party for the purpose of charging him thereby.

[Cited in The C. N. Johnson, 19 Fed. 783.]

4. Persons who are not strictly mariners may charge a vessel or her owners, in admiralty, for services on ship-board which are necessary to her navigation or safety.

5. But, where a master who contracts a sickness in a foreign port employs a native as a man servant or attendant only, those services are not a charge upon the vessel or her owners.

6. Evidence of a usage to receive such natives temporarily on board of a vessel, and to leave them at convenient ports in the course of the voyage, paying them for their services at the discretion of the master, is admissible to determine the extent of the liability of the owner of a vessel, when sued for wages by such a native employed on board the vessel.

7. A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a prochein ami, or a trustee.

This was an action to recover seaman's wages and damages [by Quaselle Sunday against Joseph Gordon, Jacob D. Fowler, and Charles Shilletoe]. The libel alleged that the libellant shipped at Elmina, on the coast of Africa, as a seaman on board the brig Packet, of which the respondents were owners, to perform a voyage to the port of Liberia, also in Africa, at twelve dollars per month; that it was agreed he should be set ashore at the latter place; but that the master of the vessel, in violation of his contract, did not set the libellant on shore at Liberia, but brought him, against his will, to New-York. For this tort the libellant claimed damages. The libel further alleged, that the libellant performed duty on board during the voyage, which lasted between two and three months; that, on arriving in New-York, he assisted in discharging the cargo and relading the vessel for a voyage out again; that the libellant was assured by the master and owners that the brig was loading for a voyage back to Elmina, and that he should be returned to the port of his

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

residence and nativity; and that, in April or May, 1835, the vessel sailed, as the libellant was assured and supposed, for Elmina, but in truth for Mogadore, in Morocco, and came thence back to New-York, without going to Elmina or within a thousand miles thereof, and without sending the libellant home or permitting him to leave the brig. The libellant averred that he would not have gone on said voyage but for the assurance and under the expectation that he was to be carried directly to his place of residence, and he charged this as a fraud upon him by the master and owners. The libel further alleged, that the brig arrived in New-York in the month of November, 1835; that the libellant did duty during the whole voyage, being between six and seven months; that he served on board, including both voyages, eleven months in all; that he signed no shipping articles; that the highest wages at the port of New-York, within the three months next preceding the last voyage, were sixteen dollars per month; and that he had received no wages except twelve dollars paid him at Elmina. The libel alleged, also, that the libellant was a native of Africa, and understood the English language but imperfectly, and that, after he was discharged, one of the respondents took him to his house in the city of New-York, and compelled him to begin a course of servitude in his family. To the libel were annexed eleven interrogatories, which the respondents were required to answer under oath.

The respondents, in their answer, denied that the libellant shipped at Elmina as a seaman, and that he did duty as a seaman on board the brig, and that he was capable of doing seaman's duty, and that the master had paid him twelve dollars within their knowledge. They admitted that the brig arrived at New-York, after a passage of three months and one day, and that the libellant remained on board during the discharge of her cargo, and until she was reladen for another voyage, and asserted that the master of the vessel died at the quarantine, one hour after the vessel arrived there. They denied that the libellant assisted in lading or unlading the vessel, and that he did any duty on board, and that, after the death of the master, the new master or the owners assured the libellant that the brig was loading for a voyage back to Elmina, or that he should return direct to that port. They did not admit that any assurances had ever been given to the libellant that he should return to Elmina from New-York as soon as the brig could make the voyage, or that the libellant was a native of Africa, or that the respondents gave the libellant any assurances that the brig was going direct to Elmina on her second voyage, or that they ever offered to send the libellant home, or refused to allow him to leave the brig, or practised any fraud upon him, and they further denied that any such assurances were given to the libellant, to the best of their knowledge. They alleged that the brig was bound to Mogadore, and returned to New-York in November, 1835; and they denied that the libellant continued on board eleven months and did duty as a seaman, and that the master, or any other person connected with the brig, had put the libellant to servitude, and that the libellant was anxious to return to Africa. On the contrary, they allege that he refused to return on two several occasions when passages had been procured for him, and that he was indebted to them in the sum of one hundred and fifty dollars for money advanced. They also denied that they owed the libellant one hundred dollars, or any other sum, and that Shilletoe, one of the respondents, was ever a part owner of the vessel, and they set forth the names of her present owners.

The evidence offered by the libellant, to prove his employment upon the brig, consisted of conversations in this city between a colored man, who offered to act as his friend, and Shilletoe, one of the respondents, in which the services and claims of the libellant were admitted. It was proved by the other respondents that Shilletoe was not a part owner of the vessel, and had no power to bind, by his declarations, the other respondents in their character of owners. The remaining evidence is sufficiently stated in the opinion of the court.

Alanson Nash and Erastus C. Benedict, for libellant.

John A. Morrill, for respondents.

BETTS, District Judge. The answer of the respondents seems to be drawn with reference to the special interrogatories annexed to the libel, rather than to the charges of the libel itself, and therefore does not furnish very direct or distinct issues to the allegations of the libel. In fact, the answer is so framed as to amount to a negative pregnant upon nearly every averment incorporated in it. The pleader who drew it has attempted to intermingle the formulæ of answers in chancery with a very abrupt and literal mode of negation to the allegations of the libel. Upon the interposing of a proper exception, the court would have ordered the entire answer to be withdrawn, and a plain, succinct, but full reply to be given to the positions of the libel. The libellant having, however, treated the answer as sufficient, and brought the cause to trial upon proofs, it becomes necessary to gather from the pleadings the points that are at issue in such a way as to admit of evidence being given in regard to them, and then to ascertain what testimony, if any, comes properly within the compass of such issues. The pleadings may probably admit the construction that the gravamen of the libellant's action is denied. At all events, no fact supposed to supply a right of action is admitted by the answer, and in the condition of the cause before the court, the libellant will ac-

cordingly be no less required to support his case by proofs, than he would have been had a plain and unequivocal denial been interposed.

The libel seems framed with the intent to exhibit four distinct causes of action—two resting in contract, and two in fraud, deceit and unlawful violence. The contracts asserted by it, are a hiring of the libellant as a mariner, at Elmina, in Africa, to proceed to Liberia, at twelve dollars per month, and a hiring in New-York at least by implication, to serve as a seaman on a voyage back to Elmina. The matters of fraud and deceit or force, are the surreptitiously bringing the libellant off from Africa, and afterward carrying him out to Mogadore, and thence back to New-York. If the libellant was tortiously brought off from Africa, that was exclusively the act of the deceased master. There is no evidence that he was authorized to obtain, by hiring, force or stratagem, negroes on the coast, for the purpose of bringing them to this country, or that the owners afterwards approved the act; and the owners, accordingly, would not be chargeable for any act of trespass, false imprisonment or kidnapping perpetrated by the master. The tortious acts charged upon the owners, and assumed by the libellant's counsel to have been proved, consist in shipping the libellant under a representation that he should go to Elmina, when in fact it was intended the vessel should go to Mogadore only, and in transporting him, against his will, to this country, and compelling his services on the voyage. I think a seaman might sustain an action in this court for a wrong of that character, and be compensated in damages adequate to the nature of the injury. In the matter of contract, the mariner is at all times entitled to an undisguised disclosure of the voyage he is to perform; and it would be an outrage meriting the vigorous interposition of the tribunals, if a foreigner, shipped under the assurance of being taken on a coasting voyage from place to place, and of then being discharged at his home port, should be compelled to perform an entirely different voyage, and one terminating at the home port of the ship, in a place not contemplated in the contract or known to the mariner. And, if the libellant was to be regarded merely as a passenger, he would be entitled to a strict performance of the contract for his transportation, and to have redress against the ship-owners in this court for a violation of it. Certainly, a ship-master cannot be justified in taking passengers, on an engagement to carry them to a specified place, and in afterwards, at his own election, changing his ship's destination, and carrying them on such voyages as he or the owners may choose to make, and finally landing them in a remote and to them unknown country. Passengers can maintain their actions and obtain redress in courts of admiralty for such violations of contracts with them. But the testimony entirely fails in establishing either a contract of hiring, as set up by the libel, or an agreement to carry the libellant as a passenger.

If the respondent Shilletoe was correctly understood by the witness who says he has admitted he was part owner of the ship, there is no proof showing that he had, in fact, any interest in her, and his declaration could, accordingly, avail no further than to charge him individually, if such statement, in the absence of all other evidence of ownership, would render him liable in that character. The answer denies that he was owner at any time, and such is the proof on the part of the other respondents; and, admitting that Shilletoe asserted that he was a part owner, his declarations alone would not be competent evidence to charge the other respondents. The respondent Gordon, in conversation with the same witness, declared that the owners were in no way responsible to the libellant, and that the master had acted without authority, and wholly contrary to their wishes, in bringing a native African from his own country to the United States. Very little reliance can be safely placed upon the version of conversations given by a witness who was seeking through them the means of maintaining an action in favor of his employer. However honest and commendable his motives might have been, a witness so employed would be exceedingly apt to remember statements favoring the wishes of his employer, and to forget or not listen to explanations and qualifications made at the time. That this has been so in the present case, to a very considerable degree, is obvious from the testimony of another witness on the same subject. On a careful examination of the proofs, it appears to me they establish no more than this state of facts—that it is customary, on the coast of Africa, for trading vessels to employ natives, at about twenty-five cents per day, as laborers, in loading and unloading foreign vessels in harbor and doing other work on board of them; that these laborers frequently accompany such vessels from port to port along the coast, and often come out to the United States and return with them; that, in the latter cases, they are compensated by a "clash," as it is called, being some trifling articles for trade, and also personal clothing; that the natives regard it as a great object to come off in that way and learn the English language, as it gives them consequence at home and enables them to get good employment on vessels trading on the coast; that they are no sailors, and are never put to duty as seamen; that, in this particular case, the libellant came off with the expectation of being left at Liberia, but the master, being sick with the fever common to that coast, retained him as a nurse or waiter to attend upon him, and brought him to the United States; that he understood nothing of a ship's duty, and was never, whilst attached to the brig,

put to any other employment than that of sweeping decks and occasionally working at the pump, and then chiefly for his necessary exercise; that his services were never of any value to the vessel; that, when the brig went back from this port, with the libellant on board, she was on a trading voyage, and it was within her instructions to run down the coast of Africa, if a good market should not be earlier found, and there land the libellant where he could most readily reach home; that, after the cargo was disposed of at Mogadore, no vessel was there by which the libellant could be sent down the coast; that the master refused to leave him, because, by the laws of Morocco, he would have become a slave; that he was accordingly brought in the ship to the United States; and that the respondents clothed and maintained him here, and procured a passage for him back to Liberia on two occasions, but that once he refused to go, and on the other occasion he was out of health, and probably so much so as to excuse his accepting the offer. The court can discern, in these facts, nothing that affords the libellant ground for maintaining this action. It is very clear that he was not employed on board as a mariner; and, although a person filling another capacity may charge the ship or her owners for his services, yet, if he is employed by the master, and not for the owners, it must appear that he performed services necessary for the ship or for the business in which she was engaged. Waiters and chamber-maids on board a packet-vessel might undoubtedly compel the owner of that vessel to pay the wages agreed by the master; but, if such persons were retained for the individual comfort or necessity of the master alone, no liability could be imposed on the owner for their services. It might, in this instance, have been a prudent and necessary thing for the master to employ a native servant to wait upon him, in a sickness contracted in that climate; but, whether he be a mere servant, or a nurse or a physician, the services are for the master individually, and have not such relation to the ship or crew as to render the owners responsible for them. The evidence, certainly, is very faint, as to the occasion or manner of the libellant's being employed; and, if it is helped out at all by implication, the custom of the coast would probably furnish the key of interpretation which the court would be bound to accept; and, in that view, the libellant must be regarded as having gone on board the vessel on the well understood terms of enjoying an opportunity to acquire the English language, and of receiving such gratuity as the master might see fit to bestow. There is certainly nothing to justify the court in inferring that he did not leave Liberia, where the vessel touched, with the same readiness that he left Elmina. It is shown to be the ordinary usage to carry natives from Elmina to the Cape, to the Gulf of Benin and to Liberia, and to land them, and then for other vessels to take them back; and, if the libellant went voluntarily to Liberia, there is nothing laid before the court to raise a presumption that he had not a free opportunity to leave the vessel at that port, or that he came with her from that place upon any other terms than were customarily allowed in similar cases. In either of these points of view, the action cannot be sustained—first, because the libellant's services were not rendered to the vessel, but to the master individually, and therefore the owners are not chargeable for them; and secondly, if they are to be regarded as services rendered to the vessel, they were to be compensated in conformity to the usage of the coast, chiefly by affording to the libellant the means of learning the English language, and then by giving him a small gratuity at the discretion of the master. The court perceives, in arrangements of this character with native Africans, much to disapprove. If they occur frequently, they will lead to abuses that may well awaken serious apprehensions here as to the ultimate interests and welfare of these benighted beings, and as to the purposes of ship-masters in bringing them off. But, looking at the case as one between party and party, I am not prepared to say, that such arrangements are to be utterly disregarded, and that the court shall take the interests of the prosecutor in charge and now see such rights measured out to him as might, by a prudent or intelligent man, have been insisted on and secured before the transaction was engaged in. In contemplation of law, this libellant was competent to enter into such contract of service, and to bind himself to its performance. He must be regarded as thus competent, as much so as any foreigner, and as no more under the guardianship and protection of this court. Whether, then, the engagement was advantageous or onerous to him, will not be inquired into here, unless for the purpose of seeing whether the evidence shows him to have been incapable of entering into a contract, or that some imposition was practised upon him.

The court does not hesitate to express its disapprobation of arrangements of this description with individuals in an uncivilized and savage condition of life, and particularly with Africans upon the slave coast, both because of the lively sensitiveness pervading the public mind in respect to that population, and because of the hazard that our laws and national character may be compromised, by unscrupulous men, in those remote regions, and in transactions with a class of beings easy to be decoyed, and who ordinarily would possess no means, if brought to this country, much less if landed in South America or the West Indies, of vindicating their rights. Yet, the ability of free negroes to surrender up their time and give their services for what to them may appear an adequate consideration, however trivial such compensation may be intrinsically, is not to

be questioned in the abstract. It must also be recollected, that the valuation of their services is not to be adjusted or measured by our standard, but by theirs. The palm oil, gold dust or ivory that might be gladly exchanged on that coast by vagrant savages for baubles or strips of calico of light value, would doubtless be adequate to pay the wages of an able seaman in our service; and, until a metallic currency shall be known there, which may afford a common measure of value, fabrics for use or mere trinkets may, in barter, command exchanges vastly out of proportion to the estimate they would receive in marts of trade having a specie medium of valuation, and there is nothing in principle inhibiting that exchange to be of services as well as of the products of the country. The inexperienced and crude estimates of value by the natives of those regions may as well be the basis of contracts for service, as of contracts for the barter of commodities; and, as to the competency of such persons to bind themselves by contracts for voyages, this court cannot discriminate between them and Malays or Chinese. If, then, the libellant were to be regarded as having engaged, in the capácity of a mariner, to perform a voyage, I should, upon the proofs, hold that no money wages were to be paid him, and that he had received all the compensation which his engagement contemplated. I am, however, clearly of opinion, that there was no hiring of him as a mariner or for the service of the vessel, but that he was employed on the part of the master solely, for his individual comfort or necessity, and that the owners are not chargeable upon his engagements. The testimony is very explicit to show, that when the libellant went out to Mogadore, it was in no respect in the character of a seaman. Captain Huggett's evidence puts it beyond doubt, that the libellant was regarded merely as a passenger, to be returned gratuitously in that way to his native country. There was no agreement of the master to send him home, except upon the chance of the vessel's going to Elmina. It was a contingency in contemplation, but the voyage was a trading one, liable, from its nature, to terminate long before reaching that place. It did terminate, in the course of its ordinary prosecution, two or three thousand miles from Elmina. The return of the libellant with the vessel to the home port was, accordingly, necessary to his preservation from a state of slavery, to which he would have been subjected if he had been left at Mogadore.

So far as the proofs disclose, the motives of the respondents, their treatment of the libellant in this country, and the measures taken by them to procure his return to Africa, were dictated by sentiments of liberal and commendable kindness. He was brought to this country without their assent or knowledge, but in a vessel owned by some of them, and through the agency of their master. Death had since put it out of his power to fulfil towards this man the purposes upon which he was brought across the ocean; and the respondents seem throughout to have acted with a marked anxiety to execute in full all that the master had contemplated. They twice procured for him a free passage home in vessels belonging to others. They disbursed for his support and clothing here from fifty to eighty dollars, and, at the last, offered to contribute an additional ten dollars towards getting him off, if his friends could obtain a passage for him in a colonization vessel. It has been thought better to resort to a suit as a means of compelling the respondents to do more. But I am constrained to say, that no action could well be brought more bald of legal or equitable support.

The occasion seems further to require, that I should observe, that suits of this character ought never to be instituted in the name of the party, without the direct authorization of the court. This ignorant savage, who cannot communicate at all in our langutge, is made to attest, under oath, to a series of allegations and statements, which, so far as his consciousness is concerned, he is scarcely more capable of making than any other individual of his tribe remaining in Africa. According to the testimony of some of the witnesses who know him best, he can hardly be made to comprehend the simplest facts occurring before his senses. How, then, is he advisedly to frame a deposition which, under the sanction of an oath, shall enlighten the court as to his rights? No such person should appear but under the guardianship of a committee, a prochein ami, or a trustee, that the court may see that its process is employed by some intelligent and responsible party.

I shall decree that the libel be dismissed, and with costs, as a necessary consequence, although the latter part of the order must, of course, be inefficacious and nugatory.

Case No. 13,617.

SUNDERLAND v. BAKER.

[Cited in Mattocks v. Baker, 2 Fed. 455, 459. Nowhere reported; opinion not now accessible.]

SUNDRY BOXES OF HAVANA SUGAR (UNITED STATES v.). See Case No. 16,418.

SUNDRY MATERIAL MEN v. PIONEER TRANSPORTATION CO. See Case No. 11,539.

SUNLIGHT, The (CAMPBELL v.). See Case No. 2,368.

SUNLIGHT, The (WYLIE v.). See Case No. 2,368.

SUN MUTUAL INS. CO. (HERNANDEZ v.). See Case No. 6,415.

Case No. 13,618.

SUN MUT. INS. CO. et al. v. McDOUGAL.

[N. Y. Times, Feb. 11, 1864.]

District Court, S. D. New York.

ARREST IN CIVIL SUIT — SECOND ARREST IN DIFFERENT STATE.

[One arrested in a civil suit, and going to another state in virtual custody of his bail, may there be arrested in another civil suit, if his bail voluntarily relinquish all claim to his detention.]

[This was a libel by the Sun Mutual Insurance Company and others against McDougal.]

This was a motion to discharge the defendant from arrest. The libel alleged that the libellants were insurers on the cargo of the schooner Jessie, of which vessel the defendant was master; that the vessel was wrecked in August last on one of the Bahamas; and that the property saved was sold by the defendant, and the proceeds amounted to $5,154 59; and that he refused to pay it over to the libellants, who were entitled to it, but had fraudulently appropriated it. On this libel the defendant was arrested and held to bail in $8,000. The defendant, on an affidavit denying any misappropriation of the funds, and alleging that there were claims for salvage and expenses on the proceeds of the property, and that he had left them in the hands of an agent in the Bahamas to await the settlement of the claims, and that he had been arrested in Boston by a detective and brought here against his will, moved to be discharged from arrest. The libellants read affidavits to show that he was arrested in Boston in another suit brought by one of the owners of the cargo against him, and that he voluntarily came on here in custody of his bail in that suit, to arrange the matter.

Mr. Fessenden, for libelants.

Mr. Averill, for respondent.

HELD BY THE COURT: That nothing is shown in the case preventing the libellants from arresting the defendant in this suit, if he was virtually at the same time in custody of his bail on another civil action, such bail having voluntarily relinquished all claim to his detention. Motion therefore denied, without costs.

SUN MUT. INS. CO. (MEIGS v.). See Case No. 9,396.

SUN MUT. INS. CO. (OCEAN INS. CO. v.). See Cases Nos. 10,407 and 10,408.

SUN MUT. INS. CO. (WRIGHT v.). See Case No. 18,095.

Case No. 13,619.

The SUNNYSIDE.

[5 Ben. 162.] [3]

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

COSTS—WITNESS' FEES.

A witness, subpœnaed at the place of trial on the day on which he is required by the subpœna to attend in court, is not entitled to travel fees to and from his place of residence. If not so subpœnaed, he is entitled to such travel fee.

In admiralty.

BENEDICT, District Judge. The only question raised by the appeal, which is taken from the clerk's taxation of costs, is whether the amount paid the witnesses was a necessary payment in order to compel their attendance.

This question cannot be determined upon the affidavits, as there is an omission to state when and where the witnesses were subpœnaed. The affidavit may be amended, however, and the bill thereupon retaxed by the clerk, who will allow the sums actually paid each witness as travel fee, at the rate of five cents per mile from his place of residence and five cents per mile for returning thereto, and not exceeding one hundred miles, unless it appears that the witness was subpœnaed at the place of trial on the day on which he was required by the subpœna to attend in court. A witness, so subpœnaed, is not entitled to receive a travel fee for coming to the court.

Case No. 13,620.

The SUNNYSIDE.

[1 Brown, Adm. 227; 6 Am. Law T. Rep. 277; 14 Int. Rev. Rec. 103; 3 Chi. Leg. News, 330.] [1]

Circuit Court, E. D. Michigan. April, 1873.[2]

COLLISION — RESPONSIBILITY OF VESSEL AT REST EXHIBITING COLORED LIGHTS — LOOKOUT—DUTY OF MASTER AS TO LIGHTS — ANNOUNCEMENT BY LOOKOUT—DUTY TO REANNOUNCE LIGHTS.

1. A tug lying in the open lake, waiting for a tow, and exhibiting colored lights, is *held* to the responsibility of a steamer under way.

2. Where a steamer in the open sea, at rest directly in the path of a sailing vessel, exhibited colored lights, as if she were under way, and the latter was guilty of no negligence in not discovering the false indication of the lights in time to avoid a collision, she was *held* faultless in keeping her course, although the steamer was sunk by the collision.

[Cited in The Free State, Case No. 5,090.]

3. When a light has once been announced to the officer in charge of a vessel obliged, under the rules, to keep her course, and he has carefully observed its character, bearing, and course, and all apparent conditions indicate ab-

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

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission. 14 Int. Rev. Rec. 103, and 3 Chi. Leg. News, 330, contain only partial reports.]

[2] [Reversed in 91 U. S. 208.]

solute safety if the law is complied with, he may leave the future watching of such a light to an experienced lookout, in confidence that the vessel bearing it will be guilty of no gross negligence. Especially may he return to his other necessary duties midships.

[Cited in Meyers Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 28.]

4. If any circumstances suggest danger, or a departure from the ordinary rules by the other vessel, then the duty of greater watchfulness is imposed upon the master, and he would not be authorized to leave to an unassisted lookout the duty of determining when a reannouncement of the light was necessary.

5. If, in these circumstances, the duty of watching a light has been fairly performed, the court should not severely criticise the best exercise of an officer's judgment, although believed to be erroneous. Especially should it not be deemed a fault when the conduct of the other ship has been gross and unwarrantable.

6. Where the libellant has been guilty of gross fault, and that of the respondent is in any degree doubtful, a decree for division of damages should not be rendered.

[Cited in The Athabasca, 45 Fed. 655.]

7. It is not the duty of a lookout to reannounce a light, unless some new conditions occur which an intelligent officer of the deck would not anticipate, and in reference to which some new order would be given. In this case, the continuous bearing of the tug, which indicated her to be at rest instead of under way, did not present such conditions, as the fact was common, and did not suggest the slightest danger or difficulty.

8. Where the original libel set up a grossly false case, and an attempt has been made to support it by inherently incredible proof; although an amendment has been allowed in the court below, alleging a right of recovery upon wholly different grounds, these facts may rightly be looked to on appeal, in denying relief by a division of damages, in favor of a libellant who thus concealed his own wrong, and sought a recovery in full from the respondent.

Libel and cross libel for collision. The collision occurred on Lake Huron, some five or six miles from, and a little above the port of Lexington, in the state of Michigan, at about three o'clock in the morning of the 14th day of June, 1869. The night was clear, and although it was not yet daylight, the morning had dawned, and a vessel could be seen from one and a half to two miles distant. The wind was southwest. The tug was then, and for several hours previously had been waiting for a tow. She had her bright and colored lights burning; and although her steam was up, her machinery was not in motion, and she was lying entirely still, except that she was drifting before the wind in a northeasterly direction, at the rate of from one to two miles per hour. At the time of the collision she was heading eastwardly, or as some of the witnesses say, east by north half north. The bark was on a voyage from Erie to Chicago with a cargo of coal, and at the time of the collision was, and for some time previously had been sailing on a course north half west. She had all sails set, and was moving through the water at the rate of about nine miles per hour. The bark struck the tug while the latter was lying as above described, hitting her just forward of the pilot-house, at about right angles, or perhaps angling a very little forward, crushing in her timbers, and causing her to sink in about 15 minutes. The fault charged in the libel against the bark was a sudden change of course when in dangerous proximity to the tug, thereby causing the collision.

The defense set up by the answer for the bark, and the faults charged against the tug by the answer and cross libel, were: (1) The change of course alleged against the bark is denied. (2) It is denied that the tug's officers and men were properly stationed and attentive to their duties, and the contrary is charged. (3) It is charged that the tug lay where she did, directly in the path of vessels, without proper lights, with no lookout or officer on deck, a mere obstruction to navigation. (4) "That, about 3 o'clock, the bark, heading as above, with all sail set, was proceeding on her course a few miles off Lexington, in the usual frequented track of vessels; a bright and green light was discovered a little over the port bow, indicating a steamboat standing to the eastward; that said bark was kept steadily on her course until a collision was inevitable, when the helm of the bark was ordered hard up, to ease the blow, if possible, but before said order could take effect the bark and tug collided."

The evidence showed that the lights of the tug were seen from the bark, as above stated, when one and a half to two miles distant. Upon the trial it was claimed by the respondent that the allegation of the libel, with regard to a change of course on the part of the bark, was not sustained by a preponderance of testimony; but it was insisted by libellant that, even if this were so, she had been guilty of other faults contributing to the collision; and permission was given to amend the libel by inserting the following averment: "That said tug was then lying motionless upon the water, and out of the track of vessels going up and down the lake; that, as your libellant is informed and believes, no proper lookout was kept upon the said bark; and that the said collision was occasioned by the failure of the officers and crew of said bark to see said tug, to discover that she was not in motion, and to take steps to avoid her."

The following opinion was delivered by the district court:

"The only fault attributed to the bark by the original libel, viz., a change of course, is not sustained by the proofs, but on the contrary it clearly appears that the bark kept her course without any variation up to the moment of collision. If the trial had been confined to this one allegation of fault, the libel should clearly be dismissed. But such is not the case. A large portion of the testimony, admitted without objection, relates to other questions of fault on the part of the bark, and of excuse on the part of the tug, than those set up in the libel, and the case was really tried and submitted upon those

other questions. I had no doubt the case had been as fully and fairly tried, and could be as satisfactorily disposed of as it could be if the original libel were dismissed and a new one filed, covering the case more fully as made by the testimony. The court, therefore, in the exercise of that broad discretion possessed by it, allowed the libel to be amended, and will dispose of the case upon the merits as really presented and submitted at the hearing. [The Syracuse] 12 Wall. [79 U. S.] 167. It is clear to my mind that gross faults are attributable to both vessels.

"First. As to the tug. The tug, showing as she did, the lights of a steam vessel in motion, must be held to the responsibilities and duties of such vessel. By article 15 of the collision act of 1864 [13 Stat. 60], it was the duty of the tug to keep out of the way of the bark, provided the bark kept her course, as was her duty under article 18. The bark, as we have seen, did keep her course. Therefore, the tug is clearly in fault in not keeping out of the way of the bark, unless the excuses set up for her, or some of them, are tenable. The excuses set up. It is contended on behalf of the tug, that she had a right to lie where she was lying, in wait for a tow, and that it was customary for tugs to do so. The tug undoubtedly had the right claimed; but while exercising that right she had no right to exhibit the lights of a steam vessel in motion, and thereby mislead other vessels as to her status and intentions. If she would exercise that right in the night time in such a manner as to exempt herself from the duty imposed by article 15, she must do so at anchor, and with her anchor light up. It is also contended on behalf of the tug that some portions of her engine or machinery were partially disabled, in consequence of which she could not get under motion readily when lying still. This excuse is clearly untenable, because, first, it appears that no effort whatever was made to put her in motion; and, second, it does not appear but that there had been ample opportunity for repairs since the disability was known to exist. The tug, then, was clearly in fault in not keeping out of the way of the bark.

"Second. As to the bark. The duty of a steam vessel to keep out of the way of a sailing vessel, and of the latter to keep her course, does not excuse the sailing vessel from the observance of ordinary care in her navigation, nor from the use of such means as may lie in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by a non-observance of duty on the part of the steam vessel. Such I understand to be the effect of article 19, which is as follows: 'In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.' That is to say, these rules are made expressly for preventing collisions. Now, if under 'any special circumstances which may exist in any particular case,' it is necessary to depart from these rules in order to accomplish the very object the rules are intended to accomplish, then it is just as much the duty of a vessel to depart from the rules, as it is under other circumstances to adhere to them. It will not do to say that because one vessel shall fail to do its duty, the other is thereby licensed to run her down and destroy her when such a result may be avoided by the exercise of ordinary care and precaution. And yet in order to exonerate the Sunnyside from blame in this case we must adopt that theory. The bright and green lights of the tug were seen and reported by the lookout on the Sunnyside when one and a half to two miles distant. The lights were seen a little over the port bow of the bark, and clearly indicated a steam vessel headed to the eastward and across the bows of the bark. When the tug's lights were reported by the lookout, the mate then in charge of the navigation of the bark came forward and looked at the tug's lights, and said to the lookout he 'supposed it was a steamer, and guessed she would take care of herself.' The mate then went aft to watch some lights there were to leeward, and paid no further attention to the tug's lights; and from this time the tug's lights were not reported, nor was any watch kept, or any notice whatever taken of them on board the bark until the lookout saw the tug right under the bows of the bark, and a collision was inevitable. Ordinary care and precaution require that when a light is once seen in circumstances to involve risk of collision, close watch must be kept of such light until it is safely passed. See article 20, Collision Act April 29, 1864; 1 Pars. Shipp. & Adm. 595, note 3; The Gray Eagle, 9 Wall. [76 U. S.] 505; The Havre [Case No. 6,232]; The Maria Martin, 12 Wall. [79 U. S.] 31, 47.

"The lights of the tug, as we have seen, were made from the bark when from one and a half to two miles distant. The bark was moving through the water at the rate of nine miles per hour, at which rate she must have been from ten to fourteen minutes reaching the tug after her lights were first seen from the bark. There could have been no difficulty, by the exercise of the commonest care and precaution on board the bark, in determining that the tug was not in motion, but was slowly drifting right up into the course of the bark, where a collision must be inevitable unless the bark herself did something to avoid it. Neither was there any difficulty in the way of the bark avoiding a collision, and if ordinary care and precaution had been exercised, she would no doubt have done so. Because that care and precaution were not exercised, the presumption is that the bark was in fault,

and that such fault contributed to the collision; and, such presumption not being rebutted, she must stand her fair proportion of the loss occasioned by it. [Williamson v. Barrett] 13 How. [54 U. S.] 108; [The Ariadne] 13 Wall. [80 U. S.] 475, 478.

"The tug and the bark were therefore both in fault, and the damages sustained by both on account of the collision must be equally divided between them. Decree dividing damages." [3]

From this decree an appeal was taken by the owner of the bark.

H. B. Brown and W. A. Moore, for the libellant and appellee.

The evidence clearly shows that the lookout upon the bark, after making the tug's light at a distance of 1½ miles and nearly dead ahead, turned to look for other lights, and paid no further attention to the tug until he saw her directly under his jib-boom. It is hardly necessary to cite authorities to the proposition that the want of a proper lookout is a fault of the grossest description, and in case of doubt, every presumption is in favor of the proposition that it contributed to the collision. From the multitude of cases, the following are cited: 1 Pars. Shipp. & Adm. 577; The Wings of the Morning [Case No. 17,872]; The Emily [Id. 4,453]; The Blossom [Id. 1,564]; Goslee v. Shute, 18 How. [59 U. S.] 463; Whitridge v. Dill, 23 How. [64 U. S.] 448. There must not only be a proper lookout, but he must actually perform his duty. The John Fraser, 21 How. [62 U. S.] 184, 195; The Vianna [Swab. 405]; 1 Pars. Shipp. & Adm. 577, note; The Genesee Chief, 12 How. [53 U. S.] 443. Though a sailing vessel, meeting a steamer, is bound, in general, to keep her course, she has not necessarily discharged her whole duty by so doing. She is bound to watch a steamer's lights as much as those of a sailing vessel, and to prevent a collision if she can. The tug may be disabled or unable to move, and still not in fault for exhibiting colored lights (The Esk, L. R. 2 Adm. & Ecc. 350; The George Arkle, Lush. 382), a white light being proper only when a vessel is actually holden by her anchor. She may be in actual violation of a rule of navigation in not keeping out of the way, but, certainly, that does not authorize a sailing vessel to run her down. Other "special circumstances" may exist, requiring a departure from the general rule, and under article 19 of the sailing rules, the vessel is bound to provide against such emergencies. By article 20, nothing can exonerate for "the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." 1 Pars. Shipp. & Adm. 580, 595; The Hope, 1 W. Rob. Adm. 157; The Cornelius C. Vanderbilt [Case No. 3,235]; The New Champion [Id. 10,146]; The New Jersey [Id. 10,161].

It is evident if the lookout had watched the tug's light carefully, he would quickly have discovered she was at rest; as her motion, if she had been moving, would have been directly across his course; and this he admits—it would then have been his duty to call the mate's attention to the fact, and that of the mate to hail her or otherwise attract her notice, and failing to do this, to starboard his helm a point and pass under her stern after he had approached so near that it had become apparent that an immediate change must be made to avoid a collision. He would have no right then to assume that the tug would back to get out of his way. The position taken by claimant is based upon the theory that a sailing vessel encountering a steamer, has but a single duty to perform, and that she may dash blindly on her course, treating the steamer, what she is averred in the cross-libel in this case to be, a simple "obstruction to navigation." There are three cases which cover this completely: The A. Denike, reported in 1 Pars. Shipp. & Adm. 595, note 3 (U. S. Cir. Ct. Mass.), where the similarity is positively striking: even the same expression was used by the pilot; The Gray Eagle, 9 Wall. [76 U. S.] 505, where the proposition is distinctly laid down that it is the duty of a lookout to watch a light until all danger is past; that because a white light usually indicates a vessel at anchor, it need not always do so, and that the fault of one vessel does not authorize another to run recklessly over her; The Havre [supra], where the same proposition was substantially repeated. See, especially, remarks of court on page 303. See, also, The Wings of the Morning [supra]; The Ariadne, 13 Wall. [80 U. S.] 475. In the case of The Hope, 1 W. Rob. Adm. 157, it was held, by the high court of admiralty, that no vessel shall unnecessarily incur the probability of a collision by a pertinacious adherence to the strict rules of navigation. In the following cases it was held that the fact that one vessel is in fault will not justify another in the infliction of an injury which could have been avoided by the observance of proper skill and care: Mills v. The Nathaniel Holmes [Case No. 9,613]; Western Ins. Co. v. The Goody Friends [Id. 17,436]. The rule is equally well settled in the common-law courts, that a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it if he does not himself use common and ordinary caution. The fact that a person is riding on the wrong side of the road will not authorize another to ride against him. Butterfield v. Forrester, 11 East, 60; Bridge v. Grand Junction R. Co., 3 Mees. & W. 245; Gough v. Bryan, 2 Mees. & W. 770; Munroe v. Leach, 7 Metc. [Mass.]

[3] [A reference was had to a master, and exceptions filed to his report were overrruled, and a final decree entered for the libellant for $4,724.09, together with costs of the suit. Case No. 13,621.]

274; Farwell v. Boston & W. R. Co., 4 Metc. [Mass.] 49; Ang. & D. Highw. § 345; Shear. & R. Neg. § 33, note 2. We cheerfully accede to the doctrine that where a fault is proven it will be presumed to be the cause of the collision, but insist it has no application where a contributory fault is clearly shown. 1 Pars. Shipp. & Adm. 580, 595; Williamson v. Barrett, 13 How. [54 U. S.] 101.

F. H. Canfield and G. V. N. Lothrop, for the claimant and cross-libellant.

No case can be found where a sailing vessel has kept her course and been condemned for a collision with a steamer, where the latter exhibited the lights of a vessel in motion. The allegation of a change of course on the part of the bark, was not insisted upon at the argument. The tug was at rest while displaying the signal lights of a vessel in motion, and the presumption is that this contributed to the collision. Waring v. Clark, 5 How. [46 U. S.] 465; The Esk, L. R. 2 Adm. & Ecc. 350; The Continental [Case No. 3,141], Taylor v. Harwood [Id. 13,794]; The Scotia [Id. 12,513]. By lying practically at anchor in the pathway of vessels, exhibiting the lights of a steamer under way, yet making no effort to avoid the bark which she had deceived as to her true character and condition, she was guilty of a positive and willful violation of law. All doubts should be resolved against her. The rules prescribed by the collision act should be rigorously enforced. St John v. Paine, 10 How. [51 U. S.] 557; Crocket v. Newton, 18 How. [59 U. S.] 583; Steamship Co. v. Rumball, 21 How. [62 U. S.] 385; The Carroll, 8 Wall. [75 U. S.] 305; The Johnson, 9 Wall. [76 U. S.] 146; The Fannie, 11 Wall. [78 U. S.] 238. It was the duty of the bark to keep her course. The tug had the right to lie still till there was danger of collision, and it is conceded that up to this time the bark was not in fault for keeping her course. But it is only at this point that the rules themselves apply. They require the bark, after there is probability of collision, to keep her course. Had she failed to do so she would have been a wrong-doer. The Potomac, 8 Wall. [75 U. S.] 592; Bentley v. Coyne, 4 Wall. [71 U. S.] 512; Baker v. City of New York [Case No. 765]; Wakefield v. The Governor [Id. 17,049]; Haney v. The Louisiana [Id. 6,021]; The Corsica [Id. 3,256]; S. C., 9 Wall. [76 U. S.] 630; The William Young [Case No. 17,760]; The Oregon v. Rocca, 18 How. [59 U. S.] 572; Crocket v. Newton, Id. 581; The Northern Indiana [Case No. 10,320]; The Clement [Id. 2,879]; The R. B. Forbes [Id. 11,598]; The Western Metropolis [Id. 17,441]; The Test, 5 Notes of Cas. 276; The George, 2 W. Rob. Adm. 386; The Vivid, 7 Notes of Cas. 127; The Superior, 6 Notes of Cas. 607. There was no want of a proper lookout upon the bark. He was an experienced sailor, properly stationed. He reported the light to the officer, who came forward and looked at it. A proper construction of his testimony shows that it is not true, as argued, that he paid no further attention to the light till the collision was inevitable. He says the bark kept straight on her course, and he saw no change in the tug's lights; and at the time of the collision he saw the same lights he had seen from the first. But even if the lookout was insufficient, it did not contribute to the collision, as it would still have been the duty of the bark to keep her course. The Fannie, 11 Wall. [78 U. S.] 238, The Europa, 2 Eng. Law & Eq. 557; The City of Paris [Case No. 2,765]; The Hansa [Id. 6,038].

The libellant fails to show that the officers of the bark could have ascertained by the exercise of ordinary care that the tug would not get out of the way, and that a change of course was necessary. They had a right to presume the tug would obey the law, and not violate it. Williamson v. Barrett, 13 How. [54 U. S.] 101; The Clement [supra]. If there are any doubts they must be resolved against the tug. Wheeler v. The Eastern State [Case No. 17,494]; Strout v. Foster, 1 How. [42 U. S.] 89; Halderman v. Beckwith [Case No. 5,907]; The Delaware v. The Osprey [Id. 3,763]; The Ariadne [Id. 525]; The Test, 5 Notes of Cas. 276; The Grace Girdler, 7 Wall. [74 U. S.] 203. Admitting the bark might have been managed more wisely, her master was guilty only of an error in judgment, not of a fault. The Delaware v. The Osprey [supra]; The Genesee Chief, 12 How. [53 U. S.] 268; The Scotia [supra]; The Grace Girdler, 7 Wall. [74 U. S.] 203; The City of Paris, 9 Wall. [76 U. S.] 638; The Carroll, 8 Wall. [75 U. S.] 305; The Favorita [Case No. 4,695]. The tug, having been guilty of such gross fault, is not entitled to recover, even though the bark was not managed with all that care which the law requires. The Wm. Young [supra]; The Catherine of Dover, 2 Hagg. Adm. 145; Ward v. The Fashion [Case No. 17,154]. The tug, having been guilty of a positive violation of law, all doubts are to be resolved against her, and the burden is upon her to show that the accident would have happened if she had performed her duty. The Pennsylvania [Id. 10,950]; The Comet [Id. 3,051]; The Continental [Id. 3,141]; The Favorita [supra]; Taylor v. Harwood [supra]; Saltonstall v. Stockton [Case No. 12,271]; The Ariadne, 13 Wall. [80 U. S.] 479. The cases of The A. Denike and Gray Eagle are the only ones which tend to support the theory of the tug.

EMMONS, Circuit Judge. The tug Goodnow was lying for a tow in Lake Huron, in the vicinity of the head of St. Clair river, in conformity with a well known usage. It was about 3 a. m., and although still dark, her hull could be seen in time to avoid her, had it been known she was without a lookout, and would not herself discover approaching ships,

so as to perform her duty and move out of the way. All her lights were brightly burning, with steam up, ready at any moment to move. A great number of vessels were in the vicinity. She was drifting before the wind, about two miles an hour, with her head to the eastward, so as to display to the Sunnyside, which was approaching from the southward, her white and green lights. These were seen by the latter nearly ahead, but, we infer, somewhat over the larboard bow, long before the collision, and, by the experienced lookout, announced to the master in charge. He came forward, observed them, and remarked they were on a steamer, and that she "was all right." He soon went further aft, to his more common station midships, where he could walk from side to side, in the observance of other lights, and where he could from time to time approach the compass, and issue orders at the wheel. The Sunnyside's speed was about nine miles an hour. The lookout observed the continuous bearing of the tug, which indicated she was not under way and lay nearly in his path. It was not until they approached the immediate vicinity of the tug that the lookout, having had his attention turned in other directions by different lights discovered that they were in dangerous proximity. He then hastily announced the fact to the master. The latter at once gave orders to starboard, but too late to avoid the disaster which sank the tug. Upon these facts it is claimed the bark was to blame for not starboarding earlier. With some doubt, and after much hesitation, we hold the Sunnyside to be without fault, believing that, in the circumstances, she was warranted in keeping her course. In arriving at this conclusion, we are in some degree influenced by the wholly inexcusable and exceptionally gross character of the Goodnow's fault The nature of the original libel and the untruthful and now abandoned proof to support it, we hold as legitimate subjects of consideration in denying a remedy.

In order to appreciate the character of the misrepresentation in the original libel and proofs, it must be borne in mind that it is now conceded the Sunnyside was at no time over the tug's quarter, or in any direction where by any possibility she could be supposed to be there. Without attempting literal accuracy, substantially the original libel alleged that, while the tug was lying as already indicated, the Sunnyside was made over their starboard quarter, and so far astern that there would have been a broad berth between them, as she passed, of nearly half a mile. That, instead of keeping her course under the rule, she suddenly ported and ran down the Goodnow. No confession of fault was made; but a case stated, having in no one of its features the most distant resemblance to the facts as they are now conceded at the bar, and contained in the amended libel. The owner of the tug was on board, and the libel necessarily framed from his and his officers' statements This false case was sought to be supported by testimony so inherently absurd and so undeniably untrue, that it is unworthy of criticism. In all this there is much which, unexplained, is so highly unconscientious as to merit censure, and essentially affect the right to relief. The Mabey and Cooper, 14 Wall. [81 U. S.] 205. No question as to the circumstances in which the amendment was made has been raised here. That no person on board the tug saw the lights of the Sunnyside until just as the collision occurred, is conceded. If they did see them, their fault is only the more extraordinary. The amended libel charges four faults upon the bark: that she had not a proper lookout; that she did not see the tug; that she did not perceive that the tug was not in motion. These imputations are conclusively negatived by the testimony. The fourth is a vague generality, giving no enlightenment to respondent, and is such as we would, upon exception, hold not to be the subject of proof. The officer in charge having once observed the light, had full authority to act upon the assumption that the steamer would avoid him. We hold, if a light is announced to the officer in charge of a vessel, obliged under the rules to keep her course, and from full observation, the unambiguous apparent conditions in reference to wind, atmosphere, course, distance and character of the vessel, all indicate absolute safety if the law of the road is complied with, he may leave the future watching of such a light to an experienced lookout. It will not be a fault that he does not himself remain with the latter and participate in his observation. He may return to his post further aft, to his general duties in the ship, and especially, if other lights are off abeam and over the quarters, give his attention to them, and in all cases frequently to his compass and his own course.

The application of the principle to ships whose duty it is to avoid others, requires only a more close criticism of the circumstances, and more frequently demands longer and continuous observation by the master. If, from such observation, any circumstances known, or which with ordinary diligence might be known, indicate a departure from the rules by the approaching ship, or would suggest danger of collision, from any cause, to an intelligent seaman, the duty of careful and continuous watchfulness is imposed upon the master He would have no right in such a case to leave to the lookout the difficult duty of deciding when, on account of increasing hazard, he should again announce the light. When, in these latter circumstances, the officer has exercised his best judgment, and kept his course, or, waiting until the peril was great, has departed from the general rule, the court should not reverse his judgment, unless the error has been gross and unpardonable It is not the duty of a lookout to reannounce a light, unless some

new conditions occur, which an intelligent officer of the deck would not anticipate, from the first observation made, and in reference to which it is in some degree probable a new order would be given.

These general principles, we think, will receive a ready common assent. We apply them here as follows: That the master performed his duty by remaining aft, where he could not see the danger, we have already sufficiently said. We think it equally clear that the lookout did his. An unnecessary argument was made to show that he might, from her continuous bearing, perceive that the tug was at rest. This seaman frankly swears he did so perceive it, and the fact is too apparent for discussion. But it indicated nothing in the least unusual, and imposed no duty upon the lookout of reannouncement. Certainly when not at a distance, because the custom is as common as the trips of the sail craft for which they lay in wait. Nor was a near approach with the same condition any more alarming. It is a common practice for these vessels to wait before they move for the close proximity of those which approach them. As a class, they are small vessels, with powerful engines, and are both started and backed with the utmost rapidity. From the nature of their avocations they acquire an extraordinary dexterity in avoiding vessels close aboard, and consequently, beyond all others, risk nearness of approach. If this one had not the characteristics of her class, it but adds another reason why assuming their attitude and proclaiming that she had, relief should be denied. Out of many thousands of instances where similar vessels have lain in the same way, not one in the whole history of navigation is known to have failed in the performance of her duty. The lookout had a right to repose, therefore, not only upon the statutes of the country, but upon the peculiar power and long practice of this class of ships to perform in just their circumstances the duty which they impose. It was in the night, when no eye can measure the distance to a light, or the hull of a ship of unknown size, so as to discover the difference between two, four and six hundred feet. The tug was already moving two miles an hour before the wind. The bark was going nine, with her bows alternately elevated and depressed, and swayed to the right and left as she rose and fell with the waves. These conditions rendered an immediate discovery of the precise moment when the tug, by a few turns of her wheel, should move slightly ahead or astern, as she should elect, utterly impossible. If life depended upon it, it could not be done. She would have to pass several times the distance necessary to avoid the bark before her movement could be perceived by the lookout.

He, too, was engaged in watching for other lights, in entire confidence that this one would move out of his way, and would not, upon the most familiar principles, give it any particular attention. That he would from time to time see it, is certain, because it lay in plain sight before him, and he concedes he did observe its continuous bearing. But it is equally certain, if he was actuated by the motives of ordinary men, he would not, as he states, particularly notice it until some new and extraordinary predicaments suggested that it was not likely to obey the laws which so many hundreds before had obeyed in like situations. Add to these conditions the rule of law, that if the bark changed her course at all in advance of real danger, she would be condemned for the fault, and we have presented predicaments in which it seems to us little less than a cruel misapplication of rules to hold the vessel liable because the lookout did not decide the precise moment at which he crossed the line of safety. We asked in vain from the learned and experienced counsel in this case a diagram designating in time and distance the point at which the lookout should have reannounced the light. None such has been furnished. We apprehend it would be difficult to draw one which would stand the criticism of an expert.

In a case where the fault of the libellant is excessively gross, where the bark has kept her course in accordance with the law, where her officers and lookout are proved to be of the very highest character, and where, to say the least, their conduct has been all which in ninety-nine cases in the hundred can be secured, we should deem it most impolitic for the safety of navigation, a discouragement to the performance of duty by good seamen, to set up in court, for the benefit of those who have outrageously violated the law, a rule of criticism which would condemn the respondents' ship. In exceptional circumstances, and under the stimulus of apprehended danger, "sleepless vigilance," rightfully in such circumstances demanded, is possible. With our present faculties it cannot be long sustained, nor do the ordinary exigencies of commerce demand it. When the facts presented not only fail to excite suspicion of peril, but, where viewed in connection with legal rules, authorize entire confidence that all is safe, ordinary care is all which can be continuously exercised, and all which the law requires.

We would like to have grouped the decisions which sustain more pointedly the various propositions involved in the preceding disposition of this case. Again compelled to work in an unusual mode from failing sight, and with many undecided cases demanding attention, we can do no better than to refer to judgments in the order in which they have been examined. In our selections we can go but little beyond the exceptionally full and thorough briefs of counsel.

The following cases show our judgment would be sanctioned by the English admiralty courts: The Test, 5 Notes of Cas. 276. Dr.

Lushington says: "I cannot conceive that anything would be more likely to lead to mischievous consequences than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequences would be that there would be no certainty. The certainty which results from adhesion to general rules is, in my opinion, absolutely essential to the safety of navigation." The George, Id. 371. This is emphatically repeated by the same judge. The Superior, 6 Notes of Cas. 607. He says the proof must be entirely clear, showing the necessity for the deviation, before it can be even justified. It is a different thing to hold that a neglect to do so is a fault. And see, equally pointed, a case quite beyond the requirements of the Sunnyside, The Vivid, 7 Notes of Cas. 127; The Immaganda Sara Clasina, Id. 582. A vessel, whose duty it was to keep her course, did not deviate until she had twice hailed the other, and at last, in alarm, did so, and was condemned in the entire damage. It is an extreme case, and goes far beyond what it is needful now to argue. We would hold the master blameless if the approaching ship neglects his duty so long as to produce alarm in an experienced sailor. And see a more recent enforcement of the same rule, The Gitana and The Esk, L. R. 2 Adm. & Ecc. 350. The Esk's light indicated her at anchor. Minute observations might have discovered she was in motion, but the Gitana was held faultless for full reliance on the lights.

The decisions of our own courts are equally pointed in the same direction. The Clement [supra]. A ship, conceding her own fault, asked a decree for division against another which was entitled to keep her course. It had been plausibly argued, as in this case, that as she approached close to it, it was entirely manifest a movement on her part would have prevented the disaster. Judge Curtis says: "Upon the rule of navigation applicable to such cases, he was not only in the right in acting upon the assumption that the brig would be so steered as to keep out of his way, but he was bound to act on that assumption, and keep his course, unless he saw that there would be no probable chance of a collision if he disregarded the rule." The Ariadne [supra]. A brig, having an imperfect starboard light, was sunk in the night by a steamer. It was sought to sustain the libel on the ground that by extraordinary vigilance the brig might have been sooner seen. Judge Woodruff, affirming the decree dismissing the libel, says: "But vessels have a right to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations, and where the negligence of the sailing vessel, and her failure to comply with the statute requiring her to bear a light which can be seen at a distance of two miles, have led the steamer into danger of collision, it is not for the sailing vessel to insist that by more than usual vigilance she might nevertheless have been discovered at a few yards' greater distance, and to claim contribution on that ground." This case is reversed in 13 Wall. [80 U. S.] 475, but upon grounds which do not in the least affect the principle for which we quote it. That court, taking an entirely different view of the facts, declared the steamer guilty of gross fault, that "for all the purpose of the case, there might as well have been no lookout on the steamer." The expressions in reference to "sleepless vigilance," are carefully confined to the crowded thoroughfare in which the collision occurred, and were applied to a ship upon whom was cast the duty of avoidance. They notice, too, that although the light of the bark was dim, she could have been seen a quarter of a mile, if the lookout had done his duty. The judgment in no way qualifies the rule of law laid down by the circuit and district judges, that the gross fault of a libellant cannot impose exceptional vigilance upon another. This is well-settled law in the supreme court. In The Comet [Case No. 3,051], Judge Woodruff says that where a party seeks a recovery after confessing a fault on his part, he must be held to the clearest proof of wrong on the part of his adversary. It is not enough to leave it in doubt. In Saltonstal v. Stockton [Id. 12,271]; Chief Justice Taney lays down the following principle at common law, which is equally applicable in a court of admiralty: "If a man unlawfully places another in a situation which compels him to undergo one of two hazards, and forces him to choose upon the instant between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted." The Scotia [Id. 12,513]. The Berkshire, with illegal lights, led the Scotia to suppose that it was a steamer, at so great a distance that her colored lights were hid by the convexity of the ocean. She was, in fact, but a few rods off. In a judgment which, on account of the magnitude of the values involved, was the result of more than ordinary examination, Judge Woodruff, affirming on appeal what Judge Blatchford had ruled in the district court, said: "It was night, the distance of the Berkshire could not at that instant be known. If the Scotia attempted to go to port, it was not at all improbable that she would meet the ship while in the act of turning, while by turning to starboard there was a like uncertainty. Her officers must choose. They did exercise their judgment in good faith, and yet the collision ensued." Attention is called to the fact that lights, in reality within a few rods, were supposed four miles off upon the mast of a steamer whose colored lights were below the line of vision over the water. Here the Sunnyside is asked to decide, within two or three hundred feet, the precise distance of the Goodnow. This case has been affirmed

by the supreme court, although not yet in the reports. The William Young [Case No. 17,760]. A sailing vessel, in fear of a collision, having changed her course to avoid it, was injured by a steamer. Judge Betts says: "Sailing vessels cannot justify a departing from their course on a probability of encountering an approaching steamer, unless she is crowding so much upon the track as to create imminent danger of collision." The R. B. Forbes [Id. 11,598]. The libellant's vessel saw a steamer more than a mile off; she might easily have avoided her by a slight movement, but as it was her duty to keep her course, Judge Sprague decreed for the whole damage, upon the ground that she had a right up to the last moment to suppose the steamer would avoid her. He adds, it would have been a fault for her to have changed her course. The Corsica, 9 Wall. [76 U. S.] 630; s. c. [Case No. 3,256]. It was the duty of the America to avoid the Corsica. In attempting to cross her bows at a late period, discovering it was too late to do so, she stopped and backed. The Corsica, in the supposition that she was going to carry out the attempt, starboarded. This would have been entirely safe, but for the unexpected backward movement of the America. Although the Corsica was misled into this movement, the district, circuit, and supreme courts all condemned her in the entire damage of thirty-three thousand dollars. She did not adhere to the rule and keep her course. Bentley v. Coyne, 4 Wall. [71 U. S.] 512. When a vessel, at the last moment, in great peril, altered her course, the court, in holding it justifiable in the circumstances prescribes rules clearly showing the Sunnyside was right in holding it, even if it would not have been a fault to do otherwise.

It is in no disregard of the familiar rule that the admiralty, if it suffers recovery at all, where there is mutual fault, equally divides the damages, that we say that when there is a gross and criminal departure from well-settled rules and an absence of all common care on the part of the libellant, he should not be entitled to recover, even although he succeeds in proving a slight fault against his adversary. The Comet [supra]. Judge Woodruff examined the question of fault on the one side, in the light of that shown upon the other. Numerous judgments pursue the same course. It may, perhaps, resolve itself into the simple truism that the more gross and improbable is the fault, upon the one side, the less is the duty of observation and of its anticipation on the other.

An extraordinary criticism is made in this case. Complaint is made that a lookout on a vessel entitled to keep her course, with a light before him which a seaman of common prudence would take for granted would get out of the way, temporarily took his eyes from it to watch other points of the horizon along which were numerous lights. Wholly unreasonable as is such an objection, when coming from the mouths of those who put them forth to protect themselves from the consequences of their own wrongs, they are nevertheless not novel, and have been frequently answered by judges of the highest character. The Europa, Brown. & L. 89; 2 Eng. Law & Eq. 557. The privy council, affirming the decision of the high court of admiralty, dispose of such a criticism in favor of this bark. The Charles Bartlett, being close-hauled, and bound to keep her course, and the steamer which sunk her having been found in fault, it was urged the sail vessel should contribute to the damage, because, among other imputed faults, it was conceded the lookout, just before the collision, had his attention attracted from the steamer by turning to observe some workmen engaged in coppering the rail. Their lordships say: "We can pay no attention to that argument; his business as lookout was to walk with his eyes to the horizon, but that does not mean that he is not to turn his eyes off to watch what a man is doing. All these expressions, 'lookout,' are to be taken in the common sense. He might do that, and look after the man coppering the rail." They say, as the bark was entitled to keep her course, the absence of a lookout was less important. Answering the objection that the bark might have heard the steamer sooner, they add: "Now we think, with reference to that, the circumstance that she was keeping her course was very important, because a ship keeping her course is only bound to go on and keep her course; not anticipating and watching that other persons are coming. If she had heard something was coming, she would have been entitled to consider that it would come so as not to do her damage." A different rule, of course, would apply when perceived irregularities indicated danger, and especially to a vessel bound to avoid another.

When that high degree of watchfulness necessary only in circumstances of danger, is in argument required of those who are entitled to their way, upon the ground that unexpected irregularities may attend the movements of an approaching ship, the appropriate answer is that given by Judge Woodruff in The Scotia [supra], where substantially he says: such a position assumes what is not to be assumed; that irregularities will occur, or that officers, without evidence that they are probable, are bound to presume they will happen. Not in reference to a vessel having a right to keep her course, but to those who are bound to keep out of the way, and where a higher duty is imposed than that demanded of the Sunnyside, the supreme court in The Grace Girdler, 7 Wall. [74 U. S.] 203, lays down the following reasonable rule: "The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and prop-

erty." The remarks in Williamson v. Barrett, 13 How. [54 U. S.] 101, are peculiarly applicable in cases like this. The supreme court says it is by no means enough to show that a particular act or movement would prevent a collision, it must further appear it is a legal duty to make it. In ninety-nine cases in a hundred, vessels bound to keep their course might save collision by deviation, but it is not their legal duty or right to do so. Equally stringent in the application and unambiguous in expressing the rule in manifold applications are The Continental [Case No. 3,141], by Judge Woodruff; Wheeler v. The Eastern State [Id. 17,494], by Judge Curtis; The Favorita [Id. 4,695]: Taylor v. Harwood [Id. 13,794]; The City of Paris, 9 Wall. [76 U. S.] 635. In Baker v. The City of New York [Case No. 765], Judge Clifford says: "The vessel whose duty it is to keep her course should do so as if there were no danger." And in Wakefield v. The Governor [Id. 17,049] he adds that these suggestions, that a ship bound to keep her way might by deviation avoid the collision, are entitled to but little weight. See, also, The Catherine of Dover, 2 Hagg. Adm. 145; Ward v. The Fashion [Case No. 17,154]; The Lion [Id. 8,379]; 1 Pars. Shipp. & Adm. 529, and cases cited; The Carroll, 8 Wall. [75 U. S.] 305; The Johnson, 9 Wall. [76 U. S.] 146; Crockett v. Newton, 18 How. [59 U. S.] 583; The Steamship Co. v. Rumball, 21 How. [62 U. S.] 385. See, also, The Free State [Case No. 5,090], decided by this court, in which the general principle authorizing full confidence that the rules of navigation will be adhered to is announced, and the leading judgments considered.

A full consideration of the books cited by the libellants is impossible. None of them, save one, purporting to be a correct manuscript report of a decision by Judge Clifford, have any tendency at variance with our judgment. We doubt whether it is fully before us. The Gray Eagle, 9 Wall. [76 U. S.] 505, is cited by the libellants. The case bears no analogy to this. The court say the Gray Eagle was grossly in fault for not perceiving that a light which must have crossed from the larboard to the starboard bow, was in motion and not at anchor. The remark that the master should have watched the light, we should agree with in the circumstances of that case. The Havre [Case No. 6,232], a vessel whose duty it was to keep out of the way, was guilty of manifest irregularities in such ample time before the collision, that had they been known to the officer on the other ship, ordinary prudence would have demanded a deviation. The lookout signally failed to do his duty. The case is but a common illustration of principles we fully concede. With some of the arguments in the opinion, if, as we much doubt, it is intended to sustain the inferences which counsel sought to draw from it, we should not agree. The Cornelius C. Vanderbilt [Id. 3,235]; The Hope, 1 W. Rob. Adm. 157, are like cases. 1 Pars. Shipp. & Adm. 580, and notes, refers to the leading cases, holding that a rule of navigation should not be stubbornly adhered to. He remarks that The Oregon, 18 How. [59 U. S.] 570; Crockett v. Newton, Id. 581, take a somewhat different view. If it is supposed that tribunal has decided a rule of navigation may be stubbornly adhered to, we do not so understand them, and certainly proceed in no such notion now. If there be any difference between the English and American rulings upon this subject, the former are more rigid in insisting upon adhesion to rules of navigation.

We think the judgment referred to and the rules best for the safety of navigation, establish the right of the Sunnyside in the circumstances which were presented to her lookout to keep her course up to the point when collision became inevitable. She then did all in her power to avoid it. We find that there was no fault in the master for returning to his post, or in the lookout, standing on the forecastle of his heaving ship, in the night, with no guide object between him and the light, that he did not discover the difference between a movement of two miles an hour and five, or in distance between six hundred feet and two. Carelessness on the part of the libellants, which, if life had been lost was undeniably criminal, can cast no such extraordinary duty upon the approaching ship. Decree for the cross-libellant.

[An appeal was taken to the supreme court, where the above decree was reversed, and the cause remanded, with directions to enter a decree affirming the district court. 91 U. S. 208.]

Case No. 13,621.

The SUNNYSIDE.

[1 Brown, Adm. 415.] [1]

District Court, E. D. Michigan. May, 1872.

DEMURRAGE—DAMAGES—MASTER'S WAGES.

1. Where a tug injured by a collision was a member of an association, into which each boat was put at an appraised valuation, and each drew its pro rata share of the net earnings of the whole, according to its valuation, the dividends paid by the association during the time the tug was laid up for repairs were *held* to furnish a proper basis for demurrage.

2. Demurrage cannot be allowed for unnecessary or unexplained delays.

3. The salary and board of the master while superintending the repairs was also *held* a proper charge.

[Cited in The Alaska, 44 Fed. 500.]

4. When the contract for raising the tug was let at a specific sum, with the proviso that the contractor should have the use incidentally of any other tugs belonging to the association, the services of these tugs were *held* a proper item of damages.

On exceptions to the commissioner's report.

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

The bark Sunnyside was libelled by John Miner, owner of the tug Goodnow, for collision, and a cross-libel was filed against the Goodnow. Both vessels were held in fault, and a division of damages was decreed, and it was referred to a commissioner to ascertain the damages. [Case unreported.] The commissioner having made his report, the owner of the Sunnyside comes in and excepts to certain items allowed by the commissioner. In the following opinion only those exceptions are noticed which were insisted on at the hearing and in the briefs furnished.

F. H. Canfield and Geo. V. N. Lothrop, for exceptions.

H. B. Brown, contra.

LONGYEAR, District Judge. 1. As to the item for demurrage, three months at $1,500 per month, $4,500. The owner of the Goodnow was a member of an association called "The Detroit and St. Clair River Towing Association," composed of owners of towing-boats at the port of Detroit. Each boat was put in at an appraised valuation, and each drew its pro rata share of the net proceeds of the earnings of the whole, according to its valuation. The appraised valuation at which the Goodnow was put in was not shown before the commissioner, but it is now shown by a stipulation between proctors to have been $23,000. The evidence shows that for the navigation season of 1869, in which the collision occurred, the net proceeds were 11 per cent. upon the appraised valuation; and it is now agreed that these data constitute the correct basis of damages for demurrage, which agreement is in entire accord with the opinion of the court. It is also agreed that the season of navigation is comprised in the eight months commencing April 1st and ending November 30th; but advocates are not exactly agreed as to the length of time the Goodnow was necessarily detained on account of the collision. They differ, however, only one quarter of a month, respondents conceding two months, and libellant claiming two and one-quarter months. The collision occurred June 14th, 1869, and the repairs were completed and the Goodnow commenced running September 30th, 1869, as appears by the proofs. This comprises a period of three and one-half months. Damages for detention can be allowed only for such time as was necessary to raise the vessel and make the necessary repairs. Nothing can be charged for unnecessary or unexplained delays. This is conceded. John Miner, libellant, testified before the commissioner as follows: "I commenced raising her nearly three weeks after she sunk. There was a delay of nearly a month after she got to Detroit before she commenced repairing." These delays are not explained, and it is conceded that some deduction ought to be made on account of them. I think the deduction of one month and a half claimed by respondents' advocates is little enough, and that an allowance for two months is liberal. The exception to the allowance for demurrage is, therefore, sustained in part, and a deduction from the amount allowed must be made as follows: Eleven per cent. on $23,000 is $2,530 for the season of eight months. This would give $632 50 for two months, as the correct allowance for demurrage. The deduction, therefore, to be made from the gross allowance made by the commissioner is $3,867 50.

2. As to the item for John Miner's board and wages, $345. The objection to this item is that it does not appear what he did, or that his services were necessary. Miner was master as well as owner of the Goodnow, and, of course, in his capacity of master, his time was worth whatever it would cost to hire a man in that capacity. The collision, of course, threw him out of employment, and, instead of engaging in other employment, it appears from his testimony that he actually worked during the time of the detention of the Goodnow in raising and repairing her. I think, under all the circumstances, he ought to be allowed for his time and board during the necessary detention of the vessel, which, as we have seen, was two months. The rates charged are $100 per month wages, and $15 per month for board. These rates were allowed by the commissioner, and I think correctly. In fact no objection is made on that account. But as the allowance was made by the commissioner for three months, the exception must be sustained in part, and a deduction of $115 must be made from the amount allowed by the commissioner for the one month's excessive allowance.

3. As to the items for use of the tug Park, at $900, Sweepstakes at $150, and Bob Anderson at $300. The raising of the Goodnow was let to one Ballentine for $2,500, and these tugs were used by him in that service. The objection to these items is that these tugs belonged to the association, and, having let the entire contract to Ballentine for a fixed sum, they must get their pay of him, or if they saw fit to donate the use of the tugs to him, they cannot charge the same to the respondents,—in other words, that all the respondents are liable for is the amount for which the contract was let.

The proof shows that these tugs belonged to the association. Ballentine, the contractor, testifies that he took the job of raising the Goodnow at $2,500, and was to have the services of the tug Park in addition; that he found the services of other tugs necessary, and employed the Sweepstakes and the Bob Anderson of the association; that the association, finding he had lost money, donated to him the services of the two last named tugs. This testimony settles the matter against the exception, and in favor of the allowance by the commissioner, so far as the tug Park is concerned. In regard to the

other two, Mr. Livingstone, the treasurer of the association, in his testimony, states the contract with Ballentine as follows: "A contract was made with J. M. Ballentine to raise her for $2,500, and deliver her at a dock in Detroit, with the understanding that he was to have the use of the tug T. F. Park, without charge or expense, and also that he was to have the use, incidentally, of any of the other tugs of the association which he might require, without charge or expense." And on his cross-examination he says: "The three tugs and the incidental help were furnished to Ballentine without charge on the part of the association. That was part and parcel of the contract." And this testimony is not in any manner contradicted, unless a contradiction may be inferred from Ballentine's testimony. But I do not think such mere inference sufficient to do away with Livingstone's positive statements. These allowances were, therefore, correct, and the exception to them is overruled. Ordered accordingly.

[NOTE. An appeal from the decree of the district court dividing the damages was taken to the circuit court, where both parties were again heard. The circuit court reversed the decree of the district court, and entered a decree for the libelant in the cross libel, and dismissed the bill in the suit instituted by the owner of the steam tug. Instead of holding that both vessels were in fault, the circuit court decided that the steam tug was wholly in fault (Case No. 13,620), and the libelant in the principal suit appealed to the supreme court. That court reversed the decree of the circuit court, and remanded the cause, with directions to enter a decree affirming the decree of the district court. 91 U. S. 208.]

Case No. 13,622.

The SUNNYSIDE.

[See Case No. 13,620.]

SUNOL (UNITED STATES v.). See Cases Nos. 16,419-16,421.

Case No. 13,623.

The SUNSHINE.

[1 Brown, Adm. 75.] [1]

District Court, N. D. Ohio. June, 1859.

TENDER—PRACTICE IN ADMIRALTY.

A tender after suit brought must include costs, though the process has not been served.

An attachment was issued against the Sunshine upon a libel filed by one Kimball. The marshal returned that the vessel could not be found in his district. Afterwards the owner came into court, tendered the amount of the debt claimed in the libel, but without costs.

Willey & Carey, for libellant.

Ranney, Backus & Noble, for respondent, insisted that the claimant was not bound to include costs in the tender, as there had been no arrest of the vessel.

WILLSON, District Judge. The tender should include not only the debt, but all costs incurred up to that time, notwithstanding the vessel has never been seized. The filing of the libel and the delivery of the writ to the officer is a commencement of suit which entitles the libellant to costs. Decree for libellant.

SUNSHINE, The (CROSBY v.). See Case No. 3,425.

Case No. 13,624.

The SUNSWICK.

[6 Ben. 112; [1] 15 Int. Rev. Rec. 154.]

District Court, E. D. New York. May, 1872.

SHIPPING — PUBLIC REGULATIONS—INSPECTION OF BOILER—INTER-STATE COMMERCE—FERRY-BOAT —BURDEN OF PROOF—JUDICIAL NOTICE.

1. A libel was filed against a ferry-boat engaged in carrying passengers and freight across the East river, from Astoria to New York City, to recover a penalty of $500 for a failure to have her boiler inspected, as required by the 11th section of the steamboat act of February 28th, 871 (16 Stat. 440). *Held*, that the court would take judicial notice that Astoria was on Long Island, whose inhabitants have commercial relations with other states of the Union, and that it is by means of the ferry-boats that such commerce is carried on.

[Cited in Re Long Island North Shore Passenger & Freight Transp. Co., 5 Fed. 604.]

2. Proof that the ferry-boat did carry the ordinary load of passengers and freight, and was held out as ready to transport on such a thoroughfare all passengers and freight that might offer, was sufficient to throw upon the claimants the burden of proving that such passengers and freight were not destined for other states.

3. In the absence of such proof, the ferry-boat must be held to be within the provisions of the steamboat act.

In admiralty.

J. J. Allen, Asst. Dist. Atty., for the United States.

Beebe, Donohue & Cooke, for claimants.

BENEDICT, District Judge. This is a proceeding in rem, in behalf of the United States, against the steamboat Sunswick, to enforce against that vessel a liability for $500, under the provisions of the act of congress entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," passed February 28th, 1871 (16 Stat. 440).

The charge is that the boat was engaged in navigating public navigable waters of the United States, to wit, the harbor and bay of

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

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

New York, without having her boiler inspected, as required by the 11th section of the statute above referred to.

The defence is that the boat is not shown to be subject to be inspected under the laws of the United States, but was engaged in the purely internal commerce of the state of New York. That the vessel had failed to comply with the section of the statute referred to is conceded, and it cannot be disputed that she is a vessel, within the description given by the act, of vessels to which the law is declared to be applicable.

By the express words of the 58th section of the act, its provisions are made applicable to every ferry-boat; and, by section 41, all steamers "navigating the lakes, bays, inlets, sounds, rivers, harbors or other navigable waters of the United States, where such waters are common highways of commerce, or open to general or competitive navigation," are made subject to the provisions of the act; and, in my opinion, she must, upon the evidence, be held subject to the act, although, notwithstanding its broad language, it be considered inoperative as against a vessel exclusively engaged in purely internal commerce.

The evidence shows that, at the time complained of, the Sunswick was a steam ferry-boat used as one of the ferry-boats employed to operate the Astoria ferry, and ran between Astoria, a place on Long Island, to the foot of 92d street, a place on New York Island, carrying passengers and freight. It also appears in evidence that the Astoria ferry is a public ferry, established by law, and a common thoroughfare open to all, and used for the transporting of all passengers and freight which cross the East river at that point. Judicial notice may be taken of the fact that Astoria is on an island, which contains a large population and has numerous and extensive manufactories and large cities within its bounds; that its inhabitants have commercial relations with various states of the Union, and use the ferry-boats as the ordinary means of communication between the island and the mainland; that, upon these boats, large quantities of merchandise and numerous passengers, destined to places in different states, are necessarily transported in the ordinary course of daily business, and that it is principally by means of these ferries that the commerce between Long Island and other states is carried on.

The East river is an arm of the sea, and navigable water of the United States; and, by the decision of the supreme court in the case of The Daniel Ball (10 Wall. [77 U. S.] 557), a vessel employed in transporting on such waters goods destined for other states is engaged in commerce among the states, and, however limited that commerce may be, she is, so far as it goes, subject to the legislation of congress, although her route may lie wholly within a single state, and she does not run in connection with or in continuation of any line of steamers or any line of railway.

The ferry-boats on the East river come within the scope of this decision, and, consequently, must be subject to the provisions of the act of February 28th, 1871.

The only doubt in this particular action arises from the absence of any evidence showing a transporting on this ferry-boat, at any particular time, of either merchandise, which had begun to move as an article of trade from one state to another, or of passengers having a similar destination. But my conclusion is that proof that the vessel was one of the ferry-boats, engaged on such a ferry as above described, and that while so engaged she did actually transport the ordinary load of passengers and freight which compose the cargoes of those ferry-boats, and was held out as ready to transport, on such a thoroughfare, all passengers and freight that might offer, is sufficient to shift the burden of proof, and in the absence of any evidence from the claimants of the vessel, will warrant the inference that the vessel was being used as an instrument of inter-state commerce, as defined by the supreme court in the case of The Daniel Ball. She was, therefore, subject to the laws of congress, and must be held liable for the omission of the proper inspection required by the 11th section of the act of February 28th, 1871.

NOTE [from 15 Int. Rev. Rec. 155]. U. S. v. The Sunswick. This is a like action for a penalty of $50 for failure to surrender her license, under the act of Feb. 18, 1793 [1 Stat. 305]. In this case the only point presented for my consideration has been disposed of, so far as this court is concerned, by my decision in the previous case against the same vessel, and a similar result must follow here. Let a decree be entered for the libelants.

Case No. 13,625.

The SUNSWICK.

[5 Blatchf. 280.] [1]

Circuit Court, S. D. New York. Oct. 30, 1865.

APPEAL — ADMIRALTY — FINDINGS OF FACT—CARRIER—ACTION FOR NONDELIVERY—MEASURE OF DAMAGES.

1. Where, in a suit in admiralty, in the district court, the question was, whether a contract was one of affreightment on the part of a vessel, or of a hiring of the vessel and her crew, she to be navigated by the hirer, and all the witnesses were examined before the court, and the question was simply one of fact, and turned very much upon the weight to be given to the witnesses: *Held*, on appeal, that this court would not disturb the finding, even if it differed with the district court.

[Cited in The Maggie P., 25 Fed. 206; The Parthian, 48 Fed. 564; The Albany, Id. 565; The Warrior, 4 C. C. A. 498, 54 Fed. 537; Re Hawkins, 13 Sup. Ct. 527.]

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

2. Where a cargo of iron, carried by a vessel under a contract of affreightment, was sunk, and its owner, after notice to the owner of the vessel, raised and saved the iron: *Held*, in a suit to recover damages for the nondelivery of the iron, that it was proper to allow, as such damages, the expense of raising the iron.

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

This was a libel in rem, filed in the district court, against a lighter called the Sunswick, to recover damages for the nondelivery of a quantity of railroad iron, in pursuance of a contract of affreightment, at a point on the Hackensack river, where a new bridge was being constructed. The iron was taken from Wetmore's dock, in Brooklyn. The lighter capsized, with the iron on board, as she was entering the Kills, and hence failed to deliver it. The district court decreed for the libellants [case unreported], and the claimant appealed to this court.

Washington Q. Morton, for libelants.
Skeffington Sanxay, for claimant.

NELSON, Circuit Justice. The main point in the defence is, that there was no contract of affreightment made on behalf of the vessel, but, on the contrary, that it was a contract of hire by the libellants, of the vessel and her crew, she to be navigated by them, and on their own responsibility. The contract was made between Hedenberg, the owner and claimant, and an agent of the libellants. Both of them were examined before the court below, the one sustaining the contract, as one for freight in the usual way, and the other the hiring of vessel and her crew, she to be under the exclusive control and pilotage of the agent of the libellants. There are some corrobcrating facts and circumstances tending to support each of these conflicting views of the transaction. All the witnesses were examined before the court, and, as the case turns very much upon the weight to be given to the witnesses, and the question is simply one of fact, I would not disturb the finding, even if I differed with the court. But I am inclined to think, on the proofs, as they appear on paper, that the finding was according to the weight of testimony and the attending circumstances, and must, therefore, affirm the decree.

A point is made upon the damages. The iron cost $2,050. The libellants, after notifying the claimant that they would hold him responsible for it, and that, if he did not get it up and deliver it, they would do so at his expense, raised it, after his refusal, at an expense, according to the proofs and the report of the commissioner, of $671.22, including interest, for which a decree, with costs, has been rendered. I see no valid objection to this assessment. The items appear fair and reasonable, and make up the loss which the libellants have sustained by the nondelivery of the iron under the contract. Decree affirmed.

SUNSWICK, The (UNITED STATES v.). See Case No. 13,624.

SUPERB, The (BOND v.). See Case No. 1,624.

Case No. 13,626.

The SUPERIOR.

[5 Sawy. 83.] [1]

District Court, D. California. Feb. 25, 1878.

SHIPPING—TITLE TO VESSEL—RECORD.

A purchaser of a vessel from the owner of record at the custom-house will be protected as against a prior unrecorded sale, unless it appears that the last [recorded] sale is colorable and without consideration.

In admiralty.

McAllisters & Bergin, for libellants.
Milton Andros, for claimant.

HOFFMAN, District Judge. On the thirtieth of January, 1877, Matthew Nunan filed a libel against the above vessel to recover one thousand six hundred and eighty-seven dollars and thirty-one cents, being moneys alleged to have been laid out and expended by him for her benefit. On the sixth day of February, one Thomas D. Young appeared and filed his claim to the vessel. On the seventeenth day of March, the California Cracker Company filed a libel to recover the possession of the vessel and damages for her detention. On the thirtieth of April this libel was amended. On the twenty-seventh of March, Young filed a claim to the vessel, and on the eleventh of April, his answer to the libel of the cracker company. No further proceedings in the Nunan suit have been had; it being understood that the cracker company, if it should be adjudged to be the owner of the vessel, will satisfy Nunan's demand. The only question now before the court is whether the title and right of property in the vessel is in Thomas D. Young or in the cracker company.

Both parties derive their title from Frederick Clay. The deraignment of Young's title is as follows: November 20, 1875, F. Clay to H. Molyneaux; January 10, 1876, H. Molyneaux to S. Q. Clay, wife of F. Clay; January 29, 1876, S. Q. Clay by F. Clay, her attorney, to Orrington Betts; January 30, 1877, Orrington Betts to Thomas Young. All of these conveyances were duly recorded in the custom-house as required by law.

The cracker company's title is as follows: In March, 1876, the company commenced a suit in the Fourth district court of this state, against Frederick Clay, to recover the amount of two promissory notes, and attached the vessel as his property. In December, 1876, the company recovered judgment, and on the eleventh of December the vessel was sold on execution and bought by the company to whom the sheriff executed a bill of sale.

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

This bill of sale was not recorded until March 8, 1877, some thirty-seven days subsequently to the record of the conveyance to Young.

On the seventeenth of January, 1877, one Peter Lassen filed a libel in this court against the schooner for materials, etc.; she was then in possession of the company under the deed by the sheriff. She was seized by the marshal, and on the twenty-ninth of January was released on a bond given by Orrington Betts, who had appeared as claimant.

On the thirtieth of January the libel of Lassen was dismissed, his demand having been paid, and on the same day the bill of sale from Betts to Young was executed and recorded, and on the same day she was again seized on the libel filed by Nunan, and the subsequent proceedings were had which have already been detailed. The above facts are undisputed.

It results that the legal title to the vessel is in the claimant Young, under a series of conveyances duly executed and recorded, commencing with Clay's, the admitted owner, in 1873. The libel does not clearly disclose the grounds upon which the cracker company base their claim of ownership. It merely avers in substance that on the twenty-fifth of October, 1873, Frederick Clay became the owner of the vessel, and so remained until she was attached, and on the eleventh of December, 1876, sold to the libellants, as his property, by the sheriff. The records of the custom-house disprove these allegations. It is contended, however, that when Clay directed Molyneaux (who, it is admitted, only held the title as security for certain liabilities of Clay) to put the vessel in Mrs. Clay's name, his motive and design was to cover up and conceal the true ownership in fraud of his creditors; that no consideration was paid by Mrs. Clay, and that her husband was the real owner.

It is further contended that the conveyance by Mrs. Clay, through her husband as her attorney, to Orrington Betts, was in like manner colorable and without consideration, and that Clay remained the real owner. There is some reason to suspect, perhaps to believe, that this was the true character of these transactions. It appears, however, that when her husband's circumstances became embarrassed, Mrs. Clay placed the whole or a large part of her separate property at his disposal. It may therefore be, that when Clay directed Molyneaux to convey to his wife, he merely intended to reimburse her in part for the property he had received from her, and to so place the title that the vessel could not be reached by his creditors. The conveyance to Betts may have been in furtherance of the same design. Under the bankrupt act this would have perhaps amounted to a preference, if Clay was insolvent and Mrs. Clay was aware of it; but it did not constitute a fraud such as would render the vessel in Mrs. Clay's or Betts's hands liable to attachment and sale on execution as Clay's property for his debts. But this point it is not necessary to consider.

For the purposes of this case I will assume that the vessel while she remained in Betts's name was in fact the property of Clay, and liable as such to attachment and execution for his debts, and that the sale by the sheriff passed, as against Betts, the title to the libellants. By section 4192 of the Revised Statutes it is provided that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, is recorded in the office of the collector of the customs where such vessel is registered or enrolled." There is no proof whatever that Young had notice, either actual or constructive, of the sheriff's sale to the libellant. He was aware that there was, or had been some litigation between Betts and the sheriff in regard to her, for he had at Betts's request signed his replevin bond; but of the suit by the company against Clay he appears to have been wholly ignorant, as also of the fact that she had been sold to the company on an execution against Clay. The deed by the sheriff can have no greater effect than if Clay himself had been the real owner, had conveyed to the company, and had subsequently conveyed to Young, and the latter had first recorded his deed. Young's title, if bona fide, would in that case prevail by force of the statute, unless he had actual notice of the prior bill of sale. As Young had no notice of the previous sale to the company, his title can only be defeated by showing that the sale to him was wholly fictitious, that it did not represent a real transaction, and that the true ownership remained in Clay. Mere knowledge on his part that as between Betts and Clay the latter was the true owner, or that Betts held the title in trust for Clay would not affect his rights unless he was a party to a conspiracy on the part of Betts to defraud his cestui que trust, which is not pretended. Nor if aware that Betts held in trust for Clay, was he bound to inquire why Clay had put the title in his name, whether for convenience, or to secure it for his wife, or to put it beyond the reach of his creditors. The protection of the statute would be gone, and the transfer of property of this kind greatly embarrassed, if the purchaser who buys a vessel for a valuable consideration from the legal owner of record were put on inquiry as to matters of this kind and were bound, at his peril to ascertain the truth.

But in fact there is no evidence to show that Young had any knowledge or suspicion that Clay or Mrs. Clay were in any way interested in the vessel. His negotiations were conducted exclusively with Betts. He swears that he never spoke with Clay on the subject, and that he had no knowledge that he or any one besides Betts had an interest in or title to

the vessel. No attempt is made to disprove Young's statement, as to the payment by him of the purchase-money. He appears to have paid seven thousand dollars in cash, besides satisfying claims against her to the amount of seven or eight hundred dollars. He gives the name of the broker in this city upon whom the checks were drawn, and produces the promissory note given for the purchase-money, with indorsements showing the dates and amount of the payments made on account.

The advocate for the libellant has, with great diligence and ingenuity, collected various incidents of the sale to Young from which he infers that that transaction was wholly fictitious, and that Young was fully aware that Clay was the real owner. But I can discover nothing in the circumstances referred to, to justify the rejection of Young's positive statement that the transaction was a real purchase, and that he in good faith paid his money for the vessel in total ignorance of any title to her on the part of Clay, or of any sale of such title by the sheriff. Young must therefore be regarded as a bona fide purchaser for value, without notice, and as such, must be protected, even though, as between Betts and Clay, the real ownership was in the latter. Decree for claimant.

Case No. 13,627.

The SUPERIOR.

[5 Sawy. 346.] [1]

District Court, D. California. Jan. 3, 1879.

SHERIFFS — ALLOWING ATTACHED VESSEL TO ESCAPE—CLAIM FOR SUPPLIES—SHIPPING.

A sheriff who has permitted an attached vessel to get into the possession of a third party, who contracted debts for supplies and necessaries furnished said vessel, acquires no lien by having paid said claim for supplies, as against a subsequent purchaser at sheriff's sale, without notice, or a subsequent bona fide purchaser for value from the legal owner of record.

In admiralty.

M. C. Hassett and Botts & Sullivan, for libellants.

Milton Andros, for claimant.

HOFFMAN, District Judge. The facts of this case are not seriously disputed. In the early part of 1876, one Johnson succeeded in getting possession of, and making away with, the schooner Superior, then in the custody of the libellant as sheriff of the city and county of San Francisco, under an attachment levied at the suit of the California Cracker Company against one Clay, the alleged beneficial owner. Johnson, after putting a crew on board, proceeded with the schooner, and in command of her, to Port Townsend, Washington territory, where he contracted debts to a considerable amount for supplies and necessaries. The sheriff, having ascertained her whereabouts, followed her to Port Townsend, and was about to reclaim her, when Rothschild, who had furnished the supplies, filed a libel against her in the admiralty court of the territory. The sheriff thereupon paid Rothschild's bill, took an assignment of his claim; and returned with the vessel to this city.

She remained in his possession until on or about the eleventh of December, 1876, when judgment having been obtained by the cracker company in the suit against Clay, and execution issued, she was sold by the sheriff at public auction, the company becoming the purchaser. On the fifteenth of January, 1877, Peter Larsen filed a libel in this court against the schooner, which was then in possession of the cracker company, under a bill of sale to them by the sheriff. The vessel remained in the custody of the marshal until on or about January 29, 1877, when Orrington Betts, in whose name she stood in the records of the custom house, sold her to Thomas D. Young, the present claimant, for the sum of eight thousand four hundred dollars, of which one thousand two hundred dollars was paid in cash, and applied in satisfaction of Larsen's claim, and the balance by a negotiable promissory note, which has since been paid. The bill of sale executed by Betts to Young was at once recorded, and the cracker company having failed to record their bill of sale from the sheriff, the property in the vessel was subsequently adjudged to Young, as an innocent, bona fide purchaser for value from the legal owner of record under a bill of sale having priority of record. On the thirtieth day of January, the present libel was filed by Nunan, as the assignee of Rothschild.

The claim of the libellant, if maintained, involves the affirmation of the following propositions: 1. That Rothschild had a valid lien on the vessel; 2. That the sheriff had the capacity to, and in fact did, succeed to the rights of Rothschild, by virtue of the latter's assignment to him; 3. That his official sale of the vessel, without notice of the existence of the lien, did not amount to a waiver of it in favor of a subsequent purchaser for value, and without notice; 4. That his lien has not been lost by his laches in prosecuting.

1. In determining the first point, it is not necessary to consider the general question whether a mere trespasser who, by force or fraud, has succeeded in making away with a vessel, and who has no color of possessory or proprietary right, can make contracts with innocent third parties which will bind her in rem as against her real owners.

The facts in this case do not present such a question. Prima facie, the person in peaceable and undisputed possession of the ship as master is presumed to have been duly appointed. If the owner seeks to avoid con-

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

tracts made or liens created by him under the circumstances above suggested, the burden of proof is on him to establish the facts. No attempt to do so has been made in the case at bar.

On the contrary, it appears that at the time of the escape, Johnson appeared on the custom-house records as her lawful master. Whether he had been discharged during the time she remained in the sheriff's custody does not appear. It is certain, however, that no one had been substituted for him of record at the custom-house. Nor is the conjecture or suspicion that Johnson escaped with the vessel with the connivance, or at the instigation, of the owners, repelled by any evidence whatever.

If, then, this were a suit between the material-man and the owners of the vessel at the time of the escape, I should feel little hesitation in holding that the latter had offered no evidence on which the claim of the former could be disallowed. I shall, therefore, in the further consideration of this case, assume that Rothschild acquired a valid lien on the vessel, which he could have enforced against the owner. Whether it would have been equally enforceable against the sheriff is more doubtful. The latter might, with some plausibility, have urged that the lien of the attaching creditor was prior and paramount to any liens growing out of the contracts made by a person whose possession had been obtained by a flagrant violation of law.

That he, the sheriff, was entitled to the exclusive possession of the ship, and that, in legal contemplation, she was still in custodia legis; that he had a right to invoke the powers of a court of admiralty to reinstate him in the possession of which he had been illegally divested; and that it must continue until the lien of the attaching creditor should be either dissolved by an adverse judgment in the pending suit, or by a satisfaction out of the proceeds of the vessel when sold; and that in the last case the material-man could only look for the payment of his demand to the surplus that might remain on such sale, after satisfying the judgment of the attaching creditor.

It may be that a possessory suit by the sheriff could have been maintained on these grounds, even against the claims of the material-man to a lien. It might be objected, however, that such a suit would be an indirect mode of visiting the consequences of the sheriff's own negligence upon an innocent party, who, but for that negligence, would have had no dealings with the vessel; that the attaching creditor was amply protected by the sheriff's liability on his official bond; and that the sheriff could not escape or diminish that liability by casting the loss upon an innocent party who had dealt on the credit of the vessel, and without knowledge or means of knowledge of the facts, with a person whose possession and apparent authority were exclusively the result of the sheriff's negligence in the performance of his official duty. If there be any force in these last suggestions it follows that the sheriff, in paying off the claims of the supply-man, did no more than his duty, and in fact, was only meeting a liability which he had already incurred. In that view the claim of the supply-man would be deemed to be extinguished by the payment by the sheriff, and the latter would have no demand on any one for reimbursement, and consequently could have no lien to enforce it. I am not sure, however, that this would be the legal result.

On the contrary, I incline to think that if the lien of the attaching creditor had been dissolved, either by an adverse judgment in the suit, by bonding of the vessel, or by a settlement of his claim, and the vessel had been restored to the owner, the sheriff might, on producing the assignment to him of the supply-man's demand, and on proof that the escape was by the instigation or with the connivance of the owners, and that the master who had contracted the debt was their agent, be subrogated to all the rights in personam and in rem of the supply-man.

But no such proofs have been presented in this case, and besides, the suit is not against the vessel in the hands of the owner, who may have instigated Johnson to commit the trespass, but against a purchaser for value without notice. It will not, it is presumed, be contended that as against the attaching creditor the sheriff had any claim or lien on the vessel. Such a contention would involve the supposition that, by a payment rendered necessary by his own negligence, he could acquire a right in the vessel superior to that of the party to whom he was directly responsible for his negligence. Whereas, in fact, if the lien of Rothschild had been adjudged to be prior and superior to that of the attaching creditor, and the latter had been obliged to satisfy it, or the vessel had sold for a less price in consequence, the sum so paid by the creditor, or the difference in price obtained at the sale, would have been the exact measure of the sheriff's liability for the escape.

It is obvious that the assignment by Rothschild to the sheriff conveyed no rights as against the attaching creditor, and carried with it no lien enforceable against the latter, or against the purchaser at the execution sale. And this not merely on the ground that the sale and delivery of the vessel to the purchaser, without disclosing his claim, created an estoppel, or constituted a waiver by the sheriff of his rights; but because he had no rights to waive, and the purchaser, at the sale, either with or without notice, took the property divested of all lien on the part of the sheriff.

It appears to me that the present claimant, who is the bona fide purchaser from the legal owner of record, must occupy the same position; and that the only right acquired by the sheriff was that of enforcing his lien upon the vessel while in the hands of the own-

er, and on proof of complicity on his part in the escape, or that the master who contracted the debt was his duly appointed agent.

But if this view be erroneous, it is at least clear that a lien acquired under such exceptional circumstances should be promptly asserted and diligently enforced. But the sheriff not only failed to assert his claim during the whole time the vessel remained in his custody after her return, but he sold her, and delivered possession to the purchaser, without the slightest intimation of any demand of his own against her in rem.

The sale was made on the twelfth of December, 1876. The present libel was not filed until January 30, 1877—after, as has been before stated, the present claimant had become the owner of the vessel for value, and without notice. The sheriff has thus been doubly in fault: 1. In permitting the vessel to be taken from his custody; 2. In not asserting his claim until the rights of an innocent party had attached. It is clear that, as between the two, the rights of the latter must prevail. The libel must be dismissed.

SUPERIOR, The. See Case No. 14,344.

SUPERIOR, The (DUDLEY v.). See Case No. 4,115.

SUPERIOR, The (TRAINER v.). See Case No. 14,136.

SUPERIOR, The (VANDERSLICE v.). See Case No. 16,843.

SUPERVISORS.

[Note. Additional cases cited under this title will be found arranged in alphabetical order under the names of the municipalities.]

SUPERVISORS (BALTIMORE & OHIO R. CO. v.). See Case No. 829.

Case No. 13,628.

In re SUPERVISORS OF ELECTION.

[2 Flip. 228;[1] 3 Cin. Law Bul. 714.]

Circuit Court, S. D. Ohio. Sept. 16, 1878.

CONSTITUTIONAL LAW—SUPERVISORS OF ELECTION—JUDICIAL ACT—OFFICERS OF COURT.

1. The act of congress directing the appointment of supervisors in congressional elections by the circuit judge of the United States for such congressional district as may be reported, pursuant to such statute, is constitutional, and is obligatory on the circuit judge.

2. Such action by the circuit judge is judicial, and does not fall under the head of non-judicial action or such as is ministerial.

3. The constitution declares that congress may, by law, vest the appointment of such inferior officers as it thinks proper in * * * the courts of law. The supervisors are inferior officers. The court is not required to perform the duties prescribed for these commissioners, but its power is exhausted when such officers are appointed.

[In the matter of the application of sundry citizens for the appointment of supervisors for the voting precincts of the city of Cincinnati.]

The act of congress provides: "Whenever, in any city or town having upwards of twenty thousand inhabitants, there are two citizens thereof, or whenever, in any county or parish, in any congressional district, there are ten citizens thereof, in good standing, who prior to any registration of voters for an election for representative or delegate in the congress of the United States, or prior to any election at which a representative or delegate in congress is to be voted for, may make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town, county or parish, is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not less than ten days prior to the registration, if one there be, or if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit." The supervisors, to be thus appointed, are then, by subsequent sections of the law, authorized to be present during the registration or voting, take cognizance of what is done, and be present at the counting of the votes, simply with a view to secure fairness and impartiality in the elections and correct returns thereof.

[The law itself directs that these supervisors shall be of opposite political opinions. The court has no discretion in the matter. The law is imperative. The court is bound to execute it, and, under the command of the statute itself, must make these appointments when called for. On motion of the clerk of the court by direction of Judge BAXTER, a number of prominent gentlemen from both parties attended. The following is the argument of Hon. George Hoadly, representing the opposition to the appointment of supervisors.] [2]

[2] [Argument of Hon. George Hoadly:

[If your honors please, this is the first time, although this law has been on the statute book for seven years, that the courts of this district have been called upon to administer its provisions. As I read the statute, your honors are sitting in a judicial capacity.

[Judge Hoadly, after briefly reciting the provisions of section 2011, said:

[I am, however, restrained or admonished by the fact that I am in the presence of a court. Such a consideration I confess was not as fully before my mind this morning, as it is now; and that your honors, sitting

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [From 3 Cin. Law Bul. 714.]

as the circuit court, as part of the judicial government of the United States, are solicited by ten citizens to make certain appointments, of a chief supervisor, and assistant supervisors or deputy supervisors, for the purpose of regulating the political election to be held by the voters of the state of Ohio on the 7th day of October next. I desire to say to your honors that the gentlemen with whom I am associated, and whom I now represent, are governed by no lack of sympathy with the objects of the law. No longer ago than the last Democratic state convention in Ohio it was sufficiently made manifest that the Democratic party in Hamilton county had no sympathy whatever with the violation of any duty or right of any citizen with regard to the elective franchise. With the objects of this law, so far as they are to protect the ballot-box, I, for one, would not consent to represent any party or any citizen not in full and thorough sympathy with it. But, if your honors please, because I am, and those with whom I am associated, are hostile to fraudulent voting, it does not by any means follow that this statute is one that we desire to see enforced. I do not propose to advert to the fact further than merely advert to it, of which your honor politically is aware, that the Democratic party, at the passage of this statute, voted against it in solid column in both branches of congress, and since the passage of this statute have treated, regarded and denounced it as part of an attempt to centralize power, both impolitic and unconstitutional, and have carried their animosity to such an extent as that in the last session of congress, as I am informed, they refused to appropriate moneys towards the pay of those who were engaged in enforcing it, which may, perhaps, be a forecast of the future.

[If your honors please, these considerations are considerations of policy, and not considerations of constitutional law, and infractions of the constitution. I do not deny that in the constitution of the United States it is written in as plain language as words can make it, that while the "times, places and manner of holding elections for senators and representatives shall be prescribed in the state by the legislature thereof, the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators"; but if your honors please, what I do deny is, that the congress of the United States can be made engines of political action, and what I do appeal to your honors to do, is to follow the example of John Jay and William Cushing, the two first chief justices of the United States; and of James Iredell, of North Carolina, when sitting as a federal judge; and of James Wilson, who was both a signer of the Declaration and a framer of the constitution, and John Blair, when sitting as judges of the circuit court in the state of Pennsylvania, Jay, Cushing, Wilson, Blair, and Iredell, all being then judges of the supreme court of the United States, who, when asked to take an action which was not judicial, refused to do it. I propose to submit to your honors the cases, which show that from the beginning of the federal judiciary until now, its most honored names, all the judiciary concurring, have held, that it has been the cardinal principle that action, such as this seeks to devolve on your honors, shall be rejected, not merely by the people, but by your honors, and the appeal I purpose to make to you in behalf of my associates is that you will follow the precedents of two solemn decisions of the supreme court of the United States, that I present to you, and refuse to perform political duty, no matter if it be enjoined in a statute of the United States; for, in the earlier days of the republic, if not the better, such was the course which the judges of the federal courts followed.

[If your honors please, I shall not delay with the suggestion that while congress may alter or make regulations, they must leave the enforcement of those regulations to the officers of the states; I shall not delay with the suggestion that the officers of the United States are necessarily, by the constitution, the creatures of the executive department of our government; for the constitution in so many words says that every officer of the federal government shall be commissioned by the president of the United States. But I shall ask your honor's attention to the judicial history, because I am reminded again that we are in a court, which shows that action which is not in its nature judicial has uniformly been rejected by the courts of the United States.

[It does not seem to me that I am called upon to argue to your honors the proposition that taking charge of the election of members of congress is not in any respect a judicial action; it does not seem to me that this admits of doubt. I am at a loss to know where to find authorities upon a proposition so patent as that the selection of the administrative managers of an election, or supervisors of an election, is not a function in any respect judicial. Nor is it necessary that I should delay to argue to your honors these propositions which I hasten over, although propositions which I believe to be perfectly well founded. It is not necessary, I say, that I should dwell on this proposition, that the election to be held in Ohio on the 7th of October is not an election merely of members of congress, but is an election as well of state and of county officers, an election in which a judge of the supreme court of Ohio, a member of the board of public works of Ohio, a sheriff of Hamilton county, and other subordinate executive officers of this county, are to be selected; and that whereas congress may make regulations and may alter regulations of the state regarding elections of members

of congress, they have no right by law to intrude upon the election of state or county officers; but, in order that such a regulation may be constitutional, the elections must be separated and identified, so that the people of the state of Ohio, in the management of that part of their concerns which is in no wise federal, may exercise their rights entirely free from interference by federal office-holders. But that is a suggestion which is patent, and needs no discussion. I shall pass on, therefore, to the proposition, to which I invite your honors' attention for a few moments, that by the law of the United States, as repeatedly administered by the supreme court of the United States, any attempt to devolve upon any court of the United States non-judicial action, has not only been disregarded, but resisted by those judges. So that it has become an established proposition that a judge will not, and must not, if called upon by congress to act in a non-judicial point of view, act at all. His duty is performed by non-action, and not by obedience. It is not the case of a law whose constitutionality may be considered as doubtful, and which, therefore, the judge will obey, leaving it to a higher court to pronounce upon, but it is a law whose constitutionality has been condemned from the year 1793 until now, and to obey which involves disobedience both to the spirit and letter of the constitution, and to the precepts handed down to us by our fathers.

[Judge Hoadly then referred to the act relating to invalid pensions passed in 1793, which, he said, while it was not certainly judicial, was far more in the nature of judicial action than the statute which he was considering. He read sections 1 and 3 of the act from 1 Stat. 324. His other references were to the opinions of the courts in the note to the Case of Hayburn, reported in 2 Dall. [2 U. S.] 409; also to the letters of the circuit court of the United States for the state of Pennsylvania, composed of Judges Wilson, Blair and Peters, and for North Carolina, consisting of James Iredell, justice, and Stitgreaves, district judge, to George Washington, president of the United States, dated respectively, April 18, 1792, and June 8, 1792; also to U. S. v. Ferreira, reported in 13 How. [54 U. S.] 40; also to a note prepared by Chief Justice Taney in the same case, on page 52, containing the case of U. S. v. Todd, decided by the supreme court in 1794.

[He continued: It therefore appears that at the time of the adoption of the constitution of the United States, and by the men who made it, in the most solemn form in which it could be transmitted to posterity, by a judgment of the supreme court of the United States, it was established that whenever non-judicial action was sought by congress at the hand of the courts of the United States, it became the duty of those courts to refuse.

[Judge Hoadly was then proceeding to read from the opinion of the supreme court of the United States, at the December term, 1851, in the case of U. S. v. Ferreira [supra]. a case arising under the treaty of 1819 [18 Stat. 252], between the United States and Spain, when he was interrupted by the court, who said it was not necessary he should argue that congress could not require of any court the discharge of any duty that was not judicial. That was a proposition too plain for argument. It has not been denied, and would not be denied by the court. The question for discussion, if there was one, was to show that this particular act was not judicial.

[Judge Hoadly: That is a question upon which I must confess my surprise that there should be an intimation of a doubt. That which is required of this court is the appointment of a chief supervisor and associate supervisors of a political election. What is the judicial action under the constitution of the United States? "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, to all cases affecting embassadors," etc. Within what part of that explicit definition of judicial power does the power to supervise the election of members of congress fall I respectfully ask? It does fall within a provision of the United States constitution, but that provision is not to be found in anything inserted in the constitution relative to the judicial department, but is written in that part of the constitution which relates to the other departments. These decisions show that the judicial work of the courts of the United States is limited by the definition of the constitution, and the executive work of the administrative officers of the United States must be performed by them, and cannot constitutionally be performed by judges of this court. Wherein does the language of this statute relate to or make any part of the judicial grant of the constitution? Wherein does it relate to any case arising under the constitution of the United States? What is there judicial about this work that your honor has to perform here today?

[After reading sections 2011, 2016–2020 of the statute, Judge Hoadly said: Bear in mind that the constitution of the United States contains this clause: "Each house shall be judge of the election returns, and qualification of its own members." Bear in mind that the end and aim of all this is contained in the words I last read: "And on receiving any such report, the chief supervisor, acting both in the facts, and he shall have power to subpœna before him any witnesses, etc., and prior to the assembling of the congress for which such delegate or representative was voted for he shall file with the clerk of the house of representatives all evidence by him taken or information by him obtain-

ed, and all reports to him made." Now, what else is there in this law? I know of nothing. Its purpose is to place at the poll boxes of every precinct in the county a corps of men appointed by the court to see that no fraud is perpetrated, and to give those men the powers to enable them to scrutinize and ascertain if fraud is perpetrated, and to report upon sworn testimony to congress the evidence of such frauds. Is that a case at law or in equity, criminal, civil or otherwise, arising under the constitution of the United States and committed to the judges of the courts of the United States? Why, if your honor please, far more than taking testimony and ascertaining who the poor fellows were that were entitled to invalid pensions for Revolutionary services; far more in ascertaining who the men were entitled under the treaty with Spain alluded to in the case of U. S. v. Ferreira, is the action of this court which is invoked by this law, political action. It is not merely not judicial action, but it is indorsed all over it in such a way that there cannot be any mistake about it—political action. It is judicial action only in this—that it is a function committed to the court, and that is not enough to make it judicial action.

[Judge Hoadly, after reading at considerable length from the decision of Chief Justice Taney in the Ferreira Case, said: What powers have these officers conferred upon them to perform acts, which are not alien to the ordinary course of the process of courts of justice? Your honors may appoint commissioners, but you appoint them for the purpose of taking testimony or for the purpose of hearing testimony, but your honors do not appoint commissioners for the purpose of searching for testimony without regard to information or the bringing of cases; and, if your honors please, when you go further than that, and see that this function is conferred in order that the house of representatives may be informed who has been elected, it appears clear that if these gentlemen are to be appointed as commissioners in any sense of the word preliminary to any judicial controversy, it is a judicial controversy arising in the legislative department, and determined and solvable only by that department. And if it can be so, by some strange reasoning, that these gentlemen are observers of events, who are to gather testimony with a view to criminal indictments to be found thereafter, the hiatus between the performance of the function and the finding of the indictment is too great to justify the analogy to causes arising in equity, where commissioners take testimony to be presented to the court, or causes arising in admiralty, or criminal causes where commissioners hold to bail. I therefore respectfully submit, on behalf of the gentlemen with whom I am associated on this occasion, that we have had handed down to us from the fathers, instructions to the effect that actions of this kind not only can not be required by congress of the courts, but can not be lawfully performed by the courts, even when asked by congress; and therefore we appeal to your honors in aid of our position, to treat this statute as Chief Justice Jay and his associates of the supreme court of 1793 treated that statute, and to treat this statute as Chief Justice Taney and the supreme court of 1851 treated the three acts with regard to the treaty with Spain, as being a statute calling for an examination of matters that cannot be judicial and are improper for judicial examination. And we are consoled in the thought that in making this appeal to your honors, we are asking you to observe the proper line of a noble and dignified jurisdiction, prescribed by the constitution, and that we have the precedents before us that this step is one which no court can take without converting itself into a court not to hold the scales of justice in cases arising in law and equity between man and man, or state and state, but a court to subserve the ends of politicians in the controversies of party, and an instrument for the revolution of the legislative department which is independent of it.

[I thank your honors for having listened to these remarks from me, and for having permitted me to make this more ample statement of reasons, legal in their character, such as might be addressed to judges by an officer of the court. The political part of this argument I do not submit to your hands. The considerations of policy will be improper to address to a court, but I do ask your honors to consider how large a branch of this argument I am compelled, by the respect which I owe to this court, to omit. It is a consideration well worthy of your honors' attention. A political party, which honestly believes itself to have been defrauded of the presidency by the instrumentality in part of this statute,—a political party numbering more than one-half the voters of the United States, as all the recent elections have shown,—is represented here, so far as this little segment of it is concerned, by myself and my associates before the court, and the question is whether the court shall take political action; and the fact that we are compelled to be silent upon grave political considerations, the fact that they are improper to be introduced because this is a court of justice and not a hustings from which to harangue the people, is itself a fact which characterizes this statute and characterizes the action to be taken under it as necessarily political. Your honors know that were I to go into the argument of the policy of the politics which have grown up about this statute I would be introducing into this court those elements of debate upon which men differ most widely in this country, and whereupon their tempers and imaginations become most heated. And yet what else is it, when your honors are to supervise

an election of members of congress, what else is it but to invite political discussion, to invite political consideration? Your honors are to appoint supervisors of both parties—all parties. Your honors are to recognize party lines and say: "This man shall not be appointed, because if appointed it will make all the supervisors of one party." Your honors are to say: "That man shall be appointed, because it is necessary to carry out the order which congress has given us to appoint from both parties," for if I take it for granted that your honors will not adopt the precedent of the election of 1876, and fill from both political parties, as was done in the state of Louisiana, by excluding from all but one. May it please your honors, the temptation is one I must resist, and I only allude to the political considerations which group themselves about this statute as suggestive that the work which is allotted to your honors is not, in any sense, and can not be by any skillfullness or subtility of reasoning, denominated otherwise than as political, and can not, I respectfully submit, possibly be conceived of by the ordinary human mind as judicial.] [2]

Before BAXTER, Circuit Judge, and SWING, District Judge.

BAXTER, Circuit Judge. I trust it will not be improper for me to say that I regret having been called upon to perform this duty. But the act of congress imposing the duty is imperative, and if constitutional, must be enforced. Learned counsel have, however, insisted that it is unconstitutional: First, because it requires the courts to perform other than judicial duties; and second, because its enforcement would be an invasion of the rights of the states. Can these propositions, or either of them, be maintained?

The government, we concede, is divided into three distinct departments—the executive, legislative and judicial—each invested with appropriate functions, and neither can be lawfully required to encroach upon the prerogatives of either of the others, without violating the fundamental law from which they all derive their authority. If therefore the act which provides for the appointment of supervisors of elections required the court to perform non-judicial duties, I would follow the precedent of Chief Justice Jay and other contemporary judges, so earnestly commended by counsel, and refuse to enforce it. I heartily concur in principles announced by the learned chief justice. The reasons assigned for declining to execute the invalid pension act are clearly stated as follows: "That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner * * * that the duties assigned to the courts by the (invalid pension) act are not of that description. * * * As therefore the business assigned to this court by this act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it by official instead of personal descriptions."

By reference to the act it will be found that it designated the judges as commissioners, to take depositions and make reports to the secretary of war, and authorized the secretary of war to suspend, and congress to revise, their decisions, and hence the learned judge added "that by the constitution, neither the secretary of war nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

But what would have been the decision of the court if the act had required it to appoint commissioners to perform the duties prescribed? The constitution declares that "congress may, by law, vest the appointment of such inferior officers as it thinks proper, in the president alone, in the courts of law, or in the heads of departments;" and under this constitutional grant of power congress has vested the president, the heads of departments and the courts with authority to appoint a great many subordinate officers. Amongst others, the courts have been authorized to appoint their clerks, circuit court, and other commissioners, and this power had been exercised by the judges who declined to enforce the invalid pension act. Why is it supposed the courts would have refused to comply with the statutory command, if the invalid pension act had authorized and required them to appoint commissioners to perform the merely ministerial duties by its provisions imposed? There would have been no greater impropriety in the court's appointing commissioners to perform the duties prescribed by that act, than in appointing clerks or circuit court commissioners under the several acts authorizing them so to do. The terms in which they express their objection to acting in the non-judicial character of commissioners indicate clearly, that without doubt or hesitation they would have appointed commissioners to discharge the same duties. The duty of the courts to appoint subordinate officers when required and authorized so to do by law, has never before been questioned, and cannot be upon the basis of any adjudicated case. All precedents and authority are to the contrary. The state governments, like the national, are divided into separate departments. There is no more power under the state constitutions to impose other than judicial duties on the courts than there is under the federal constitution. And yet by law in several of the states the appointment of judges of elections has been conferred upon the courts, and so far as I am advised the validity of these laws, or the propriety of their enforcement has not been questioned.

[2] [From 3 Cin. Law Bul. 714.]

There is a very obvious distinction between the invalid pension act and that under consideration. In the former, the judges were designated and required to act as commissioners. That duty they very properly declined to perform. And if the act under consideration commanded this court to supervise the elections, I should refuse to obey it. But the command is, that this court shall appoint others to perform that duty. The supervisors so to be appointed will be "inferior officers." The constitution authorizes congress by law to vest such appointments in the courts. Congress, by the statute under discussion, has authorized and commanded the circuit judges, when requested by the requisite number of citizens, to make the appointment which has now been asked for. And though this law may conflict with the opinions of counsel and those whose views they represent, as to the proper classification and division of powers between the several departments of the government, the constitution and the act when construed together make the appointment of supervisors a judicial duty which this court cannot decline to perform without a flagrant violation of the obligations imposed upon it by law.

Let us now consider the second objection. Does the act invade the rights of the states? If so, how? I do not anticipate any possible conflict between the state and national authority proceeding from the exercise of the power conferred by this act. Congress has the right to regulate the election of its own members, and by the constitution each house is made the exclusive and final judge of their election and qualification. In the exercise of this jurisdiction witnesses may be summoned and examined, and investigations made into the fairness and regularity of elections. If this may all be done after election, may not congress by law provide safeguards before election to prevent fraud, secure an honest count, and compel correct returns? This is all the appointment of supervisors is intended to accomplish. It is not contemplated that they shall supersede or exercise any part of the authority vested by state laws in the persons acting under state authority. Supervisors can neither admit nor exclude the ballot of any one offering to vote. They are not present to act as judges but simply as witnesses to remain with the officers holding the elections, take cognizance of everything done, and witness the counting of the votes polled with the purpose to secure fairness and impartiality in the conduct of the election. No injustice can possibly result from such action. It is only to those contemplating frauds either in the casting of the votes or in the counting and return thereof that these impartial witnesses provided by the law are a terror. Frauds perpetrated in the election of members of congress are punishable in the courts. And while the supervisors to be selected from opposing political parties, cannot control the elections and are without authority to receive or exclude a vote, or do any act calculated in the slightest degree to intimidate a legal voter, yet they may, after the election, give evidence and secure the conviction and punishment of violators of the law, and to this class supervisors would naturally be obnoxious.

Thus far I have treated the questions argued as original, and as though there were no precedents in the enforcement of this law in other instances to support the views I have expressed. It was remarked in the argument that the protection intended to be given by the statute had not heretofore been invoked in this circuit. The statement is erroneous.

Judge Hoadly: This district is what I said.

THE COURT: The statement is correct in reference to the districts; but the act has been enforced elsewhere in the circuit, as also in other circuits, and so far as I am aware the action of the courts in exercising the powers conferred has not in any instance been objected to.

I think the statute is constitutional; that it is obligatory upon me, and appointments will be made in accordance with its requirements. If after they are made the appointees shall do any act in excess of the powers conferred on them by the law they will be held amenable therefor. Their acts will be their own and not the court's. In making the appointments the court exhausts its powers, and therefore in their selection I wish to act with judicial impartiality, so as to secure men worthy of so important a trust, and for this purpose invoke the counsel and co-operation of good men of every shade of political sentiment who desire that the popular will may prevail and honest elections be secured.

[NOTE. The following is the application made to Judge Baxter, for the appointment of supervisors, and here reprinted from 3 Cin. Law Bul. 714:]

The Call.

Cincinnati, August 31, 1878.

Hon. John Baxter, Judge of the United States Circuit Court, Sixth Circuit—Dear Sir: The undersigned citizens of Cincinnati, a city having upwards of 20,000 inhabitants, desire to have the election held on the 8th day of October, A. D. 1878, at which a representative in congress is to be voted for, guarded and scrutinized under the laws of the United States, and respectfully request the appointment of supervisors for the several voting precincts of said city, as provided by title XXXVI., Revised Statutes.

James McKeehan.	Harry C. Urner.
B. F. Evans.	Geo. F. Davis.
W. J. Lippincott.	H. Wilson Brown.
Geo. W. Jones.	Edmund H. Pendleton.
Lewis Glenn.	John W. Hartwell.
B. Eggleston.	C. M. Holloway.
Richard Smith.	E. W. Cunningham.
F. T. Foster.	A. H. Hinkle.
C. W. Thomas.	C. W. Bowland.
Wm. Means.	H. C. Whiteman.
J. A. Townley.	

[The following note from Judge Hoadly is reprinted from 3 Cin. Law Bul. 722:]

Editor Law Bulletin: Will you please add in connection with my argument before Judge

Baxter what I would have gladly said, had the judge given me the opportunity, on the subject of the attempt to support the power of the courts to appoint supervisors of elections, by the provision of the constitution allowing congress to delegate the appointment of subordinate officials to the courts. I am more free to ask this because the question is in its essential character, political, and because Judge Baxter (of course, undesignedly,) diverted my mind from this provision, by interrupting me, and conceding that the proposed action could not be sustained if it were shown to be non-judicial.

It will be seen at once that unless this power is controlled by the distribution into the three great departments—executive, legislative, judicial—the learned judge has raised a larger question than he has solved. Can it be possible that he thinks congress competent to require the federal courts to administer the patronage of the government, to appoint governors of territories, postmasters, collectors of customs, and of internal revenue? But the supreme court long ago suggested the true solution. In Ex parte Hennen, 13 Pet. [38 U. S.] 257, 258, the supreme court, speaking through Mr. Justice Smith Thompson, used the following language, which is perfectly decisive: "By the constitution of the United States (article 2, § 2) it is provided that the president shall nominate, and by and with the advice and consent of the senate, shall appoint certain officers therein designated, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but congress may, by law, vest the appointment of such inferior officers, as they shall think proper in the president alone, in the courts of law, or in the heads of departments. The appointing power here designated in the latter part of the section, was no doubt intended to be exercised by the department of the government to which the appointment of officers most appropriately belongs."

Very Respectfully, George Hoadly.

Cincinnati, Sept. 20, 1878.

SURDAM (SHARPLEIGH v.). See Case No. 12,711.

SURETTE, In re. See Case No. 3,037.

Case No. 13,629.

SURGET v. BYERS.

[Hempst. 715.] [1]

Circuit Court, D. Arkansas. April, 1845.[2]

PLEADING IN EQUITY — EXHIBITS — ANSWER—ADMISSIONS—SPECIFIC PERFORMANCE—FRAUDULENT SALE.

1. Pleadings in equity are viewed without regard to form, and exceptions are never allowed if made under circumstances calculated to effect a surprise on either party.

2. Copies of deeds filed with the bill as exhibits become part of it, and if intended to be objected to, should be done before the hearing.

3. It is a rule of pleading at law, that every material averment not denied is admitted; and that rule would seem to apply à fortiori in equity, where all formal exceptions are discouraged.

[Quoted in Cahoon v. Ring, Case No. 2,292.]

4. Allegations in the bill may be considered as established, whenever the statements in the answer can, by fair interpretation, be construed into an admission of or acquiescence in the same.

5. Where inadequacy of consideration in a sale, either private or judicial, is so gross as to shock the conscience, it is presumptive evidence of fraud.

6. Courts of equity will refuse a specific performance where the consideration is grossly inadequate, or the contract is oppressive and unconscientious.

7. Where the attorney prepared the writ for the clerk, taxed the costs, prepared the advertisement of the sheriff, directed a large quantity of land to be levied on, and himself became the purchaser at a grossly inadequate consideration: *held*, that the sale was fraudulent and void, and the same was set aside.

8. Facts and circumstances detailed and commented on, and a case of fraud developed.

Bill in chancery [by Francis Surget against William Byers] to set aside a sale of lands.

P. Trapnall and S. H. Hempstead, for complainant.

A. Fowler and A. Pike, for defendant.

DANIEL, Circuit Justice. This is a case, as to which, whatever may be the decision upon it, it cannot be denied that it is striking and singular in many of its features. An outline or sketch of the most prominent of those features present these obvious lineaments or characteristics: 1. The institution of an action at law, by a creditor, for the satisfaction of an alleged (and indeed an undeniable) obligation. 2. The discharge of the debtor upon grounds wholly distinct and apart from any impeachment or satisfaction of that obligation, but upon a proceeding which admits the legality of that obligation, and the right to resort to courts of justice for its enforcement. 3. The adjudication of costs against the creditor, for having resorted to a court for the enforcement of his legal rights, and on account of the discharge of his debtor from an obligation and right of action confessedly legal. 4. The transfer, by means of this claim for costs, to the debtor, or to those deriving title under him (and who, from their position in relation to the proceedings above mentioned, and to the parties to those proceedings, were necessarily cognizant of their existence and nature), of landed property in value of more than seven thousand times the amount of the costs adjudged against the creditor, for having instituted his action upon an obligation which is neither impeached nor satisfied. Such, I repeat, are the characteristics of this cause. That they are unusual and striking, none can for a moment hesitate to admit; nor can it be denied, that in their influence they have been, if not ruinous, most oppressive to the plaintiff at law, who is also the complainant in this suit; so unusual and so oppressive, indeed, as to force upon every one the inquiry, by what stern and unbending rule or principle that influence can be maintained; for it must be by the operation of some rule or principle too firm and inflexible to be shaken

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

[2] [Affirmed in 19 How. (60 U. S.) 303.]

by considerations of inequality or hardship, or by any circumstances surrounding the transaction, that results such as have been shown in this cause can be operated by the means employed.

The complainant insists that the pretensions set up by the respondent are void:—1. As being contrived by the respondent for the purposes of circumvention, oppression, and fraud. 2. For the gross inadequacy of consideration and effect produced by the contrivance of the respondent. 3. For the want of competency in the respondent to sell the property of the plaintiff to become the purchaser of it himself. 4. On account of the unreasonableness and excessiveness of the levy, this being an abuse of the process of the court, and an evidence of a fraudulent design, and as calculated to inspire suspicion and to deter purchasers, by reason of that suspicion, and by offering larger amounts of property than many persons were disposed or were able to buy. 5. By proof that the suit at law, on which the judgment for costs was rendered, was instituted without the consent or knowledge of the complainant, and that therefore whatever may have appeared on the face of that suit at law, there can arise hence no bar to the right of the complainant to aver and show, in a court of equity, the true position of the complainant with reference thereto. 6. That the process sued out on the judgment at law was not made out nor issued by the only legal and competent officer, but was made up and calculated and determined by the respondent, and by him delivered to the sheriff, who was ordered by the same party as to what particular property, and to what extent to levy the execution. That the sale by the sheriff was null, and could not divest the title of the complainant, because it is proven by the witnesses examined on the part of the respondent, that the requisites of the law, a compliance with which was necessary to give validity to any sale of lands under execution, was not complied with, but were departed from, with the knowledge and participation of the respondent.

The positions on which the defendant rests his defence are substantially these: 1. The strength of his legal title under the execution and sale above mentioned, which sale he alleges was fair, and not fraudulent; and 2. That sacrifices of land in the same section of the state, similar to that complained of, were usual under execution sales.

Before considering the grounds as above stated, constituting what may be called the merits of this case, it seems proper to advert to some questions which have been raised upon the pleadings. These, it is well known, are viewed with very little regard to form in courts of equity, where exceptions are never allowed if they are made under circumstances calculated to effect a surprise on either party, and might have been made at a different stage of the cause, and consistently with fairness to all. This is a tribunal which addresses itself to the consciences of men, which looks to the substance of things, and acts upon the maxim, "ut res magis valeat quam pereat."

Exception has been taken in this case, for the first time at the hearing, to Exhibits A. and B., purporting to be copies from the records of deeds by which portions of the lands levied upon and sold were conveyed by Stephen and Wm. B. Duncan to the complainant. The objection to these deeds or copies is twofold: first, that they were not regularly admitted to record in the state of Arkansas; and that as the complainant had proffered the production of the originals, if required, he should be strictly held to their production. In answer to the first of these grounds of exception, it may be remarked that these copies were filed with the bill as exhibits, and therefore, in legal intendment, made portions thereof. The same notice, therefore, which was given of other portions of the bill, was given of the character of that part of it which was constituted by these documents. It was the undoubted right of the respondent to except to the whole or to portions of the bill, or to acquiesce in the regularity of its allegations, either by express admission or by necessary implication. It is a rule of pleading in the courts of common law, that every material averment which is not denied will be regarded as admitted. This rule would seem to apply à fortiori before a tribunal which discourages all exceptions of a formal character. The respondent had the power, either by demurrer or plea, or by direct denial in his answer, to object to the structure of the bill, or to the competency of the parts or members thereof; and surely it was his duty to warn the complainant, to enable him to meet such exception, if designed to be insisted upon. But it is contended that, by the rule of pleading in equity, where allegations in a bill are neither confessed nor denied by the answer, the complainant is bound to sustain them by proofs, on the final hearing. This rule, which applies rather to the substance than to the forms of proceeding, is, undoubtedly, true in cases where the respondent states that, with the knowledge possessed by him, he can neither confess nor deny the charges contained in the bill; but entirely untrue wherever the statements in the answer can, by fair interpretation, be construed into an admission of, or acquiescence in, the allegation of material facts.

It is insisted that for an insufficiency in an answer, exception may be taken to it. This is true; and, for a like imperfection in the bill, the like remedy may be resorted to; the rule and the obligation operates equally on complainant and respondent; but it is certain that, with respect to the bill or the answer, the court would not sustain a captious exception, when the pleading disclosed or admitted the real grounds of contest in the

cause. Thus much it has been deemed proper to state with reference to the rules of pleading, which even if they went to the exclusion of these copies, would not, on further examination of the case, materially affect the question on which they are intended to bear. For the answer explicitly admits the interest of the complainant, not merely in the lands patented to him, but in all the lands embraced within this controversy.

Leaving, then, this question, raised upon the pleading, we come back to those matters which enter essentially into the character of the proceedings impeached by the bill; and, on reviewing those proceedings, it might, perhaps, be considered pro hac vice, that mere inadequacy of consideration shall not per se amount to proof of fraud, although the concession, thus broadly stated, would scarcely be reconcilable with the qualification put by the courts, namely, unless such inadequacy be so gross as to shock the conscience, —for this qualification amounts necessarily to an affirmation, that if the inadequacy were of a nature so gross as to shock the conscience, it would per se be evidence of fraud. In another instance the courts of equity have reprobated such gross inadequacy when standing solely and singly as the ground of objection, namely, in refusing for that objection alone to decree a specific performance of an oppressive and unconscientious contract; thus showing that they are not governed by mere legal or technical interpretation, but yield to a certain extent to the moral sense and feelings of mankind, and to that principle so strongly stated by Lord Camden: "that nothing can give life and activity to a court of equity, but honor, integrity, fairness; and that wherever these are wanting a court of equity cannot be incited to action, but neither listens, perceives, nor moves." Again, it is insisted that whatever presumption arising from inadequacy of consideration may be permitted as respects transactions strictly between vendor and vendee, no unfavorable influence from that cause is allowable, with respect to sales made under judicial process. In stating the position thus broadly, there seems to be overlooked the qualification uniformly put by the courts, namely, that such sales are to be fairly made. Certainly the fact that such sales are made under the authority of the law, and by the officers of the law, may justly weaken the presumption arising from great inadequacy; but to say that such inadequacy, connected with other facts or circumstances tending to evince fraud or unfairness, could never be regarded, would be about as rational as an assertion that the process of the law could not possibly be abused, and that the ministers of the law must necessarily be pure and upright. The true, the intrinsic character of proceedings, both in court of law, and in pais, are alike subject to the scrutiny of a court of equity, which will probe and sustain or annul them, according to their real character.

In approaching an inquiry into the conduct of the parties, and into the circumstances surrounding the transactions impeached by the bill, it is deemed proper by the court in limine to advert to certain positions advanced by the counsel for the respondent; to which, as urged by those counsel, this court cannot lend its sanction. Thus it has been insisted, that an attorney, as the representative of his client, has a right to control the judgment rendered in favor of that client, and in so doing frame, and to sue out what final process he pleases; to direct the sheriff both as to the kind and amount of the property to be levied upon; to prepare such advertisements of the property as in his judgment may be deemed effectual; and, at the sale of the property, so prepared by himself, to purchase the whole of that property at any sacrifice of it, however great. To the affirmance of such doctrines, or of any practice in pursuance thereof, this court can never lend its assent. An executor, or administrator, or a trustee, cannot purchase at his own sale. If by the levy either the legal or equitable title to the property levied upon is vested in the judgment creditor, or in his attorney for him, the one or the other becomes a trustee, and in any aspect is bound to perfect fairness; and, therefore, cannot take advantage of untoward circumstances, although they may be induced by his own irregularity, to force a sale to the ruin of the debtor, and for his own profit. If such control of judicial proceedings, and of the officers of the law, can be tolerated, the widest door to fraud and oppression would at once be thrown open, and the most unscrupulous adventurer would be the most successful.

With reference to the judgment at law, and the proceedings under it, it has been insisted that this judgment, having been rendered by a competent court, and still remaining unreversed, neither the validity of the judgment nor the proceedings in virtue thereof can now be questioned. True, with respect to the regularity of that judgment, or with any legal errors in obtaining it, this court does not pretend to take cognizance, or to exercise any appellate jurisdiction for its reversal; and, in any attempt at law to impeach such judgment, it must be regarded as operative. But with any fraudulent conduct of any of the parties, in attempting to avail themselves of that judgment, this court can regularly take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes a most comprehensive ground of their jurisdiction.

With reference to the acts of the respondent, in obtaining and enforcing the judgment at law, those acts have been by his counsel sought to be sustained, upon the ground, that as an attorney for Marsh, he had a right to control the judgment, and to carry it into effect. That right, in this respect, like every other right, is bounded by rules of law and justice, and by a proper regard to the rights

and duties of others. So far as it was proper to enforce the legitimate rights of Marsh, it was unquestionably within the power of his attorney to control and direct them; but he could have no power according to what he may have fancied was legitimate, or what he may have thought judicious and promotive of the interest of his client or himself, to usurp the powers of those officers and functionaries to whom the laws have intrusted its just administration, and preservation of the rights of the citizen. The office of clerk or of sheriff, was never designed to be a mere name, or an engine, or a pretext, to be used at the will of any person. By what authority, then, could this respondent assume the functions of both clerk and sheriff? tax such costs as he deemed proper? seize upon property to any amount? advertise it himself, and ultimately become the purchaser? For, by converting the clerk and sheriff into mere ciphers, and becoming the really efficient actor in all their functions, he substituted himself entirely for these officers, in whom the law invested peculiar powers, and on whom it imposed peculiar responsibilities. By this assumption the respondent at once destroyed or evaded all those checks and securities designed for the protection of all. In justification or in excuse for this assumption, it has been contended in argument, (for the position is not sustained in proof,) that it was rendered necessary by the ignorance of those officers, to whom the duties of clerk and sheriff had been assigned, and had become a common practice among attorneys in the particular section of country where it occurred. If this position must be taken as true, it rather aggravates than extenuates the wrong here complained of, as it shows that by the ignorance or corruption of the officers of the law, the rights of the complainant had been handed over to the mercy of one having a direct interest to invade those rights; and evinces a practice in a profession deemed enlightened and honorable, highly calculated to bring that profession into merited disrepute.

Upon the question of illegality in the sale for want of notice, it has been contended in argument for the respondent that the bill contains no charge with respect to such illegality, and that therefore no proofs as to that point can be admitted. It is undeniably the rule in equity, as well as at law, that the proofs must correspond with the allegations, and that evidence inapplicable or irrelevant to the latter, will be disregarded as immaterial. The bill in this case is less minutely and searchingly drawn, than it might have been on this particular point, yet it is considered as being sufficiently comprehensive and sufficiently specific at the same time to cover this point and to justify proofs in relation thereto. It alleges, as illegal and unwarrantable, the taxing of the costs, the writing of the execution, the sale of the property by the party, the description of the property, and the advertisement or notice of sale by the respondent, and the proceedings under that notice, all as being unwarranted by law and concocted and carried out in fraud. All these allegations it was competent to the complainant to prove. The answer of Byers, after a general denial of fraud and unfairness, after admitting the taxing of the costs, the writing of the execution, the direction to the sheriff as to the lands to be levied upon, and the preparation of the notice of sale—all by himself—next insists upon the regularity and propriety of all these acts. He then proceeds to aver the performance of every prerequisite of the law as to such sales. These prerequisites he enumerates in detail, and introduces evidence to establish them. He says the sheriff advertised the lands, and advertised them for twenty days, in three most public places in each township; and he introduces the evidence of the sheriff and of other witnesses to prove these averments. But in contravention of these statements are first, the admission of the respondent that he himself prepared the notice, and not the sheriff; and as to the evidence of the sheriff introduced and relied on by the respondent, so far from showing that the requisites of the law were complied with, it establishes the fact that they were violated and disregarded, for the sheriff shows that he took the description of the property and the notice of sale prepared by the respondent, and did not act upon any description or statement prepared by himself; in the next place this answer declares that he never did set up advertisements either in number or locality, as he was bound to do, nor could he swear to the fact. He says it was his practice to set them up in places in which it was convenient for him to do so; and to hand over other notices to persons in whom he had confidence. Here, then, is proof supplied by the respondents, that the law had not been complied with. The acts of an official deputy are regular evidence as acts of his principal, binding on that principal and on all persons falling within the scope of his acts. But it is not perceived how the rights of suitors can be at all dependent upon the unofficial and private confidence of an officer, even when that confidence may not have been misplaced. In this case there is no proof that it has been fulfilled; for no person shows that the notices had in fact been given according to law. The belief of either the sheriff or any other person can have no influence where the law calls for full legal proof.

The objections here stated, cannot be deemed narrow or technical in a case like the present,—a case admitted in the argument to be entitled to no favor either at law or in equity,—a case which presents us one feature of liberality or equality,—a case in which the respondent was and is bound to walk the hair line of legal strictness, and from which, if he trips or deviates never so small a space, he is doomed to fall.

The court has not deemed it proper to express an opinion upon the point raised as to the validity of sales under execution made curia non sedente. That is a point as to which there appears to be a considerable diversity, and as to which there is room for diversity of opinion. Not considering that point necessarily involved as a mere question of law in this case, and as it arises upon the statutes of this state, which have not yet been expounded by the local courts, it has been thought respectful to the latter to leave to them the interpretation of these statutes, on points not unavoidably in the path of this tribunal in the performance of its duty. In one aspect, however, the existence merely of the wide spread impression as to the time and place of making sales, may have a direct bearing on the present case, whether such impression was or was not warranted by the statutes, and that is as the knowledge of such an impression, and its effect upon bidding at sales may be an index to the quo animo, the intention and purposes of the respondent, and may point to him as the artificer or contriver of the entire train and machinery by which the interests of the complainant were sought to be and were in fact sacrificed.

Little weight has been given to the general statements of witnesses that property in the particular section of the state has, when sold under execution, commanded but a very small portion of its real value. The instances referred to are susceptible of explanation on two grounds, either of which would deprive them of influence in this cause. The sales thus mentioned might have been, and until the converse is shown, must be presumed to have been unaccompanied by any circumstances which could affect their validity; or they may have been acquiesced in from inability or indisposition of the victims in those sales to subject them to the test of judicial scrutiny. It may well be presumed that a majority of sufferers by such sacrifices would be persons possessed of slender means of resistance, or they would have brought to light any facts or circumstances, if such really had existed, rather than have submitted to oppression and ruin. And here it must be remarked, as a striking and ominous feature in this cause, that amongst the numerous witnesses examined to establish the difference between the value of property and the proceeds of sales under execution; that to the oft repeated, and as it were, stereotyped interrogatory put to them, nothing is said about the quality of the lands so sacrificed, or about the clearness or defectiveness of the titles, and not one word about the situation or value of the lands embraced in this controversy. By evidence taken on the part of the complainant, it is stated that they were worth from one to five dollars, or from two to three dollars per acre, and, taking a mean valuation between these, giving the estimate of three dollars per acre, the lands at the time of the sale were worth not less than forty thousand dollars, and were purchased by the person who originated and controlled the whole transaction for nine dollars and thirteen cents! An inadequacy so enormous as this, if not when regarded singly, yet when taken in connection with the attendant circumstances, with the agency of the defendant in the transaction, can be declared with sincerity to have shocked the conscience and every sense of right entertained by this court, and caused this transaction to be viewed as a proceeding which cannot be countenanced, without the subversion of every rule of legal or moral equity; caused it to be regarded as tainted with fraud from its inception to its consummation; calls upon this court to declare, as it does declare, the sale and conveyance of the property now claimed by the bill as fraudulent and void, and to decree, as it does hereby decree, that the respondent, by proper assurances, release to the complainant all right, title, interest, and property held or claimed by them in and to the lands purported to be conveyed to them by the deed from the sheriff, referred to in the proceedings in this cause. Decreed accordingly.

RINGO, District Judge, did not sit, having been of counsel in the case.

From this decree the defendant appealed to the supreme court of the United States [which affirmed the decree of the circuit court. 19 How. (60 U. S.) 303].

SURPLUS & REMNANTS OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "Surplus & Remnants of the Ship Edith. See The Edith."]

SURRATT (UNITED STATES v.). See Case No. 16,423.

Case No. 13,630.

The SUSAN.

[1 Spr. 499; [1] 22 Law Rep. 531.]

District Court, D. Massachusetts. Oct., 1859.

PILOTS — SALVAGE — REQUEST FOR ASSISTANCE — RIGHT TO REFUSE—CONTRACT FOR SERVICE —POLICY IN FIXING COMPENSATION.

1. When a vessel is in such peril as to be the subject of salvage service, a pilot, by the general law, is not bound to give his aid for mere pilotage.

[Cited in Flanders v. Tripp, Case No. 4,854.]

2. If, in such case, the vessel hoist her colors at the fore topmast head, it will be deemed a request for assistance, although it be the usual signal for a pilot.

3. Salvors cannot force themselves upon a vessel in distress, against the will of the mas-

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

ter. It is at his option to accept their service or not.

[Cited in The Choteau, 9 Fed. 211; The Cherokee, 31 Fed. 169.]

4. But, if he has requested their assistance by a signal of distress, or otherwise, and they have incurred danger, expense or labor, in compliance with such request, and their aid has then been refused, it seems, they have a right to some compensation, at least if the vessel ultimately comes to a place of safety.

[Cited in Pope v. The Sapphire, Case No. 11,276; The Williams, Id. 17,710; The Louisa Jane, Id. 8,532; The New Orleans, 23 Fed. 910.]

5. Where aid in saving a vessel from a sea-peril is rendered, under a contract, it is a salvage service, unless, by the terms of the contract, the compensation is to be absolute, and not contingent upon success.

[Cited in Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 478; The Williams, Case No. 17,710; The Louisa Jane, Id. 8,532; Baker v. Hemenway, Id. 770.]

6. In fixing the amount of salvage compensation, it is proper to take into view the policy of encouraging competent persons, on a dangerous coast, to associate together and keep themselves prepared with boats and other appliances, to render prompt assistance to vessels in distress.

In admiralty.

J. Wilder May, for libellants.

E. F. Hodges, for claimant.

SPRAGUE, District Judge. This was a libel for salvage. I have no doubt that this vessel was in such peril as to be the subject of salvage-service, and that the libellants went on board from the shore, and aided in bringing her to a place of safety. But it is insisted that they are not entitled to a salvage compensation, because it was understood between them and the master, before and at the time the assistance was rendered, that it was to be merely pilotage.

This requires examination. It appears that, on the 6th of February, this vessel made sail from Holmes' Hole, bound for Boston. After proceeding about fifteen miles, her lumber ports were stove in by sheet ice, and in five minutes she was filled with water, and sunk as low as her cargo of lumber would permit. Her cabin and her rails were submerged, and only the extremities of the stern and bow, and the upper part of the deck-load of lumber were above water. The crew could have neither fire nor shelter, and most of their clothing was wet. The water flowed into her so freely, that no attempt was made to free her from it by the pumps or otherwise. In this condition she made a signal of distress, and was soon afterwards taken in tow by the brig Rebecca, belonging to the same owner. The weather being mild for the season, and the wind moderate, some consultation was had between the masters of the two vessels, about proceeding to Boston; but it was concluded that the Susan should go into Monomoy Point. The master of the Susan was on board of the Rebecca, and her flag was then hoisted at the fore topmast head as a signal. Upon seeing this, eight of the libellants proceeded in a boat toward the Rebecca; and as they approached her, the master of the Susan inquired if they had a pilot, to which one of them, James Colson, replied that he could take her in, referring to the Susan, then water-logged and in tow.

There is testimony that Captain Lowd, the master of the Susan, said that a pilot was all that he wanted, and that he needed no other assistance. But it is not stated that any response was made to this by any of the libellants, and I am not satisfied that it was said to them or made known to them, so that they understood or ought to have understood that whatever they should do would be only as pilots, and for mere pilotage compensation.

Immediately after getting on board of the Rebecca, she and her tow, by advice of Colson, were taken into shoaler water, and there anchored as a place less in danger from ice, until the tide should favor her going into harbor. In the meantime, four of the libellants, at the request of Captain Lowd, took the steward of the Susan and the clothes of her crew on shore, and afterwards returned. While this boat was absent, the Rebecca departed and kept on her voyage. Soon after the return of the boat, with the aid of the libellants the anchor of the Susan was weighed, and she attempted to get into the harbor of Monomoy, steering partly by her rudder, and partly by her sails. Being very deep in the water she took the ground; thereupon a part of the libellants went in her boat to the light ship, half a mile distant, obtained a kedge anchor, and aided in kedging her off the shoal and into the harbor. These were, in their nature, salvage services. In weighing the evidence, with a view to determine whether the libellants were by agreement restricted to the mere compensation of a single pilot, all the circumstances should be taken into consideration. No one of the libellants was a pilot by commission or appointment; and if they had been, the Susan was in such condition that they would not, by the general law, have been bound to go on board and aid in getting her into port, merely as pilots. The Hebe, 2 W. Rob. Adm. 247. The presumption, therefore, is, that the service was understood by the parties to be salvage, unless it be shown by satisfactory evidence that there was a different agreement. In The Haedwig, 24 Eng. Law. & Eq. 582, a vessel in a condition to be the subject of salvage service made a signal for a pilot, by hoisting her colors at the fore topmast head, as in the present case, and when a boat came alongside, the master of the vessel said he wanted one man as a pilot; and the boat's crew—none of whom were commissioned pilots—aided in getting the vessel into port, it was held that they were entitled to salvage. Dr. Lushington, in giving his judgment, declared that he should hold a signal, under such cir-

cumstances, to be a signal for assistance, and not for a pilot, and awarded salvage. He does not notice the fact, stated in the protest which was in evidence, that the master of the vessel said to the boat that he wanted one man as a pilot, but construed the signal as a request for assistance; and, as the assistance needed and actually rendered was in its character salvage, and not mere pilotage, he decreed a salvage compensation. It may, perhaps, be inferred, that in his view, the receiving of such assistance overruled the mere declaration that a pilot only was wanted. The cases Lea v. The Alexander [Case No. 8,153], and Callagan v. Hallett, 1 Caines, 104, were decided not upon the general law, but upon the positive enactments of a New York statute. It is true, salvors cannot force themselves upon vessels in distress, against the will of the master. It is at his option to accept their services or not; and if he refuse them, compensation cannot be recovered for assistance subsequently rendered against his will. I am not speaking of cases in which the master fraudulently attempts to destroy his vessel; for in the present case there is no doubt of his good faith toward the owners and underwriters. If the aid of salvors be accepted only upon a clearly understood condition that it shall be deemed merely pilotage, they will be limited to mere pilotage compensation. But I hold, with Dr. Lushington, that a signal, made by a vessel in actual distress, and needing other assistance than pilotage, although it be the usual signal for a pilot, shall be deemed a signal for assistance.

In such case, the vessel has no right to make a signal merely for a pilot. Pilots are not bound, unless by statute, to take the hazards, or subject themselves to the labor of going on board, and aiding such a vessel, for mere pilotage compensation. But suppose such a signal is made, or an actual signal of distress is held out, and persons are thereby induced to go on board to render assistance, and then the master of the vessel, who has made the signal, refuses to accept their services, or will receive them only upon conditions to which they are under no obligation to accede, are they to be entitled to no compensation? This, I believe, is a new question, although such a state of facts has sometimes actually existed.

A signal of distress is a request for assistance. And, if competent persons, upon such request, subject themselves to labor and danger, and expense, to get on board of the vessel, and there offer their services for such reward as the law will give them, if such offer be rejected, it would seem that some compensation should be made for the labor, expense, and danger so incurred; at least, in cases where the vessel subsequently comes to a place of safety. Several cases have heretofore been presented to me, where boats have put off from the shore to vessels making a signal of distress, with great gallantry and hazard to life, in launching through the surf, and where the subsequent service of getting the ship out of danger was comparatively trifling. The chief merit, and principal ground of compensation, was their great courage, skill, and danger in reaching the ship; and I should be slow to believe that, in such case, they would be deprived of all reward, at the option of the master in rejecting their services, after reaching his ship. But, in the present case, this question need not be decided, and comes into view only in giving construction to the acts of the parties, in order to determine in what character the libellants really acted. In my opinion, their services were not refused, nor accepted upon condition that they should be deemed mere pilotage, but were properly rendered by them as salvors.

It is true that these services were rendered upon the request of the master, and with some understanding; that is, under a contract with him. And it is sometimes said that the service is not salvage, if performed under a contract. This is quite inaccurate; and it is important that the error should be pointed out.

In much the greater number of salvage cases, the services performed are by agreement; that is, a contract between the salvors and the agent of the owners. Take the common case of a vessel in peril, sending a boat's crew ashore for assistance, and upon their request, and by mutual agreement, certain persons, with a boat, or a sailing vessel, or steamer, render the desired assistance, nothing being said about compensation. The law declares what the compensation should be, viz., meet and suitable salvage, if property be saved; and no pay, if nothing is saved. But it is competent for the parties to go further in their contract, and stipulate what the compensation shall be. They may agree that, if the property be saved, a specified sum shall be paid. That is still a salvage compensation, although the amount is fixed by the previous agreement of the parties. They may agree that compensation shall not be dependent upon success, but payable, at all events, for the time and labor bestowed, whether property be saved or not. By such agreement, the compensation, not being contingent upon the safety of the property, is not salvage. But the party who asserts that there was a contract which displaces salvage, assumes the burden of proving affirmatively the existence of such contract. It is not sufficient for him to show that there was some contract; but he must go further, and prove that it was agreed that the compensation should be absolute, and not contingent, otherwise the law will say that it was to be contingent upon the saving of property.

The cases of Hennessey v. The Versailles [Case No. 6,365], and The Independence [Id 7,014], rest upon these principles. On land, the law is otherwise. If a person requests another to labor in saving his crops, or other

property, from danger and loss, and nothing is said of compensation, the employer is to pay a reasonable amount, at all events.

But here, again, the parties may, by their express contract, make the compensation contingent upon success. For land services, the law gives a quantum meruit, without regard to success, unless it appears that the parties had made a different agreement.

But for services in rescuing property from perils of the sea, the law gives no compensation, unless the property is saved. And the error into which some learned lawyers have fallen, as to the right to salvage, is in looking at the subject only by the light of common law doctrines applicable to services on land. In the present case, it is not proved that there was a special agreement for an absolute compensation, or fixing the amount.

It remains only to consider what amount shall be awarded. The vessel and cargo were worth about $5000. The time occupied by the eight libellants who first went to the Susan, was from ten o'clock in the morning, till twelve at night. Thirteen others of the libellants went on board, about eight o'clock in the evening, and continued to aid, or were ready to aid, until twelve o'clock; but I do not think the assistance of so many was by any means necessary. The labor and hazard were inconsiderable, but the service was promptly rendered, and the compensation was contingent.

There is one element which I have heretofore taken into view, in some cases, and which is not to be wholly overlooked in this. It is that encouragement should be given to competent persons, upon dangerous parts of our coast, to associate together, and keep themselves organized, with suitable boats and other appliances, to render prompt and efficient assistance to vessels in distress. Decree for $250 and costs.

NOTE. That the salvors have no right to act against the will of the master, see Clark v. The Dodge Healey [Case No. 2,849]; The Bee [Id. 1,219]. That pilots are not bound to give their aid, for mere pilotage, to a vessel in such peril as to be the subject of salvage service, see The Elizabeth, 8 Jur. 365; The Persia, 1 Spinks, 166; The Frederick, 1 W. Rob. Adm. 17; The King Oscar, 6 Notes of Cas. 284; The Hedwig, 1 Spinks, 19; The Joseph Harvey, 1 C. Rob. Adm. 306; The Industry, 3 Hagg. Adm. 203; The Star, 14 Law Rep. 487; The Centurion [Case No. 2,554]; The Adventurer, Stu Adm. 101; Hobart v. Drogan, 10 Pet. [35 U. S.] 117. In the late case of The Undaunted (decided by Dr. Lushington, in the court of admiralty, June 21st, 1860), 2 Law T. [N. S.] 520, the Undaunted, troop-ship, bound to London, in coming to, in a heavy gale, at the North Foreland, parted with both her anchors and cables. Sail was made on the ship, and rockets fired for assistance. The steamer Resolute came up, and the master of the Undaunted requested the steamer to proceed to the nearest harbor and bring off an anchor and cable. The steamer went to Ramsgate, and as the best means of executing the order, engaged two luggers, and put on board of them an anchor and cable. During the next three days, the steamer and luggers searched for the Undaunted, without success, she having run to the northward, and got ready her spare anchor. In the afternoon of the third day, the steamer fell in with her, and with the aid of another steamer towed her to Gravesend, where the luggers came up with her, and her master refused to accept the anchor and chain from them.

The action was brought by the owners and crew of the steamer and luggers, claiming salvage for all these services. The learned judge gave £400 to the steamer, and £100 to each lugger, and in deciding the case said: "There is a broad distinction between salvors who volunteer to go out, and salvors who are employed by a ship in distress. Salvors who volunteer, go out at their own risk, for the chance of earning reward, and if they labor unsuccessfully, they are entitled to nothing; the effectual employment of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labor and service may not prove beneficial to the vessel."

Case No. 13,631.

The SUSAN.

[3 Ware, 222.] [1]

District Court, D. Maine. April 6, 1859.

SEAMEN—WAGES—WHEN PAYABLE—WHEN SUIT MAY BE BROUGHT—TEN DAYS' LIMIT—SUITS IN REM—IN PERSONAM.

1. A seaman is entitled to his wages as soon as he has completed his contract and is discharged from the vessel.

2. The provision in the seaman act of 1790 [1 Stat. 131], that process shall not issue against the vessel until ten days after the vessel has arrived at her last port of discharge, except under certain contingencies, does not suspend the right to a personal suit, either in the admiralty or at common law, until after the expiration of that time.

3. The admiralty has a general discretionary power over costs, and when a seaman has a just cause of complaint it will deny him costs, unless he allows to the master and owners a reasonable time for an amicable settlement of the dispute before commencing his libel.

4. Costs in this case allowed on the facts.

Mr. Sawyer, for libellant.

Mr. Hodges, for respondent.

WARE, District Judge. This is a libel in personam by Trott, the mate of the brig Susan, against Drew, the master, for wages. The libellant shipped at Charleston, South Carolina, Feb. 4, 1859, as mate, for wages at $40 per month for a voyage from that port to Boston. The brig arrived in Boston in the evening of the 7th of March, and Trott was discharged and left the brig on the 9th, the period of service being one month and one-seventh of a month, which, at $40 a month, amounts to $46.66, and he had received advance wages to the amount of $20.25, leaving due $26.41. It was not much disputed at the hearing, that the evidence actually in the case showed a balance of wages to be due. There is, in the answer, a defence set up of misconduct and incapacity, which, if proved, might go to a reduc-

[1] [Reported by George F. Emery, Esq.]

tion of the rate, or an entire forfeiture of wages; and the respondent moved for time to obtain and introduce proof in support of this allegation, but that motion, under the circumstances, was overruled, and there remains no defence against the claim for wages.

But it is objected the suit was prematurely commenced before the time of service was ended and before the libellant was discharged. The deposition of Antonio Garcia, the cook, connected with the answer, sufficiently shows that Trott was discharged, by the master, on the 8th of March. The cook was then discharged and there was no more cooking for the crew, though Trott did not finally leave the brig until the 9th. The master, in his answer, says, that on the 8th he told Trott that his services were no longer required on board, and that if he called on the owners his wages would be paid. The admissions in the answer are evidence to charge the master, though his averments are not evidence in his defence; and this, in connection with the fact that the rations of the crew were then stopped, is sufficient evidence of a discharge. Trott, indeed, according to the answer, said that he would not take his discharge until his wages were paid. But the next day when he found that no provision was made for his board, either in the vessel or on shore, he had a right to discharge himself He may be considered as discharged, so far as the master is concerned, on the 8th, and the wages were then due and payable, and the libel was filed on the 10th. The wages of a seaman are payable of common right as soon as his contract is completely performed, and then the right of action arises. The provision of the seaman act of 1790, that process shall not issue against the vessel until ten days after her arrival at her last port of destination, and the discharge of her cargo has never, that I am aware, been construed as suspending the right of a personal action against the master or owner until after the expiration of that time, either in common law or in the admiralty. My opinion is, that there was a legal right of action when the libel was filed.

It is then contended that, if the legal objection to the suit be overcome, it was hastily and vexatiously commenced, without allowing the master and owners a reasonable time to compromise and settle the dispute, and that, therefore, no cost ought to be allowed. That there was a dispute about the wages, is amply shown by the answer. That is framed with a view to a defence against the entire claim. The admiralty has a general discretionary power over the matter of costs, and it is its habit to exercise this power for the purpose of checking vexatious litigation. It exercises liberally a large discretionary power for the protection of seamen against undue advantages attempted to be taken by masters and owners. But it will not allow this protecting shield to be turned into a weapon of offence. If a controversy arises and a seaman has a just cause of complaint, it requires of him a reasonable moderation in enforcing his rights by legal process. If in a revengeful and litigious spirit, he runs with hot haste to commence a suit without allowing a reasonable time for an amicable settlement of the controversy, the court will mark its sense of his conduct by a denial of costs. But I do not think this can be fairly charged on the libellant in this case. He had been discharged from the ship, and at that time he claimed his wages; his rations were stopped and he was thrown on his own resources for the expense of board; there was evidently an ill feeling between the parties and it is equally evident that there was a controversy about the amount at last due. He waited two days before commencing a suit, living at his own expense. In cases of seamen, a delay of payment practically amounts to nearly a denial of payment. My opinion is that Trott is justly entitled to costs.

Case No. 13,632.

In re SUSAN.

[2 Wheeler, Cr. Cas. 594.]

Circuit Court, D. Indiana. Nov. 3, 1818.

SLAVERY—FUGITIVE SLAVE—PROCEDURE FOR RECLAIMING.

[Act Cong. Feb. 12, 1793 (1 Stat. 302), providing a procedure for the reclaiming of a fugitive slave escaping into another state, is valid, and the remedy thereunder supersedes the remedy given by state laws.]

[Motion to dismiss a warrant for the arrest and removal of a fugitive slave.]

PARKE, District Judge. Susan, a person of colour, being brought before me, upon a warrant issued upon the complaint of her master John L. Chasteen, a citizen of the state of Kentucky, who claims her as a fugitive from labour, it appeared that cognizance of the case had been taken under a law of this state, which provides that a non-resident, having a claim to the service of any person in this state, shall procure a warrant from a judge, or a justice of the peace, who, being satisfied of the validity of the claim, shall certify the case to the next term of the circuit court for the county, where a trial by jury shall be had in the ordinary mode; and upon verdict and judgment being obtained against the servant, the court shall grant a certificate, authorizing the claimant to remove the servant out of the state; that the claim of Chasteen having been asserted under this law, the case was certified to the circuit court, for the county of Jefferson; and, being dismissed by the claimant, a bill in equity was filed, and an injunction obtained against him, for the purpose of investigating the claim of the girl to her freedom. She claims, however, being brought before me, the case pending before the state court was dismissed,

and a motion submitted for the dismissal of the warrant, upon the ground: "That the 3rd clause of the 2nd section of the 4th article of the constitution of the United States, confers no authority on congress on the subject of fugitive slaves; and, therefore, that the act of congress (Feb. 12, 1793) is unconstitutional."

But admitting the constitutionality of that law, it was contended that the several states have authority, concurrent with congress, to legislate on this subject. and therefore, that any procedure under the law of this state, (December 30, 1816,) already mentioned, operates to the exclusion of any authority derived from the act of congress. Prior to the adoption of the constitution of the United States, the inhabitants of the states where slavery prevailed, were exposed to so many inconveniences from the escaping of the slaves into other states, where slavery was not tolerated. From the different views entertained of the subject, it was thought unnecessary or improper to aid in their restoration; and in the states where coloured persons were free, persons escaping from their masters, became emancipated by their laws. To correct these abuses, prevent collisions between the several states, to secure the enjoyment of property according to their laws, respectively, and to enable the owners of slaves, fleeing from their service, to reclaim them, the constitution provides that no person held to labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on the claim of the party to whom such service or labour may be due; and in conformity to this provision of the constitution, congress accordingly enacted that any person held to service or labour, in any state, according to the laws thereof, escaping into another state, may be seized by the person to whom such service or labour is due, and taken before a judge of the United States or any magistrate of a county, &c.; who, upon proof, to his satisfaction, that the person so seized, doth, under the laws of the state from which he or she fled, owe service or labour to the claimant, shall give a certificate thereof, and which shall be a sufficient warrant to remove back the fugitive to the state from which he or she escaped.

This case has probably furnished the first occasion on which the validity of this law has been questioned, which is cited by Judge Tucker in his commentary on the constitution of the United States (Tuck. Bl. Comm. 366), and by the supreme court of the state of New York (in, I believe, Glen v. Hodges, 9 Johns. 67), with approbation, and which has been recognized in many cases before the judges and courts of this country. No reason has been suggested to influence a deviation from this current of authority; and the case, as regards this point, is considered clear of doubt or difficulty.

Before the passage of the act of congress, owners of slaves escaping into other states must have resorted to the laws of these states for the recovery of their property. They had no other means of redress; but when, in conformity to the constitutional provision, congress legislated and provided a remedy commensurate with the object in view, it superseded any state regulation then existing, or that might thereafter be adopted. The idea of another concurrent power in the federal and state governments appears to have been carried too far in the argument, and, if admitted, would be pregnant with the greatest mischief, and the source of perpetual collisions between the states and the general government. The cases of taxation, &c., are not opposite. A concurrent power may be exerted, on the same subject, for different purposes, but not for the attainment of the same end. If laws of the same tenor and effect are enacted, one must be useless; but if they differ in the remedy, and in the mode of obtaining it, their relative authority must be determined from a recurrence to the source from whence they originated. In the formation of the constitution of the United States, the states parted with this authority, and devolved it upon the general government, and it is a privilege secured to the people of the states, respectively, to seek redress before the tribunals, in the mode designated by congress.

By the law of congress, a judge or magistrate is competent to decide, finally, the service of the owner; but by the law of the state, if satisfied of the validity of the claim, he is to certify the case to the circuit court. The former case is to be determined in a summary way; according to the latter, by a court aided by a jury. By the former, there is a discretionary power as to the reception of evidence in support of the claim; by the latter, the cause must be conducted as is usual in suits at common law And it is unnecessary to inquire whether one or the other is best calculated to promote the ends of justice. It is sufficient that congress have prescribed the mode, and the motion must, therefore, be overruled.

SUSAN, The (EDWARDS v.). See Case No. 4,299.

Case No. 13,633.

The SUSAN E. VOORHIS.

[10 Ben. 380.] [1]

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

SHIPPING — BOND FOR SAFE RETURN OF VESSEL — ACCOUNTS BETWEEN PART OWNERS — STIPULATION.

1. C., a minority owner of a brig, filed a libel against her to obtain security for her safe return from a voyage from which he had dis-

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

sented. The majority owners appeared and agreed to give the security, the vessel was appraised and the security for the interest of C. was given and the vessel was released and sailed on the voyage. The security was a stipulation, entitled and filed in the cause, in the sum of $1,300, conditioned on the vessel's safely returning "from the said voyage to the port of New York." Afterwards C. filed a supplemental libel, in which he averred the proceedings above mentioned, and that the vessel never returned to the port of New York but was lost at sea. The claimants answered, averring that the vessel returned from the voyage dissented from, to Boston, and was then sent without objection from C. on another voyage, on which she was lost, which was claimed to have been a satisfaction of the stipulation, and setting up also that at the time when the action commenced there were outstanding bills against the vessel, which the majority owners had since paid, and that they were entitled to have the share of such bills which belonged to C. to pay, deducted from any amount due on the stipulation: *Held*, that the return of the vessel to Boston did not satisfy the stipulation, which was conditioned on her returning to New York.

2. The vessel having been lost, the liability of the stipulators to pay the amount of their stipulation was absolute. But they were not liable for interest during the absence of the vessel.

3. The amount which might be found due upon an accounting between the majority owners and C. could not be applied to diminish the liability of the stipulators for the full amount of their stipulation.

In admiralty.

Huntly & Bowers, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

BENEDICT, District Judge. This action was brought by Robert P. Conk, a minority owner of the brig Susan E. Voorhis, to obtain security for the safe return of that vessel from a contemplated voyage to which he had dissented.

The vessel having been seized by virtue of the process, the majority owners appeared as claimants and consented at once to give the security prayed for. Accordingly, by consent, an order was entered, appointing appraisers to ascertain the value of the vessel, and that value having been thus ascertained, by consent, the majority owners gave the security demanded, in the sum of $1,300, and, thereupon, on like consent, the vessel was released from custody and proceeded upon the voyage objected to.

The security referred to was in the form of a stipulation, executed by the claimants and two stipulators, which stipulation was entitled as in this cause, and was duly filed herein on the 6th day of November, 1875. It recites the filing of the libel, the seizure of the vessel, the appearance and filing of a claim by the majority owners, the value of the libellant's interest in the vessel to be $1,300, and then goes on as follows: "And the parties hereto hereby consenting and agreeing that in case of default or contumacy, on the part of the claimants or their sureties, execution for the above appraised value may issue against their goods, chattels and lands. Now, therefore, the condition of this stipulation is such that if the said brig, her tackle, apparel and furniture, shall safely return from the said voyage to the port of New York, or in case of dafault, if the stipulators undersigned shall pay the said sum of thirteen hundred dollars ($1,300), and shall at any time upon the interlocutory or final order or decree of the said district court or any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Beebe and Donohue, Esquires, proctors for claimants of said brig, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue."

The vessel having been thereafter lost at sea before any return to the port of New York, the libellant filed a supplemental libel herein, wherein after setting forth the proceedings above described, it is averred that the vessel, when released from custody, as aforesaid, was despatched by the majority owners upon the voyage dissented from and never returned to the port of New York, but was on the 18th of July, 1877, lost near the mouth of the Godaway river in Hindostan.

To this supplemental libel the claimants filed an answer, in which, after admitting the giving of the stipulation and the despatch of the vessel upon the voyage dissented from they set up that the vessel returned from the voyage dissented from to the port of Boston, which return they insist satisfied the condition of the stipulation they had given; that the return of the vessel to Boston was known to the libellant, and she was permitted thereafter to undertake another voyage without objection from the libellant, on which last mentioned voyage the loss set up in the libel occurred. The claimants further set up that at the time of commencing this action there were bills outstanding against the vessel for repairs done prior to and not in preparation for the voyage dissented from, which bills the majority owners have since paid, and for one-sixteenth of which with interest this libellant is indebted to the majority owners, and this sum they claim to recoup and have deducted from any amount found due upon the stipulation aforesaid.

There being no dispute in regard to the giving the stipulation, the non-return of the vessel to the port of New York, her actual return to the port of Boston and her subsequent loss, the cause has been submitted with the understanding that, if in the opinion of the court the fact that the majority owners have paid bills for the vessel, incurred prior to and not connected with the voyage dissented from, for one-sixteenth of which the libellant is now indebted to the majority owners, is material to the present controversy, evidence in regard to such fact may be taken at a future time.

In regard to the questions thus presented I am of the opinion that the fact that the vessel returned to Boston and again sailed from that port upon a voyage during which she was lost, affords no defence against this demand.

The undertaking of the stipulation was clear and unmistakable, that the vessel should safely return from the then projected voyage to the port of New York, or, in case of failure so to return, that the stipulators would pay the sum of $1,300. A return to Boston was not a return to New York, and the failure to return to New York renders the stipulators liable upon their stipulation, for the amount thereof.

It being admitted that the vessel is lost, the liability of the stipulators has become absolute to pay the full amount of their stipulation. Their liability, however, cannot be extended beyond that amount. They are not liable for interest during the absence of the vessel, and can be charged with interest only from the time of entry of a decree upon the stipulation, the terms of the stipulation being that "in case of default or contumacy execution for the above approved value ($1,300) may issue, etc."

The remaining question is clear. The claimants have no right to diminish the libellant's recovery upon the stipulation given for safe return, by any amount that might be found due from the libellant to his co-owners, upon an accounting between such owners as to the business of the vessel up to the commencement of the voyage dissented from. In the first place, the court is without jurisdiction to take such an accounting. In the second place, if such a claim could be entertained upon general principles of equity, no equity here appears, as it is not averred that the libellant is insolvent. In the third place, the present is a proceeding upon a supplemental libel to obtain a decree against the parties to the stipulation given for the safe return of this vessel. The matter of the accounts between the owners is wholly foreign to such a demand and what is more, it is a matter between different parties, for among the stipulators are persons who were never owners in the vessel. It is evident, therefore, that the state of the account between these part owners is a matter not material to the present controversy.

The libellant is therefore entitled to a decree against the stipulators upon their stipulation for the amount thereof, to wit, $1,300. He must also recover his costs.

Case No. 13,634.

The SUSAN G. OWENS.

[2 Am. Law J. (N. S.) 179.]

District Court, E. D Pennsylvania. 1848.

ADMIRALTY—LIEN FOR SUPPLIES.

[The agents of the owners of a ship registered in Baltimore, where the owners resided, made a contract, at Philadelphia, for the sale of the ship to H. & S., not residents of Philadelphia; the title to the ship to be transferred to them on full payment of the price. H. & S. caused extensive improvements to be made to the ship and supplies furnished to her at Philadelphia. They were unable to complete their contract, and assigned it to other persons, to whom the legal title to the ship was transferred by the owners, and by whom she was registered anew at Philadelphia. *Held*, that the ship chandlers and material men and the stevedore who stowed the cargo and stores were entitled to liens against the ship for the goods and services furnished and rendered to the ship, upon the invitation of H. & S., before the transfer to the assignees of their contract.]

In admiralty.

Mr. Barns, Mr. Van Dyke, and Mr. Donegan, for libellants.

G. M. Wharton and Mr. Kennedy, for respondents.

KANE, District Judge. The ship Susan G. Owens was registered in the district of Maryland, as the property of citizens resident thereof. On the 21st of February last, then being at the port of Philadelphia, she was made a subject of an agreement between certain persons as agents for the owners and Messrs. H. P. & S. S. Townsend. The agreement was as follows: "We, Mason, Kirkland & Co., of Philadelphia, agents for the owners of the ship Susan G. Owens, burthen 730 $^{10}/_{95}$ tons, lying in this port, do, by these presents, sell said named ship to Messrs. H. P. & S. S. Townsend, for the sum of fifty-four thousand dollars, to be paid in hand by them to the said Messrs. Kirkland & Co., in the following sums and periods as here stated, viz.: ($10,000.) Ten thousand dollars to be paid within 15 days from this date, February 21. (10,000.) Ten thousand dollars to be paid within 25 days from this date. (29,000.) Twenty-nine thousand dollars to be paid within 35 days from this date. (5,000.) Five thousand dollars to be paid in hand on the signing of this contract. And the said sum ($54,000) to be considered as deposited in the hands of Mason, Kirkland & Company, for the faithful performance of the said stipulation. And we, the said H. P. & S. S. Townsend, do, by these presents, agree to forfeit all our right, title and interest in the said sum of $5,000, and any further sums as they may be paid in, and also of all claim of ownership in said vessel, provided that we should fail to perform our portion of this contract as named. On the faithful completion of the terms of this contract, Mason, Kirkland & Co. bind themselves, by these presents, to have the said ship Susan G. Owens, legally transferred to Messrs. H. P. & S. S. Townsend. Witness our hands and seals this twenty-first day of Feb., A. D. 1849. Mason, Kirkland, & Co. (L. S.) H. P. & S. S. Townsend. (L. S.) Witness: H. Frank Robinson. D. C. Landis."

The Messrs. Townsend appear to have been in Philadelphia at the time of executing this instrument, but they had no domicil here in

any sense, commercial or other. In fact, it would seem that they were merely adventurers who came here for the occasion, one of them intending to take passage in the ship for California, which was to be its destination. They proceeded immediately to fit her out as a passenger ship, on a very expensive scale, and to lay in supplies and stores for a two years voyage. What her employment was to be after arriving out, does not clearly appear; whether she was to remain there as a receiving ship, or to trade as a packet along the western coast; but the outfit was intended to be adequate to either object. The contracts with the material men and others were not made by the Townsends in person. The captain sometimes alone, sometimes in company with the father of one of the partners who acted as agent of the concern, gave the orders, and they were executed as it appears in all cases on the credit of "the vessel and her owners." Their means and credit were very soon exhausted. They paid $5,000 upon the execution of the agreement which I have recited; but when the first instalment fell due—fifteen days after—they were only able to pay one-fourth of it. And at some early period of their transactions, they were glad to borrow $500 from one of the libellants. At last, on the 25th of April, finding themselves altogether unable to prosecute their intentions, and the vessel having been attached in this court, at the instance of numerous libellants, they assigned their contract of purchase to the present claimants for the sum of $25,000, and the vessel was registered anew in the port of Philadelphia, as the property of residents of this district; the entire ownership of the ship and her outfits vesting accordingly in them. The demands before the court are against the ship, her tackle and apparel by ship chandlers and other material men, and by the stevedore who stored the cargo and stores; all of them founded on contracts made before the transfer of the 25th of April. They are resisted upon the ground that the vessel was a domestic vessel in her home port, where the owner was at the time of contracting, and that therefore she was not liable upon an implied lien for supplies or stowage services.

The other points which were made in the case, I do not think it necessary to consider. What is meant by ship chandlery in the Pennsylvania act of assembly, and whether a domestic vessel is, or is not, specifically liable to the stevedore, were questions elaborately and ably discussed in the argument; and so was the other question, whether the opinion of the supreme court in the case of The General Smith, 4 Wheat. [17 U. S.] 438, is to be regarded as conclusively establishing the distinction between foreign and domestic ships, as to a specific liability for repairs and out-fits. It would not perhaps be difficult to decide all of these questions; but it will be time enough to do so when they shall be necessarily involved in the determination of a cause before the court. But the present does not seem to be the case either of a domestic vessel, or of a vessel domestic or foreign, contracting through the instrumentality or in the presence of the owners. The vessel was registered in a foreign port, and her legal owners resided there. The Townsends had only an equitable and contingent, or at best, a defeasible interest in her; and moreover, they were not residents of this district. Now, whether we turn to the law maritime of the world, or to the modification of it which is asserted in the case of The General Smith, there can be no doubt but that a vessel thus circumstanced becomes liable for repairs and supplies generally. The general maritime law recognizes no distinction in this respect between foreign and domestic vessels. Both are liable on the civil law principle that whoever has contributed to the preservation, or the increased value of property, has a privilegium in it for the amount due to him in return.

The distinction which has been admitted into our law on this subject is not found, that I am aware of, in either the ancient or modern law of any other country. The Consulado, c. 32, as quoted by Boulay Paty (1 Cours de Droit Mar. 121),[1] says, that "if a new vessel before making her first voyage is sold at the instance of creditors, the carpenters, caulkers, and other workmen, as well as the persons who have furnished the timber, the pitch, the spikes, and other things necessary for her construction, shall be preferred to all other creditors whatsoever." The Guidon, c. 9, § 1, says: "The debts contracted by the master of a ship for repairs, provisions, supplies, or other things for voyages (entrepris) determined on, have a special hypothecation in their favor upon the proceeds of the freight, in preference to anterior debts, whether by hypothecation or otherwise." 2 Pard. Lois Mar. 424. The laws of the Hanseatic League (Anno 1614), tit. 5, § 7, authorize the captain in case a part owner shall refuse to contribute his share of the out-fit, to take up such amount as may be needed, on the credit of the vessel and on the profits of the voyage, and to hold his share of them answerable jointly, with those of the other part owners. 2 Pard. Lois Mar. 546. A provision altogether similar is found in the Maritime Code of Sweden (Anno 1667), pt. 3, c. 2, and is applied with appropriate modifications to the case of advances for the construction of the vessel and the payment of the crew. Part 4, c. 9, of same Code; 3 Pard. Lois Mar. 160, 161, 169. So too by the Danish Code of 1683, bk. 4, cc. 5, 59, the vessel is specially hypothecated for all moneys lent for the construction of the ship, or the support of the

[1] I quote from Boulay Paty, because the arrangement and notation of the chapters of the Consulado are not uniform in the different editions, and I am unable at the moment to find the original passage in Pardessus' translation, which is the only one accessible to me.

workmen engaged in building her; and this privilegium continues and may be enforced until she has sailed on her first voyage. 3 Pard. Lois Mar. 301. The Water brieven hypothecation of the Netherlands, for which a remedy is given by the Ordonnance of Gordrecht (Anno 1533), is to the same effect. See 4 Pard. Lois Mar. 165, 167, and the notes. The Ordonnance of Louis 14 (Anno 1681), which Judge Washington recognized in the case of The Seneca [Case No. 12,670], as a compend of the law maritime of the world in arranging the order in which privileged debts shall be paid, (book 1, tit. 16,) enumerates as well advances for repairs and out-fit before departure, as for necessaries furnished abroad. And Valin, in his commentary on this title, (volume 1, 363), says, that this of course includes the debts due to all those mechanics and others who have supplied necessaries for the voyage. Emerigon (Contract Gr. Avent. §§ 3, 4) does the same; and he is followed by Boulay Paty (1 Cours. Dr. Mar. 121, 122), who adds that the modern law of France is to the same effect. All these writers give, indeed, a different and higher rank to the privilegia which accrue, pending the voyage, than to those originating in the home port; but they unite in awarding a preference to both over the general creditor, or the party claiming under an elder bottomry bond. The modern law of Holland agrees with this (see Lord Hardwicke's opinion in Ex parte Shank, 1 Atk. 234), and indeed, after looking with some care through the different maritime codes of Europe, as collected by Pardessus, I do not know that any commercial state on the continent refuses to the material man any implied lien on a domestic more than on a foreign ship. In England and Scotland the same rule obtained as on the continent during a long series of years; the admiralty enforcing the liens. The agreement made at Whitehall, 18 Feb. 1632, by all the judges, before the king and privy council, § 3 (Godol. 157), expressly negatives the right of the common law courts to issue writs of prohibition in such cases. Even as late as the year 1777, Lord Mansfield, in the case evidently of a domestic vessel (Rich v. Coe, Cowp. 639, 640), declared that by the English law, "whoever supplies a ship with necessaries has a treble security: (1) The person of the master; (2) the specific ship; and (3) the personal security of the owners, whether they know of the supply or not. And in deciding that the owners in that case were liable notwithstanding some special circumstances, he argues that the unquestioned liability of the ship, is enforced by the admiralty process. "Suppose the ship," he says "had been impounded in the admiralty court, the defendants could never have taken the ship out of the court without paying the debt for which the ship was impounded." I know, indeed, that prohibitions had issued before this period, to restrain the English admiralty from entertaining the claims of material men, and that of later years, that court has very reluctantly foregone the exercise of this branch of its ancient jurisdiction. But the English cases did not formerly, nor do they now, recognize a distinction in this respect, between foreign and domestic ships, except in so far as they are based on the statute of 3 & 4 Vict. c. 65. Both are equally excluded from liability to an implied lien for materials and supplies by the law of England, as both are equally made subject to such a lien by the general law of the sea. See the cases collected in Abb. Shipp. pt. 2, c. 3.

The case of The General Smith [supra], established for the United States a rule on this subject differing, I humbly conceive, as much from that of the English as that of the continental courts. It is this: "Where repairs have been made or necessaries furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the admiralty to enforce the right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and no lien is implied unless it is recognized by that law." Per Story, J., delivering the opinion of the same case, 4 Wheat. [17 U. S.] 438 It is not perhaps altogether easy to harmonize the language in which this opinion is expressed, with the remarks of Judge Johnson in delivering the opinion of the same court in The St. Jago de Cuba, 9 Wheat. [22 U S.] 409. Judge Story, it may be observed, derives the lien in the case of a foreign ship from the civil law as adopted into the Maritime Code of Nations.—Now, by that Code, the master can hardly be said to acquire his authority to constitute implied liens for either out-fits or repairs from his character of præpositus or agent of the ship owner. He is indeed regarded in that character by the Roman law, and as such he may bind not only the specific ship, but the owners in solido, and even make them liable for his delicts; this authority being implied from necessity, and therefore suspended while the exercitor—his constituent, is present. But the qualified power of the master under the law maritime, while it is much more limited in some respects, is in others more ample, or at least less dependent. Thus on the one hand his power extends only to a charge upon the ship, and that for legitimate contracts; the owner may avoid personal liability by abandoning his interest. But on the other hand his authority as manager (gerante) or representative of the ship and its interests, being specific as to them, continues so far as regards these implied liens, whether the owners be present or absent. See the argument of Judge Ware, in The Phebe [Case No. 11,064], and such I understand from the language of Judge Story, on many occasions, to have been his meaning in the case

of The General Smith. The reasoning of Judge Johnson, however, in the case of The St. Jago de Cuba [supra], refers the master's power to a somewhat different theory, and applies to it a different limitation accordingly. "The necessities of commerce require, he says, that when remote from the owner, the master should be able to subject his owner's property to that liability, without which it is reasonable to suppose he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself on his ordinary responsibility without a view to the vessel as the fund from which compensation is to be derived." But whether we take the law as it is laid down by the court in the case of The General Smith, or limit it as was done in that of The St. Jago de Cuba, the result as to The Susan G. Owens is the same. Where did she belong? and who were her owners? Her register, the document by force of which she has any national or home character whatever, without which she is alien every where, declares that she belongs to Baltimore. The act of congress, under which this registry was made, enacts that on a change of the ownership a corresponding change shall be made in the register;—no such change was made.

The grand bill of sale, the universally accepted and looked for evidence of a transferred title to ships and vessels, required not merely by a municipal regulation, but as Sir Wm. Scott says, in The Sisters, 5 C. Rob. Adm. 155 (Am. Ed.) by the universal law of the sea, is not made; the registered owners stand out to the world as the owners and only owners. And thus, holding the legal title, they first permit the libellants on the invitation of third persons, to make and perform contracts for repairing and out-fitting the vessel, which add largely to her value; and then, they or their grantees (for the claimants here are only grantees of the former registered owners, and do not affect to come here in any other capacity,) they come here in full possession and enjoyment of the vessel thus largely meliorated, and claim that neither they nor their vessel shall be held liable for the price of the repairs and out-fits so furnished her. The material men are to look, not to the legal owner at the time of their contract, not to the legal owners now, not to the vessel itself—but to certain conduit-pipes of an equitable, contingent, defeasible interest—cosmopolitan gentlemen who were to have been the owners, had they been able to complete their bargain or had not found it more safely profitable to assign it away. The very statement of such a defence is enough. If the lien of a material man could be avoided by an arrangement like this, it might as well rest at once upon the ship owner's honor. It would only be necessary for him to vest for the time some equitable interest in the captain of his ship, and she might visit every port of the United States in succession, and collect supplies at them all without incurring a liability. Every port would be a home port for her.

But even regarding the Townsends as the owners, the argument of the defence is not less inconclusive. Because these gentlemen are residents no where else, it can hardly be said to follow that they must be domiciliated here; and if the home port of the vessel is dependent on the domicil of the owner, may we not be led to the conclusion that both are homeless alike. Certain it is, that the argument would exempt a vessel from liability to a specific lien precisely in those cases in which such a lien is most needed—the cases namely in which she is most unequivocally a stranger to the port, and personal recourse against her owners least available. I cannot find anywhere the warrant for so marked a departure from the established policy of the maritime law. It is emphatically the law of fair dealing and well protected confidence;—looking with a liberal spirit to the general interests of navigation, holding foreigners and citizens as members alike of that great community in which commerce has united mankind, securing credit and aid to the ship owner every where, by securing payment to all who trust upon the credit of his ship, but watching jealously against oppression and fraud, however masked or tricked off in the semblance of legal formulas. Such is its policy; and I am constrained to add that I have rarely known it more essentially contravened than it would by sustaining this defence.

The decrees must be for the libellants, with full costs,—in the case of McDermott, in the amount claimed by him; in the other cases, the amount to be ascertained by a commissioner from the evidence upon the files. I have no doubt upon the proofs as to the other facts which have been controverted in the cause. Decrees accordingly.

[On appeal to the circuit court, the above decree was affirmed. Case No. 17,310.]

SUSAN LUDWIG, The (HARRISON v.) See Case No. 6,145a.

Case No. 13,635.

SUSQUEHANNA BRIDGE & BANK CO. v. EVANS et al.

[4 Wash. C. C. 480.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

EVIDENCE — PAROL — TO ALTER WRITTEN AGREEMENT—CONTRACTS IMPLIED BY OPERATION OF LAW—INDORSER OF NOTE.

The reasons which forbid the admission of parol evidence to alter or explain written agree-

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

ments and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies with respect to the indorser of a note of hand.

[Cited in Bank of U. S. v. Dunn, 6 Pet. (31 U. S.) 58; Phillips v. Preston, 5 How. (46 U. S.) 292; Halsey v. Hurd, Case No. 5,967; Dessau v. Bours, Id. 3,825; Goldsmith v. Holmes, 36 Fed. 486; Martin v. Cole, 104 U. S. 36.]

[Cited in brief in Goodwin v. Davenport, 47 Me. 115. Cited in Holmes v. First Nat. Bank, 38 Neb 326, 56 N. W. 1013; Ross v. Espy, 66 Pa. St. 483; Smith v. Morrill, 54 Me. 52.]

Action of assumpsit by the president and directors of this company upon a note of hand, dated the 3d of September, 1817, made by T. Burr, payable to defendants [Evans and Evans], one hundred and twenty days after date, negotiable at the bank of the plaintiffs, where it was discounted. On the 3d of January, 1818, the note was regularly protested, according to the provisions of the act of incorporation of the state of Maryland. The defendants gave in evidence, without opposition, (the plaintiff's counsel reserving the right to question its admissibility on the argument of the cause to the jury,) that, at the time this note was discounted, the plaintiffs agreed that, when it came to maturity, the plaintiffs would charge the amount to Burr, the maker, (who was then engaged in constructing a bridge across the Susquehanna for the plaintiffs,) if they were then indebted to him in a sum equal to the amount of the note, and not look to the defendants for payment The contract, proved by a witness of the plaintiffs was, that if, when the bridge should be finished, there should be a balance due to Burr equal to the amount of this note, it should be charged to him, and that they would not look to the defendants. It appeared on evidence that, at each of the above periods the plaintiffs were indebted to Burr a much larger sum than the amount of the note in question. It further appeared that Burr had executed mortgages to the plaintiffs and assigned to them certain securities, which the plaintiffs afterwards released; but what was the particular reason for giving these securities did not appear, otherwise than by the evidence of a witness, who deposed that the object was to protect the plaintiffs against the creditors of Burr. Evidence was given that the president and directors of this bank and bridge company were citizens of Maryland, but that some of the stockholders were citizens of Pennsylvania.

For the plaintiffs it was contended (1) that the parol agreement attempted to be proved between the plaintiffs and defendants was inadmissible to control the contract which the law created to bind the defendants as assignees of this note. 3 Camp. 57; 7 Mass. 518; Phil. Ev. 424, 433, 442; 11 Mass. 29; 8 Johns. 189.

But if the evidence be admissible, still it appears from the minutes of the board, that, on the day when this note was discounted, only five directors were present, whereas the charter of incorporation requires that nine directors should be necessary to form a board to transact the ordinary business of the institution, although five are sufficient to make discounts. It was further insisted, that the weight of evidence was in favour of the agreement to charge that bill to Burr, in case a balance should be in his favour on the completion of the bridge.

The counsel for the defendants insisted: (1) That parol evidence of the agreement was properly admitted Whart. Dig. pp. 253, 254, pl. 382, 384; 5 Serg. & R. 363; 3 Serg. & R. 609. That the witnesses prove that this agreement was made between the plaintiffs and defendants. And that it is of no consequence whether the agreement was as the plaintiff contends for, or as it is proved by the defendants. (2) That the plaintiffs, by surrendering to Burr, the principal debtor, the securities they held, discharged the defendants, the indorsers. 1 Madd. 235; 3 Bos. & P. 363; Chit. Bills, 374; 2 Bos. & P. 61; 8 Serg. & R. 457; 4 Johns. Ch. 130. (3) That this court has no jurisdiction. It is not sufficient that the president and directors are citizens of Maryland, all the members of the corporate body must be so. They are emphatically the plaintiffs, suing by their corporate name. But some of those members are citizens of the same state with the defendants. [Turner v. Bank of North America] 4 Dall. [4 U. S.] 11; Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61; [Strawbridge v. Curtiss] 3 Cranch [7 U. S.] 267; Whart. Dig. 113; [Browne v. Strode] 5 Cranch [9 U. S.] 303; Kyd, Corp. 231; 5 Johns. Ch. 303.

Upon the question of jurisdiction, the plaintiff cited Serg. Const. Law, 113; [Chappedelaine v. Dechenaux] 4 Cranch [8 U. S.] 306; [Skillern v May] 6 Cranch [10 U. S.] 267.

Mr. Cohen, for plaintiffs.
Mr. Purdon, for defendants.

WASHINGTON, Circuit Justice. The reasons which forbid the admission of parol evidence to alter, or explain written agreements, and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted. What that agreement was, the jury must decide from that evidence. But it appears to the court to be quite immaterial whether the defendants were to be exonerated in case the plaintiffs should be indebted to Burr to a greater amount than this note at the time when it should become due, or when the work should be finished; provided you are satisfied that,

they were so indebted when the latter event happened. As to the objection made by the defendants' counsel, on the ground of the surrender to Burr of the securities he had given them, no opinion respecting it need be given, since the contract between the plaintiffs and Burr, pointing out the objects for which the security was given, is not before the court, and parol evidence of its contents is inadmissible.

No opinion need be given upon the question of jurisdiction, although we have a decided one, as it seems to the court that the plaintiffs must fail upon the first. If, however, the jury should think otherwise, they will find, subject to the opinion of the court, whether the court has jurisdiction, the president and directors being citizens of Maryland, and some of the stockholders citizens of this state. Verdict for defendants.

NOTE BY MR. JUSTICE WASHINGTON. My opinion upon the point of jurisdiction was that the court could not take it, if any of the stockholders were citizens of this state, although the president and directors were not. The corporate body are the plaintiffs, although they sue by their corporate name. This is obviously the meaning of what was said in Bank of U. S. v. Deveaux [supra], which was misunderstood by Mr. Sergeant in his Constitutional Law.

SUTER (PETER v.). See Case No. 11,021.

Case No. 13,636.

In re SUTHERLAND.

[2 Biss. 405; [1] 3 Chi. Leg. News, 73; 12 Int. Rev. Rec. 211.]

Circuit Court, D. Indiana. Nov., 1870.

BANKRUPTCY — REVISORY PETITION — UPON WHAT MATTERS HEARD.

1. A revisory petition to the circuit court, under the second section of the bankrupt act [of 1867 (14 Stat. 518)], must show wherein the error in the order or ruling of the district court complained of consists, and its nature must be distinctly set forth. The case will not be taken up de novo.

2. Proper practice stated.

[Cited in Re Beck, 31 Fed. 555.]

[In review of the action of the district court of the United States for the district of Indiana.]

In bankruptcy. This was a petition for review, filed by William Sutherland, September 9, 1870, under the second section of the bankrupt law of 1867, alleging that certain persons claiming to be his creditors had presented a petition to the district court of this district to have him declared a bankrupt, for acts therein stated; that on denial of bankruptcy by him the case was submitted to the court on the third day of June, 1870, and he was then adjudged a bankrupt. The petitioner alleged that he did not commit any of the acts of bankruptcy charged against him, and that he did not at the time owe three hundred dollars, and denied that he was in any way indebted to the petitioning creditors. The petitioning creditors filed an answer to the petition, alleging that the petitioner took no exception or objection to the adjudication of bankruptcy, and did not cause the evidence to be made matter of record, nor did the petition to this court set forth the evidence given before the district court. To this answer Sutherland excepted.

McDonald & McDonald, for bankrupt.

Perkins & Perkins and Hendricks, Hord & Hendricks, for creditors.

DRUMMOND, Circuit Judge. The exception of Sutherland to this answer as insufficient must be carried back to the petition itself, and, that being done, I am of opinion that upon its face no case is made for the revisory power of this court under the second section of the bankrupt law. If it be conceded that the circuit court, under that section, may revise any order or ruling made in the progress or at the end of the proceedings in bankruptcy, not provided for by the 8th section, still the petition or bill must show wherein the error in the order or ruling consists. In re Alexander [Case No. 160]; Ruddick v. Billings [Id. 12,110]; Littlefield v. Delaware & H. Canal Co. [Id. 8,400].

The petition in this case appears to have been framed on the principle that if a party merely stated the particular order or ruling of which he complained, he could thus bring up the case to be tried de novo. That has not been the construction which has been given to this section. In this instance the petitioner alleges that he should not have been declared a bankrupt, because he did not owe three hundred dollars, nor did he owe the petitioning creditors, nor had he committed any act of bankruptcy. On all these points the district court found against him. The only special circumstances to which the petitioner refers, is to a promissory note of $1,900, held by the petitioning creditors, and which he declares he did not owe, in consequence of the acts of the payee, one Moses; but the court may have been satisfied upon competent evidence that the note was assigned and held for value and in good faith before maturity; and if so, what took place between Sutherland and Moses might be immaterial.

It is not enough that the petitioner state a grievance, or allege that an error has been committed; but the nature of the error or grievance should be distinctly set forth, so that the appellate court may be able to judge of the same.

Here the evidence on which the district court found against the petitioner is not spread out in the record so that this court can determine whether any error has in fact been committed.

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

It is to be regretted that the supreme court has not prescribed some rule under the second section, as the practice is by no means uniform in the different districts. It is desirable that the proceedings should be as simple as possible, and, therefore, in ordinary cases it may be sufficient if a statement is made by counsel, under the direction of the judge of the district court, setting forth the order or ruling complained of, and sufficient facts to enable the appellate court to form an opinion upon the point. This, verified by the judge or clerk, might form the basis of the petition or bill in the circuit court. Of course it is not intended to intimate that the whole case may not be brought up by bill of exceptions, or otherwise; but generally the error complained of consists of a few rulings, and these disposed of, the rights of the parties are settled.

As there seems to have been a misapprehension as to the practice under the second section, I will allow the petitioner to amend his petition, if he shall be so advised.

There ought to be some limit of time within which the application should be made to the circuit court, and it will be observed that the petitioner did not file his petition until more than three months after the decree, a circumstance which would seem to need explanation.

The petition for revision should state clearly and specifically the question decided in the district court. In re Reed [Case No. 11,638].

Case No. 13,637.

In re SUTHERLAND.

[6 Biss. 526.] [1]

District Court, N. D. Illinois. March, 1876.

BANKRUPTCY—ASSETS—CERTIFICATE OF MEMBERSHIP IN BOARD OF TRADE.

A certificate of membership in a board of trade is not an asset which passes to the assignee in bankruptcy.

[Cited in Re Gallagher, Case No. 5,192; Re Ketchum, 1 Fed. 842; Re Warder, 10 Fed. 277.]

[Cited in Barclay v. Smith, 107 Ill. 357.]

In bankruptcy. Motion for a rule on the bankrupt [Israel Sutherland], a member of the Chicago Board of Trade, that he assign and transfer to the assignee his certificate of membership in said board. The bankrupt opposes the rule on the ground that the certificate is not an asset which passes to the assignee.

Samuel Kerr, for assignee.
Ewing & Leonard, for Sutherland.
F. Ullmann, for Board of Trade.

BLODGETT, District Judge. The Chicago Board of Trade is a corporation constituted by a special act of the legislature of Illinois, with a nominal capital of $200,000. The object of the association is declared to be: "To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and disseminate valuable commercial and economic information; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

By its charter the corporation is prohibited from carrying on any business except such as is usual in the management of boards of trade or chambers of commerce. No dividends are made upon its stock. The funds of the association are derived mainly from the initiation fees paid by members, annual assessments, and such fines and fofeitures as are imposed upon members for the violation of its rules and regulations, and are expended in the expenses of the organization in procuring and disseminating information among members. Persons are admitted as members on written application indorsed by two members, and on approval by the affirmative ballots of at least two-thirds of the members of the board of directors, and the payment of the initiation fee of $1000, and signing an agreement to abide by the rules, regulations and by-laws of the association, and all amendments duly made thereto. Any member is liable to be expelled or suspended for the violation of the rules and regulations, extortion, bad faith, dishonorable or dishonest conduct.

It will be seen there is no pecuniary profit to the members of this body, further than what is derived from the incidental use made by a member of the privileges which his membership gives him. It confers no property rights; that is, it represents no interest in property, but only, like the membership of a Masonic lodge, or church, or social club, confers upon the member the privileges of the order.

There is a provision in the rules by which a member who has paid all assessments due, and has against him no outstanding or unadjusted or unsettled claims or contracts held by the other members, whose membership is not in any way impaired or forfeited, may transfer his certificate to any other person eligible to membership, after ten days' notice, posted on the bulletin board of the exchange, and approved by a vote of two-thirds of the board of directors, and it is admitted that at the present time a membership will sell for about $500, when the seller and buyer are able to comply with the regulations in regard to transfer. I have been unable to find any direct authority bearing upon this question, but from analogies I can not see what right this membership confers that can be called property. True, it may be valuable to the member, as is a license to a pedlar, auctioneer, distiller or liquor dealer; but it confers a mere personal privilege. It does not pass to the assignee in bankruptcy by operation of law. The assignee does not become

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

clothed with the rights of membership by virtue of his office and the deed by the register, as he does in respect to the other assets of the bankrupt. He does not even succeed to the rights of a purchaser except by consent of the proper quorum of the board of directors. The certificate expresses nothing which the assignee can use except by the favor and consent of others.

Without discussing the question further, then, I am of the opinion that the bankrupt's membership in this board, being in the nature of a franchise, title, or privilege, does not vest in or pass to his assignee, and cannot be treated as a portion of his assets. It confers no property right, but only the right to trade upon the board, frequent its chambers and exchanges, participate in the information collected, and avail himself of the remedies given to members under the by-laws. But he cannot sell these privileges to a stranger without the consent of the board, through its board of directors, and then only on certain conditions. The rule is denied.

Case No. 13,638.

In re SUTHERLAND.

[Deady, 344;[1] 1 N. B. R. 531 (Quarto, 140).]

District Court, D. Oregon. Jan. 11, 1868.

BANKRUPTCY—FORM 61—RULES OF COURT—ANSWERS—ADMISSIONS.

1. No. 61 of the forms of proceeding in bankruptcy, is merely a demand for a jury trial, and not an answer to the petition—it is neither a showing of cause nor an allegation by the respondent, and the denial contained in it, is to be taken as the mere recital by the clerk of a denial already and otherwise made by the respondent in his answer to the petition.

2. Whether the answer or plea of the respondent to the petition should be general or specific or verified or not, must depend upon the rules of the court in which the petition is pending.

[Cited in Re Findlay, Case No. 4,789.]

3. The general rule of this court being that answers must be specific and verified, and the true object of pleading in any case being to narrow the controversy to the point really in dispute, no greater latitude ought to be allowed the defence in bankruptcy in this respect, than in ordinary actions and suits.

4. Where a petition alleged that the respondent, with knowledge of his insolvency, confessed two judgments in favor of third persons with intent to give a fraudulent preference to such persons, and the answer of the respondent tacitly admits the confession of said judgments and insolvency, but denies that the same were confessed "with any fraudulent intent or with the fraudulent intent to give a fraudulent preference:" *Held*, that the issue taken by the answer upon the word fraudulent in the petition was an immaterial one, and that a confession of judgment by an insolvent debtor necessarily gave a preference to the creditor in such judgment and ought therefore, in the absence of sufficient allegation of proof to the contrary, to be presumed to have been so intended.

[Cited in Re Seeley, Case No. 12,628.]

5. Where the respondent by his answer admits, that being insolvent, he confessed a judgment in favor of one of his creditors, but denies that he thereby fraudulently intended to give such creditor a fraudulent preference, there is an affirmative implication that such judgment was confessed with intent to give a preference, and the petitioner is entitled to judgment on the pleadings.

[Cited in Re Ryan, Case No. 12,183; Catlin v. Hoffman, Id. 2,521; Corbett v. Woodward, Id. 3,223.]

6. In effect, the bankrupt act, § 39 [14 Stat. 536], prohibits an insolvent debtor from giving any preference for any reason to any creditor, upon pain of being declared a bankrupt therefor, on the petition of his other creditors.

[Cited in Re Gallinger, Case No. 5,202; Silverman's Case, Id. 12,855; Vogle v. Lathrop, Id. 16,985; Re Lord, Id. 8,503.]

On November 30, 1867, certain creditors of Robert Sutherland filed a petition in bankruptcy against him, charging him with the commission of divers acts of bankruptcy, alleged to have been committed on and after November 19, 1867, and praying that said Sutherland be declared a bankrupt. On the filing of the petition an order was entered, requiring the respondent to show cause on the first Monday in January, proximo, why the prayer of the petition should not be allowed. On January 1, 1868, the respondent filed a paper in the words of "form No. 61" of the prescribed "forms of proceeding in bankruptcy," signed by himself and solicitor, but not by the clerk, and also a special answer to the petition verified by his own oath. At the time appointed for showing cause, the parties appeared, and the petitioners moved for judgment on the pleadings, and the respondent for an order setting down the cause for trial by jury, as demanded in the paper filed by him.

J. W. Whalley and M. W. Fechheimer, for petitioners.

David Logan, for respondent.

DEADY, District Judge. The petitioners' motion for judgment, assumes that form No. 61, entitled "Denial of Bankruptcy and Demand for Jury by Debtor" is simply a rule entered by the clerk, at the instance of the debtor, for a jury trial; and that the statement therein, that the respondent "appears and denies that he has committed the acts of bankruptcy set forth in said petition, and avers that he should not be declared a bankrupt for any cause in said petition alleged," is a mere recital, which is based upon, and presupposes, that the debtor has shown cause why he should not be adjudged a bankrupt, by filing an answer or plea to the allegations of the petition. Sections 40, 41, of the bankrupt act, provide that upon the filing of the petition, "the court shall direct the entry of an order requiring the debtor to appear and show cause, * * * why the prayer of the petition should not be granted," and that, upon the day appointed to show cause, "the court shall proceed summarily to hear the allegations of petitioner and debtor, * * * and shall, if the debtor

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

on the same day so demand in writing, order a trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

An allegation is the statement by a party of his cause of action or defence. To show cause is to make appear, to give a reason. From the well understood signification of these terms, and the nature of the proceeding, I infer, that the act intends, that on the day appointed to show cause, the respondent shall appear and plead to the petition—that is, answer it in writing. In Re Drummond [Case No. 4,093], it appears that the respondent "filed a plea denying the charges" in the petition. As at present advised, I must decide that the paper filed in the words of form No. 61, is merely a demand for a trial by jury, and not an answer to the petition. It is neither a showing of cause nor an allegation by the respondent, and the statement contained in it concerning the denial by the respondent of the acts of bankruptcy alleged in the petition, must be construed as a recital by the clerk, of a denial already and otherwise made by the respondent;—and this recital is made for the purpose of showing on the face of the entry, that it is authorized by what has preceded it—the filing of an answer to the petition controverting the allegations therein contained. Whether this answer ought to be general or specific, or verified or not, must depend, as it appears to me, upon the general rules of the court wherein the petition is pending, in regard to pleadings, or any special rule which may be made therein concerning pleadings in bankruptcy. The general rule of this court requires that answers or pleadings by the defendant, shall be both specific and verified. No good reason is perceived or suggested, why any greater latitude in pleading should be allowed the defence in a petition in bankruptcy, than in ordinary actions and suits. In either case, the true object of pleading is the same—to narrow the controversy to the point really in dispute between the parties. To allow the respondent to controvert the allegations of the petition by the entry of a rule or order with the clerk, or a general unverified answer, would often, if not always, impose upon the petitioner the unnecessary and burdensome trouble and expense of proving that which the respondent well knew to be true, and which he would not deny under oath.

In considering the motion for judgment, the denial recited in the demand for a jury trial, will be laid out of view as immaterial, and the only question is whether the answer admits sufficient to authorize the court to give judgment, pronouncing the respondent a bankrupt. Among other things, the petition alleges that the respondent, on November 19, 1867, then and prior thereto, well knowing that he was insolvent, confessed two judgments in favor of third persons, with intent to give a fraudulent preference to such persons over his other creditors. The answer tacitly admits the confession of the judgments and the insolvency of the respondent, but denies that such judgments were confessed "with any fraudulent intent, or with the fraudulent intent to give a fraudulent preference" to the creditors therein. This traverse, as to the intent with which the judgments were confessed, is too broad. Although the petition alleges that the intent was to give a fraudulent preference, the allegation is surplusage, and not traversable. The bankrupt act (section 39) does not use the word fraudulent in this connection. It declares that an insolvent debtor who confesses a judgment "with intent to give a preference to one or more of his creditors, shall be deemed to have committed an act of bankruptcy." The manifest object of the act is to secure an equal distribution of the property of an insolvent debtor among his creditors; and to this end it is made an act of bankruptcy for such debtor to prefer one creditor over another, without reference to the question whether such preference would otherwise be considered fraudulent or not.

The petition in this case, and the answer following it, seem to have been drawn upon the theory that a confession of judgment by an insolvent is not an act of bankruptcy unless it was done, not only with an intent to prefer the creditor in such judgment, but also with a special intent to defraud the other creditors. Now, section 39 of the act makes the confessing of a judgment by an insolvent "with an intent to give a preference to one or more of his creditors. * * * or to defeat or delay the operation of the act," an act of bankruptcy, whether there was any special or distinct purpose to thereby defraud the other creditors or not. The fact is, and so the act seems to assume, that the giving of such a preference necessarily operates as a fraud upon the other creditors, because it must, if allowed, deprive them of their just proportion of the insolvent's assets. But the intent to prefer being made an ingredient in the act of bankruptcy, ought to be alleged in the petition and may be denied in the answer. Still, unless it appears that the judgment was confessed in ignorance of the respondent's insolvency, or otherwise, so that it could have been done without intending to give a preference, the intent to prefer is a necessary inference from the premises. In Re Drummond, supra, the court says: "Now, it is a rule that every sane man is presumed to intend the probable consequences of his voluntary act. The consequence of this transfer by Drummond of all his property to a portion of his creditors, was not only that it would probably give them a preference, but that it would necessarily and certainly produce that effect. He must have known that this consequence would follow that act, and he must, therefore, be conclusively presumed to have in-

tended it. In so doing, he committed an act of bankruptcy, and a judgment that he is a bankrupt must follow."

[It is also true, that, in this case, the intent with which the transfer was made by Drummond appears to have been averred in the pleadings, but if, in the language of the court, that intent "must be conclusively presumed" from the fact of the transfer under the circumstances, it cannot legitimately be the subject of a distinct issue in the pleadings. The fact being established, only one consequence can follow it, and that the law conclusively presumes was intended. What the law conclusively presumes, cannot be controverted either by pleading or proof. The views upon the question of intent are advanced suggestively, and subject to correction upon further argument and investigation in future cases that may arise. The present motion may be satisfactorily decided, upon the construction of the law, that a confession of judgment by an insolvent, to constitute an act of bankruptcy, must be with intent to prefer one creditor over another, and that such intent must be averred in the petition and may be controverted by the debtor.][2]

Here, as has been said, the answer tacitly admits the insolvency of the respondent and his knowledge of it at the time he confessed the judgments. This being so, the necessary consequence of the respondent's act was to give a preference to the creditors in the judgment. The answer, even if it contained an explicit denial of the intent to prefer, admits the case stated in the petition, because it admits the facts, and alleges nothing in avoidance or to the contrary, which conclusively prove that a preference was in fact necessarily given. This necessary consequence of the respondent's conduct in the premises, the law, in the absence of sufficient allegation or proof to the contrary, presumes was by him intended. But the answer only denies that the judgments were confessed with a fraudulent intent to give a fraudulent preference. This kind of negative allegation involves what the books call an affirmative implication that the judgments were confessed with an intent to give a preference, though not a fraudulent one. This is an implied admission that a preference was intended to be given by the respondent. The act (section 39) in effect prohibits an insolvent debtor from giving any preference, for any reason, to any creditor, upon pain of being declared a bankrupt therefor, on the petition of his injured creditors.

[So it may, for the purpose of argument, be taken for granted that this denial of the debtor is true in point of fact—that he did not fraudulently intend to give a fraudulent preference, and yet as it impliedly admits that the act complained of was done with an intent to give a preference, it is insufficient.] [2]

The petitioners are entitled on the pleadings to have the respondent adjudged a bankrupt. Judgment accordingly.

[2] [From 1 N. B. R. 531 (Quarto, 140).]

Case No. 13,639.

In re SUTHERLAND.

[Deady, 416; [1] 3 N. B. R. 314 (Quarto, 83); 8 Am. Law Reg. (N. S.) 39.]

District Court, D. Oregon. May 23, 1868.

BANKRUPTCY—PROVABLE DEBTS—JUDGMENT FOR FINE.

A judgment for a fine is not a debt provable in bankruptcy.

[Cited in M. & M. Nat. Bank v. Brady's Bank, Case No. 9,018; Re Lachemeyer, Id. 7,966.]

[Cited in Howland v. Carson, 28 Ohio St. 629.]

[In the matter of Robert A. Sutherland, a bankrupt. For prior proceedings in this litigation, see Case No. 13,638.]

M. W. Fechheimer, for assignee.

M. F. Mulkey, for the State.

DEADY, District Judge. From the certificate of the register it appears that the state of Oregon proved a debt against the estate of the bankrupt, amounting to $1,394.46. Upon the motion of the assignee, the claim has been set down for examination before the court. From the evidence and admissions of the counsel for the state and assignee, it appears that on December 3 and 4, 1861, two several judgments were given in the circuit court of the state for the county of Multnomah, sentencing the bankrupt to pay two certain fines, and that he be committed until the same be paid. The debt proved before the register is a part of the sum for which these judgments were given, the remainder having been paid. It is also understood from the admission of counsel that these fines were imposed upon the bankrupt as a punishment prescribed by law for the commission of a crime, of which he had been duly convicted. Indeed a judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime.

Section 15 of the act of January 25, 1854 (Laws Or. 1854, p. 473), in force when these judgments were given, provides that "any convict" confined in jail "for the non-payment of a fine," may be discharged from such imprisonment by the commissioners of the county, if he is unable to pay the fine; "but such convict shall not thereby be released from the payment of such fine, but the same may be collected by execution at any future time." Under this act the bank-

[2] [From 1 N. B. R. 531 (Quarto, 140).]

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

rupt was discharged from imprisonment soon after the judgments were given. Section 19 of the bankrupt act [of 1867 (14 Stat. 525)] declares: "That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, * * * may be proved against the estate of the bankrupt." Does the term "debt" include a judgment for a fine? 3 Bl. Comm. 154, says: "The legal acceptation of 'debt' is a sum of money due by certain and express agreement." This, however, is not the popular acceptation of the word. In Gray v. Bennett, 3 Metc. [Mass.] 526, the court say: "The word 'debt' is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contracts to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise." This view of the subject was approved by Justice Story. Carver v. Braintree Manuf'g Co. [Case No. 2,485].

To ascertain, then, whether the word "debt" is here used in the legal or popular sense, recourse must be had to the subject matter and the context. Immediately following the general clause of section 19, concerning debts, as above quoted, it is provided, that, "all demands against the bankrupt for, or on account of, any goods or chattels wrongfully taken, converted or withheld by him may be proved or allowed as debts, to the amount of the value of the property so taken or withheld, with interest." The section then proceeds to provide for the case of contingent debts and liabilities, as well as unliquidated damages upon a contract or promise, and then concludes: "No debts other than those above specified, shall be proved or allowed against the estate." From all the provisions of the section it is apparent that the word "debt" is used in the legal or limited sense. If it were used in the popular sense it would not have been necessary to have specially provided that "demands for goods wrongfully taken, etc., may be proved or allowed as debts." In the popular sense such demands are debts, and would have been included in the preceding clause providing for the proving "all debts."

A discharge in bankruptcy releases the bankrupt from all debts which were or might have been proved against his estate. Bankrupt Act, § 34. These fines were imposed upon the bankrupt as a punishment for crimes of which he was convicted. If provable against his estate, he may be discharged from the payment of them, and from arrest made to enforce such payment. In effect, this would be allowing the national government, through its courts, to grant pardons for crimes committed against the state. A person convicted of manslaughter, and sentenced to pay a fine of a thousand dollars, by a discharge in bankruptcy, would be relieved from the punishment affixed by law to his crime. I do not think, that the act while it reasonably admits of any other construction, ought to be construed so as to permit or allow such a consequence.

Looking at the letter of the act, or the nature of the subject, either separately or conjunctively it appears to me, that a judgment for a fine, imposed as a punishment for a crime, is not a debt provable against the estate of the bankrupt. Abstractly considered, it may be proper that such a judgment should be proved as a debt against the estate for the purpose of receiving any dividend as a part payment thereof, without effecting a full discharge of the same. Such a provision is found in section 33, concerning debts created by fraud or embezzlement, or by defalcation, while acting as a public officer, or in a fiduciary character. But judgments for fines are not included in this special provision, because not enumerated in it. In People v. Spalding, 10 Paige, 284, it was decided that a discharge under the bankrupt act of 1841 [5 Stat. 440] did not discharge a party from a judgment for a fine imposed upon him as a punishment for a contempt, committed by violating an injunction. The contempt was merely constructive, and the fine imposed was directed by statute to be ultimately applied in satisfaction of the civil injury to the party who obtained the injunction. The court of errors affirmed the decision. 7 Hill. 301. On error to the supreme court of the United States, the judgment of the court of errors was affirmed. 4 How. [45 U. S.] 21.

This case seems decisive of the question. Indeed it goes much farther than the court is required to go in this case. The bankrupt act of 1841 in the use of the word "debt" is much less qualified than the present one; yet the court held that it did not include a judgment for a fine. In the case under consideration, the fine was imposed, purely as a punishment for the commission of an actual crime, while in the case cited, the fine was imposed, nominally as a punishment, but in reality as a compensation to the creditor for the civil injury he sustained by reason of the commission of the acts constituting the contempt.

The claim must be expunged from the list of debts proved against the estate of the bankrupt.

[For subsequent proceedings in this litigation, see Case No. 13,640.]

Case No. 13,640.

In re SUTHERLAND.

[Deady, 573.] [1]

District Court, D. Oregon. March 29, 1869.

BANKRUPTCY — DISCHARGE — OPPOSITION TO — CONTINUANCE — DISMISSAL — FINAL OATH OF BANKRUPT.

1. A creditor has no standing in court to oppose the discharge of a bankrupt, unless he

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

enter his appearance in opposition thereto, within the day appointed for showing cause against the petition therefor.

2. Where there is no opposing party to the discharge, the proceeding may be continued from time to time, to suit the convenience of the bankrupt.

3. A creditor who has entered his appearance in opposition to a discharge, cannot maintain a motion to dismiss the petition for want of prosecution; but should move to set it down for hearing upon the objections thereto, if any, filed.

4. The final oath of a bankrupt is not a pleading, but is in the nature of indispensable evidence in support of the petition for discharge, and need not be made or filed until the hearing.

[In the matter of Robert A. Sutherland, a bankrupt. For prior proceedings in this litigation, see Cases Nos. 13,638 and 13,639.]

W. W. Fechheimer, for motion.

David Logan, contra.

DEADY, District Judge. On January 11, 1868, Robert A. Sutherland was adjudged a bankrupt in this court upon the petition of certain of his creditors. On December 19, 1868, said bankrupt filed his petition for discharge. Upon the filing of the petition, an order was made that the creditors show cause against the same, on January 23, 1869. On that day, no one appearing for or against the petition, it was continued under the rule of the court until the following Saturday, and so on until March 13, when the attorneys for the petitioning creditors filed a motion, that the bankrupt's application for a final discharge, "be denied upon the ground that the day fixed for the hearing of such application has elapsed, and that the oath required by law thereon, has not been filed." By consent of counsel for the bankrupt and the aforesaid creditors, the motion was set for hearing on March 20, at which time it was argued by counsel.

This subject is regulated by sections 29 and 31 of the act [of 1867 (14 Stat. 531, 532)], and general order 24. Upon the day appointed to show cause, a creditor intending to oppose the application for discharge, must enter his appearance in opposition thereto. His appearance is entered with the clerk as provided in general order 3. Until such appearance is entered, the creditor has no standing in court as to the petition for discharge, and therefore cannot be heard in opposition thereto. Where there is no opposing party, the petition of the bankrupt for final discharge, may be continued from time to time, to suit the convenience of the bankrupt. When an appearance has been entered by any creditor against the discharge, the proceedings upon the petition are no longer under the exclusive control of the bankrupt; but the opposing creditor cannot then move to dismiss the petition, or that its prayer be denied, because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The remedy of the creditor is to move the court to set down the matter for hearing upon the petition, and his objections thereto, if any, be filed. This motion, therefore, must be denied. The parties making it have no standing in court, as to the petition, although they were the petitioners in the proceeding on which Sutherland was adjudged a bankrupt. Nor is it correct to say, as in this motion, that the day fixed for hearing the bankrupt petition has elapsed. In fact no day has yet been fixed or appointed for the hearing of the application for discharge. True a day has been appointed for the creditors to "show cause why a discharge should not be granted to the bankrupt." Section 29. This day the creditors have allowed to pass by without entering their appearance or filing grounds of opposition to the application for discharge. Under general order 24, the application could not be set down for hearing, except by consent of the creditors, until the day appointed for showing cause had elapsed, because the creditor has the whole of that day to enter his appearance in opposition thereto. If an appearance is entered then the party entering it has ten days thereafter to file his objections to the granting of the discharge. After this time has elapsed, the court may make an order upon the application of either party, setting the petition down for hearing or trial as the case may be.

The second ground of the motion seems to assume that the bankrupt must make and file his final oath as required by section 19, before the day appointed for the hearing of the petition, or even showing cause against it. Indeed, upon the argument, counsel for the motion treated this oath as a quasi pleading, or a part of the allegations against which the creditors are cited to show cause. But this oath is merely an item of indispensable evidence, without which the bankrupt is not entitled to his discharge; and it is sufficient if it be produced and filed on the hearing. This is apparent from the language of the act:—"and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, etc., anything specified in this act as ground for withholding such discharge, or as invalidating such discharge if granted." Section 29. The motion is denied.

Case No. 13,641.

SUTHERLAND v. KELLOGG.

[The case reported under above title in 3 Chi. Leg. News, 73, and 12 Int. Rev. Rec. 211, is the same as Case No. 13,636.]

Case No. 13,642.

SUTHERLAND v. The LADY MAUNSEL.

[44 Hunt, Mer. Mag. 624.]

District Court, S. D. New York. March 15, 1861.

MARITIME LIENS—REPAIRS TO FOREIGN VESSEL—FUNDS AND CREDIT AVAILABLE.

[Furnishing necessary repairs and materials to a foreign vessel gives rise to no lien, when her owners have ample credit, and actual funds in the port, of which the creditor has implied notice.]

This case came up on a libel by Mr. Sawyer, to recover repairs and supplies, and involved a very important question of law as to the right of lien under the late decisions of the supreme court of the United States, whether ship-chandlers and others could recover for supplies furnished to a foreign vessel in any of our ports, when it was made to appear that the master or agent of the foreign owner had ample funds in the country to pay for such repairs and supplies. The case was heard at the January term, and briefly noticed in the papers. It was then contended by McMahon, for the owners, that the agent here had sufficient funds to meet all such claims, and if the creditors did not use due diligence in finding them out, the libellant [Benjamin Sutherland] could not recover in this form of action against the owners.

BETTS, District Judge, delivered an elaborate opinion, in which he says:

This vessel is arrested on a claim by a blacksmith for $267.42, for materials and labor supplied for her repair. It is admitted that she is a foreign vessel, and came to this port disabled, and that the iron and labor furnished at the libellant's shop and put upon her, were necessary to enable her to complete her voyage home. On her arrival here she was consigned to a Mr. Bulley, and a contract was made by the master with a ship-wright named McMahon for the repairs. The first question which arises, was the entire repairs independent and exclusive of the materials needed and the work of the blacksmith? The next point is whether the libellant was the party employed, or whether the labor and material were purchased by his brother, under an agreement with McMahon, as a sub-contractor, or whether the libellant himself had any interest whatever in the contract? The next and most material point is, whether the libellant acquired any lien on the vessel, as her owners possessed funds and credit to meet this or other demands? Had the libellant notice of this, or certain means of informing himself? This point is vital to the action.

Up to December, 1856, it was adopted and recognized as maritime law that a vessel in a foreign port, in want of supplies or repairs to render her fit for navigation, and obtaining them on credit, the owners were bound for the debt, the cardinal point being the necessity of the case, and whether the verdict was bona fide, or if the creditors set up a lien with knowledge that the master had funds sufficient to satisfy the debt. This was the maritime law of Europe until the last few years, when a most important modification was established. That, in addition to the proof of the necessity of the vessel, there must be a proof of the necessity for a credit upon the vessel. The courts have declared this to be essential and remark:—"That circumstances of less pressing necessity for supplies or repairs, and an implied hypothecation of the vessel to procure them, will satisfy the rule, than a loan of money on bottomry for the like purpose."

HELD BY THE COURT: That the power was in the master to bind both vessel and owner for supplies and labor without imposing on the creditor the duty of further proofs; but when the condition of the credit exacted from the owners a recompense beyond the ordinary rate of interest, no lien was allowed unless the usurers proved satisfactorily that the owners had not funds sufficient to satisfy the debt, and moreover that the debt, with its enhanced interest, was both subject to the condition that the vessel should perform her home voyage safely. As the testimony is clear that the owners of the vessel had ample credit and actual funds in the hands of Mr. Bulley, and the libellant had implied notice thereof, the libel must be denied, with costs.

Case No. 13,643.

SUTHERLAND et al. v. LAKE SUPERIOR SHIP CANAL, RAILROAD & IRON CO. et al.

[9 N. B. R. 298;[1] 1 Cent. Law J. 127.]

Circuit Court, E. D. Michigan. 1874.

MORTGAGE — SUBSEQUENT INCUMBRANCES — PROPERTY IN HANDS OF RECEIVER—BANKRUPTCY —PENDING SUIT IN STATE COURT.

1. To a bill by a junior mortgagee against a mortgagor or his assignee in bankruptcy, prior encumbrancers are necessary parties where there is substantial doubt as to the amounts which are due them, or the property covered by their liens.

2. A court of equity will in no instance expose to sale an interest capable of being reduced to certainty where any doubt exists as to its character and extent.

3. Where a subsequent encumbrancer is already impleaded by a prior one, a subsequent original bill, on his part, will not be sustained to foreclose his mortgage. Full relief may be granted in the first suit, either with or without a cross-bill, as exigencies exist.

4. Where property is in the hands of a receiver no party having interest therein, and much less will actual parties, be permitted, without leave of court, to seek an enforcement of their rights by an original suit. Such leave will in no case be granted where the relief sought is competent in the pending litigation.

[1] [Reprinted from 9 N. B. R. 298, by permission.]

5. Where a subsequent mortgage trustee, who had appeared and submitted to a receiver of the estate, resigned his trust pendente lite, and his successor, without leave, filed an original bill of foreclosure, it was held to be unnecessary and unwarranted. Such suit would be permanently stayed on summary application, or, upon answer and proofs, dismissed at the hearing. The rights of such successor need not be noticed in the original suit, as he would be bound by the decree.

6. A court of equity may sell mortgaged premises free from encumbrances, remitting the lien holders to the proceeds, at the suits of subsequent encumbrancers or other parties having right in the equity of redemption. The power in this regard, so frequently exercised in bankruptcy, is but an application there of this principle.

7. The late decision in Marshall v. Knox [16 Wall. (83 U. S.) 551], denying the power of the district court to invade the jurisdiction of a state tribunal, where property is in its actual custody, under proceedings commenced anterior to the bankruptcy, does not deny the power of the circuit court to order all matters pending therein to be adjudicated in an original suit, subsequently commenced in such court by an assignee in bankruptcy. It is a mere question of practice and convenience. That the property is in the hands of the court's own receiver constitutes no exception to the rule.

8. The circuit court will entertain a bill by an assignee in bankruptcy against several mortgagors and other lien holders to ascertain the amount due, and sell all the property free from encumbrances.

9. When matters are germain to and connected with the subject of a suit they may be introduced by cross-bill although new and not mentioned in the original bill.

In equity.

The following is the substance of an opinion prepared through the aid of an amanuensis, and submitted to the judge. It has his approval as being substantially correct.

EMMONS, Circuit Judge. The property involved amounted to several millions of dollars, consisting of lands granted by congress to aid in the construction of a canal, and of the canal itself and a large quantity of personal property. July 1st, 1865, the company executed a mortgage, of which John L. Sutherland is trustee, upon part of the land and all the personal property and the canal, to secure its bonds, in the sum of five hundred thousand dollars. July 1st, 1868, it executed a mortgage, of which Lucien Birdseye is trustee, upon other lands and upon the canal and the personal property, to secure an additional issue of bonds, in the sum of five hundred thousand dollars July 1st, 1870, it executed a mortgage, of which Thomas N. McCarter is trustee, upon all the property covered by the two other mortgages, to secure a further issue of its bonds, in the amount of one million two hundred and fifty thousand dollars. May 1st, 1871, it executed a mortgage to the Union Trust Company of New York, upon all the property covered by the several other mortgages and some additional property. May 25th, 1872, a bill was filed in Sutherland's name, in this court, to foreclose his mortgage, to which the company, Birdseye and Frost, McCarter's predecessor in the trust, and the Union Trust Company are made parties defendant. The defendants all appeared and answered. June 13th, 1872, a receiver was appointed, in the Sutherland case, of the entire property of the company and authorized to create an indebtedness of five hundred thousand dollars, to be a first lien on all the property. This was by consent of some and without opposition from any of the defendants. July 3d, 1872, a bill was filed in this court in McCarter's name (he having been duly appointed Frost's successor) to foreclose his mortgage. The mortgagor and the Union Trust Company of New York are made parties. July 5th, 1872, a bill was filed in this court, in Birdseye's name, to foreclose his mortgage. The mortgagor, McCarter and the Union Trust Company of New York are made parties. August 27th, 1872, the mortgagor was adjudicated bankrupt December 3d, 1872, George Jerome and Fernando C. Beaman were duly appointed assignees, and by supplemental bill were made parties to said several foreclosure suits. The entire property was thus in the custody of the court, through its receiver in the Sutherland case, where the subsequent bills were filed, without leave of the court being asked or obtained. Subsequently the Union Trust Company of New York filed its bill, to foreclose its mortgage, in the bankruptcy court. In reference to the amount due upon each of these successive securities, and more especially in reference to what the certificates of the receiver cover, whether all, or a part only of the property of the corporation, the widest differences exist at the bar. The assignees, after their appointment, appeared in the Sutherland, the Birdseye and the McCarter suits without setting up in either the pendency of the others, though the pendency of the Sutherland suit is expressly set up in the bills of complaint in both the Birdseye and McCarter cases, and in each it is stated that the complainant therein is made defendant in the Sutherland case, and that a receiver of the property had been appointed.

In these circumstances it was insisted by the assignees that neither Birdseye nor McCarter, being subsequent encumbrancers and already impleaded in the Sutherland suit they might have had their liens adjusted and the property which they covered sold, had a right to file either of the subsequent bills without leave of court, and thus necessitate a triple litigation. They insist further that as doubts exist in reference to the amount of the prior liens which was put in issue by the pleadings, and as to the property which the dominant one covered, it was impossible to make a proper decree under either the Birdseye or McCarter bills. As the facts upon which these equities rested were not contained in the answers and could not be administered as the pleadings in the foreclosure cases then stood, an original bill was filed by the assignees in this court, making Sutherland, Birdseye, McCarter and the Union Trust Company parties, which had for its object a sale

of the mortgaged premises free of liens, and an ascertainment of the rights of the various parties interested in the proceeds and their distribution accordingly. Upon this bill a motion was made to stay the proceedings in the foreclosure cases, which was granted. Whether this bill should be entertained, and the rights of all the parties interested in the several mortgages named should be administered in this suit, and in the meantime the foreclosure suits permanently stayed, or whether the equities should be worked out in the foreclosure suits—in one or all of them—was the general subject discussed upon the argument and submitted for decision of the court.

The motion for stay was originally made before the circuit judge, who then expressed a strong preference for the amendment of the pleadings in the Sutherland suit, in which he intimated an opinion that all the rights of the parties could be effectually secured. Full reference was made by his honor to the written judgment delivered by him some months since, when the stay of proceedings was originally granted. That opinion announced fully all opinions expressed in this. It emphatically declared the gross impropriety of suffering Birdseye or McCarter to sell the equity of redemption while prior liens existed, the extent of which was disputed both in amount and as to the property which they covered. A strong preference was then expressed for continuing the entire working of the causes in the hands of the mortgagees, who seemed to have interests so much more extensive than any other parties upon the record. The high character of their equities and the obligation of great diligence to speed the cause on the part of the assignees were therein fully recognized.

On the point of whether all the prior mortgagees might have been made parties to the McCarter bill, his honor said: "We deem it entirely clear that the prior encumbrancers, under the circumstances of this case, are necessary parties to the McCarter bill if it were proper, as it was not, to file it at all after the property which it seeks to sell was already in custodia legis."

To sustain the right to sell the equity of redemption without making prior lien holders parties, and ascertaining their rights, the counsel for the mortgagees, he said, had referred to the following, and numerous other cases: 2 Barb. Ch. 174; 1 Daniell, Ch. Prac. 373; 2 Spence, Eq. Jur. 605, 704; In re Langdale, 6 Beav. 557; Hobart v. Abbot, 2 P. Wms. 643; Williamson v. Probasco, 4 Halst. Ch. [8 N. J. Eq.] 571; Gibson v. McCormick, 10 Gill & J. 109. "We have," he said, "examined them all. They show only that subsequent encumbrancers must be parties. There is nowhere an intimation that prior ones may not and should not be impleaded whenever it is necessary to ascertain the amount which is due to them, or there is a substantial doubt as to the property covered by their liens. A mortgagor who insists that he has paid a prior encumbrance cannot be subjected to the injury of a sale while this question is in dispute."

In Findley v. Bank of U. S., 11 Wheat. [24 U. S.] 304, Marshall, C. J., says: "It cannot be doubted that Coleman (the prior mortgagee) ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court no decrees ought to have been pronounced in the cause until he was introduced into it." This was not understood as declaratory of a universal rule. It is correctly limited in Hagan v. Walker, 14 How. [55 U. S.] 29, where Curtis, J., reviews the authorities, and lays down the doctrine as announced by this court some months since at the hearing of the motion. He says: "On the other hand there are cases in which it has been declared that all encumbrancers are necessary parties. Many are collected in Story, Eq. Pl. 178, note. But we consider the true rule to be that, where it is the object of a bill to procure a sale of the land and the prior encumbrancer holds the legal title and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense and for this purpose he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior encumbrance—a power which it will exercise in fit cases. And when the prior encumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating its jurisdiction, and the validity of the encumbrance is admitted, it is fit to dispense with his being made a party." Galveston R. R. v. Cowdrey, 11 Wall. [78 U. S.] 459, fully authorizes every matter liquidated here to be determined in either one of the pending suits. A bill was filed by bondholders in successive mortgages, in behalf of themselves and all others, and the court holding that holders under either of the securities might intervene by cross-bill to contest the priority of anterior mortgages. To show the necessity, in many cases, of making prior mortgagees parties, he cited the following cases: Barb. Ch. Prac. 174; Story, Eq. Pl. (8th Ed.) par. 193; Clark v. Prentice, 3 Dana, 468. In McGown v. Yerks, 6 Johns. Ch. 450, Chancellor Kent refused a decree without making prior encumbrancers parties in a case where the reason for bringing them in was far less than that presented by the facts in the case before us. In Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige, 284, the court, in overruling a demurrer interposed by a prior encumbrancer to a bill filed by a junior mortgagee, declined to decide the point whether in all cases the court would decree a sale of the property free from encumbrance against the consent of the prior lien holder, but overruled the demurrer, holding that the bill was clearly maintainable for the purpose of making a better title and ascertaining the amount due. The judge observed that there was no such difficulty as this in the case now under con-

sideration, as all the bills on file ask a sale for the full amount secured by their mortgages. They not only consent to, but are all demanding decrees for immediate sale. The only question is, shall there be four lawsuits instead of one?

The counsel for the mortgagees cited Rose v. Page, 2 Sim. 471, Delabere v. Norwood, 3 Swanst. 144, and other cases, to the position that when a second mortgagee files a bill against a third mortgagee and the mortgagor, such case constitutes an exception to the rule that a prior mortgagee must be made a party, even where there is a doubt as to what the prior mortgage covers or the amount due thereon. Respecting these cases his honor said these two cases, together with the other referred to by counsel for complainants in this connection, are cited by Barb. Parties, who, on page 449, uses the language quoted in the counsel's brief in reference to this point, as does Story, J., in his Equity Pleading. It is manifest, however, that neither of these authors mean, nor do the cases which they refer to justify the conclusion, that it constitutes an exception to the universal rule, that a prior encumbrancer must be made a party when his lien is in contestation. None of the long list of books referred to by counsel, either English or American, has the slightest tendency to even qualify the rule that no sale should be suffered to take place in a court of equity where the extent and the amount of prior liens are disputed. Every elementary work referred to by counsel for mortgagees announces in the most explicit terms, rules of pleading and practice which forbid the anomalous decree he asks in the McCarter and Birdseye cases. Cases, too, have been cited, and especially commented on, which incidentally say that the holder of a prior admitted mortgage need not be made a party. Every one of them undeniably negatives the doctrine sought to be deduced from them. They clearly show that what is meant by the word "admitted" includes what is due upon the lien and what it covers. There is nowhere in judgment or in elementary book the slightest warrant for the unjust and impolitic doctrine that Birdseye and McCarter in their respective suits can sell in mass some millions of property, capable of division into suitable parcels for more judicious sale, and subject to liens uncertain in amount and as to the property which they cover. Had the proofs disclosed such a case at the final hearing, the court would of its own motion have ordered the pleadings to be amended and the proper parties brought in. It would be a gross fraud on the part of the assignee to consent to such a decree. In no other way could the court accomplish what was so well expressed by Johnson, J., in Taggart v. Caldwell, 4 Pet. [29 U. S.] 190, 9 Curt. Dec. 49: "It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investments and not to wild speculation. Its process should act upon known and definite interests and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction."

On the question of the propriety of commencing the Birdseye and McCarter suits, under the circumstances, his honor, among other things, said: The bills by Birdseye and McCarter were not only defective for want of proper parties to enable the court to make such a decree as would expose the property for sale in such conditions as would authorize purchasers to bid, but they had both been unnecessarily and improvidently commenced pendente lite without leave of court. Birdseye, and Frost, who was the predecessor of McCarter, were both impleaded and actually appeared in the Sutherland suit and were bound by the receivership. Similar action has been frequently discountenanced by courts of the highest respectability. In Wendell v. Wendell, 3 Paige, 509, where the subsequent encumbrancer was made a party to a bill to foreclose a prior mortgage, and he without leave subsequently filed a bill to foreclose his own mortgage, Chancellor Walworth charged costs against the party thus proceeding, and this where the objection was not taken in the answer. He said the whole property might have been sold and all the rights adjusted in one suit, as all the parties were before the court. To this familiar truth cases and elementary books are numerous. The doctrine is applicable to the case before us. It is true, that in this case there is some property in the Birdseye mortgage not covered by that of Sutherland; but so long as all are a common lien upon the canal and its franchises, and all have alike consented to the receivership which creates a dominant lien over all the property, this can work no practical legal consequence. If there is any doubt as to the power of the court, without cross-bills, to sell the additional assets mentioned in the subsequent mortgages, such bill would be directed to be filed.

Davis v. Gray, 16 Wall. [83 U. S.] 203, elaborately reviews the doctrines in regard to receivers in courts of equity, and lays down the undoubted rule that no party having interest in the estate, whether impleaded or not, can properly commence an original suit without leave of court. Had such leave been asked in this instance, beyond all controversy it would not have been granted, from the fact that such suits are wholly unnecessary and can tend only to make costs. Indeed, it is not perceived how it is possible to make a complete decree in either the Birdseye or the McCarter suits, and to settle the amounts due upon the previous encumbrances, in such circumstances as to give all the parties proper review in the court of last resort without making them parties in each suit where those facts are to be settled. At great length and with much earnest-

ness counsel for the mortgagee has argued that there is no objection whatever to selling property so circumstanced, subject to the rights of Sutherland and the receiver. This position is directly answered in the very full opinion of Nelson, J., in Wiswall v. Sampson, 14 How. [55 U. S.] 52. It is there stated in express terms that it is no answer to the objection that the sale is to be made subject to the rights of the receiver; that the court will not suffer a hostile claimant to be created, whose rights are to be subsequently settled in another tribunal. It is fallacy to argue that a receiver holds subject to the rights of the mortgagees only. He holds alike for all. He represents just as fully those of the assignees, of the shareholders, and the creditors as the prior lien holders; and if a sale should be ordered which was in hostility to and would dispose of the rights of those interested in the equity of redemption, this sale would be directly in hostility to the rights of the receiver who holds possession for them. To illustrate the completeness of the jurisdiction in the Sutherland suit, and how the rights might be adjusted therein, cases—Freeman v. Howe, 24 How. [65 U. S.] 450; Davis v. Gray, 16 Wall. [83 U. S.] 203; Jones v. Andrews, 10 Wall. [77 U. S.] 327—were referred to and commented upon. They show that suits in reference to property in custodia legis are deemed auxiliary only to the principal cases.

His honor said it was wholly unnecessary for Sutherland in any way to notice the trustee. McCarter. He had become trustee pendente lite. It seemed extravagant to say that while his predecessor, Frost, was impleaded in the Sutherland suit and bound by the order granting a receiver, that his successor could file an original bill, without leave of court, to sell the equity of redemption without impleading the prior parties. Story, Eq. Pl. 156. "Generally speaking an assignee pendente lite need not be made a party to a bill, or be brought before the court; for every person purchasing pendente lite is treated as a purchaser with notice, and is subject to all the equities of the person under whom he claims in privity. And it would make no difference whether the assignee pendente lite be the claimant of a legal or of an equitable interest, or whether he be the assignee of the plaintiffs or the defendants. Still, however, it is often important to bring such assignee before the court as a party by a supplementary bill, in order to take away a cloud hanging over the title, or to compel the assignee to do some act, or to join in some conveyance. So that such assignee, although not a necessary party, may at the same time be a proper party, at the election of the plaintiff. And an assignee after the bill was filed, but before subpœna was served, has been held to be a necessary party." It is only in cases where the complainant parts with his interest and where defendant's rights are transferred by death or by operation of law, as by bankruptcy or the insolvent laws, that a transfer pendente lite need be noticed by litigants in court.

His honor said that among the positions taken by mortgagee's counsel which surprised him most, and to sustain which he had found the least learning, whether in judgments or elementary books, was that there exists no power in an American court of chancery to sell property covered by successive mortgages free from encumbrances, upon bills filed by junior mortgagees, by judgment creditors, or by the owner of the equity of redemption.

It has been argued that Sutherland and Birdseye were not proper parties to the suit by McCarter, because if they were brought in, there was no power on the part of the court to make any other decree than the mere one to sell this vast estate in mass, subject to prior liens which were uncertain in amount and extent. The broad ground had been taken that prior encumbrancers were not necessary parties, for the reason that there was no power to sell free from encumbrances. This power, he said, is fully conceded in Hancock v. Hancock, 22 N. Y. 568; in Gibson v. McCormick, 10 Gill & J. 65. The latter quite fully asserts and justifies the rule. It cites Elliott v. Pell, 1 Paige, 263, and Chamley v. Lord Dunsany, 2 Schoales & L. 710, 718, as sustaining such right. The only doubt is where a prior mortgagee opposes the sale because his claim is not due, or he would be injured by it; but, as before said, in these cases they all demand a sale. In Vanderkemp v. Shelton, 11 Paige, 28, a bill was filed to foreclose a junior mortgage and the prior mortgagee was made a party. The chancellor says: "The complainant's bill is properly framed for that purpose, as this is a bill for the foreclosure and sale of the equity of redemption in the mortgaged premises to satisfy the several encumbrancers thereon according to their respective priorities, and is not a mere bill to redeem. In England the court does not decree a sale of mortgaged premises, but merely allows the encumbrancer to file a bill to redeem from the first encumbrance, and that the junior encumbrancers may redeem both of the prior ones or be foreclosed. And the complainant there is in all cases required to offer to redeem the first encumbrance. But here the puisne creditor has the right to a sale of the estate to satisfy his debt after applying so much of the proceeds of the sale as may be necessary to pay the debt and costs of the prior encumbrancer; he is not required to offer to pay the first encumbrance. All the prior encumbrancer has a right to ask, even when he is in possession under his encumbrance, is that he shall not be subjected to useless costs, when the proceeds of the sale will not probably be sufficient to pay the amount of his debt with interest and the costs of foreclosure." In Hagan v. Walker, 14 How.

[55 U. S.] 29, Curtis, J., after very fully considering the subject, says: "The court will exercise its discretion whether to sell free from or subject to prior encumbrances."

The power exercised by the court of bankruptcy to sell free from encumbrances, is but an instance of a similar one familiar to the court of chancery. We should, wholly irrespective of the bankrupt law, if the facts ultimately presented warranted it, sell the entire estate free from encumbrances; it may appear that in no other way can the various interests in the equity of redemption be in the slightest degree protected.

Respecting the power of the court in exercising the functions conferred upon it by the bankrupt act, when these functions should be called into operation by proper proceedings on the part of the assignees, his honor said: "The reading of the statute which has been given by the learned counsel for the mortgagees comes too late. The numerous instances in which the district courts, originally by summary proceeding, and latterly, since that has been pronounced to be irregular, by bill, have sold property free from encumbrances, remitting lien holders to the fund in court, would, upon every rule of propriety, constrain this court to consider it as settled law until a superior tribunal shall pronounce the practice unlawful." The following cases are some only of the instances of its exercise: In re Sacchi [Case No. 12,200]; In re Alabama & F. R. R. Co., 1 N. B. R. 100[2] (Quarto); In re Kirtland [Case No. 7,851]; In re Salmons [Id. 12,268]; In re Stewart [Id. 13,418]; Foster v. Ames [Id. 4,965]; In re Barrow [Id. 1,057]; In re Kahley [Id. 7,593]; In re Columbian Metal Works [Id. 3,039]; In re New York Kerosene Oil Co. [Id. 10,206]; In re Schnepf [Id. 12,471]; Markson v. Heaney [Id. 9,098]; In re McClellan [Id. 8,694]; Davis v. Anderson [Id. 3,623]; In re Mebane [Id. 9,380]; Houston v. City Bank, 6 How. [47 U. S.] 486; Fowler v. Hart, 13 How. [54 U. S.] 373.

In a proper case he thought the circuit court would, under this act, entertain a bill in equity to ascertain the extent of liens, and to sell free of encumbrances. That a lien-holder is an adverse claimant, and that an ordinary debtor is such, was several times decided under the act of 1841 [5 Stat. 440] the language of which, so far as affects this question, is identical with that of the present law. See Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662]; Pritchard v. Chandler [Id. 11,436]. In Forsyth v. Woods, 11 Wall. [78 U. S.] 484, jurisdiction to recover a debt was assumed without question; and see Morgan v. Thornhill, 11 Wall. [78 U. S.] 65. In McLean v Lafayette Bank [Case No. 8,886] it is said that an assignee in bankruptcy, having a right to discharge encumbrances on the bankrupt's estate, may file his bill in chancery against all encumbrancers to ascertain the validity, priority and amount of the encumbrances.

But all this history, it is said, is rendered wholly inapplicable by the late decision in Marshall v. Knox [supra], in which it was decided that property in the custody of a state sheriff, by process anterior to the bankruptcy, could not be interfered with by a district court. But for that case, after a good many perusals of the judgments in Ex parte Christy, 3 How. [44 U. S.] 292; Peck v. Jenness, 7 How. [48 U. S.] 612; Orton v. Smith, 18 How. [59 U. S.] 263; Taylor v. Carryl, 20 How. [61 U. S.] 583; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334,—and the many judgments in which their doctrine has been applied and limited, he would have confidently held with so many of his brethren, of the circuit and district courts, that the bankrupt law did intend to create a complete system and enable the district court to administer all the assets of the bankrupt, irrespective of the accident of whether litigation might be pending in state tribunals concerning portions of his property. They who have so held did so in no want of familiarity with the rule which these cases affirm. It was thought that congress had exercised its undoubted power to create a complete bankrupt system, and draw instanter into the district court every right of the bankrupt. When it dissolves attachments, notwithstanding the custody of the state courts, and abrogates assignments when the property is in the hands of the assignees under state insolvent laws and full jurisdiction is expressly given to arrest all pending suits in personam at law in state tribunals, no matter when commenced, it would seem that but a small additional power is necessary to complete the wholesome and beneficial system which ought at least, he thought, to have been established by the statute. And when it is considered what Marshall v. Knox seems to concede that where judgments are confessed and levies made by way of preference in the state courts within four months preceding the bankruptcy, they may be declared void and the property seized by the bankrupt court, the remaining domain of the state tribunals which cannot be interfered with is so trivial and exceptional as to leave the inference a strong one that it was not

[2] [In the case of the Alabama & Florida Railroad Company, a voluntary bankrupt, proceedings in the state court, in behalf of some of the first mortgage bondholders, for foreclosure and sale of the road, were enjoined by an order made upon the receiver appointed by the state court, to deliver up the property of the road to the assignee, and an order for the sale of the franchise and property of the road for cash, as perishable property, fast deteriorating in value, and as the best mode of ascertaining the amount to be applied to the payment of liens, when the amount and priorities of such liens should be determined. Some of the mortgage bonds, claimed to be first liens upon the road, not having been executed in strict compliance with the law of the state, it was insisted by the bankrupt, were not liens. The second mortgage bondholders also objected to the recognition of the first mortgage bonds as liens upon the property. This question was not directly raised, and therefore not decided, but left to be determined upon decree for the distribution of the fund arising from the sales.]

intended to be protected by congress. His honor remarked that it was difficult, many times sitting in the midst of exigencies which demand a more extended power in order to secure an efficient and protective administration of right, at first to appreciate the wisdom of decisions which seemingly without necessity limit and cramp our jurisdiction. It was only when we take into consideration a series of decisions made in a long course of years that their wisdom could be fully appreciated. They have established a principle, which experience had found to be beneficent, of leaving every assumption of jurisdiction, on the part of federal tribunals, to be expressly authorized by congress. Nothing was to be taken by implication unless it was that necessary inference without which the law could not be administered. Notwithstanding the ingenious criticism of the assignee's counsel, he did not see why Marshall v. Knox does not decide that, excepting cases where a fraud upon the bankrupt law is charged, property in custodia legis by a state court was beyond the jurisdiction of the district court. "The decision in this case," he said, "goes upon the supposition that Marshall v. Knox so hold." The doctrine, however, he thought has no application where the pending suits are in our own tribunal, and the property in the hands of our own receiver. Here no comity is to be violated. A large mass of property worth millions, encumbered by successive and doubtful liens, some upon one portion and some upon another, with bills unnecessarily and irregularly filed, he thought, within principles entirely familiar to courts of equity, and especially to the federal tribunals a bill by the assignees setting forth the entire history of the case might be authorized by the court. He did not think it necessary in this case to resort to the doctrine of ancillary or cross-bills. He had, however, had his request answered, which was made during the argument, that he might be referred to a few cases sustaining a bill in the nature of a cross-bill, in which both new parties and new matters might be added, irrespective of any power derived under the bankrupt act. The following cases were then cited and commented upon: Brown v. Story, 2 Paige, 594; Jones v. Smith, 14 Ill. 229; Blodgett v. Hobart, 18 Vt. 414; Fletcher v. Holmes, 25 Ind. 458, 468. That the time in which this may be done is within the discretion of the court, see Story, Eq. Pl. 396.

A reading of all the judgments upon this subject, with attention to the facts involved in each, will show with entire clearness that all which is meant when it is said that new parties and new subject matter cannot be introduced into a cause by cross-bill, is that it cannot be done when they are foreign to and not necessarily connected with the matter of the original bill.

His honor, in the progress of the opinion, indicated his intention to make an order directing future proceedings in the several foreclosure cases. Such an order, however, was not made, but subsequently an order was entered in each of the cases vacating the previous orders staying the proceedings, leaving the counsel for the assignee to take such action, in the light of his honor's opinion, as they should deem best. It is understood that an immediate application will be made by them for leave to amend their answers, and to file a cross-bill in the Sutherland case.

Case No. 13,644.

SUTHERLAND v. STRAW et al.

[See 2 Fed. 277.]

SUTTER (UNITED STATES v.). See Case No. 16,424.]

Case No. 13,645.

SUTTON v. The ALBATROSS.

[2 Wall. Jr. 327; 1 Am. Law Reg. 87; 1 Phila. 423; 10 Leg. Int. 10; 10 West. Law J. 197.] [1]

Circuit Court, E. D. Pennsylvania. Nov., 1852.

MARITIME LIEN—TAKING NOTE—RELEASE OF LIEN—INTENTION.

Under the Pennsylvania statute of June 13, 1836 [Laws 1835-36, p. 617], giving to mechanics a lien for work done to vessels, the lien is not necessarily discharged by the party's taking a note, and giving a receipt in full. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction.

[Cited in Srodes v. The Collier, Case No. 13,272; The Dubuque, Id. 4,110.]

[Cited in Aiken v. The Fanny Barker, 40 Mo. 260; Swain v. Frazier, 35 N. J. Eq. 334.]

[See The Active, Case No. 34.]

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

Sutton had made repairs to the Albatross, a vessel, owned at Philadelphia by a corporation governed by directors elected from time to time. And under the statute law of Pennsylvania he had a lien on the vessel for his work. According to the usual and previous course of dealing of the company, as well with Sutton as with others, it had made its settlements every six months; but on this occasion the managers being about to resign prior to the expiration of that term, Sutton came to the president, rendering his bill up to the date of it, and requesting him to close the account previously to the change of directorship; as if that was not done, a new board might raise some dispute or difficulty, a thing which he wished to avoid. "He re-

[1] [Reported by John William Wallace, Esq. 10 Leg. Int. 10, contains only a partial report.]

quested the settlement," it was testified, "prior to the usual time, as a favour, on account of the expected change in the directorship." The president, finding the account correct, directed his clerk to draw notes at four months for the amount, and to take Sutton's receipt for them; nothing having been said or suggested by any body as to the form of the notes or receipt, or as to the effect of either or both of them in releasing the lien. The clerk drew notes in the ordinary form at four months, and gave them to Sutton, who, without saying anything, signed a receipt for them, drawn by the clerk, "in full for repairs of steamship to this date." Before the notes matured, the company failed, and made a general assignment; and Sutton, having produced and deposited in court all the notes, now sought to enforce his original lien against the ship. The question accordingly before the court was, whether he had lost his lien by taking the notes in the manner stated. The district court, from which the case was here on appeal, had decided that it was not lost. [Case unreported.]

[2] [The only evidence in the case was the deposition of Samuel T. Pierce, who had been superintendent of the company, and in charge of their books. The material parts of his testimony are as follows: "Mr. Thompson was president of the company in December, 1850. I was present at an interview between Mr. Thompson and Mr. Sutton, in relation to the work on the 16th December. Mr. Sutton rendered his bill for work against both the Albatross and Osprey, up to that date, and requested that Mr. Thompson would close it by notes, previous to his resignation, and the rest of the board; as, if that was not done, a new board might raise some dispute or difficulty, which he wished to avoid. Mr. Thompson examined the account, and requested me to draw four notes for the amount, in equal portions, and to take Mr. Sutton's receipt for them. That is all I recollect that passed. I drew the notes and took the receipts. The notes were given at the request of Mr. Sutton, on account of the directors being about to resign. Mr. Sutton's mode of dealing, account and settlement, with the company, six months' settlements; first of January and July,—for repairs. I say for repairs, because contracts for building are different; they are settled when they are finished. Mr. Sutton requested this settlement as a favor, on account of the expected resignation. He requested it prior to the usual time of settlement, for the reasons I have mentioned. They actually resigned, subsequently, but their resignations were refused by the stockholders." On cross examination, the witness stated that Mr. Sutton's account was a running account; that by the words "their course of settlement" he meant what he learnt from the books, as well as his own knowledge, admitting that he had never been present at any interview between Sutton and others, on behalf of the company, as to how he was to be paid for his work, except on the day when the notes were given; and that no notes were given under these six months' settlements, except those on the contracts. It is to be remarked, that the notes received by Sutton were never negotiated, but were brought into court at the hearing, and surrendered; and that the receipt was a mere printed form, filled up by the clerk.] [2]

The case was first called for argument somewhat out of course, but Mr. St. G. T. Campbell for libellant, Sutton, regarding it as a clear case in favour of the lien, proceeded to argue it without much preparation, and without citing any authorities. Mr. G. M. Wharton and Mr. Balch having argued the case more fully, Mr. Justice GRIER at a subsequent day gave a written opinion, reversing the decree below, and so deciding that the lien was gone. In consequence however of the mode in which the case had been called, and on Mr. Campbell's promising to cite authorities on his side directly in point, the court permitted a re-argument; and it was now heard again

Mr. Wharton and Mr. Balch.

The law of Pennsylvania does not differ materially from the civil or maritime law on this subject. But as the lien claimed by the libellant, is given by the statute of Pennsylvania, the local law as to its extinguishment or waiver must govern. In one Pennsylvania case (Hart v. Boller, 15 Serg. & R. 162) it was decided that a new note, without a fresh consideration, is not a satisfaction of a preceding one, unless it has been accepted as such. And in another (Kinsley v. Buchanan, 5 Watts, 118), that the acceptance of a note without an express stipulation was not deemed a relinquishment of such a lien. In a third case (Jones v. Shawhan, 4 Watts & S. 257) the plaintiff had taken the note of the owner, and given his receipt in full of the bill for materials, and the court below instructed the jury that such a receipt was not an extinguishment or satisfaction of the original bill as to affect his right to a lien. But the supreme court reversed the judgment of the court below on this point, and decided this was a fact to be decided by a jury, and said: "By the receipt at the foot of the bill, it appeared that the plaintiff had accepted the owner's note 'in full of the bill,' which certainly was evidence to rebut the presumption, and ought to have been left to the jury." In the case before the court, Sutton's purpose was to "close the account." He took a marketable security, which was of itself an advantage, and gave a receipt in full on his bill. His intention must be judged of from his own written discharge or receipt. Without it, the law would not have presumed the note, if

[2] [From 1 Am. Law Reg. 87.]

[2] [From 1 Am. Law Reg. 87.]

not negotiated, to be an extinguishment of the original debt. But, although a receipt in full may not have the technical effect of a release under seal, it is, till rebutted, conclusive evidence of satisfaction of the original debt. It is true that such a receipt is not an estoppel. It may be explained, or even contradicted. It may be shown to have been given by mistake, or obtained by fraud. But without other evidence showing that the parties did not intend, what their words clearly express, the court have no right to presume it. The court, in this case, cannot devolve the duty of judging of the intention of the parties, upon a jury; and there is no evidence in the case which would justify a jury in deciding that the receipt does not express the meaning of the parties who signed it. The testimony shows that the plaintiff usually settled with the defendants every six months, and received their notes or payment in cash; and that in the present case they settled with the defendants, previously to the usual day, because they expected that a new set of directors might be elected, with whom they might have difficulty. Here, too, as in getting a negotiable security, they gained an advantage, which may well have been a consideration for releasing a lien. There is no evidence that Sutton had ever looked to his lien as a mode of enforcing payment, or ever intended to take the notes merely as additional or collateral security for his account, reserving their right to recur to it. He has indeed (as it appears in the result) acted without due caution; but that is no reason why the court should construe his acknowledgment of satisfaction, as not meaning, what it plainly purports to mean, or presume a contract different from that which he himself has executed.

GRIER, Circuit Justice. Taking the note of hand of the debtor is not per se legal satisfaction, unless there is evidence that the parties intended it should operate as such. Where the debtor has two securities, as in the present case, it will not be easily presumed, that he has voluntarily relinquished one of them, and that the best of the two. The giving the receipt for the notes, as in full of the account, it is true, is primâ facie evidence that such was the case. But a receipt is no estoppel; and when we consider how little attention is usually paid to the peculiar form or expressions of such documents, signed by mechanics, and drawn up by the clerks of the employer, such formal words may be easily rebutted, by showing the true nature of the transaction. The note taken is no higher a security than the account, and, unless the transaction shows an intention to surrender without consideration the better security, these formal words in a receipt, given when the account is settled, ought not to be considered as at all conclusive of an intention to receive the lesser security as satisfaction. The case of Jones v. Shawhan, 4 Watts & S. 263, is directly in point, and states the law as applicable to this case. The law as laid down in that case is this—a new note without a fresh consideration is not satisfaction of an open account, or of a preceding note unless it has been accepted as such: and though the presumption is, that a larger security is not exchanged for a smaller one, yet a receipt of the lesser security as "in full" is but evidence to go to the jury to rebut such presumption. But it is not conclusive, and when opposed by the presumption, it may be explained by showing that there was no contract to take the lesser security and release the better, and that the intention to accept it as satisfaction and relinquishment of another security, was not in the contemplation of the parties. In this case, the duty of finding these facts cannot be devolved upon a jury; and on a careful examination of the evidence, I am convinced that the libellant when he signed this receipt, had not the idea before his mind of releasing any security held by him. Nor did the officer with whom this settlement was made, contract for any such release, or that the note should be received in actual satisfaction.

In the 1st place, it does not appear that notes were demanded for the purpose of having a marketable security on which to raise money, or that they were used for that purpose. They are brought into court and surrendered. 2nd. The libellant called for a settlement of his account, not for the purpose of getting immediate payment by note, but to have the account settled and adjusted before the officers who had dealt with him, should send in their threatened resignation. The notes were given as evidence of the amount of the balance due on settlement, says the witness, "on account of the directors being about to resign." When the account was stated and adjusted with the president of the company, he ordered the clerk to draw these notes and take a receipt for them. No direction was given to the clerk in what form to draw the receipt either by the president or by Sutton. The clerk drew it in his usual form. Sutton signed it without criticising its form, or perhaps reading it. His object was to get his account settled, so that he might not have difficulty with the new officers of the corporation. No suggestion was made by either party, that these notes were either wanted to raise money on, or given as a favour, or received in satisfaction of any other security held by the mechanic. There was no consideration given, or intended to be given for the relinquishment of one of the mechanic's securities, nor did such an act enter into the contemplation of the parties at the time of their settlement. The clerk drew the receipt in the usual form in his receipt-book without any instruction from either party to put it in any particular form, and thus made it have an apparent effect which was not within the scope of the contract, or contemplation of the parties.

Upon a more careful examination of the case than I was able to give originally, I feel satisfied that a jury would have been justified in finding that it was not the intention of the parties to this settlement to give or receive their notes in satisfaction of the debt so as to relinquish the security on the vessel given by law to the libellants. Decree affirmed.

SUTTON (BAILEY v.). See Case No. 747.

Case No. 13,646.

SUTTON v. HENNELL et al.[1]

Circuit Court, S. D. New York. Oct. 3, 1853.

AFFREIGHTMENT — SALE OF CARGO TO REALIZE FREIGHT—INADEQUACY OF PRICE—BALANCE.

[Where, by direction of the master, and to realize freight, goods were sold at San Francisco, through an auction house, in the customary way, and after the usual advertisements in newspapers, hand bills, and placards, the mere fact that the price realized was less than half the amount of the freight, and that the purchaser, within a few weeks, sold the goods at retail at an advance of about 200 per cent., is not sufficient to show that there was any fraud or unfairness on the part of the master, such as would relieve the shipper from liability for a balance of freight.]

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

[This was a libel by Effingham H. Sutton against Frederick Hennell and others to recover a balance of freight. From a decree of the district court dismissing the bill (case unreported), libelant appealed.]

Platt, Gerard & Buckley, for appellant.

Betts & Donohue, for appellees.

NELSON, Circuit Justice. This libel was filed in the court below to recover a balance of freight earned by the ship Cygnet for goods shipped from the port of New York to San Francisco in the fall of 1849. The goods described in the bill of lading consisted of thirteen bundles, thirty-one packages, and twenty-two pieces of lumber, two cases, five joists, two bundles of doors, and a considerable quantity of plank and boards, particularly specified. The freight was 55 cents per cubic foot, with 5 per cent. primage, amounting, in the whole, to the sum of $2,350.70, payable on delivery of cargo; the delivery to the order of the respondents, the shippers, or their assigns. The goods were to be called for at the port of delivery within twenty days after arrival of the ship, and freight paid, or sufficient to be sold for payment of the same. The vessel arrived at the port of San Francisco the latter part of March, 1850. No consignee of the cargo or other person appeared to receive the delivery of it and pay the freight, and, after the expiration of the time mentioned in the bill of lading, it was turned over by the master of the vessel to the house of Mellus, Howard & Co., to take the proper measures to collect it. They put the bill of lading into the hands of J. L. Riddle & Co., one of the first auction houses in the city of San Francisco, with direction to sell the goods at auction for the purpose of paying freight. They were advertised accordingly for sale in the usual and customary way, in the newspapers, and hand bills or placards, and sold at the auctioneers' rooms on the 30th of April, after the arrival of the ship, to Charles Scholfield, he being the highest bidder, for the sum of $1,250, leaving a balance of freight unpaid of $1,293.69, to recover which this libel has been filed.

It appears from the evidence of Scholfield, the purchaser, that he resold the property within a few weeks after the purchase at auction, and by retail, for an advance of between two and three thousand dollars, and it is supposed and contended, on the part of the shippers, that there must have been some unfair dealing in the sale by the master, or persons employed by him, or else there could not have been so great a sacrifice of the property. The adventure has certainly been an unfortunate one, but I find no evidence in the case to charge the loss upon the master or his owners. He has been examined in the case, also a member of the house, and his clerk, who had charge of the sale, the auctioneer, and purchaser, and their testimony is full and conclusive that the sale was made in the usual way, and with all the means customary to induce competition in bidding at public auction. Efforts were made to ascertain if the goods had been consigned to any one, and from the initials in the bill of lading it was supposed possible that a Mr. Gelston, of Sacramento City might be the owner, and a letter was addressed to him accordingly, but no answer received; and it is more than probable upon the proofs, that the bill of lading had been transferred to him by the respondents, and that he had an agent attending the sale, and who bid upon the goods, but declining to take the cargo and pay the freight. The evidence was not of a character that would authorise us to place reliance upon it in deciding the case, but it would have been more satisfactory if some explanation of the circumstance had been given by the respondents. It must have been in their power to have removed any unfavorable inferences against them in this matter. But I do not regard this view as at all material in the case. The ground upon which I place the decision is that the proofs are full and satisfactory, that the sale of the goods was fair, and made in the usual and customary way, and after all reasonable steps had been taken, under the circumstances, to obtain for them the highest market price. Considerable quantities of other goods were sold at the

[1] [Not previously reported.]

same time, embraced in the same public advertisement of the sale, and some fifty bidders present, and several bids made for these goods before struck down to the purchaser. If there had been a sacrifice of the goods of the respondents, it is their misfortune, and referable to the hazards of the trade in which they were engaged. The libellant has performed his part of the contract entered into with them, and is entitled to his compensation.

I cannot, therefore, agree with the late Judge Judson that the sale was irregular, or that an inference of unfairness is warranted from inadequacy of price, after the explanation given by the proofs in this case. I must, therefore, reverse the decree below, and direct a decree for the balance of the freight and interest, with costs.

SUTTON (IRVING v.). See Cases Nos. 7,077 and 7,078.

Case No. 13,647.

SUTTON v. KETTELL.

[1 Spr. 309; [1] 18 Law Rep. 550.]

District Court, D. Massachusetts. Nov., 1855.

BILL OF LADING—PAROL EVIDENCE—MISTAKE.

That part of a bill of lading which acknowledges that goods have been shipped, may be shown by parol evidence to have been made by mistake. It is like any other receipt.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

[Cited in Sears v. Wingate, 3 Allen, 108.]

In admiralty.

C. P. Curtis, Jr., for libellant.

William Brigham, for respondents.

SPRAGUE, District Judge. This is a libel to recover the freight of a cargo of logwood, consigned by one Germaine to the respondents, and brought from Hayti to Boston, in the brig General Foster, amounting, as per charter-party, to $1200.

The respondents admit the charter-party, and the services performed, but in defence, they seek to deduct the value of twenty-eight tons of logwood, loaded on deck, and thrown overboard on account of stress of weather, as well as of five tons which were not brought in the vessel, though included in the bill of lading.

I will consider the five tons first. The evidence is, that when the last lighter's load came off to the brig, a portion of it was put on the vessel's deck: but that the mate, as soon as these five tons were taken on, found that they could not safely be carried, and immediately threw them back into the lighter, where there was remaining other logwood belonging to Germaine, the owner of the cargo. Now, by the bill of lading, the captain acknowledges the receipt of these five tons, and engages to deliver them to the respondents in Boston.

But is this receipt true? It is certainly not conclusive on the master; for a receipt is always open to contradiction and explanation, and the evidence shows that these five tons were not shipped. They were only on the deck for the purpose of ascertaining whether they could be carried, and as soon as it became evident that they could not be carried, they were, without the captain's knowledge, put back into the possession of Germaine's agents. These five tons belonged to Germaine, and it is wholly immaterial to the owners of the vessel, what became of them after they were put back into the lighter [or what Germaine's agents did with them afterwards.] [2] The master signed the bill of lading under a mistake, and that cannot render the libellants responsible.

The respondents, secondly, claim to deduct the value of the logwood which was on deck and was lost. And they assign as reasons, that, upon the faith of the bill of lading, which was signed by the master without specifying what cargo was on deck, and forwarded to them, they made advances to Germaine on the logwood, to the whole value of that thrown overboard, and also, that they got insurance thereon, without being able to designate how much of said insurance should be upon cargo on deck, and supposing that it was all under deck; and that, consequently, such as was on deck was not covered by the policy.

The burden is on the respondents to prove these allegations, and I am of opinion that neither of these positions has been sustained by their evidence. In fact, they have abandoned the first one in their second answer, now alleging that Germaine was indebted to them, by former shipments, to the value of the whole cargo. [And the testimony of their own clerk, Mr. Kurtz, is sufficient to disprove the second. The respondents say that they were misled by the bill of lading; but Mr. Kurtz's testimony shows that they got all the insurance they could have got before the bill of lading was received by them. He says, in the first place, that he procured the insurance, but whether personally, or by sending a clerk, he is not sure; but the open policy put in by the respondents shows an entry of the date of June 11, 1855, on "property per General Foster." Mr. Kurtz, upon having his memory refreshed, says that that entry or indorsement was made at the time of its date, and in consequence of advices received from Germaine of logwood loading on board this vessel; that, not then knowing the precise amount, the valuation could not then be entered on the policy, but was left until receipt of the bill of lading by the vessel. He further says that the letter containing the bill

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

[2] [From 18 Law Rep. 550.]

of lading and invoice, which was put aboard the General Foster, was received here on June 27th, before the arrival of the brig, by a vessel from New Providence, where the General Foster had put in in distress after the loss of her deck load; which vessel also brought the news of the damage to the brig, and of that loss. After these papers arrived, Mr. Kurtz says, he went and filled up the amount of the property covered in the policy; but it was then too late to insure the deck-load, as the loss had occurred before she arrived at New Providence, and the respondents then knew of it.][2] And the second is not proved. (The judge here went into a full and minute examination of the evidence derived from the policy, invoice, bill of lading, letters, and the testimony of the respondents' clerk.) The allegation that the insurance was obtained on the faith of the bill of lading, not having been proved, it becomes unnecessary to decide whether the owners would have been responsible for this loss, had the respondents been misled by the bill of lading, as alleged, and a decree must be entered for the libellant for the whole amount of the charter-party, with costs.

NOTE. As between the shipper and ship-owner, "the bill of lading has, in legal effect, a double aspect. It is a contract for the transportation and safe delivery of the property shipped; and it also embodies, as a matter collateral to that contract, a receipt for the goods so shipped. In so far as the bill operates as a contract, it is undoubtedly, the exclusive evidence of the obligation of the parties; but in respect to those clauses which operate merely as a receipt for the goods, it has no higher obligation than an ordinary receipt, and is open to explanation and rectification by parol proof." Goodrich v. Norris [Case No. 5,545]; Wolfe v. Myers, 3 Sandf. 7; Shepherd v. Naylor, 5 Gray, 591; The Tuskar [Case No. 14,274]; O'Brien v. Gilchrist, 34 Me. 554.

Case No. 13,648.

SUTTON v. MANDEVILLE.

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

Circuit Court, District of Columbia. April Term, 1801.

PARTNERSHIP—BALANCE—PROOF OF—PARTNERSHIP BOOKS—SET-OFF.

1. Parol evidence cannot be given of a statement of an account by a master in chancery in a suit pending in another court.

2. In an action at law by one partner against the other the partnership book kept by the defendant is not evidence against the plaintiff, although it had been in his possession.

3. The defendant cannot set off a joint judgment recovered by himself and wife (for slander of the wife) against the plaintiff.

Debt on a promissory note [by John Sutton against John Mandeville]. Nil debet, and issue. James Keith was sworn on the part of the defendant to prove that he was appointed a commissioner by the high court of chancery of Virginia to state the partnership accounts between plaintiff and defendant, and that there was a balance due from plaintiff to defendant.

Mr. Mason, for plaintiff, prayed the court to instruct the witness that he was not to say any thing to the jury on the subject of any statement of the accounts made by him as a commissioner, a bill having been filed in the high court of chancery of Virginia to compel a settlement of the accounts.

THE COURT gave the instruction as prayed, because the report of the commissioner was of no authority unless it had been ratified by a decree of the chancellor; and if it had been so ratified, it ought to be produced and proved as a record from chancery.

Mr. Swann, for defendant, offered the books of the partnership to prove that the plaintiff had credit on the partnership books for the amount of the note. It was admitted that the books were kept by the defendant, but that the ledger in which it was credited had been in the possession of John Sutton, the plaintiff, but the entry was not in his handwriting, nor any proof offered that it was made with his consent.

THE COURT refused to permit the book to go in evidence to the jury.

The defendant's counsel then offered to offset a judgment obtained against the plaintiff in an action of slander, by defendant and his wife, for slander of the wife.

Mr. Mason, for plaintiff, objected that this judgment was in right of the wife, and could not be offset against a debt due from him in his own right. If the wife survives the husband the judgment survives to the wife. Oglander v. Baston, 1 Vern. 396; 2 Com. Dig. 85, tit. "Baron & Feme," F, 1; Bond v Simmons, 3 Atk. 20.

Mr. Swann, for defendant. By the law of Virginia, 4th December, 1786, § 4 (Ed. 1803, p. 37), the plaintiff must allow all just discounts. Picket v. Morris, 2 Wash. [Va.] 255. A discount may be produced at the trial. The judgment will not survive to the wife. A bond, if due to the wife dum sola, and reduced to a judgment before the death of the husband, will not survive to the wife, but go to the executors of the husband. Obrian v. Ram, 3 Mod. 189; Miles' Case, 1 Mod. 179; Butler v. Delt, Cro. Eliz. 844.

THE COURT refused to suffer the judgment of Mandeville and his wife to be given in evidence as a discount to the debt due by Mandeville alone.

[See Cases Nos. 13,649-13,651.]

[2] [From 18 Law Rep. 550.]

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

Case No. 13,649.

SUTTON v. MANDEVILLE et al.

[1 Cranch, C. C. 32.] [1]

Circuit Court. District of Columbia. July Term, 1801.

JUDGMENT—FORTHCOMING BOND.

A defective forthcoming bond, will, at the plaintiff's request, be quashed, as well as the execution upon which it was founded.

Motion for judgment on a forthcoming bond. The bond produced was not signed by Mandeville and Jamieson, but had two scrolls for seals, and was signed and sealed by Charles Turner as surety. Charles Turner was the town serjeant who served the execution upon which the bond was given, and who had returned upon the execution that the bond was returned to the office, but did not describe the bond in any manner. There was no subscribing witness.

THE COURT refused to give the judgment; and, at the plaintiff's request, quashed both the bond and the execution.

[See Cases Nos. 13,648, 13,650, and 13,651.]

Case No. 13,650.

SUTTON v. MANDEVILLE.

[1 Cranch, C. C. 115.] [1]

Circuit Court. District of Columbia. March, 1803.

DEPOSITION—AFFIDAVIT—DISTRICT OF COLUMBIA—LAWS GOVERNING.

1. The court in Alexandria will not grant a commission to examine witnesses in a suit at common law, without affidavit showing it to be necessary for the purposes of justice.

2. The laws of Virginia, in the county of Alexandria, are to be considered, with respect to the laws of the United States, as common law, that is, not repealed without negative words or other and repugnant provisions upon the same subject. (Quære.)

Debt on bond. Issue, and continued to next term.

Mr. Mason moved for leave to issue a commission to take depositions in the state of Massachusetts, under the act of congress, (Judiciary Act), 1789, § 30 (1 Stat. 88).

Refused by THE COURT, because not grounded on affidavit showing it to be necessary to the justice of the case.

A question was made whether commissions for taking depositions must be taken out under the law of Virginia, or whether they may be taken out under the act of congress, without ten days' notice required by the Virginia law.

MARSHALL, Circuit Judge, said that he had been informed by the chief justice of the supreme court of the United States, that it was the opinion of that court that the laws of Virginia were to be considered in this district, with regard to the general laws of the United States, as the common law is considered with regard to the statute law, viz., that it is not altered without negative words, or an absolute inconsistency, so that both cannot stand together.

[See Cases Nos. 13,648, 13649, and 13;651.]

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

Case No. 13,651.

SUTTON v. MANDEVILLE.

[1 Cranch, C. C. 187.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

TRIAL—RIGHT TO OPEN AND CLOSE—BANKRUPTCY—BOND—MALICE.

1. The defendant has not a right to open the cause in all cases where he holds the affirmative of the issue.

2. Malice may be given in evidence in aggravation of damages in an action upon a bond conditioned to prove the plaintiff a bankrupt.

3. Evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment.

Debt on bond conditioned to prove plaintiff a bankrupt. Plea, conditions performed. Replication. Breach, that defendant [Joseph Mandeville] did not prove plaintiff to be a bankrupt. Rejoinder, that he did prove him to be a bankrupt. Surrejoinder, that he did not; and tenders issue Rebutter, joins the issue.

Mr. Swann, for defendant, contended that he had a right to open the cause, because he held the affirmative, to wit: that he did prove plaintiff a bankrupt.

THE COURT, however, refused to permit him, because the replication is in nature of a new declaration; and the rejoinder is only a denial of the fact charged in the replication.

CRANCH, Circuit Judge, contrà, because the defendant is entitled to show that he did prove the plaintiff to be a bankrupt, and it is only upon the supposition that he has failed to support the issue on his part, that the plaintiff can consistently introduce evidence of the damages sustained by him.

C. Lee, for defendant, as this was not an action for a malicious prosecution, prayed the opinion of the court whether the plaintiff had a right to give evidence of malice in aggravation of damages.

THE COURT said that the question was premature, until evidence of malice should be offered, when it might come properly before the court on an objection to the evidence. But THE COURT permitted the plaintiff to give evidence of fatigue, trouble, vexation and expenses occasioned by the attempt to prove him a bankrupt. And afterwards permitted the plaintiff to go into evidence of malice in aggravation of damages.

THE COURT also permitted the defendant to give evidence of the circumstances and conduct of John Sutton, which would have

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

amounted to acts of bankruptcy, if he had been a proper subject of the bankrupt law, in mitigation of damages and to repel the suggestion of malice. But refused to admit evidence that the commissioners of bankruptcy had erred in their judgment.

[See Cases Nos. 13,648–13,650.]

SUTTON (NORWOOD v.). See Case No. 10,365.

SUTTON (SHERWOOD v.). See Cases Nos. 12,781 and 12,782.

SUTTON (WOODWARD v.). See Case No. 18,009.

Case No. 13,652.

SUYDAM et al. v. ALDRICH.

[3 McLean, 383.] [1]

Circuit Court, D. Illinois. June Term, 1844.

PLEADING AT LAW—VARIANCE WITH PROOF—RECORDS.

Any variance between the judgment described in the declaration from that of the record will exclude the record from being received as evidence.

[This was an action by Suydam, Sage & Co. against Aldrich.]

Butterfield & Beaumont, for plaintiffs.
Logan & Little, for defendant.

McLEAN, Circuit Justice. This action is brought against the defendant for an escape. The declaration stated the judgment, under the execution on which the escape was charged, as having been obtained by the plaintiffs against Elijah Doolittle for $5,590. The record of the judgment introduced as evidence showed that the judgment was entered for $5,522.83 and costs, entered the 8th of December, 1838. The record was objected to as evidence, on the ground that it varies from the judgment described in the declaration. This variance is fatal. A judgment to be used in evidence, as the foundation of the action, must be described with entire accuracy. It being a matter of record, there is no reason why the true statement of the amount should not be made. The record of the judgment cannot be read in evidence.

Case No. 13,653.

SUYDAM et al. v. BEALS et al.

[4 McLean, 12.] [1]

Circuit Court, D. Michigan. June Term, 1845.

CREDITORS' BILL—PROCEEDINGS—PLEADING—PRO CONFESSO—EXECUTION—RETURN—VENDOR AND PURCHASER—SURRENDER OF DEED.

1. A creditor's bill is sustainable in the courts of the United States under the mode of proceedings, as authorized in chancery by state statutes.

2. And in this form, property fraudulently conveyed, or choses in action, may be subjected to the payment of judgments.

3. The surrender and cancellation of a deed, does not reinvest the title in the grantor.

[Cited in brief in Fitzgerald v. Wynne, 1 App. D. C. 115.]

4. The return of the executions on the judgment nulla bona, is sufficient, without stating that search was made for property by the officer.

5. The executions were returned before the return day, but the bill was not filed until afterwards.

6. On a bill in chancery, the errors of a court of law can not be corrected.

7. A court of law gives relief on terms which a court of equity can not impose.

8. The demurrer being overruled, and the other defendants failing to answer, the bill as to them may be taken as confessed.

In equity.

Mr. Seaman, for complainants.
Mr. Talbott, for respondents.

McLEAN, Circuit Justice. This is a creditor's bill, which represents that at October term, 1839, a judgment was obtained by the complainants against F. and A. Beals, for twelve hundred and sixty dollars. That several executions issued on the judgment, several of which were returned nulla bona; and that on the 26th August, 1840, by virtue of another execution, a levy was made on lots 5, 6, 7, and 8, in the eastern division of Schoolcraft, and also on other lands. That the judgment debtors have choses in action, equitable interests, etc., which the bill seeks to reach, to satisfy the judgment. And the bill alleges that the defendants at law, on or about the 13th of May, 1841, assigned a large amount of effects and choses in action to Welles, the defendant, which it prays may be made subject to the judgment. That lots 5, 6, and 7 were owned by Grant, who sold them to the defendants in the judgment in July, 1839, for which they paid him fifteen hundred dollars. A deed was made for the lots by Franks, in whom was vested the legal title; but this deed was never recorded. That the defendants entered into possession of the lots, made valuable improvements thereon, and are still in possession of them. That lot No. 8, being owned by Welles, was sold by him to A. Beals, and he received the purchase money. That A. Beals sold the lot to the defendants in the judgment, and directed Welles to convey it to them. That this bill was filed September 3d, 1839, and that on the 7th of October following, F. and A. Beals sold their house and their store of goods, to Kimberly, one of the defendants. That on the same day, F. and A. Beals gave up to Franks, to be canceled, their deed of said lots 5, 6 and 7, and procured a deed for the same to be made to A. Forsythe, without consideration; and also, at the same time, procured a deed to be made from Welles to Forsythe, for lot No. 8.

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

These conveyances, the bill charges, were made to delay and defraud the plaintiffs. That Forsythe was the father-in-law of A. Beals, and that he had notice of the facts alleged.

Welles demurred to the bill, and Forsythe answered, admitting many of the allegations of the bill, but denying that the conveyances were made to him without consideration. On the contrary, he says that A. Beals owed him $613, and that the lots were sold in discharge of that debt; and that he had become security for A. Beals to the amount of twelve hundred dollars, etc. The deed from Franks to F. and A. Beals, vested the title to the lots in them, which could not be divested by the surrendering and cancellation of that deed, and a conveyance of the property to Forsythe.

A surrendering and canceling of a lease for a term or years, is not good within the statute of frauds, unless it be by deed or note in writing, signed by the party. Harrison v. Owen, 1 Atk. 520; Rev. St. Mich. 257. Canceling and destroying a lease, by the agreement of the parties, will not operate to divest the interest of the lessee. Rowan v. Lytle, 11 Wend. 616. The same principle applies to a deed in fee simple. Lewis v. Payn, 8 Cow. 71, Jackson v. Gardner, 8 Johns. 394. The conveyance to Forsythe was clearly fraudulent and void. This is shown by the time and the circumstances which attended that conveyance. The surrender of the deed of Franks by the Beals, is a fact which gives a strong presumption of fraud to the transaction; and when to this is added the facts that this bill was then pending, the judgment having been previously obtained, the embarrassment of the Beals, and the admitted fact that this was the only property of the defendants Beals which could be reached by execution, would seem to leave no doubt that the conveyance was made to prevent the satisfaction of the judgment. In the case of Harrison v. Southcote, 1 Atk. 538, where a conveyance of land for the nominal consideration of £4,500, only £100 being paid down, and the bond of the purchaser given for the balance, without mortgage or other security, was held by Lord Hardwicke as merely colorable and fraudulent.

By his demurrer, Welles admits that he has taken the effects of the Beals from the judgment debtors, as alleged in the bill. From the filing of the bill, a specific lien attached to these effects; and in the hands of Welles, they must be considered subject to the complainant's demand. 3 Paige, 568, 366; 4 Paige, 42 and 43; and 5 Johns. Ch. 280. The double aspect of the bill is not objectionable; and the issuing of a second and third execution does not operate against the right of the complainant to file it. Storm v. Badger, 8 Paige, 130; Clark v. Davis, Har. [Mich.] 234. 235.

The averments in relation to the return of the executions, are sufficient to sustain the bill. It is not necessary to aver that the marshal searched for property. He returns that he could find no property, under his official sanction; and that is all that the law requires. Before the return day, the execution was returned; but the bill was not filed until after that day; and this is sufficient. Rev. St. 481, § 8; 8 Paige, 470. An objection is made to the regularity of the judgment; but this can only be decided by a court of law. It is not the province of a court of chancery on a creditor's bill, to correct the errors of a legal procedure. In Shottenkirk v. Wheeler, 3 Johns. Ch. 279. 280, Chancellor Kent says "that a court of chancery has no jurisdiction over the question of irregularity in a judgment at law." A court of law grants relief on terms which a court of equity cannot impose. On the hearing, it is proper to produce in evidence the record of the judgments and executions set forth in the bill A part of the bill may be taken as confessed, and a final decree entered. 8 Paige, 593. 594.

Upon the whole, the demurrer of the defendant Welles to the bill is overruled, and the sale of the property is ordered in satisfaction of the judgment.

Case No. 13,654.

SUYDAM v. DAY.

[2 Blatchf. 20;[1] 1 Fish. Pat. Rep. 88.]

Circuit Court, S. D. New York. April 25, 1846.

PATENTS—ASSIGNMENTS—PART INTEREST—TERRITORIAL ASSIGNMENT.

1. Under the patent laws of the United States, an assignee of a patent must be regarded as acquiring his title to it, with a right of action in his own name, only by force of the statute.

2. Such exclusive right of action exists in favor of a sole assignee only in two cases, namely, where he acquires, by assignment, the whole interest in the patent, or a grant or conveyance of the whole interest within some particular district or territory.

[Cited in Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 60 Fed. 624.]

3. Under sections 11 and 14 of the act of July 4, 1836 (5 Stat. 121, 123), an action is given only to such party (composed of one or more persons) as possesses the whole interest.

4. The subject-matter of a patent is not partible except in respect to territorial assignments.

[Cited in Blakeney v. Goode, 30 Ohio St. 359.]

5. Where a patent was granted for an improvement in the mode of preparing india-rubber with sulphur "for the manufacture of various articles," and S. became the assignee of the exclusive right to use the improvement "in the manufacture of shirred or corrugated india-rubber goods:" *Held*, that S. could not maintain an action in his own name alone for an infringement of his right by the manufacture of such goods.

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

Demurrer to a declaration. The action was case for the infringement of letters patent [No. 1,090]. The plaintiff [David L. Suydam] counted on two patents. The first count set forth a patent to Charles Goodyear, assignee of Nathaniel Hayward, granted February 24th, 1839, for an "improvement in the mode of preparing caoutchouc with sulphur, for the manufacture of various articles," and an assignment by Goodyear to the plaintiff on the 24th of May, 1844, of "the exclusive right, privilege, and license to use the said improvement in the manufacture of shirred or corrugated india-rubber goods," and alleged an infringement by "the manufacture of shirred or corrugated india-rubber goods." The specification of the said patent described the invention as an "improvement in the mode of preparing caoutchouc, gum-elastic or india-rubber, for the manufacturing of various articles in which that substance is used." The claim was "the combining of sulphur with gum-elastic, either in solution or in substance, either in the modes above pointed out, or in any other which is substantially the same, and which will produce a like effect." The second count set forth a patent to Charles Goodyear, granted June 15, 1844 [No. 3,633], for an "improvement in india-rubber fabrics." The claims of the last-mentioned patent were: (1.) The combining of caoutchouc "with sulphur and with white-lead, so as to form a triple compound, either in the proportions herein named, or in any other within such limits as will produce a like result. And I will here remark, that although I have obtained the best results from the carbonate of lead, other salts of lead, or the oxides of that metal may be substituted therefor, and will produce a good effect, I, therefore, under this head, claim the employment of either of the oxides or salts of lead, in the place of the white-lead in the above-named compound." (2.) "In combination with the foregoing, the process of exposing the india-rubber fabric to the action of a high degree of heat, such as is herein specified." The second count also set forth an assignment by Goodyear to the plaintiff on the 24th of May, 1844, of "the sole and exclusive right to use, in the manufacture of corrugated or shirred india-rubber goods, the application of white-lead and the oxides of lead in connection with the application of artificial heat, and in combination with india-rubber and sulphur, in the manner and proportions set forth in the specification annexed" to the last mentioned patent, and averred that the said specification and the application for letters patent under the same were, at the time of the making of the assignment, on file in the patent office, according to law, and alleged an infringement by "the manufacture of shirred or corrugated india-rubber goods or fabrics." The defendant [Horace H. Day] demurred to both counts, and the plaintiff joined.

George Griffin and Francis B. Cutting, for defendant.

Seth P. Staples, for plaintiff.

(1.) By the act of congress, the plaintiff can maintain an action in his own name, for injury to his rights under the patents. He has the exclusive right to use the patents for his own profit. Under section 11 of the act of July 4, 1836 (5 Stat. 121), a party may sell any undivided part of his interest in a patent. The right to sell is not confined to an aliquot or integral part of the patent, but applies also to the divisible properties of the invention. Section 14 of the same act also tends to support the idea that a person who has an exclusive right in a patent, may have a remedy by action, may disclaim, &c., and, under section 17, a bill in equity may be filed by "any party aggrieved."

(2.) The plaintiff can sustain this action on the general principles of the common law. It is an action on the case, and the law furnishes the remedy where the right is established.

THE COURT (NELSON, Circuit Justice, and BETTS, District Judge) held: (1) Under the patent laws of the United States, an assignee of a patent must be regarded as acquiring his title to it, with a right of action in his own name, only by force of the statute. (2) Such exclusive right of action exists in favor of a sole assignee only in two cases, namely, where he acquires, by assignment, the whole interest in the patent, or a grant or conveyance of the whole interest within some particular district or territory. (3) Section 11 of the act of 1836, which authorizes the assignment of "the whole interest or any undivided part thereof," taken in connection with section 14 of the same act, gives an action only to such party (composed of one or more persons,) as possesses the whole interest. (4) The subject-matter of a patent is not partible except in respect to territorial assignments. (5) As the declaration in this case shows that the plaintiff has an interest in only a part of each patent, to wit, a license to use, in the manufacture of a particular kind of goods, the invention covered by each patent, it is bad on its face, and judgment must be rendered for the defendant.

[For other cases involving this patent, see note to Goodyear v. Railroads, Case No. 5,563.]

Case No. 13,655.

SUYDAM et al. v. EWING et al.

[2 Blatchf. 359.] [1]

Circuit Court, S. D. New York. Jan. 27, 1852.

PARTIES IN INTEREST — STATE PRACTICE — CAUSE REMOVED.

1. In a common law action, in the circuit court for the Southern district of New York,

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

the assignee of a non-negotiable contract has no capacity to sue upon it in his own name; the provision of the state Code of Procedure, requiring every suit to be brought in the name of the real party in interest, not having been adopted by that court.

2. And this practice applies not only to an action originally commenced in that court, but to one removed into that court from a court of the state, and to all the proceedings in such action after its removal.

3. Accordingly, where a debt was contracted with a copartnership, and afterwards the interests of some of the members of the copartnership in the debt were assigned, and then a suit at law was brought thereon in a court of the state, in the names of the real parties in interest, and was removed into the circuit court for the Southern district of New York, and afterwards one of the partners died: *Held*, that the suit must be continued in the circuit court in the names of the surviving partners, without any reference to the real parties in interest.

[Cited in Noyes v. Barnard, 11 C. C. A. 424, 63 Fed. 787.]

[Cited in brief in Ayres v. Western R. Corp., 45 N. Y. 264.]

This was an application, on behalf of surviving plaintiffs in three suits, for leave to revive and prosecute two of them in the names of Francis P. Sage, Ferdinand Suydam, Jr., and Charles Suydam, or in the names of Charles Suydam, and of Samuel S. Whitney, assignee of Francis P. Sage and Ferdinand Suydam, Jr., and the third in the names of Francis P. Sage, Henry L. Suydam, Ferdinand Suydam, Jr., and Charles Suydam, as surviving partners of the firm of Suydam, Sage & Co., or in the names of Charles Suydam, and of Samuel S. Whitney, assignee of Francis P. Sage and Ferdinand Suydam, Jr., and of Henry S. Wyckoff and Charles Suydam, executors of the last will and testament of Ferdinand Suydam, deceased. The facts were these: The defendants [William P. Ewing and George W. Ewing] became indebted to the firm of Suydam, Sage & Co. in the sum sued for in the last named cause, that firm being at the time composed of Ferdinand Suydam, Francis P. Sage, Henry L. Suydam, Ferdinand Suydam, Jr. and Charles Suydam. The other two actions were brought to recover balances due on debts contracted with the firm of Suydam, Sage & Co. when composed of Francis P. Sage, Ferdinand Suydam, Jr. and Charles Suydam. Prior to August 6th, 1850, Henry L. Suydam, Francis P. Sage and Ferdinand Suydam, Jr., assigned to Ferdinand Suydam all their interest in the said several debts. In November, 1850, the said suits were instituted in the supreme court of the state of New York, in the names of the real parties in interest, and attachments were issued therein and served on persons in the state of New York who had in their possession effects and credits of the defendants, in such manner as to bind those effects and credits. Each suit demanded over $500, exclusive of costs. The plaintiffs were citizens of New York, and the defendants were citizens of another state. In March, 1851, the suits were all of them duly removed by the defendants into this court, the appearance of the defendants in this court was perfected, and the suits were pending in this court. After the removal of the causes into this court, Ferdinand Suydam died, and Henry S. Wyckoff and Charles Suydam were duly appointed his executors. The other members of the respective firms with which the debts sued for in the several actions were contracted, were still surviving. The supreme court of New York appointed Samuel S. Whitney, assignee of Francis P. Sage and Ferdinand Suydam, Jr., in place of Ferdinand Suydam, deceased.

Samuel L. M. Barlow, for plaintiffs.

Benjamin F. Butler and Hiram Barney, for defendants.

BETTS, District Judge. The practice of the state courts has been changed by a recent act of the legislature, so that suits must now be brought in the name of the real party in interest. Laws N. Y. 1849, c. 438, § 111. Prior to that statute, the rule of proceeding in that respect was founded upon the practice of the king's bench in England, and required actions to be brought in the name of the party in whom the legal interest was vested. 1 Dunl. Prac. 36; Grah. Prac. 59; 1 Chit. Pl. 16, 17; 1 Tidd, Prac. 7. The United States courts follow the same rule, except where the assignee is authorized to sue in his own name by the custom of merchants or by statute. Winchester v. Hackley, 2 Cranch [6 U. S.] 342.

The rules of the United States supreme court adopt for the circuit courts the practice of the English king's bench, leaving to those courts the power to regulate the subject at their discretion. Rule 7, Sup. Ct. Aug. 1791; Acts Sept. 29, 1789, and May 8, 1792 (1 Stat. 93, 275). The standing rules of this court adopt the practice and modes of proceeding in force in the supreme court of the state of New York in 1838, in cases not regulated by express rule of the circuit or district court. Cir. Ct. Rule 102; Dist. Ct. Rule 240.

Under this state of the law governing this court in common law cases, the assignee of a contract has no capacity to sue upon it in his own name, unless it be negotiable in its nature. The action must be brought in the name of the person with whom the contract was made, or by his legal representatives in case of his decease.

In these causes, there are surviving members of the copartnerships with which the debts were contracted. The right of action has devolved upon the survivors, and suits for the debts can be maintained only in their names. The change made by the New York Code of Procedure, in respect to the competency of parties to sue in their own names, when they are the ones having the real interest in the matter in controversy,

does not apply to the United States courts, and cannot affect their course of practice until it is recognized and adopted by them. Wilcox v. Hunt, 13 Pet. [38 U. S.] 378; Craig's Case [Case No. 3,325]. In each of these causes, the debt sued for was contracted with a copartnership, members of which are surviving. The well-settled rules of pleading require actions for such demands to be prosecuted in the names of the surviving partners, whoever may be interested in the amounts after their recovery. 1 Chit. Pl. 12; Bernard v. Wilcox, 2 Johns. Cas. 374; Holmes v. D'Camp, 1 Johns. 34.

The proceedings in this court, after the transfer of the causes, must be the same as if the suits had been originally commenced here, and, accordingly, the declarations filed here must be in the names of the respective surviving partners, and must conform in structure to our modes of pleading. The plaintiffs are entitled to have orders entered for the continuance of the causes in such names, without prejudice to the attachments levied in the court below in the causes as there instituted and entitled.

Case No. 13,656.

SUYDAM et al. v. TRUESDALE et al.

[6 McLean, 459.] [1]

Circuit Court, D. Michigan. June Term, 1855.

PLEADING IN EQUITY — SUPPLEMENTAL ANSWER — NEW MATTER—JUDICIAL DISCRETION—PARTIES.

1. Leave to file a supplemental answer to a bill of foreclosure, based upon a fact which was known to the party at the time of the original answer, and which was not omitted through mistake, refused.

[Cited in Cross v. Morgan, 6 Fed. 244; Rice v. Ege, 42 Fed. 660.]

2. A supplemental answer must embrace new matter discovered after the putting in of the answer on file.

3. It is an application to the discretion of the court, and will of course be denied, if it is apparent from the record, that it was known to the party before his first answer.

4. The rule as to parties to proceedings in equity is not inflexible, and will not be enforced so as to work injustice.

In equity.

Davidson & Holbrook, for the motion.

Toms & Campbell, for complainants.

WILKINS, District Judge. The motion which has been argued in this case, and been held under consideration by the court, is made on the part of defendant Kibbe, and is for leave to file a supplement to his answer, and based upon his affidavit, setting forth that, at the time he filed his answer, "he had no notice or knowledge" of the matter now proposed to be introduced by way of amendment; or in addition to what he has already placed upon record as matter of defense.

A full understanding of the merits of the application requires a brief statement of the proceedings in the order of their occurrence. The complainants filed their bill on the 18th of April, 1850, against Westley Truesdale and wife, to foreclose a mortgage, alleging therein that Augustus S. Porter was, by deed of assignment, a subsequent incumbrancer of the mortgaged premises, with a prayer that he might be made a party. On the 25th day of November, 1850, the complainants filed their supplemental bill, exhibiting Terry & Kibbe as purchasers of the premises at an assignee's sale, on the 24th of July, 1850, for a mere nominal consideration, and making them parties. The bill was taken as confessed against Terry, and on the 8th of February, 1851, Kibbe filed his answer, and four days after filed a cross bill against the complainants and David M. Price and John Stephens, the statements of which, as appears by the bill itself, were sworn to by the said Kibbe as true on the 1st day of February, 1851, eleven days before the same was filed of record. In this bill, "he shows to the court and charges the fact to be," that some time in the year 1850, the complainant in the original bill, viz.: Suydam, Reed & Co., executed and delivered to John Stephens and David M. Price, a deed for the said mortgaged premises, and that they, the said Stephens & Price, were then in possession of the same. Eight days then, before he filed his answer, Kibbe knew that the mortgaged premises had been sold, and a deed executed and delivered therefor to Stephens and Price by the complainants, Suydam, Reed & Co. On the 20th day of October, 1851, more than eight months after his answer had been filed, he makes his affidavit, on which he asks the court for leave to file a supplemental answer, swearing as follows: "That previous to the time said complainants filed their said supplemental bill, they sold all their right and title in the premises described in the bill of complainant to Price and Stephens, and that, at the time, the said deponent Kibbe filed his answer to said supplemental bill, he had no notice or knowledge of said Price and Stephens' title, and that this ground of defense, viz: the sale and conveyance to Stephens and Price, he, the said Kibbe, had no knowledge of till some time after his said answer had been filed."

Now, it is apparent, that the sworn statement in the cross bill,—sworn to before the answer was filed, showing that Price and Stephens were then in possession, and that the complainants, Suydam and Reed, had delivered them a deed therefor, is a fact directly antagonistic to the fact alleged in the affidavit of the 20th of October, "that this ground of defense, viz: the sale and conveyance to Stephens and Price," was not known to affiant until some time after his said answer had been filed, which said answer was filed on the 8th of February, 1851. This self-contradiction in regard to the principal fact,

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

on which the granting of the present motion must depend, leaves the court in great uncertainty which statement to believe. If we credit the oath of the 1st of Feb. 1851, then the matter of defense is not new, and was known before, and should have been incorporated in his answer, filed on the 8th, and if we grant his request upon what is sworn to now, it must be upon the ground that his former oath was a careless, if not a perilous one. For we are estopped from concluding that it was a mistake—the very statement of the fact shows his knowledge at the time of its existence. Leave to file.

A supplemental answer, as observed in Talmage v. Pell, is the proper course where a new matter of defense is discovered after the putting in of the answer, but which existed before; 9 Paige, 413. But as the application is to the discretion of the court, it is essential that the new matter of defense should have been recently discovered. If known before the answer was filed, the application will of course be refused, especially if the introduction of the new matter is calculated to embarrass the further proceedings in the case, and is not essential as substantial matter of defense. It is true that where the party has assigned, pendente lite, the whole of his interest in the subject-matter of the suit, the adverse party can object that the suit has abated as to such assignor, and bar the proceedings, until the assignee is made a party, who has a right to be heard for the protection of his interest. But such adverse party may, after he becomes acquainted with the fact of such assignment, waive his privilege of objecting that the suit has abated in consequence of a transfer of interest. Such was the conduct of the defendant Kibbe, who makes this application; for, knowing as he did, on the 1st of February, 1851, this matter of defense, he should have inserted and relied upon it in his answer of the 8th, and not doing so, he waived all objection to the suit proceeding. Although courts of equity require all parties in interest to be brought before them, in order that the controversy may be finally settled, yet, the court will not extend a ready ear to such applications, when by doing so justice must be defeated, and by refusing the application, no injury can be done to the defendants. In this case, the complainants, who are citizens of New York, were, when their bill was fixed, the sole parties in interest. The affidavit alleges the transfer of that interest to individuals—who appear by the papers on file, to be citizens of this state. The amendment proposed then, is the introduction of matter, which would cause the dismissal of the bill, for want of jurisdiction. What just end, then, is to be attained by making Stephens & Price parties complainant? If any interest is shewn in them, by the affidavit, it is the same which is sought to be secured by the decree now prayed for by the complainants, which must inure to their benefit. And how is the defendant profited? Does it enable him to establish his defense—of fraud in Truesdale?

But, again, conceding the new matter as true, the mortgages sold pendente lite, and the interest of their vendees, is comprehended within the interest represented by the complainants; and being one and identical, the decree of foreclosure, (if any is eventually rendered,) is a decree for their benefit, and if the bill be dismissed, for any or all the causes shown in the answer of Kibbe—they, the assignees, having no other title than that conferred by the complainants, the controversy, as to the subject matter, is finally ended: which object is the spirit of the rule of the supreme court, as declared in Ellmendorf v. Taylor, 10 Wheat. [23 U. S.] 152. A final decree can be made without affecting their rights. They are not active, but passive parties—they hold under complainants—who prosecute for their benefit. This rule as to parties in equity is not inflexible, and will never be so rigorously enforced as to defeat its purpose and work iniquity. It is a discretionary rule, and the court will consider its application to the circumstances of the case, and require or deny its enforcement according to its discretion.

But, again, the proposed amendment is chiefly technical in its character; it introduces no substantial matter of defense. The omission of other parties in supposed interest, whose rights may be affected by the decree, does not in this case impair the rights of those of record; neither, under the showing of the affidavit, can it affect the interest of those who are not of record; The policy of the rule, as given in Mandeville v. Riggs, 2 Pet. [27 U. S.] 282, is, to prevent future litigation. The alleged transfer, then, to Stephens & Price, is not such substantial matter, without the consideration of which justice cannot be done to the parties litigant. If the proposed new matter was as to fraud, or, that the assignment was anterior to the mortgage, and that the latter was fraudulently obtained, or antedated, or that there never had been a mortgage bona fide, or, that it had in fact been paid: I should be disposed to grant the application; but, as it is, going not to the merits, but, to dismiss on purely technical considerations, I cannot, with satisfaction to my own conscience, grant the motion. Motion refused.

Case No. 13,657.

SUYDAM et al. v. VANCE.

[2 McLean, 99.] [1]

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

PRINCIPAL AND SURETY — RELEASE OF SURETY — TIME GIVEN—STAY OF EXECUTION—CONSENT OF SURETY—WITNESS — INTEREST — ATTORNEY AND CLIENT.

1. To release a surety the holder of a note must, for a valuable consideration, give time to the principal.

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

2. If the principal confess judgment at the first term, with stay of execution until the second, and it appears that, in the ordinary course of the business of the court, a judgment could not have been obtained before the second term, no time is given which affects the liability of the surety.

[Cited in Preston v. Hood, 64 Cal. 409, 1 Pac. 489.]

3. Time given to the principal, at the instance of the surety, or with his consent, affords no ground for his release. Nor is an indorser discharged where time is given by an unauthorized agent of the plaintiff.

[Cited in Treat v. Smith, 54 Me. 114.]

4. A witness must have a direct interest to render him incompetent.

5. An attorney who may be chargeable with negligence, is liable, only, to the extent of the injury his client has received.

[Cited in Spangler v. Sellers, 5 Fed. 894.]

[Cited in Bongher v. Scobey, 23 Ind. 587.]

[This was an action at law by H. Suydam & Co. against J. B. Vance.]

Mr. Lockwood, for plaintiffs.

Mr. Switser, for defendant.

McLEAN, Circuit Justice. This action was brought against the defendant as the indorser of a promissory note. The attorney, Mr. Lockwood, being sworn as a witness, stated, that he received the note for collection some time in the year 1838. That he shortly afterwards called on the defendant, as indorser, who admitted that he had received regular notice of the nonpayment of the note, and that he was liable to pay it. When he received the note from the agent of the plaintiff, the witness observed, that if he should have to bring suit against the maker of the note, who resided in Illinois, he should expect a higher compensation than if the suit was brought in Indiana. That the defendant specially requested the witness to bring the suit against the maker. And the note was sent to Illinois, and suit was brought against the maker at the instance and for the benefit of the indorser. The maker of the note executed a power of attorney to confess a judgment on the note, with stay of execution until the second term of the court; and it was proved, that in the ordinary course of proceeding in the court, a judgment could not have been obtained before the second term. No part of the note could be made from the maker, and this suit was brought against the indorser.

The defendant's counsel moved the court, on this state of facts, to instruct the jury: First: That the indorser was discharged from liability, as time was given to the principal on the judgment, as above stated. Second: That the testimony of Mr. Lockwood was incompetent, by reason of interest, and should, therefore, be withdrawn from the jury.

In regard to the first point, it is a well established rule, that where the holder of a note, for a valuable consideration, gives time to the principal on the note, the surety is thereby discharged. It is the right of the surety, at any time, to pay the note, and be substituted to all the rights of the holder; and if the holder shall make a contract with the principal which shall suspend the right to coerce payment, this suspension is to the prejudice of the surety, and he is, consequently, released. But in this case there seems to have been no suspension of the right of the plaintiff, and if there had been such suspension, at the instance, and for the benefit, of the indorser, his consent was a waiver of any advantage from it. It does not appear that either the agent of the plaintiffs or their attorney was authorized to give time to the principal in the note; and if time were given without the authority of the plaintiffs, they are not to be prejudiced by it.

It is proved that, in the ordinary course of the business of the court, a judgment could not have been obtained before the second term; there was no time given, therefore, which could affect the liability of the defendant. Whether we consider the assent of the defendant to the proceedings on the judgment in Illinois, or the fact that no time on the judgment was given beyond the ordinary course of the court, or the power of the agent, it is equally clear that nothing has been done which goes to discharge the defendant. If the holder of a note, who has sued the maker, obtain a judgment, and agree, in consideration thereof, not to issue execution before a certain day, before which day he could not, by the practice of the court, have otherwise obtained a judgment; this is not such an indulgence to the maker as will discharge the indorser. Hallett v. Holmes, 18 Johns. 28; Bruen v. Marquand, 17 Johns. 58.

There seems to be no ground on which to overrule the testimony of the witness, Lockwood. It is contended that, by giving time on the judgment in Illinois, he has made himself liable to the plaintiff, and that by establishing a right of recovery against the present defendant, he exonerates himself. In the first place there seems to be no ground on which to make the witness liable as an attorney. His liability attaches, in this view, only for gross negligence. And the extent of his liability depends upon the injury the plaintiffs may have received. It must be shown, therefore, not only that the attorney was grossly negligent in proceeding against the maker of the note, but that the amount might have been collected from him, had the proper steps been taken. Now, there is no evidence of negligence whatever, nor any as to the ability of the maker of the note, at any time, to pay it. There is, therefore, not the shadow of a ground for the objection to the competency of the witness.

The verdict in this case can, in no respect, operate beneficially to the witness, in any suit which may be brought against him. And, indeed, it appears, from the facts, that

he is in no shape liable to the plaintiffs, for the amount of the note in question.

The jury found for the plaintiffs, and a judgment was entered on the verdict.

Case No. 13,658.

SUYDAM et al. v. WATTS.

[4 McLean, 162.] [1]

Circuit Court, D. Ohio. July Term, 1846.

DECEIT—DAMAGES SUSTAINED—LOSS OF COMMISSIONS—MONEY ADVANCED.

1. A fabricated warehouse receipt, representing that a large amount of pork had been received by defendant, subject to the orders of the plaintiff, irrevocably; which receipt, accompanied by a draft of $12,000, being forwarded, was accepted and paid by the plaintiffs, affords a ground for an action against the warehouse man, to the extent of the injury received.

[2. Cited in Low v. Martin, 18 Ill. 291, to the point that case is the proper form of action.]

3. By making the advance, the plaintiffs, who were commission merchants in New York, expected to sell the property and receive the ordinary commissions.

4. This was in the line of their business, and the only motive they could have had to advance the money.

5. The loss of this constitutes an item of damage which the plaintiff may claim.

6. It was a part of the contract.

7. The defendant is also liable, on the fraud, for the money advanced.

[This was an action by Suydam, Sage & Co. against Watts.]

Ewing & Forman, for plaintiffs.
Mr. Hunter, for defendant.

McLEAN, Circuit Justice. This is an action of deceit. The case made in the three first counts in the declaration is, in effect, this: The defendant executed a receipt, saying that Samuel Adams, on the 24th of November, 1843, delivered to him two thousand barrels of mess pork, marked A, in good order, etc., for, and irrevocably subject to the order of the plaintiffs, and agreeing to deliver the same with all reasonable diligence, so soon as the navigation would permit, to the plaintiffs, in New York, in like good order, dangers of fire excepted, they paying charges, etc., and further specifying that the plaintiffs should hold said pork for sale on commission, and have a lien thereon, not only for the subjoined draft against his (the said Adams's) property, of twelve thousand dollars, but also a general lien thereon for all other liabilities incurred or to be incurred for the consignors.

Adams drew his draft for the above sum, subjoined to the receipt, indorsed the same to the Leather Manufacturers' Bank, and forwarded the draft and receipt to plaintiffs, who accepted the draft and paid the same at maturity to a bona fide holder. But the statement was false; no produce, whatever, had been delivered by Adams to Watts, and plaintiffs have lost their reasonable commissions, and are in danger of losing the amount of their advance. To these counts there is a general demurrer.

In the declaration three grounds are assumed, on which damages are claimed: (1) In being defrauded of divers commissions and gains which would have accrued to them on the sale of the said property. (2) In being in danger of losing the moneys paid on the draft. (3) In being otherwise greatly injured and damnified.

The third ground, it is argued, in support of the demurrer, is too general. That if it stood alone, the declaration would be bad for uncertainty. That its only use is, to show the violence, etc., of the defendant's conduct, and give character to the case. 1 Chit. Pl. 398. The cause of action, it is contended, set forth, is not such as necessarily shows that the plaintiffs have sustained damage. It might be all true that the defendant gave a false receipt, and that the plaintiffs were thereby induced to accept the bill, etc., and yet the plaintiffs not be injured. Adams, the drawer of the bill, might have refunded the amount of it to the plaintiffs. Hence the necessity, in pleading, to negative such payment by Adams, and aver the special damage. The rule is, "that when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration, that the resulting damage should be shown with particularity." 1 Chit. Pl. 396. That another rule is, "that the particular damage, in respect of which the plaintiff proceeds must be the legal and natural consequence of the injury done." And "special damage must be stated with particularity, in order that the defendant may be enabled to meet the charge, if it be false." Id. And the counsel insist that the special damages claimed in this case, are not the "legal and natural consequence of the act complained of." And first it is said the alleged loss of commissions and gains which it is claimed "would have otherwise accrued." The acceptance of the draft, it is said, "had no connection whatever with the commissions." In answer to this, it may be asked, for what purpose does a commission merchant make advances? That is a part of his regular business. It is true, he may charge a commission on his advances, but his business is not to loan money, but to sell property on commission. And as a means to enable him to secure consignments, he makes advances. Was not that the object of the plaintiffs in accepting the draft in this case? It was not that the money would be paid to them with interest and a per cent. for the advance, but that the property should be consigned to them for sale. This was promised by the receipt, and it was in the line of the plaintiffs' business to make such an advance. Then it was the natural and legal conse-

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

quence of the payment of the advance, that the plaintiffs should have the usual commissions for the sale of the property consigned.

With the view to this action, the transaction must be considered as real, and the legal consequences resulting from it. It having been fraudulent and fictitious, is the ground of complaint, and shows the damage by showing what would have been the benefit, had the transaction been bona fide.

The defendant's counsel would limit the payment of the draft, under the second ground, to the danger of losing the money advanced. If the money had not been advanced, the plaintiffs could not have been in danger of losing it; but the inducement to make the advance, is the question here. Not that the plaintiffs are in danger of losing it, because they made it. The only inducement to the advance was, to secure the consignment of the property, as above stated.

The counsel seems to think that the law, in a case like the present, can give no compensation. That that is done for services rendered; and not because, by the conduct of the defendant, the plaintiffs "have lost the opportunity to make commissions." Why not give compensation in such a case? Is it not a contract? Have not the plaintiffs advanced twelve thousand dollars to secure the sale of the pork; and if the sale be not given to them, may they not claim compensation for a breach of the contract? This does in no respect differ from ordinary contracts made daily, for a breach of which the law gives damages. But it is said, if there was a contract, why not bring the action upon it. There was the form of the contract, but the fraud of the defendant withheld from it the substance of a contract. He has made himself responsible on the ground of fraud, and for that he should be prosecuted. The false warehouse receipt which he gave, saying in it that the property was to be irrevocably held subject to the plaintiffs' order, created a responsibility on the part of the defendant, if the statement had been true, to keep the property safely, and forward it as soon as practicable to the plaintiffs, which he promised to do. The whole being false, he is not the less liable to the plaintiffs for the deceit. And it is not for him, or those who represent him, to say, sue on the contract and not on the fraud. He is liable as the plaintiffs seek to make him liable, and that is a sufficient answer to the demurrer.

As to the second ground, that the plaintiffs are in danger of losing the money paid on the draft, it is said, the allegation does not allege a loss, and consequently they having suffered no damage, can recover none. And it is objected that there is no averment in the declaration, of the inability of Adams to refund the money paid on the draft. Can this be relied on by the defendant, as a sufficient answer to his liability? That Adams, having received the money, is liable, is admitted, but is not the defendant also liable? If he be liable, the plaintiffs are not bound to sue Adams before they can resort to their suit against him.

The advance was made on the faith of the defendant's receipt, as a warehouse man. The plaintiffs looked to the pork, as a security for the money, and by the advance made, it was their own until they were completely reimbursed. Though Adams may be, or may have been, a man of property, the twelve thousand dollars were not paid on his credit. The transaction was commercial in its character, and the defendant as warehouse man, occupied a position of peculiar trust and confidence; and he is bound to answer in that capacity. He was the chief instrument in the fraud, which could not have been successfully carried out, had it not been for his co-operation. He is, therefore, in morals as well as in law, responsible to the plaintiffs for the injuries experienced by them, through his fraud. The demurrer to the first three counts is overruled.

SUYDAM (WILLIAMSON v.). See Case No. 17,756.

Case No. 13,658a.

The SVEND.

[See 1 Fed. 54.]

Case No. 13,659.

In re SVENSON.

[9 Biss. 69;[1] 19 N. B. R. 229; 11 Chi. Leg. News, 367; 8 Reporter, 261; 25 Int. Rev. Rec. 274.]

Circuit Court, N. D. Illinois. July, 1879.

BANKRUPTCY — APPLICATION FOR DISCHARGE — ASSENT OF CREDITORS — PECUNIARY CONSIDERATION.

1. The district court has authority to allow a bankrupt to withdraw his petition for discharge and to file a new one at a later day.

2. The statute making it a ground of objection to a discharge, that the bankrupt has procured the assent of creditors by a pecuniary consideration, does not apply to the payment by the bankrupt of the attorney's, notary's and register's fees, in making proofs of claims against his estate.

[In review of the action of the district court of the United States for the Northern district of Illinois.]

In bankruptcy. The bankrupt [Sven Svenson] filed his petition for discharge in the district court, on the 27th day of March, 1878, returnable on the 4th day of May, 1878, and on the last mentioned day, petitioners, creditors of bankrupt, appeared and objected to the issuing of the discharge on the grounds that the estate, the bankruptcy being voluntary, had not paid 30 per cent., nor had the bankrupt obtained the assent

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

of the requisite amount in number and value of creditors who had duly proved their claims. On the 25th of October, 1878, leave being given, the bankrupt withdrew his petition, and on the 13th of November, 1878, filed his second petition, returnable December 23, 1878. On the last mentioned day he filed various proofs of claims, and the requisite assent, in writing, of creditors, the bankrupt having employed an attorney to draw up the proofs and also paid the notary's and register's fees. The district court ordered a discharge to be issued [case unreported], and the objecting creditors then filed this petition for review.

B. M. Shaffner, for bankrupt.
T. S. McClelland, for objecting creditors.

HARLAN, Circuit Justice. The power of the district court over the subject of the bankrupt's discharge was not exhausted on May 4, 1878. It is true that upon the showing then made a discharge could not have been granted. But there was no order or judgment, at that time, denying the application for discharge. The question of discharge was not judicially determined upon that application. The subsequent action of the court allowing the bankrupt to withdraw his first petition for discharge, and to file a new one, was not in violation of any provision of the bankrupt law [of 1867 (14 Stat. 517)]. The whole question of discharge was within the control of the bankruptcy court until "the final disposition of the cause."

It appears that after the bankrupt obtained leave to file a second petition for discharge, he employed an attorney who prepared proofs of eight claims against his estate, and the consents of such creditors to his discharge. He paid the notary his services for taking the proofs, and the register his fees for filing same. He bore the entire expense connected with the proofs of those claims, for the sole purpose of obtaining the consent of creditors to his discharge. The statute makes it a ground of objection to a discharge, "If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation." Rev. St. § 5110. The present case is not covered by that statute. Certainly the bankrupt could rightfully ask the assent of creditors to his discharge. If they are unwilling to incur the expense of proving their claims, either because of their worthless character, or for other (to them) satisfactory reasons, the bankrupt, in order to obtain the benefit of their formal assent to his discharge, could bear the expenses of such proofs, without necessarily affecting his right to a discharge. In such case, it cannot be fairly said that the assent of creditors was procured, or their action influenced, by "any pecuniary consideration or obligation." The statute evidently refers to cases when the creditor receives himself some pecuniary or other substantial profit or benefit from the bankrupt, or from some one acting in his behalf, as the result or fruit of his action in the bankruptcy proceedings.

For these reasons, the court is of opinion that the action of the district court was right. The petition for review is overruled, and it will be so certified to the court below.

Case No. 13,660.

SWAIM et al. v. The FRANKLIN.

[Crabbe, 210.] [1]

District Court, E. D. Pennsylvania. April 20, 1838.

SHIPPING—FAILURE TO DELIVER GOODS—BILL OF LADING—JURISDICTION.

A libel dismissed, pro forma, for want of jurisdiction, in order to allow an immediate appeal; the question being on the jurisdiction over a case of contract under the general maritime law.

[Cited in Knox v. The Ninetta, Case No. 7,912.]

This was a libel for damages, for not delivering goods according to the provisions and terms of a bill of lading. It appeared that the bill of lading was dated at Philadelphia on the 28th December, 1836; that the goods therein mentioned were to be delivered to Champomier and Guard at New Orleans, they being the agents for the libellants [Charles G. Swaim and Isaac Damarest] and by them forwarded to one John S. Rhea, at Dayton, Ohio; that the goods were not delivered to Champomier and Guard at New Orleans, but to some other person; that they were not sent to Rhea for a long time, but were transported in various directions, and to various places by the person to whom they were erroneously delivered at New Orleans; and that, when they finally reached Rhea, they were damaged, and burthened with heavy charges for transportation. The libel was filed on the 14th March, 1838, and claimed damages on this state of facts. A plea to the jurisdiction was filed on the 16th of the same month.

On the 4th April, 1838, the case came on for a hearing before Judge HOPKINSON, on the question of jurisdiction, and was argued by Thompson & Gerhard, for the libellants, and Fallon & Shoemaker, for the respondent.

Mr. Thompson, for libellants.

This court has jurisdiction over contracts of a maritime nature, by proceedings in rem or in personam. De Lovio v. Boit [Case No. 3,776]; Thackarey v. The Farmer [Id. 13,852]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611. The ancient admiralty court of England has always taken jurisdiction according to the nature of the action, and not accord-

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

ing to the place. Dunl. Adm. Prac. 7, 13, 16, 35. The restrictions on the admiralty jurisdiction in England arose from the contest between the courts of common law and admiralty; but the restraining statutes have never had any effect in this country, and ought not to affect the jurisdiction of this court. Stevens v. The Sandwich [Case No. 13,409], in note; Davis v. The Seneca [Id. 3,650]; Zane v. The President [Id. 18,201]; Davis v. The New Brig [Id. 3,643]; Thackarey v. The Farmer [Id. 13,852]. When the contract is strictly maritime, and within the ancient English admiralty jurisdiction, our courts will take jurisdiction of it, not restrained by the English common law decisions. Serg. Const. Law, 21, 207. Our courts have far exceeded the admiralty jurisdiction in England. 2 Brown, Civ. & Adm. Law, 122; Abb. Shipp. 143; North v. The Eagle [Case No. 10,309]; The Aurora, 1 Wheat. [14 U. S.] 96, 102, 105; The General Smith, 4 Wheat. [17 U S.] 438; Phillips v. The Scattergood [Case No. 11,106]. A lien is given, on a foreign ship for repairs, by the general maritime law, but denied by the common law of England. The fact of such a lien being recognized in this country proves that we follow the general maritime law. The St. Jago De Cuba, 9 Wheat. [22 U. S.] 409, 416; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 613, 616. All these liens, of which the admiralty takes jurisdiction, are on an implied liability incurred on land, and the service is performed on land, but the contracts relate to navigation and commerce. The Jerusalem [Case No. 7,294]; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Draco [Case No. 4,057]; The Zodiac, 1 Hagg. Adm. 325; Johnson v. M'Donough [Case No. 7,395]; Hussey v. Christie, 9 East, 426; Smith v. Plummer, 1 Barn. & Ald 575, Bulgin v. The Rainbow [Case No. 2,116]; Brackett v. The Hercules [Id. 1,762]; Ross v. The Active [Id. 12,071]; The Favourite, 2 C. Rob. Adm. 237; The Grand Turk [Case No 5,683]; Ouston v. Hebden, 1 Wils 101; Skrine v. The Hope [Case No. 12,927]; The Aurora, 3 C. Rob. Adm. 133; Janney v. Columbia Ins. Co., 10 Wheat. [23 U. S.] 411. Many cases can be found as to seizures under laws of the United States, yet these laws must be unconstitutional if the admiralty and maritime jurisdiction of our courts is confined to what it was in England when the constitution was adopted. U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297; The Samuel, 1 Wheat. [14 U. S.] 9; The Octavia, Id. 20; The Sarah, 8 Wheat. [21 U. S.] 391. In regard to contracts of a maritime character our courts have jurisdiction. The Orleans v. Phœbus, 11 Pet. [36 U. S.] 183; The Mary [Case No. 9,187]. Jurisdiction is exercised over cases of charter-parties and bills of lading. Drinkwater v. The Spartan [Id 4,085]. The only difference between a charter-party and a bill of lading is, that one is for the whole ship, and the other for particular articles. The Volunteer [Id. 16,991]; 2 Kent, Comm. 220; The Rebecca [Case No. 11,619].

Mr. Fallon, for respondent.

We will not go into the general question of jurisdiction, but shall take up the case on its own particular facts. We mean to deny the jurisdiction over this particular case, but not over the general and broad ground. We will admit, for the present, that in general a bill of lading may be enforced in this court, but we say that this is not such a case as is embraced in this principle. Bains v. The James and Catherine [Case No. 756]. The libel charges, for the cause of action, that the goods were not delivered to the persons named in the bill of lading, but to other persons, and by reason whereof they were sent out of their destined course. The jurisdiction does not appear, and, as the court is one of limited jurisdiction, it must appear affirmatively on the libel that the case is within the limits. Bank of U. S. v. Weisiger, 2 Pet. [27 U. S.] 341. It does not appear that the damage was done at sea, or in a seaport, and there is, therefore no admiralty jurisdiction. The action is brought for the non-delivery of the goods to the proper person; not for any damage sustained by them at sea, or in port, or on board the vessel, but because the goods were sent out of their proper course The goods having arrived at New Orleans, this court has no jurisdiction because of their delivery to a wrong person after their arrival The libel admits the arrival, and charges, as the ground of the suit, that the goods were delivered to a wrong person, which, of course, could not have happened at sea, or in the harbor. The cases fully establish that a bill of lading is within the jurisdiction of the court; but to be within the jurisdiction, the contract must be maritime, and the breach must happen, or the cause of action arise at sea. De Lovio v. Boit [Case No. 3,776]. If the libel shows that the goods arrived safely at New Orleans, there is an end of the jurisdiction. A bill of lading contains two contracts, one to transport the goods, the other to deliver them. For the breach of the first the admiralty has jurisdiction, but not for the second, which is not to be performed at sea. The Volunteer [supra]. The lien for freight is sustained because the service was, from its inception to its termination, on the sea. Drinkwater v. The Spartan [supra]. The same principle decides Crane v. The Rebecca [supra]; Bulgin v. The Rainbow [Case No. 2,116]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, 634; and Phillips v. The Thomas Scattergood [Case No. 11,106]. The damages claimed here are extraordinarily remote; they are for the consequential expense and loss alleged to have been sustained by sending the goods to a wrong place, out of their destined course. That is, the goods were delivered to a wrong person; that person sent them to a wrong place, and that occasioned the loss

and expense, which is the damage claimed. Even if the owners should be responsible, this gives no lien on the vessel. Whoever claims a lien must establish it. The General Smith, 4 Wheat. [17 U. S.] 443.

Mr. Shoemaker, for respondent.

Admiralty judges and courts, in this country, are governed only by the constitution and acts of congress. It was intended to give to the admiralty jurisdiction in such cases, only, as were not properly cognizable at common law. Talbot v. The Three Brigs, 1 Dall. [1 U. S.] 95; Articles of Confederation, arts. 2, 9. The words "cases of admiralty and maritime jurisdiction," in article 3, § 2, cl. 1, of the constitution, were intended to refer to the jurisdiction, as given by the articles of confederation. The trial by jury has always been a favorite with the states. See the 7th amendment to the constitution. All this matter, however, is to be decided by the statute under the constitution. The act of 24th September, 1789, § 9 (1 Story's Laws, 56 [1 Stat. 76]), uses the words, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." "Suitors" includes defendants as well as plaintiffs. Whatever jurisdiction this court might have had before this statute, it is now taken away wherever the common law can afford a remedy. Fisher v. Blight, 2 Cranch [6 U. S.] 386.

Mr. Gerhard, for libellants, in reply.

It has been frequently decided by this court, that its jurisdiction extends to all maritime contracts. Davis v. The New Brig [Case No. 3,643], De Lovio v. Boit [supra]; Drinkwater v. The Spartan [supra]; The Rebecca [Case No. 11,619]; The Draco [Id. 4,057]. This jurisdiction extends over the whole contract, and is not limited to the place where the breach takes place. The contract is not performed by the mere transporting the goods over the sea. This must be followed up by the delivery of them to the person designated. It is this which is the consummation of the contract. The objections which have been made to the jurisdiction, from the origin and statutory limitations of the admiralty courts in this country, are answered by Dunl. Adm. Prac. 38. The case, Bains v The James and Catherine [Case No 756] is inconsistent with the whole current of decisions. Thackarey v. The Farmer [supra]: Peyroux v. Howard, 7 Pet. [32 U. S.] 324; Davis v The New Brig [supra]; The Orleans v. Phœbus, 11 Pet. [36 U. S.] 184; 3 Story, Const. p. 640, § 1663 et seq.; Id. p. 536, § 1668 et seq.; 1 Boul. P. Dr. Com. 149, 150; 2 Boul P. Dr. Com. 308; 3 Pard. Dr. Com. 163, 186; The Nestor [Case No. 10,126]; Certain Logs of Mahogany [Id. 2,559]; Janney v. Columbia Ins. Co., 10 Wheat. [25 U. S.] 418; 2 Brown, Civ. & Adm. Law, 122.

HOPKINSON, District Judge, said that the case had been elaborately argued; that it would impose a great labor upon him, and require much time to give a full examination to all the authorities and arguments that had been insisted upon, which was hardly possible to be done during the session of the circuit court; that even when done it would decide nothing, but be only preliminary to carrying the case to the circuit court. In this view of the case, he had determined to give a judgment pro forma; that it would be in favor of the plea to the jurisdiction, because that would be a final judgment, and allow an immediate appeal, whereas a judgment for the jurisdiction would be followed by a further hearing on the merits.

Libel dismissed pro forma, for want of jurisdiction. No appeal was taken.

Case No. 13,661.

SWAIN v. HOWLAND.

[1 Spr. 424.] [1]

District Court, D. Massachusetts. June, 1858.

SEAMEN—FORFEITURE OF WAGES—DESERTION—JUDICIAL DISCRETION.

By the general maritime law, desertion by a seaman is not necessarily a forfeiture of all antecedent wages, and all goods on board, but the court has the power to mitigate the forfeiture according to circumstances.

[Cited in The Quintero, Case No. 11,517; The Balize, Id. 809.]

In admiralty.

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

L. F. Brigham and J. C. Stone, for respondent.

SPRAGUE, District Judge. This is a libel by a father for the share, or lay, of his minor son in a whaling voyage. The son shipped at a lay of 1/170, in 1850, being nearly 17 years of age, and the vessel sailed from New Bedford in June of that year. The father afterwards expressed his approbation of what had been done. The son continued on board, and in the performance of his duty, until September, 1853, when he deserted, at a port on the coast of the Pacific. The ship had then ceased cruising for whales, and she returned from that port directly home, where she arrived in January following, with a large quantity of oil. The only defence to this suit is the desertion of the minor. No statute desertion is proved, or even alleged, but it is insisted that, by the general maritime law, all the earnings of the son are absolutely forfeited. There is no question that the libellant was entitled to the services of this minor son, and might recover either their value to him, or the stipulated compensation, if the voyage had been fully performed. The objection to the claim rests wholly upon the desertion. Some stress was laid in the argument upon the suit's not being by the seaman himself, and also

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

upon the fact that the deserter was a minor; but I do not choose to rest my decision upon those circumstances, because I am of opinion that, if this lad had been of full age when he shipped, and were now the libellant, it would not be imperative upon the court to deprive him of all compensation. A desertion, under the general maritime law, is not an absolute forfeiture of all antecedent wages and goods on board, but the court has the power to mitigate it, according to the circumstances of the case; and I rejoice, for the sake of justice and humanity, that such a power exists. I am aware that much is said in the books to countenance a different doctrine, founded upon the early maritime codes and usages. Lord Mansfield said, in the king's bench: "We do not sit here to take our rules of evidence from Siderfin or Keble." And I think maritime courts, at the present day, may well decline being absolutely controlled by the practice or opinions of a remote and rude age, when voyages were short and navigation was in its infancy, and which cannot be applied to the navigation and business of the present day, without gross injustice. Suppose that, in the Middle Ages, the state of commerce, the relation of the seamen to the voyage, and the danger from enemies and pirates were such that it was deemed proper, in the imperfect light of the dawn of commercial jurisprudence, to inflict, as a peremptory mulct upon seamen, the loss of all wages then due, and all their goods on board of the vessel, does it follow that we are to apply the same doctrine to the whale fishery as it now exists, a business which did not then enter into the imagination of man, and in which the voyages are extended often to four, and sometimes to five years and upwards? The case now before the court is a sufficient illustration of the wrong that may be worked by the doctrine of absolute forfeiture. This young man served faithfully for three years and four months, in a laborious and dangerous occupation. The circumstances under which he left that service do not appear, nor that the master made any endeavor to procure his return. It is not proved, or even alleged, that his desertion caused any loss or damage to the owners; on the contrary, it is not unreasonable to presume that it was a benefit. A greater number of men is required in taking oil than for navigating the ship, and as, after he left, she was only to make her homeward passage, the rest of the crew was probably more than sufficient for sailing her, and the owners were saved the expense of his board. Yet, if the forfeiture be absolute, he is cut off from any share in the proceeds of the voyage, that is, deprived of all the earnings that are due to him for more than three years' hard and hazardous service. There may be cases in which there has been a course of ill treatment, on the part of the officers or some of the crew, or infirmity of body or of mind, or apprehension, or error, which falls short of a complete justification of desertion, and yet comes near to it, and presents strong grounds for its extenuation, especially where little or no damage has accrued to the owners. Now to apply an iron rule of forfeiture of all antecedent earnings, and all goods on board, without regard to their amount, or to the degree of delinquency in the deserter, or of injury to the owners, is at war with the whole spirit of our jurisprudence. Scarcely another instance of forfeiture or penalty can be named, in which there is not somewhere lodged a power of dispensation or mitigation. In covenants with a forfeiture for non-performance, the forfeiture is enforced only to the extent of the damage. Penal bonds are chancered by the court; forfeitures under the revenue laws may be remitted by the secretary of the treasury, under certain restrictions; and even the penalties and punishment of crimes of every grade may be remitted by the pardoning power of the executive. Why should the law of forfeiture be blindly inexorable against seamen alone, and that, too, for an offence often venial, committed from thoughtlessness, or rashness, in a moment of irritation or temptation. Its injustice is palpable. It is at least of doubtful policy. Desertion is often the effect of a sudden impulse from real or supposed wrong, or the temptations or allurements of the shore, after being long subjected to confinement, privations and hardship at sea. The hope of obtaining compensation for past services would be an inducement to return to this country. Ought it to be wholly cut off by an absolute forfeiture?

Seamen, in general, have little confidence in the justice of those whom circumstances have placed above them, and there is too much ground for this feeling. If a seaman is wronged by a subordinate officer, and makes complaint to the master, it too often happens that he not only can obtain no hearing or redress, but brings upon himself further and greater ill treatment; and an appeal to an American consul against a master is oftentimes no more successful, pre-occupied, as that officer is likely to be, by the representations and influence of the master. Upon his return home, he finds those whom he has served, the owners of the ship, generally take part, at once, with the officer, in every controversy with the seamen, and not unfrequently exerting themselves to intercept that justice which the law would give him. And if to all this be added peculiar severity, even by the law of his country, in subjecting him alone to a forfeiture which cannot be remitted, or even mitigated, he may well be excused for feeling little confidence in the justice of superior powers. This feeling enters into his character, adds to his recklessness, weakens the ties that bind him to his country, and tends to make him a vagrant citizen of the world. The doc-

trine that the court is not, by the maritime law, bound to decree a forfeiture of all antecedent earnings, is not new in this court. I have held it in several former cases, two of which have been reported. Lovrein v. Thompson [Case No. 8,557]; Gladding v. Constant [Id. 5,468]. I am glad to find it sustained by the authority of Judge Ware. Gifford v. Kollock [Id. 5,409].

Judge Story, in Coffin v. Jenkins [Case No. 2,948], at first lays down the doctrine that desertion is, by the maritime law, an absolute forfeiture, but he afterwards qualifies this by saying that, in case of severity by the officers and ill treatment of the seamen, or of an offer to return to duty, the forfeiture may be mitigated. It is true, that he seems to confine this amelioration of the doctrine to the cases specified, or others similar thereto, but it is apparent that the same principle which makes the rule to recede before those circumstances, must make it yield to others equally cogent; that is, it establishes a power of mitigation, to be exercised by the court according to its judicial discretion. It is to be observed that he uses the word mitigated, showing that he had reference not to cases of justification, which excludes all forfeiture, but of extenuation which may render it partial, instead of total.

I have no occasion to consider any statute desertion, either under the act of 1790 [1 Stat. 131], or the recent act of 1856, c. 127, § 25 [11 Stat. 62], which has been passed since this voyage was completed.

The cause must be sent to an assessor, to ascertain and report what were the proceeds of the voyage, and the advances to the libellant, or for his benefit, and the court will then determine the amount for which a decree shall be rendered. The Mentor [Case No. 9,427].

NOTE. See The Martha [Case No. 9,144], that desertion, by the maritime law, is "to be punished by a simple mulct or abstraction of wages, at the discretion of the court." See, also, Coffin v. Shaw [Id. 2,952]. That the statute does not supersede the general doctrine of the maritime law, or repeal it, see Cloutman v. Tunison [Id. 2,907]; Coffin v. Jenkins [Id. 2,948]; Burton v. Salter [Id. 2,218]; The Rovena [Id. 12,090]; The Cadmus [Id. 2,282]; The Union [Id. 14,348]; The Osceola [Id. 10,602].

Case No. 13,662.

SWAIN TURBINE & MANUF'G CO. v. LADD.

[2 Ban. & A. 488;[1] 11 O. G. 153.]

Circuit Court, D. Massachusetts. Jan. 2, 1877.[2]

PATENTS—REISSUE—CONFLICTING CLAIMS—FUNCTIONAL DIFFERENCES.

1. Swain, the assignor to the complainants, was the inventor of an improved form of that class of water-wheels known as "turbines." The reissue of his patent was broader in its wording than the original. *Held*, that the claims in the reissue must be construed so as not to embrace any invention broader than that described or substantially indicated in the original patent.

[Cited in Brainard v. Cramme, 12 Fed. 624.]

2. No matter how valuable and meritorious an invention may be, a patentee has no right, by reissuing his patent, to gradually widen the scope of his claims so as to keep pace with the progress of invention.

3. A claim, which would be void as merely functional, should be construed in connection with the described means, in the reissue, but so as not to embrace any invention broader in its scope than the original.

4. In cases where mere changes of form become patentable by reason of involving functional differences, it should be left open to subsequent inventors to devise other changes of form involving other functional changes, when the same result is not attained in substantially the same way.

[This was a bill in equity by the Swain Turbine & Manufacturing Company against James E. Ladd, for the infringement of reissued letters patent No. 5,154, granted to A. M. Swain November 19, 1872, the original letters patent, No. 28,314, having been granted May 15, 1860.]

J. S. Abbott and H. W. Boardman, for complainants.

Brown & Holmes and C. E. Mitchell, for defendant.

SHEPLEY, Circuit Judge. The invention of Swain, the assignor to the complainants, relates to a new and improved form of that class of water-wheels known as "turbines," which operate by means of extracting power from the unbalanced pressure of water, which, as it passes through the wheel, has its direction changed by the curved surfaces of the floats, which take and transmit the power of the water impinging upon and passing over their curved surfaces. In all wheels of this class, form is material, substantial and functional, and very slight changes of form and proportion involve functional changes of great importance. Slight modifications and deviations from any prescribed operative forms and proportions may destroy the usefulness or put an end to the identity of the device, or, on the other hand, may effect new and different and better results.

Before the invention of Swain, the turbine wheels in common use were generally classed under two heads, the Fourneyron and the Jonval wheels. The wheels of the Fourneyron type received and discharged the water horizontally. The wheels of the Jonval type received the water vertically from the top and discharged it downwardly. Various modifications had been made, and many patented, of both these forms of the turbine wheel. That Swain made a great improvement, upon any of the turbine water-wheels which preceded his, is very evident, and no testimony in the record, in the opinion of

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

[2] [Affirmed in 102 U. S. 408.]

the court, has any tendency to show that he was not the first and original inventor of that which he claimed in his original patent. Valuable and meritorious as that invention was, it entitles him only to a monopoly of that which he really invented, and no inventor has any right to gradually widen the scope of his claims to keep pace with the progress of invention. Especially in cases, where mere changes of form become patentable by reason of involving functional differences, should it be left open to subsequent inventors to devise other changes of form involving other functional changes, where the same result is not attained in substantially the same way.

In order properly to construe and limit the claims of the reissued patent in this case, so as to give to the patentee the entire monopoly of the invention actually made by him, and at the same time to so limit it as not to cover a field of invention into which the patentee had not entered, it becomes necessary to examine the original patent, and endeavor to determine from that, what was the scope of the invention which was described, indicated, or suggested in the specifications of the original patent. The original patent granted to A. M. Swain, May 15, 1860, for a new and improved wheel, No. 28,314, describes the object of the invention "to obtain a simple and efficient horizontal water-wheel, one that will have all its parts accessible for repairs, and which will give the maximum power of varying heads, with an economical use of water." After describing the devices for raising and lowering the wheel, as desired, without removing the wheel from its proper working position, and without being troubled with the influence or action of the water, the description of the wheel and its floats is as follows:

"The wheel has its floats cast or constructed each of a single piece of metal. The face sides of the floats, where the water impinges, are of paraboloidal form, whose axes are tangent to a circle, to which the guides, hereinafter described, are also tangents, and also to the curve at or near the circumference of the wheel. The bottoms of the floats are formed by revolving the curves on their axes."

A description is then given of the annular chamber, termed the hydrostatic chamber around the wheel, with a series of guides, which, in connection with the top of the chamber and the cylinder connecting the guides at the bottom, form chutes, which direct the water properly to the buckets of the wheel, and an arrangement is provided by means of raising and lowering them to increase or diminish at will the volume of water admitted to the wheel, thereby regulating the capacity of the wheel as occasion may require.

"When J (the ring or cylinder to which the guides are attached and cast) is lowered, the water strikes the floats with all the force and velocity due to its head, directly under the rim of the wheel, which is so curved as to force the water down rapidly in the lower curved parts or bottoms of the floats, the water not leaving the wheel until its force has been properly expended on it."

When we examine this specification in connection with the drawings to which it refers (leaving out of view, for the purpose of this examination, the annular chamber with the guides and chutes, and the devices for raising and lowering the wheel), we find the essential elements of the wheel to be, first, floats whose face sides where the water impinges are of paraboloidal form, whose axes are tangent to a circle to which the guides are also tangent, and also to the curve at the outer circumference of the wheel. We find the upper edge of the floats not to be horizontal to the axes of the wheel, but curving downward inwardly diagonally, so as to conform to the rim of the wheel to which the floats are attached, which is so curved inwardly and downwardly. We find these floats with a discharge-line curving over their inner edges from the curved crown to the lower outer edge of the wheel, the float thus narrowing almost to a point at the lower band or rim of the wheel. This form of float, acting in combination with the curved part of the crown, and the hub inside of the inner edges of the floats, discharges the water neither horizontally nor vertically with reference to the axis of the wheel, but in diagonally-curved lines; secondly, we find, as one of the elements of this wheel, a rim, or crown, "which is so curved as to force the water down rapidly in the lower curved parts or bottoms of the floats." This downward and inward curvature of the crown is not described as an alternative or preferable construction, but as one having an important function in combination with the floats. As correctly stated by Mr. Renwick, one of the experts examined by the defendant, if there had been any intention of discharging the water in nearly horizontal lines, the lower side of the rim or crown would not have been bent downward, so as to force the water down, and the space in the centre of the wheel, into which the horizontally flowing water would escape, and which would be necessary for its escape, would not have been stopped up by the hub and the downward prolongation of the crown after it extends inward beyond the inner edges of the buckets. And if it had been intended that any considerable portion of the discharge should have been downward vertical, as, in the Jonval wheel, then the delivery-edges of the buckets would not have been curved, as before described. This view of the office and function of the downward curved crown is further confirmed by the arrangement of the chutes in the Swain device in such a manner as that the water at part-gate is admitted directly under the curved rim of the wheel.

The reissued patent, No. 5,154, dated No-

vember 19, 1872, has its first, second, third and fifth claims so worded, as in their broad and literal construction, without any limitation to the invention described in the specifications of the original and the reissued patent, to claim any form of "water-wheel having an effective inward flow and discharge of part of the water, and an effective downward flow and discharge of part of the water simultaneously in one wheel, whereby the effective area of discharge is increased without increasing the diameter of the wheel." This is the exact language of the fifth claim, which would be void as a claim merely functional, unless this claim be construed as must also the first, second and third claims, as including the described means of effecting the result. To uphold these claims they must not only be construed in connection with the described means in the reissue, but so construed as not to embrace any invention broader in its scope than the invention described, or substantially suggested or indicated in the original. However meritorious and original the invention of Swain was (and of its originality and merit as an advance in the state of the art at the date of Swain's invention, the court does not entertain any doubt), nevertheless, its great merit and utility will not justify such broad claims in a reissue as shall effectually interpose a barrier in the path of subsequent inventors, and arrest the progress of invention. The broad language of these claims, liberally construed, eliminates from the combination in the reissue, the downward and inward curvature of the crown which forms an essential functional element of the combination in the original. Such a literal construction of these claims, with the scope contended for by the complainants, would render the issue void, according to the decisions in Gill v. Wells [22 Wall. (89 U. S.) 1], and many other cases decided by the supreme court of the United States, including Seymour v. Osborne [11 Wall. (78 U. S.) 516]. In this connection the court can only repeat the language of the opinion in Forsyth v. Clapp [Case No. 4,949].

"The court will look beyond the mere form of words in the claim of a reissued patent into the specifications, in both the original and reissued patents; and even if on the face of the reissued patent it does not embrace anything not described or suggested in the original, nevertheless, the court will ascertain whether there is any substantive invention adequate to support a claim ingeniously worded, not so much for the purpose of describing what the patentee really invented, as of grasping within its terms, some contrivance not within the knowledge or contemplation of the patentee, and for that reason, not by reason of inadvertence or mistake, not embraced in the claims of the original patent."

Giving to these claims the construction which we have indicated, the word "crown" in the first three claims will refer to and include in the combination such a crown as is described in the original patent and represented in the drawings of the original and the reissue, and the fifth claim will be limited in its scope to water-wheels possessing such elements as we have hereinbefore recited as the described essential component parts of the turbine-wheel described in the specifications and drawings of the original patent. Giving this construction to the claims, the defendant does not infringe, and the bill must be dismissed.

[On appeal to the supreme court, this decree was affirmed. 102 U. S. 408.]

Case No. 13,663.

The SWALLOW.

[8 Ben. 223.] [1]

District Court, N. D. New York. July, 1875.

COLLISION — TUG AND TOW — INJURY CAUSED BY TOW—AGREEMENT FOR SERVICE—LIABILITY OF TOW FOR TUG'S NEGLIGENCE.

1. The schooner O., going down the St. Clair river, had anchored about two miles above the flats, just below a bend in the river. While so lying, she was struck by the schooner S., which with two other schooners was being towed down the river by the tug M. It did not appear in evidence what was the agreement under which the S. was being towed. The M. having taken hold of the vessels assumed the control of them and proceeded down the river, each vessel being manned by her own crew. The tug and the first schooner passed safely by the O., but the S. ran into her. When the collision was imminent, the master of the tug gave directions to the crews of the vessels in tow, and there was no fault in the seamanship of the crew of the S. The owner of the O. filed a libel against the S. alone to recover the damages. *Held*, that, in the absence of any proof as to the agreement for the service, or as to the usage on the river, it could not be said that the tug was under the control of the vessels constituting her tow.

2. Under the circumstances, it was negligence for the tug to attempt to pass the bend with more than one vessel in tow, and this could have been known in season to have avoided the collision.

3. The tug and not the S. was the principal in the transaction, and the S. was not liable.

In admiralty.

WALLACE, District Judge. This libel is filed by the owner of the schooner Onondaga to recover damages for a collision on the St. Clair river, and the important question is, whether the Swallow or the tug Masters, which had the Swallow in tow, is responsible for the damages.

Owing to a jam of boats, which had occurred on the river at "the flats," the Onondaga was unable to proceed down the river, and cast anchor about two miles above the flats and a short distance below a bend in the river. Subsequently the barge Kilderhouse cast anchor above the Onondaga. A

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

number of other vessels and barges had cast anchor below the Onondaga, some of them quite near her, and others lay at various points between her and the flats. The Swallow, bound on a voyage from Chicago to Buffalo, was taken in tow by the tug at the entrance of the St. Clair river, to be towed through the river. Two other schooners were also taken in tow by the tug, and the tug and tow proceeded down the river, the schooner Sardinia being next the tug, and attached by cable to the latter's stern, the Swallow next, attached by cable to the Sardinia's stern, and the Preston, attached by cable to the Swallow's stern, was last. The tug and tow passed safely by the Kilderhouse, and the tug and the Sardinia also passed safely by the Onondaga, but the Swallow struck her, causing the damages for which the action is brought.

Under the circumstances, it was not practicable for a tug to pass safely below the bend of the river with more than one vessel in tow, and the proofs justify the conclusion that this was known, or could with reasonable circumspection have been known, to those in charge of the tug and of the schooner in tow, in sufficient season to have prevented the collision. Without giving the reasons for such conclusion, it suffices for present purposes to say, that were the action against the tug, I should have no difficulty in ordering a decree for the libellant. No negligence is imputed to those in charge of the Swallow in the management of their vessel, or in the prosecution of the voyage, except such as is to be implied from the fact that they knew, or should have known, that a tug with more than one vessel in tow could not safely proceed down the river below the bend when the channel was obstructed to the extent it then was by the various vessels lying at anchor. It remains, then, to ascertain, as in all cases where the question is whether a tug or vessel in tow is responsible for a collision, which of the two was the principal and which the servant. This must be determined as a question of fact, and depends upon the circumstances of the particular case. While it may be conceded that in England the tow is to be considered the principal, and while some of our own courts have followed the English rule, the weight of authority here seems opposed to any inflexible presumption upon the question. As was said in Sturgis v. Boyer, 24 How. [65 U. S.] 122, "by employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service." Upon this, as upon all other issues in the case, the burden of proof is upon the libellant. The only evidence he has offered upon it may be briefly recapitulated as follows: The Swallow, together with two other vessels, was taken in tow by the tug at the entrance of the river; the tug and each vessel of the tow was manned by its own crew; without any consultation apparently, the tug assumed control of the vessels, and proceeded down the river, each crew upon their own vessel; they attempted to pass between the vessels lying at anchor; they passed one vessel safely, and danger of collision with the Onondaga becoming imminent, the master of the tug gave directions to the crews of the tow; and without fault in the seamanship of the Swallow's crew, she collided with the Onondaga.

Upon this evidence, in the absence of any proof as to the terms of the agreement for the service to be performed by the tug, and of any proof as to the usage upon the river in question, it cannot be said that the tug was under the control of the vessels constituting her tow. All the facts would indicate that the vessels were under the control of the tug, except that each vessel was manned by its own crew; and while that circumstance has been emphasized in some of the decided cases as important, it is not controlling here, because it is quite apparent, that all that was expected of the crews of the vessels was, that each vessel should be so navigated as to respond to the manœuvres of the tug. The co-operation between the tug and vessels of the tow seems similar in its character to that between tugs and tows composed of barges or canal-boats; in which instances it is held that the tug is to be deemed the master. The Express [Case No. 4,596]. The facts present a case analogous in all its aspects to that of Sproul v. Hemmingway, 14 Pick. 1, where a vessel on the Mississippi, manned by her own crew, while in tow of a steamer, collided with another vessel, and a recovery against the owners of the vessel was denied.

There is another view of the case which presents a cogent argument against the right of the libellant to recover against the Swallow. It would not be contended that, by the joint participation of the vessels in the towage service to be rendered by the tug, the owners of any one of the vessels constituted the masters and crews of the others of the tow their agents in the transaction; and yet, upon the proofs, a recovery could be urged against the Preston or the Sardinia with equal propriety as against the Swallow. The masters of the Preston and the Sardinia were as culpable as the master of the Swallow. The collision resulted not from any exclusive fault in the management of the Swallow, but from not dividing the tow, after the perils of the voyage, if continued jointly, became apparent. If the master of either vessel could have required the tow to be divided, those of the Sardinia and Preston could have done so as well as the master of the Swallow; for if the tug was the servant of the Swallow, it was also of the Sardinia and Preston, and, if either vessel of the tow was the principal, all of them were principals. Co-principals are liable for the act of each

one engaged in a joint enterprise, unless the act is so exclusively that of one of them only that the other cannot be deemed to participate in it. The Swallow was not the offending thing, merely because she was the object which collided with the Onondaga. (Taney, C. J. [The James Gray v. The John Fraser] 21 How. [62 U. S.] 194); if the collision was through her fault, she was; if not, she was only the passive instrument of the injury. These considerations go far to sanction the proposition, that when a tug has several vessels in tow she should be presumed to be the principal in the absence of countervailing evidence.

The case is to be distinguished from those where both the tug and the tow are liable, as where those in charge of the respective vessels jointly participate in their control and management, and both participate in the fault which is the cause of the collision. Such are cases where the tug is insufficiently manned or equipped for the service, and negligence can be imputed to the owners of the tow on the ground that the motive power employed by them was inadequate. In these cases the liability does not turn upon the relation of the parties, but upon the fault which caused the injury. Here, unless the Swallow was the principal, her master had no authority to require the tug to stop and divide the tow, and he was not, therefore, in fault.

These considerations lead to the conclusion that the libellant cannot recover. Accordingly it is ordered that the libel be dismissed with costs.

Case No. 13,664.

The SWALLOW.

[Olc. 4.] [1]

District Court, S. D. New York. Sept., 1843.

SEAMEN — WAGES — DESERTION — TESTIMONY OF JOINT LIBELLANTS—TACKING CLAIMS—COSTS.

1. By the well-settled principles of maritime law, where seamen employed for a voyage, or by the month, voluntarily leave the vessel before the termination of the voyage, or the expiration of the time for which they hired, without good cause, or the consent of the master, they will thereby forfeit the wages previously earned.

[Cited in The John Martin, Case No. 7,357.]

2. A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him.

[Distinguished in Walsh v. The Louisiana, 4 Fed. 752.]

3. The principles touching the duties of seamen under a contract of hiring on a sea voyage are binding upon those engaged in the navigation of inland tide waters. A suit for wages cannot be maintained until the contract of service is performed or released.

4. The testimony of a ship's crew, being joint libellants, each swearing for the other, will be received with great caution. The court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory and he has no interest in the action.

5. Full costs will be decreed the claimant, although the demand of the libellants is less than $50 to each.

In admiralty.

Mr. Benedict, for libellants.
Mr. Hoffman, for claimant.

BETTS, District Judge. The crew of the steamboat Swallow arrested the ship upon a joint libel for wages for half a month's service on board her upon the North river. She is a large passenger vessel, making daily trips between New York and Albany. The action is defended, upon the ground that the libellants deserted the vessel, and thereby forfeited their right to wages. The libellants were employed by the month as deck hands on the boat, and the answer charges, that without the consent of the master, or any officer of the boat, they left the ship before the termination of the time for which they had engaged to serve, and as the boat was about leaving this port on her daily trip to Albany. It is admitted that a claim of Dates, one of the libellants, for $15, for taking charge of the boat during the winter months, is just, and ought to be paid.

By the well-settled principles of maritime law, where seamen, employed for a voyage or by the month, voluntarily leave the vessel before the termination of the voyage or the expiration of the time agreed upon, without justifiable cause or the consent of the master, they thereby forfeit all wages previously earned. The libellants, as witnesses each for the other, give evidence tending to show that they were discharged from the boat by the master. The testimony is met by express denial on the part of the master. His testimony, if believed, is conclusive that the men left the boat in his absence and without his consent. The law admits a crew to testify on a question for wages for each other, but does not disregard the bias which will naturally influence them to give the case a coloring most favorable to their feelings and interests; and it is to be furthermore noticed, that they are all implicated in the charge of disorderly and mutinous conduct on board, and that their joint testimony is intended to establish for them a justification of their conduct. Their evidence, under such circumstances, must be received with great caution. The boat arrived here from Albany the morning of the day the libellants left her. The day previous, about breakfast time, a fight had occurred in the kitchen and on the deck between the cooks and some of the crew, one Rhind being the ringleader. The other libellants joined Rhind in the affray. The master joined the boat at Red Hook, on her passage down from Albany, and next morning,

[1] [Reported by Richard Olcott, Esq.]

on learning the disturbance, he discharged the two cooks and Rhind in New York. Their wages were paid to the time of their discharge.

The libellants, to justify leaving the vessel, and to establish their right to wages, attempt, by their own testimony, to prove they were discharged by the master. Dates says: "That he, in presence of three or four others, asked the master what was to be done; whether they or the black men (cooks) were to go ashore? The master replied, they might every d—d one go ashore, and go to the office for their money." Deyo says: "He went to the master with Dates and asked what was to be done? The master said he would look into the matter, and those who were in fault might go ashore, and those who were not might stay." Fuller replied: "I am one of them." Dates said, he, also, had been engaged in the disturbance. The master said, "he had more trouble than a little with him, and told Knight to pay them all off and let them go," and then the master went away. The witness turned to his work. Crum testified, that Dates asked the master "what he intended to do with the black men?" The master replied, "he had discharged them, and would discharge all who were concerned with them." Fuller said, "he was one," and the master ordered Knight to pay him off. Dates said, "he might as well go, too," and the master said, "Let every d—d one of them go." Sellick gives this account of the occurrence: "Dates asked the master what was to be done about the disturbance?" He answered, "he had discharged the two negroes and Rhind, and meant to discharge as fast as he found others interested." Fuller said he was interested, and the master said: "Go to the office and get your money, and every d—d one of you." A number of the crew, he thinks a majority, were there sitting on chairs and boxes near by. The master testifies, that he ordered the cooks and Rhind to be discharged in the morning —at about 11 a. m.—the work on the boat having been done up. The men were sitting about on boxes. At this time Fuller asked what was to be done. He replied, that if any one had any thing to do with the disturbance he would discharge him. Fuller said he was one. Witness ordered him ashore, and to go and get his money. The remainder of the crew were dispersed about the boat. Dates said he had struck the negroes, and the witness answered he had done right, and then all the men went to work. At about 3 p. m. he first heard the men had left the boat; he directed the pilot to supply their places, but not to take either of those who had left. The pilot wished to take one or two of them. No one of these men offered to return to duty. The pilot testified that he tried to dissuade the men from leaving the boat, but they said the master told them they might go ashore.

This rehearsal of the testimony as to the disturbance on the boat and the declarations of the master show that there was no direct discharge of any of the libellants, or any consent on his part to their leaving the ship. It will be seen that Dates gives a different version of his language from the other witnesses, and confirms the statement made by the master. The libellants asked him what was to be done in regard to the occurrence of the previous morning, and he replied, "that he would look into the matter, and those who were in fault might go ashore." No other complaint was made against the hands than the particular act of misconduct and disorder at Albany, and the direction, or rather permission, to go ashore and be paid off, was a correction for the fault they had committed. They elected to accept that punishment, and tendered no apology or atonement for their conduct, nor did any one offer to remain with the vessel and perform his duty. The burden of proof is upon the libellants. They broke their contract, and they must show that they have a clear excuse in law for so doing. If they were discharged without just cause, they would be entitled to recover the full amount of the wages for the month; so, also, if they leave before the time of service for which they engaged has expired, without a legal excuse, they forfeit all wages earned.

In comparing the statements of the libellants themselves with those of the master and pilot, I am satisfied his order or direction to go ashore applied to the men alone who had engaged in the affray on board, and not to all the libellants. The reciprocal testimony of the libellants, each endeavoring to prove a discharge for his fellows, should be received and acted upon with great caution, especially when it stands contradicted by the evidence of the master, and the strong probabilities of the case. It would be a dangerous confidence in evidence, derived from witnesses so circumstanced, to hold that it authorized all these men to abandon the ship, and maintain an action for full wages for the term of their contract, and of mischievous influence to countenance in a crew conduct so disorderly as that pursued by these libellants. For a crew to leave abruptly a large passenger steamer, on the point of sailing, might cause the trip to be lost to the owners, and the traveling community to be greatly inconvenienced, or perhaps the more serious hazard of putting the vessel in the charge of those unskilled and incompetent to her safe management. This freak on board the boat, in which so much hasty temper was displayed, afforded no excuse to the men for breaking their contract and resorting to an action for future or past wages.

When the parties had come to a cooler consideration, the whole matter might probably have been compromised between them; the owners, upon a suitable acknowledgment due on the part of the men, should have overlooked the irregularity and breach of duty

which had occurred, and continued them on board with pay for their past services. The libellants have not chosen to adopt this course; and instead of resorting to a trial by jury before a local court, where the equities on both sides might have been considered with liberal allowances to both parties, they have chosen to arrest the ship in a court of admiralty, and submit their rights to be decided on the principles of the maritime law, and the owners insist their claim shall be judged by the strict rules of that law. By the maritime law, an authorized and deliberate departure by seamen from a ship in the course of a voyage, without intending to return to her, is cause for the forfeiture of antecedent wages earned by them. Cloutman v. Tunison [Case No. 2,907]; 3 Kent, Comm. 198. But the court might exercise a discretion in such case, and even if the men were guilty of a willful desertion, might reduce an absolute forfeiture of wages to a fine or mulct proportionate to the offence. The Union [Id. 14,347]; The Lady Campbell, 2 Hagg. Adm. 5; The Malta, Id. 168. These principles embrace maritime services and obligations of seamen employed in coasting, or tide water navigation on rivers, equally as at sea. Under the facts in proof, the libellants had no right to abandon the ship of their own accord, and they fail to show that kind of discharge by the master which would sustain the obligation of the ship to them for their wages. He was justifiable in punishing them for misconduct on board by putting them ashore at their home port; and his direction to them to go to the clerk of the boat and receive pay for half a month's wages was no recognition of the legal obligation of the ship to them for wages.

So, also, it is to be observed that their hiring was by the month, and both by the admiralty and the common law, if they leave the service during the month, without justifiable cause, the obligation to pay for past services is destroyed. Dates is entitled to recover the $15, antecedently due him; but as no proof is given that he ever demanded that money, he will not be allowed now, by tacking it to his other claim, to carry costs. If there be an equity in his behalf to costs on this demand, the owner would have an equal equity to costs against him on the other, which was the only subject of contestation, and, as far as appears upon the proofs, the only one made known to the owner or master. The case as to costs will prove a hard one on the libellants, but it was their folly or misfortune to bring an action where they had not sufficient proof to support it.

On the evidence as it stands, I am of opinion that there must be a decree for full costs against all the libellants, except Dates, although the respective demands are below $50; and that a decree be entered in favor of Dates for the sum of fifteen dollars, without costs.

Case No. 13,665.

The SWALLOW.

[Olc. 334.] [1]

District Court, S. D. New York. April 15, 1846.

SHIPPING—MASTER—WAGES—CUSTOM—HIRING FOR SEASON—ASSOCIATION OF OWNERS—INDIVIDUAL RESPONSIBILITY—INTEREST—STATE CLAIM.

1. Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due.

[Cited in The Grapeshot, Case No. 5,703.]

2. An association of separate owners of several steamboats into a joint concern, to run their vessels upon the Hudson river, and to collect and receive the earnings of the boats in a common fund, out of which the expenses of all the boats are to be paid, is no more than a private co-partnership in a particular business or transaction.

3. Each member of the association is responsible individually for his acts or contracts in the business of the common concern.

4. The custom with steamboat owners upon the Hudson river is, to hire masters, pilots and engineers for the season, at a yearly salary, payable in ten equal parts—the season for the purpose being understood to begin with March and end with December.

5. The master is entitled to recover a proportionate part of the salary when his services do not commence or terminate with the season.

6. Where a master of a boat who was hired by the owners in that manner for a succession of seasons, and during the period the vessel was chartered by the owner for a term ending on the first of January, and the master continued with her subsequently, without giving proof of any special contract of hiring and beginning actual service on board the first of March, it will be implied that the hiring was for the season according to usage, and that it commenced on the first of January and not the first of March.

7. The objection that a demand in suit is stale or barred by the statute of limitation, cannot be made without being properly stated in the pleadings.

[Cited in The Shady Side, 23 Fed. 732.]

The libellant [Alexander McLean] had been master of the steamboat Swallow a period of several years. She was a passenger vessel, owned by the respondents [Anthony N. Hoffman and Smith Cutter], making regular trips between New-York and Albany. This action was brought to recover wages alleged to be due him in that capacity, and also for moneys paid by him during the term to other persons on board, and in the service of the vessel. The libel claims wages in arrears in the years 1837, 1841, and 1843. The answer admits that one month's wages for July, 1837, $83 33, is due the libellant, and further that the services were rendered as alleged in the libel, but avers that the wages of the libellant were paid him in full by the respondents for the year 1843. That during the year 1841, the boat was in the employment of the Hudson River Association, who appointed the master on the nomination of the owners, and that his wages for that year are chargeable to the joint funds of the association, and not

[1] [Reported by Richard Olcott, Esq.]

against the respondents individually. It asserts that the moneys paid to others on board by the libellant were overpayments, and not legally chargeable against the respondents.

Burr & Benedict, for libellant.
Mr. Hoffman, for claimants.

BETTS, District Judge. For the one month's wages admitted to be unpaid, there must, of course, be judgment for the libellant. He is also entitled to interest from the time the wages were payable. It is the rule of admiralty, as well as at law, to allow interest on liquidated claims from the time they are demanded, and on mariners' wages from the time they are due. Gammell v. Skinner [Case No. 5,210]; The Elizabeth Frith [Id. 4,361]. The preponderance of proof clearly is, that the libellant advanced one hundred and fifty dollars for the wages of part of the crew, during the month of July, 1837. This proof is also corroborated by the acts of one of the respondents, who presented the account as rendered by the libellant, to his coassociates in the employment of the boat, and urged its payment, as justly chargeable against them in common. This sum must accordingly be recovered by the libellant, with interest.

The main contestation in the cause has been in relation to the wages of the libellant for the months of January, February and March, 1841, and for two months in the year 1843, in all five months, amounting to $416 65. This amount the respondents contend they are not individually liable for, if due, but that it is chargeable to the Hudson River Association. The owners of several steamboats plying upon the Hudson river, of which the Swallow was one, entered into an association or joint arrangement, by which the earnings of the different boats were to be brought into a common fund, out of which the expenses of all the boats were to be paid by the association. Each owner was to equip and furnish his particular boat, and engage his crew, and nominate the master of the vessel, but the appointment of the master was to be made by the association. The Swallow was employed for a time under that engagement; but in the year 1841, her owners chartered or hired her to the association for a fixed price. The object was to reserve her as a supernumerary boat in the common business, and only run her in the place of any boat in the association that might happen to be disabled. In such case she was to be manned and navigated by the company of the disabled boat. This agreement was signed and entered into April 6th, 1841. When it went into operation, the libellant was in command of the Swallow, as he had been previously, (but not by appointment of the association,) and then retired from the command. The proofs show the uniform usage with owners of the Hudson river boats had been to hire their masters for the season, at a yearly salary, which was ordinarily paid in ten equal instalments, covering the period the boats were in service or preparing for it, or being laid up, and considered as beginning with March and ending with December, but not unfrequently the amount was divided into equal monthly payments.

It is clear, upon the evidence, that the libellant was entitled to $1,000, wages for the season, and at that rate for any period less than a season, when his services did not commence or terminate with it; and that the amount payable to him has not been satisfied by the respondents or the Hudson River Association. The main question in dispute is, whether his resort must be to the association, or if he can hold the owners of the boat responsible for the balance unpaid. So far as that question applies to the wages for 1843, the allegation of the respondents, that the full wages for that year have been paid, necessarily makes part of the defence to be considered. If the association had been composed of strangers to the respondents, wholly independent of any interest or influence in it on their part, that fact would afford no legal exemption from their individual liability to the master. He was hired by them as owners of the boat, and the services of the boat for the association nominally, was in effect to the benefit of the owners individually. They received from the common fund, created by the earnings of the associated boats, an equivalent for the earnings of their own. It was only a different method of collecting her earnings and defraying the charges upon them; or, to represent the operation in mercantile language, it was placing the freights of the vessel in the hands of trustees for the owners, who were to discharge the obligations of the vessel to the crew, and pay the surplus to her owners. Should the holder of freight refuse or neglect to pay the wages of the master, his resort to his owners therefor could in no way be prevented or impeded, because of the manner in which they employed the vessel. If they let her to a third party in solido, she still remains answerable for her owners' engagements in regard to her fitments or navigation. 2 Dod. 500; Bronde v. Haven [Case No. 1,924]; Cowp. 636. But there is a higher principle in the case which supplants the defence set up by the respondents. As owners of the boat, they composed a part of the association. It was, in relation to its operation and purposes, a private copartnership, and partners can never discharge themselves of liability for their individual debts by showing that the copartnership had assumed to pay them, and was supplied with funds for the purpose. The individual liability is not merged in that of a copartnership. The questions mooted in respect to a personal or associate responsibility to creditors relate to liabilities imposed upon the whole by acts of separate members, and not to the exemption of individual members from responsibility for their own acts,

because a common obligation may also rest on others. 3 Kent, Comm. 24, 32; Williams v. Bank of Michigan, 7 Wend. 542; Colly. Partn. 625. The ratification of the appointment of the libellant as master of the boat by the association, does not affect his legal relation to the owners. Whether it gives an additional security against the associates conjointly, need not be considered, but clearly the owners who made the contract with him, and who had the benefit of his services, cannot exonerate themselves from paying the agreed wages by showing that as to themselves there was an equity in his securing payment from their associates, and out of the joint fund. The disposition of that fund must be regulated between the common proprietors, and the respondents must look to their own trustees for indemnity against any injury they sustain from an improper application or withholding of their mutual funds. The owners deny there is a balance of wages due for 1843. The charter of the boat terminated with the year 1841, and the Hudson River Association has run no boats on their joint account since that date. The owners insist she did not come back to their particular possession and use until March, 1842, and that the hiring of the libellant by the year commenced at that period. It is shown that he received one thousand dollars during the year 1842 and early in 1843, and the argument is, that a year's wages, from March, 1842, to March, 1843, was thereby satisfied and discharged.

The libellant was appointed by the respondents in writing, master of the boat, in 1837. That appointment had not been revoked, and after the special hiring of the boat in 1841 to the association terminated, the libellant resumed the command of her, under the respondents alone. The libellant sailed her from the opening of the season in 1842, for the benefit of and on the hiring of the respondents. They give no proof that a different bargain was made with him for that service, and the implication that it was rendered upon the same terms with his previous employment, amounts to sufficient proof in his favor of the fact. There is no direct proof that the agreement with the master for 1842 was for the running season; but the notorious and universal usage on the Hudson river, and with the boats owned by this association was, that masters, pilots and engineers are hired and paid by the year, from January to January. And it is strongly corroborative of the presumption that the respondents recognised the custom in this instance and acted in conformity to it; that the engineer of the boat, this same period, from January, 1842, to January, 1843, was hired and paid by stated salary. In May, 1843, fifty dollars were paid the libellant, in full for the balance of his wages for 1842. The cash-book of the boat was produced by the respondents to show that the libellant's wages were there credited at one thousand dollars, or one hundred dollars per month, beginning on the first of March. This book was not kept by the master, nor is it proved he had any knowledge of the terms of that entry. Such ex parte entry in the respondents' books is not adequate evidence to support the defence. It certainly can avail them no further than the receipt of May, 1843, drawn and signed by the master, stating that the money thus paid was applicable to his wages for 1842, can be made to support his claim.

On the facts in proof, the libellant, in my opinion, was entitled to wages from January 1st instead of March 1st, 1842, to January 1st, 1843, leaving a balance in his favor still unpaid. The testimony is not distinct as to the time the libellant remained in command and attached to the Swallow in 1841. I shall assume that he left her on the execution of the charter-party, and take that date to be April 1st, 1841, as it was proved that the arrangement was made before the contract was signed. He will, accordingly, be entitled to one hundred dollars arrears of wages in 1841, two months wages in 1843, and one month in 1837. The credit for payments made for the boat in July 1837, and claimed by the libellant, is twenty dollars to Bates, the mail clerk; forty dollars to Lockwood, the second engineer; to ten firemen forty dollars, and ten deck hands fifty dollars—one hundred and fifty dollars. It is now denied that the libellant had authority to hire those men, or that he can charge the payments made them against the respondents. But I think, after rendering these demands to the association as being proper charges against the boat, and attempting to obtain their payment with interest, the respondents are precluded denying their obligation to satisfy them. The above statement of the claims varies a few dollars from the demand made in the libel, but I do not think it proper to order a reference on a difference of so small an amount.

I accordingly decree that the libellant recover against the respondents $150, with interest from August 1st, 1837; $83 33, with interest from January 1st, 1838; $209 99, with interest from January 1st, 1842, and $166 66, with interest from January 1st, 1844, together with costs to be taxed. The demand of payment of wages should be equitably implied to have been made at the close of each year's services, and that interest was due from the period the advances were made by the libellant for the respondents, and interest be computed accordingly. 7 Wend. 178; 15 Johns. 409; 2 Nott & McC. 493; 7 Wend. 109. The staleness of the claim for arrears due in 1837, and the expiration of more than six years since those payments, create no bar to the action. Independent of the state of the pleadings, which would exclude those defences, it is proved that demand of payment was made by the libellant upon the respondents in 1842.

Decree for the libellant according to the above directions.

Case No. 13,666.

The SWALLOW.

[1 Ware (21) 13.] [1]

District Court, D. Maine. Dec. Term, 1822.

SHIPPING—PUBLIC REGULATIONS—FISHING VOYAGE—FRAUDULENTLY OBTAINING BOUNTY—TRADING—FORFEITURE.

1. The forfeiture of a fishing vessel under the act of July 29, 1813 [3 Stat. 49], for fraudulently obtaining the bounty allowed by that act, does not attach on the improvident payment of the bounty to a vessel not entitled to it, but to the act of fraud and deceit in obtaining it.

2. If the vessel be in fact entitled to the bounty, and fraud and deceit are employed by the owners in obtaining it, she will be subject to forfeiture.

3. A vessel licensed for carrying on the fisheries, is liable to forfeiture under the act of February 18, 1793, § 32 [1 Stat. 316], for a single act of trading, not authorized by the license.

4. The taking of a few cattle, and carrying them from an island to the main land, in going out or returning, not for hire, but as a neighborly or friendly act, is not engaging in a trade within the meaning of the act.

[Cited in The Willie G., Case No. 17,762.]

This was a case of seizure under the revenue laws.

Mr. Shepley, Dist. Att'y, for libellants.

E. Thacher, for claimant.

WARE, District Judge. The libel or information in this case sets out two causes of forfeiture. The first is that of fraudulently obtaining the bounty allowed, by the act of congress of July 29, 1813, to vessels employed in the fisheries. By the 6th section of the act, it is provided, that an allowance of $1.60 per ton shall be paid to a vessel of more than five and less than twenty tons burden, provided she has been actually employed at least four months during the fishing season, and has landed and dried, fit for exportation, at least twelve quintals of fish for every ton of her admeasurement. As a prerequisite to obtaining this allowance, an account of the weight of the fish when they are sold, the original adjustment and settlement of the fares, between the owner and the fishermen, with a description of the vessel, and the time she has been employed, must be submitted to the collector and verified by the oath of the owner. Upon this evidence the allowance is to be paid, and if it shall appear, within one year after the payment, "that any fraud or deceit has been practised in obtaining the same," the vessel is declared to be liable to forfeiture. The bounty having been paid, it is to be presumed that the proper evidence was submitted to the collector, and the question now is whether that evidence was tainted with fraud or deceit.

A good deal of testimony has been introduced to prove that the Swallow was employed the requisite time, and that the required quantity of fish was taken and cured. The evidence is pertinent, so far as it shows an absence of all temptation to the practice of fraud. There can be no doubt that the vessel was employed at least four months during the season, and it is shown by a pretty strong probability that as much as 156 quintals of fish, the amount required to entitle a vessel of her tonnage to the allowance, were taken and cured. This may be all true, and the vessel not escape forfeiture. The forfeiture attaches on the practice of fraud and deceit in obtaining the allowance. The vessel may bring herself within the law as to the time employed and the amount of fish taken, yet if the owner has employed corrupt evidence in obtaining the bounty, the vessel is forfeited by the express words of the statute. As, if part of the fish had been disposed of without securing the proper evidence, to be submitted to the collector, as to the part thus sold, and the owner obtains the allowance on false or fabricated evidence, with respect to fish taken not in his boat but in another; this would be fraud and deceit, which would be followed by a forfeiture. It would be no defence to prove that the required amount of fish was in fact taken and cured. Again, if the collector should improvidently pay the bounty to a vessel, which was not in fact entitled, there would be no forfeiture if the owner had practised no fraud or deceit in obtaining it. The forfeiture attaches not upon the payment of the bounty to a vessel not entitled to it, but to the act of obtaining it by fraud and deceit. The question then is, whether such fraud has been employed in the present case. The only evidence which implicates the vessel, is that of Sweetland. He states that he was with Snow, the skipper, one trip in the Swallow, in the month of October; that while lying at Matinicus, where she usually went for a harbor, he had a conversation with the skipper on the subject of obtaining the bounty, and Snow gave him to understand that he intended to obtain it by corrupt evidence; that while they were in the harbor, they landed a small quantity of fish, which were sold to Mr. Buck, a trader, who gave a receipt for them. This receipt, the witness thinks was written by Snow before he left the vessel, and was for a larger quantity of fish than in fact were sold to Buck. The witness did not read it himself, but heard Snow read it, and the exact amount of fish expressed, he does not pretend to recollect. Buck at first declined to sign the receipt, but at last consented, and the witness understood from Snow that he intended to use this in obtaining the bounty. If a receipt thus obtained were used, there cannot be a doubt but it was a fraud, which would work a forfeiture. But it is to be remarked that the fact rests on the unsupported testimony of a single witness. An attempt has been made to discredit him, but I can see no sufficient reason for leaving his testimony out of the case. I admit it as far

[1] [Reported by Hon. Ashur Ware, District Judge.]

as it goes. But it proves at most that Snow at one time had an intention of using fraudulent means to obtain the bounty, not that he actually used it; and it is not in proof, by other testimony, that this receipt was used. This is not such proof as is required to justify a decree of forfeiture.

The next allegation in the libel relied upon is, that the Swallow was employed in another trade than that for which she was licensed, and is forfeited under the 32d section of the coasting act of February 18, 1793. The facts are not disputed. At one time, when she was on her way to the fishing ground, she touched at the Green Islands and took twelve or thirteen sheep, and carried them to Matinicus; and two or three days after, when returning home, she took from Matinicus, four or five neat cattle, and landed them at Thomaston. She does not appear to have gone out of her way, or to have been detained at most more than an hour or two in the whole of the business. There is no evidence that this was done for hire; with respect to the sheep, the proof is that it was not, and such is, I think, the presumption in the other case. They appear to have been merely acts of good neighborhood, which fishermen in that place are in the habit of doing for each other, and for which no compensation is expected, except in the way of similar favors. It is also worthy of remark, that the sheep and cattle were not sold, but merely removed from one part of a man's farm to another, there being no conveyance by land. Is this employing the vessel in a trade within the meaning of the 32d section of the act? It has been well settled by a variety of decisions that the forfeiture of this section attaches in every case of trading, of whatever nature and with whatever object, which is not expressly within the license. The Eliza [Case No. 4,346]. The revenue and navigation laws of the country constitute a system framed for the protection of great public interests, and is of a very unbending character. If a party has a case which presents equitable grounds for relief, that must be sought in another quarter. The only duty which the court has to perform is to administer the law according to its obvious import, but the court is not called upon to give a strained construction of those laws, so as to include cases which are not within the meaning of the words in their ordinary acceptation. I have looked into the cases, and do not find, what indeed could hardly be expected, a case precisely like the present. They are all cases of trade in the common acceptation of the word, the conveyance of merchandise in the ordinary course of commercial transactions. The Active, 7 Cranch [11 U. S.] 100, was laden with provisions, and manifestly intended for a foreign voyage. The Three Brothers [Case No. 14,009] purchased in a foreign port a considerable quantity of fish, and was, in every sense of the word, engaged in trade. The Two Friends [Id. 14,289] had taken on board upwards of one hundred barrels of flour, and was avowedly destined from Boston to Chelsea, but probably for a very different voyage. The Eliza [supra] had taken on board, as freight, a quantity of wine and provisions, and was seized while in pursuit of a foreign vessel, for which she was destined, and that, probably, an enemy. All these cases are widely different from the present. They are all clearly cases of engaging in a trade, in the usual meaning of the word, and they undoubtedly show that a single act of trading, beyond the authority of the license, is fatal. But can it in propriety of language be said that if a small fishing schooner, employed in the coast fisheries, while on her way to or from the fishing grounds, takes a few articles of provisions, or a few cattle, at one place and drops them at another, without being diverted from her course or occupation, and without any contract of hire or compensation, or expectation of compensation, except that of a reciprocation of the same offices of good neighborhood on another occasion,—can a vessel, under such circumstances, be said to be engaged in a trade within the meaning of the law? This would be extending the restrictions of the law further than any decision has yet carried them. I cannot think that this kind of interchange of neighborly acts falls within the words or policy of the law. I decree a restoration of the boat, but shall certify probable cause of seizure.

SWALLOW, The (STAPP v.). See Case No. 13,305.

Case No. 13,667.

The SWAN.

[3 Blatchf. 285.] [1]

Circuit Court, S. D. New York. June 13, 1855.

NAVIGABLE WATERS — OBSTRUCTION TO — SUNKEN VESSEL—TUG AND TOW—LIGHTS.

1. Where a tow was sunk through the fault of a propeller, which came in collision with her, and without any fault on the part of the tug which was towing the tow: *Held*, that the right of property in the tow was still in her original owner, or, if he chose to abandon her, he could only look to the propeller for her loss, and not to the tug, and the propeller would, in such case, have the right to raise and repair the tow.

2. Where, in such case, a vessel ran against the sunken tow and was lost, in the night, because her position was unknown, and was not marked by any light; *Held*, that the tug was not responsible for such loss, as her control over the tow ceased when the tow sank, and especially as the captain and crew of the tow were on board of the tow when she sank.

3. The tug was under no obligation to place a light at the point where the tow was sunk, or to raise the tow.

4. Whether either the owner of the propeller or the owner of the tow was bound to remove

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

the obstruction, or to indicate its position by a light, quere.

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

This was a libel in rem, filed in the district court, against the steamboat Swan, to recover damages for the loss of the schooner H. H. Day and her cargo. After a decree by the district court, dismissing the libel [case unreported], the libellants appealed to this court.

James R. Whiting, for libellants.
Cambridge Livingston, for claimants.

NELSON, Circuit Justice. The H. H. Day was damaged and sunk on the Raritan river, in New Jersey, on the night of the 6th of November, 1850, some four miles below New Brunswick, having run against a sunken canal-boat lying in the bed of the river, while on her way to Brooklyn, New York. The canal-boat was so far under water that persons navigating the river at night were unable to see where she lay.

The steam-tug Swan, belonging to the claimants, left New Brunswick on the same evening with the H. H. Day, but some hours before her, for the city of New York, with six canal-boats and barges in tow, laden with coal and other articles; and, while proceeding down the river, met the propeller Erie coming up, which came in collision with one of the canal-boats with such violence that she immediately bilged and sank. The collision was owing to the negligence and carelessness of the propeller, without any fault on the part of the tug. The canal-boat thus sunk was the one upon which the H. H. Day, the vessel of the libellants, ran a few hours afterwards, occasioning the loss complained of in the libel. The captain and crew of the canal-boat were on board during the navigation of the tow, and at the time of the collision with the propeller, but were under the orders and direction of the master of the tug. According to the terms of the contract entered into by the master of the tug before the canal-boat was taken in tow, she was to be towed at the risk of her owners. After the collision, the captain and crew went on board of the propeller, and returned to New Brunswick.

The ground upon which the libellants seek to recover for the loss of the schooner and her cargo, occasioned by her running upon this sunken canal-boat, is the negligence and want of care on the part of the tug, in not placing a buoy or boat at the place with a light, or in some other way giving reasonable warning of the danger to vessels navigating the river. The court below dismissed the libel, holding that no such duty, under the circumstances, was imposed upon the tug. In this opinion I am inclined to concur.

It is conceded that the canal-boat was separated from the tug and sunk without any fault on the part of the tug, and wholly by the wrongful act of the propeller. The tug, therefore, was not responsible for the act of sinking the boat, and, of course, not for the loss of the boat itself or its cargo. If the owner of the boat chose to abandon it, and look to the wrongdoer for the entire loss, he could look only to the propeller. That was a question exclusively between those parties. No duty attached to the tug in respect to it. The right of property in the boat still remained in its owner after it was sunk, and he might, in his discretion, immediately have taken the proper measures to raise and repair it; or, if he elected to abandon it, and to look to the colliding vessel for damages, the owners of that vessel might, if they deemed it better for their interest, in the misfortune that had occurred, assume the responsibility and expense of raising the boat. In the case of a collision, which results in the sinking of the injured vessel, there is oftentimes great difficulty in arriving at the actual damage sustained, in the absence of any effort to raise her. She may have been so broken and submerged, as to render any effort to restore her hopeless, and thus the entire loss of vessel and cargo would be the measure of damages. She may also be in such a situation as to be recovered from her sunken condition at an expense that would diminish the extent of the loss otherwise occurring. In such a case, the value of the vessel would not be the measure of damages to be awarded; but the measure would be the expense of the raising of the vessel, and of the repairs, together with reasonable compensation for loss of use in the mean time. And, where the sunken vessel is abandoned by its owner, with the design of looking to the colliding vessel for the whole value, it may sometimes be for the interest of the owner of that vessel to admit his responsibility as claimed, and take measures to raise and repair the vessel for his own benefit. At all events, this is a right which I think properly belongs to him, if he chooses to assert it. Therefore, the right of property in the sunken canal-boat was still in its original owner; or, if he chose to abandon it, the right to raise and repair it might be exercised by the party responsible for the loss, which in this case was the propeller. In no event had the tug any interest in the matter.

Then, which of these parties, if any one of them, was under obligation to place a light at the point of obstruction on the river, occasioned by the sinking of the boat? Upon general principles, the duty would seem naturally to belong either to the proprietor of the boat, or to the party guilty of the wrong of sinking it in the public highway. Whether it would devolve upon either, it is unnecessary to determine in this case. The case of Rex v. Watts, 2 Esp. 675, raises a doubt as to the duty of the owner, under the circumstances stated. The court there held, that the owner of a vessel sunk in a navigable river

by misfortune or inevitable accident, without his fault, was not liable to an indictment for a public nuisance for not removing the obstruction. This decision necessarily excludes the idea of any duty resting upon the owner, in such a case, to remove his sunken vessel; and raises, at least, a pretty strong implication, that he would not be bound to take any other measure of precaution to prevent the injurious effect upon the navigation.

Whether the injury to the libellants' schooner, in running upon the sunken boat, was not a consequence too remote, as resulting from the collision, to charge the vessel in fault in that transaction, is a question upon which much might be said, and which I do not intend to determine.

But, be all this as it may, I am satisfied that the tug, in this case, cannot be charged with the injury, upon any sound or consistent principle. Her owners had no other interest in, or control over the canal-boat, than what arose out of the contract to tow her to her place of destination. When they had discharged that duty, their obligations ceased, especially as the captain and crew of the tow accompanied her in the navigation. On the termination of that contract, the control and disposition of the boat belonged exclusively to her captain, as she was no longer subject to the orders or direction of the master of the tug. It is difficult to see where the responsibility of the owners of the tug would cease, if it be carried beyond the scope and limit of their contract. There can be no hardship, as it respects third persons or the public, in confining it to this limit, for, on the termination of the contract, and of the consequent responsibility of the owners of the tug, that of the owner of the tow begins, or, rather, in judgment of law, is resumed, the power of the tug over the tow, by virtue of the contract for towing, having ceased.

It is said, that the owners of the tug should be held responsible for the obstruction in this case, as they were instrumental in producing it, having towed the boat to the place where she was sunk. But, this was an act not only lawful in itself, but an act procured by the owners of the canal-boat. There is nothing, therefore, in this circumstance that can, upon any consistent reasoning, shift the responsibility from the owner of the boat to the owners of the tug. But, the true answer to this suggestion is, that the circumstance of the boat's being on the river at the place where she was run into and sunk, was the fault of no one. She had a right to be there. And I may add, also, as is admitted by the facts of the case, that it was no fault of either of these parties that she was at the bottom of the river. That was the fault of the vessel that ran her down.

The argument that would make it the duty of the tug, in this case, to place lights at the place of the sunken boat, to warn vessels of the danger, must, it seems to me, be carried to the length of making her responsible for raising the boat and removing the obstruction. For, I do not see how that duty is to be distinguished from the one claimed, of keeping up lights or some other notice of the danger, so long as the obstruction continues. This duty, as to lights, can be maintained only upon the idea that the tug is responsible for the obstruction. I cannot think her thus responsible, where she is neither the owner of the thing constituting the obstruction, nor in any way in fault in placing it there. Decree affirmed.

Case No. 13,668.

SWAN v. BANK OF THE UNITED STATES et al.

[2 Brock. 293.] [1]

Circuit Court, D. Virginia. May Term, 1827.

PRINCIPAL AND SURETY—JUDGMENT AGAINST SURETY—COLLUSION—DEBT PREVIOUSLY SATISFIED—INJUNCTION.

W. obtained a loan from the Bank of the United States, with S. as his endorser. The note was subsequently endorsed by H., for whose indemnity for any loss which might accrue to him in consequence thereof, W., the drawer, executed a deed of trust. W. afterwards executed other deeds of trust on the same land for the security of other creditors, and, among others, of V. The deed for the benefit of H., was not recorded, but full notice of its execution was given to V. Before the deed to V. was made, he made a calculation of the amount of the prior liens, and said that the property was sufficient to pay them, and secure him. The land was sold, subject to the prior liens, for the payment of V.'s debt. V bid the amount of his debt, and the property was struck out to him. V. afterwards died, and his executors proposed to the bank to pay the note on which S. was endorser, on condition that the bank would institute suit against S. for their benefit, to which terms the bank acceded, and obtained a judgment against S. S. filed his bill, stating these circumstances of which he had no knowledge until the judgment was obtained, as he averred, and prayed an injunction, which was granted. The injunction was made perpetual.

In equity.

MARSHALL, Circuit Justice. Blake B. Woodson had obtained a loan from the Bank of the United States on his note, with John T. Swan, the plaintiff, as his endorser. After some time, an additional endorser was required by the bank, whereupon Walthal Holcombe agreed to add his name to that of Swan, upon which, the accommodation was continued. In October, 1818, Blake B. Woodson executed a deed conveying a tract of land in the county of Cumberland, to Benoni Overstreet, in trust, that "if the said Walthal Holcombe shall be likely to suffer on account of the undertaking of the said Walthal Holcombe, for the said Blake B. Woodson, at the bank aforesaid, in the opinion of the said Benoni Overstreet, or in the case of the note in the said bank now, or hereafter, with the name of the said Walthal Holcombe as endorser thereon for the said Blake B. Wood-

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

son, shall be protested, whereby the said Walthal Holcombe, his heirs, etc., shall in the opinion of the said Benoni Overstreet, be likely to suffer for the amount of any such protest, costs, and charges, or any part thereof, the said Benoni Overstreet at the request of the said Walthal Holcombe, shall" on thirty days' notice, proceed to sell the trust premises. Blake B. Woodson executed other deeds of trust on the same land for the security of other creditors, and among others, for the security of Samuel W. Venable, under whose deed the land was sold, and the said Venable became the purchaser thereof. The deed to Benoni Overstreet for the benefit of Holcombe, was not recorded, but full notice of it was given to Samuel W. Venable. At, and before the sale, it was shown to him by Benoni Overstreet, the trustee. After he had read it, the said Overstreet observed that it was not recorded, on which Venable admitted its validity as to him. Before the deed to secure Venable was executed, he had a conversation with Edward Bedford respecting the affairs of Blake B. Woodson, in which Bedford informed him of the several liens on Woodson's land, including that for the security of Holcombe, on which Venable made a calculation of their amount, and said that the land would be sufficient to discharge those liens and pay the debts due to him. The deed for his benefit was executed soon afterwards. When the conversation took place between Venable and Overstreet at the sale, they again made a calculation of the liens which were found to amount, including the debt due to the bank, to about $9,000. The land was sold for the payment of the debt due to Venable, subject to the prior liens, among which, the debt due to the bank was mentioned, and Venable bid the amount of his own debt, and being the highest bidder, the land was struck out to him. A higher price had been offered for the land and rejected by Blake B. Woodson. This offer was repeated during the bidding, and again rejected, about which time the land was struck out to Samuel W. Venable.

The accommodation to Blake B. Woodson, with John T. Swan, and W. Holcombe as endorsers, was continued by the bank, and before any change took place in the debt, Samuel W. Venable died, leaving N. E. Venable and A. W. Venable his executors. They proposed to the bank to pay the debt, provided the bank would put the note in suit against John T. Swan, for their benefit. This proposition was acceded to, and a judgment obtained in the name of the bank against John T. Swan. Swan filed his bill, stating the foregoing circumstances, alleging his ignorance of these transactions, until after the judgment was rendered, and praying an injunction. The defendants, the executors of Samuel W. Venable, admit their liability to W. Holcombe, but insist that the lien of Holcombe, as he has not been compelled to pay anything, and is now discharged from all responsibility, cannot be set up by the plaintiff. It is perfectly clear, that Holcombe, as a subsequent endorser, having made no arrangement whatever with Swan, the previous endorser, which connected them in any manner with each other, would not have been responsible to Swan, for any portion of the debt paid by that endorser, but would have had recourse against Swan, to be indemnified for any sum he might be compelled to pay. It must be admitted, that the deed of trust was intended solely as an indemnity to Holcombe, and was not executed for the benefit of Swan. If Swan can now avail himself of it, his right to do so grows out of subsequent transactions.

In considering this case, the first inquiry that presents itself to the mind is, could Swan, in the event of being compelled to pay the debt to the bank, before the sale of the trust property, have resorted to that property for indemnity? By force of the mere terms of the deed, he undoubtedly could not; but would a court of equity have given its aid? The property, after Holcombe was discharged from his endorsement, would have reverted to Woodson, and the trustees would have been seized in trust for him. Consequently, any creditor might have pursued it; and a court of equity would, if necessary, at least have removed the trust out of the way. But when the land became charged with subsequent deeds of trust, the creditors for whose benefit those deeds were made, would not be postponed to that made for Holcombe, farther than was necessary to satisfy the terms of that deed. Consequently, Swan, had he in that state of things been compelled to pay the debt to the bank, could have had no pretext for claiming the aid of Holcombe's deed against the holder of any subsequent deed, or against any purchaser at a sale made in pursuance of such deed. If his case is mended, it is by the facts attending the sale, and the discharge of the note in bank, as disclosed by the testimony. It is proved, that when Mr. Venable obtained the deed of trust, he valued the property at a sum sufficient to discharge the debt due to himself, after discharging all prior incumbrances, including that of Holcombe. It is also proved, that this computation was again made at the sale, and that the land was at that time thought a good purchase, supposing it to be charged, not contingently, but positively, with the debt to the bank. These facts show, that in the mind of Mr. Venable himself, the debt due to the bank constituted a part of the purchase money; and would probably have afforded strong inducements to any creditor, acting solely under the influence of his own feelings, and with the single desire of obtaining his debt, to press Mr. Holcombe, who was secured, rather than Mr. Swan, who could revert to no fund for reimbursement. Had the creditor pursued this course, the land purchased by Mr. Venable

would have been subjected to the debt, and it will not be alleged that he could have had any recourse, in law or equity, against Mr. Swan as the prior endorser. Had the land still retained the value at which it was estimated when sold, all will admit that that is the course which, in right and justice, the affair ought to take. But, although the fact is not alleged in the record, the reduced price of property, real as well as personal, is a matter of general notoriety, and will certainly justify the defendants in avoiding the payment of this debt, if the law will enable them to do so. Had the bank, without their interposition, proceeded of itself, to coerce payment from Mr. Swan, he could not, perhaps, have obtained the aid of a court of equity. Had the representatives of Mr. Venable remained passive spectators of the procedure, it is probable that the circumstances attending the purchase made by their testator, would not have affected the estate. But they have not remained passive spectators. The bank has acted at their instigation, and by their procurement. They have been the means of inducing the bank to proceed against a surety having no indemnity, rather than against one holding an indemnity from the original creditor. Although this might have been perfectly justifiable in a court of equity, if disconnected from the circumstances attending the taking of the trust deed, and the sale of the property under that deed, it cannot be sustained when viewed in connexion with those circumstances.

An additional argument, which has been suggested by my brother judge, is entitled to great weight. It is, that if Mr. Venable may coerce the payment of this money from Swan by using the name of the bank, he gives Swan an action against Woodson, and thus renders Woodson liable for the money which his land was intended to secure.

The injunction is made perpetual.

NOTE. From the decree perpetuating the injunction in this cause, the defendants, executors of Samuel W. Venable, appealed to the supreme court of the United States. At the January term of the supreme court, 1830, on motion of Mr. Wirt, of counsel for the appellee, Swan, the cause was docketed and the appeal dismissed, "the appellants having failed to lodge a transcript of the record in the said cause with the clerk of this court, agreeably to the rules of" the supreme court. 3 Pet. [28 U. S.] 68.

Case No. 13,669.

SWAN v HUGHES.

[1 Wash. C. C. 216.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

PUBLIC LANDS—CERTIFICATE OF COMMISSIONERS—SETTLEMENT ON LANDS.

The certificate of the commissioners of Virginia, appointed under the law of that state, to adjust the claims for settlement and pre-emption rights to lands, which were afterwards found to be within the limits of Pennsylvania; being ex parte, is not evidence of a settlement on the lands in dispute. The holder of the certificate must prove, by other testimony, his settlement to be prior to that, under which the defendant claims.

This cause turned almost entirely on the evidence; and therefore it is only necessary to state here, such of the circumstances as may be required to explain the only law point which occurred in it. The plaintiff, in 1781, obtained from the commissioners in Virginia, who were appointed, under a law of that state, to adjust the claims for settlement and pre-emption rights, a certificate for four hundred acres of land, on the waters of Ten Mile creek, in Monongahela county, to include his settlement made in 1770. A survey was made, by a Virginia surveyor, after the compact which took place between Virginia and Pennsylvania; and therefore was not relied on as an official survey. In 1777, plaintiff purchased from one Gregg, an adjoining tract, claimed by him in right of settlement. But the same land was also claimed by Millar, in right of a prior settlement, which it was admitted he had made. Swan's certificate right was founded on a purchase of Woodfield, who, it appeared by the evidence in the cause, first settled it in 1774. It was clearly established and admitted, that Millar made his settlement in 1773. In 1778, Millar sued Swan, who claimed under Gregg, and laid the demise as of four hundred acres. He recovered a general verdict. Swan then sued Gregg, in an action of covenant on his deed of warranty, conveying him this four hundred acres, more or less, and laid his breach as general as the deed. He recovered a compensation in damages.

In this case the plaintiff contended, that the certificate was evidence that Swan's settlement was made in 1770, and consequently his right was prior to Millar, (under whom the defendant claims.) Secondly—If not so, that yet Millar had agreed to fix a dividing line between him and Swan, so as to leave to Swan the land now in dispute; and that he was bound by this location. Witnesses were produced, on the part of the plaintiff, to prove this location; and on that of the defendant, to show that Millar had claimed a boundary, so as to include it, and had pointed out (pending his suit with Swan,) to the surveyor, that line as his boundary.

With respect to the evidence attempted to be drawn from the certificate, to establish Swan's prior settlement; THE COURT stated to the jury, that Millar claimed the land in question adversely to the plaintiff, in 1778, as proved by some of the witnesses; and that this must have been known to Swan. That his certificate being obtained ex parte, without notice to Millar, he cannot rely upon it as evidence, on a question whether he or Millar was the first settler, to prove that he was. If Millar had been before the commissioners,

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

it would have been otherwise. But to bind him, by a judgment stating that Swan's settlement was in 1770, without his having had an opportunity to controvert the fact, was repugnant to every principle of justice and law. The question here is, who had the first settlement? Millar proves his in 1773, and Swan endeavours to prove his to have been in 1770, and relies upon an ex parte judgment to establish the fact. This is improper. Swan's certificate only states, that he had made a settlement in 1770, on Ten Mile creek; but on what part, is not stated. It might be so remote from the land in question, that he could never reach it; consequently it is incumbent on him, to show to the jury, where it was; and therefore he must prove his settlement, and locate it. Whether he has done so; or whether the agreement of Millar to fix the dividing line as contended for by plaintiff; or whether the recovery of Millar was for the whole land, to include the part in dispute; are facts left to the jury. If no such line was established, or if the land now in dispute was recovered by Millar against Swan, for which Swan was compensated by Gregg, then the verdict should be for defendant; if otherwise, for plaintiff.

Verdict for defendant.

SWAN (OMALY v.). See Case No. 10,508.

SWAN (PICQUET v.). See Cases Nos. 11,132 and 11,133.

Case No. 13,670.

SWAN v. WRIGHT.

[3 Woods, 587.] [1]

Circuit Court, S. D. Alabama. June Term, 1879.

PRACTICE IN EQUITY—BILL OF REVIEW—SECURITY FOR COSTS AND DAMAGES—MOTION TO DISMISS.

1. On the filing of a bill of review, the equity practice requires the complainant to give security or deposit a sum of money for satisfying the costs and the damages for delay, if the case is found against him.

2. But if such a bill is filed without security or deposit, and the defendant allows the case to proceed and costs to accumulate without objection, he cannot have the bill instantly dismissed on motion.

3. In such case the complainant will, on motion, be ordered to give the security or make the deposit within a day named, and, in default thereof, his bill will be dismissed.

4. To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree.

5. When the complainant, in a bill of review, had leave of the court to file his bill, and had performed all things required by the decree up to the time of filing his bill of review, but had failed to perform matters required by the decree to be performed after the date of filing the bill of review, he was ordered by the court, on motion of the defendant, to perform, by a certain day, those matters as to which he was in default, on penalty of having his bill of review dismissed.

6. It is no sufficient reply to a motion to dismiss a bill of review on the ground that the decree sought to be reversed has not been performed, to say that there is ample security for the performance of the decree. The defendant in the bill of review is entitled to the absolute performance of the decree.

In equity. Bill of review.

The Alabama & Chattanooga Railroad Company, by authority of a decree of this court, made on January 23, 1874, was, on December 4, 1876, by the masters appointed for that purpose, sold to John T. Wilder and D. C. McMillen, who, on March 30, 1877, transferred their bid and purchase to the complainant, John Swan, and on June 30, 1877, a decree of this court was made confirming said sale, and substituting the complainant as purchaser in the stead of said Wilder and McMillen. The sale was made for the price of $600,000, and the property was sold subject to the lien of certain receiver's certificates which had been issued by authority of the court, and the interest accrued and to accrue thereon, which was evidenced by coupons attached. The receivers were authorized to issue twelve hundred certificates of $1,000 each, due in ten years after date, with eight per cent interest, payable semi-annually. The certificates all bore date September 5, 1872, and are to fall due September 1, 1882. The executors of one John S. Wright claimed to be the bona fide owners and holders of one hundred and eleven of said receivers' certificates for one thousand dollars each, with a number of past due coupons, and upon a reference to Lyman Gibbons, Esq., master, he reported on April 7, 1877, that said one hundred and eleven certificates so held by the executors of said John S. Wright, with the interest coupons thereon, were just and valid claims in favor of said executors, and on June 14, 1877, said report was confirmed by the court, and said certificates and coupons allowed in favor of said executors.

The decree of the court of June 19, 1877, confirming the sale of said railroad to Swan, after reciting the payment by him of the sum of $80,000 part of his bid of $600,000, ordered and directed him to pay $30,000 of the residue within thirty days from the date of the decree of confirmation, $190,000, with interest thereon, on or before the first day of the then next term of the court, to wit, the fourth Monday of December, 1877, and the residue of his bid, to wit, $300,000, with interest, on or before the first Monday of June, 1878. The payment of the $30,000 installment was made according to the terms of the decree, but on December 17, 1877, on the application of Swan, the time for the payment of the installment of $190,000 was extended from the first to the last day of the December term, 1877. During said term,

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

to wit, on January 19, 1878, an order was made by the court suspending all further payments of the unpaid purchase money of said railroad until the fourth Monday of June then next following. By a subsequent order, dated June 20, 1878, the court extended the time for the payment of the residue of said bid of $600,000 to July 11, and on that day said residue was paid into the registry of the court.

On February 13, 1878, Swan applied to this court for leave to file a bill of review to reverse and annul so much of the decree of June 14, 1877, as confirmed the report of the master establishing the said certificates and allowing them to the executors of John S. Wright. The bill of review alleged that the complainant had, since said decree, discovered evidence which showed the invalidity of said certificates allowed to John S. Wright's executors, and it also charged, upon information and belief that said executors fraudulently concealed and withheld said evidence from the master and the court, and thereby procured the decree of the court establishing said certificates. The bill of review alleged that the complainant therein "had made no default, but had fully complied with the order and decrees of the court in respect to his said purchase, and that, by an existing order of the court, the payment of the said claim of said John S. Wright, as well as of other claims, was postponed to a future period, and remained so postponed." The court granted leave to file said bill of review, and it was accordingly filed on February 13, 1878.

On June 3, 1878, the defendants to the bill of review filed their answer, in which the objection was taken to the bill that the complainant had not complied with the terms of the decree which he sought by his bill to review. After the case was put at issue by replication, examiners were appointed by the court, and a large mass of testimony was taken. Neither before nor since July 11, 1878, the date on which the last indulgence for paying the purchase money of the road expired, had any interest been paid upon the certificates held by the executors of Wright. When the bill of review was filed on February 13, 1878, nearly $40,000 of interest was due on the certificates held by the defendants, and more than $10,000 interest had since accrued, and no part of these sums had been paid. The complainant had not given any security for the costs nor had he made any deposit of money to be applied to the costs, as required by the rules of the court.

On June 16, 1879, the defendants filed a motion to dismiss the bill on two grounds: (1) Because no security for costs had been given or deposit of money made, as required by the rules of the court; and, (2) because the complainant had not performed the decree of the court which his bill of review sought to reverse.

Peter Hamilton, T. A. Hamilton, Moorfield Storey, and E. L. Grandin, for the motion.

S. F. Rice and David Clopton, contra.

WOODS, Circuit Judge. This is the first time that the defendants have brought to the notice of the court the fact that no security for costs had been given by the complainant. The defendants have answered, the complainant has replied, and an immense mass of testimony has been taken at great cost and expense. The English rule on this subject of security for the costs is without question substantially the rule by which this court is to be governed. The fifth of Lord Bacon's ordinances provided that no bill of review should be put in except the party that preferred it entered into recognizances, with sureties, for satisfying costs and damages for the delay, if it was found against him. This provision being insufficient, by an order of March 12, 1700, it was ordered, for the future, that no bill of review should be allowed or admitted, except the party who preferred it first deposited the sum of £50 with the registrar of the court as a pledge to answer such costs and damages as the court should award to the adverse party, in case the court should think fit to dismiss the bill of review. 3 Daniell, Ch. Prac. 1730. But conceding this to be the rule of this court, yet if a bill of review is filed without security or deposit of money, and the defendant allows costs to accumulate without objection, he cannot have the bill dismissed on that account. The conduct of defendant is a waiver of his right to have the bill dismissed. The most he can claim is that complainant shall be ordered to give security within a given day, and in default thereof that then his bill be dismissed. Lavange v. Burke, 50 Ala. 61. The first ground of the motion to dismiss is, therefore, not well taken.

The second ground for the motion to dismiss is, that the complainant has not performed the decree. To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree, as if it be for land, that the possession be yielded, if it be for money, that the money be paid. 3 Daniell, Ch. Prac. 1730. And by the third and fourth of Lord Bacon's ordinances, no bill of review shall be admitted, or any other new bill, to change matter decreed, except the decree be first obeyed and performed. Mitf. Eq. Pl. (6th Am. Ed.) 106, note. And Lord Redesdale says: "It is a rule of the court that the bringing of a bill of review shall not prevent the execution of the decree impeached, and if money is directed to be paid before the bill of review is filed, it ought regularly to be paid before the bill of review is filed, though it afterwards be ordered to be refunded." Mitf. Eq. Pl. (6th Am. Ed.) 106. In Wiser v. Blachly, 2 Johns. Ch. 488, Chancellor Kent says: "The party asking for a bill of review must gen-

erally show that he has performed the decree, especially if it be a decree for the payment of money, and he must likewise pay the costs, and nothing will excuse the party from this duty but evidence of his inability to perform it. This appears to be a settled rule laid down in the ancient and modern books." In Partridge v. Usborne, 5 Eng. Ch. 195, the lord chancellor said: "Whatever the party is bound to do whenever the bill of review is put on file, that he must do before the bill is filed. But as the permission to file a bill of review is always given upon the assumption and implied understanding and engagement that the original decree shall be performed, I am also of opinion that if, after the bill is filed, the period arrives when money ought to be paid, it is incumbent on the party to pay that money. Otherwise an application to dismiss the bill may be made on that ground, he having filed the bill upon an engagement and understanding which he has failed to comply with." In the case of Williams v. Mellish, 1 Vern. 117, a motion was made on behalf of the plaintiff, that proceedings might be stayed on a decree until the plaintiff was heard on a bill of review. But the lord keeper said: "In this case the decree shall be performed to a tittle before any bill of review be allowed, unless the plaintiff Williams will swear himself not able to perform the decree, and will surrender himself to the fleet, to lie in prison till the matter be determined on the bill of review." See, also, on this subject, the following cases: Anon., 12 Mod. 343; Bishop of Durham v. Liddell, 2 Brown, Parl. Cas. 63; Wiser v. Blachly, 2 Johns. Ch. 488; 2 Smith, Ch. Prac. (2d Am. Ed.) 53.

These authorities apply not only to bills of review, strictly so-called, but to all bills in the nature of bills of review, which seek to disturb decrees of the court already rendered: Bacon's Ordinances, 3 and 4, supra. Has the complainant in the bill of review performed the decree? This question can only be answered by inquiring what the decree required him to do The property which the complainant purchased was sold to him for a fixed sum, and subject to the lien of such receiver's certificates as should be allowed by the court, and other claims superior to the first mortgage bonds. The fixed sum, namely, $600,000, and the liens superior to the first mortgage bonds, including receiver's certificates, principal and interest, constituted the purchase money. The decree of the court contemplated the payment of the interest as it fell due on the receiver's certificates, as much as it did the payment of the bid of $600,000. If the purchaser was not bound to pay the interest on the receiver's certificates as it fell due, then the question occurs, when was he bound to pay the interest? His obligation, under the decree of the court, was duly to pay his bid, $600,000, in the installments fixed by the court, and to pay such interest coupons as were due and not extinguished by the $600,000, and to pay the coupons not due as they fell due. The complainant himself has put this construction upon the decrees of the court, and his obligations thereunder. In the fourteenth paragraph of his bill he states that he has made no default in complying with the order or decrees of the said circuit court, in respect to his said purchase, * * * and that by an existing order of said court, made during the present term, * * * the payment of the said claims of John S. Wright, as well as of other claims, was postponed to a future period. The order referred to here was that made January 29, 1878, "that any and all payments of the unpaid purchase money arising out of said purchase of petitioner Swan, be and the same is hereby suspended and postponed until the fourth Monday of the next regular term of this court."

It is, therefore, evident that the complainant himself considered the certificates of Wright a part of the purchase price of the railroad, and that it was his duty, under the decrees of the court, to pay the interest thereon as it accrued, for he claimed that the order of the court just quoted was effectual to prolong the time for the payment of the claim of Wright. When, therefore, Swan applied to the court, on January 22, 1878, that all further payment of the unpaid part of the purchase money, under said purchase of said Swan, might be stayed and postponed till the further order of the court, he asked to have the payment of the past due coupons on Wright's certificates postponed. If the claim of Wright was not then payable by the terms of the decree of the court, there was no propriety in asking the court to postpone its payment. The undoubted purpose of the order of January 29, 1878, was to postpone the payment of all sums which, by the decree of the court, were then due from Swan on his purchase. His petition for postponement represented that, by a bill filed in the United States circuit court for the Northern district of Alabama, a mortgage lien superior to the mortgage lien by virtue of which the sale had been made, was set up against said railroad which he had purchased. The purpose of the postponement of payments prayed for in his petition was, that he might ultimately be relieved from his purchase, in case the prior lien set up in said bill should prevail. It was, therefore, just as important that he should be relieved from the present payment of past due coupons on the receiver's certificates, which at that time amounted to about $400,000, as from the unpaid balance of his bid, which was only $300,000. It may, therefore, be assumed that the order of January 29, 1878, and the subsequent orders on the same subject, heretofore mentioned, postponed until July 11, 1878, the payment of all sums due and payable by Swan on his purchase, whether due on his bid or due on coupons attached to the receiver's certificates. That was what Swan asked for, and that was what the court granted him. When, therefore, on February 13,

1878, in his petition for leave to file his bill of review, he stated that he had performed up to that time all things required of him by the orders and decrees of the court, he stated, so far as appears, what was the truth, and upon that statement the court allowed the bill of review to be filed.

Therefore, when the defendants, in their answer filed June 3, 1878, set up, as a defense to the bill of review, that the complainant therein had not obeyed and performed the decree of the court, their allegation was not sustained by the facts of the case. But on July 11, 1878, the indulgence granted by the court to Swan expired. The entire residue of his bid was then due and he paid it. But it was just as incumbent on Swan to pay on that day the past due interest on the receiver's certificates, as the residue of his bid. The orders and decrees of the court required it. The grace which he had asked from the court for the payment of this interest, including the coupons belonging to Wright's certificates, had expired. He had no warrant for another day's delay. Yet, up to this time, although there is $50,000 of interest due on the certificates held by the defendants, it is not pretended that he has paid them one cent. His failure to pay is a contemptuous disregard of the orders and decrees of this court. In the mean time, the bill setting up a prior lien on the railroad property has been dismissed; he is in the undisturbed possession and enjoyment of the railroad, and he still prosecutes his bill of review, without any pretense of compliance with the decree of the court which he seeks to review. It is no excuse that the railroad property on which his certificates are a lien is ample security for the performance of the decree. These defendants are entitled to something more than security. They are entitled to the absolute and unconditional performance of the decree. After, as in this case, the court has deliberately settled the rights of the parties by its decree, the operation of the decree cannot be suspended by the filing of a bill of review, either with or without leave.

The complainant was allowed to file his bill of review on the assumption that he would perform the decree, unless relieved from performance by the orders of the court. If, after the bill of review is filed, the period arrives when money ought to be paid, it is incumbent on the party to pay that money, otherwise an application to dismiss the bill may be made, he having filed the bill upon an engagement and understanding which he has failed to comply with. Partridge v. Usborne, supra. This is the first time since the complainant has been in default that the fact has been brought to the attention of the court. The defendants are now entitled to require the complainant to give security for costs, and to perform so much of the decree as it was his duty to perform up to this time. But he is not, under the circumstances, entitled to a peremptory order of dismissal. The complainant should be allowed a reasonable time to discharge the duty required of him.

The final hearing of this case having been heretofore fixed for October next, the order of the court will be that, unless by that time the complainant gives security for the costs, and pays to the defendants all coupons which at that date shall be past due on the certificates held by them, his bill of review shall be dismissed out of this court.

[On final hearing the bill was dismissed, and on appeal to the supreme court that decree was affirmed. 110 U. S. 590, 4 Sup. Ct. 235.]

SWAN, The THOMAS. See Case No. 13,931.

Case No. 13,671.

SWANN v. ALEXANDRIA CANAL CO.

[1 Hayw. & H. 163.] [1]

Circuit Court, District of Columbia. Jan. 17, 1844.[2]

ARBITRATION AND AWARD—APPOINTMENT OF UMPIRE—WHEN HE MAY BE APPOINTED.

Where the order of reference provides for the appointment of an umpire, he may be appointed before the referees had heard the evidence and discovered that they could not agree.

W. Jones and Swann & Swann, for plaintiff.

Thomas Semmes and Richard S. Coxe, for defendant.

At law. The plaintiff [Francis Swann] brought suit in Alexandria county against the defendant [the Alexandria Canal Company] in the sum of $15,000, for damages sustained by her in taking away the soil from the close of said plaintiff. The pleas of the defendants were: (1) Not guilty. (2) The statute of limitations; viz., not guilty within five years. (3) Confession and avoidance; special plea under the charter. A change of venue under the act of congress of June 24, 1812 [2 Stat. 755], was asked for and obtained by the plaintiff, and the suit was ordered to be tried at Washington county. The plaintiff, by her counsel, joined issue on the first and second pleas and demurred to the third. Judgment was entered for the plaintiff on the demurrer. An amended declaration was filed, differing from the original, in setting out the abuttals, to which defendants pleaded not guilty, upon which issue was joined. A jury was duly sworn to try the issue, and with the consent of the counsel for the several parties a juror was withdrawn. The whole matter in controversy was by consent referred to arbitration and award.

Upon the following terms being agreed to a rule of the court was made in pursuance thereof: "To value the entire damage to the

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

[2] [Affirmed in 5 How. (46 U. S.) 83.]

freehold from the first entry of the canal company on the premises in question to the time of the arbitration. The damage from the disturbances, if any, to the proprietors of the said premises, and interruption to the cultivation of the land from the operations of the company or their laborers and agents on the premises during all the time aforesaid. To value the land acquired by the company for permanent occupation, of which a precise description and survey by metes and bounds shall be furnished to the arbitrators. The award of the arbitrators, or major part of them, to be returned during the next session of this court, and made the judgment of the court for the whole sum awarded, for such damage and value of the land as aforesaid as if a verdict for so much had been found in this action. Upon payment of such judgment, the plaintiff agrees to give defendants a deed of conveyance for the land so set apart for the permanent occupation of the defendants. To be referred to four arbitrators, with power to the arbitrators to appoint an umpire in case the arbitrators or a majority of them cannot agree on any point or points in controversy, and the umpirage of such umpire to be confined to such point or points of difference, and his umpirage to constitute a part of the said award. The said arbitrators shall be appointed on or before the 10th of January next, and shall be appointed as follows: Each of the parties shall produce to the other a list of ten persons, none of whom shall be stockholders, or officers, or servants, or agents of the said company, nor proprietors of lands having any unsettled controversy with the said company for damages to their freehold or value of land taken by the company; out of the list so produced by defendants, the plaintiff shall choose two of the arbitrators; and out of the list so produced by plaintiff, the defendants shall choose the other two; and the four so chosen shall constitute the four arbitrators aforesaid. A reference and arbitration upon the principles and conditions aforesaid shall be entered in due form as a rule of court on or before the said 10th of January, 1843. [Signed] Wm. Jones, for the Plaintiff. Thomes Semmes, for the Defendants. December 27, 1842."

The plaintiff selected Dennis Johnston and Wm. L. Powell from the list furnished by the defendants. The defendants selected Thomas Carberry and Peter Force from the list furnished by the plaintiff. Before entering upon an examination of the case, Maynadier Mason was chosen umpire at a meeting of the arbitrators, June 26, 1843. The arbitrators were equally divided in opinion, two of them agreeing in one award and the other two agreeing in a different award.

The following is the award agreed upon by two of the arbitrators: "First. Of the sum of money to be assessed and awarded to the plaintiff for the entire damage to the freehold in question from the first entry of the said canal company on the premises in question to the time of said arbitration. Second. Of the sum of money to be assessed to the plaintiff for the damages from the disturbances to the proprietors of the said premises, and interruptions to the cultivation of the same from the operations of the said company or their laborers and agents on the said premises during all the time aforesaid. Third. Of the sum of money to be assessed and awarded to the plaintiff for the value of the land required by the said company for their permanent occupation, of which a precise description or survey was furnished to and laid before the said arbitrators by the defendant, pursuant to the requirements of the said reference and submission. [Signed] Thomas Carberry. Peter Force. August 12, 1843."

The other two refused to attend the last meeting, although notified, and refused to sign an account of the proceeding of the arbitrators that such account could be returned to the court. The umpire appointed by the several arbitrators made the following umpirage and award agreed to by the arbitrators Carberry and Force. On the first point of difference, $3,468.75, and interest at 6 per cent. for ten years on $1,500. On the second point of difference, $1,000 and interest at 6 per cent. for ten years. On the third point of difference, $1,000. A rule was filed on the defendants to show cause why judgment should not be entered on said umpirage and award. Judgment being entered on the said umpirage and award for $6,968.75, a motion was made to strike out said judgment, but was withdrawn.

A writ of error was sent to the supreme court of the United States on the transcript of the record, where the judgment was affirmed. 5 How. [46 U. S.] 83.

SWANN (BANK OF ALEXANDRIA v.). See Case No. 853.

SWANN (BANK OF METROPOLIS v.). See Case No. 902.

SWANN (BANK OF UNITED STATES v.). See Case No. 937.

SWANN (BEARDSLEY v.). See Case No. 1,187.

Case No. 13,672.

SWANN v. BOWIE.

[2 Cranch, C. C. 221.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

DAMAGES—EXCESSIVE—ACTION FOR VALUE OF DOG KILLED—SPECIAL VERDICT—JUSTIFICATION—CITY ORDINANCE.

1. In cases of tort, courts have seldom granted new trials on the ground of excessive damages, unless they were so excessive as to imply gross partiality, or corruption, on the part of the jury.

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

2. Upon a special verdict in an action of trespass for killing the plaintiff's dog by a constable who justifies under the by-law of the corporation of Alexandria, of the 28th of April, 1811, the court cannot render judgment for the defendant, unless the jury expressly find that the dog was "found going at large within the limits of the corporation without his owner."

Trespass, that the defendant [Davis Bowie], on the —— day of June, 1819, at the county aforesaid, with force and arms, that is to say with a gun loaded with powder and lead, did break and enter the close of the plaintiff [Thomas Swann], and did then and there shoot into the garden of the plaintiff, and did then and there kill the dog of the plaintiff of the value of one hundred dollars and other wrongs did, &c.; damage, $500. The defendant pleaded not guilty, with leave to give special matter of justification in evidence. The jury found a special verdict, stating that on the 15th of June, 1819, the plaintiff was owner of a dog, named Beaver; that the plaintiff resided and kept the said dog in the town of Alexandria, and within the limits of the jurisdiction of the common council of said town; that on that day the defendant was a constable duly appointed. They found also the charter of the said town of 1779, the act of congress of the 25th of February, 1804 (2 Stat. 255), to amend the charter, and the several by-laws of the corporation authorizing the killing of dogs; by one of which, passed on the 28th of April, 1811, it was enacted, "that it shall be lawful for any person, and shall particularly be the duty of the constable, to kill and destroy any dog found going at large within the limits of the corporation without his owner, between the first day of April, in each year, and the first day of October." That on the said 15th day of June, the plaintiff's said dog then being found upon the foot pavement in one of the public streets of the town of Alexandria, within the jurisdiction of the common council, was shot by the defendant and killed. That the said dog, at the time he was shot and killed, and for a long time before regularly watched in the plaintiff's stable, and attended upon the hostler; and had been in the regular habit of walking from the said stable, which fronted on the street, along the foot pavement, and by the side of the plaintiff's garden paling, through a gate into the plaintiff's yard and kitchen; and that there was no other path or open access from the said stable into the plaintiff's yard; that the said stable is about 120 feet distant from the said gate, which opens through the paling into the yard on the same side of the street with the stable, and is the nearest open access from the stable into the said yard and kitchen; that the dog was uncommonly domestic and harmless in his disposition, and in good health and condition at the time of being shot and killed as aforesaid, and was at that time peaceably pursuing his accustomed and daily route, before sunrise in the morning, from the said stable along the paved footway in the street, and close along the plaintiff's said garden paling, to the said gate; and was there shot and killed aforesaid; that the defendant at the time of discharging the gun by which he so shot and killed the said dog, placed himself in such a position, and so pointed his gun that the shot from the same would necessarily and obviously strike against the plaintiff's said garden paling, and did in fact so strike against the said palings and penetrate through the same into the said garden; that the said foot pavement, whereon the said dog was shot as aforesaid, is a part of the public street, but is separated from the public carriage way and horse way, by a curbstone, and is paved with brick for the accommodation of foot passengers; and that the whole expense of making the said foot pavement, and laying such curbstone, along the whole front of the plaintiff's lot, was, pursuant to the by-laws and regulations of the said corporation, paid by the plaintiff. "If upon the matter found as aforesaid the court shall be of opinion that the defendant was not, in law, justified in shooting the said dog, in the circumstances aforesaid, then we find for the plaintiff and assess his damages to the sum of two hundred and seventy-five dollars. And if the defendant was justified, in law, in so shooting and killing the said dog; but is liable to the plaintiff, in this action, for shooting into his fence and garden, we find for the plaintiff and assess his damages, for the last-mentioned act, to the sum of two hundred dollars; and if the law be for the defendant on both of the grounds of action stated in the declaration, and before mentioned, then we find for the defendant."

Mr. Taylor, for defendant, moved for a new trial, on the ground of the damages being excessive.

Mr. Fendall and Mr. Swann, contrà, cited Duberley v. Gunning, 4 Term R. 651; Beardmore v. Carrington, 2 Wils. 249; 9 Johns. 52; Tidd, Prac. 93, 818.

In the argument upon the special verdict, it was contended by the plaintiff's counsel that the corporation had no authority to make the by-law of the 28th of April, 1811; and that, if they had, and if the defendant had a lawful right to kill the dog, yet the manner of doing it was unlawful and made the defendant a trespasser ab initio.

CRANCH, Chief Judge. A motion has been made, in this cause, for a new trial on the ground of excessive damages. In cases of tort, courts have seldom granted new trials unless the damages are so excessive as to imply gross partiality or corruption on the part of the jury. This is not a case of that kind; and although the court should think the damages unreasonable (which however we do not say), yet we should not be

justified by precedent in setting aside the verdict on that ground. In the argument upon the special verdict, it has been contended: (1) That the corporation of Alexandria had no authority to make the by-law under which the defendant attempts to justify the act. (2) That if they had, the justification under that by-law is not made out in point of fact; that is to say, it does not appear, by the special verdict, that the dog was "found going at large, within the limits of the corporation, without his owner." And, (3) that if the dog was in a situation in which he might be lawfully killed by the defendant, yet the manner and means of killing, were unlawful, and therefore the defendant must be considered, in law, a trespasser ab initio.

As the opinion of the court upon the second point is in favor of the plaintiff, it will be unnecessary to decide the other two. The special verdict does not find that the dog had not such a collar as is required by the by-law of the 24th of September, 1804; so that the defendant cannot justify under that law. The only by-law under which he can claim a justification is that of the 28th of April, 1811, which enacts, "that it shall be lawful for any person, and shall particularly be the duty of the constables to kill and destroy any dog going at large, within the limits of the corporation, without his owner, between the first day of April, in each year, and the first day of October." The special verdict does not find that the dog was "found going at large without his owner." We do not suppose it necessary that the jury should have found the fact in so many words, but in order to justify the defendant they must have found facts which, in law, amount to the same thing. They find only that the dog, "being found upon the foot pavement in one of the public streets of the town," "was shot by the defendant and killed," "and that he was, at the time of his being so shot and killed, peaceably pursuing his accustomed and daily route from the said stable along the paved footway in the street, and close along the plaintiff's said garden paling to the said gate." All this may be true, and yet the dog might not be going at large without his master. He might have been led by a string by a servant, or he might have been with his master. The court can infer no fact from the facts found; and the facts found do not amount, in law, to the facts required by the by-law in order to justify the defendant. As this view of the case seems to be very clear and decisive of the cause, we abstain from giving any opinion upon the other points made in the argument

Judgment. THE COURT, having heard the arguments of counsel upon the special verdict found in this cause, and the same being considered, THE COURT is of opinion, that inasmuch as the jury have not found that the dog in the declaration mentioned, was, at the time of the defendant's killing him, found going at large without his master, within the meaning of the by-law of the 28th of April, 1811, in the said special verdict recited, the defendant was not, in law, justified in shooting and killing the said dog, in the circumstances stated in the said special verdict. Whereupon it is considered by the court that the plaintiff recover of the defendant the sum of $275 so as aforesaid assessed by the jury as his damages, and —— for his costs about his suit in this behalf expended.

Case No. 13,673.

SWANN et al. v. BROWN.

[4 Cranch, C. C. 247.] [1]

Circuit Court, District of Columbia. Oct. Term, 1832.[2]

USURY—VIRGINIA STATUTE—EQUITABLE JURISDICTION.

Under the third section of the Virginia statute of usury, every debtor has a right to go into equity, alleging usury, whether he can or cannot prove it without the aid of the defendant's answer, and although judgment at law may have been rendered against him.

Bill in equity, stating that William T. Swann, in October, 1819, proposed to borrow of the defendant, $2,300, at ten per cent. per annum, which proposition was acceded to by the defendant; and it was agreed that $1,000 of it should be secured by a ground rent of $152 per annum upon, two lots of land, &c., and that the residue should be secured by a bond, with sureties; the rent and interest to be paid half-yearly, with leave to W. T. Swann to redeem the ground rent on payment of $1,000. He was to retain the loan for three years, but she had a right to demand repayment at the end of any year, upon sixty days' notice; and had a right to enter on the property, if the interest and rent were not punctually paid. That the $2,300 were advanced on those terms. The lots were conveyed to her in fee, and she leased them to W. T. Swann at $152 a year, who also gave his bond for $1,300, according to the agreement, bearing interest at six per cent. per annum. That W. T. Swann died in October, 1830. That $1,400.30 have been paid by W. T. Swann and his administratrix. That the defendant afterward brought suits at law on the bond against this complainant and the sureties. That those defendants were advised that the contract was usurious, and that if they took the defence at law, and should succeed, the present defendant would lose the debt entirely; but they were not disposed to push the matter to that extremity; and the counsel of these complainants agreed with the counsel of the present defendant at the bar, at the time the judgment was rendered, and in the presence and hearing of the court, that the plea of usury should be withdrawn, and a judgment rendered upon the bond, with an

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

[2] [Reversed in 10 Pet. (35 U. S.) 497.]

understanding that these complainants should have the privilege of resorting to a court of equity to have the claim settled, upon the same principles as if she had instituted against the defendant, a bill in chancery for the discovery of the usury. That they have been advised that they are not bound in equity to pay more than the principal debt, and are entitled to have credit for the moneys which the administratrix has paid, to be deducted out of the sum of $2,300 loaned as aforesaid, and only bound to pay the balance of principal; but that the defendant has issued execution for the whole amount of the bond and interest thereon, &c. Wherefore the complainants pray injunction, &c. The injunction was granted, but was dissolved as to $849.70, being the balance of the principal after deducting all payments, and $50 for the supposed costs of this suit. The defendant demurred to the bill, and answered, admitting the agreement, but denying that it was usurious.

At April term, 1828, the cause came on to be heard upon the demurrer, and was argued by Mr. Jones, for the defendant, and Mr. Taylor, for the complainants, who cited the case of Young v. Scott, 4 Rand. [Va.] 415, in which the court of appeals in Virginia, in 1826, decided that every debtor has a right to go into equity, under the third section of the Virginia statute of usury, whether he can or cannot prove the usury without aid of the defendant's answer; and that, in all cases of usury, the court of equity, if it give relief at all, will give that pointed out by the statute; that is, will oblige the creditor to accept his principal without any interest.

Upon the authority of that case, the judges were of opinion that this court, as a court of equity, has jurisdiction of this cause, by virtue of the third section of the Virginia statute of usury of November 23, 1796 (page 367), and that the defendant is bound to answer the allegations charging the usury; although the complainants have not stated in their bill that they cannot prove the usury without the aid of the defendant's answer, and although judgment has been rendered at law. That the demurrers, therefore, must be overruled, so far as they proceed upon those grounds. The plaintiffs had leave to amend their bill; and the injunction, which had been dissolved, was reinstated, as to all but the sum of $899.70.

The third section of the Virginia statute of usury is in these words: "Any borrower of money or goods may exhibit a bill in chancery against the lender, and compel him to discover, upon oath, the money or thing really lent, and all contracts, bargains, or shifts which shall have passed between them, relative to such loan, or the repayment thereof, and the interest and consideration for the same; and if, thereupon, it shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without interest or consideration, and pay costs, but shall be discharged of all other penalties of this act."

The cause having been continued to the present term, was now, by consent, set for hearing, on the bill, supplemental bill, answer, general replication, and demurrer to the supplemental bill and evidence, and having been heard and argued by counsel,

CRANCH, Chief Judge, delivered the opinion of the court as follows: The supplemental bill does not substantially differ from the original bill; but it is somewhat more formal and pointed in its allegations; and it refers to the original agreement signed by Mr. W. T. Swann, and the defendant, which is referred to in an affidavit of Gustavus B. Alexander, and is admitted in the defendant's answer as constituting the original agreement. That the bond in question was executed in pursuance of that agreement, is apparent by comparing them with each other. That the original agreement thus confessed in the answer, was usurious, is apparent on its face. The bond, therefore, is affected, or infected by that usury.

The only question remaining, is, whether this court, as a court of chancery, or a court of equity, can now give relief. That point was decided by this court upon the former demurrer, which embraced all the causes of demurrer which are now urged. That decision we believe to be fully warranted, by the judgment of the court of appeals of Virginia, in the case of Young v. Scott, 4 Rand. [Va.] 415, which case embraces and decides every point of demurrer made in this. In one particular, this case is stronger for the complainants than that; because, in that case, a judgment at law had been rendered without any reservation of equity; a forthcoming bond had been given, upon an execution issued upon that judgment; the forthcoming bond had been forfeited, and a judgment rendered upon it, without reservation of equity. Whereas, in the present case, the judgment was confessed, with a saving of the defendant's equity; meaning thereby, no doubt, the defendant's right to apply to a court of equity for the relief given by the statute, as well as relief upon any original equity of which they could not have availed themselves at law. As the case is clearly made out in favor of the complainants, without resorting to evidence beyond the written contract, the answer and the bond upon which the judgment at law was rendered, we have not looked into the affidavits of the Alexanders, and therefore give no opinion as to their competency as witnesses, or the competency of the matter of the affidavits. We think the injunction ought to be perpetual, and that the complainants are, under the statute, entitled to costs.

Decree accordingly, nem. con.

NOTE. Reversed by the supreme court of the United States (10 Pet. [35 U. S.] 497), who

do not seem to have noticed the case of Young v. Scott, 4 Rand. [Va.] 415, upon the authority of which case, this court decided the cause.

SWANN (COMMON COUNCIL v.). See Case No. 3,066.

SWANN (RIGGS v.). See Case No. 11,831.

Case No. 13,674.

SWANN v. RINGGOLD.

[4 Cranch, C. C. 238.] [1]

Circuit Court, District of Columbia. Oct. Term, 1832.

MARSHAL—POUNDAGE—DISCHARGE WITHOUT PAYMENT.

The marshal of the District of Columbia is not entitled to poundage, upon the arrest of a debtor on a ca. sa. in Alexandria county, who has been discharged from such arrest, by order of the plaintiff, without payment.

[Cited in The Clintonia, 11 Fed. 742.]

[This was an action by W. T. Swann's administratrix against Tench Ringgold, marshal of the District of Columbia.]

At April term, 1829, a rule was obtained by William T. Swann's administratrix, on the marshal, to show cause, on the 9th of May following, why he should not refund to her the sum of $47.53, received by him, from her, for commissions included in a prison-bounds bond, by him taken under a writ of ca. sa., in her favor, against G. A. Brown; or so much of the said sum of $47.53, as exceeds the fees allowed by law for the service of the said writ, and for taking the said bond, upon the following case agreed. "On the 13th of April, 1826, William T. Swann's administratrix issued a ca. sa. against G. A. Brown, returnable on the fourth Monday in June following, which was served on Brown, who gave a prison-bounds bond to the marshal." Before the expiration of the term limited in the prison-bounds bond, the plaintiff gave the marshal the following written order: "The marshal will discharge G. A. Brown, and deliver to him his bounds-bond, as he has made a settlement of his case with me." That the settlement alluded to in the order to the marshal, consisted in Mr. Brown's allowing the administratrix to set off a judgment which he had obtained against her for $450.37, with interest from the 27th of April, 1824, and $11.22, costs against the judgment which she had obtained against him for a larger sum; and to secure the balance due to her, he gave her a deed of trust on some lands in Virginia, which security she still holds; but the lands are wholly insufficient to satisfy the balance due to her; and that she has received no benefit from the arrangement, except the discharge of Mr. Brown's judgment against her. That, in making the arrangement, she was not deceived as to the value of the lands. The original judgment of W. T. Swann's Administratrix v. Brown, was for $3,316.66, with 4 per cent. interest from the 1st of April, 1817, and costs, to be released except costs, by payment of $1,525.76, with interest thereon from the 16th of October, 1820, at 4 per cent. per annum, till paid. The condition of the prison-bounds bond was, that the defendant would not depart, &c. The marshal calculated the amount due upon the ca. sa., as follows:

Debt	$1,525 76
Interest	337 26
Costs	13 86
Marshal's fees	47 53
	$1,924 41

The case, thus stated, was argued by Mr. Hewitt, for the marshal, and by Mr. Taylor, for Mrs. Swann, who contended that the marshal was not entitled to a commission of any kind, upon the amount due upon the ca. sa. at the time of the service of it upon Mr. Brown.

The COURT, at a previous term, having adjourned the case, for consideration, and requested information as to the practice in Virginia, sundry letters from gentlemen of the bar, and from sheriffs and clerks in Virginia, were laid before the court, from which it appears that there is no settled practice in that state, upon such a case as the present. It seems, however, to be the practice for the sheriff to receive his full commissions, if the plaintiff receives his whole debt, and discharges the defendant from custody, on the ca. sa. And to receive no commissions if the defendant be discharged under the insolvent law, except upon the sale of the effects which may be surrendered by the debtor.

CRANCH, Chief Judge. By the act of congress of the 3d of March, 1807 (2 Stat. 430), the marshal of the District of Columbia is to receive, for the service of any writ, 50 cents only for each person on whom served; and for taking any bond required by law, 50 cents only; and for such services as were not enumerated in that, or some other act of congress, he is to receive the like fees and compensation, if performed in Alexandria county, as by the laws of Virginia, in force on the first Monday of December, 1800, were allowed to a sheriff of a county, for the like services. By the act of congress of the 28th of February, 1799 (1 Stat. 624), the marshal was allowed, "for sales of vessels, or other property, and for receiving and paying the money, for any sum under $500, 2½ per cent.; for any larger sum, 1 and ¼ per cent. upon the excess." No other commission or poundage was expressly given by any other act of congress. It is, however, by the same act provided, that, "for all other services not therein enumerated, (except as should be thereafter provided,) such fees and compensations as are allowed in the supreme court

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

in the state where such services are rendered." But a commission or poundage fee upon a ca. sa., whether the money was paid to the plaintiff or not, was not expressly given. The reference to the fees and compensation allowed in the state courts, is only to fees and compensation for services not enumerated in some act of congress. The service of arresting the defendant, and of taking the bond, are enumerated in the act of 1807, and the services of committing him to prison, and of discharging him, are enumerated in the act of 1799. The services, therefore, of arresting and committing the defendant, taking the prison-bounds bond, and discharging him, are all enumerated services. What service, then, remains to be performed by a sheriff, under a ca. sa., the compensation for which is to be ascertained by reference to the laws of Virginia? Nothing but the fee of 21 cents a day for keeping and providing for a debtor in jail. The only commission or poundage given by the act of Virginia of 1792, is for a service which cannot be performed under a ca. sa., namely: "For proceeding to sell on any execution, if the property be actually sold, or the debt paid, the commission of 5 per centum on the first three hundred dollars, or ten thousand pounds of tobacco, and two per centum on all sums above that; and one half such commission where he shall have proceeded to sale, and the defendant shall have replevied; and no other commission, fee, or reward, shall be allowed upon any execution, except for the expense of removing and keeping the property taken." The act of the 10th of December, 1793, § 33. (page 302,) gives the same commission in precisely the same words, with the same denial of all other commission, fee, or reward upon "any execution."

It is evident, from the purport of these sections, that they refer only to executions upon which property may be taken and sold, and not to a writ of ca. sa., upon which property cannot be taken. So, also, in the 12th section of the act of December 10, 1793, respecting executions, it is enacted, that, "on all executions," "the sheriff, or other officer, having published notice of the time and place of sale," &c., "at least ten days before such sale, shall proceed to sell by auction the goods or chattels so taken," &c. And the 13th section provides for taking a forthcoming bond, "reciting the service of such execution, and the amount of money or tobacco due thereon, and with condition to have the goods forthcoming at the day of sale," &c. By the 22d section of the same act, it is provided, that if goods taken in execution will not sell for three fourths of their value, the debtor may give a bond, with surety, to pay the amount within twelve months. A similar provision had been made by the act of 1787, c. 7, § 3. These bonds are called replevy bonds; and, upon giving them, the property is said to be replevied. This provision, however, was repealed by the act of December 17, 1795, p. 341. But it explains the term "replevied," in the act of 1792. By the 32d section of the act of December 10, 1793, also, it is enacted, that "when the sheriff shall, under any execution, have fixed the time and place for the sale of the property taken under such execution," &c. In all these instances, the legislature, although adopting the terms "any execution," or "all executions," seem to have used them only in reference to writs of fieri facias; if so, they give no authority to the sheriff to take a commission or poundage upon a ca. sa.; yet it is admitted that the practice of the sheriff is to take a commission if he arrest the defendant on a ca. sa., and the plaintiff receives his debt. By what law is this practice justified? By the 29th section of the act of December 10, 1793, the debtor, taken on a ca. sa., may tender property, in discharge of his person, and the sheriff is to sell the property as if taken on a fieri facias. Under this section, it is understood to be the practice for the debtor who has thus discharged his body by tendering goods, to give a forthcoming bond, under the 13th section of the same act, in the same manner as if the goods had been taken under a writ of fieri facias; which bond recites the service of the execution, and the amount due thereon, including the sheriff's commission, in the same manner as in a bond for the forthcoming of goods taken under a fieri facias, according to the 11th section of the act of December 24, 1794, concerning executions (page 326,) which enacts, "that every sheriff or coroner may include his commissions in forthcoming and replevy bonds, taken on any writ of execution; but he shall not demand or receive such commissions on forthcoming bonds unless the same shall be forfeited." The condition of the bond, required by the act, is, simply that the goods shall be forthcoming on the day of sale. But, it seems, by the language of the section, that the bond may be discharged by the payment of the debt and costs mentioned in the execution; and such was also the purport of the act of 1726, § 17. If the property be forthcoming at the day, the sheriff proceeds to sell, and is, then, only entitled to a commission on the amount of sales. The recital of the commission in the bond is then of no avail, because the bond is not forfeited. But if the bond be forfeited, the judgment upon it includes the commission recited in the bond. But, in the present case, no forthcoming bond was given. The debtor was committed and discharged by order of the creditor, after giving a prisonbounds bond, which, however, does not alter the law of the case, for the bond was only a substitute for the walls of the prison.

There is no statute of Virginia, in force in this district, or any act of congress which expressly gives the marshal a right to a commission upon service of a ca. sa. in any case upon a judgment rendered in Alexan-

dria county How, then, did the practice originate, which allows the marshal a commission upon service of a ca. sa., if the debt be paid? At common law the sheriff was not entitled to any fee for doing his duty; but was to be paid by the king. Walden v. Vessey, Latch, 17, Palmer, 399, Poph. 173; Woodgate v. Knatchbull, 2 Term R. 148. But it appears by the statute of 3 Edw. I., c. 26, which prohibits the sheriff from taking any reward for doing his office, that sheriffs had demanded rewards from individuals; and it appears from 29 Eliz. c. 4, which limits their fees, and which is entitled "An act to prevent extortion in sheriffs," &c., "in cases of execution," that they continued to demand a reward, notwithstanding the prohibition in the statute of Edward. By the statute of 29 Eliz. c. 4, it is enacted, "that it shall not be lawful," "for any sheriff," &c., "by reason or color of their office, to have, receive, or take of any person or persons whatsoever, for the serving and executing of any extent or execution, upon the body, lands, goods, or chattels of any person, more or other consideration of recompense, than in this present act is, and shall be, limited and appointed, which shall be lawful to be had, received, and taken, that is to say 12d. for every 20s. where the sum exceedeth not £100, and 6d. of and for every 20s. being over and above the said £100, that he or they shall so levy and extend and deliver in execution, or take the body in execution for, by virtue or force of any such extent or execution." The statute of 23 Hen VI. c. 9, gives the sheriff a fee of 20d. for an arrest, and 4d. for the bailiff, and 4d. for the gaoler, if committed. These statutes were in force in England at the time of the first settlement of Virginia; they ought, therefore, to be borne in mind in considering the legislation of that state upon this subject. It was early decided under the statute of Elizabeth, that the sheriff was entitled to his poundage upon a ca. sa. as soon as he had arrested and committed the defendant, and could recover it of the plaintiff in an action of debt. This was well understood to be the law in England when the legislature of Virginia, in 1642, passed their law for ascertaining the fees of sheriffs and other officers; by which it was enacted, "that the sheriff's fees shall be as followeth: For an arrest, 10 lbs. tobacco. For bond-taking, 10 lbs. tobacco. Going to prison, 10 lbs. tobacco. For serving an execution under 100 lbs. tobacco, 10 lbs. tobacco. If above 100 to 500 lbs. tobacco, 20 lbs. tobacco. If above 500 to 1,000 lbs. tobacco, 40 lbs. tobacco. If unto 2,000 lbs. tobacco, 60 lbs. tobacco. If above 2,000, then 10 lbs. upon every 1,000. For attachment half as much as for execution and accordingly." These fees were reënacted, in nearly the same words, in 1657, 1661, and 1671. By the act of April, 1718 (4 Hen. St. 72), the sheriff's fees were: "For arrest, bond, and return, 30 lbs. tobacco. For putting into prison and releasement, 20 lbs. tobacco. For serving executions for any debt due in tobacco, 5 per cent. for the first 1,000l. and 2 per cent. for all above 1,000l. For serving attachment on goods where they shall be appraised and delivered to the plaintiffs, the same fees as on executions; but when not appraised, 15 lbs. tobacco. For serving attachment upon the body and bond, 20 lbs. tobacco. For keeping and providing for a person in gaol, each day, 10 lbs. tobacco." By the act of 1732 (4 Hen. St. 348), the sheriff's fee for arrest, &c., is the same as in the former laws; but the fee for serving executions is thus expressed: "For serving an execution for any debt due in tobacco, 5 per cent. for the first 1,000 pounds, and 2 per cent. for all above 1 000 pounds. Due in money 5 per cent. for the first 100 pounds, and 2 per cent. for all above 100 pounds." These fees were reënacted, in nearly the same words, by the acts of 1734, 1735, and 1745, and so continued until the year 1788.

It is worthy of observation, that the editor of the edition of the Virginia Laws, published in 1769, in a note to that part of the fee-bill of 1745, which gives the poundage fee upon the service of an execution, refers to the statute of 1764, c. 6, § 8, which prohibits sheriffs from taking commissions from the plaintiff upon the debt due from a debtor committed upon a ca. sa. and discharged under the insolvent act; thus showing the opinion of the editor that the act of 1745 authorized the sheriff to receive his commission or poundage upon the service of a ca. sa. The 8th section of the act referred to (1764, c. 6, § 8) is as follows: "And whereas some doubts and disputes have arisen, whether the sheriffs are entitled to any and what commissions upon the amount of debts due from persons either committed to their custody in court, or taken upon executions, and who have afterwards taken the benefit of the act of assembly made for the relief of insolvent debtors, and been discharged as such, or who, having remained in prison twenty days, are discharged by the sheriff for want of security for the prison fees; for settling and putting a stop to any further disputes thereon; be it further enacted," &c., "that from and after the passing of this act, it shall not be lawful for the sheriffs, or other officers, to demand, receive, or take, of or from any creditor, or suitor, at whose suit or instance any debtor shall be committed to his custody, by the court, or shall be taken in execution and shall afterwards be discharged by taking the oath of an insolvent debtor, or for want of security for the prison fees, any commissions upon the amount of the debt for which such insolvent was in custody as aforesaid, except on the amount of the effects mentioned in the schedule delivered in by such debtor; nor any other fees or perquisites, than such as are already allowed by law upon the commitment, releasement, and for the maintenance of such debtor." The

9th section of the same act is also important; it is as follows: "And whereas it is represented that some sheriffs have demanded commissions upon the amount of the penalties of bonds or other writings on which judgments have been obtained and executions issued, which is altogether unreasonable and unjust; be it further enacted, that it shall not hereafter be lawful for the sheriffs, or other officers, to demand, receive, or take any such commissions upon the penalties mentioned or expressed in executions delivered to them to be executed; but upon the sum, only, by the payment of which such execution is directed to be discharged, from the persons against whom such executions shall be issued; any former custom or usage to the contrary thereof in anywise notwithstanding." These statutes seem clearly to recognize the right of the sheriff, at that time, to receive poundage upon the service of a ca. sa. whether the debt be paid or not.

But in the year 1788, the language of the fee-bill is materially changed. Instead of giving poundage under the name of a fee for serving an execution, it gives "a commission for proceeding to sell on any execution if the property be actually sold, or the debt paid;" and one half of such commission, "where the sheriff shall have proceeded to sale and the defendant shall have replevied; and no other commission, fee, or reward shall be allowed upon any execution, except for the expense of removing and keeping the property taken." This change of language indicates a change of intention. The commission does not become due upon the service of the execution; but upon proceeding to sell, and upon an actual sale; or upon payment of the debt; or upon giving a replevy-bond; in which last case, only half of the commissions were allowed. The language seems to confine the commission to executions upon which property may be taken and sold; yet it is understood that the practice, under this act, has been to allow the commissions on a ca. sa. if the debt be paid. This construction has probably been grounded on the words, "or the debt be paid." If so, then the commissions on a ca. sa. should be limited to the case where the debt is paid, and could not be demanded of the plaintiff until the debt was paid. If the act gives the whole commission when the whole debt is paid, the equity of the act would give part of the commissions when part of the debt should be paid; that is, pro ratâ. When the sheriff receives the money he knows whether the debt, or what part of it is paid, and of course, what part of his commission is due But when the plaintiff receives the money and orders the defendant to be discharged, the sheriff cannot know to what proportion of his commission he is entitled, and has a right to suppose that the whole debt is paid. Whether the release of the defendant is conclusive evidence as between the plaintiff and the sheriff, that the whole debt is paid, may be a question. It seems to me that it is not; but that it is primâ facie evidence, and throws the burden of proof upon the plaintiff to show what part of the debt, or that no part of the debt, was paid; and if he does this, the sheriff's commission, if any part of the debt was paid, will be in proportion thereto. In the present case, the plaintiff in the execution has shown that the debt was not paid at the time of ordering the marshal to discharge the debtor, and has not been paid since. It is admitted that she received no benefit from the arrangement made between her and the debtor, except in the discharge of a judgment which he had obtained against her; and that the security which she received and still holds, is wholly insufficient to satisfy the balance of her claim.

Upon the whole, we are of opinion that the marshal is not now entitled to any commission upon the ca. sa. stated in the case agreed, and ought to refund the $47.53. which he has received for commissions in that case.

Case No. 13,675.

SWANN et al. v. SANBORN et al.

[4 Woods, 625.][1]

Circuit Court, N. D. Florida. Dec. Term, 1878.

BANKRUPTCY—JURISDICTION OF DISTRICT COURTS—SUITS IN EQUITY—PARTNERSHIP—WHAT CONSTITUTES—FIRM AND INDIVIDUAL CREDITORS.

[1. A suit brought by a number of creditors against the assignee in bankruptcy of a member of a partnership, who in fact owned all the property used in the partnership business, to procure an adjudication that their debts, which were contracted in the firm name, were entitled to be first paid out of such property in preference to the claims of the individual creditors of the bankrupt, is a suit against an assignee "touching any property or rights of a bankrupt transferable to or vested in such assignee," within the meaning of Rev. St. § 4970, giving jurisdiction in such cases to the district court.]

[2. The district court having decided, in such case, that complainants were entitled to have the property in controversy applied first to the payment of their debts, it was within its jurisdiction as a court of equity to go further and provide for the application of the same to the payment of the debts, instead of turning complainants over to another court for complete relief.]

[3. A person loaning money to another, who uses the same in carrying on a business under the style of a firm, consisting of his own name with "& Co." annexed to it, cannot be held liable as a partner in such firm, where he neither held himself out as a partner nor allowed any one else to do so.]

[4. Where all the property of a partnership, if any partnership in fact exist, belongs to one member of the firm, and the others have no interest except in the gains and profits, such property will be liable, in the first instance, to the individual debts of the person owning it.]

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

In equity.

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

The bill was filed by Samuel A. Swann and others, claiming to be creditors of a partnership which, it was alleged, carried on the business of manufacturing lumber, and which, it was alleged, was composed of F. S. Chester, the bankrupt, E. N. Chester, Franklin E. Town, and Horace Stillman. The facts, as disclosed by the evidence, were as follows: Horace Stillman, a retired business man of fortune, residing in Buffalo, N. Y., was applied to by F. S. Chester, who also resided in Buffalo, and who had married Stillman's niece or adopted daughter, for a loan of money with which to start the business of manufacturing lumber at some point in this state. One purpose of F. S. Chester in desiring to engage in the enterprise was to afford occupation and give an opportunity for a start in business to his younger brother, E. N. Chester, and his brother's friend, Franklin E. Town. Stillman promised to advance the money to F. S. Chester as requested. In September, 1871, Town came to Fernandina, Fla., and there bought a sawmill, engine, and machinery, for which he paid with funds furnished to F. S. Chester by Stillman, and took a bill of sale therefor in the names of F. S. Chester and Stillman. In November, 1871, E. N. Chester, the younger brother of F. S. Chester, came to Fernandina, and on December 7, 1871, he and Town procured of one Peter Cone a 20 years' lease of a small tract of land on which to erect their mill. This lease was made to F. S. Chester and Horace Stillman, as composing the firm of Chester & Co., of the city of Buffalo, N. Y., and embraced six acres of land, with a yearly rent reserved of $100, with the right to purchase the fee simple for the price of $600. This lease was at once placed on record in the proper office in Nassau county, where the demised premises were situate. The two young men opened an office in Front street, Fernandina, over which they placed a sign with the firm name of Chester & Co., and proceeded to erect their mill upon the land leased from Cone. E. N. Chester had a written contract with F. S. Chester, dated January 15, 1872, by which E. N. Chester agreed to take charge of such part of the sawmill business carried on by the said F. S. Chester, on Bill's run, in Florida, as the latter should commit to him, and give his time and attention thereto for the period of five years, in consideration of which F. S. Chester agreed to pay him "a sum equal to the one-fourth part of the net profits of the business, such payment to be made on the 11th of April annually, and to advance him $100 per month on the first day of every month." The agreement provided that the same should not vest in said E. N. Chester any title or claim to the mill or property, or business connected therewith. F. S. Chester made a contract in similar terms with Franklin E. Town, who took charge of the running of the mill, while E. N. Chester conducted the office business in Fernandina. In the course of the business E. N. Chester drew bills in the name of Chester & Co. on F. S. Chester, in Buffalo, N. Y., all of which were paid by him. Before the purchase of the mill and machinery the defendant and Stillman had loaned to F. S. Chester various sums, amounting in all to $20,000, for the purpose of establishing and carrying on the business, and these sums were used for that purpose.

In January, 1872, the defendant Stillman came to Fernandina, and examined the mill and other property, and on April 11, 1872, the defendant F. S. Chester executed and delivered to defendant Stillman a chattel mortgage upon the former's interest in the mill site and upon the mill building, engines, etc., to secure the payment to him of the sum of $15,000. This mortgage was duly recorded in the proper office of Nassau county, Fla. During the visit of Stillman to Fernandina in January, 1872, he learned for the first time that the lease from Peter Cone had been made to him and F. S. Chester jointly as partners. He at once declared that the statement implied by said lease, that he was a party to the lease, or a partner of F. S. Chester, was false. E. N. Chester promised defendant Stillman to inform Cone of the falsity of said statement in the lease, and to get Frank S. Chester to make, and Cone to accept, a surrender and cancellation of the lease, and to induce Cone to make, and F. S. Chester to accept, a new lease of the premises, and to have the cancellation and new lease put on record. This promise was fully performed, except that the new lease and the cancellation of the old lease were not put on record. These papers, however, were delivered to E. N. Chester, to be by him put on record in the proper office, and some time afterwards E. N. Chester informed Stillman that they had been so recorded. On April 11, 1872, Stillman took from F. S. Chester his bond of that date for $6,000, money loaned and to be loaned by him to F. S. Chester. This sum was in addition to the $15,000 before mentioned secured by mortgage. This bond recited that F. S. Chester proposed to pay said $6,000 within the period of five years, and in lieu of interest thereon to pay Horace Stillman a sum equal to one-fourth part of the net earnings, gains, and profits of said sawmill and business, while said principal sum of $6,000 should remain unpaid. This appeared to have been a temporary arrangement, for in November following this bond was given up, and F. S. Chester executed and delivered to Stillman his notes for the amount. In October, 1872, there was due to Stillman from F. S. Chester, for money loaned, the additional sum of $8,000. This was secured by a mortgage from F. S. Chester to Stillman on the mill property, duly recorded and dated in October, 1872. First and last, Stillman loaned to F. S. Chester sums amounting in the aggregate to $30,000. He never received payment of any part of this sum, or any interest thereon, in any

manner or shape. The business was carried on by E. N. Chester and Town with no profits, but at considerable loss, until the winter of 1872–73. Supplies of various kinds were furnished on credit, by complainants and others, who, in January or February, 1873, commenced suits by attachment for the recovery of their claims To secure an equal distribution of the assets of F. S. Chester among his creditors, Stillman, as he alleged, commenced proceedings in involuntary bankruptcy against him, and on March 19, 1873, he was adjudicated a bankrupt. A few days before the last-named date, F. S. Chester, who was indebted to Cone for rent of the mill site, and who claimed to be unable to pay the sum due, surrendered the lease to Cone, and thereupon Cone conveyed the mill site in fee simple to the wife of Stillman for the consideration of $2,400 in money.

The bill in this case was filed by a large number of the creditors of the so-called firm of Chester & Co., who joined as complainants, against Winton A. Sanborn, assignee of F. S. Chester, and against E. N. Chester, F. E. Town, and Horace Stillman. The theory and averment of the bill was that F. S. Chester, E. N. Chester, F. E. Town, and Horace Stillman were partners in the mill business under the name of Chester & Co.; that the mill and its appurtenances were the property of said firm, and should be primarily applied to the payment of its debts; and that the proceedings of the assignee, by which said property was seized as the individual property of F. S. Chester, and his purpose to apply it to the discharge of the individual debts of F. S. Chester, were in violation of the rights of the creditors of the firm. The prayer of the bill was that the assets of the late firm of Chester & Co., which had been returned to the bankrupt court as assets of the bankrupt estate of F. S. Chester, and were in the possession of his assignee, might be adjudged primarily liable for the debts of Chester & Co., and that such order and decree might be made in the premises as would protect the rights of complainants as creditors of the firm of Chester & Co., and enable complainants to subject such assets to the payment of their claims. The district court made a decree substantially in accordance with the prayer of the bill, and the defendants appealed to the circuit court.

L. I. Fleming, J. J. Daniel, and F. P. Fleming, for complainants.

C. P. Cooper and Robert M. Smith, for defendants.

WOODS, Circuit Judge. It is claimed by defendants that the case made by the bill does not fall within the equity jurisdiction of the courts of the United States. As the complainants are all citizens of Florida, and Sanborn, the assignee, who is one of the principal defendants, is also a citizen of Florida, the jurisdiction is not based upon the citizenship of the parties, but must be conferred, if at all, by the bankrupt act. The complainants rely on section 4970 of the Revised Statutes as their warrant for bringing the suit in the United States court. That section declares: "The several circuit courts shall have within each district concurrent jurisdiction with the district court * * * of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee." Now it is perfectly clear that this is a suit in equity brought against the assignee by persons claiming an adverse interest touching property or rights of the bankrupt transferable to or vested in such assignee. The charge is that the assignee has possession of property, which he holds as the individual property of F. S. Chester, and which he is about to apply to the payment of the individual debts of F. S. Chester, which in fact belongs to the firm of Chester & Co., of which they are creditors, and which should be first applied to the payment of the debts of that firm. Clearly, this is the very case provided for by the section first cited. The case of Stickney v. Wilt, 23 Wall. [90 U. S.] 150, sustains the jurisdiction in a similar case. The objection made by counsel for defense seems to be more to the decree of the district court than to the purview of the bill. The court may have exceeded its jurisdiction in the making of the decree. That, however, is not the question made. The real question is, has this court the jurisdiction to grant the relief or any of the relief prayed for? If it has, it must retain the bill for that purpose. It is conceded that the court has jurisdiction to decide, in this case, upon the claims of the complainants to have this property, as the property of Chester & Co., applied to the payment of their debts. It is therefore the duty of the court to pass upon this question, at least, and if the district court went further by its decree than was warranted by its jurisdiction, that fact does not change the duty of this court. The decree of the district court is vacated by the appeal. The case comes here for trial de novo, and the question is entirely open in this court what decree it shall make. But this objection to the decree does not seem to me well founded. It was the duty of that court, sitting as a court of equity, having jurisdiction of the parties and subject-matter, to do complete justice, and not, having decided that the complainants were entitled to have the property in controversy applied first to the payment of their debts, to turn them over to another forum to complete the relief to which they were entitled. I am of opinion, therefore, that the objection made to the jurisdiction of this court is not well taken.

I proceed to consider other questions raised by the record. The bill appears to be de-

fective for want of a sufficient averment that the complainants have reduced their claims against the alleged firm of Chester & Co. to judgment. Without judgment the complainants have no right to insist on payment of their claims out of any specific property of their debtors. They have a right to be paid so much money by their debtors, but have no lien or claim upon any property of their debtors. The bill does not allege the recovery of judgments by the complainants. It is true it refers to an exhibit which contains a list of the creditors of the alleged firm of Chester & Co., giving amounts, and opposite some of them is written the word "Judgment" and a date. If this is intended as an averment that such claims have been reduced to judgment, it is a very ineffectual and insufficient way of making such an averment.

Passing over this defect in the bill, I proceed to a consideration of its merits. The first claim I shall notice is that there was a partnership under the firm name of Chester & Co., of which Horace Stillman was a member. From this the inference is drawn that the firm could not be indebted to him, and he could not hold liens upon its property executed by another member of the firm in his own name. Without deciding whether this conclusion follows from the premises, I am entirely satisfied that the proof fails to show that Stillman was a partner in the alleged firm. There is no evidence to show that, as between Stillman and the other alleged partners, there was any partnership. The proof is clear and uncontradicted that he was not. But it is claimed by complainants that he was a partner as to strangers. He could only be made such by holding himself out as a partner, or allowing the other partners, with his knowledge, to hold him out as a partner. That he never held himself out as a partner is clear. The evidence is all on one side upon that issue. There is no evidence that he knew that the other so-called partners were holding him out as a partner, and no evidence that they did hold him out as such partner, with the exception of two instances. These are that Town took a bill of sale of the engine and mill in the name of F. S. Chester and Stillman, and the other that the lease by Cone for a mill site was made to F. S. Chester and Stillman as partners. As to the first, there is no evidence that it ever came to the knowledge of Stillman; and as to the second, it is in evidence that, when Stillman discovered, in February, 1872, the terms of the lease, he at once denounced it as implying a falsehood, and required the lease to be canceled, and a new one executed in the name of F. S. Chester alone, and that he required the cancellation of the first lease, and that the new lease and the cancellation of the old lease should be put upon the public records of the county, and supposed it had been done. The bill avers, it is true, that with the business public, in the vicinity of the mills and in Fernandina, the general impression was that Stillman was a partner in the firm of Chester & Co. Upon this averment the proof is conflicting. But it is not pretended, nor does the bill aver, that Stillman knew that any such idea existed. He did not represent himself to be a partner, nor did any of his alleged partners so represent him. But it is claimed that the bond for $6,000, given by F. S. Chester to Stillman, in which the former agreed, in lieu of interest, to pay Stillman a sum equal to the fourth part of the net profits of the sawmill and business, made Stillman a partner in the business. Whether this made Stillman a partner it is unnecessary to decide. It could only make him a partner while this bond was in force, and only those persons who credited the firm while Stillman retained this bond could hold Stillman as a partner. There is no averment in the bill, and no proof, that any of the complainants became creditors of the firm while Stillman held the bond, or that they ever knew of the existence of the bond, and no proof in the record to sustain such an averment, if there were. In short, the attempt to hold Stillman as a partner of the alleged firm of Chester & Co. has failed.

As to the claim, made by the bill, that E. N. Chester and F. E. Town were partners in the firm of Chester & Co., the evidence shows conclusively that they were not in fact partners; but it shows that, with the knowledge of F. S. Chester, they held themselves out as such. The truth is that there was, in fact, no such firm. The property all belonged to F. S. Chester. It was bought with his money, and owned by him exclusively. Now, under this state of facts, which class of creditors is entitled to priority of payment out of this property,—the creditors of F. S. Chester, or the creditors of the supposed partnership? F. S. Chester never reported that E. N. Chester and Town were part owners of the mill and other property of Chester & Co. His exclusive title to this property could not be divested by any statements made in relation thereto by E. N. Chester and Town. If the firm of Chester & Co. existed as to strangers, it was a firm in which F. N. Chester owned all the property, and the other partners were interested only in the business, in its gains and profits. All the products of the business—all the lumber made, for instance—were liable for the partnership debts; but the individual property of one of the partners, even though used by the partnership to carry on its business, was liable in the first instance for the individual debts of the owner. Murrill v. Neill, 8 How. (49 U. S.) 414. If I am right upon this proposition, the prayer of the bill, that this property may be first subjected to the payment of the partnership debts, cannot be sustained. It is individual, and not partnership, property, and must be first applied to the individual debts of the owner. The fact is that the complainants gave credit to the supposed firm of Chester & Co. without any inquiry as

to the condition of the partnership or the title to the property with which the partnership business was carried on. Any inquiry, addressed either to F. S. Chester or to Stillman, would no doubt have elicited the truth. No such inquiry was made. The rights of these men are not to be denied because the complainants have blindly bestowed credit on a supposed firm which had no means except what it might make in carrying on its business. The conduct of F. S. Chester in allowing the lease of the mill site to become forfeited, and the conveyance of the property to Mrs. Stillman, is a matter entirely immaterial to these complainants. The lease itself, burdened with a yearly rent reserved of $100, was of little or no value; and even if its value had been considerable, it appears very clearly by the averments of the bill that the property of F. S. Chester, including the lease of the mill site, would be insufficient to pay the mortgages to Stillman. Without an averment that there would be a surplus after paying Stillman his claims, the disposition of the lease is a matter in which complainants have no concern. The case is that Stillman loaned $30,000 to F. S. Chester, to be used for the erection of his mill and the carrying on of the business. F. S. Chester was the only one of the three persons engaged in any way in the enterprise who had any money. The property used in the business was all his individual property, and did not belong to the firm The property was bought with money furnished by Stillman, under an agreement that he should be secured by mortgages upon it. He has mortgages of record to the amount of $23,000, which appears to be the full value of the property. The assignee of F. S. Chester is entitled to this property, for it is the individual property of F. S. Chester, and cannot be taken for his partnership debts until his individual debts are paid. The property will not pay these debts. The complainants' partnership creditors have, therefore, no claim to this property, and their bill seeking to subject it to their debts must be dismissed, at their costs.

Decree accordingly.

Case No. 13,676.

SWANN v. SCHOLFIELD.

[2 Cranch, C. C. 140.] [1]

Circuit Court, District of Columbia. April Term, 1817.

PARTIES—ASSIGNEE OF NOTE.

After a note is taken up by the indorser, its negotiability ceases, and he cannot, by transferring the note, assign his right of action at law, so as to enable the assignee to sue in his own name.

Assumpsit [by W. T. Swann, for the Real Estate Bank, against Jonathan Scholfield] on the defendant's promissory note, indorsed by Thompson Simpson, and George Bruce, Jun. The note when due, was taken up by the discount of notes of Bruce indorsed by Simpson, and afterwards returned by Bruce to the bank, who brought suit in the name of W. T. Swann, as indorsee.

THE COURT (THRUSTON, Circuit Judge, absent), instructed the jury, that after the note was taken up by Bruce, its negotiability ceased, and he could not assign his right of action at law to the plaintiff, so as to enable him to sue in his own name.

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

SWANN (UNITED STATES v.). See Case No. 16,425.

Case No. 13,676a.

SWANSON v. BALL.

[Hempst. 39.] [1]

Superior Court, Territory of Arkansas. Oct., 1826.

APPEAL — LIABILITY ON BOND — CONSTRUCTION OF BOND.

1. Where a bond is conditioned to prosecute a certiorari, and if the judgment of the justice is affirmed or more recovered, on a trial de novo the obligors will pay such judgment; the bond is discharged if the judgment of the justice is set aside for irregularity, although there may be no trial on the merits de novo.

2. The law will not create a liability against securities, which they have not brought on themselves by their contract

3. And where less is recovered in the appellate court than before the justice, this is not embraced in the condition of such bond, so as to render the securities liable.

Appeal from Pulaski circuit court.

[This was an action by Edward Swanson against James Ball.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. By the record it appears that suit was brought by the plaintiff, Swanson, against Ball, and on October 22, 1825, a judgment was rendered against him by default. On January 18, 1826, Ball obtained a certiorari, and by that means brought the case before the circuit court of Pulaski county, having entered into bond with Nicholas Pray and Ambrose H. Sevier, as his securities. At the May term of the court, in 1826, the judgment of the justice was set aside for irregularity. A trial de novo was awarded at the next term, at which term judgment was rendered against Ball for the sum of forty-four dollars and eighty-one cents; but as appears by the bill of exceptions, the court refused to give judgment against the securities on the bond to prosecute the certiorari.

The question presented to the court is, whether the circuit court did right in refusing to give judgment against the securities.

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

In support of this assignment of error, the plaintiff refers to the act of 1818, which provides, "That in all cases of appeals or certiorari from justices of the peace by virtue of existing laws on those subjects, if the judgment of the justice be affirmed, or judgment given on a trial upon the merits de novo in the circuit court, judgment shall be given and execution issue not only against the original defendant or defendants, in the suit before such justice, but also against his or their security or securities, in the appeal bond or bond, to prosecute such certiorari." Acts 1818, p. 27. But to determine this question we must refer to the obligation contracted by the sureties in the bond, the conditions of which are substantially, that if Ball shall well and truly prosecute his certiorari, and if the judgment of the justice shall be affirmed, or if Swanson shall recover more than the judgment of the justice, that Ball shall pay such judgment. The defendant by his counsel insists, that the first condition has been complied with, namely, that he has prosecuted his certiorari and reversed the judgment of the justice, and the securities are therefore not liable under that condition; that the event which would make them responsible under the second condition, never has nor can happen; namely, if Swanson shall recover more than the judgment of the justice, that Ball shall pay the judgment. Swanson having recovered less than the judgment of the justice, there is no provision in the bond which will make the securities answerable, provided the plaintiff shall recover less than the judgment of the justice, and without such an express condition, the law will not create a liability against the securities which they never intended to bring on themselves by entering into the bond. The statute referred to creates no such obligation, but only points out the remedy. It is contended by the counsel for the plaintiff, that Ball has not reversed the judgment of the justice. He has shown irregularity in the proceeding, and set it aside for the irregularity. He had a right to complain, and having succeeded in his complaint, he was not responsible under his bond, much less his securities. The proceedings were had at the peril of the plaintiff, and if he be injured by the delay, it is an injury proceeding from his own errors. The decision of the circuit court, setting aside the judgment of the justice, was to all intents and purposes a reversal of the judgment. Indeed, Ball might claim the judgment of the circuit court as a reversal of the judgment of the justice. But the fair way of testing the security bond would be to suppose a suit to be brought thereon, and after setting forth the conditions, the plaintiff should assign as a breach, that Swanson had recovered less than the judgment of the justice. This clearly would not be a sufficient breach. As to the costs, Swanson will be responsible for all costs in this court, and the costs before the justice, and up to the time of setting aside the judgment of the justice for irregularity, and Ball must pay the balance. Affirmed.

Case No. 13,677.

SWANSTON et al. v. MORTON.

[1 Curt. 294.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

CUSTOMS DUTIES — PROTEST — FORM OF — GROUNDS OF OBJECTION TO COLLECTOR'S RULINGS.

A protest under the act of February 26, 1845, (5 Stat. 727,) being a commercial document, need not be drawn with technical accuracy; but it must state, distinctly, every ground of objection intended to be relied on; and none other can be relied on at the trial. It must also show, distinctly, what is objected to.

[Cited in Burgess v. Converse, Case No. 2,154; Vaccari v. Maxwell, Id. 16,810; Curtis v. Fiedler, 2 Black (67 U. S.) 480; Davies v. Arthur, Case No. 3,611; Frazee v. Moffitt, 18 Fed. 585; Herman v. Schell, Id. 892; Arthur v. Morgan, 112 U. S. 501, 5 Sup. Ct. 244.]

[See Bangs v. Maxwell, Case No. 841.]

This was an action of assumpsit [by James Swanston and others against Marcus Morton] to recover from the defendant, who was formerly collector of the customs for the port of Boston, certain duties alleged to have been illegally exacted by him. The district attorney denied that the protest was sufficient. The regular duties on the computed cost of the article, as invoiced, amounted to $646.66. Under the eighth section of the tariff act of 1846, the collector had caused an appraisement to be made, and the appraised value exceeded the value declared on the entry more than ten per cent. The collector required payment of the twenty per cent. additional duties provided for by the above-mentioned section. It was admitted that the proceedings on the appraisement were irregular, and the appraisement not made in conformity to law, and that the plaintiffs must recover, if they had made a sufficient protest. Upon the paper which contained the entry, the regular duties were computed, and the result stated to be $646.66; and on the same paper were the following words and figures: "Penalty, $6466.58 a 20, $1293.31.

	646.66
Penalty,	1293.31
Referee's fees,	10.00
Permit,	20
	1950.17 paid."

In the accompanying paper, by the side of these words and figures was the protest, as follows: "We hereby protest against paying the additional penalty of twenty per

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

cent., believing the entry and invoice presented by us to be the actual cost of the barilla." The only objection made to the protest was, that it protested against the payment of a penalty, whereas the amount paid was not a penalty, but an additional duty.

G. G. Hubbard, for plaintiffs.
Mr. Lunt, Dist. Atty., for defendant.

CURTIS, Circuit Justice. The act of February 26, 1845 (5 Stat. 727), contains the provision: "Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of the said duties, setting forth, distinctly and specifically, the grounds of objection to the payment thereof." This is an important provision of law, and must be carefully construed, so as to secure the practical advantages to the government which it was designed to secure, and at the same time to embarrass as little as possible the transaction of this species of business. The protest must declare what is objected to, and what are the grounds upon which the objection is rested. I should not permit any ground, not distinctly and specifically set forth in the protest, to be relied on at the trial. Here, however, it is not alleged that the protest does not sufficiently state the ground of objection; but the defect alleged is in the description of the thing objected to. It is urged that the action is to recover back money paid as additional duties; but the thing objected to in the protest was a penalty. It is true the tariff act denominates it additional duty; but it clearly appears, from the circumstances under which it was to be levied, that it was an additional duty, by way of penalty, for not declaring the true value. And if it were necessary to decide upon the strictly technical term appropriate to such a demand, I am by no means clear that it would not be the word penalty. But it is not necessary to go to this length. These protests are commercial documents; and though they must be certain and distinct, they need not conform to any technical rule. If this protest, taken in connection with the other contents of the paper on which it is written, and to which it refers, makes known what was protested against, it satisfies the statute in this particular. That it does make this known, no reasonable man can doubt. It protests against payment of "the penalty of twenty per cent.;" and the same paper calls the additional duty a penalty in the place where it is computed. It was under the name of penalty that the collector exacted the money, and by that name it was proper to call it in the protest. It is clear, it was against this payment of the additional twenty per cent., called by the officer of the customs, who computed and demanded it, a penalty, that the protest is directed. I hold it to be sufficient.

SWANWICK (LIVINGSTON v.). See Case No. 8,419.

SWART (GRANGER v.). See Case No. 5,685.

SWARTWOUT (DORR v.). See Case No. 4,010.

SWARTWOUT (KIDD v.). See Case No. 7,756.

Case No. 13,678.

SWARTZ v. FUNK.

[9 West. Jur. 412.]

Circuit Court, D. Iowa. July, 1875.

TAX SALE—FRAUDULENT COMBINATION—WHAT IS NOT PROOF OF.

In a suit in equity to set aside a tax deed because of a fraudulent combination among bidders at the sale, it is not enough to show simply that no lands were bid off at less than the whole tract for the taxes due, and that the bidders each obtained a tract substantially in turn, when there were more lands for sale than all wanted, and there was no showing that they did not bid against each other.

Bill in equity to remove a cloud upon the plaintiff's title to 80 acres of land, and praying for a writ of assistance. The plaintiff has the regular or patent title. He so avers and proves. The defendant is alleged to hold under a recorded tax deed executed in 1869 for the taxes of 1864, pursuant to a sale made by the county treasurer, October 2, 1865. This the defendant admits, and he claims no other right or title except under this tax deed. Defendant is alleged to be in possession. The only question in the case on the merits is whether the tax deed of the defendant conveyed a valid title. The plaintiff in the proofs assails the tax deed on one ground only, viz. that at the sale for taxes, October 2, 1865, all the persons purchasing the land on the delinquent list entered into an "unlawful combination and agreement to allow each purchaser and bidder to select such lands as he desired to purchase and bid in the same without competition or opposition," and that the lands in question were purchased in pursuance of that combination and agreement, and such fact was known to the defendant when he received an assignment of the tax-sale certificate on which his deed is founded. The answer denies the alleged combination. The plaintiff has taken proof for the purpose of establishing it. The answer also insists that the case is not one of equity cognizance, and that the plaintiff has a plain and adequate remedy at law. The answer sets up no claim for taxes or improvements.

D. D. Miracle, for complainant.
Chas. A. Clark, for defendant.

DILLON, Circuit Judge. I am inclined to think that the proofs do not make a case of equity cognizance. The defendant is in possession. Nothing stands in the way of an action of ejectment, and the contest, and only contest, is one of title, depending upon the validity of the defendant's tax deed; and whether this deed is valid depends upon a controverted question of fact, viz. the alleged unlawful combination among the purchasers to suppress competition at the tax sale. No account is necessary to be taken for taxes paid or improvements made by the defendant. If the defendant's tax deed be valid, it is no cloud upon the plaintiff's title which he has a right to have removed. Whether valid or not can be tried at law. If there decided against the tax deed, and the plaintiff recovers in ejectment, he would probably not need to have the cloud cast by that deed removed; but, if it were necessary or desirable, he could then file his bill for that purpose, and allege the result of the ejectment action as the foundation of his right to such relief. But if it be granted that the court can entertain jurisdiction of the suit on his bill in equity, the proofs fail to sustain the fact on which the bill is based. At the tax sale in question there was a large list of delinquent lands. There were only six or seven persons present desiring to purchase. There were more lands than those persons wished to buy, and when the sale closed there were lands yet unsold for want of bidders. Nothing special appears in reference to the lands in controversy in this suit. The persons present declined generally to bid in for the taxes due any less quantity of land than the whole tract on which the tax was assessed. Each tract was regularly exposed in its order for sale It does not appear that the parties did not bid against each other at the sales, for the reason that, there being more than enough for all, there was no motive for doing so The result was that, as a rule, one person bid in a tract, then another, and another, and so on, in turn, until each had purchased the quantity he desired, leaving, as above stated, lands yet unsold for want of purchasers. The proofs do show a failure to bid against each other, but do not show that there was any agreement not to compete in respect to the lands in question, or any of the lands. The proofs bear out the statement of the witness Sutton, who testifies that "there were more lands offered than the purchasers desired to take, and they could procure all the lands they wanted to purchase without competition."

Let a decree be entered dismissing the bill. Decree accordingly.

SWASEY (FOSTER v.). See Cases Nos. 4,984 and 4,985.

Case No. 13,679.

SWASEY v. NORTH CAROLINA R. CO. et al.

[1 Hughes, 17;[1] 1 Am. Law T. Rep. (N. S.) 359, 71 N. C. 571.]

Circuit Court, E. D. North Carolina. June, 1874.

STATES—PARTY IN INTEREST—STATE'S AGENT—RAILROAD COMPANIES—STOCK—CERTIFICATES OF DEBT—INTEREST.

1. Where a state of the Union is a party in interest but not a party to the record, the jurisdiction of the United States circuit court attaches where that court has jurisdiction of the state's agent who has charge of the property as a trustee, and where the property which is the subject of the suit is stock or shares in a railroad company, held by it in pledge for the security of a debt due to the complainant, for which a lien has been given by the state "in addition" to the pledge.

[Cited in Lee v. Kaufman, Case No. 8,191.]
[Cited in King v. La Grange, 61 Cal. 228.]

2. Where stock in a corporation has been pledged for the "redemption of certificates of debt," and the certificates bound the debtor for the payment of "the sum therein mentioned and the interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any instalment of interest.

[Distinguished in Toler v. East Tennessee, V. & G. Ry. Co., 67 Fed. 182.]

At law.

WAITE, Circuit Justice. The North Carolina Railroad Company was incorporated by an act of the general assembly, passed January 27th, 1849, to construct a railroad to commence at the Wilmington & Raleigh Railroad, and proceed to Charlotte. To aid in building the road, the board of improvement was, by the act of incorporation, authorized to subscribe on behalf of the state $2,000,000 to the capital stock of the company. Sections 38 and 41 of the act are as follows:

"Sec. 38. That in case it shall become necessary to borrow the money by this act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the state for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually, at such times and places as the treasurer may appoint; the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued, at any one time there may be sufficient to meet the instalment required to be paid at that time."

"Sec. 41. That as security for the redemption of said certificates of debt, the public faith of the state of North Carolina is hereby pledged to the holders thereof, and in addition thereto, all the stock held by the state of North Carolina Railroad Company, hereby created, shall be and the same is hereby pledged for that purpose, and any dividends

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

of profit which may from time to time be declared on the stock held by the state as aforesaid, shall be applied to the payment of interest accruing on said certificates; but until such dividend of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated."

The authorized subscription was made and certificates of debt issued to the amount of $1,858,000, on which the money was borrowed to meet the payments. By these certificates it was "certified that the state of North Carolina justly owes ——, or bearer, $1,000, redeemable in good and lawful money of the United States, at, etc., on the 1st day of July, 1884, with interest thereon at the rate of 6 per cent. per annum, payable half yearly at, etc., on, etc., until the principal be paid on surrendering the proper coupon hereto annexed." On the 14th of February, 1855, the general assembly passed another act, entitled "An act for the completion of the North Carolina Railroad," by the terms of which the public treasurer was authorized and instructed to subscribe $1,000,000 more to the capital stock of the company, and to make payment therefor by issuing and making sale of the bonds of the state, under the same provisions, regulations, and restrictions prescribed for the sale of the bonds theretofore issued and sold to pay the state's original subscription, and the same pledges and securities were thereby given for the faithful payment and redemption of the certificates of debt then authorized, as were given for those issued under the direction of the first act. This stock was by the terms of the act to be a preferred stock. The subscription was made, and certificates of debt, in the same general form as the first, issued to provide the means of payment. The plaintiff is the owner of five certificates of the first issue and two of the second. The interest on the first, payable January 1st, 1869, and after, and on the second, payable April 1st, of the same year, and after, was unpaid when this suit was commenced. This action is prosecuted for the benefit of all bondholders who may come in and make themselves parties. About $1,800,000 of the indebtedness is now represented. No certificate for the stock, upon either of the subscriptions, had been issued by the company at the time of the commencement of this action. Since that time, upon the order of the court, the proper certificates have been issued, and placed in the hands of a receiver, appointed in this cause, who has collected the dividends thereon as they have from time to time been declared and paid. These dividends as far as received have been applied to the payment of interest, but there is still a large amount in arrears, and the plaintiff now asks that a sufficient amount of the stock may be sold to pay what is past due.

It is first insisted by the defendant that the state of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause. The state, although directly interested in the subject-matter of the litigation, is not a party to the record. The eleventh amendment to the constitution of the United States provides that no suit can be prosecuted in this court against a state, by the citizens of another state, or by citizens or subjects of a foreign state. It has long been held, however, that this amendment applies only to suits in which a state is a party to the record, and not to those in which it has an interest merely. It is next urged that if the state is not actually a party to the suit, it is a necessary party in whose absence the cause cannot proceed, and that as a state cannot be brought into court, no relief should be granted upon the case made. If the state could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of Osborn v. Bank of U. S., reported in 9 Wheat. [22 U. S.] 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a state in the hands of its agents without making the state a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent. The real question, therefore, presented for our determination is whether the court has jurisdiction of the property which it is sought to charge, or of the agent of the state having it in possession. The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt of the state contracted on its account. This was part of the law of its creation. It has always been pledged. The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case, holds the share of its property represented by the stock subscribed by the state in trust, as well for the stockholders as for the state. The charter made the company the depositary of the pledge to hold it for both parties according to their respective interests. Consequently a suit which seeks to charge the stock as security, and brings the corporation in to represent it, may be maintained in the absence of the state as a party. This was evidently the understanding of the parties when the pledge was made. It was then the case as now, that a state could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the courts in proper cases, notwithstanding the ownership by the state. The faith of the state had been pledged. This pledge the courts could not enforce. The

stock to be obtained with the money borrowed could not be reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose. Understanding this, a lien was given upon the stock as security "in addition" to the pledge of faith. But it was no addition if the bondholder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the state not only should, but that it in fact did, grant to the bondholders the power to use the machinery of the courts to subject this portion of their security if default should be made in the payment of the debt. In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed.

The next objection is that the stock was pledged as security for the payment of the principal of the debt alone, and not the interest, and that as the principal is not yet due there can be no decree for a sale. The stock was pledged for the "redemption of the certificate of debt." The certificate bound the state "for the payment of the sum therein mentioned, with interest thereon." Thus it is apparent that the interest is as much a part of the obligation of the certificate as the principal. If more is necessary to sustain this view, it is to be found in a subsequent part of the section where it is provided that the "principal of the certificate shall be redeemable," etc. If it had been supposed that the certificate only related to the principal, it would have been sufficient to provide for the time of the redemption of the certificate, the same as in section 41, the security for the redemption of the certificates was designated and granted. If then the certificate bind the state for the payment of both principal and interest, it would seem to follow must unquestionably that whatever was given as security for its redemption could be held for the performance of all its obligations. But it is argued that the dividends are specially designated as security, and the only security, for the payment of the interest. The language of the act is that the dividends "shall be applied to the payment of the interest accruing on such certificates." This is additional security. Without it (as the state could not be sued) there was no power to compel this application. With it there was. The officer in whose custody the dividends were placed, was, so long as the fund remained in his hands, amenable to the process of the courts to compel him to do what the law required of him. It is again claimed that, as it was made the duty of the treasurer, until dividends were declared, to pay the interest as it accrued out of any moneys in the treasury not otherwise appropriated, it could not have been intended that the stock should be held for anything but the principal. This, too, was additional security. Without it the bondholder had no power to enforce the payment of the interest. With it, after default, upon a proper showing, the treasurer could be compelled to apply the unappropriated moneys in his hands to discharge that obligation. Neither can an argument in favor of the claim of the defendant be drawn from the fact that the stock is pledged for the redemption of the certificate. It is true the principal of the certificate was made redeemable at the end of thirty years, and that the interest thereon was payable semi-annually. The certificate could not be redeemed until both principal and interest were paid. Redemption and redeemable are, therefore, in this connection, only other names for payment and payable, and the general assembly appears to have used the words as though they conveyed the same meaning. If the stock was not given in security for the interest, then the faith of the state was not pledged for its payment, for that, like the stock, was only pledged for the redemption of the certificate. So, too, if no payment of interest should be made during the whole thirty years, no part of the stock could be applied to its payment then, even though its value should be sufficient to discharge both principal and interest. If the stock is held at all for the payment of the interest, it may be subjected at any time after a semi-annual instalment falls due.

For these reasons we are clearly of the opinion that the plaintiff, and those whom he represents, are entitled to have their proportion of the stock, or so much thereof as may be necessary, sold in order to pay the past due interest upon their bonds. They can act, however, only for themselves. So much of the stock as equitably belongs to them as security they can control in this action, but no more. The security is divisible, and should be apportioned to the various bondholders according to the amount of their respective claims. Each bondholder should have an amount of stock which bears the same proportion to the whole stock that his bonds do to the whole amount outstanding. We are not willing, however, to order that a sale be made until ample time has been given the state to provide, by levy and collection of taxes, the necessary funds for the payment of the interest now past due, and such as may fall due before the money can be realized and applied. An account may be taken of the amount due for unpaid interest upon the bonds represented in this cause, and of such as will mature on or before the 1st day of April, 1875, and a decree entered that if full payment thereof is not made by that day, so much of the stock apportioned as security to the plaintiff, and those he represents, as may be necessary to pay the same, be sold. If on or before the day of sale it shall be made to appear to the court that the state has, in good faith, levied a tax to pay the arrears of interest on the debt, and

provided for its collection, the sale will be further suspended until a sufficient time shall have elapsed for the collection to be made.

[NOTE. Subsequently a decree was made in this court as follows: "This cause coming on for further order, the court doth declare: (1) That, by the terms of the charter of the North Carolina Railroad Company, and the amendments thereto, the shares of stock in said company belonging to the state of North Carolina, meaning thereby the shares and all dividends thereon, are pledged as security for the payment of the certificates of debt in such charter and amendments provided for, and for every part of such certificates, meaning thereby the interest accruing upon the principal thereof, as well as the principal. (2) That the plaintiff and those he represents, as owner of such certificates of debt or bonds or of coupons detached therefrom, now hold large amounts of past-due coupons of said certificates of debt or bonds, and that they are entitled to have their respective proportions of the stock, or so much thereof as may be necessary, sold in order to pay such past-due interest. Upon motion of counsel for the plaintiffs, it is therefore ordered and decreed that Joseph B. Bacheler, the commissioner heretofore appointed in this suit, take an account of such unpaid interest, and of such further interest as will be due on or before the 1st day of April, one thousand eight hundred and seventy-five, and also of such proportion of the said stock of the state of North Carolina in said North Carolina Railroad Company as may be equitably applicable to the payment of said interest found due to each of said plaintiffs, respectively, and that he make report to the next term of this court. It is further ordered and decreed that, unless, on or before the 1st day of April, 1875, it shall be made to appear to this court that the said state of North Carolina has levied a tax sufficient to pay the said arrears of interest, and has provided for its collection, or shall otherwise have paid or secured the payment of said past-due interest, then so much of the said stock of the state in the said North Carolina Railroad Company apportioned to the plaintiff and those he represents as may be necessary to pay off and discharge said arrears of interest shall be sold to the highest bidder for cash." Directions were then given as to the manner in which the sale was to be made, and at the end of all were these words: "And this cause is held for further directions."

[An appeal was then taken to the supreme court, where a motion was made to dismiss the appeal on the ground that the above decree was not final. The appeal was dismissed. 23 Wall. (90 U. S.) 405.]

Case No. 13,680.

SWAT v. UNITED STATES.

[Hoff. Land Cas. 230.] [1]

District Court, D. California. June Term, 1857.

MEXICAN LAND GRANTS—PETITION TO COMMISSIONERS—NEGLECT TO PROSECUTE—LIMITATION—HOW EVIDENCE TAKEN.

1. Where a claimant for land has presented his petition to the board of land commissioners, but has neglected to support it by evidence within two years thereafter, such neglect does not bring the claim within the limitation prescribed in the thirteenth section of the act of March 3, 1851 [9 Stat. 633].

2. Whether this court can proceed to decide such claim solely on evidence taken by its order, left an open question.

3. The claim rejected as fraudulent.

Claim [by George Swat] for three leagues of land on the Sacramento river [called the Rancho Nueva Flandria], rejected by the board, and appealed by the claimant.

E. O. Crosby, for appellant.

P. Della Torre, U. S. Atty., and Peyton & Duer, for appellees.

HOFFMAN, District Judge. The petition in this case was presented to the board February 28th, 1853. No evidence whatever, either oral or documentary, was introduced by the claimant before the board, and the claim was accordingly rejected, March 27th, 1855. The original documents on which the claim is founded, as well as the oral testimony in support of them, are for the first time submitted to this court, under its general rules authorizing "further testimony" to be taken in this class of cases. It may well be doubted whether the claimant has not, according to the letter as well as the spirit of the act of 1851, forfeited whatever rights he had to the land now claimed by him. The eighth section of that act requires "all persons claiming lands by virtue of any right or title derived from the Mexican or Spanish governments, to present the same to the commissioners, together with such documentary evidence and testimony of witnesses as the claimant relies on to support his claim." When the decision of the board comes up for review in this court, the tenth section requires a decree to be rendered "on the pleadings and evidence, and on such further evidence as may be taken by order of this court." The thirteenth section provides that all lands the claims to which shall not have been presented to the board within two years after the date of the act, shall be considered public lands, etc.

The first question to be considered is—was this claim "presented" to the commissioners within the provisions of the eighth and thirteenth sections? If not, it is barred, and the land must be deemed to be part of the public domain. The eighth section requires, as we have seen, that a party claiming land under any right or title derived from the Mexican or Spanish governments shall present the "same." This would, in strict grammatical construction, be taken to mean the "right or title" previously mentioned. But it cannot mean the grant itself, for the statute proceeds to say "together with the documentary evidence and testimony of witnesses" on which he relies. He is thus required to present both his title or right and also the documentary evidence of it. If then he has presented a petition, claiming the land, he would seem to have complied with one of the requirements of the law. The thirteenth section in effect

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

bars all claims which shall not have been presented within the two years prescribed. But as section eight evidently discriminates between the claim and the documentary evidence in support of it, it would seem that the omission to present the latter would not, within the thirteenth section, constitute an omission to present the former. I think, therefore, that the "claim" was presented within the period limited by the statute, and that the board would have been authorized to receive evidence in support of it, though offered after the expiration of the two years.

The second and more difficult question is—can this court proceed to decide this claim upon the evidence taken in this court, none whatever having been submitted to the board? If this evidence is properly before the court, the case must be determined upon it. The inquiry then is—does the law or the rule of court in pursuance of it authorize evidence to be taken in this court where none has been taken by the board? The language of the tenth section is "the court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by its order." The term "further" seems to indicate that the evidence ordered to be taken shall be additional evidence, and that some evidence shall already have been taken. The rule of court provides, not that the party shall be allowed to produce testimony in the case, but that he may take additional testimony; and certainly both congress and the court contemplated that such additional testimony should be taken to supply defects and omissions, to corroborate or rebut, and not that it should constitute the whole proofs in the case. It is clear from all the provisions of the act, that the jurisdiction intended to be conferred on this court was in its nature an appellate jurisdiction, or a power to review the decisions of the board. The case as presented to the board is to be reviewed in this court, and the decision is to be rendered upon the evidence submitted to the board, and such further testimony as the court may order. But if the claimant, disregarding the positive requirements of the eighth section, is permitted to withhold all his evidence, both oral and documentary, until he reaches this court, the functions of this court become in effect original and not appellate.

In cases of appeal from the district to the circuit courts in admiralty, additional testimony may be taken in the latter court. But if a libel were filed in the district court, no testimony whatever offered in support of it, and thereupon dismissed, the libellant would hardly be allowed in the circuit court, for the first time, to enter upon his proofs. If such a proceeding were permitted, it would be easy to evade the provisions of law which give to the district court exclusive original cognizance of admiralty suits, and to the circuit courts only an appellate jurisdiction. But the jurisdiction of this court in land cases, though called an appellate jurisdiction, and though the proceeding by which the decision of the board is reviewed is spoken of as "an appeal," and though bearing a close analogy to an appeal in admiralty or equity suits, has yet been decided to be an original proceeding; the removal of the transcript of the papers and evidence into this court "being but a mode of providing for the institution of suit in this court." U. S. v. Ritchie, 17 How. [58 U. S.] 534. It is to be remembered, however, that this view of the nature of the proceeding in this court was taken by the supreme court to meet the objection that the law authorizing an "appeal" from the decision of the board was unconstitutional. The latter not being "a court" under the constitution, the case when presented to the district court becomes for the first time a suit or case before a "court," and in this sense the jurisdiction of the court was said to be original. But the mode of exercising that jurisdiction is exactly analogous to the mode of exercising an appellate jurisdiction, and the proceeding is practically, though not technically, an appeal. When, therefore, congress has directed that this case shall be determined upon evidence taken before another tribunal, not a court, but certified up to this court to be used as evidence, and also on further evidence to be taken by order of this court, the question still recurs whether this court can, where no testimony has been certified to it, permit all the testimony on which its decision is to be founded to be taken as "further testimony."

The answer to this question depends on the force we attach to the word "further." If the construction contended for by the United States be adopted, the court would still be at liberty to order further testimony to be taken in all cases where any testimony whatever had been taken by either side before the board. Suppose then, that the testimony so taken by a claimant is wholly irrelevant, or immaterial, or even adverse to him, shall he be in a better position in this court than one who by accident or neglect of agents or counsel has been unable or has omitted to produce any testimony? It would hardly occur to the claimant under such circumstances that he could save his rights in this court by examining before the board a witness who knew nothing about his claim, or who would testify that he had no title.

Again: If the strict and literal construction of the term "further" be adopted, it might with some plausibility be urged that the testimony must be additional to some testimony already taken by the party seeking to introduce it. Suppose then, the United States have been wholly unable to procure any evidence before the board to establish a suspected fraud. When the case is in this court conclusive evidence is for the first time discovered. Shall they be pre-

vented from introducing it because they have offered no testimony to the commissioners?

It is unnecessary, however, to pursue this subject further. On the whole, I incline to the opinion that the intention of congress was to allow testimony on either side to be taken in this court; that the word "further" was used because it was taken for granted that the claimants would in all cases comply with the directions of the eighth section, and offer some testimony to the board; but that it was not intended to provide for the rare and exceptional case where they had totally omitted to do so, nor absolutely to restrict the power of the court to those cases where in strictness of language the testimony could be deemed "further testimony." In the present case, however, it is not necessary finally to decide the point. It is to be considered, therefore, as still open to discussion in this court. We proceed to consider the merits of this case.

The title of the appellant is claimed under what is known as the general title of Micheltorena. The question to be determined is one of fact—Was the claimant one of those in whose favor the general title issued? The persons to whom the governor authorized General Sutter to deliver a copy of the general title were those who had petitioned for lands, with a favorable informe by the latter, previous to December 22d, 1844, the date of the general title. If therefore, it appears that previous to that date the claimant had petitioned for his land, procured a favorable informe from Sutter, and obtained a copy of the general title from him, he is, according to the ruling of this court, entitled to a confirmation of his claim. In support of his claim an original petition to Governor Micheltorena, dated November 13th, 1844, is produced, with a marginal informe by Gen. Sutter of the same date, together with a copy of the general title, and a certificate signed by Sutter that it was delivered to Juan de Swat on the twenty-fifth of April, 1845. It is contended that no petition was ever presented to the governor; that the petition now produced was made November 3d, 1845; that its date has been altered to November 13th, 1844, and the favorable informe of Gen. Sutter, dated November 13th, 1844, recently written in the margin. The present claimant is the brother and heir of Juan de Swat, the alleged original grantee. During his lifetime Juan de Swat conveyed his interest in a part of the lands to Warner, by whom a claim was presented to the board through his attorneys Messrs. Kewen & Morrison. It is shown that Juan de Swat delivered to Warner his title papers. And copies of the papers as presented in the Warner case are in evidence in this cause. Mr. Morrison, one of the attorneys of Warner, testifies that he had in his possession the original papers in the case, viz: the petition of Swat to the alcalde, De la Rosa, with the marginal indorsements of that officer and of Sutter, the petition to the governor and the map accompanying it. That he delivered all these papers to Mr. Crosby, the attorney for the present claimant. It is also shown that Swat himself stated that Messrs. Kewen & Morrison had his original papers, which is further corroborated by the fact that Swat and Warner conveyed to Kewen & White an interest in part of the land as a compensation for their professional services. A copy of the petition to the governor is produced and admitted to be in the handwriting of Mr. Kewen. This copy was delivered with the other papers to Mr. Crosby by Mr. Morrison.

On examining the copies of the papers filed in the Warner case, the originals of which were, as has been stated, delivered to Mr. Crosby after the Warner case was rejected and abandoned, we find them to correspond in every respect with the papers now produced, except in three vital particulars: The map has no date, while that now produced has the figures "1844" upon it. The petition to the governor is dated November 3d, 1845, instead of November 13th, 1844; and there is no favorable informe of General Sutter on its margin. That a map without the date of 1844, that a petition to the governor dated November 3d, 1845, and having no marginal informe by Sutter, were presented in the Warner case, cannot be doubted; and that those papers were delivered to Mr. Crosby, is equally clear. If the papers now produced be not those papers which have since been altered, where are they? And whence have the papers now produced been obtained? No explanation on these points is offered on the part of the claimant, nor is any reason suggested why Warner & Swat, who are shown to have given the papers to Messrs. Kewen & Morrison, should have withheld from them the only papers by which the claim could be established. That Messrs. Kewen & Morrison had no papers bearing the dates of those now presented is clear; and the copy of the petition to the governor made by Mr. Kewen and handed with the other papers to Mr. Crosby, is dated like that filed in the Warner case, November 3d, 1845, and not November 13th, 1844.

On examining the petition now produced we recognize the facility with which an alteration of its date could be made. Numerous experts have testified that they discover the marks of the supposed alteration by the insertion of the figure one before the three in the date of the day, and the change of the number of the year from 1845 to 1844. I cannot say that I have been able myself to detect these alterations, although there is evidently something unnatural in the appearance of the figures, which suggests the possibility of their having been changed.

One indication is extremely suspicious, the ordinary English affix "th" is placed after and above the figures "13," which certainly would not have been done by a person writing a document in Spanish. But the moral evidence afforded by the circumstances of this case is stronger than any furnished by the mere appearance of the documents. Before we can believe the petition now presented to be genuine, we must suppose that two petitions to the governor were drawn, the one dated November 13th, 1844, the other November 3d, 1845. That they were not merely similar in purport but identical in every particular, except the date. That when the title papers were furnished to counsel for the purpose of establishing the claim, only one of them was delivered with the other papers; that the other, on which alone the claim could be substantiated, was withheld. That neither they suspected, nor their clients advised them during the whole proceeding, of the existence of any other petition than that furnished. That the second petition has recently, and after the cause had been pending two years before the board, and after the claim had been rejected, been suddenly produced we know not whence, while the first petition has disappeared we know not whither; and, finally, that the unfortunate coincidence has occurred that the second petition presents, if not unmistakeable marks of alteration, at least an equivocal and suspicious appearance. A series of suppositions so improbable and extravagant cannot, without the clearest proof, be entertained. The testimony of Mr. Bidwell is relied on by the claimant to explain some of the circumstances of the case. But the evidence of this witness tends to corroborate rather than to weaken our suspicions. It is clear from his statements that in the fall of 1845, or spring of 1846, he did prepare a petition and map for Swat, but was evidently prevented from presenting them to the governor. But the previous petition of November 13th, 1844, he cannot recollect. That purporting to bear that date he recognizes as in his handwriting, and he presumes from its date and from the date of the map, that he drew it at the time it bears date. His opinion is thus derived entirely from the dates of the documents, and the question whether those dates have been altered is the very point in controversy.

But, in addition, it is admitted that on the seventh of October, 1845, Swat petitioned the alcalde of Sonoma for permission to occupy the land in question for the security of his cattle and horses. That this petition was referred to Gen. Sutter, who reported on the thirty-first of October, 1845, that the land was vacant. And yet if the documents now produced are genuine, he had on the thirteenth of November preceding petitioned the governor for the same land, with a favorable report by Sutter, and the latter had, as authorized by the general title, delivered to him a copy of that document on the twenty-fifth of April, 1845. At the very time then at which he asks for permission to occupy a piece of land for the security of his cattle, and at which Sutter certifies that it is vacant, and for six months previously, he had received from Sutter himself what was then regarded and what has since been considered by this court as a good title to the land.

Again: If at the time the petition of 1845 was drawn, Swat had already presented a precisely similar petition, with a favorable report of Sutter, on which the latter had given him a copy of the general title, those papers must have been in his possession. It is certainly surprising that Mr. Bidwell, who was conversant with the mode of obtaining grants, should have totally forgotten such important documents, and should, when drawing the petition of 1845, have omitted all mention of the previous petition of 1844, drawn by himself, on which was written Sutter's favorable report, and on which Swat had already obtained a copy of the general title. That it must have been before him when he drew the petition of 1845 is evident from the fact that the one is a literal transcript of the other, and that they only differ in their dates.

If the object of the second petition of Swat was merely to procure the "extension of his title in proper form," as promised in the general title of Micheltorena, the nature of the application was essentially different from an ordinary petition for lands; and yet in his second petition he merely asks for "the vacant land" on the Sacramento river, and gives its boundaries, etc., in the usual form, while he wholly omits to mention the facts which constituted the foundation of his application. It is not conceivable that Mr. Bidwell should, under such circumstances, have contented himself with copying the first petition, and should now have lost all recollection of so singular a proceeding. If to all these considerations be added the facts that the petition of the present claimant to the board omits to mention the date of the petition to the governor, or Sutter's favorable report upon it; that no one of the numerous attorneys who have been concerned in the case, or of the persons who have examined the papers, has ever seen such papers as are now produced; that if this petition be not the petition of 1845, with its date altered, that paper has suddenly and unaccountably disappeared simultaneously with the equally unexplained appearance of the present petition; that Swat repeatedly declared to numerous witnesses that his title consisted of the "alcalde papers, and that he had been too late in his application to the governor"; and, finally, that the present claimant, in a deed dated July, 1855, refers to the petition of Swat to the governor as made on Novem-

ber 3d, 1845, showing that even so late as 1855 the existence of the petition of 1844 was wholly unknown to him,—the conclusion is irresistible, that no petition dated November 13th, 1844, was ever presented to the governor or prepared by Bidwell, and that the document now presented is the petition of November 3d, 1845, the date of which has been fraudulently altered, and on which the marginal endorsement of Gen. Sutter has since been written. There is some testimony which would, if admitted, confirm this view of the facts. I have not thought it necessary, however, to decide upon the question of its admissibility, for upon the evidence above referred to I entertain no doubt as to the facts of the case. The claim must be rejected.

Case No. 13,681.

SWATARA R. CO. v. McKIM.

[2 West. Law J. 138; 11 Hunt, Mer. Mag. 363.]

Circuit Court, D. Maryland. Oct., 1844.

CORPORATIONS—SUBSCRIPTION FOR STOCK—FRAUDULENT AGREEMENT.

This suit was brought by the Swatara Railroad Company of Maryland, to recover of the executors of John McKim, Jr., deceased, the sum of $500, the amount subscribed for ten shares of stock. On the part of the defendant, it was proved that the plaintiff's commissioner to receive subscriptions, had agreed with certain other stockholders who had previously subscribed their names on the list, to receive, in payment of their shares, Tide Water Canal stock at its nominal amount, when in fact it was greatly depreciated in the market; this agreement, it was contended, was a fraud upon the other bona fide stockholders, and entitled them to a recission of their subscription.

THE COURT (TANEY, Circuit Justice,) decided that each stockholder must be charged with notice of the company's charter, which authorized only payments of stock in money, and, therefore, as the said agreement to receive depreciated securities was illegal and void, it was incompetent to the parties to the illegal agreement, to set it up in bar of an action brought against them for the stock subscribed; and if the said parties would be precluded from setting up said agreement, neither could any other bona fide subscriber of stock rely upon the said illegal agreement for the purpose of annulling his own subscription. It is proper to state that the articles of subscription, signed by all the stockholders, purported, on their face, to be payable in dollars, but THE COURT decided that whether the collateral agreement to pay in depreciated securities, was in writing or by parol, it was equally inadmissible as a defence.

Case No. 13,682.

SWATZEL v. ARNOLD et al.

[1 Woolw. 383.] [1]

Circuit Court, D. Nebraska. May Term, 1869.

PLEADING IN EQUITY—AMENDMENT—SUPPLEMENT—FOREIGN ADMINISTRATOR—FUNCTIONS—RIGHT TO SUE—INTEREST IN SUBJECT MATTER—CHANGE OF CHARACTER.

1. The general rule is, that matters existing at the time of filing the bill, but omitted therefrom, and appearing necessary to the case, should be brought before the court by amendment.

2. Matters pertinent to the case, arising after the bill is filed, should be brought before the court by way of supplement.

3. Before answer, it is in some cases admissible to charge matters arising after filing the bill, by way of amendment, instead of by supplement.

[Cited in Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 755.]

4. An administrator appointed by the court within whose jurisdiction a decedent was at his death domiciled, is entitled to receive from the administrator appointed in another jurisdiction in which there are assets, what may remain after paying the debts of the estate therein.

[Cited in Pulliam v. Pulliam, 10 Fed. 41.]

5. Such administrator is, by virtue of his character as such, and the statute of Nebraska, entitled to administration in Nebraska.

6. An administrator appointed in one state, like an executor who has not proved the will, may sue in the courts of another, before he has letters therefrom; and having obtained letters, may aver the fact by amendment.

[Cited in Black v. Henry G. Allen Co., 42 Fed. 624; Giddings' Ex'rs v. Green, 48 Fed. 491.]

7. He has an interest in the subject matter, although he has no standing in court, and for that reason may support his suit in order to defend his right by authority afterwards acquired.

8. This is also sustainable on the principle that a party, suing in one capacity, may amend by asserting a claim in another, even though subsequently acquired.

On the 12th of March, 1864, John Swatzel filed his bill of complaint in the district court of the late territory of Nebraska, for the county of Washington. The object of the bill was the foreclosure of a mortgage upon lands situated in that county, executed by Anselm Arnold, the ancestor of the defendants, to Joseph Parks, the intestate of the plaintiff. The bill alleged the appointment of the plaintiff as administrator of Parks' estate, by the probate court of the county of Johnson, in the state of Kansas. On the 25th of April, 1864, the defendants demurred to the bill, on the ground that the plaintiff, not having been appointed administrator by any court in Nebraska, was incapable of maintaining the suit. The court in which the suit was brought sustained this demurrer. Thereupon the plaintiff obtained leave of the court to file an amended bill. This he did on the 18th of May, 1865. The allegations of new matter in the amended bill were as follows:

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

"That afterwards," that is, after the appointment of the plaintiff as administrator of Parks' estate by the Kansas court, "on or about the 8th day of August, A. D. 1864, your orator, the said John Swatzel, was, on application to the probate court of said county of Washington, in said territory of Nebraska, duly appointed administrator of the estate of said Joseph Parks, deceased; that he at once qualified, and is the acting administrator of the estate of Joseph Parks within said territory." The parties plaintiffs in the suit being citizens of the state of Missouri, and the parties defendants citizens of the state of Nebraska, the cause was, upon the admission of the latter state into the Union, and the organization of the state and federal courts therein, removed into the United States circuit court. On the 14th day of December, 1868, which was after the removal of the cause into said court, the defendants filed their demurrer to the amended bill, and as cause therefor alleged, that the appointment by the court in Nebraska of the plaintiff as administrator, after the commencement of the suit, was ineffectual to maintain the same, and that the objection successfully urged by them to the original bill was likewise fatal to it as amended.

Mr. Briggs, for plaintiff.
Mr. Woolworth, for defendants.

MILLER, Circuit Justice. In this case the plaintiff brought, in the district court of the late territory of Nebraska, his suit as administrator of the estate of the decedent, Joseph Parks, to foreclose a mortgage. His only claim to sue as administrator rested on his appointment by the probate court of the county in the state of Kansas in which the decedent was domiciled at the time of his death. A demurrer to this bill was sustained in the court in which it was brought, on the ground that the plaintiff could not maintain his suit because he had not been appointed administrator by any probate court of the territory. The plaintiff asked leave to amend, and after this procured letters of administration in the territory, and filed his amended bill setting up that fact. On the organization of separate state and federal courts, the cause came here, because the parties were citizens of different states. The defendants have, in this court, demurred to the bill as amended.

Two propositions are relied on in support of the demurrer: 1. That if the matter set up in the amendment is admissible at all, it can be brought in only by supplemental bill. 2. That as it appears that the plaintiff had no right of suit at all when the original bill was filed, and now attempts to assert a right acquired since the first demurrer was sustained, he can do this only by a new and independent suit.

It is certainly a general rule in equity pleadings, that matters existing at the time the bill was filed, which, being omitted in the original bill, are important to the plaintiff's case, are to be introduced by an amended bill; and that matters pertinent to the case occurring after the bill is filed are to be brought before the court by supplemental bill. This constitutes the essential difference between the two classes of bills we have mentioned. If the matter of the amendment had been alleged by way of a supplemental bill, it would have conformed to this rule, and this would seem to have been the more appropriate form of pleading. But before answer, it is often proper to allege in the amended bill pertinent matter occurring after the filing of the original bill. Story, Eq. Pl. § 885. The entire method of pleadings in chancery in the federal courts, is taken from the high court of chancery in England, and the system of pleading in that court was based largely upon the decisions of the chancellors and the practice which had grown up under them. In some respects, this system was not a little artificial and conventional, though, as a whole, deserving of much of the praise it has received.

In the case of Humphreys v. Humphreys, 3 P. Wms. 349, a demurrer had been sustained to a bill in chancery, because the plaintiff, who claimed in right of her deceased father, had not sued as administratrix, and, in fact, no administrator had been appointed. Subsequently to the allowance of the demurrer, she had taken out letters of administration, and it was held by the lord chancellor, that she might set up that fact by an amended bill, though it was objected to on the ground taken in this case. The lord chancellor said, that the mere right to have an account of the personal estate was in the plaintiff, Helen, the daughter, as she was next of kin to her father, and it was sufficient that she had now taken out letters of administration, which related to the time of the death of the intestate, just as where an executor brings a bill before proving the will, and his subsequent proving the will makes such a bill a good one, though the probate be after the filing thereof. Whereupon his lordship resisted the plea as one for delay, and held that the taking out of letters of administration might be charged either by way of supplement or amendment. The analogy between this case and the one before me is close and obvious. It is attempted to distinguish them by the circumstance that the rights claimed in the case cited were under a will; and it is said that an executor may do many things under a will before it is proven. But the distinction fails, because there the executors named in the will were both dead, and had never proved the will, and the right of the plaintiff in that case, as in this, to maintain the suit, depended solely upon the letters of administration granted after the suit was brought and first set out in the amended

bill. And aside from the special circumstances of that case, the principle in respect of administrators and executors suing in courts foreign to the jurisdiction in which they obtain their letters, is precisely the same. In Dixon's Ex'rs v. Ramsey's Ex'rs, 3 Cranch [7 U. S.] 319, the rule laid down by the court in respect of foreign administrators is applied to foreign executors. The case before cited also goes to the second proposition; for the plaintiff here, before the administration granted in Nebraska, stood very much in the same position that the plaintiff there did, namely, having an interest in the subject matter of the litigation, and no standing in court to assert it. The present plaintiff, as administrator of the domicile, had a right to receive for final distribution the sum due on the mortgage. He had an inchoate right to be appointed administrator here, and if any one else had been appointed, that person would have been liable to account to him for what was in hand after paying the debts in this jurisdiction. Stevens v. Gaylord, 11 Mass. 255; Harvey v. Richards [Case No. 6,184]; Burn v. Cole, Amb. 415; Somerville v. Somerville, 5 Ves. 791.

In order to establish the position that this matter could not be shown by amendment, the alleged incapacity of the plaintiff must be so radical that the defendants could not waive it, but whenever, in the progress of the cause, it came to the notice of the court, it would dismiss the suit. This is not the case. The objection is to the character of the parties, and had it not been taken by demurrer or plea, but a general answer had been filed, it would have been considered waived. See 39th rule in equity. The cause would have proceeded without regard to the objection. This is apparent from one or two considerations. It is well settled that a voluntary payment to the administrator of the domicile, by a foreign debtor, is a good acquittance to such foreign debtor. Doolittle v. Lewis, 7 Johns. Ch. 49; Stevens v. Gaylord, 11 Mass. 256; Dawes v. Head, 3 Pick. 128; Davis v. Estey, 8 Pick. 475; Harvey v. Richards [supra]. This could not be done if the administrator's authority for all purposes is confined to his jurisdiction. The impediment to the exercise of the full powers of an administrator in a jurisdiction foreign to that granting his letters, is essentially technical and formal, and should not be strained beyond its necessary application. Yeaton v. Lynn, 5 Pet. [30 U. S.] 224. The incapacity of the foreign administrator not being radical, so as to entirely deprive him of power to proceed with his cause, the fact of his taking out letters in this state, was matter which he might aver by amendment, and maintain his suit thereon. The demurrer is overruled.

See Noonan v. Bradley (in the U. S. supreme court at the December term, 1869) 9 Wall. [76 U. S.] 394.

SWAYNE (WHITELY v.). See Case No. 17,568.

S. W. DOWNS, The (STEVENS v.). See Case No. 13,411.

Case No. 13,683.

In re SWEARINGER et al.

[5 Sawy. 52;[1] 17 N. B. R. 138.]

District Court, D. Nevada. Dec. 13, 1877.

HOMESTEAD—CONSTRUCTION—TENANTS IN COMMON—NEVADA.

1. The first section of the Nevada homestead act is a literal copy of the first section of the California homestead act of 1860 [Laws 1860, 311,] which, when copied, had been so construed as to deny the right of homestead exemption to a tenant in common in the common property, but the constitutions of the two states in regard to such exemptions are different: *Held*, the language of the law being free from ambiguity, and the intention of the legislature and the framers of the constitution of Nevada plain, that in construing the law of Nevada the court was not bound to adopt the construction of the courts of California.

[Cited in Commercial & Sav. Bank v. Corbett, Case No. 3,058.]

2. The interest of a tenant in common in the dwelling-house and land actually occupied by him as a homestead, not exceeding five thousand dollars in value, is by the constitution and law of Nevada exempt from forced sale.

[3. Cited in Re McKenna, 9 Fed. 29, to the point that a petition, and not a plenary suit or action, is the proper remedy for the assignee who seeks to gain possession of property claimed to be improperly withheld from him.]

This is a proceeding by the assignee of the bankrupts to compel Swearinger to surrender possession of certain premises, which the latter claims as a homestead. At the time Swearinger and Lamar were adjudicated bankrupts, in January, 1877, they were partners in the business of ranching, and tenants in common of the premises now in question. For about two years before, the respondent Swearinger had been residing with his family on these premises, having no other home. In October, 1876, with the consent of Lamar, Swearinger filed and recorded a declaration of homestead, embracing the whole premises, and it was understood that if Swearinger held the whole as a homestead he should give Lamar something for his share. The respondent, in his answer, now claims to hold as his homestead, one hundred and twenty acres of the whole tract, and offers to give the assignee possession of the rest.

C. H. Belknap, for assignee.

J. H. Windle and S. D. King, opposed.

HILLYER, District Judge. The contention in this case is as to the true construction of the first section of the law of Nevada, commonly called the homestead act. Under that section, can a homestead be ex-

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

empted from forced sale when the dwelling-house and land claimed are owned and possessed by the debtor as a tenant in common with another?

At the outset, counsel for the assignee invokes a well-known rule of construction, which, he claims, is decisive. The first section of the Nevada homestead act (1 Comp. Laws, 60), is an exact copy of the first section of the California act of 1860. The courts of California have, from the first decision in 1855, held that no homestead could be carved out of a tenancy in common, and counsel insists that this construction was adopted when the section was copied. The thing to be ascertained is the intention of the legislature of Nevada, "but this intention is to be searched for in the words which the legislature has employed to convey it." [The Paulina v. U. S.] 7 Cranch [11 U. S.] 52. Before rules of construction are invoked, there must be something to construe. If the words used express clearly the sense and intention of the law they must always govern. For it is not permitted to interpret what is plain and manifest, as it stands in no need of interpretation. Smith's Comp. § 545. It would be hard to find language freer from uncertainty or ambiguity than that of the law now under consideration to express the undoubted intention of the law-givers to protect the home of a family from forced sale. "The homestead consisting of a quantity of land, together with the dwelling-house thereon, shall not be subject to forced sale," etc. These are the words. To my mind they present a sense too obvious to admit of more than one interpretation, and there is no occasion to go further and inquire how they may have been restrained in their meaning by the courts of another state. Were this otherwise, the constitution of Nevada is so much more explicit than that of California, in the section providing for a homestead exemption, that it must receive great consideration in construing any law passed in pursuance of its provisions. Const. Nev. art. 4, § 30.

In the case of Hawthorne v. Smith, 3 Nev. 182, the court say, speaking of section 82: "It is evident the constitution intended that at all times the homestead should be exempt from forced sale, except in a few enumerated instances. It is equally evident the legislature intended to carry out this policy;" and in that case it was held that registration of the homestead might be made after an attachment levied on it, and indeed at any time before actual sale. In so holding, the supreme court of Nevada disregarded the decisions of the courts of California upon a precisely similar provision of the homestead law of that state, to the effect that registration was a condition precedent to exemption from sale, and that liens attaching before such registration were valid. In re Reed's Estate, 23 Cal. 410; McQuade v. Whaley, 31 Cal. 526. See, also, In re Walley's Estate, 11 Nev. 260; Noble v. Hook, 24 Cal. 638. If then the language of the law and constitution of Nevada is free from ambiguity; if there is no room for doubt about the intention with which that language was used, that intention must govern in spite of the decisions of the courts of another state, which do violence to that language and intention. Van Doren v. Tjader, 1 Nev. 380; Little v. Smith, 4 Scam. 402; Gray v. Askew, 3 Ohio, 466, 480.

[I come then to the more important inquiry whether in any case under the laws of Nevada, lands held by tenants in common can be the subject of a homestead exemption? Is there anything denying this right to a tenant in common, either in the language of the constitution or law, or in their spirit and general policy?] [2]

"A homestead," says the constitution, "as provided by law, shall be exempt from forced sale," etc. "The homestead," says the law, "consisting of a quantity of land, with the dwelling-house thereon, * * * shall not be subject to forced sale. * * *" There is nothing here, surely, denying the benefits of the exemption to a tenant in common. Indeed, the courts which have made the denial do it not upon what the law-giver has said, but what he has not said. If a tenant in common can, as a matter of fact, have a home on the lands held in common, the language used applies to him as fairly as it does to any one. The homestead is one thing, the title to it another. Nor is there anything in the spirit and policy of homestead exemptions which does not apply with as full force to a tenant in common as to any other person.

Two reasons have been given for denying a homestead to tenants in common, under general homestead laws substantially like that of Nevada: 1. In states whose laws require the claimant to be the owner of the property, because it requires the title of all the tenants to constitute an ownership; 2. That the statute did not contemplate carving homesteads out of tenancies in common, "because it has not provided any mode for their separation and ascertainment." Wolf v. Fleischacker, 5 Cal. 244; Thurston v. Maddocks, 6 Allen, 427. The Nevada law omits the word owner in prescribing the qualification of those who may claim the exemption, so that the first objection loses nearly, if not quite, all its force here.

The second reason hardly seems a satisfactory one for refusing to obey a plain and positive injunction of the law-makers, even if the difficulties are great. But I think, that on examination, the supposed difficulties will be found chiefly imaginary. The law does not attempt to guarantee a perfect title to the premises, or, necessarily, an exclusive ownership and possession, but it protects whatever right, title and interest the

[2] From 17 N. B. R. 138.

debtor has from forced sale. The object of the law is to protect from forced sale the homestead in which lives the family of a man who is so poor as to need such protection. Now a homestead, owned and occupied in conjunction with a co-tenant, is as much a shelter to the family of a poor man, as if the land were owned in severalty. The co-tenants may have rights to adjust among themselves, but a creditor has, if possible, less interest than he would have if his debtor owned the land separately instead of jointly.

In the case of Spencer v. Geissman, 37 Cal. 69, one having possession of certain premises, while the title in fee was in a stranger, filed a declaration of homestead thereon, and afterwards acquired the title in fee. In holding this declaration good, Sawyer, C. J., delivering the opinion of the court, says: "There is no question made as to its being a homestead if a party having a naked possession only, the title being in a stranger, can acquire a homestead right in the land so possessed. The statute does not specify the kind of a title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it, not on the title merely. The actual homestead as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales." This view of the law, the correctness of which I think cannot be doubted, will give a tenant in common a homestead to the extent of his interest in the premises claimed. It seems to me to overthrow the case of Wolf v. Fleischacker, as an authority to the contrary, and that case, if still followed in California, must be so solely because it has become a rule of property. It must be borne in mind that the law does not give the claimant any title whatever to the homestead which it protects. A person, who, with his family, is actually in possession of a dwelling-house as a home, cannot be disturbed in such possession by a forced sale. But if another has a better title to the premises, or any part of them, the claimant gains nothing by having dedicated them as a homestead. In the case of tenants in common, the law can be complied with without disturbing in any way their relations to the property and each other. When the homestead of one tenant is protected from sale, it can only be, as in all other cases, to the extent of his interest. No specific portion of the common lands can be secured by the selection and recording of the homestead. The interest of the co-tenant cannot be affected in that way. The parties continue, after the interest of one is secured as a homestead, as before, to be tenants in common of the whole premises. The authorities on this question are conflicting. In favor of the exemption to tenants in common, are Williams v. Wethered, 37 Tex. 130; [Smith v. Deschaumes] Id. 429; Greenwood v. Maddox, 27 Ark. 648; Tarrant v. Swain, 15 Kan. 146; Bartholomew v. West [Case No. 1,071]; Thorn v. Thorn, 14 Iowa, 49; McClary v. Bixby, 36 Vt. 254; and see, also, Smyth, Homest. § 120; Freem. Ex'ns, § 243.

In California a tenant in common or joint owner of personal property may hold his share exempt from execution. Servanti v. Lusk, 43 Cal. 238. So in New York, Radcliff v. Wood, 25 Barb. 52. Opposed are Wolf v. Fleischacker, supra; Thurston v. Maddocks, supra, and cases in Indiana and Wisconsin. My own conclusion is, that, under the constitution and laws of Nevada, the actual homestead of every head of a family, of less value than five thousand dollars, is protected from forced sale; that there is nothing in such constitution or laws restricting the benefit of exemption to those who have any particular kind of title; that any interest the claimant may have in the dwelling-house and land constituting his actual home which would otherwise be subject to forced sale, is by the laws exempted from such sale; and, consequently, that under such circumstances the interest of a tenant in common is exempt.

In the case at bar the respondent, with the consent of his co-tenant, Lamar, has been occupying the dwelling-house and land claimed as his homestead. He and his family have no other home. As tenant in common he is rightfully in possession so long as he does not exclude his co-tenant. This home, such as it is, and subject to the rights of the co-tenant, is exempt from forced sale. The interest of Swearinger in the premises did not pass to the assignee in bankruptcy. The interest of Lamar did pass, thus making the assignee a tenant in common of the whole premises to the extent of an undivided one half interest. Swearinger and the assignee being entitled as tenants in common to a united possession of the premises, neither can exclude the other. The request or consent of Lamar to the occupation of the premises claimed did not amount to a parol partition and was not intended to be one. Since the estate of a tenant in common is subject to the same dispositions and incidents as an estate in severalty, the assignee can sell the interest of Lamar in the whole premises, and the purchaser will be entitled to a share in the possession with Swearinger. Doubtless the assignee could, if such course is advisable, proceed for a partition of the premises either in this court or the courts of the state. The interest of Swearinger in the premises was not purchased with partnership funds, and is not partnership property, if that fact would in any way affect the result.

A decretal order will be entered adjudg-

ing the assignee Smith to be the owner of an undivided one half interest in the premises described in his petition, as a tenant in common with Swearinger, and directing that he be let into possession accordingly, also adjudging the interest of Swearinger to be exempt as a homestead.

Case No. 13,684.

SWEATT v. BOSTON, H. & E. R. CO. et al.

[3 Cliff. 339; 5 N. B. R. 234; 4 Am. Law T. 174; 1 Am. Law T. Rep. Bankr. 273; 6 Am. Law Rev. 168.] [1]

Circuit Court, D. Massachusetts. Sept. 7, 1871.

BANKRUPTCY — RAILROAD COMPANIES — PRIVATE AND PUBLIC CORPORATIONS—CONSTITUTIONAL LAW—TRANSFER OF FRANCHISE.

1. Railroad companies are private commercial corporations within the meaning of section 37 of the bankrupt act [of 1867 (14 Stat. 535)], and the district courts of the United States have therefore jurisdiction to adjudge such corporations bankrupt, the same as in the case of other debtors.

[Cited in Re Independent Ins. Co., Case No. 7,017; Re Brinkman, Id. 1,884; Winter v. Iowa, M. & N. P. R. Co., Id. 17,890; Re California Pac. R. Co., Id. 2,315; Re Southern Minn. R. Co., Id. 13,188; Re Oregon Bulletin Printing & Pub. Co., Id. 10,560; Graham v. Boston, H. & E. R. Co., 14 Fed. 762; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 506, 5 Sup. Ct. 1011.]

[See Adams v. Boston, H. & E. R. Co., Case No. 47; Baldwin v. Raplee, Id. 802.]

2. Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit; but if it is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government.

3. Transportation of freight and passengers from one state to another, or through more than one state, either by land or water, is commerce within the meaning of the provision of the constitution which gives to congress power to regulate commerce between the several states.

[Cited in U. S. v. Boston & A. R. Co., 15 Fed. 211.]

4. Congress has power to enact that railroads created by the states shall be liable to the provisions of the bankrupt act.

5. Such corporations are not among those means and instruments of the state governments over which congress has no power or jurisdiction.

6. Inasmuch as the exclusive power to establish a uniform system of bankruptcy is vested in the federal legislature, it has the power to authorize the district courts or their registers in bankruptcy to transfer the franchise of a railroad company in bankruptcy, it being a private corporation.

Proceedings in bankruptcy were instituted against the Boston, Hartford & Erie Railroad Company in the district court of this district, October 21, 1870, on the petition of Seth Adams, one of the creditors of the company, and on the 2d of March, 1871, the company was adjudged bankrupt on said petition. The petitioner for revision [Enoch G. Sweatt], also one of the creditors of the company, on the 18th of March filed a petition in the circuit court praying among other things for a revision and reversal of that decree. Further facts necessary to an understanding of the case are embodied in the opinion.

[For prior proceedings in this litigation, prosecuted in Massachusetts, see Case No. 47; in New York, Id. 152.]

J. P. Converse and E. A. Kelly, for the petitioner for revision.

B. F. Butler, C. S. Bradley, W. G. Russel, and T. K. Lothrop, for the petitioner in bankruptcy and the assignees.

R. R. Bishop, for Adams.

CLIFFORD, Circuit Justice. Circuit courts within and for the districts where the proceedings in bankruptcy are pending have a general superintendence and jurisdiction of all cases and questions arising under the bankrupt act, "and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as in a court of equity." 14 Stat. 518. Evidently the revision contemplated by that clause is of a special and summary character, as sufficiently appears from the words "general superintendence" preceding and qualifying the word "jurisdiction," and more clearly from the fact that the power to revise, as conferred, extends to mere questions as well as to cases, and to every interlocutory order in the case pending the proceedings; and also from the language of the second clause of the section, that the powers and jurisdiction therein granted may be exercised either by said court, or by any justice thereof, in term time or vacation. Morgan v. Thornhill, 11 Wall. [78 U. S.] 80. Power to revise "all cases and questions" which arise in the district court under the bankrupt act is conferred upon the circuit courts by the first clause of the second section of the act, "except when special provision is otherwise made," as appears by the express words of the clause, and the further enactment is that the circuit courts in such cases may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case or question in term time or vacation as in a court of equity, showing that all congress intended by the phrase was to prescribe the rule of decision, whether it was made in court or at chambers.

Original jurisdiction in all matters and proceedings in bankruptcy is conferred upon the district courts, and they are authorized to hear and adjudicate upon the same, according to the provisions of the bankrupt act. Pursuant to that authority the district courts may exercise original jurisdiction in all suits in equity as well as in suits at law which may or shall be brought by the as-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 6 Am. Law Rev. 168, contains only a partial report.]

signee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, provided the suit shall be brought within two years from the time the cause of action accrued for or against such assignee. Three conditions must concur in order that the controversy may be cognizable under that clause of the section. It must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other; but where they all concur, and the suit has proceeded to final judgment or decree in the district court, the cause may be removed into the circuit court for re-examination by writ of error, if it was an action at law, or by an appeal, if it was a suit in equity, provided the debt or damage amounts to more than five hundred dollars, and the proceedings to effect the removal of the cause are reasonable and correct. Appeals under that clause are too late unless the appeal is claimed and the required notices are given, within ten days from the entry of the decision or decree in the district court, and the act of congress does not give the circuit court any power to enlarge the time. None of those provisions, however, apply to petitions for revision filed under the first clause of that section, nor does the bankrupt act fix any precise limitation to the right to file such a petition in the circuit court, unless it be that the right must be exercised before the proceedings in the district court are closed. Leave to apply for such a revision is granted by the act of congress; but the act does not prescribe any limitation as to the time within which the application must be made, nor do the rules and regulations promulgated by the supreme court ordain any limitation upon the subject. Littlefield v. Delaware & H. Canal Co. [Case No. 8,400]; 14 Stat. 521. Power to make rules for the orderly conducting business in court is vested in the circuit courts as well as in the supreme court, provided such rules are not repugnant to the laws of the United States and are not inconsistent with the rules relating to the same subject established by the supreme court. 1 Stat. 83; 5 Stat. 578. Experience, though for a brief period, showed that some regulation was necessary, and the court accordingly, on the 10th of September, 1870, adopted the rule that such an application would not be entertained except by special leave of the court on good cause shown for delay, unless the aggrieved party should give the required notice within ten days from the date of the order or decree described in the petition for revision. Rendered as the decree in the district court was, more than ten days before the present petition was filed in the clerk's office of the circuit court, the first question for consideration is whether the petition for revision is properly before the court. Petitions of the kind must be filed within ten days from the entry of the order or decree sought to be revised, unless the time on good cause shown for the delay, is enlarged by special leave of court. Seasonable application for such special leave was made to the presiding justice, but he could not hear it, as he was at the time attending to his official duties in the supreme court, nor could the circuit judge sit, as he, sitting in the absence of the district judge, rendered the decree described in the application. Necessarily postponed as the application was, it is certainly proper that the question as to the sufficiency of the cause shown for the delay in filing the petition should now be heard and determined. 16 Stat. 174.

Good cause, it is conceded, may exist for such delay, and if such cause is shown in this case the petitioner is entitled to be heard, but if not, then the petition for revision must be dismissed. On the 21st of October the original petition was presented to the district court, representing that the railroad company had committed certain acts of bankruptcy, and praying that the company might be adjudged bankrupt, as provided in section 39 of the bankrupt act. Due process was issued on the same day, returnable on the 4th of November following, and on the return day the company appeared and filed a motion to dismiss the petition for the want of jurisdiction. Both parties were subsequently heard upon that motion, and on the 18th of December last the district court, the circuit judge sitting in the absence of the district judge, overruled the motion and decided that the district court had jurisdiction of the petition. Such jurisdiction being still denied by the company, their counsel on the 23d of the same month filed an application in the circuit court, in the form of a bill in equity, to obtain a revision and reversal of that decision under the power conferred by the first clause of section 2 of the bankrupt act. Considerable delay ensued, but the petitioning creditor and the company, on the 28th of February last, filed in the clerk's office of the circuit court an agreement in writing to withdraw the application for such revision, and on the 2d of March following the corporation by consent of parties was adjudged bankrupt by the district court. Notice of that adjudication, in the usual form, directed to the present petitioner, at Woonsocket, in the state of Rhode Island, where he resides, was mailed at Boston on the 10th of the same month, and it is conceded that it was received by him at that place on the following day in due course of mail. He knew of the decision overruling the motion to dismiss the original petition, and he also knew that an application was filed in the circuit court to obtain a revision and reversal of that decision, but he did not

know that the company had been adjudged bankrupt, nor had he any knowledge of the proceedings which led to it until he received that notice. Proper steps were immediately taken to obtain a revision of that decree, but the application for the same was not seasonably filed in the clerk's office as required by the rule recently adopted by the circuit court in this district; but if the application had been filed as required, it would not have expedited the hearing, as the circuit judge could not sit in the case and the presiding justice was sitting in the supreme court. Some weight should also be given to the fact that the rule limiting the time within which such applications must be made has never been promulgated in the district where the petitioner resides. Surprise, especially when occasioned by the act of the opposite party, is often a good excuse for a want of preparation, and it cannot be doubted that the agreement of the company to withdraw the pending application for a revision of that decree had that effect upon the present petitioner. Withdrawn as the application was without notice, the act of withdrawal must have operated as a surprise to all who were interested to obtain a different result. Viewed in the light of the attending circumstances, the court is of the opinion that the cause assigned for the delay in filing the application for revision in this case is sufficient, and that the petitioner is entitled to be heard upon the merits. In re Alexander [Case No. 160], Littlefield v. Delaware & H. Canal Co. [Id. 8,400].

Three principal errors are assigned by the petitioner in support of the pending application, as showing that the order and decree of the district court should be reversed. They are in substance and effect as follows: (1) That the provisions of the bankrupt act do not apply to the corporation adjudged bankrupt by that decree, as a railroad corporation is neither a moneyed, business, nor a commercial corporation within the meaning of those words as employed in section 37 of the bankrupt act; and, therefore, that the district court had no jurisdiction of the case set forth in the original petition. (2) That it is not within the constitutional power of congress to enact that railroads created by a state shall be liable to the provisions of the bankrupt act, as such corporations are agencies and instrumentalities of the state for affording their citizens safe and convenient highways for public use, and for the transportation of passengers and freight. (3) That the district court had no jurisdiction to adjudge the railroad corporation bankrupt in this case, because all the property and assets of the company had been previously transferred to receivers appointed under a decree passed by the supreme court of the state.

Congress has the power to establish uniform laws on the subject of bankruptcies, and having exercised that power, the presumption is that it was rightly exercised, and that all persons and corporations whose pecuniary condition brings them within the provisions of the act, are entitled to the benefits which the act confers, and are made subject to all its obligations and requirements. Moneyed, business, and commercial corporations are certainly within the words of the act, as section 37 enacts that the provisions of the act shall apply to such corporations and to joint stock companies. Wherever the word "person" is used in the act, it must doubtless be construed as including corporations, as section 48 of the act so provides, but that section cannot be construed as including any corporation within the provisions of the bankrupt act, except such as are mentioned in section 37 of the act, as the rules therein prescribed regulating the proceeding in such cases do not apply to any other corporations than those previously named in the same section. Corporations not therein described are not subject to the provisions of the bankrupt act, and it is equally clear that railroad corporations are not moneyed corporations nor joint stock companies within the special meaning of that section. Argument in support of that proposition is unnecessary, as both parties agree to its correctness. Conceded as the proposition is, it may be dismissed without further explanation or remark. Jurisdiction is not claimed upon that ground, but the appellee insists that the word "commercial," as well as the word "business," preceding the word "corporations" in that clause of the section, includes railroad corporations, and that the legal effect of that clause, when properly construed, is to give the district courts the same jurisdiction in such proceedings against a railroad company as in case of other debtors. Whether the district courts have jurisdiction in such a case depends, in the first place, upon the terms of the bankrupt act, as they clearly cannot exercise any such power, unless it is conferred by that act. Power to establish uniform laws on the subject of bankruptcy throughout the United States, is vested in congress, and the proposition is beyond doubt that it is as competent for congress to apply such laws to private corporations created by the states, as to natural persons or to private corporations created by authority of congress. Much discussion of that topic is unnecessary, as the proposition is conceded by the petitioner, but he insists that railroad corporations are not private corporations, and even if they are, he denies that they are included in the words employed by congress in the bankrupt act. Public corporations are towns, cities, counties, parishes, and the like, which are created and continued for public purposes. Such institutions are the auxiliaries of the states in the important business of municipal rule, and have not the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legis-

lature, as their objects and duties are incompatible with everything of the nature of compact. Bonaparte v. Camden & A. R. R. [Case No. 1,617]; Ang. & A. Corp. § 31; Bissel v. Jeffersonville, 24 How. [65 U. S.] 294. Municipal corporations are created by the authority of the legislature, and they are invested with subordinate legislative powers to be exercised for local purposes connected with the public, but all such powers are subject to the control of the legislature of the state. 2 Kent, Comm. (11th Ed.) 275. Private corporations are created by the legislature for an infinite variety of purposes, and their powers are perhaps as various as the purposes they are designed to accomplish. Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit, but if the corporation is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government. Banks created by the government solely for its own uses, and where the stock is exclusively owned by the government, are public corporations, but a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may become a partner in the association by sharing with the corporators in the stock, and Chancellor Kent says that the same thing is true of insurance, canal, bridge, turnpike and railroad companies. 2 Kent, Comm. (11th Ed.) 275. When government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. U. S. Bank v. Planters' Bank, 9 Wheat. [22 U. S.] 907.

Text-writers everywhere, in treating of the subject under consideration, class railroad companies with banks, insurance companies, canal and steamship companies, turnpike and bridge companies, and assume that all such are private corporations. 1 Redf. R. R. (3d Ed.) 53. "In all these cases the uses may, in a certain sense, be public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person." Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 669. Railways are created for the purpose of carrying passengers and freight, and they are everywhere regarded as common carriers when engaged in transporting merchandise and the baggage of their passengers. Steamships which carry freight and packages for all who apply, are also responsible as common carriers. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place or from one port to another. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods are of such a kind as to be liable to extraordinary danger, or such as he is not accustomed to convey. Such carriers, whether by land or by water, in the absence of any legislative provisions prescribing a different rule, are insurers, and are liable in all events and for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. The Lexington, 6 How. [47 U. S.] 381; The Cordes, 21 How. [62 U. S.] 23.

Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are undoubtedly commercial corporations within the meaning of that phrase as employed in the bankrupt act, and as such are clearly subject to the provisions contained in section 39 of the same act. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination and are properly included in the same classification. All such corporations transact immense amounts of business, and may perhaps, in view of that fact, be well enough called business corporations, but their true legal and constitutional denomination, in the opinion of the court, is that of commercial corporations, as they are enacted for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Commerce among the states, as well as foreign commerce, is subject to the regulation of congress, and it is well-settled law that the word "commerce" includes navigation as well as traffic, and that the power to regulate extends to the vehicles of intercourse as well as to the commodities to be exchanged. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189. Power to regulate commerce, including navigation and commercial intercourse, was one of the primary objects for which the constitution was adopted, and it is beyond every doubt that the power extends to commerce among the states as well as to foreign commerce. 2 Story, Const. (3d Ed.) 4.

Regulations of the kind may not comprehend that commerce which is completely internal, and which does not extend to or affect other states, but the railroad in question, and most others, are parts of connecting lines intended to promote commercial intercourse among several states. Such corporations, with their engines and cars, are certainly vehicles of commerce among the states, and as such are commercial corporations within the meaning of the bankrupt act, and are proper objects of regulation by congress under the grant to regulate commerce among the states. Pom. Const. Law, 244. Even an incorporated bridge company, where it appeared that the bridge was a connecting link between two railroads, was

held by the supreme court to be a commercial corporation, and no doubt is entertained but that the decision was correct. Gilman v. Philadelphia, 3 Wall. [70 U. S.] 729.

Comprehensive as the phrase, "among the states," is, it may nevertheless be restricted to that commerce which concerns more states than one, but where railroads incorporated in different states are connected in one continuous line of communication, they are clearly instruments of commerce within the meaning of the constitution, and as such are commercial corporations within the meaning of the bankrupt act, and are subject to congressional regulation. Recent decisions besides the one in this case may be referred to, in which it is held that railroad corporations are business corporations, and as such that they are subject to be adjudged bankrupt as natural persons; but some difficulties attend that conclusion, as municipal corporations and others not liable to be dealt with under that act transact vast amounts of business as well as railroad corporations. Alabama & C. R. Co. v. Jones [Case No. 126]; Rankin v. Florida, A. & G. C. R. Co. [Id. 11,567]. Those cases and others of like character proceed upon the ground that every corporation transacting business for gain as its chief and ultimate purpose is a business corporation, and as such that it falls within the provisions of the bankrupt act, and it may be admitted that every such corporation in a general sense is a business corporation. Serious difficulties, however, are involved in the other branch of the proposition, as moneyed corporations also transact business for gain, and it is the chief and ultimate purpose of their creation; but they are not business corporations within the meaning of the bankrupt act, as they are legally and properly known by a more distinctive and characteristic denomination. Vast amounts of business are also transacted by municipal corporations, but they are not business corporations in the sense of that law, because they are created for public purposes, and exercise by delegation, a portion of the sovereign power of the state. Religious, charitable, literary, and educational corporations are not subject to the bankrupt act, nor are corporations created for political purposes, even though they or some of them may transact large amounts of business, as their chief and ultimate purpose shows that they are not properly denominated moneyed, business, nor commercial corporations. Private corporations are of many kinds, and they are known by certain appellations according to the objects for which they are created. Known as they are by some denomination significant of their distinctive characteristics, indicating their chief and ultimate purpose, there will prove to be no great difficulty in determining whether they are or are not subject to the provisions of the bankrupt act. Incorporated banks not of a public character, and insurance companies may be mentioned as examples of the moneyed corporations described in the provisions under consideration. Veazie Bank v. Fenno, 8 Wall. [75 U. S.] 533.

Modern legislation is crowded with private charters creating business corporations in every branch of the industrial pursuits, and no doubt is entertained that all such are business corporations within the meaning of the bankrupt act, as expounded by all the courts. Corporations of a commercial character are also subject to the provisions of the bankrupt act, and there is no question that railroad corporations, as well as steamship, steamboat, and canal corporations, if the subject of private ownership, are properly included in that classification. Direct authorities may be referred to, showing that a railroad corporation is a commercial corporation, and if that be shown, it must follow, with certainty, that such corporations are subject to the bankrupt act, as they fall, in that event, within the very words of section 37. Joint-stock companies, by the Irish bankrupt and insolvent act, are made subject to its provisions, and the same act also provides that the words of the act shall include every company and body of persons associated for any banking or other commercial purpose, incorporated by statute or charter, or which derives any immunity, privilege, or power under any act of parliament, and all commercial or trading companies or partnerships, etc. Authority is given to railways by the railway acts in that jurisdiction to borrow money, and a certain railway under that authority obtained certain loans, and gave mortgages to secure the payment, with interest, on a given day. Interest not having been paid, the creditor filed an affidavit of his debt in the court of bankruptcy for the purpose of having the corporation adjudged a bankrupt. Objection was made to the application upon the ground that railways were not commercial or trading companies, but the judge of the bankrupt court overruled the objection and sustained the application. Due appeal was taken to the court of appeal in chancery, where the parties were again fully heard, and on a subsequent day the opinion was given by the chancellor. He showed, in the first place, that railways were within all the other conditions of the bankrupt act, and then proceeded to say that the only question was whether a railway "is a company for commercial or trading purposes within the signification of those terms as used in the statute," and he held that it was, chiefly upon the ground that railways are "created for the purpose of conducting the business of carriers," remarking that in general, they are common carriers, and recognized as such, with all the liability attached to that character. In re Bagnalstown & W. Ry Co., 15 Ir. Ch. 491; Ex parte Barber, De Gex, 381.

Reported cases, decided by the supreme court, confirm that construction and show to a demonstration that the transportation of passengers and freight from one state to another, or through more than one state, whether by land cr water, is commerce within the meaning of that provision of the constitution which gives to congress the power to regulate commerce among the several states. Express power to regulate commerce among the several states is given to congress, and the words of the grant comprehend every species of commercial intercourse, and the power is complete in itself, and may be exercised to its utmost extent without limitations other than such as are prescribed in the constitution. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 193; Brown v. Maryland, 12 Wheat. [25 U. S.] 445; U. S. v. Coombs, 12 Pet. [37 U. S.] 78; Clinton Bridge, 10 Wall. [77 U. S.] 462; Erie Ry. Co. v. State, 31 N. J. Law, 531.

Confessedly, railroad corporations are created to transport passengers and freight, and it is that precise business in which they are employed. They must, therefore, be held to be commercial corporations. Undoubtedly the word "business," as applied to corporations, has a broader meaning than the word "commercial," as used in the same clause, but it was not the intention of congress, in the opinion of the court, to give such a scope to the word "business" as to supersede the words "moneyed" and "commercial," and leave them without any practical signification. Harris v. Amery, L. R. 1 C. P. 154.

Sufficient has already been remarked to show that railroad corporations are not public corporations, but the petitioner for revision insists that a recent decision of this court, as affirmed by the supreme court, supports the theory which he assumes in his second proposition. Buffinton v. Day, 11 Wall. [78 U. S.] 113. Taxes, in that case, were assessed against the plaintiff, under the internal revenue laws, upon his salary as judge of probate and insolvency for the county of Barnstable, in this state, and having paid the same under protest, he brought an action of assumpsit against the collector to recover back the amount, and the court held that it was not competent for congress to impose such a tax upon the salary of a judicial officer of a state. State power to lay and collect taxes for the support of their government may reach every subject over which the sovereign power of the state extends. They cannot, however, tax imports nor exports without the consent of congress, as they are prohibited from so doing by the constitution; and the power does not extend to the instruments of the federal government nor to the constitutional means employed by congress to carry into execution the powers delegated to that government, by the constitution. Congress may lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare; but that grant of power, when properly construed, does not interfere with the power of the states to levy taxes for the support of their own governments, nor does it extend to the means and instruments of the states any more than the power of the states to levy taxes for the support of their governments can be held to extend to the means and instrument of the governments of the United States. Founded as these principles are in the nature of the government ordained by the constitution, and in the relation which the states and the United States sustain to each other under that paramount law, they are immutable, and they are expounded and illustrated by a series of the decisions of the supreme court, never surpassed in ability, wisdom, and logical power by any ever delivered from the bench of any judicial tribunal. Examined separately or as a whole, they show on the one side that the federal government, though limited in its powers, is supreme within its sphere of action; that its laws, when passed in pursuance of the constitution, form the supreme law of the land. On the other hand, they also show that the powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively or to the people; that the exclusive powers possessed by the United States cannot be exercised by the federal government, and that the United States and the states in those respects, though exercising jurisdiction within the same territorial limits, are separate and independent sovereignties, acting separately and independently of each other within their respective spheres, just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." McCulloch v. Maryland, 4 Wheat. [17 U. S.] 406; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 204; Osborn v. Bank, 9 Wheat. [22 U. S.] 859; Brown v. Maryland, 12 Wheat. [25 U. S.] 448, 458; Weston v. Charleston, 2 Pet. [27 U. S.] 449; Dobbins v. Commissioners, 16 Pet. [41 U. S.] 447; Collector v. Day, 11 Wall. [78 U. S.] 124; National Bank v. Com. 9 Wall. [76 U. S.] 361. What those cases decide, as applied to the present case, is that the states cannot tax the means or instruments of the United States, nor can congress tax the means or instruments of the state governments. By the word "means" is meant the revenue, taxes, and public securities, as applied both to the United States and the several states, and the prohibition extends to the salaries of the executive and judicial officers and to the compensation of senators, members of congress, and to that of members of the state legislatures. Officers whose compensation is derived from fees paid by those transacting business with the office stand upon a different footing, but the question whether

such compensations fall within the reciprocal exemption is not involved in this case. Even less difficulty is felt in giving examples of what is meant by the instruments of government, as that phrase is used in decided cases. Austin v. Aldermen, 7 Wall. [74 U. S.] 699; Hamilton Co. v. Massachusetts, 6 Wall. [73 U. S.] 639; Society for Savings v. Coite, 6 Wall. [73 U. S.] 604.

Instruments of government, such as are referred to, are the officers, as such, executive, legislative, and judicial, appointed or chosen to enact, execute, and expound the laws, and the public buildings erected and occupied for the uses of the government. Federal machinery is much more multifarious than that of the states, as the government of the United States is charged with the national defence, and of course our forts, navy-yards, public ships, and the like, fall within the exemption. Public corporations also fall within that exemption, but railways are private corporations, just as much as steamship and steamboat companies or canal corporations, where the stock belongs to the corporators, or as much as moneyed, manufacturing, or business corporations, all of which are created to promote the public good. Doubtless, some such corporations are more convenient and useful than others; but the question before the court is not affected by the degree of importance which attaches to the corporation. Private corporations are not instruments of the state governments, and it is settled law that railways are private corporations, as appears by many decisions of the highest character. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 669. State governments sometimes become partners in such corporations, but the state does not, by becoming a corporator, identify itself with the corporation. Instead of that the state, in such a case, divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. U. S. Bank v. Planters' Bank, 9 Wheat. [22 U. S.] 907; Union Pac. R. Co. v. Lincoln Co. [Case No. 14,378]. Apart from that proposition of the petitioner, the authority of congress to subject railroad corporations to the provisions of the bankrupt act is also denied, because it is insisted that such a corporation cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business. Suppose it to be correct that a railroad corporation may not by its own act alienate any of its franchises, either the franchise to exist as such, or the franchise to accomplish the objects for which it was created, still it is conceded that it may transfer the same if so authorized by the state, and it is difficult to see, if the corporation is a private corporation, why the necessary power to enable the district court or the register, as the case may be, to make the transfer, may not be conferred by congress, as it is conceded that the exclusive power to establish a uniform system of bankruptcy is vested in the national legislature. 14 Stat. 522.

Express power is given to congress to establish such a law, and the constitution also provides that congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and it is clear that one of the powers previously granted is the power to pass such a law. Pursuant to that power, congress has, in effect, provided that the commercial corporations shall be subject to the bankrupt act, and that all the provisions of the act applicable to the debtor, or which set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall, in like manner and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matter concerning the corporation or company, and their money and property. Prior to that clause, the same section enacts that "like proceedings shall be had and taken" as are provided in the case of debtors, and the section concludes with the enactment that all property and assets of the corporation shall be distributed to the creditors of such corporations in the manner provided in this act in respect to natural persons. More satisfactory regulations for administering the bankrupt act than are found in the existing law could not well be framed; and the court, having come to the conclusion that such a corporation is a private corporation, is entirely satisfied that the section of the act which provides that the act shall apply to such a corporation is a valid law. But suppose that the franchise to be a corporation, unless assignable by the laws of the state, is not transmissible under the bankrupt act, still it is unquestionably true, as was held by the district court in this case, that the franchise to build, own, and manage a railroad, and all the property of the company, are alienable and subject to sale and transfer under the laws of the state which created the corporation. Hall v. Sullivan R. Co. [Case No. 5,948]; Union Pac. R. Co. v. Lincoln Co. [supra]. Much discussion, however, of that point is unnecessary, as the court here concurs entirely upon that topic with the views expressed by the circuit judge in disposing of the case in the district court. Adams v. Boston, H. & E. R. Co. [Case No. 47].

Extended argument to show that the third proposition of the petitioner cannot be sustained is unnecessary, as the theory of fact assumed in the proposition is erroneous, as appears by the evidence exhibited at the

hearing. All the property and assets of the company had not been previously transferred to receivers appointed under a decree passed by the supreme court of the state, which is all that need be said upon the subject.

Petition for revision denied.

[For subsequent proceedings in this litigation, prosecuted in Connecticut, see Case No. 1,677; in New York, see Cases Nos. 1,678–1,680.]

Case No. 13,685.

SWEENEY et al. v. CLOUTMAN.

[2 Cliff. 85.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1862.

SEAMEN—WAGES—ORAL AGREEMENT—SUBSEQUENT WRITTEN AGREEMENT—SHARES—FISHING VOYAGE.

Certain mariners contracted orally with the master of a fishing-vessel to serve as fishermen during a specified time, and for a certain rate of wages in money, and, in pursuance thereof, went on board the vessel. Some days afterward, and while she was fitting for the voyage, at the master's request the men signed certain articles which, among other things, contained a "shares" clause, but without reading the articles or being informed of the purport thereof. *Held*, that the mariners were entitled to recover wages in conformity with the oral agreement, and that such oral agreement was not merged in the subsequent written one.

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

Admiralty appeal in a cause of subtraction of seamen's wages. The libellants [Michael Sweeney and others] were seamen belonging to the schooner John G. Cowell, and were employed during the season of 1860 on a codfishing voyage from Marblehead to the Grand Banks. The master's name was Thomas Hanrahan, and the respondent [John Cloutman] was the owner of the vessel. It was set forth in the libel, which was filed on the 9th of December, 1861, that the libellants shipped in Boston, on the 28th of April, 1860, to serve as mariners and fishermen on board the schooner for that fishing season. According to the libel, the first two of the libellants—there were three in all—were to receive $140 each as wages for the season, and the other $100 for the same voyage. Accordingly, they alleged, they entered upon the voyage, performed the contract, and returned to Marblehead with the vessel, October 6, 1860, when and where the voyage ended. Having set forth the contract and their performance of the same, they alleged that on their arrival at the home port, they were duly discharged, and became entitled to their wages, but that the respondent refused to pay them. Ownership of the vessel by the respondent was admitted in the answer, as well as the engagement of the vessel in a fishing voyage during the season of 1860, but it was averred that the respondent himself did not hire any of the libellants to serve on board the schooner, at any rate whatever, and that no one of them served thereon in pursuance of any contract for wages in that voyage. It was, however, in effect admitted that the libellants shipped on board the vessel, and also that they performed service on board as mariners and fishermen; but the respondent averred that they entered into a written agreement with the master and the rest of the crew, as required by the act of congress, to serve for shares of the fish to be caught, and that the whole service performed by them during the voyage was under that agreement, and that no other agreement was made by him with them, or by any person authorized to act for him. A special replication to so much of the answer as set up the written agreement to serve for shares of the catch was filed by the libellants. First, they denied that they ever entered into any written agreement upon the subject either with the master or the respondent, but averred that the only contract they made was an oral one to serve during the fishing season for the wages specified in the libel. Second, they alleged that the written agreement, if any such was signed by them, was invalid, because they were fraudulently induced to sign the same without knowing the contents, or suspecting it was of a character to affect their contract for wages.

The decree in the district court was in favor of the libellants for their wages, under the oral contract set forth in the libel. [Case unreported.]

So far as that decree related to two of the libellants, an appeal was taken, and afterwards both sides took additional testimony by which it appeared that the master took charge of the vessel upon the condition that he should be permitted to hire the crew for the voyage, and his testimony contained the declaration that he employed the libellants and agreed to allow them the wages set forth in the libel. They were actually on board the vessel seven or eight days, during the period she was fitting for the voyage. When the men arrived at Marblehead, the respondent requested to see them, and on their being pointed out to him, he complained because the master had not procured more able-bodied men, and said he hoped he had not agreed to give them too much money.

C. G. Thomas, for libellants.

As to implied authority of the master to hire the men when no direction is given, see Baker v. Corey, 19 Pick. 496; Curt. Merch. Seam. pp. 15–18, §§ 3172, 3336.

R. T. Paine, Jr., for respondent.

The skipper of a fishing-vessel has no implied authority to hire fishermen on wages. 3 Stat. 2; Baker v. Corey, 19 Pick. 498. The evidence is positive, uncontradicted, and admitted by libellants that after their parol

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

bargain for wages, these two libellants signed the written fishing-agreement, to go on shares. This merged the previous parol bargain. The libellants can only escape from this written agreement by proving fraud. The burden of proof is on them, the libellants, to prove the six elements of fraud which would be a valid defence to the writing, namely: 1. False and fraudulent representations. 2. By respondent. 3. To libellants. 4. As to contents and purpose of the writing. 5. To induce them to sign it. 6. That they were thereby induced. There was no unusual clause in this agreement. An unusual clause in a shipping-paper must be read to the seamen. Heard v. Rogers [Case No. 6,298]. The shares clause is the only important one in this case, and being prescribed by 3 Stat. 2, every man is presumed to know the law.

CLIFFORD, Circuit Justice. Taken as a whole, the testimony shows that the libellants were shipped by the master, and that he contracted to give them respectively the wages specified in the libel, and that the oral contract was never modified or varied in any respect whatever. Express authority to hire the crew upon wages was fully proved by the master, and the circumstances attending their employment, and the conduct and declarations of the respondent on their arrival at Marblehead, were of a character to satisfy the court that the master's account of the transaction is correct, without adverting to the subsequent conduct of the respondent, which in many respects goes very far to confirm that view of the case. The proof of express authority having been exhibited, it is unnecessary to consider the second proposition submitted by the respondent, which was that the master had no implied authority to make such a contract. But it is insisted by the respondent that the oral contract of the libellants, if made as alleged, was merged in a subsequent written contract, wherein the libellants agreed to serve during the fishing season for shares of the fish to be caught, in the proportions specified in the written agreement. That proposition is based upon the fact that the libellants at the request of the master signed such an agreement three or four days before the schooner departed on her voyage. She sailed on the 25th of April, 1861, which was some seven or eight days after the libellants had arrived at Marblehead, and entered upon the performance of the oral contract under which they agreed to ship for the voyage. Three or four days before the vessel sailed, the master, as he stated, told the crew, including the libellants, that he wanted them to sign the fishing-agreement or paper which he exhibited to them, and he and every one of the crew signed it. Recurring to the paper, it will be seen that it corresponds in all respects with the form of the fishing-agreement usually adopted where the master and crew are shipped to serve for shares of the fish caught during the season or voyage; but the instrument was never read to them, and the facts and circumstances show to the entire satisfaction of the court that the paper was never executed and delivered as an agreement to determine and control the wages either of the master or the crew. Circumstances strongly indicate that it was executed in connection with some purpose, contingent or otherwise, to perpetrate a fraud upon the government, but the evidence fails to disclose any grounds to conclude that the libellants or any of the crew were parties to any such fraudulent purpose. They appear to have acted heedlessly in signing the paper, but without any knowledge of its contents, and without the slightest suspicion that it had any relation to their contract. They made no inquiries in regard to the paper, and no explanations were given, and the whole case shows that the paper was not executed or intended by either party as one to show the terms of the contract of shipment, and was never delivered as such by the libellants, or received as such by the respondent. To hold otherwise would be to sanction a fraud upon the libellants, and to impute a fraudulent purpose to the respondent not warranted by any evidence in the case. He well knew that the libellants had been shipped upon wages, and he also knew that they so understood the contract, and there is no just ground to believe that he caused the paper to be signed with any view to discharge or modify the contract.

The decree of the district court is therefore affirmed with costs.

Case No. 13,686.

SWEENEY v. COFFIN.

[1 Dill. 73; [1] 3 Am. Law T. Rep. U. S. Cts. 18; 3 West. Jur. 333.]

Circuit Court, E. D. Missouri. 1870.

REMOVAL OF CAUSES—PETITION—AFFIDAVIT—APPEARANCE.

1. Under the provisions of the judiciary act of 1789 [1 Stat. 73], where application is made to remove a cause from the state court to the United States circuit court on account of the citizenship of the parties, it is not necessary that the petition filed for that purpose should be verified by affidavit. The filing of the petition for removal is a sufficient appearance to the suit to give the court jurisdiction of the person; and the question as to citizenship of the parties can be raised in the United States court. If the party fail to file a petition for removal at the time of entering his appearance, he will be precluded from doing so at any subsequent stage of the proceedings.

[Cited in Moynahan v. Wilson, Case No. 9,897; Small v. Montgomery, 17 Fed. 865; Romaine v. Union Ins. Co., 28 Fed. 631, 638; Tallman v. Baltimore & O. R. Co., 45 Fed. 158; Reifsnider v. American Imp. Pub. Co., Id. 434; Ahlhauser v. Butler, 50 Fed. 706;

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

Morris v. Graham, 51 Fed. 53. Cited in brief in American Wooden-Ware Co. v. Stern, 63 Fed. 677. Cited in Wabash Western Ry. v. Brow, 13 C. C. A. 222, 65 Fed. 947; Goldey v. Morning News of New Haven, 15 Sup. Ct. 563.]

[Cited in Farmer v. National Life Ass'n of Hartford, 138 N. Y. 271, 33 N. E. 1,075.]

2. Under the subsequent acts of 1833 [4 Stat. 632], March 3, 1863 [12 Stat. 755], July 27, 1866 [14 Stat. 306], March 2, 1867 [14 Stat. 558], the petitions for removal must be verified by affidavit. Per Treat, District Judge, arguendo.

[Cited in Allen v. Ryerson, Case No. 235.]

Before TREAT and KREKEL, District Judges.

TREAT, District Judge. This is a suit originally brought in the state circuit court for Butler county, returnable at the March term thereof.

At the return term, the defendant, by attorney, filed a petition for the removal of the cause to the United States circuit court, on the ground that the amount in dispute exceeded $500, and that the defendant is a citizen of Pennsylvania, and the plaintiff a citizen of Missouri. The necessary bond was given, but objection was made by plaintiff's attorney to the desired removal, on the ground of insufficient affidavit, etc. This objection was overruled by the state court, and a bill of exceptions filed.

The pending motion is to remand said cause to said state court, on the ground that the same was improvidently removed here. The ground of the motion is not specific, and the court has examined the transcript to ascertain if any irregularity exists. The objection presented to the state court was that the affidavit to the petition was sworn to by an attorney, and not by the defendant himself, and that it failed to allege that defendant could not have a fair trial.

The act of September 24, 1789, § 12 (1 Stat. 79), does not require any affidavit to the petition. True, Conkling in his Treatise refers to a notice of the application and to an affidavit, a practice which may be advisable, and which may obtain in some circuits; but the statute of 1789 has no such requirements. That statute says "the defendant shall, at the time of entering his appearance at such state court, file a petition for the removal," etc., and offer good and sufficient surety, etc., whereupon it shall be the duty of the state court to accept the surety and proceed no further in the cause, etc.

In several adjudications the question has arisen, how the amount of the matter in dispute is to be determined, as the statute says if the same "shall appear to the satisfaction of the court to exceed $500, exclusive of costs." That question may be considered authoritatively settled, viz: it is the amount claimed in the declaration.

The court can find no authority in that statute, nor in published decisions based thereon, requiring the petition for removal to be sworn to, although such seems to have been the general practice.

In the case under consideration, there was in the state court no formal "appearance," as such, entered. When the act of 1789 was passed, the first formal step in a cause, so far as the defendant was concerned, was his appearance. That appearance may have been voluntary, or by entry after service of a capias where bail was required, etc.; but still a formal entry of his appearance was made of record. Such practice has, to a large extent, disappeared throughout the United States, because service on a defendant to appear is held to answer all the requirements of an actual appearance, so as to conclude him by the subsequent proceedings. In personal actions not criminal, as a general rule, he could appear by attorney; and as a matter of fact, as well as of law, he was considered as present, through his attorney. Hence, if in 1789, a party to a suit could appear by attorney in civil causes like the present, for the purpose of pleading, etc., why not for the formal entry of appearance to the original complaint?

But in this case there was no such formal entry by or through any one; but the first step on the part of the defendant was the filing of the petition, by his attorney, for the removal of the cause to this court. Is the appearance of a defendant petitioning for a removal, an entry of his appearance in the state court, within the meaning of the act of 1789? Although no express decision in a United States court has been found, and although state courts differ largely as to what makes an appearance in causes before them, and whether appearances by attorneys are conclusive or prima facie merely; yet there are general reasons governing the removal of causes from state to United States courts, which enable this court to reach a satisfactory conclusion on the point presented.

When the jurisdiction of a United States court is dependent on the citizenship of the parties under the constitution and acts of congress, if the suit be originally brought in the United States court, personal service is necessary, unless there is a voluntary appearance. Toland v. Sprague, 12 Pet. [37 U. S.] 300. If this suit had been brought originally in this court against the defendant, service or appearance would have been necessary for further proceedings. Although in state courts constructive service is sufficient, it is not so in a United States court, and hence the necessity of a voluntary appearance or of actual service. But as appearance by attorney was and is admissible in this class of actions, where no capias or bail is required, this court holds that the filing of the petition for removal is the entry of an appearance within the meaning of the statute. Indirectly the reasons for such a rule were given by the supreme court, not only in Toland v. Sprague, supra, but also in several other cases. By constructive service

in the state court it could have proceeded to judgment; but to prevent such action defendant availed himself of his right of removal, and is precluded from denying the status he has assumed. If the defendant denies that status, he can raise the jurisdictional question in the United States court. The defendant is therefore held to have appeared in the state court and to be bound by his action there.

There seems to be some confusion about removals from state courts to United States courts, arising under the several recent statutes. By the act of 1789, inasmuch as both state and United States courts have concurrent jurisdiction in many cases, the defendant had his right of election, by conforming to its provisions. If he appeared in the state court and pleaded, he was held to the jurisdiction to which he had submitted. He made an issue there, for that tribunal to dispose of—an issue on the merits in a court of general jurisdiction. Hence, by that act he must file his petition for removal at the time of entry of his appearance and before plea put in. That is the first time at which he could make known his election of the tribunal to pass upon his rights.

By the act of 1833, generally known as the "Force Bill," and by the act of March 3, 1863 (12 Stat. 756, § 6), also by the various subsequent acts to be found in 14 Stat. 172, 306, 558; 15 Stat. 227, 267,—the right of removal in cases where officers of the United States are concerned, or where acts are done under authority or color of authority of the United States, is fully provided for and regulated. But none of those acts affect the case under consideration. The act of 1863 requires in the cases for which it provides, an affidavit to the petition for removal, said petition to be filed at the time of entering appearance, and it allows appeals after final judgment from a state court to a United States circuit court. That act, however, is confined to the class of cases it enumerates. Similar remarks apply to several of the other acts of congress cited. In some, special modes of proceeding are required, such as petitions, affidavits, certificates of counsel, bonds, etc., and are mostly in reference to United States officers, or those acting under the laws of the United States, when their action in respect to such official proceedings, or by supposed authority of the United States, is called in question. So there are statutes in reference to the rights and duties of common carriers where interrupted by military or rebel violence. Those, however, are peculiar to the cases there enumerated, and make no special provisions therefor.

Private parties, not affected by official action, or United States laws, were required by the act of 1789, to petition for removal when they first appeared in a state court, or they were held to have waived their right of election to trial elsewhere. The exception to that rule is made, first, by act of July 27, 1866 (14 Stat. 306). Where all the parties, plaintiff or defendant, are not of the same state, certain privileges are granted to them, thus obviating the difficulties arising from decisions of the United States supreme court on that point under the act of 1789. Second, by the act of March 2, 1867 (14 Stat. 558), in which the citizen of another state than that in which suit is brought may, if the other party be a citizen of the state, file an affidavit, whether he be plaintiff or defendant, stating that he has reason to, and does, believe that, from prejudice or local influence he will not be able to obtain justice in such state court, and then on his petition for removal may have the same removed "at any time before the final hearing or trial of the suit," by giving good and sufficient surety, &c.

The distinctions are clear and important. If their cause of removal is based merely on citizenship of the parties, the application must be made at the time of appearance in the state court, by the defendant, and no affidavit is required. If the objection be prejudice or local influence, endangering a fair trial, the application may be made by either plaintiff or defendant, at any time before final hearing or trial, but must be supported by affidavit.

The act of July 27, 1868 [15 Stat. 226], relates to corporations organized under the laws of the United States, permitting them to file a petition for removal, verified by oath, "either before or after issue joined."

The foregoing reference to the various acts of congress is sufficient to indicate that as this case occurs solely under the act of 1789, the defendant was required at the time of first appearing in the state court only to file his petition for removal, alleging his citizenship (as he did) and averring the amount in controversy to exceed $500, exclusive of costs. No oath was required, nor technical entry of appearance, for his appearance by said petition was sufficient under the statute.

If he had appeared after pleading, the petition and affidavit would have had to show prejudice or adverse local influence endangering a fair trial.

[It is difficult to decide whether this case as brought in the state court was an action at law or suit in equity, or both combined. In equity a general money judgment and a decree in equity cannot be had in one proceeding,—that is, general judgment against the defendant for money due on a mortgage debt, and a decree of foreclosure. Noonan v. Lee, 2 Black [67 U. S.] 499. Nor can a suit at law in the state court be transferred in the United States court, after removal, into a suit in equity, or vice versa. Thompson v. Railroad Cos., 6 Wall. [73 U. S.] 134. Motion to remand overruled.] [2]

. Construction of Acts July 27, 1866, and March 2, 1867. See Sands v. Smith [Case No. 12,305].

[2] [From 3 Am. Law T. Rep. U. S. Cts. 18.]

SWEENEY (UNITED STATES v.). See Case No. 16,426.

SWEENY (BANK OF COLUMBIA v.). See Cases Nos. 881 and 882.

SWEENY (CHERRY v.). See Case No. 2,641.

Case No. 13,687.

The SWEEPSTAKES.

[1 Brown, Adm. 509.] [1]

District Court, E. D. Michigan. Sept., 1874.

COLLISION—TUG AND TOW—DIVISION AND ORDER OF TOW—FASTENING OF LINE.

1. A request by the masters of a tow to divide the vessels composing it, and take them separately through a narrow channel, would not create an obligation on the part of the tug to do so. It is the duty of the master of the tug to make up the tow, and he is entitled to exercise his judgment in that regard.

[Cited in Orhanovich v. The America, 4 Fed. 340.]

2. In arranging the order of vessels in tow, regard should be had to dangers incident to any portion of the route covered by the undertaking, and in passing through the channel of St. Clair flats the vessel of heaviest draft should be placed last.

[Cited in Orhanovich v. The America, 4 Fed. 340.]

3. The rule of the supervising inspectors requiring ascending vessels to stop before entering narrow channels, and wait till a descending vessel has passed through, does not apply to the lakes and their connecting waters.

4. In the absence of usage or positive law, it is not a fault for a tow to enter the channel of St. Clair flats while another tow is coming through in an opposite direction.

5. It is the duty of the tug to see that the towline is securely fastened, so as to hold in all emergencies likely to happen, ordinary or extraordinary, and the fact it does not so hold is the best evidence the duty is not performed.

6. Tugs are prima facie responsible in all cases for damages resulting from the slipping of the line.

[Cited in Bust v. Cornell Steam-Boat Co., 24 Fed. 190.]

On libel for towage and cross-libel for collision.

H. Norton Strong, owner of the tug Sweepstakes, since deceased, libeled the schooners Dobbin and Atmosphere, in separate suits, for towage services in the sum of $109 in the case of the Dobbin, and $81 in the case of the Atmosphere. The services were for towing the schooners as alleged in the same tow and in company with a third vessel, the schooner Couch, on the 14th and 15th days of October, 1872, from Lake Erie to Lake Huron. Thereupon Frank Perew, owner of the Dobbin, and Valentine Fries and Malcolm Stalker, owners of the Atmosphere, respectively put in their answers and filed cross-libels against the tug. By their answers and cross-libels they admitted the undertaking on the part of the tug, and the prices agreed on, as alleged, but charged fault and negligence on the part of the tug, and the consequent grounding of the head vessel in the tow in the channel on St. Clair flats, by which the vessels were caused to collide with each other, resulting in damages to the Dobbin in the sum of $8,000, and to the Atmosphere in the sum of $2,100, as claimed.

The cross-libels charged the tug with the following specified faults: (1) That she did not divide the tow and take the two schooners though the channel separately from the Couch, as her master was requested to do by the masters of those schooners. (2) That she did not arrange the tow so as to have the lightest draft vessel first. (3) That she did not stop and wait at the lower end of the channel for a descending tow to pass through. (4) That she did not properly and securely fasten her end of the tow line, but negligently permitted it to slip off.

Libellant Strong having died pending the litigation, his executor, Thomas Pitts, was admitted to prosecute the suits. Both suits and the cross-libels were heard together, and upon the same proofs.

F. H. Canfield and G. V. N. Lothrop, for the tug.

W. A. Moore and H. B. Brown, for the schooners.

LONGYEAR, District Judge. 1. As to the first charge of fault, in not dividing the tow, I am aware of no positive rule upon this subject, and no general duty in this regard, growing out of usage or otherwise, was shown, nor is it believed to exist. Whether it was a duty or not, therefore, depended, as it must depend in all cases, upon the special circumstances of the case in hand. A request on the part of the vessels comprising the tow would not of itself create a duty. The tug master was as much entitled to his opinion, as to the necessity, as were the vessel masters to theirs—in fact more so, because it was his right to say how the tow should be made up and taken through. Whether his decision was right or wrong, and if wrong, a culpable fault, depended upon the appearances when it was made, and not by what happened afterwards, unless what so happened might and ought to have been anticipated, and was in fact the result of taking the three vessels through together. But it nowhere appears that the grounding of the Couch was caused by there being three vessels in the tow instead of only two. Non constat, the same thing might have occurred if the Dobbin and Atmosphere has been taken through without the Couch, as requested. The first allegation of fault is therefore not sustained.

2. As to the arrangement of the vessels in tow with reference to their difference in draft. The case of The Zouave [Case No. 18,221], decided in this court by my learned predecessor, the late Judge Wilkins, was, in its facts and incidents, almost identical

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

with the present case in regard to the point now under consideration. In that case it was held that it was not good seamanship, and was a fault for the tug master to so arrange his tow, in towing over the St. Clair flats, as to have the vessel of heaviest draft first in the tow. The only difference between that case and this is, that then the tow was going down, and here it was going up. No distinction, however, is noted on that account, neither do I presume that any exists in principle. It is true, in coming down, the current would add so much to the velocity and momentum of the vessels, and make it more difficult for those in the rear to steer clear of those forward of them, and to strike harder and do more damage in case of a grounding and collision. But the difference is not radical—it is only in degree. The current is very weak there, not exceeding two or two and a half miles per hour, and not sufficient to overcome the momentum of vessels moving against it in a tow at an ordinary and allowable rate of speed, so as to prevent a collision by the rear vessels in case of the grounding of any of the forward ones, especially so when, as in the present case, there was a brisk wind directly up the channel, or very nearly so. At all events, the current did not stop the rear vessels in the present case in time to prevent a collision and serious damage. In the present case the vessel of greatest draft, the Dobbin, was placed second in the tow; the next heaviest, the Couch, first, and the lightest, the Atmosphere, last. But the Couch alone grounded, and the arrangement of the vessels in the tow being proper as between her and the Dobbin, nothing can be claimed under this charge of fault on account of damage done the Dobbin by her running into the Couch. But the arrangement was not a perfect one as between the Couch and the Atmosphere, the former being of the greater draft, and being placed forward of the latter in the tow. Therefore, as far as the Atmosphere was concerned, the tug committed a fault in this respect, which, on the authority of The Zouave, supra, — to the reasoning and conclusion of which I agree,—would make the tug liable, so far as concerns the damage done to both the Dobbin and the Atmosphere, by the latter running into the former, unless the Atmosphere could have avoided the Dobbin, of which, however, I believe there is no pretense. Tugs have the right to direct how their tow shall be made up. In all cases, in arranging the order of the vessels in the tow, the tow should be made up with reference to dangers incident to any portion of the route covered by the undertaking. Here the St. Clair flats were so covered, and the tow should have been made up with the same care in this regard as if the undertaking covered that portion of the route only; or, at least, if not so made up originally, it should have been changed to meet the case when the flats were reached. The channel on St. Clair flats is quite narrow and somewhat crooked—vessels do sometimes ground there. There is, to say the least, a liability to ground or risk of grounding there; and that is sufficient to impose the duty now under consideration. That vessels usually or frequently ground there was not necessary to be shown. The second allegation of fault is therefore sustained.

3. In not waiting for the downward tow to pass through before entering the channel. The rule of the supervising inspectors, requiring that when two vessels are about to enter a narrow channel at the same time, the ascending vessel shall be stopped below such channel until the descending vessel shall have passed through it, etc., has no application ex proprio vigore to the lakes and their connecting waters, and therefore not to the present case, as was contended. It applies only to the rivers flowing into the Gulf of Mexico and their tributaries (see Rules of June 12, 1871, "For Western Rivers"; also, caption to "Pilot Rules for Lakes and Seaboard," of June 10, 1871). No such rule, I believe, exists by virtue of any positive law or regulation, or by the decisions of courts, in regard to the lakes and their connecting waters; no good reason is apparent, however, why, on principle, it should not apply as well to narrow channels, of which there are many connecting the lakes, and through which the path of a vast navigation lies, as to Western rivers. However, in the absence of positive law and of any common usage to support it, I do not conceive that the court can lay down any general rule upon the subject. Each case must be governed by its own peculiar circumstances. Certainly no court would hold a tug blameless that should recklessly, whether ascending or descending, lead a tow into a narrow channel, like that on the St. Clair flats, when crowded with vessels moving in an opposite direction. But I think the court would hardly be justified in applying such a rule to even an ascending tug, when, as in this case, another tug was about entering or even had entered the channel from the opposite direction with a single vessel in tow. It would be contrary to common usage to require a tug to wait under such circumstances; neither is it hazardous to any considerable extent for tugs with even more than one vessel in tow, if properly arranged and properly managed by all concerned, to attempt to pass each other in that channel, nor is it so deemed by competent navigators. The third charge of fault is, therefore, not sustained.

4. In not properly fastening the tow line. If the charges of fault were to be determined solely by the expert testimony as to the mode of fastening adopted, it would have to be decided that the line was properly fastened, as far as the mode of fastening is concerned. But the question raised goes be-

yond the mere mode of fastening. Conceding the mode to have been correct, the real question is, was it properly and securely fastened according to that mode? Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible prima facie in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug. The expert testimony shows, and without it common sense teaches, that a tow line can be fastened so that it will not slip, and therefore the above rule is not unreasonable. The Quickstep, 9 Wall. [76 U. S.] 665; The Olive Baker [Case No. 10,489]. This view of the matter narrows the controversy upon this point down to the question whether the Couch grounded before the line slipped, or whether the line slipped first and the grounding was on that account; because, if the former, then the slipping of the line cannot be attributed as the cause of the disaster, although it may be evidence of a faulty fastening; but if the latter, then it may have been the direct cause, and the fact of slipping alone sufficient, unexplained, to hold the tug responsible for all the unavoidable consequences of the grounding. As to this very material point, the testimony was conflicting. That of the officers and men upon the tug, on the one side, and of those upon the Couch and the other vessels composing the tow, upon the other, were in direct and irreconcilable contradiction of each other. These extremes stand upon an equality as to interest, those upon each side being anxious and desirous, of course, to fasten the blame upon the other, and if there were no other testimony it would be exceedingly difficult to come to anything like a satisfactory conclusion. But there was other testimony, and that must turn the scale. The officers and men upon the Lion and the Perew, the passing tug and tow, fully corroborated those upon the Couch, and the other vessels composing the tow. Their witnesses had an opportunity of observing, equal at least to those upon the tug, and greater than those upon the Dobbin and the Atmosphere, and they had no interest to see things as they were not. Their testimony is therefore entitled to the greater weight. It must be borne in mind, also, that the officers and men upon the Couch were in a better situation than any of the others to know what occurred first, and therefore their testimony, aside from the question of interest, which as between them and those upon the tug is equal, is of greater weight. There is, therefore, a preponderance of evidence that the line slipped before the Couch grounded, although I must confess it is not free from doubt. The only remaining question is whether the grounding of the Couch was in consequence of the slipping of the line. I think it quite evident from the position of the tow in the channel while passing the downward tow, and considering the great breadth and flatness of bottom of the Couch, that she was "smelling" the bank and tending toward it, notwithstanding the starboard helm, when the line slipped, and in the absence of evidence to the contrary, I think it fair to assume that if the line had not slipped the tug would have overcome that tendency and prevented the grounding. The grounding of the Couch must, therefore, be held to have occurred in consequence of the slipping of the line, and the fourth charge of fault is sustained. The tug is, therefore, held in fault in two particulars: (1) In not so arranging the tow as to place the lightest draft vessel, the Atmosphere, first instead of last. (2) In permitting the line to slip. It is nowhere made to appear, neither is it claimed, that the Dobbin would have avoided the Couch, or the Atmosphere the Dobbin after the Couch had grounded. The tug must, therefore, be held liable for the damages caused by the collision.

5. As to the tug's claim for towage services. The contract was to tow to Lake Huron. She towed the Dobbin to Port Huron, near the entrance to the lake. Here the Dobbin was obliged to stop and lay up for repairs. Ordinarily a contract to tow to Lake Huron would require that the tow should be taken into the waters of the lake; but, under the circumstances of this case it must he held that the contract was substantially performed. The wind being favorable, the Atmosphere sailed up from the flats or a little above, but the tug was ready and willing to tow her up, if the Atmosphere had seen fit to avail herself of the tug's services. The Atmosphere can therefore claim no exemption from paying the full amount of the contract price. The tug must, therefore, be allowed the contract price for towing in each case, viz. $109 against the Dobbin, and $81 against the Atmosphere, to be offset against the damages sustained by each. Decrees accordingly.

Case No. 13,688.

In re SWEET et al.

[9 N. B. R. 48; 21 Pittsb. Leg. J. 82.] [1]

District Court, E. D. Michigan. 1874.

BANKRUPTCY—ASSIGNEE'S ACCOUNT—AUCTIONEER'S CHARGES—NECESSITY FOR SERVICES OF AUCTIONEER.

The law contemplates that the assignee himself shall sell the property of the bankrupt. Where an auctioneer is employed the assignee must show affirmatively the necessity for such employment, or the auctioneer's charges will not be allowed him by the court in his final account.

[1] [Reprinted from 9 N. B. R. 48, by permission. 21 Pittsb. Leg. J. 82, contains only partial report.]

On exceptions to assignee's final account, filed by the register, Hovey K. Clarke, Esq.

LONGYEAR, District Judge. In regard to the employment of an auctioneer, I entirely agree with the learned judge of the Western district of Texas in Re Pegues [Case No. 10,907], where he says: "the law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it would be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court, and leave obtained." At all events, the assignee having taken the responsibility upon himself to employ an auctioneer he must now make the necessity of such aid, and the reasonableness of the amount paid therefor, to appear, before he can have that charge allowed.

SWEET (GRAYDON v.). See Case No. 5,733.

Case No. 13,689.

SWEETSER v. HELMS et al.

[2 Ban. & A. 263; [1] 10 O. G. 4.]

Circuit Court, D Massachusetts. April 4, 1876.

PATENTS—INFRINGEMENT—COMBINATION—USE OF PART.

The patents of the complainant, alleged to be infringed, were for machines for polishing the edges of the heels and soles of boots and shoes, in which machines there was a combination of certain mechanism for holding the sole or heel or both to be polished, with the mechanism of the polishing-tool, so that the surface to be polished and the polishing-tool were brought into proper relations with each other. The defendants' machine dispensed with the shoe-holding mechanism, and used only the polishing-tool and its mechanism, the operator holding the surface to be polished in proper relations to the tool: *Held*, no infringement.

[Cited in Dodge v. Fearey, 8 Fed. 329.]

[This was a bill in equity by David H. Sweetser, trustee, against Charles H. Helms and others.]

Thomas L. Livermore, for complainant.

James E. Maynadier, for defendants.

SHEPLEY, Circuit Judge. The bill in this case charges infringements of three patents—one to Elias S. Ingalls, dated May 8, 1860 (No. 28,181), for "improvements in machines for burnishing the edge of the sole and heel of boots and shoes," one to Benjamin Q. Budding, dated August 18, 1863 (No. 39,546), for "improved heel-polishing machine," and one to Benjamin Q. Budding, dated May 3, 1864 (No. 42,555), for "improved machine for polishing the heels of boots and shoes." These patents all relate to a class of machines for polishing the edges of the heels and soles of boots and shoes, in which there is a combination of certain mechanism for holding the sole or heel or both to be polished with the mechanism of the polishing-tool, under such conditions of mechanical combination that either the holding mechanism, with the material held, can be so moved as to bring the surface to be polished in proper relations to the polishing-tool, or the polishing tool can be so operated as to bring it into proper relations with the surface to be polished of the material held by the holding mechanism.

The Helms machine, alleged to be an infringement, differs from these machines in this essential feature. There is no attempt in the Helms machine to so combine a shoe-holding mechanism with the polishing-tool and its mechanism that the two will operate properly together. On the contrary, in the Helms machine the shoe-holding mechanism is dispensed with, and the operator puts the shoe into proper relations with the polishing-tool, and holds and keeps and guides it there, by and with his own muscular strength and will. There is no shoe-holding mechanism which is made to travel in a fixed path in relation to the polishing-tool, nor any polishing tool made to travel in any fixed path in combination with or in any relation to a shoe-holding mechanism.

This radical difference between the two classes of machines is fatal to the claim of infringement, and renders unnecessary a consideration of the other questions presented at the argument of the case. Bill dismissed.

[For another case involving this patent, see Dodge v. Feary, 8 Fed. 329.]

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

Case No. 13,690.

SWETT et al v. BLACK et al.

[1 Spr. 574.] [1]

District Court, D. Massachusetts. June, 1861.

PARTIES—ASSIGNEE—ADMIRALTY—WITNESS—COMPETENCY—INTEREST—EFFECT OF DECREE—AFFREIGHTMENT.

1. An assignee of a chose in action may sue in his own name, in the admiralty.

[Cited in The Norfolk, Case No. 10,297; The Sarah J. Weed, Id. 12,350.]

2. And this is so, if the assignment be only of a part of the entire right; or, at least, the respondents cannot object, on that ground, if the whole right be represented by the libellants.

3. In a suit by the owners of a vessel against the shippers of a cargo, for freight, where the defence is, that the cargo was never delivered to the consignee, the master, although interested, is a competent witness.

4. The decree, in such case, would not be evidence for or against the master, in a future suit against him by the shippers, it appearing that, if the cargo was not delivered, it was owing to his own default.

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

5. The master having been a part owner of the vessel, when the contract of affreightment was made, and the voyage performed, and having afterwards assigned all his right and interest, and not being a party to the suit, the decree, in this case, would not be evidence for or against him, in a future suit, by the shippers, against him as part owner, it appearing that, if the cargo was not delivered, it was owing to his own default.

This was a libel in personam, in admiralty, promoted by the owners of the brig Edinburgh, to recover freight for a cargo of lumber, transported from Boston to California. The libel alleged a shipment by the respondents, and a delivery by the master, to the consignee and agent of the respondents, at Sacramento City. The answer set up the defence that the respondents were not parties to the contract, and if parties, not liable, because the master had failed to deliver the cargo. At the hearing, the deposition of the master was offered in evidence for the libellants. It appeared by his deposition, that the deponent was a part owner of the vessel, with the libellants, at the time the contract was made, and until after the vessel returned to Boston, and that he had conveyed his interest in the vessel and in this claim to James A. Swett, one of the other owners, before this suit was brought. As master, he was sailing the vessel on wages.

Sidney Bartlett and David Thaxter, for respondents.

(1) The deponent is a necessary party libellant, being one of the contracting parties, and owner of this claim, when it became due. At common law, a claim of this sort, being a chose in action, cannot be sued in the name of the assignee. It is not negotiable, either by statute or by the custom of merchants. It is incumbent on the libellants to show affirmatively, that a different practice obtains in the admiralty. There is no statute of the United States, or rule of the court, allowing it; and it is believed that no instance can be found in the reports of the English admiralty, to which we owe our rules of practice. It is also a right of the respondents to have the original contracting parties made parties to the record, with reference to rights of set-off, or recoupment, and equities. But if the assignee of an entire claim can sue it in his own name, it is not in the power of a part owner of a claim to introduce a new part owner.

(2) The deponent is disqualified, as a witness, by reason of interest. He is interested, first as master, and second, as part owner. The point to which he is to testify is the due performance of the contract. First. As master, he is liable over to the libellants, in case he failed to perform the contract, and consequently has an interest to procure a decree in their favor. Second. As master, he is by the law merchant, liable to the respondents for a non-delivery of the cargo, as an original and independent contracting party, by the bill of lading, and is interested to procure a decree establishing the fact that the contract was performed by him. Such a decree he could use as a bar, or in evidence, in his own defence, and, if not, he could use it as a defence of the owners, to avoid circuity; for if the shippers could recover of the master, and the master recover over of the owners, and the decree could not be used in either suit, it could not avail the parties who obtained it. Third. As part owner, he could be sued by the shippers for non-delivery of the cargo, and could plead non-joinder of his co-owners; or, if not, and he were mulcted in damages, he could have a claim over for contribution. If, in this suit, the respondents succeed upon the ground of non-delivery, then they clearly can sue the owners, including the witness, for damages. If, however, the question of delivery is decided against them, then it would be a bar to any suit against the witness, as part owner, either because he could compel the joinder of the other co-owners, or call upon them for contribution, in either of which cases, the other co-owners would be compelled to litigate the same question twice, contrary to the policy of the law.

Richard H. Dana, Jr., for libellants.

The assignee of a chose in action may sue in his own name, in the admiralty. The admiralty practice, in this respect, is derived from the Roman law. 2 Brown, Civ. & Adm. Law, 348; Betts, Adm. Prac. 11. In the United States, the civil law is the source of admiralty practice, by statute. Act 1789, c. 21, § 2 (1 Stat. 93). The rules and practice of the English admiralty courts are not a test either of the jurisdiction, powers or practice of the admiralty and maritime courts of the United States. Act 1789, c. 21, § 2; Waring v. Clarke, 5 How. [46 U. S.] 441; Nelson v. Leland, 22 How. [63 U. S.] 48; The Magnolia, 20 How. [61 U. S.] 296; The Genesee Chief, 12 How. [53 U. S.] 443; Fretz v. Bull, Id. 466. The history and gradual establishment of the right of the cessionary (assignee) of a demand, to sue it in his own name, is presented in the following summary:

By the Roman law, an obligation, i. e., the legal relation arising from express or implied contract, (and, by that law, also ex delicto,) is intransferable. The increase of affairs, however, demanded transfers. The delegatio, by which, in place of the old, was substituted a new obligation, (a so-called novatio,) with the assignee as the creditor, was objectionable, especially as requiring the co-operation of the debtor. Resort was had to the relation of procuratorship. The Roman procurator ad agendum, (i. e., ad litem,) did not stand in the same relation to the suit, as a modern attorney, or proctor. This resulted from the peculiar effect attributed to the litis contestatio, (joining of is-

sue,) which also worked a novatio, a substitution for the cause of action, of a new, a forensic obligation, (contract of record,) viz., to perform the judgment; and this bound only those who actually pleaded in propriâ personâ. At this point in the proceedings, the procurator became, of course, dominus litis, and the judgment ran in his name, and belonged to him. This change of relation during the suit shows itself in the formula, or brief instruction, sent down by the prætor to the trial-judge, e. g.: "If it appear that the defendant owes Titius a thousand aurei, condemn him to pay the same to Mævius," (i. e. the procurator of Titius.) When the procurator was merely for the purposes of the litigation, the principal was secured by the legal obligation of the procurator to have the judgment applied to his benefit. When, however, a transfer of the claim itself was intended, this obligation did not arise.—the procurator retained his judgment for his own benefit,—hence the name procurator in rem suam, for what, in later law, is called cessionarius, our assignee. But there was still an interval of insecurity for the procurator in rem suam, before the litis contestatio created a privity between him and the debtor, who might anticipate it by settlement with the creditor. This led to the denunciatio, or notice to the debtor, which prevented subsequent dealings to the prejudice of the assignee. From this point, I follow more particularly Savigny, in his Obligationen-Recht, I. 244, &c., a work still in the course of publication, and thus the latest, as well as of the highest authority, among civilians. He says that where there was already an assignment of the claim, the necessity of obtaining, in addition, a mandatum procuratoris, an express and regularly written authority to sue the claim, as procurator, was liable to many objections. It was, in any case, a circuitous formality, and might be very prejudicial to the assignee, if the assignor should prove recusant or dilatory, and require legal compulsion. And even after it was executed, it was liable to be voided by death, so that the assignee could no longer sue in the assignor's name; that it was, no doubt, the experience of these inconveniences that led to an obvious resource to simplify the proceedings. This was, that wherever there already existed a causa cessionis, such a relation, (e. g., by assignment of a claim,) as would entitle one to demand the use of the remedy on it, he might bring the action immediately in his own name. This was a utilis actio, and the assignee sued therein no longer as procurator, but suo nomine, i. e., in the formula, (see above,) the statement of the claim, intentio, as well as the condemnatio, is in the name of the assignee; and this as the more advantageous, became the regular remedy. See (besides Savigny) Mühlenbruch's Cession of Claims, p. 495 et seq.; 3 Vangerow's Lehrbuch der Pandekten, 104–107, 116–121; 2 Puchta's Cursus der Institutionen, 266 et seq.; Heffter's Civil Process, 82; 2 Mackeldey's Römisches Recht, § 333 et seq.; 2 Goeschen's Civil Recht, 22 et seq.; Schweppe's Röm. Privat Recht, § 400. In one passage, arguendo, Mühlenbruch thinks that this change of form is probably not attributable to the resort to the utilis; but the texts from the Corpus Juris, L. ult. C. Quando Fiscus, &c., IV. 15, and L. 18, C. de Legat, VI. 37, which he endeavors to explain, seem irreconcilable with any other historical view than that of Savigny, and the other authorities. Subsequently, however, Mühlenbruch says (page 495): "In the suit against the debtor, the assignee is treated in every particular as the true party to the action, both in respect to his rights as plaintiff, and to the pleas and counter-claims which the defendant has against any one who sues in his own name, without reference to the question, whether the cause of action were originally his own, or derived from another." See also, page 196.

On the point raised by the respondent, the result is the same. The forensic position of an assignee, with its consequences, is that of an ordinary plaintiff suing his own claim.

As to the form of remedy: Utilis actio was the general name for any form of action when extended by analogy beyond its original sphere. As the relations of Roman life grew more complex, there grew up alongside of the simple rights of the old jus civile, and corresponding severally to them, equitable rights and beneficial uses; to these the prætor supplied remedies, by extending the action on the old right, by a variation in the formula, to the corresponding new relation. At first, a regular hearing, (causa cognita pro tribunali,) must precede the decree granting a utilis, but this gradually fell away, though the decree, as a formality, continued longer. Both the decree and the distinction in form, had ceased more than a century before Justinian, in whose time all forms of action were merged in the common libel and answer, which has come down through the canon and modern civil law, to the admiralty practice. This practice of the Roman law, to allow the cessionary to sue and have relief in his own name, beside being, by statute, the rule for our courts of admiralty, has, in fact, been adopted and recognized by them. The Boston [Case No. 1,669]; Mutual Safety Ins. Co. v. Cargo of The George [Id. 9,981]; Fretz v. Bull, 12 How. [53 U. S.] 466; Thomas v. Osborn, 19 How. [60 U. S.] 22; Cobb v. Howard (Nelson, J.) [Case No. 2,924]; Ben. Adm. § 380. The practice in courts of chancery is evidence of what the rule of the Roman law was; and especially evidence that that rule has been adopted in England and America. In chancery, if the court has jurisdiction over the cause of action at all, the assignee may sue in his own name; and the assignor is not a necessary party, unless he has

rights which may be affected by the decree. The point in dispute between Judge Story and some of the English and the New York courts, is only this: Whether the fact that a chose in action is assigned, and the assignee cannot sue upon it at law in his own name, does, of itself, give a court of equity jurisdiction over the suit; or, whether it is incumbent on the assignee to show that a suit at law, in the name of his assignor, is not a sufficient remedy. All admit that there is no technical objection, in equity, to his suing in his own name, if the court has jurisdiction. Story, Eq. Pl. § 153; 1 Pars. Cont. 192–194, and notes; Trecothick v. Austin [Case No. 14,164]; 1 Daniell, Ch. Prac. 248, note 1. The allowing a suit, by the real owner of the right, is not at variance with public policy. Sir. W. Blackstone, treats the relaxation of the old rule of the common law, in the case of notes of hand, as one of the benefits of the Revolution of 1688. It is now established, as the general practice in New York, under the late Code, that the assignee may sue in his own name. Code Proc. N. Y. (5th Ed.) 76, a.

SPRAGUE, District Judge. This is a libel by the owners of the brig Edinburgh, to recover freight for a cargo of lumber transported from Boston to California.

The libel alleges the shipment by the respondents, and a delivery by the master, to their consignee, at Sacramento City.

The answer denies the delivery. There is no doubt, that this cargo was taken on board at Boston, and was safely transported to its destination at Sacramento, but whether it was there delivered by the master to the consignee, is a matter in controversy.

The master was part owner, when the contract for the transportation of this cargo was made; but afterwards, and prior to the commencement of this suit, he sold all his right and interest in the ship and voyage, to one of his co-owners, who are the libellants. It was objected, that he ought to have been joined in this suit, and that the assignees of his interest cannot represent it in this libel; but I am satisfied, from the authorities which have been adduced by the counsel for the libellants, as well as by the practice of this court, that an assignee of a chose in action may maintain a suit, in his own name, in the admiralty. It has been urged that, even if such be the rule, where the assignor had the entire interest, it ought not to be permitted where he was only a part owner, as he might thus bring a stranger in, as a co-plaintiff, against the will of his associates. But it will be time enough to consider such an objection, when made by his associates. The respondents certainly cannot avail themselves of it. It is not for them to defeat the suit of the libellants, under color of protecting their rights.

The deposition of Swett was offered by the libellants' counsel. Its admission was objected to, on the ground of interest, and this for several reasons. In the first place, that he is called to testify that he performed his duty, in delivering this cargo to the consignee, and that, if it were not delivered, it was through his default, for which, as master, he is liable to his owner. On the other hand, it is insisted that this creates no interest; and that, if it does, it comes within the exception, by which agents are admitted as witnesses, from necessity. Upon this question the authorities are numerous, and not easily reconcilable. I think the law is best laid down by Chief Justice Shaw, in Draper v. Worcester & N. R. Co., 11 Metc. (Mass.) 505. That was a suit for the non-delivery of goods transported by railroad. The agent, whose duty it was to receive and deliver them at the depot, was called, as a witness, by the corporation. The court were inclined to think that he was not interested, but placed their decision on the ground, that, if interested, still he was a witness from necessity.

In the present case, as it appears that the master had the cargo in his own possession and control, and ought to have delivered it to the consignee, I think he has an interest that the libellants should recover in this suit. If they fail, on the ground of non-delivery of the cargo, they may immediately resort to him for compensation. But if they prevail in this suit, then their legal right to compensation from the shippers is established; and whether they obtain satisfaction or not, they cannot say that they have lost their legal right to enforce payment of the freight, by the default of the master. The decree will establish their right, and if not satisfied, it will be because their debtors are insolvent.

But I think the testimony of the master admissible, because it is within the exception by which an agent is admitted, as a witness, from necessity, to show that he performed acts which were within the regular course of his business.

It is further objected, that the master of a vessel being liable to a suit by the shippers, if the cargo be not delivered, Swett has an interest, because the decree may be evidence in a future suit between him and the respondents.

It is not contended that, if the respondents prevail, they can use this decree in a suit against the master. But it is said that, if the decree shall be against them, he may set it up in a future suit against him, for not delivering the cargo. But not being a party to this suit, he is not bound by its result, for he has had no opportunity to litigate the matters in issue; and not being bound by it, he cannot, in his own right, and merely for his own protection, avail himself of the decree, as a defence. If he can set up the decree, as a defence, in a fu-

ture suit against himself, it must be because such a course is necessary for the protection of those who have a right to be thus protected—that is, the libellants in the present case.

The contract of affreightment is made for the benefit of the owners of a vessel. Assuming that the master is liable to the shippers, such liability is founded upon maritime policy, not upon the general principles of contracts made by agents. His liability, therefore must rather be deemed subsidiary than primary; and if compelled to pay the shippers for a cargo lost, without any fault or neglect of his, he must have a right over against his owners for indemnity. If these libellants prevail in this suit, the decree will, as between the parties, judicially establish the delivery of the cargo; for that fact is directly in issue, and the libellants have a right to be protected, by this decree, against any future suit by the respondents, for the non-delivery of the cargo.

Suppose, then, that the respondents should hereafter sue the master, for not delivering the cargo, if he cannot set up this decree, as a defence, he may be compelled to pay the whole value of the cargo; and then, if in no default himself, he must have a right to recover the same amount from his principals, the owners of the vessel; and thus they would be compelled, indirectly, through the master, to pay damages to the shippers, for the non-delivery of the cargo, when its actual delivery had been judicially established, in a suit directly between the owners and the shippers.

In Greely v. Dow, 2 Metc. (Mass.) 176–180, a question arose as to the admissibility of a surety, as a witness for his co-surety, and the right of contribution was adverted to. That case, however, is not analogous to the present, and I am not satisfied that the master would not be entitled to plead a decree in favor of the present libellants, in bar of a future suit against him, as master, by the respondents, for the loss of his cargo, provided such loss was without his fault, so that, if compelled to pay, he would have a remedy over against the ship owners. But in the present case, upon the facts now presented to the court, it is quite clear that, if this cargo was not delivered to the consignee, at Sacramento, it was wholly owing to the fault of the master; and, if compelled to pay the shippers, he could have no claim for indemnity against his principal.

Looking, then, at the actual state of this case, the master would not have a right to plead this decree, in a future suit by the shippers, for his own protection, because he is no party to the suit; and he would have no right to plead it for the protection of his owners, because they would be subject to no liability over to him. As master, then, he has no such interest as to exclude him from being a witness. But it is further urged, that he is interested, as an original contractor for the transportation and delivery of this cargo, as he was then a part owner of the vessel. Should he be sued alone, for the loss of the cargo, he might plead the non-joinder of his co-owners in abatement. Whether a replication to such plea, setting forth the proceedings and decree in this suit as a severance of his right and interest, by his own act, and claiming to recover only the one-fourth for which he would have no claim to contribution from his co-owners, would be a good answer to the plea in abatement, I will not pause to consider. But supposing that he has a right to abate the suit, for the non-joinder, this right he would have, whether the decree in this case be for or against the libellants, or if there be no decree. But the consequence of the exercise of such right to plead in abatement may be to compel the shippers to bring their suit against all the owners, including the libellants, who may then defend themselves by pleading the decree in this case, should it be in their favor. And if Swett should join in that plea with the libellants, he would, perhaps, be protected by it. But his protection, in such case, would not be owing to any right to plead the decree himself, for his own benefit, but to the right of his associates, to plead it for their benefit. If, therefore, they should make no defence, or refuse to put in such a plea, (and this might happen, either from a sense of justice to the shippers, or their own insolvency,) then Swett could not interpose it. So also, if the co-owners were dead, the suit might be against Swett alone, and he could not avail himself of the decree, merely for his own protection. The interest, then, that he would have in such a decree, would not be certain, but contingent upon the lives of his associates, or their choosing to make defence and plead the decree.

But it may be urged that, if his associates be dead, and he be sued alone, he would have a right of contribution over against his co-owners, if compelled to pay for the cargo, and, therefore, he must have the right, in such case, to set up the decree, in order to protect the estate of those who have a right to its benefits. But here, too, the actual state of facts show that, if Swett, the co-owner, is liable to pay for this cargo, it is a liability arising from his own personal default, he being the master as well as the part owner, and, therefore, he could have no claim against the estate of deceased part owners for indemnity or contribution. In the case of Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, the effect of a judgment against one of several joint promissors was considered. In that case, a promissory note having been given by two partners, Jamesson and Mandeville, one of them, Jamesson, was sued alone, and a several judgment rendered against him. In a subsequent suit against both, Jamesson made no defence, and it was held, that Mandeville could not set

up the former judgment against his co-promissor, as a defence.

The deposition of Swett is competent evidence.

Case No. 13,691.

SWETT et al. v. BLACK et al.

[2 Spr. 49.] [1]

District Court, D. Massachusetts. June, 1862.

AFFREIGHTMENT — ASSIGNEE OF BILL OF LADING.

A person to whom a bill of lading is assigned as security for the payment of goods purchased of him by the shipper of such goods, under said bill of lading, is not liable to the ship-owner for the freight.

This was a libel by the owners of a vessel, to recover for the freight of a cargo of lumber shipped from Boston to California. L. S. Brown and Francis Tukey bought the lumber of the defendants, lumber-merchants of Boston, to ship to California, paying half cash, and giving notes for the balance, with an agreement to assign the bill of lading to them as security. The bill of lading was made out in the name of Brown & Tukey as shippers, and was assigned by them to the defendants. There was some conflict of testimony, as to whether the assignment was written before or after the bill of lading was signed by the master. It was signed by the master in defendants' counting-room, and they took and kept the one signed for the shippers. The libellants offered other evidence, including the declarations of defendants, to show that the defendants were the real owners of the property, and had never parted with the possession of it. The defendants endorsed the bill of lading to F. M. Warren & Co., of San Francisco. This latter house had no interest in the cargo, and there was a conflict of testimony as to the character and extent of their agency. Upon the arrival of the cargo out, Warren made a written contract with the master, to keep the cargo on board at a certain rate per month. Warren failed to perform his part of the agreement, as to paying the storage; and therefore the master sold the cargo for non-payment of freight and storage, alleging a custom there which authorized him to do so. The cargo fell short some $5,000 of the amount due for freight. The libellants sought to put in parol evidence of the contents of this contract for storage, upon the ground that they had used all the diligence which the law required to obtain the original, but that it had been lost.

R. H. Dana, Jr., for libellants.

S. Bartlett and D. Thaxter, for respondents.

SPRAGUE, District Judge. This libel is brought to recover freight, also on a claim for storage. In regard to the claim for freight, the libel charges the defendants, as the parties contracting, for the carriage of this lumber. It does not set out the bill of lading, or refer to it or its contents. The first question to be considered is, have the libellants proved such a contract as they have alleged? The respondents allege that this cargo was carried under a bill of lading, which they set up, and which is in the case. This bill of lading is a written contract, and the cargo was carried under it. Upon the face of it, Brown & Tukey are the shippers, and the contract of carriage is between them and the libellants as carriers. The defendants are connected with it only as assignees, and as such they certainly cannot be considered as the original contractors; and in this view it is immaterial whether the assignment was written a few moments before, or a few moments after, the master signed it.

Evidence aliunde was offered to show that the defendants were the owners of the property. Of course this evidence must be offered to show, that Brown & Tukey, while appearing on the bill of lading as the shippers, were not in fact so, but were really to be considered as the agents of the defendants in making the shipment. The evidence failed to show this; and the fact undoubtedly was, that Brown & Tukey bought and shipped this cargo on speculation, and, not having the means to pay for the whole of it, assigned the bill of lading as security for a part of the purchase money. This decision is supported by the case of Blanchard v. Page, 8 Gray, 281, where the late Chief Justice Shaw has examined the whole subject of the liability of shipper and carrier with great care and thoroughness.

The claim for storage cannot be allowed, as the libellants have not placed themselves in a position to be allowed to offer parol evidence of the contract, and so there is no legal evidence upon this point before the court.

See Cock v. Taylor, 13 East, 399; Tobin v. Crawford, 5 Mees. & W. 235, 9 Mees. & W. 716; Dougal v. Kemble, 3 Bing. 383; Smurthwaite v. Wilkins, 11 C. B. (N. S.) 842; Lewis v. M'Kee, L. R. 2 Exch. 37.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

SWETT (UNITED STATES v.). See Case No. 16,427.

Case No. 13,692.

SWICK v. HOME INS. CO.

[2 Dill. 160;[1] 2 Ins. Law J. 415; 4 Bigelow, Ins Cas. 176.]

Circuit Court, E. D. Missouri. March 25, 1873.

INSURANCE—LIFE POLICY—ASSIGNEE'S RIGHT TO RECOVER—WAGER POLICIES—WARRANTY AS TO HEALTH, AND USE OF INTOXICATING LIQUORS—EFFECT OF FAILING TO MAKE FULL ANSWERS—ONUS PROBANDI.

1. When a life policy of insurance is assigned by the assured, with the consent of the company, to a creditor of the assignor, to secure a past debt and future advances, the assignee has all the rights which the executor of the assured would have had if the policy had not been assigned, and can recover, if entitled to recover at all, the full amount thereof, irrespective of the amount of his debt against the assured.

2. A life policy taken for the benefit of and assigned to a person who has no insurable interest in the risk is void. See Holabird v. Atlantic Trust Life Ins. Co. [Case No. 6,587], note.

[Cited in Langdon v. Union Mut. Life Ins. Co., 14 Fed. 274.]

[Cited in Singleton v. St. Louis Mut. Life Ins. Co., 66 Mo. 72.]

3. Warranty in relation to "good health," and being "free from any symptoms of disease," construed.

4. Warranty that the assured "had never been addicted to the excessive or intemperate use of alcoholic stimulants," and that he "did not habitually use intoxicating liquors as a beverage," construed.

[Cited in Northwestern Mut. Life Ins. Co. v. Hazelett (Ind. Sup.) 4 N. E. 587.]

5. Distinction pointed out between untruthful answers to specific questions and the mere failure to make full answers, and the effect of such failure under the provisions of the policy in suit.

[Cited in Whitmore v. Supreme Lodge Knights & Ladies of Honor, 100 Mo. 47, 13 S. W. 497; Wilkins v. Germania Fire Ins. Co., 57 Iowa, 531, 10 N. W. 917.]

[See Wilkinson v. Union Mut. Ins. Co., Case No. 17,676.]

6. By the pleadings, the company set up affirmatively as a defence a breach of specific warranties as to existing facts, and this was denied by the plaintiff: *Held*, that the burden of proof to establish this defence was upon the company. See Holabird v. Atlantic Mut. Life Ins. Co., note [supra].

The defendant issued a policy dated February 11, 1870, to William Henry for $2,000, insuring his life. With the consent of the company, the assured, Wm. Henry, by instrument dated March 19, 1870, assigned this policy to the plaintiff [Elias Swick]. Henry died in June following. The plaintiff sues to recover from the company the amount of the policy. The defendant denies that the plaintiff is entitled to recover, and makes several specific defences to the action, which are noticed in the charge of the court to the jury given below.

John W. Noble and Strongs & Hedenberg, for plaintiff.

D. T. Potter and Lee & Adams, for defendant.

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

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

DILLON, Circuit Judge. 1. The first defence relates to the assignment of the policy and the plaintiff's rights under such assignment. The plaintiff claims that prior to and at the time of the application for the policy, he was a creditor of Henry, and remained such creditor until his death, and that the policy was assigned to him as security for the debt, and for any sums he might afterwards advance to Henry. If upon the evidence you find this to be the case, then the plaintiff can recover on such policy if Henry's executor could have recovered thereon if the policy had not been assigned. And in such case the plaintiff can recover, if entitled to recover at all, the full amount of the policy, although the debt of Henry to him may be much less than the amount insured. On this subject we may observe that no life policy is valid if taken for the benefit of a person who has no insurable interest in the risk. Hence if this policy on the life of Henry had been taken directly for the benefit of Swick, and Swick at the time was not a creditor of Henry, and there was no agreement or understanding that it was for the purpose of securing him for advances to be made to Henry, and if the plaintiff had in no way an insurable interest in Henry's life, then the policy would have been void. The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded.

Hence if Swick and Henry confederated together to procure this policy for the benefit of Swick, who was not or had not agreed to become a creditor of Henry, and with the view of having the same assigned thereafter to Swick, without consideration, or not as a security for a debt due or to become due, or for any other lawful purpose, then such contrivance would make the policy void. If, on the other hand, Swick was a creditor of Henry, and if the purpose in procuring the policy was to have the same assigned thereafter to Swick for his (Swick's) indemnity, and Swick paid the premium, and the facts were known to the agent of the company, the policy is not void. So if there was, as plaintiff contends, an understanding between Henry and Swick, the latter being a creditor of Henry, or having agreed to become such, that this policy should be taken on Henry's life, with the view of having Henry or Henry's estate in the event of his death in a condition to meet his debt to Swick, and if Swick paid the premium with the knowledge of the company's agent, and thereafter the policy was assigned to Swick when such creditor of Henry, or as a security for debts due or agreed to be created, and the company agreed in writing to such assignment, then the policy and assignment were not invalid. In other words, the

law exacts fair dealing in these respects from all parties in interest. It will not uphold a policy made, or fraudulently contrived to be made for the benefit of a person who has no insurable interest in the risk. Mere speculative risks in the lives of others, or gambling policies of any kind, are forbidden for the good of society. It is not necessary for the purposes of this case to discuss what may, under different circumstances, be a mere speculative risk, or what interest will be non-speculative; for in the case before the jury the question is merely on the one hypothesis, whether Swick was a creditor of Henry at the date of the policy, and continued so to be at the date of assignment; and on the other hypothesis presented—that if he had no understanding at the date of the policy concerning its subsequent assignment—whether Swick was Henry's creditor when it was assigned, and remained such until Henry's death.

2. The main defence upon the trial has been rested upon alleged misrepresentations by the assured in the application, respecting his health, and his habits as to the use of alcoholic drinks.

In the application the following questions were asked of Henry and answered by him: (6) "Is your health good, and, as far as you know, free from any symptoms of disease?" Answer—"Yes." (9) "Are your habits uniformly and strictly sober and temperate?" Answer—"Yes." (10a) "Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium?" Answer—"No." (10b) "Do you use habitually intoxicating drinks as a beverage?" Answer—"No."

By the terms of the contract between these parties, these answers are warranted to be true, and it is agreed in the policy that if the answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent misstatements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you first, that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question.

If you find from the evidence that at the date of the application Henry's health was not good, or if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact to be as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was known to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness, which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided.

3. Now as to the questions respecting intoxicating liquors. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive or intemperate use of them, and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants.

The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to a habitual use of such drinks as a beverage.

It is your province to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten, or contribute to the death.

4. We have been asked by the defendant to instruct you that if the answers as to the

health and habits are not full, correct, and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional. The application referred to and made part of the policy, contains the provision: "The undersigned does hereby covenant * * * that the preceding answers and this declaration shall be the basis of the policy; that the same are warranted to be full, correct, and true, and that no circumstance is concealed, withheld, or unmentioned, in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life," and that if the foregoing answers and statements be not in all respects full, true, and correct, the policy shall be void. The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked, renders the policy absolutely void, though made in relation to a matter not material to the risk.

5. The statements and declarations in the application are warranties, and the defence here is that there has been a breach of some of these warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This may not be the rule as to promissory warranties—that is, where the party warrants that he will not thereafter do or will refrain from doing something stipulated in a policy as to the future.

In this case the alleged breach of warranty is as to the statement of existing facts—the facts as to his health, and the facts as to his habits; and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach.

These observations cover, it seems to us, all that it is necessary to state relating to the law of the case. The facts the law commits to your decision, to be decided upon the evidence, and upon the evidence alone, and it expects that your verdict will be one not influenced by any considerations arising from the nature of the parties—that it will be one which is the expression of your unbiased judgment upon the testimony before you.

There was a verdict for the plaintiff. Judgment accordingly.

NOTE. As to the burden of proof, see Terry v. Life Ins. Co. [Case No. 13,839], affirmed in supreme court, December term, 1872 [15 Wall. (82 U. S.) 580]. Compare, however, Price v. Phœnix Mut. Life Ins. Co. [17 Minn. 497 (Gil. 473)].

[Holabird v. Atlantic Mut. Life Ins. Co., which is given as a note to 4 Dill. 160, is published as Case No. 6,587.]

Case No. 13,693.

In re SWIFT.

[6 Ben. 324;[1] 7 N. B. R. 591.]

District Court, S. D. New York. Jan., 1873.

BANKRUPTCY—AMENDED ACT—DISCHARGE—TIME OF CONTRACTING DEBT.

S. hired premises of H., in 1865, for 5 years. He surrendered the lease in May, 1868, and the landlord agreed with him to rent the premises, S. to pay any deficit in the rent. There was a deficit, and in May, 1871, H. obtained judgment against S. for such deficit. S. becoming a bankrupt, H. proved the judgment as a debt against the estate, and filed specifications in opposition to his discharge. S. had no assets, and did not obtain the consent of creditors, provided for in the 33d section of the bankruptcy act, as amended on July 27th, 1868 (15 Stat. 228). *Held*, that the debt was contracted prior to January 1st, 1869, within the meaning of the act of July 14th, 1870 (16 Stat. 276).

The bankrupt having made application for his discharge, specifications in opposition thereto were filed by Goold Hoyt, executor, &c., a creditor who had proved his claim. The facts in relation to the claim were these: On April 16th, 1865 [Septimus E.] Swift leased of Hoyt, executor, &c. certain premises in New York City, for five years from May 1, 1865. In May, 1868, he surrendered the lease, and the landlord accepted the surrender, and they agreed that the landlord should rent the premises for the best price he could obtain, for the remainder of the term, and that any deficit in the rent from the amount of rent reserved by the lease should be paid by the tenant. There was a deficit, and, on the 1st of April, 1871, the landlord obtained judgment against Swift for $9,144.43 for such deficit, and this judgment he proved as a debt against the estate. The register certified that the bankrupt had conformed to all the requirements of the act, unless the court should hold that the debt in question was not contracted prior to January 1st, 1869. The 33d section of the bankruptcy act, as amended on July 27th, 1868, provides, that, in all proceedings in bankruptcy commenced after the 1st of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to 50 per cent. of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless he has the written assent of 50 per cent. of his creditors. The act of July 14th, 1870, § 1, provides that this provision shall not apply to debts from which the bankrupt seeks a discharge, contracted prior to January 1st, 1869. The

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

bankrupt had no assets. No assent in writing had been obtained by him. If this debt was contracted after December 31st, 1868, the consent of creditors was necessary.

BY THE REGISTER:

[2] [I, Isaiah T. Williams, the register in charge of the above entitled matter, do hereby certify that Septimius G. Swift, the above named bankrupt, has in all things conformed to his duty under the act of congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867 [14 Stat. 517], and has conformed to all the requirements of the said act unless the district judge should be of opinion that a certain judgment against the bankrupt, recovered by Mr. Goold Hoyt, executor, &c., amounting to nine thousand one hundred and forty-four dollars and forty-three cents, on the 1st day of April, 1871, duly proved against the estate of the bankrupt on the 2d day of January, 1872, be a debt "contracted" subsequently to the 1st day of January, 1869.

[There can be no doubt that the judgment, as it was obtained prior to the filing of the petition in bankruptcy, is provable against the estate and that the judgment creditor can be heard to object to the discharge.

[The only question presented is, was that debt contracted prior to January 1st, 1869? The decision in Re Williams [Case No. 17,705], and the decision in Re Gallison [Id. 5,203], arose upon the question whether a judgment creditor, whose judgment was obtained after the filing of the petition in bankruptcy, had a debt provable against the estate of the bankrupt. It was held in those cases that such a debt was not provable against the estate of or payable out of the assets of the bankrupt, but that it was a debt which accrued after the filing of the bankrupt's petition and would be unaffected by his discharge even though the claim upon which the judgment was founded was owing and due before the filing of the petition in bankruptcy. The ground of this decision was that the claim upon which the judgment was founded was extinguished by the judgment.

[Assuming that the bankrupt act requires such a construction, I don't think the court should feel compelled, under these authorities, to hold that the claim was contracted by the judgment rendered thereon, even though a judgment be conceded to be a contract between the parties.

[The act as amended July 14, 1870, uses the word "contracted" in contradistinction to the word "accrued" or the phrase "become due" or "payable." A debt would seem to be contracted when the contract under which it becomes due or payable is made. Even a liability to pay rent is contracted when the lease is executed, for it is under that contract, and under that alone, that the rent becomes payable. But in the present case, if the debt in question were not contracted at the time the lease was made in 1865, how can it be denied that it was contracted in May, 1868, when the bankrupt surrendered the lease and contracted, in consideration of its acceptance, that he would pay, at its expiration, such sum as the rent the landlord might receive for the use of the premises should fall short of the rent reserved in the lease? All the consideration there was for this promise was the acceptance of the surrender of the lease by the landlord, and this consideration passed at the time the contract was made. The fact that the amount of the liability was not then, and could not then be, ascertained, did not render the contract incomplete or in anywise invalid. The amount was the only thing that was left to any uncertainty, but it was capable of being reduced to certainty before it should fall due. Such uncertainty has never been thought to have the effect to render the contract incomplete.

[It is still strenuously urged by the counsel for the creditor that the decisions above referred to are in point, and establish the doctrine that a debt evidenced by a judgment bears date to all intents and purposes as of the time of docketing the judgment. It is argued that these decisions establish the doctrine that a simple contract is extinguished by a judgment recovered thereon as a matter of law, and that what is extinguished by law cannot legally be a debt or a contract of which the law can take notice. It is argued that if a debt due prior to bankruptcy, but upon which a judgment is docketed after bankruptcy, be so extinguished that the court in bankruptcy can take no notice of it as a debt against the estate of the bankrupt, then a fortiori a contract made prior to January 1st, 1869, for the payment of money, the amount of which is contingent upon events to occur after January, 1869, cannot but be extinguished by a judgment obtained after the period in question. In Re Gallison, the learned judge speaks of the judgment as a "new contract" which operates to extinguish the former contract, and it is argued that congress in the amendment above referred to would not have referred to an extinguished contract.

[To all this it may be answered that the decisions referred to are not quite in point. They don't decide that the debt evidenced by a judgment was not contracted prior to the rendition of such judgment. Even the application of the doctrine of those cases to the facts before these courts respectively, is exceedingly questionable as a matter of authority. An opposite doctrine is held in the following cases: Harrington v. McNaughton, 20 Vt. 293; Downer v. Rowell, 26 Vt. 397; Dresser v. Brooks, 3 Barb. 429; Fox v. Woodruff, 9 Barb. 498; Clark v. Rowling, 3 N. Y. 216. The doctrine of the case of Williams, above referred to, was dissented from

[2] [From 7 N. B. R. 591.]

by this court, in Re Brown [Case No. 1,975]. This decision was followed substantially by Withey, J., in Re Vickery [Id. 16,930], and by Longyear, J., in Re Crawford [Id. 3,363]. The doctrine that a judgment extinguishes the simple contract upon which it is founded, is simply a principle of evidence. In Clark v. Rowling, 3 N. Y. 216, the court held that "a judgment upon a contract technically merges the demand, but not in so complete a sense that the court cannot look behind it for the purpose of protecting equitable rights of the parties, especially in cases of insolvency and bankruptcy." A similar doctrine is affirmed in 12 Pick. 572; 1 Cow. 316; 3 Barb. 429; 3 Barb. Ch. 360; 3 Cow. 147. To say that the debt in question was not contracted in May, 1868, but that it was contracted on the day judgment was docketed upon it in the office of the clerk, would not square with the common sense of mankind.

[I therefore certify that Septimius E. Swift, the above named bankrupt, has, in all things, conformed to his duty under the act of congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and has conformed to all the requirements of the said act, except in the particulars covered by the specifications of objections to the discharge of said bankrupt filed by the said Goold Hoyt, executor, &c., a creditor as aforesaid.] [2]

H. W. Fowler, for bankrupt.
F. M. Scott, for creditor.

BLATCHFORD, District Judge. In this case I am of opinion that the debt due to Goold Hoyt, executor, &c., represented by the judgment recovered April 1st, 1871, and from which debt the bankrupt seeks a discharge, was contracted prior to the 1st day of January, 1869, namely, when the agreement of May, 1868, was made. The case will, therefore, stand for hearing on the specifications filed by said creditor.

Case No. 13,694.

SWIFT et al. v. The ALBUS.

[N. Y. Times, June 9, 1856.]

District Court, S. D. New York. May 31, 1856.

MARITIME LIEN — STORES — FURNISHED TO CHARTERER — CHARGE — LIABILITY OF VESSEL.

This was a libel filed by the libelants [Frederick Swift and others] to recover the sum of $4,010, for supplies and passenger stores alleged by the libelants to have been furnished by them to the ship.

Owen & Vose, for libelants.
Beebe & Donohue, for claimants.

HELD BY THE COURT: The ship was chartered to one Pelletier upon certain terms. He was to load the ship, and she was to sail for his benefit, the owners to appoint the captain. The owners ran up a bill of stores for the ship, which were paid. But the stores in question, it is evident, were furnished, in part, on the credit of Pelletier. There was no personal credit given to the owners for them. But it is said that credit was also given to the ship, and therefore the libelants have a right to look to her for payment. Now, to enable them to recover, they must show—First, that they did charge the ship; and, second, that they had the right to charge her. I should doubt very much, on the evidence, whether they ever did charge them to the ship. Other stores were charged to the ship Albus but these were charged to the ship Albus' passengers. But, suppose they did look to the ship; had they the right to do so? Pelletier was not the agent of the owners. and did not contract for the stores as such; and the owner told the libelants, when they furnished the stores, that the ship should not be responsible for them. The libelants, then, did not look to the ship, and, if they did, they had no right to do so. Libel dismissed, with costs.

[2] [From 7 N. B. R. 591.]

Case No. 13,695.

SWIFT et al. v. BROWNELL et al.
BROWNELL et al v. SWIFT et al.
SWIFT et al. v. BROWNELL et al.

[Holmes, 467.] [1]

Circuit Court, D. Massachusetts. March, 1875.[2]

COLLISION — LIGHTS — NAVIGATION RULES — DAMAGES — ABANDONMENT — DEMURRAGE — LIMITED LIABILITY — EQUIPMENT AND SUPPLIES.

1. Neglect by a vessel having the right of way at night, to show the regulation-lights, does not relieve another vessel, meeting her, from the duty of observing the rules of navigation and using all practicable precautions to avoid a collision.

[Cited in The Mary Doane, Case No. 9,205; The Abby Ingalls, 12 Fed. 218; The Ada A. Kennedy, 33 Fed. 624.]

2. Where an experienced and capable master of a vessel badly injured by a collision at sea, himself a part owner of the ship and cargo, acting in good faith according to his own judgment and the advice of two other ship-masters, abandons the vessel and cargo, their value is to be taken as a total loss in estimating the damages by the collision, although the other vessel, almost as badly injured, succeeded in reaching a port of safety.

[Cited in The C. H. Foster, 1 Fed. 734; The Venus, 17 Fed. 926.]

3. In estimating the damage caused by a collision between two New Bedford whaling-ships in the Arctic Ocean, a cargo of bone and oil on one of them, there abandoned with the ship in consequence of the collision, is to be taken at its market value in New Bedford, at the time when it would ordinarily have arrived there, if

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Reversing in part and affirming in part Case No. 10,543.]

shipped at the time and from the place of the collision.

[Cited in Sheppard v. Philadelphia Butchers' Ice Co., Case No. 12,757; Dyer v. National Steam Nav. Co., Id. 4,225; Guibert v. The George Bell, 3 Fed. 585.]

4. The whaling equipment, provisions, and supplies of a whaling-ship, are not within the meaning of the words "ship or vessel" as used in section 3, of the act of March 3, 1851 (9 Stat. 635), limiting the liability of ship-owners in cases of collision to the value of their interest in the "ship or vessel, and her freight then pending."

5. There is no "freight pending" on a whaling voyage within the meaning of that act.

6. In estimating the damages to a ship on a whaling voyage caused by a collision, demurrage is to be allowed for the time she is in port undergoing repairs.

Admiralty appeals from a decree of the district court of Massachusetts, dividing the damages caused by a collision between the whaling-ships Ontario and Helen Mar, in the Arctic Ocean. [Case No. 10,543.] [They are cross libels by William O. Brownell and others against Jireh Swift, Jr., and others.]

Marston & Crapo, for owners of the Helen Mar.

Oliver Prescott and T. M. Stetson, for owners of the Ontario.

SHEPLEY, Circuit Judge. These cross-libels are promoted to recover damages consequent on a collision in the Arctic Ocean at ten o'clock at night, between the whale-ships Ontario and Helen Mar. A gale was blowing from the north-west, and both vessels were lying-to under storm-sails. The Ontario was close-hauled on the starboard tack under close-reefed maintopsail and foretopmast-staysail, and the Helen Mar was close-hauled on the port tack, having set her lower maintopsail and foretopmast-staysail. Each vessel was making from one and a half to two and a half knots, much of it to leeward. The starboard bows of both vessels came in contact, each vessel losing foremast, main and mizzen topmast, and head-gear and anchors, and all the boats but one. The Ontario, with a valuable cargo of oil and bone, was necessarily abandoned. The Helen Mar was, in her disabled condition, brought safely out of the Arctic Ocean with a damage alleged at twenty thousand dollars. The night of the collision was intensely cold, with a north-west wind blowing a gale, with a clear sky, except during the occasional snow-squalls, when the intense cold precipitated the vapors in the air in flurries of snow. Except during these brief snow-squalls, the moon and stars were visible. The Helen Mar had the red and green lights required by the act of April 29, 1864. The Ontario, it is admitted, had not the statute lights, but it is claimed that she had a white light in a large Fresnel signal-lantern.

It does not seem to be questioned in this case that the Ontario had the right of way. Being absolutely close-hauled on the starboard tack, although by the rules it was her duty as well as that of the Helen Mar to port her helm, she could not port any more without going in stays, which is not required except in extreme cases. That the Ontario was in fault for not having the regulation-lights is clear. The evidence fails to prove that this fault was immaterial, but, on the contrary, is conclusive that it contributed to the disaster.

The Helen Mar was bound to port her wheel and go to the right. The law requires great vigilance on the part of the vessel bound to give way. The omission of the other vessel to exhibit the proper lights is insufficient to relieve her from the duty of observing the laws of navigation, and of using all practicable precautions to avoid a collision. This was the settled law before the enactment of the act of April 29, 1864. Chamberlain v. Ward, 21 How. [62 U. S.] 548. It is enacted in the twentieth article of that act, and has been, since the passage of the act, so held in The Gray Eagle, 9 Wall. [76 U. S.] 505. The Helen Mar did not port her wheel until too late to avoid the collision. Was this omission attributable solely to her inability to see the Ontario or to know her position and course by reason of the absence of the colored lights; or was it attributable partly to any inattention or neglect and want of proper lookout on the Helen Mar? Ought the Ontario to have been seen from the Helen Mar much earlier than she was seen, notwithstanding the absence of the colored lights? I think the evidence clearly proves that there was no snow-squall at the time of the collision, and had not been for fifteen minutes before. Not only the lights of the Helen Mar, but the vessel itself, were clearly seen from the Ontario a considerable time before the collision, and I am satisfied that the Ontario could have been seen from the Helen Mar when distant at least a quarter of a mile. If there was a forestaysail on the Helen Mar at the time of the collision, a fact which the evidence leaves in doubt, I do not think it would have obstructed the view of the lookout on the Helen Mar materially, and, if at all, only at intervals when the vessel was pitching. I do not, therefore, attach any importance to the question, so much discussed at the argument, whether or not the forestaysail was up. The Helen Mar had four men on deck besides the officer: two near the wheel, which was lashed but could be readily and quickly freed, and two on the lookout. The lookout were stationed amidships, because the Helen Mar was a wet ship, and with a north-west wind blowing a gale, and the temperature at nineteen degrees below zero, the spray freezing instantly, and with no topgallant forecastle or staging in the bow to accommodate the lookout, it was almost, if not quite, impossible to keep men at the bow. Yet from the vise-bench, where one of the men on the lookout was stationed, I think the Ontario could have been, and ought to have been,

seen sooner. What the reason was why the two men on the lookout did not see the Ontario sooner than they did, whether it was a momentary carelessness of the seamen, or a state of listlessness and indifference to passing events in the minds of men yielding to the numbing influence of the intense cold, we may not be able to discover. It is not often easy to discern, or necessary to know, why negligence existed in a given case. It is sufficient for purposes of judicial determination if we find the fact of negligence established. I think in the case of this collision neither party proves that "it has endeavored by every means in its power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident." See The Lochlibo, 3 W. Rob. Adm. 318. Here, then, is not a case of inevitable accident, but one of mutual fault; the fault of each contributing to a common calamity, the aggregate loss resulting from which is to be equally divided.

A question is presented whether the Ontario is entitled to have her total loss estimated, on the ground that she was abandoned, when, it is contended, she might have been navigated to a port of safety. Because the Helen Mar, in a condition of almost equal disability, succeeded in reaching the port of San Francisco, it is easy, with the wisdom which comes after the event, to contend that the Ontario might have done the same. But the master of the Ontario was experienced and of undoubted seamanship and capacity. He was a part owner in ship and cargo. He acted not only on his own judgment, but on the advice of two other masters of whalers in the Arctic Ocean. In good faith he determined that it was his duty rather to abandon the property of himself and his owners than to risk the lives of his crew. Placing ourselves in the position in which he was when called to determine, we ought to be slow in overruling the decision at which he arrived, and in which the other masters concurred. The true rule in estimating the value of the cargo of the Ontario is the restitutio in integrum. The injured party is to be made whole. He is to be as well off as if the injury had not been inflicted, and no better. "It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages." Smith v. Condry, 1 How. [42 U. S.] 35. If there is a market value ascertainable at the time and place of injury, that market price governs. If, however, the article is of value to the owner, the wrongdoer does not escape by showing the absence, at the time and place of the injury, of a market for the article. Stickney v. Allen, 10 Gray, 352. There was no market price for the oil and bone in the Arctic Ocean. The true rule, so far as it goes, is stated in Bourne v. Ashley [Case No. 1,699]. "The market of New Bedford, which the witnesses and the assessor adopted, is the controlling market of the country, as well as the home port of both vessels, and furnishes the proper standard. The damages, then, will be the value at New Bedford, of the oil and bone * * * less the average necessary expenses of * * * freight, insurance, and the other usual charges, with interest on the sum thus arrived at." This rule is clearly a just one; but it seems clear to me that an error was made in the mode of applying it to the facts of this case. The value of the oil and bone was determined by the commissioner, as confirmed by the court, by taking the market price at New Bedford at the time of collision, and deducting freight, insurance, and other usual charges. But the price of bone and oil was exceptionally high at New Bedford at the time of the collision. By making the assessment at that price, the libellants receive what they could not have obtained by any possible combination of circumstances. They had oil and bone in the Arctic Ocean. To get it to a market, they must take time and incur expense. The value to them was what the net proceeds of the oil and bone would be after the expenses had been incurred and the time had elapsed necessary to reach a market. The element of time, it seems to me, is as much to be taken into account as the element of freight. There being no market in the Arctic Ocean at the time and place of collision, the article is constructively transported to a place where there is a market. We ascertain when it could reach the market, what it would produce on arrival over the cost of placing it there, and thus determine precisely what it was worth at the time and place of the injury. This is what the owner could have realized for it by freighting it to the market. As he could not have realized the exceptionally high price at New Bedford at the time of the collision, but only the price at New Bedford when he could get his articles there, the estimate should be based upon that price only which the article could command. If a cargo of powder be destroyed, destined for a port where by reason of war it commands an exorbitant price, it would not be reasonable to give the owner that exceptional price, when by no combination of circumstances it could have reached the port until the causes creating the exceptional price had ceased to be operative. I think, therefore, that, in applying the rule quoted from Bourne v. Ashley [supra], the New Bedford price of the bone and oil, adopted as a basis, should be the New Bedford price when the bone and oil could have reached the New Bedford market. This seems to have been the rule adopted by Judge Sprague in Taber v. Jenny [Case No. 13,720]. It certainly seems to be a rule of exact justice and precise restitution.

The commissioner to whom the assessment was referred reported the value of the cargo of bone and oil lost on the Ontario, at New Bedford prices in September, 1866, the

time of collision, after deducting expenses, to have been $52,554.04; and the value, computed at the market price of such commodities in New Bedford at the date it would probably have arrived there, if shipped immediately, deducting expenses, shrinkage, &c., in the same manner, at $34,647.67. The latter sum should be substituted for the former in making up the decree. The damage to the Ontario, as found by the commissioner, would then be $68,512.67, instead of $86,419.04, and the damage to the Helen Mar, including the general-average charges and demurrage, $20,422.28. So that, in order to equalize the damages, the Ontario would be entitled to the sum of $24,045.19, instead of $32,993.38, as found in the decree of the district court.

But as the liability of the owners of the Helen Mar for damage or injury by collision, by the provisions of the act of congress of March 3, 1851, "shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending," it becomes necessary to determine the contributory value of the ship or vessel and her freight then pending. The liability is for the value of the vessel after collision, the act of congress having adopted the rule of the maritime law, and not the rule of the English statutes, on this subject. Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104. It is contended in behalf of the Ontario that the value of the whaling equipment, at date of collision, is to be estimated in the value of the vessel. The commissioner has found this to have been $10,000; and the decree of the district court adding this to the $8,000, the value of the Helen Mar, after the collision, makes the estimated value of the ship at the date of collision $18,000.

The limitation of liability in the statute is the value "of the ship and her freight then pending." Does the word "ship," as used in the statute, include, in the case of a whaler, the whaling outfits, consisting of whaling-gear, casks, provisions and supplies for the crew, and trading, known as "slops"? That the word "ship" was intended to include the tackle, apparel, and furniture of the ship, I suppose, will hardly be questioned. In case of insurance, whaling equipment or fishing-stores are not considered as covered by a policy on the ship, or as a part of her tackle, apparel, and furniture. In construing the English statute (53 Geo. III. c. 159), Lord Stowell, in the case of The Dundee, 1 Hagg. Adm. 109, held the fishing-stores of a vessel engaged in the Greenland fisheries liable to contribute in compensation for damages done to another British ship by collision. But that learned judge did not so hold on the ground that the whaling implements or fishing-stores were included in the term "ship," or in the phrase, "ship, her tackle, apparel, and furniture." He states the question thus: "The only remaining question can be, whether the word appurtenances is properly applicable to fishing-stores on board of a fishing-vessel. It is a word of wider extent than 'furniture,' and may be properly applied to many things that could not be so described (with propriety at least) in a contract of insurance." He then proceeds to discuss what may properly be defined as appurtenances to a ship. The word "appurtenances," he states, must not be construed with a mere reference to the abstract naked idea of a ship; for that which would be an incumbrance to a ship one way employed would be an indispensable equipment in another; and it would be preposterous abuse to consider them alike in such different positions. You must look to the relations they bear to the actual service of the vessel. He held the fishing-stores of a whaler to be "appurtenances." So far from holding them to be included in the words "ship, her tackle, apparel, and furniture," he held that the seventh and eighth clauses of the act 53 Geo. III., in which the word "appurtenances" is introduced as subject to contribution, must be considered as explanatory of the first enacting clause, which subjects the ship, tackle, apparel, and furniture, and its freight, to contribution, thus proving that the obligation of that clause, as explained by the following clauses, was intended to embrace whatever could be fairly considered as the appurtenances of the ship. He adds: "It cannot be supposed that these following clauses introduce any inoperative word totally without meaning." Unless the word "appurtenances" be an inoperative word totally without meaning, it is, as Lord Stowell observes, a "word of wider extent than 'furniture;'" and the English statute, which subjects the ship and all her appurtenances to liability, is much broader in that particular than the act of congress, which limits the liability to the value of the ship and the pending freight. The question in the case of The Dundee was, "whether the word 'appurtenances' is properly applicable to fishing-stores on board a fishing-vessel." The question in the case pending is, whether the word "ship" is properly applicable to fishing-stores on board a fishing-vessel. It seems to me as clear that such stores are not "ship" in the case of a fishing-vessel, as that, in such case, they are appurtenances of the ship, and as clear that they are not included in our statute in the word "ship," as it is clear that they were included in the English statute in the expression "ship with all her appurtenances." The very nature of an appurtenance is that it is one thing which belongs to another thing. If the fishing-stores are "ship," they are not appurtenances of the ship.

The act of congress seems to have been drawn with direct reference to all the previous English statutes on this subject. The word "appurtenances," used in the seventh and eighth clauses of the act of 53 Geo. III.,

had, almost thirty years before the passage of the act of congress, received a construction by Lord Stowell in The Dundee. The court of king's bench, also, in Gale v. Laurie, 5 Barn. & C. 156, growing out of an application for prohibition in the case of The Dundee, had decided that the words "with all her appurtenances," in the seventh section of the act of 53 Geo. III., were to be considered as if inserted after the words "ship" and "vessel" in the first clause, and that fishing-stores were a part of the appurtenances of the ship. By the use of the words "ship" and "freight pending," and the omission of the word "appurtenances," used in the English statute after this construction had been given to it, congress clearly expressed an intention to limit the liability to the value of the ship, and that which is properly a part of the ship, her tackle, apparel, and furniture, and not to include that which is no part of the ship in the language of merchants, but only appurtenant to it as necessary for a special voyage or adventure. There is no "freight pending" in a whaling voyage; and the decree in the district court properly omitted any allowance for freight in the valuation of the Helen Mar.

In the estimate of damage to the Helen Mar by the collision, the commissioner allowed demurrage on the Helen Mar while under repair at San Francisco. The rule allowing demurrage, under such circumstances, is too well settled to be questioned. The sum allowed by the commissioner seems large; but the report is in all respects remarkable for its accuracy and ability; and, upon a mere question of fact as to amount, I do not feel disposed to disturb the conclusion of so competent a commissioner, after it has received the approval of an admiralty judge so careful and experienced, without a more clear preponderance of evidence against the finding than I can find from the testimony reported in this case. The Helen Mar, therefore, is to be valued immediately after the collision, without adding thereto the value of her whaling outfits, or any allowance for freight. The aggregate damages are to be divided. No cost is to be taxed for either party in the district court, and the Helen Mar is to recover the costs after the appeal. The decree of the district court, so far as it decrees that both parties were in fault, and the aggregate damages are to be divided, is affirmed, and so much of it as includes in the valuation of the Helen Mar her whaling outfits, as a basis for determining the extent of the liability of her owners under the statute, is reversed; and a decree is to be entered against the Helen Mar and owners for the sum of $8,000, with interest from the date of the collision. Decree accordingly.

SWIFT (CARTER v.). See Case No. 2,479.

Case No. 13,696.

SWIFT et al. v. GIFFORD.

[2 Lowell, 110.] [1]

District Court, D. Massachusetts. March, 1872.

FISHERIES—FIRST TO IRON WHALE—USAGE.

1. Where a boat's crew from whale-ship A. pursued and struck a whale in the Arctic Ocean, and the harpoon, with the line attached to it, remained in the whale, but did not remain fast to the boat, and a boat's crew from ship B. continued the pursuit and captured the whale, and the master of ship A. claimed it on the spot, *held*, that an admitted usage that the whale should belong to ship A. under such circumstances was a valid usage.

2. A like decision was made by Judge Sprague in a case not reported.

[See Case No. 1,698.]

[Cited in Ghen v. Rich, 8 Fed. 161.]

Libel by [W. C. N. Swift and others] the owners of the ship Hercules against the agent and managing owner of the Rainbow, both whale-ships of New Bedford, for the value of a whale killed in the Okhotsk Sea by the boats of the Hercules, and claimed by the master of the Rainbow, and taken and appropriated by him, because one of his harpoons, with a line attached to it, was found fastened in the animal when he was killed. The evidence tended to show that the boats of the respondents raised and made fast to the whale, but he escaped, dragging the iron and line, and so far outran his pursuers that the boats' crews of the Hercules did not know that any one had attacked or was pursuing the whale when they, being to windward, met and captured him; that the master of the Rainbow was, in fact, pursuing, and came up before the whale had rolled over, and said that one of his irons would be found in it, which proved to be true; and he thereupon took the prize. The parties filed a written stipulation that witnesses of competent experience would testify, that, during the whole time of memory of the oldest masters of whaling-ships, the usage had been uniform in the whale-fishery of Nantucket and New Bedford that a whale belonged to the vessel whose iron first remained in it, provided claim was made before cutting in. There were witnesses on the stand who confirmed the existence of the usage, and who extended it to all whalemen in these seas; and there was nothing offered to oppose this testimony. The only disputed question of fact or opinion was concerning the reasonable probabilty that the whale would have been captured by the Rainbow, if the boats of the Hercules had not come up. The value of the whale was said to be about $3,000.

J. C. Dodge and C. T. Bonney, for libellants.

1. The rule of law is, that wild animals become property only when fully and actu-

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

ally taken into possession. 2 Kent, Comm. 239; Pierson, v. Post, 3 Caines, 175; Buster v. Newkirk, 20 Johns. 75; 2 Bl. Comm. 389–394.

2. The admitted custom, being in contravention of this rule of law, is void. Dickinson v. Gay, 7 Allen, 29; Copeland v. Richardson, 6 Gray, 536; Brown v. Jackson [Case No. 2,016]; Thompson v. Riggs, 5 Wall. [72 U. S.] 663; Nudd v. Hobbs, 17 N. H. 524; Constable v. Nickerson, 14 C. B. (N. S.) 230; Dodd v. Farlow, 11 Allen, 429; Reed v. Richardson, 98 Mass. 216; Leach v. Perkins, 17 Me. 465; Hone v. Mutual Safety Ins. Co., 1 Sandf. 149.

3. The usage is not universal. See the reported cases in England. Addison v. Row, 3 Pat. App. 334; Hogarth v. Jackson, 2 Car. & P. 595; Aberdeen Arctic Co. v. Sutter, 4 Macq. 355; Fennings v. Lord Grenville, 1 Taunt. 241; Littledale v. Scaith, Id. 243, note.

4. The custom is unreasonable.

5. We ought to have salvage, at least.

G. Marston and W. W. Crapo, for respondent.

The admitted usage is valid. The several English and Scotch cases cited by the libellants recognize and uphold a usage not precisely like this, but equally derogatory or the general rule of law. The very same usage is referred to by Sprague, J., in Taber v. Jenny [Case No. 13,720], with apparent approbation, and in Bourne v. Ashley [Id. 1,698], decided by the same learned judge, but not reported, the usage was recognized and applied.

LOWELL, District Judge. The rule of the common law, borrowed probably from the Roman law, is, that the property in a wild animal is not acquired by wounding him, but that nothing short of actual and complete possession will avail. This is recognized in all the cases concerning whales cited at the bar, as well as in the authorities given under the first point. Whether the modern civil law has introduced the modification that a fresh pursuit with reasonable prospect of success shall give title to the pursuer, does not seem to be wholly free from doubt, though the ancient commentators rejected such a distinction, for the satisfactory reason that it would only introduce uncertainty and confusion into a rule that ought to be clear and unmistakable. See 16 Poth. Pandects, p. 550, lib. 41, tit. 1; Gaius, by Tompkins & Lemon, p. 270. I do not follow up this inquiry; because it would be impossible for me to say that the crew represented by the respondent, though continuing the chase, had more than a possibility of success.

The decision, therefore, must turn on the validity of the usage, without regard to the chances of success which the respondent's crew had when the others came up. It is not disputed that the whalemen of this state, who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it. The converse of the proposition is that a whale which is found adrift, though with an iron in it, belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalemen in the Northern fishery, as shown by the cases, is, that the iron holds the whale only while the line remains fast to the boat; and the result is, that every loose whale, dead or alive, belongs to the finder or taker, if there be but one such.

The validity of the usage is denied by the libellants, as overturning a plain and well-settled rule of property. The cases cited in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law. Thus Story, J., in The Reeside [Case No. 11,657], says, "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law." Many similar remarks of eminent judges might be cited. But in the application of these general views it will be found difficult to ascertain what is considered a principle of law that cannot be interfered with. Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing; and some of them may be varied by usage, which, if general and long established, is equivalent to a contract. Thus in Wigglesworth v. Dallison, 1 Doug. 201, which Mr. Smith has selected as a leading case, the law gave the crops of an outgoing tenant to his landlord; but the custom which made them the property of the tenant was held to be valid.

The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by

the interposition of an arbitrary exception. Then the application of the rule of law itself is very difficult, and the necessity for greater precision is apparent. Suppose two or three boats from different ships make fast to a whale, how is it to be decided which was the first to kill it? Every judge who has dealt with this subject has felt the importance of upholding all reasonable usages of the fishermen, in order to prevent dangerous quarrels in the division of their spoils. In Fennings v. Lord Grenville, 1 Taunt. 241, evidence was offered of a custom in the Southern fishery for the contending ships to divide the whale equally between them. This custom, which differed entirely from that prevailing in the North Atlantic, was yet thought to be not unreasonable. Chambre, J., said, "I remember the first case on the usage which was had before Lord Mansfield, who was clear that every person was bound by it, and who said, that were it not for such a custom there would be a sort of warfare perpetually subsisting between the adventurers." The case went off upon a question of pleading, and the custom was not passed upon, but it is clear that it was thought to be valid. In the other cases cited, the usage first above mentioned was found to be valid. In the case of Bartlett v. Budd [Case No. 1,075], the respondents claimed title to a whale by reason of having found it, though it had been not only killed, but carefully anchored, by the libellants. I there intimated a doubt of the reasonableness of a usage in favor of the larceny of a whale under such circumstances. And I still think that some parts of the asserted usage could hardly be maintained. If it were proved that one vessel had become fully possessed of a whale, and had afterwards lost or left it, with a reasonable hope of recovery, it would seem unreasonable that the finder should acquire the title merely because he is able to cut in the animal before it is reclaimed. And, on the other hand, it would be difficult to admit that the mere presence of an iron should be full evidence of property, no matter when or under what circumstances it may have been affixed. But the usage being divisible in its nature, it seems to me, that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale, and prescribes that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, it is reasonable, though merely conventional, and ought to be upheld. In Bourne v. Ashley [supra], determined in June, 1863, but not printed, Judge Sprague, whose experience in this class of cases was very great, found the custom to be established, and decided the cause in favor of the libellants, because they owned the first iron, though the whale was killed by the crew of the other vessel, or by those of both together. Mr. Stetson, of counsel in that case, has kindly furnished me with a note of the opinion taken down by him at the time, and I have carefully compared it with the pleadings and depositions on file, and am satisfied that the precise point was in judgment. The learned judge is reported to have said that the usage for the first iron, whether attached to the boat or not, to hold the whale, was fully established, and that one witness carried it back to the year 1800. He added, that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in that trade.

In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it. If the pursuit of the Rainbow had been clearly understood in the beginning, no doubt the other vessel would not have taken the trouble to join in it, and the usage would have had its appropriate and beneficial effect. In the actual circumstances, it is a hard case for the libellants; but as they have not sustained their title, I must dismiss their cause, and, in consideration of the point being an old one in this court, with costs.

Libel dismissed, with costs.

Case No. 13,697.

SWIFT et al. v. The HAPPY RETURN.

[1 Pet. Adm. 253.][1]

District Court, D. Pennsylvania. 1799.

SEAMEN—DUTY IN UNLADING—DURING VOYAGE—END OF VOYAGE—SUPPLEMENTARY LABOR—WHEN WAGES DUE—PHILADELPHIA CUSTOM.

1. Whether mariners are bound, when the voyage is ended, to unlade the ship.

[Cited in Knagg v. Goldsmith, Case No. 7,872; Packard v. The Louisa, Id. 10,652.]

2. Guindage, or hoisting, supplementary labour, and extra allowance therefor.

3. Wages of navigation, and those for loading and unloading, distinct.

[Cited in The Martha, Case No. 9,144.]

4. Seaman bound to unlade and relade, at any port on the voyage.

[Cited in Florez v. The Scotia, 35 Fed. 916; Cuban Steamship Co. v. Fitzpatrick, 66 Fed. 66.]

5. End of the voyage, and discharge of the cargo separate subjects.

6. Custom in Philadelphia to hire others than the crew to unlade.

[7. Cited in Slacum v. Smith, Case No. 12,936, to the point that the absenting of a seaman from the vessel after the voyage was ended, and before the cargo was discharged, is not a forfeiture of wages.]

[8. Cited in The Nimrod, Case No. 10,267; Harden v. Gorden, Id. 6,047; Freeman v. Baker, Id. 5,084; Holmes v. Hutchinson, Id. 6,639; The Forest, Id. 4,936,—to the point that, by the

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

general maritime law, if a seaman falls sick during the voyage, he is to be cured at the expense of the vessel.]

[9. Cited in The Childe Harold, Case No. 2,676, to the point that feeding a crew on unwholesome or spoiled provisions would justify their leaving the ship, and such neglect of the owner would subject him, at least, to pay full wages for the voyage.]

[10. Disapproved in The William Jarvis, Case No. 17,697, upon the point that wages are not payable until the expiration of the period allowed for collecting the freight.]

[This was a libel for wages by Swift, Hastings, and others, against the Happy Return.]

PETERS, District Judge. As to mariners shipped "for the voyage," unless specially obliged by the articles, as they are in many ports of the United States, and elsewhere, it is questionable whether or not they are bound to unlade the ship, after the voyage is ended. I incline to think they are not so bound: the voyage is ended when the vessel has arrived at her last port of delivery, and is there safely moored. Should it be deemed an additional duty to their common maritime employment to unlade the cargo, they are only answerable in damages for neglect or refusal. The contract for the voyage cannot be so amplified and prolonged, as to subject mariners to forfeitures, after the voyage is completed, though the lading or ballast be not discharged. Laws so highly penal, must be construed strictly. In 1 Strange, 405, it will be seen that the general doctrine is, that "no wages are payable while the ship is lading or unlading." I presume, at the port of outfit and return, as well as under the circumstances developed in this case.

By the Laws of Wisbuy (article 5) "the mariners shall have three deniers a last, for loading, and three for unloading; which is to be reckoned only as their wages for guindage or hoisting." These duties "are never fixed on account of the dearness of provisions, and the value of money, which changes and encreases daily. The rate of guindage or reguindage" (hoisting up and down, or loading and unloading) "is commonly in France, five sols a last, which is two sols six deniers turnois, a tun." These authorities, among others, shew that there is a distinction in the maritime laws, between the wages of navigation, and those allowed for loading and unloading; the latter being considered independent and distinct services from the former. On the voyage, at a foreign port of delivery, the seamen are certainly bound, under the penalty of forfeiture of wages, &c. to unlade and reload the ship.

Our act of congress for regulating seamen [1 Stat. 131] only fixes, and with too little precision, the time when the wages are due and payable. It does not specifically declare who shall unlade the ship, after the voyage is ended: the words are, "and as soon as the voyage is ended, and the cargo or ballast be fully discharged, at the last port of delivery, every seaman or mariner, shall be entitled to the wages which shall be then due, according to his contract." By this it seems obvious to me, that in the contemplation of this law, following the principles of the maritime laws of other nations, the end of the voyage, "and the discharge of the cargo," are separate and distinct subjects; though time, after the discharge, is given to the merchant and master, to enquire into embezzlements and other malfeazances, and to collect the freight. The wages of the mariner are "due, according to his contract," when the voyage is ended, though not payable, until the expiration of the period allowed for collecting the freight. It is debitum in presenti; solvendum in futuro.

Advantage of neglect or refusal to unload has been seldom attempted to be taken in this port, with the single and bona fide intent of compelling the seamen to perform this service. Forfeitures of wages for a whole voyage have been called for on this account, most frequently when old quarrels at sea, or recent animosities, or differences about accounts, have embittered the parties. The law is too often, in violation of its principles, spirit and system, considered and applied to, as a means to gratify the passions. In disputes relative to seamen's wages, the most irksome and unpleasant part of my duty, this propensity is too often evinced, by one or the other party. In this port, it is the general custom to hire others than the mariners to lade and unlade vessels. The merchants find it more for their interest so to do, than to depend on the mariners, who are particularly ungovernable after a voyage is ended; and are, when arrived at home, impatient under confinement to the drudgery of unlading the cargo. The owners, too, wish to avoid the trouble, danger and expense of keeping fire, and cooking and furnishing provisions[2] on

[2] Expenses for boarding on shore, in a foreign port particularly, have been often brought forward. I have always determined according to circumstances, finding no direct rule to guide me. Cooking and provisions actually furnished on board, have always been decisive with me, to deny allowance for boarding on shore. But where these have not been afforded; or if insufficient, irregular, or unsound, I have deemed myself justified in allowing charges for boarding. In one case, very atrocious, I would have gone the length of payment equal to that directed for short allowance, but an accommodation took place. Expenses for boarding on shore have sometimes been voluntarily agreed to be paid; at others, so trifling a sum has been allowed by the master to the mariners, that I have been obliged to increase it, to a reasonable rate. Where no provisions were provided on board, or the means of supporting themselves on shore furnished, I have deemed it justifiable in the mariners to leave the ship; after tendering themselves ready to do duty, on being furnished with money or provisions for their support.

Controversies often arise on hospital bills, paid for sick sailors sent on shore in foreign ports. I have seldom satisfied myself in the decisions

board the ship. This point is therefore rendered less important, under the custom prevailing here.

Case No. 13,698.

SWIFT v. HATHAWAY et al.

[1 Gall. 417.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

PAYMENT—DEPOSIT WITH CONSENT OF CREDITOR.

If a debtor deposit money for his creditor with a third person, and the creditor assents thereto, or give the depositary a new credit upon the footing of such deposit, the original debtor is discharged.

[Cited in Wright v. Crockery Ware Co., 1 N. H. 282.

The action [by Jireh Swift, administrator of William Ross, against Stephen Hathaway and John W. Russell] was brought to recover the sum of $3431.87, alleged to be due on balance of account from the defendants to the intestate. On the trial, it appeared that the defendants were commission merchants at New York, and the action was brought to recover the balance due on a sale, made by them, of two thirds of the ship Neptune belonging to the intestate. The sale was made on the 1st of February, A. D. 1810, on a credit of four and six months, and notes were given by the purchasers accordingly. On the 16th of May, 1810, the defendants dissolved their partnership, and due notice was given thereof in the gazettes. John W. Russell, on the dissolution of the firm, was constituted the agent for settlement of all the partnership concerns, and immediately formed a new partnership with his brother Gilbert Russell, under the firm of John W. and Gilbert Russell. The notes were put into the hands of the new firm and collected by them, and duly credited in the account of the administrator; and due notice was given to him of all these facts. In September, 1810, he drew a bill on the new firm for part of the money so collected, which was duly paid. The residue remained in the hands of the new firm until they failed in the spring of 1811. There was considerable evidence in the cause, to show an express assent and acquiescence on the part of the administrator to the money remaining in the hands of the new firm.

W. Prescott, for plaintiff.

W. Sullivan and Harrison G. Otis, for defendant Hathaway.

STORY, Circuit Justice, in summing up, stated to the jury, that if they were satisfied, that the notes were originally lodged in the hands of J. & G. Russell with the assent of the administrator; or if afterwards he assented to the collection of the money by them, or voluntarily left the money in their hands and ratified their proceedings, the firm of Russell & Hathaway were discharged from all responsibility. If a creditor know that his debtor has lodged money in the hands of a third person for his account, and he assents to the proceeding, or gives a new credit to such person on the footing of such deposit, the original debtor is completely discharged.

The jury found a verdict, without difficulty, for the defendant Hathaway. Russell, the co-defendant, did not appear, and was defaulted. The court ordered a general judgment to be entered, that the plaintiff should take nothing by his writ.

SWIFT v. HUMPHREYS. See Case No. 5,480.

SWIFT (SLOCUM v.). See Case No. 12,954.

Case No. 13,699.

SWIFT et al. v. WADY.

[Nowhere reported; opinion not now accessible.]

I have been obliged to give in such cases. The charge for medical or chirurgical advice, is commonly mixed in the gross, with the general items, per day or week, for boarding and attendance. The sailor must only pay for the former. I think, if the merchant cannot specify the amount of this charge, he should pay it himself; as it is impracticable to fix it at discretion, in any just proportion; and I have sometimes erred in attempting it. By the Laws of Oleron, a ship-boy, or nurse, must attend a sick seaman on shore; which would be more expensive than the controverted charges. When one of a crew is seized with an infectious disease, he should be removed from the rest, and sent on shore, at the ship's expense, for the safety of the whole, and the advantage of the owner, who must count on extra disbursements, if he will trade to ports or places, liable to such casualties. The charge should not be thrown on the sailor, and niceties insisted on, to shew that it was incurred at his request. It ought to be borne, from motives both of humanity and justice. So should it be, when proper care cannot be taken of sick seamen on board, and particularly when most, if not all, of the crew are infected. It is often endeavoured to be shewn that a sick seaman made his election to go on shore, and therefore he should pay the expense: but this is not correct. The Law of Oleron expressly directs, that a sick seaman (one really ill) shall be put on shore, and a ship-boy or nurse employed to attend him, at the expense of the ship. The interests of commerce require liberality on this subject; yet I have, frequently, and most painfully, witnessed a contrary disposition. Laws cannot be made to reach every point. Although in ordinary cases, having a medicine chest on board, may be a compliance with the act of congress, exceptions should be made, where dangerous diseases require, and compel, extraordinary remedies and expense.

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

Case No. 13,700.

SWIFT et al. v. WHISEN et al.

[3 Fish. Pat. Cas. 343; 2 Bond, 115; Merw. Pat. Inv. 426.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1867.

PATENTS—ASSIGNEE—REISSUE—FRAUD IN PROCUREMENT—OMITTED CLAIMS—DRAWINGS—EXTENSION—FOREIGN INVENTION—EXPERIMENTS.

1. A reissue may be granted to an assignee of an assignee of letters patent.

2. A reissue may be granted to an assignee, upon his application, without the consent, approbation, or knowledge of the original patentee.

3. It is the uniform doctrine of all the courts of the United States that they will presume that the law has been complied with; and they refuse to go into any inquiry, back of the grant by the commissioner, except in cases of fraud.

4. If facts appear which are sufficient to satisfy the jury that there has been fraud in the procurement of the reissue, either actual fraud, or circumstances which may be supposed to amount to constructive fraud, the reissued patent will be void.

5. There may be a constructive fraud, where it is made manifest that the reissued patent is fraudulently extended beyond the claims of the original patent for a deceptive purpose.

6. If a certain feature of the original invention was the invention of the patentee which he omitted to claim in his specification and claim, upon the surrender of the patent, by himself or an assignee, he has a right to incorporate that element in the claims for a reissued patent.

7. If the drawings show an element of the invention which the patentee has not included specially in his claim, it is evidence, nevertheless, that it was a part of his invention, and he or his assignee has a right to incorporate that element in a reissued patent.

8. The fact that the original patent has been reissued three times, and that the original patent had been thus three times submitted to the investigation of the patent office, would be a presumption in favor of the fairness of the transaction.

9. Upon an application for an extension of a patent, the law requires a very rigid scrutiny into the original claim of the patentee as to the novelty and utility of the invention.

[Cited in Cook v. Ernest, Case No. 3,155.]

10. An extension strengthens the presumption of the novelty and utility of the patent.

[Cited in Cook v. Ernest, Case No. 3,155.]

11. Courts are reluctant to declare a patent void on the ground of vagueness or ambiguity, unless it be very clear and unmistakable.

12. A claim for a bolt to be placed in a position, "vertical or nearly so," is free from ambiguity. It calls for a bolt in a vertical position, with permission to the builder to give it a slight inclination if necessary, in his discretion.

13. In all descriptions of patented machines, something must be left to the judgment and discretion of the mechanic who constructs the machine.

14. An ambiguity in the description may be removed by reference to the drawings, which may be examined to determine the dimensions of the parts, when dimensions become material.

15. All the parts of a combination must co-act in producing the result claimed from their combination.

16. If a machine be invented and used in a foreign country, but not patented or described in any publication or work, such use will not affect the right of a bona fide American inventor to a patent.

17. There is no kind of testimony that is more reliable in regard to the true character of a machine than an accurate model; it is a witness that can not lie.

18. If a machine, although designed to separate smut from wheat, embodies the principle of a machine afterward patented to separate flour from bran, and, without the exercise of invention, could be changed so as to perform the same functions as the latter, in substantially the same way, the patent would be void.

19. If a prior machine were merely got up for the purpose of experiment, and was not practically tested, it would not constitute a practical invention.

This was an action on the case [by Alexander Swift and Joseph Kinsey against Amos Whisen, and Jesse Green, and others] tried before the court and a jury, brought to recover damages for the infringement of letters patent [No. 6,148] for "improvement in machinery for separating flour from bran," granted to Issachar Frost and James Monroe, February 27, 1849, reissued to them March 13, 1855 [No. 302], assigned to H. A. Burr, J. D. Condit, A. Swift, D. Barnum, and J. M. Carr, and reissued to the assignees May 11, 1858, assigned to Alexander Swift and reissued to him February 25, 1862, extended to the original patentees, upon their application, for seven years from February 27, 1863, and on the same day assigned to the plaintiff.

The disclaimer and claim of the original patent were as follows: "Having thus fully described the construction, arrangement, and operation of the several parts of our machine, we will now add that we do not mean to claim to be the original inventors of a cylinder, nor of a combined punched and reticulated cylinder, nor of a cylinder covered with strips of punched sheet iron and strips of leather filled with tacks, such as are used in smut machines, nor the arrangement of gearing by which the machine is propelled; but we do claim to be the original and first inventors of the combination and arrangement of the external upright stationary close cylindrical case B, with the internal combined punched and reticulated upright stationary scourer and bolt B^1, B^2, and revolving cylindrical scourer and blower C, constructed, arranged, and operated in the manner and for the purpose herein fully set forth, by which the fine flour that usually adheres to the bran, after being subjected to the first bolting operation, is now completely separated from the bran and collected in the annular space between the cylindrical bolt and cylindrical case, from whence it descends through the segmental openings in the horizontal base, upon which the said bolt and case rest, into conducting spouts as

[1] [Reported by Samuel S. Fisher, Esq., reprinted in 2 Bond, 115, and here republished by permission. Merw. Pat. Inv. 426, contains only a partial report.]

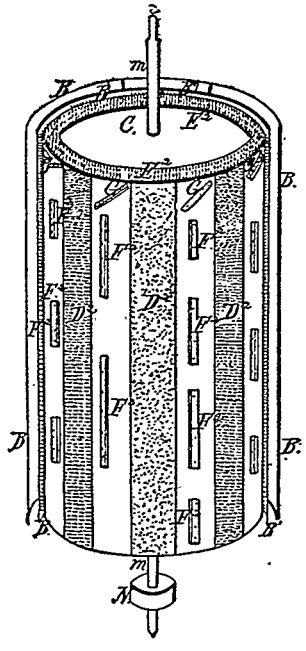
aforesaid, whilst the bran is blown from the interior of the bolt through a spout leading through the external case as aforesaid, in the meshes of the bolting cloth, being kept open by the pressure of air produced inside the combined cylindrical scourer and bolt, by the manner in which the oblique and radial and parallel wings are arranged on the revolving, scouring, and blowing cylinder, as above set forth."

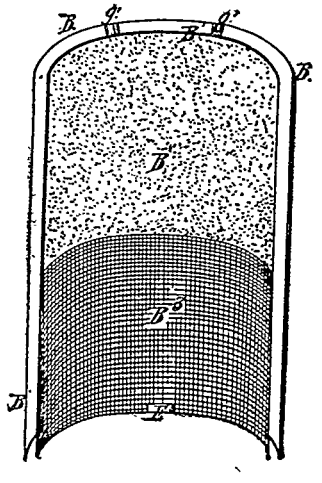
The claims of the reissue of 1855 were as follows: "I claim, first, the platform D (always at right angles with the sides of the bolt when not made conical), or close horizontal bottom, when used in connection with upright stationary or revolving bolt for flouring purposes. Second. The openings at D^5, for the admission of a counter current of air through the bottom and into the bolt, and the opening and bran spout F, as described in combination with the platform D. Third. The upright stationary bolt and scourer combined with its closed-up top, except for air and material; or, in combination with claims first, second, and fourth, or either of them, or their equivalents, to produce like results in the flouring process. Fourth. The use of the revolving, distributing, scouring, and blowing cylinder of beaters and fans, by which the material is distributed, scoured, and the flour blown through the meshes of the bolting cloth."

The claims of the reissue of 1858 were as follows: "We claim, first, the vertical, or nearly vertical position of the bolt. Second. A surrounding case forming a chamber or chambers round the bolt, substantially as and for the purpose specified, and provided with suitable means for the delivery of the flour, as specified. Third. A rotating distributing head at or near the upper end of the bolt, substantially as described. Fourth. Rotating beaters or fans within the bolt, substantially as and for the purposes specified. We also claim, in combination with the first, second, and fourth features of the combination first claimed, the closed-up top of the bolt, except an aperture or apertures for the admission of the material and air, substantially as and for the purpose specified. We also claim, in combination with the first, second, and fourth features of the combination first claimed, the closed-up bottom of the bolt proper, except an aperture or apertures for the discharge of the bran, substantially as and for the purpose specified, whether the said bottom be or be not specially provided with an aperture or apertures for the admission of air as specified. We also claim, in combination with the third combination claimed, or the equivalent of the features thereof, the employment of rotating arms, or wings, moving in close proximity with the inner surface of the closed-up bottom, substantially as and for the purpose specified. And finally, we claim the combination of all the features herein specified as essential features, substantially as described, or any equivalents for any or all the said features."

The reissue of 1862, which was granted to Alexander Swift, upon his application, described seven essential features of the invention, which were substantially as follows: (1) The vertical or nearly vertical position of the bolt; (2) the surrounding case, forming a chamber outside of the bolt; (3) the rotating cylinder armed with beaters, pins, or fans; (4) the distributing head on the top of the rotating cylinder; (5) the closed-up top to the bolt proper; (6) the closed-up bottom to the bolt proper; and (7) rotating wings or bran scrapers to clear the bottom

[Drawings of patent No. 6,148, granted February 27, 1849, to Frost & Monroe; published from the records of the United States patent office.]





[Drawings of reissued patent No. 302, granted March 13, 1855, to Frost & Monroe; published from the records of the United States patent office.]

Fig. 1.

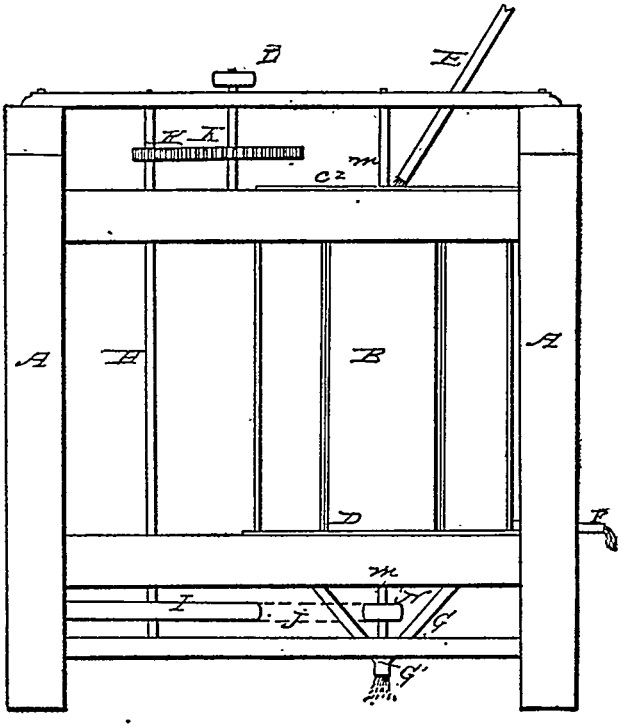
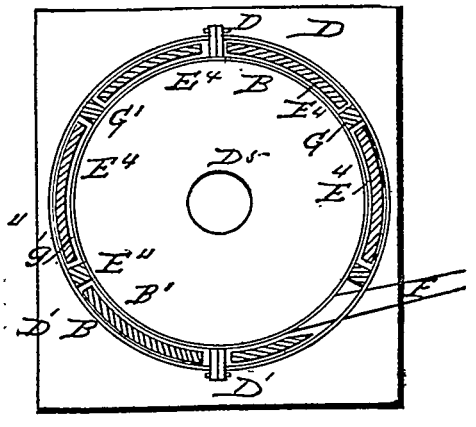


Fig. 2.



of the bolt and discharge the bran. The claims were as follows: "First. The combination of the essential features severally described and severally numbered 1, 2, 3, and 4, or their equivalents, substantially as described; and for the purposes specified in the several numbers. Second. The combination of the essential features severally described and severally numbered 1, 2, and 5, or their equivalents, substantially as they are described; the purpose of the combination being substantially as set forth in number 5. Third. The combination of the essential features severally described and severally numbered 1, 2, and 6, or their equivalents, substantially as they are described; the purpose of the combination being substantially as set forth in number 6. Fourth. The combination of the essential features severally described and severally numbered 1, 2, 6, and 7, or their equivalents, substantially as they are described; the purpose of the combination being substantially as set forth. Fifth. The combination of the essential features severally described and severally numbered 1, 2, 4, 5, 6, and 7, or their equivalents, substantially as described; the purpose of the combination being substantially as severally set forth."

A. F. Perry and S. S. Fisher, for plaintiffs.

G. R. Sage, E. B. Forbush, and E. W. Stoughton, for defendants.

LEAVITT, District Judge (charging jury). This suit is brought, gentlemen, by the plaintiffs, Swift & Kinsey, against the defendants, charging an infringement of a patent of which they claim to be the owners or proprietors, which was originally issued to Frost & Monroe, February 27, 1849, purporting to be for a new and useful improved machine for separating flour from bran, and designated as a bran duster. The plaintiffs assert their ownership to this patent by assignment. There have been three reissues upon this original patent: The first was on

March 13, 1855, upon the application of the original patentees, Frost & Monroe. They surrendered the patent and obtained the reissue with an amended specification. The patent seems, then, to have been assigned by the original patentees to Burr and others, and on May 11, 1858, was again surrendered and a reissued patent was granted to those assignees. They assigned the patent, it would appear, to one Alexander Swift, and it was reissued to him on February 25, 1862, and this last reissued patent was, on February 27, 1863, extended to the original patentees, on their application, for the term of seven years, and by them assigned to Swift & Kinsey, the present plaintiffs. The extended term has not yet expired, and of course the patent is still in force. It will expire in three years—a little more than three years—when the improvement will be free to the public, without let or hindrance.

There are several grounds of defense to this action, to which I propose, very briefly, to call your attention. And the first involves a legal question or proposition, viz: that the reissue is void for several reasons, to which I shall advert hereafter. In the second place, that the invention, the original invention of Frost & Monroe, was not a new one, and therefore not patentable, and not having the character of novelty, the patent itself is void. Then, in the third place, the infringement of this patent is denied by the defendants. These are the issues, gentlemen. The two last are issues of fact; that is, the novelty of this invention and the question of infringement, upon which you are to pass upon the evidence adduced. The questions as to the validity of the reissue are for the court, and upon these questions—for there are several of them—I propose to state my conclusions, very briefly, however, not intending to go into an elaborate discussion of these propositions, some of which are very important and very interesting. For the purposes of the present trial it is unnecessary. All that the jury and the parties want upon these questions of law, is a mere statement of the conclusions of the court, and then, if the views stated by the court are erroneous, the counsel know very well how they can avail themselves of the remedy, and take the proper course to correct the errors. But, of course, it would not be expected of me, that upon these questions of law which have been submitted and extensively argued, I should present to the jury an elaborate exposition, with a reference to all the authorities; there is no necessity that I should detain the jury by such an exposition. I proceed, therefore, to refer to the points raised.

The first is, that this reissued patent, upon which these plaintiffs sue, is void because the right of reissue was not assignable to Alexander Swift; that, in short, an assignee of an assignee has no right, under the law, to surrender a patent and obtain a reissue. It is admitted, by the learned counsel for the defendants, that the immediate assignee of the patentee could make a valid surrender and a valid patent could be issued to him. He claims, however, that a second or third assignee can not make a valid surrender, because the statute does not give the right to such an assignee to make a surrender of the patent. No authority was cited by the counsel in support of this proposition; nothing to show that there was any such limitation upon the right of surrender and reissue of a patent as the counsel claim. There was a reference merely to an opinion delivered many years ago, by the late Chief Justice Taney, when he was attorney general of the United States, during the administration of General Jackson. But this decision, or opinion, is not judicial authority; it is not the action or decision of any court, and therefore not obligatory upon this court. If the point had been before the supreme court of the United States, and had been decided there, it would have been imperative upon this court to follow it, to adopt it as the law of the case. But no such decision has been referred to, and I am not aware that any such exists. The thirteenth section of the patent act of 1836 [5 Stat. 122] is relied upon as sustaining the proposition urged by the learned counsel for the defendants. I will not trouble you to read this section, for it has been repeatedly read in your hearing, and it may be presumed that you are familiar with its main provisions. That section authorizes the surrender of a patent where the description of the invention is defective or insufficient, and the error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, and the same section contains a provision giving this right of surrender and reissue to executors and administrators when the patentee is deceased, and to assignees. There is nothing, therefore, in the terms of the statute, which limits the right of reissue to the patentee or first assignee. So far as the statute is concerned, there may be, at least by strong implication, a right of reissue by subsequent assignees. And it is very well known that this is the construction which has been uniformly given to this statute by the patent office. There are, as was observed by counsel, a large number of patents now in force, having full validity, and patents, too, of the greatest public interest and importance, that have been second and third reissues, and it is every day's practice thus to grant these reissues. And here I am called upon to remark that the doctrine and principles involved, and to which I am now calling your attention, have been adjudicated upon in this court by my learned brother, Judge Swayne, who, when present, is the presiding judge of this court, and to whose opinion upon all legal questions I always yield a most implicit respect. This point was be-

fore him, was fully argued, and it was held that a reissue to a second assignee was valid.

The next point urged as an objection to the validity of this reissued patent is, that the original patentees, if living, must join in the surrender of the patent and the application for a reissue, and that a reissue to an assignee, without the concurrence and approbation of the original patentee, is void. This objection, too, is covered by the decision to which I have referred, made in this court by my learned brother, Judge Swayne. And in reference to this point, too, I may observe that the practice of the patent office at Washington has been uniform. So far as I know and am informed, it has been the practice of that department, ever since the enactment of the law of 1836, to grant reissued patents to assignees without requiring the concurrence and assent of the original patentee. And thus, as I remarked a little while ago, there may be thousands of patents in the United States that have been issued under these circumstances; they have been reissued upon the application of an assignee or assignees of a previous assignee. And it would be obvious to the jury that the result of a contrary doctrine, under existing circumstances, would be exceedingly injurious to the public interest, as the effect would be to invalidate all the patents that have been reissued under the circumstances to which I have adverted. And, as there is no limitation, there is no provision in the act which denies to assignees this right of surrender and reissue; no provision requiring that the patentee should assent to the reissue, and there is no necessity devolved upon the court to declare that the grant of such a reissue by the commissioner of patents is unauthorized. And without going further into this question, I may say that until the supreme court of the United States shall have had this point before them, and shall have decided adversely to the usage and practice of the patent office and the views to which I have referred, I shall feel compelled to regard the statute as authorizing a reissue to an assignee of an assignee, and that without the consent, or approbation, or knowledge of the original patentee. If he is dead, of course his consent and approbation can not be procured; the statute is express in declaring that the reissue may be to the executor, or administrator, or to the assignees—the holders and owners. It is very true that there are some considerations that would operate in the mind of a judge, if it were a new question, in the other direction, and to the effect that, unless the application for the reissue was made with the knowledge or consent of the original patentee, a second or third reissue should not be valid. There does seem to me some inconsistency in requiring the assignee, in sustaining his application for a reissue, to go before the commissioner and to make oath in regard to the invention covered by the reissue, and to show that it is the same invention covered by the original patent. But, as I said before, there is no prohibition in the statute to this effect, and, as there are no judicial decisions to the contrary, and as it has been the uniform usage of the patent office to grant reissues under these circumstances, the court would not now feel authorized to say that the patent in question, the patent upon which you are to pass, is invalid upon the ground referred to.

The third legal question raised and relied upon by the counsel for the defendants is, that this patent is void as being for a different invention from that covered by the original patent to Frost & Monroe. There is no question, gentlemen, that section 13 of the statute to which I have referred does require that the reissue shall be for the same invention covered by the original patent. But the statute makes it the special duty of the commissioner of patents to examine closely every application for a reissue, and he is vested with no authority to grant a reissue except under circumstances where the statute has been complied with. It is to be supposed, in support of the exercise of the authority of the commissioner of patents under the law, that all the requisites of the statute have been complied with, and hence it is the uniform doctrine of all the courts of the United States, that they will presume that the law has been complied with, and they refuse, except under special circumstances referred to in the act, to go into any inquiry back of the grant, by the commissioner of patents, of these reissues; in other words, to a certain extent they consider the action of the commissioner upon the right of parties to a reissue to be conclusive, presuming that all the requirements of the law have been enforced, have been complied with, in the case. The decisions upon the general doctrine to which I have referred, namely, to the effect that the action of the commissioner is conclusive upon the question of the identity of the inventions embraced or described in the reissue and in the original patent, would seem to be harmonious. There is no case, that I am aware of, in conflict with this general proposition, and these decisions rest upon the fact that in deciding whether the reissue is for the same invention, the commissioner of patents, who acts, of course, under the obligation of an oath, acts in that particular in a judicial capacity. His decisions, therefore, on points of that kind, have the force and effect of judicial decisions, and courts are reluctant to go back of those decisions and to inquire whether the reissue has been properly granted or not, except in cases where it is made apparent that the reissue was obtained by fraud, or for the purposes of deception and imposition. But if any facts appear in the progress of a trial, which are sufficient to satisfy a jury that there has been fraud in

the procurement of a reissue, either actual fraud, or circumstances which may be supposed to amount to constructive fraud the reissued patent will be held invalid. There is a plain distinction between actual fraud and constructive fraud. The statute refers, specially, to cases of collusion—fraudulent, corrupt collusion between the applicant for the patent and the commissioner of patents. If it is apparent that there has been any improper collusion between them, and that the patent has been granted corruptly, then of course, that is an act of positive fraud that will invalidate any patent to which it applies. And there may be also constructive fraud, where it is made manifest that the reissued patent is fraudulently extended beyond the claims of the original patent for a deceptive purpose, for the purpose of imposition upon the public, and where there is no just foundation for such a claim in the original patent; where, in fact, the reissue goes altogether beyond the scope of the original invention and incorporated an element that was not contemplated or intended by the original patentee in his original patent. Cases of this kind have occurred in the progress of the execution of the patent laws of the country where reissues have been fraudulent; that is, where they have been tainted with this constructive fraud; where it appeared that, for a deceptive purpose, a party applying for a reissue had sought to embrace an element in the reissued patent that was not claimed and did not pertain to the original invention, for the purpose of taking advantage of other parties in the community who were using that element which he had fraudulently made a part of his original invention. It will, therefore, be competent, in my judgment, for the jury to inquire in the present case, whether there is anything that will amount to constructive fraud on the part of the last assignee in the obtainment of the reissued patent upon which this action is founded. Some decisions of the courts, perhaps, go to the extent of saying that even this is a proper inquiry for the court, and not to be submitted to the jury. My strong inclination, however, is to the opinion that this question may be fairly left to the jury for their decision. There is no claim, in the present case, that there was any actual fraud in the obtaining of this reissue, and the only ground upon which it is asked that the jury should presume fraud, as claimed by the counsel for the defendants, is the fact asserted by them and insisted upon, that the claims of the reissued patent are broader than those of the original patent. On this subject, I may remark, in deciding what a party may claim under a reissued patent, there has been a tendency to great liberality in the action of the courts, and it has been held that whatever was the invention of the original patentee, whether expressly claimed in the original patent or not, when incorporated in the reissued patent, will be held to be within the claim of the original patent, and that it is the right of the assignee or holder of the patent to claim everything that was claimed, or everything which belonged rightfully, by fair construction, to the original patentee. I may not be understood. If there is evidence that the original patentee claimed, as a part of his invention, a certain feature, or that a certain feature was a part of his invention, which he omitted to claim in his specification and claim, upon the surrender of that patent by himself, or by an assignee, he has a right to incorporate in the reissued patent that element, though not claimed specially in the first patent. And in determining this question, that is, the substantial identity of the invention covered by the original patent with that covered and described in the reissued patent, it is competent for the jury to look into the drawings of the original patent to determine whether the inventions are the same. The drawings, as well as the specifications, are to be looked to in giving a construction to the claims of a patent, in determining what was the invention of the original patentee. If, for instance, the drawings show an element of the invention which the patentee has not included specially in his claim, it is evidence, nevertheless, that it was a part of his invention, and he or his assignee has a right to incorporate that element in the reissued patent. It will be proper, therefore, upon this point, for the jury to look to all the evidence upon the question whether the invention included in the reissued patent is identical with that patented to Frost & Monroe, and in doing this, as I remarked just now, it will be proper for them to look to the drawings and to the evidence of Mr. Knight and Mr. Clough, who, if I remember rightly, stated that the drawings of the original patent to Frost & Monroe were precisely the same as those accompanying the specifications of the reissued patent. It will be proper to remark here that, in my judgment, very clear and decisive evidence would be required in order to invalidate this patent upon allegation of fraud in the reissue. In the first place, the grant of the original patent affords a presumption that it was for something new and useful; that the claim of the patentees had been fully and critically examined by the officers of the patent office, and that upon clear conviction of the rightfulness of the patent it was granted to them. Then the fact that there have been three reissues of this patent, and that the original claim has thus been three times submitted to the investigation of the patent office, would be a presumption in favor of the fairness of the transaction; and lastly, the fact that this patent has been extended for seven years beyond the duration of the period for which it was originally granted. The law upon the subject has been adverted to by counsel. I will not read it, but upon an application for

the extension of a patent, the law requires a very rigid scrutiny into the original claim of the patentee as to the novelty of the invention, its utility, and whether the patent was fairly granted. The commissioner is required by law to give public notice to all concerned that a hearing will be had before him on the question whether the patent shall be extended or not. He is required to investigate the originality and novelty of the invention to ascertain whether the patent, originally, was properly granted, and then he has further to inquire whether the patentee has been sufficiently remunerated by the benefits or the emoluments which he has reaped from it during the period that it has run, and, if satisfied on all these points, then the patent is extended, as this patent has been.

There is another point raised by the counsel for the defendants, and it is that this reissued patent is void for vagueness and uncertainty in the specification. There is an express provision in the statute that every patentee shall define or describe his invention in such full, clear, and exact terms that any mechanic, skilled in that department, would be able to construct the machine, or to make the improvement covered by the patent. It is not controverted in this case, I believe, that a skillful mechanic could take the specifications and the drawings in the original patent and construct the machine, the bran duster, as claimed by Frost & Monroe. And one of the witnesses, Mr. Knight, a gentleman very well skilled in mechanics, has said that the machine could be constructed from the specification and drawings accompanying the reissued patent. But the counsel for the defendants insist that there is a fatal defect that vitiates the patent; first, in claiming the bolt of the machine, or bran duster, as vertical, or nearly so. The argument is that there is such an uncertainty, so much of vagueness and ambiguity, that a machine could not be constructed under it without experiment. Now, in construing the claim of patents, the specifications, and drawings, it has been the usage of the courts of the United States, who are vested with the sole jurisdiction in the administration of the patent law, to exercise great liberality. Courts have avowed it to be a rightful object to carry out, if possible, the purposes of the inventor in the patent which has been granted to him; and unless, therefore, the objection on the ground of vagueness or ambiguity is very clear and unmistakable. courts are reluctant to declare a patent void on this ground. I do not, for myself, see that there is such vagueness in the description referred to, requiring the bolt to be vertical, or nearly so, as would invalidate this patent. I think the clear understanding of every one who reads the patent would be, that while the vertical or perpendicular position was claimed, distinctly and clearly, it was left to the discretion of the builder to incline it in a very slight degree from the vertical position, if he judged that would be the preferable mode of setting the machine. But where the upright position is claimed, distinctly and clearly, as a way by which the machine may be successfully operated, it does seem to me that the expression "vertical or nearly so," is free from all ambiguity or vagueness that would invalidate the patent on the ground claimed. It may be remarked here, as it has been very often remarked by judges of much more learning and experience in the patent right law than myself, that in all descriptions of patented machines, something must be left to the judgment and discretion of the mechanic who constructs the machine. It will, perhaps, rarely happen, even where the utmost vigilance and care are observed, that the machine or structure will be so accurately described as that the description can be literally and strictly followed in every particular. The skillful mechanic will see that in some particulars there is some vagueness, and some discretion is required, but that fact will not invalidate the patent.

It is urged, moreover, as a ground of defense to this action—as a reason why this patent should be declared void—that it fails to describe the place or the size of the apertures in what is called the "closed-up top." One or more apertures, as the jury will recollect, are called for in the specification, and they are required to be upon the inner periphery, if I remember rightly, of the upright cylinder, but the size of those apertures is not described in the specification. It is stated by the counsel for the plaintiff who last addressed the jury, that these apertures, though not especially described in the specification, are nevertheless shown in the drawings. I have not examined the drawings with a view to that point, but if that be the fact, it undoubtedly removes any objection on the ground of vagueness or uncertainty in the description, which might be occasioned by not stating the exact size of these apertures. The jury, on their retirement, can examine these drawings with a view to this question. If they find these apertures are there, with an intimation, from the drawing itself, as to their position and their size, it would undoubtedly be an answer to the objection which has been urged by the counsel for the defendant.

I did not intend, gentlemen, to detain you so long with my remarks, but there are still some other points to be presented. This patent, as the jury will have clearly understood, is for five different combinations of various elements, constituting five different inventions. Now, there is no question but what the law does authorize a patent for inventions of this kind. The jury will observe that there is no claim that any one of the elements of these several combinations is new. The entire claim of the original patentee, and so of the reissues, is that these elements, when combined

in a certain way, are new, and that in that combination they do produce a new and useful result. If this proposition is sustainable in the minds of the jury, there is no question as to the patentability of the combinations. The object of this invention you all clearly understand, and it is hardly necessary, therefore, to detain you by stating the object, as it is set forth in the specification connected with this reissued patent. They say: "Our invention consists in forming new combinations for producing the results desired and for remedying the defects enumerated in prior machines," etc. Then follows a minute or full description of the different combinations which are claimed in the reissued patent. Now, to one uninitiated, it is very possible that there would be something unintelligible or not clear in these claims to combination. If I were called upon, as I am unacquainted with practical mechanical science, I should certainly have some difficulty in ascertaining and defining precisely the elements of these five separate combinations. The machine, as a whole, as it is admitted, is undoubtedly a practical and efficient machine. It works well, and the experts who have been examined upon that point have testified to the jury that they find, in the claim of the patent, all the parts and elements of these five several combinations. There are, probably, mechanics upon the jury who will understand this subject better than I do, and who will be able to examine for themselves, and I doubt not the jury will give due credit and weight to the opinions of the learned experts who have testified upon this subject to the effect, as I just stated, that the several combinations are all included in the specifications which accompany the reissued patent. If the jury find, therefore, that these combinations are there, that they are parts of this working and efficient and practical machine, there would be no reason for a conclusion unfavorable to the claims of this patent.

There are two instructions that have just been submitted to the court by one of the counsel for the defendants. I do not know that there is any objection to stating them to the jury. The court is asked to say to the jury that, as a matter of law, all the parts or devices of the combination claimed must co-act to produce a given result in order to form a legitimate combination, and if the jury find that the surrounding case does not co-act with the vertical position of the bolt and closed-up bottom to the bolt proper for the purpose of discharging the bran, as stated in the third claim of the reissued patent upon which this suit is brought, then such claim is void for want of unity and co-operation of its several parts; and the court is requested to charge the same in respect to the combinations of the fourth and fifth claims of the patent. I suppose the entire meaning of this is, that each separate combination claimed by the patentee in the reissued patent must be what it is described to be; that all the parts must be found there, and that all those parts must co-act in producing the result claimed for the combination. That instruction may be given to the jury.

If the jury are satisfied that this is a valid patent—that the various objections to which I have referred do not exist—the next question which will be submitted for their consideration will be the novelty of the invention, as claimed by the original patentees, Frost & Monroe; and here, the inquiry for the jury will be, does the patent describe and claim a combination not before known. Now, it is a very familiar principle with which, no doubt, every juror is perfectly acquainted, that novelty is an essential element of a patented invention; that the law only authorizes a patent for an invention that is new and useful in its result. The presumption of novelty is a presumption arising upon the emanation of the patent itself, and from the fact, to which I have adverted, that the patent has been extended after the rigid and scrutinizing examination of the patent office. But it is still the right of a party sued for an infringement to prove the want of novelty, and if that position is sustained by the evidence, the patent is undoubtedly invalidated. It is a good objection to every patent, that there was no novelty in the invention. This is a question exclusively for the jury. There are two machines here which have been relied upon by the defendants as showing a want of novelty in the invention of Frost & Monroe; to show, in other words, that they were anticipated in the invention which they claim in their patent. The first is the Ashby machine, a machine patented in England to William Ashby in 1846, and prior in date to the patent of Frost & Monroe. If the jury are satisfied, from all the evidence, that that machine, as invented by and patented to Ashby in England in 1846, is substantially identical with that covered by the claims and invention of Frost & Monroe, it would be a full answer to the present action. The law of identity in regard to mechanical structures, I presume the jury are acquainted with. It does not look merely to the form of a structure, or its dimensions, or appearance, but the question is, as has been fully settled by the courts, whether the two involve the same mechanical principle in their operation. Now, this invention of Ashby, if it had not been patented in England, or described in a foreign publication, even if the jury should be of opinion that it was identically the same machine covered by the Frost & Monroe patent, would be no bar to their patent. If, for instance, Ashby had merely invented a machine, but had never patented it, and it had not been described in any publication or work in that country, a man here, who had, by his invention, discovered the same machine, would

not be barred from a patent in this country, and his right to a patent would not be affected. But where an invention has been patented in a foreign country, or has been described in a public work, then a man claiming to have been the inventor in this country is presumed, in the eye of the law, to have been acquainted with that invention as it was known in the foreign country.

It is for you to inquire whether this Ashby machine, as it is proved before you by the models, is identical with the machine of Frost & Monroe—whether it contains all the separate elements and combinations which are included in their machine. Upon that subject there is some discrepancy in the testimony. Mr. Knight and Mr. Clough are very clear and unequivocal in the expression of their opinion that they are dissimilar in all their essential characteristics; while, as I remember, Mr. Blanchard and Mr. Forbush, witnesses for the defendant, give it as their opinion that there is a substantial identity between the two machines. It is not my purpose to go into a critical analysis of these machines as they are described and claimed in the specifications, or as they are described and shown in the mills before the jury. I will observe, however, that the jury will be greatly assisted in all these inquiries by a reference to the models. Indeed, there is no kind of testimony that is more reliable in regard to the true structure and character of a machine than an accurate model. It is a witness that can not lie; the jury may rely on it, and it will be for the jury, if they find it necessary, to institute a comparison from the models of these two machines, and then decide whether they are identical. And then, as I said before, the question will be, not whether there may not be elements in the Ashby machine which belong to this machine of Frost & Monroe, but whether they find in the Ashby machine all the combinations claimed by the patent to Frost & Monroe, and embraced in the specifications of the reissued patent. It appears, by reference to the specification, that the parties who applied for this reissue were familiar with the Ashby machine, for they refer to it specially in their specification; point out what they regard as defects in that machine, and it is their professed object to remedy the defects which they hold to apply to the Ashby machine.

Then, there is another machine introduced, the Bradfield smut machine, which, it is claimed, embraces the same principles as the Frost & Monroe machine. And being older in point of invention, for it was invented, it appears, in 1839, and patented in 1840, if the jury find that machine to be identical with the one covered by the plaintiffs' patent, of course that would be fatal to the novelty of the Frost & Monroe invention. And here, I may observe, that that machine was intended and invented for an entirely different purpose from that of Frost & Monroe. But if the jury should come to the conclusion that that machine, although a smut machine, and designed originally to separate smut from wheat, embodies the same principles with the plaintiffs' machine, and that, without the exercise of invention, it could be changed so as to produce all the useful results of the Frost & Monroe machine, it would have precedence undoubtedly, in point of novelty, over the machine invented by Frost & Monroe, provided the Bradfield machine was actually perfected and brought into use. If it was merely got up for the purpose of experiment and not practically tested, it would not be regarded as a perfected invention. As has been well said by counsel, that which a person perfects, or invents and applies to a practical use, that is to be regarded as the invention, and the mere knowledge by an individual of a prior mechanical structure similar to the one patented, which has not been used practically, would not be an answer to the novelty of the later patent. I do not know that I ought to detain you with further remarks in regard to the invention of Bradfield; it has been so much discussed by counsel.

Mr. Sage: The Straub smut machine was also introduced for the defense, your honor.

THE COURT: Yes, sir; there was a patent put in evidence. I think, therefore, gentlemen, that after the thorough discussion which has been had, by the able counsel on both sides who have dissected and analyzed those inventions, and with the knowledge, too, that some of the jury, at least, have a practical acquaintance with mechanics, I think I may safely leave the question of the novelty of the Ashby, and the Bradfield, and the Straub inventions with you, and leave it to you to decide whether, upon the principles that I have indicated, any of them anticipate the invention of Frost & Monroe.

There is another matter to which it will be necessary for me to direct your attention, and that is the question of infringement. Upon that there has been very little controversy. It is conceded that the machine used by the defendants in this action, and which is claimed to be an infringement of the invention covered by the reissued patent, is the Ashby machine, with the addition of certain features or elements claimed to be taken from the Frost & Monroe machine and applied to that machine. It is not, I believe, controverted, that if the jury should find the patent to be a valid patent, and that it is not impeached for want of novelty, there is an infringement of it by the use of this machine. It will, however, be for the jury to say whether the machine that is before them, and used by the defendants, is substantially identical with that covered by the Frost & Monroe invention. It is incumbent on the plaintiffs, upon this issue of infringement, to make it appear affirmatively, and to the satisfaction of the jury, that their machine has been infringed.

If the jury find the issues for the plaintiffs to which I have adverted there will then be the inquiry as to damages; but that, as I am informed, is a very immaterial inquiry. The damages in this case will only amount, as claimed by the plaintiffs, to some sixty dollars, it appearing from the testimony that the defendants have manufactured only five hundred barrels of flour by this machine. It is claimed, however, and is doubtless the fact, that collaterally this case may be of great interest and importance, not only to the plaintiffs in this action, but to other parties elsewhere. The struggle, on the part of the plaintiffs, and that on the part of the defendants undoubtedly is, not with a view to the damages to be recovered in this present action, but to have a finding by the jury as to the validity of this patent.

The jury found a verdict for the defendants. [For another case involving this patent, see note to Carr v. Rice, Case No. 2,440.]

SWIFT (WHITE, v.). See Case No. 17,557.

Case No. 13,701.

SWIGGETT v. SEYMOUR.

[4 Biss. 220.] [1]

Circuit Court, D. Indiana. May, 1868.

NOTE—INDORSEMENT—DILIGENCE—MORTGAGE SECURITY.

1. At common law, promissory notes could not be assigned so as to vest the legal title in the assignee. The statute of 3 & 4 Anne, which is not in force in Indiana except as to "notes payable to order or bearer in a bank in this state," altered the common law rule.

2. In this state, the negotiation of promissory notes is governed by Indiana statutes. Under these statutes, notes payable to order or bearer in a bank in this state, are governed by the law merchant. Other notes are not. And as to the latter, as a general rule, the indorsee must employ due diligence by legal proceedings to collect the note from the maker before he can maintain an action against the indorser. But, to this general rule, there are several exceptions.

3. A note was indorsed in the state of Indiana to a citizen of the state of Ohio, and was secured by a mortgage, executed by the maker to the indorser, on lands in the state of Wisconsin. The maker was wholly destitute of property, subject to execution. *Held*, that the indorsee might maintain an action without first suing the maker or foreclosing the mortgage.

[This was an action on a promissory note by Seth W. Swiggett against Elisha Seymour. Heard on demurrer.]

Wm. Henderson, for plaintiff.

Gordon & March, for defendant.

McDONALD, District Judge. The declaration in this case contains four counts. The first, second, and third of these is on the indorsement of a note of one thousand dollars; the fourth is a common count. All the special counts charge that the note was executed in New York and indorsed in Indiana. The defendant is sued as indorser. The note was made by Uriah Gregory and Marion Gregory. The first and second counts allege that the makers, when the note fell due were notoriously insolvent; and, in addition to this, the third count charges that the indorsee, when the note fell due, made diligent inquiry for the makers, and could not find them.

A special plea is filed, alleging that the note was secured by a mortgage of lands in the plea described, including several lots in Green Bay, Wisconsin, and divers tracts of land described by congressional surveys but not stating in what part of North America they lie. The plea avers that these lands are worth three thousand dollars; that the mortgage was executed by the makers of the note to the defendant; and that the plaintiff had notice of all this when the note was assigned to him, but has never attempted to obtain satisfaction of the note by enforcing the mortgage lien. A general demurrer has been filed to this plea.

The plea is in many respects defective. But the point insisted on by the plaintiff, and which is the main one in the case, is this: Under the Indiana statute providing that the indorsee of a note shall have his recourse on the indorser only after "having used due diligence in the premises," must the indorsee of a note secured by a mortgage on lands in another state exhaust that security before he sues the indorser?

By the common law, promissory notes are not assignable. The statute of 3 & 4 Anne made them negotiable like inland bills. And, though the substance of this statute has been re-enacted in most of the states of the Union, it has never been adopted in Indiana. In 1818, the Indiana legislature passed an act making notes assignable by indorsement, and giving the indorsee (after "having used due diligence to obtain the money") a right of action against the indorser. Rev. Code 1818, 232, 233. This enactment has been substantially the law in Indiana ever since, so far as relates to notes not negotiable in banks in this state. As to the latter a subsequent act puts them on the footing of inland bills.

Under the act of 1818, continued in force now fifty years, many adjudications have been made by the supreme court of Indiana; so that, from these adjudications, a system of law concerning notes has grown up, which the state courts recognize, and which is binding on this court.

These adjudications have firmly established in this state the following primary general rule with its exceptions: The "due diligence," required by the statute as a prerequisite to recourse against the indorser of a note, is a prompt effort to collect it by a proceeding at law followed up to a

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

return of nulla bona on a fieri facias against the maker of the note. Hanna v. Pegg, 1 Blackf. 181; Merriman v. Maple, 2 Blackf. 350; Bishop v. Yeazle, 6 Blackf. 127.

To this general rule there are several exceptions. These arise from two warranties implied in every general indorsement of a note, namely that the note is valid, and that the maker is solvent. These exceptions are as follows:

1. No diligence to collect the note by a legal proceeding is required, if, at the time when suit ought otherwise to have been instituted, the maker was wholly destitute of property subject to execution. Formerly, the supreme court of Indiana employed, in this connection, the phrase "notoriously insolvent." But, as a man may be notoriously insolvent, and yet have property out of which some part of the note might be collected the phrase was obviously inappropriate; and that court now substitutes for it the phrase, "the absence of all property, within reach of the law, applicable to the payment of any debt." Hardesty v. Kinworthy, 8 Blackf. 304.

2. Another exception to the rule requiring diligence by a suit at law, is that if, upon diligent search and inquiry the maker of the note cannot be found and his residence cannot be ascertained, the assignee may sue the assignor, without having previously sued the maker. This exception proceeds on the maxim that lex non cogit ad impossibilia. And it is a very reasonable exception. For it would be unjust and even absurd to hold that an indorsee should lose his recourse for omitting to do what cannot be done.

3. If the note is not valid, as, for example, if it is a forgery, or was given without consideration, or on an illegal consideration, or if the consideration has failed, or if it is voidable for fraud, infancy, or coverture, or if it had been paid before assignment—in fine, if there is any valid defense against a recovery on it, the indorsee may sue the indorser without first suing the maker. Howell v. Wilson, 2 Blackf. 418; Fosdick v. Starbuck, 4 Blackf. 417; Bernitz v. Stratford, 22 Ind. 320.

4. If the indorser consents to the omission to proceed promptly in a suit at law against the maker, the prompt legal proceedings required by the general rule will be thereby waived; and the omission will not defeat the indorsee's recourse on the indorser. Nance v. Dunlavy, 7 Blackf. 172; Brown v. Robbins, 1 Ind. 82.

5. If, after the indorsement and before the time when a suit can be brought on the note, the maker removes out of the state, no diligence by a suit is required to fix the indorser's liability. But it is perhaps otherwise, if at the time of the indorsement the maker was known to be a resident of another state. Bernitz v. Stratford, 22 Ind. 320; Brinker v. Perry, 5 Litt. [Ky.] 195; Taylor v. Snyder, 3 Denio, 145, 151; Spies v. Gilmore, 1 Comst. [1 N. Y.] 321, 326.

I believe there is no decision in a case exactly like the present; but there are several that bear a strong analogy to it. The case of Cheek v. Morton, 2 Ind. 321, very much resembles the one at bar. There it was held that the indorsee of a note, given for the purchase money of land sold to the maker, and which was a lien on the land, was not bound to resort to the lien before suing the indorser. Such a lien is an equitable mortgage. And if, on such a mortgage of lands in the state, the indorsee is not bound to enforce the lien, it should seem strange that he must go out of the state to enforce a lien created by a legal mortgage. I think the general rule only requires that an ordinary proceeding at law shall be attempted by the indorsee. And I am not aware that there is any decision requiring either a resort to equitable proceedings, or to equitable assets in order to fix the liability of an indorser. In the case of Bernitz v. Stratford, supra, it was held that where the maker of the note had left the state before it became due, but had left behind him property subject to execution, the indorsee was not bound to proceed in attachment against that property before suing the indorser. And the reason given is that attachment "cannot be regarded as one of the ordinary proceedings at law. It cannot be resorted to without giving a bond to pay damages, &c., and is thus attended with liabilities which might involve the party in loss which he could not hold the indorser responsible over to him for, in case the attachment should turn out to be wrongful." 22 Ind. 323. It appears to me that the reasons why an indorsee should not be bound to resort to a distant state to foreclose a mortgage on lands are fully as strong as those above stated against a proceeding in attachment. The foreclosure of a mortgage is a proceeding in equity, and not "one of the ordinary proceedings at law." To foreclose a mortgage in Wisconsin would not require such a bond as the Indiana Code requires in attachment; but it would require a bond for costs from the plaintiff who is a citizen of Ohio; and it would probably require him to perform journeys to Wisconsin which might be attended with more trouble and expense than the giving of an attachment bond. Besides, in the case of Bernitz v. Stratford, supra, the property which might have been attached lay in the state of the indorsee's residence; but here the mortgaged property lies in a state remote from him.

As already stated, I deduce, from the decisions on the statute in question, the conclusion that in every case where the maker of a note, at the time when it falls due, is wholly destitute of property of his own subject to execution, the indorsee, in order to have his recourse on the indorser, is not

bound to make any effort whatever to collect the note from the maker. I suppose, therefore, if the note was secured by a mortgage of property situate in the county where all the parties to the note reside, it would be very questionable whether the indorsee would be bound to proceed against the mortgaged property before suing the indorser. If the rule were otherwise, it would seem to follow that the indorsee must pursue and exhaust every security and every remedy, known to the law or available in equity, before the indorser's liability would be fixed. Suppose, for example, that a note has passed through several hands by indorsements; and the last indorsee sues the last indorser alleging that the maker has no property subject to execution; would it be a good defense to such an action, that the prior indorsers, whom by the statute the last indorsee may sue, are sureties to him for the payment of the note; that they are perfectly solvent; and that they ought first to be sued? To carry the doctrine of diligence so far would be unreasonable. Indeed, it may well be doubted whether the supreme court of Indiana has not carried it too far. It would have been no strained construction of the statute to have held that "due diligence" is merely such diligence as is required of the holder of commercial paper, namely a prompt demand of payment, and due notice of the failure to pay. But the decisions are otherwise; and I must follow the decisions. I am not willing, however, to go any farther on this point than the supreme court of Indiana has gone. And, as that court has never gone so far as to require the indorsee to pursue collateral securities and equitable remedies out of the state where the indorsement was made and where he resides, before suing the indorser, I am not willing to take the lead in support of such a doctrine. On the contrary I am satisfied that the indorsee ought not to be held to a degree of diligence so extreme and extraordinary.

The demurrer to the special plea is sustained.

NOTE. In Illinois any bond, bill, or other instrument in writing, is assignable, by indorsement thereon, "under the hand of such person." 3 Gross, St. p. 292, § 4.

A note cannot be assigned on a separate piece of paper, so as to vest the legal title in the assignee. Fortier v. Darst, 31 Ill. 212; Ryan v. May, 14 Ill. 49.

Formerly notes payable to a person or bearer could not be transferred or assigned by delivery only so as to authorize the holder to sue in his own name. It could only be done by writing the payee's name on the back. Hilborn v. Artus, 3 Scam. 344; Roosa v. Crist, 17 Ill. 450. This is altered by the statute of 1874, so that simple delivery is sufficient. 3 Gross, St. p. 293, § 8.

To fix the indorser or assignor in Illinois, the assignee must use due diligence by the prosecution of a suit against the maker, except (1) when institution of such suit would be unavailing; (2) when the maker has absconded—resided without or left the state, when the instrument became due. 3 Gross, St. p. 293, § 7. "Due diligence" is held to require institution of suit at the first term of court after the note becomes due. Lusk v. Cook, Breese, 84; Chalmers v. Moore, 22 Ill. 359. If suit is not instituted when the note falls due, the holder must show that a suit against the maker would have been unavailing at any time while he holds the note. Bledsoe v. Graves, 4 Scam. 382. Diligence requires that execution be issued on the judgment, and not ordered returned within its life, unless holding in the officer's hands would have availed nothing. Chalmers v. Moore, supra. Execution should be issued promptly. Rives v. Kumler, 27 Ill. 291. In fine, due diligence is such as a prudent man would use in the conduct of his own affairs. Nixon v. Weyrich, 20 Ill. 600.

The following cases besides the above bear upon the question: Saunders v. O'Briant, 2 Scam. 369; Schuttler v. Piatt, 12 Ill. 417; Pierce v. Short, 14 Ill. 144; Bestor v. Walker, 4 Gilman, 3; Mason v. Burton, 54 Ill. 349; Roberts v. Haskell, 20 Ill. 59; Curtis v. Gorman, 19 Ill. 141; Allison v. Smith, 20 Ill. 104; Robinson v. Olcott, 27 Ill. 184.

A remote assignor is liable to a remote assignee if due diligence, when required, has been used against the maker. Clifford v. Keating, 3 Scam. 250. Consult, also, Mott v. Wright [Case No. 9,883].

SWIMLEY (RICHARDS v.). See Case No. 11, 773.

SWITZERLAND MAR. INS. CO. (SAWYER v.). See Case No. 12,408.

Case No. 13,702.

SWOPE et al. v. ARNOLD.

[5 N. B. R. 148.] [1]

District Court, W. D. Missouri. 1871.

BANKRUPTCY—JUDGMENT LIEN—PROCEEDS OF SALE.

Where there is no dispute as to the validity of judgments under which executions were issued and levy made, the execution creditors are entitled to satisfaction out of the proceeds of the goods levied on by the sheriff, and afterwards seized by the United States marshal under a warrant in bankruptcy.

[Cited in Davis v. Anderson, Case No. 3,623; Re Hufnagel, Id. 6,837.]

[Cited in Pauley v. Cauthorn, 101 Ind. 93.]

Voluntary appearance by the parties.

The petition alleges that certain judgments were obtained by plaintiffs against Marks Lesem at the March term, eighteen hundred and sixty-eight, of the Miller county circuit court; that executions issued thereon and were levied on the merchandise of said Lesem; that after the said levy the said Lesem, on the petition of Claflin, Allen & Co., was declared a bankrupt, and that the United States marshal, under a warrant issued from the district court sitting in bankruptcy, took the merchandise levied on, and delivered the same to assignee Arnold, defendant in this cause, who disposed of the same as part of the estate of Lesem—concluding with a prayer for payment of said judgment. The answer denies that there was a good and valid levy or existing lien by virtue thereof at the time the marshal took possession of the goods as the property of Lesem; and

[1] [Reprinted by permission.]

affirms that if there had been such levy and lien, the same was abandoned and lost by the delivery of the property by the sheriff to Lesem; that the property belonged of right to the assignee, and that plaintiffs have no right to demand payment as asked for by them.

Statement of Facts: The bankrupt, Marks Lesem, was doing a mercantile business in the spring of the year eighteen hundred and sixty-eight, in Miller county, Missouri; was sued by plaintiffs in the circuit court of said county, and judgments, amounting to three thousand dollars, were obtained at the March term, eighteen hundred and sixty-eight; executions issued thereon, and were levied on the goods, wares and merchandise of said Lesem to the value of ten thousand dollars and upwards. The sheriff's return on execution shows that he executed the writ "by levying the same upon and seizing all the right, title, claim and interest of defendant in and to all his personal property, consisting of goods, wares, merchandise, and machinery; done in said county this first day of April, eighteen hundred and sixty-eight; and I further certify that prior to the day of selling said property, to wit: On the eighth day of April, eighteen hundred and sixty-eight, the said defendant as principal, and J. M. Goodrich and Thomas Thompson as securities, executed to me a delivery bond in the penal sum of six thousand eight hundred and thirty-eight dollars and forty-two cents, conditioned that said property would be delivered to me on or before the day of sale. And I further certify that before sale the United States marshal for the western district of Missouri notified me not to sell said property as the same was of right the property of the assignee of said defendant. I hereby return said execution not satisfied, together with said delivery bond, this sixth day of October, eighteen hundred and sixty-eight." On the sixteenth day of April, eighteen hundred and sixty-eight, a creditor's petition was filed by Claflin, Allen & Co., on which petition Lesem was, on the twenty-fifth day of the same month, declared a bankrupt. Under the warrant issued in bankruptcy the marshal took the goods levied upon by the sheriff and delivered under the bond to Lesem, as the property of Lesem, and the same have been sold by the assignee. The question is shall the court order the assignee to pay from the proceeds arising from the sale of said goods the amount of the executions and costs.

Lay & Belch and Ewing & Smith, for Swope, Levy & Co., and others.

E. L. Edwards, for L. L. Arnold, assignee.

KREKEL, District Judge. The answer must be in the affirmative unless it shall appear that there was no such levy on the property of Lesem by the sheriff as would create a lien. The statutes of Missouri direct that the word "levy" be construed to mean "the actual seizure of the property by the officer charged with the execution of the writ;" and further provide that "no execution prior to the levy thereof shall be a lien on any goods, chattels, or other personal property." The return of the sheriff is that on the first day of April, eighteen hundred and sixty-eight, he executed the writ "by levying the same upon and seizing all the right, title, claim and interest of defendant in and to all his personal property, consisting of goods, wares, merchandise and machinery." To this return it is objected that there is no such description of property as constitutes a valid levy and lien. Giving the language used in the return its legal import, the conclusion must be that the sheriff took actual possession of the goods, wares, merchandise and machinery. This would enable the sheriff or any one interested to identify the property levied on—the object had in view by the enactment. Questions of identity under levies, mainly arise between claimants to the same property in cases of implied liens or possession, and the cases cited at bar are nearly all of that class. There is no doubt that creditors, other than the plaintiffs in these executions, could by proper steps, have compelled the sheriff to make a full description in his return of the goods levied on, that they might be enabled to prosecute and take care of their own interests, but such steps were not taken, nor if taken, would they be of avail. The possession of the property sufficiently identified it for any purpose, and the levy must be held good against the objections made.

It is strongly urged upon the consideration of the court that the delivery of goods by the sheriff under the bond, destroys the levy and makes void any lien that may have existed, and that the possession of, and title to, the property by such delivery, restored to Lesem all the rights which he had prior to the levy. Whatever of difficulty might have occurred in the absence of statutory provisions, the latter seem to solve. The law which authorizes the taking of a bond by the sheriff from the person who desires to retain possession of property levied on, provides that, "if the property is not delivered in conformity to the bond, the levy shall remain a lien upon the property taken for the satisfaction of the judgment into whose possession soever the property may pass." It is not necessary to discuss the difficulties which might arise in the construction of the latter part of this provision in a case where the property, in the ordinary course of trade, had passed out of the possession of the defendant in the execution, and was held by an innocent purchaser, for no such question is presented. The property in controversy was found in the possession of Lesem, taken by the United States marshal under a warrant in bankruptcy, and delivered to the assignee. To hold that by taking the delivery

bond the levy and lien had been abandoned or lost, would require such a construction of the provision cited as to declare that from the time of taking the bond and up to nondelivery in conformity to its conditions, no lien existed —a construction which the court is not willing to give. Whatever construction the phraseology may admit of, the intention of the law evidently is to continue the lien. It is urged that if a lien existed by force of state law, the marshal, in taking possession of the goods, committed a trespass. No question as to the act of the United States marshal has arisen, for the sheriff seems to have yielded his better right by prior levy, adopting, perhaps, the view of the court, or the one urged by the general creditor, that the delivery bond secured him and the plaintiffs in the executions. This, under ordinary circumstances, would undoubtedly be the case, but here the law had wrested from the defendant in the executions the property which he and his securities had obligated themselves to deliver. If they were liable on their delivery bond they certainly would have had a valid claim against the creditors of the bankrupt to the extent of the value of the goods taken or the amount of their liability on the bond. The property in this case amounted in value to more than double the amount of the judgments. The creditors who realized the benefit of the whole property must not be injured by the disposition to be made of the case. There being no dispute as to judgments under which execution issued and levy was made, the court holds that the execution creditors are entitled to satisfaction out of the proceeds of the goods levied on by the sheriff and afterwards seized by the United States marshal under a warrant in bankruptcy, and orders accordingly.

Case No. 13,703.

SWOPE v. COURTNEY.

[1 Cranch, C. C. 33.] [1]

Circuit Court, District of Columbia. July Term, 1801.

ASSAULT AND BATTERY—RECOVERY—BAR.

In a joint assault and battery, a recovery in a suit against one is a bar to a suit against the other.

Assault and battery. The defendant [Mary Courtney] pleads that the assault was a joint assault committed by her and Hannah Dyson, and that the plaintiff [Eve Swope] recovered judgment at this term against Joseph Dyson, and the said Hannah, his wife, for the same assault. The evidence was, that Mary Courtney and Hannah Dyson were together, and that Dyson threw a bucket of water at the plaintiff, and dropped the bucket; and that the defendant immediately took up the bucket, and threw it at the plaintiff, for which this action was brought.

On the trial of the case of Dyson and wife, objection was made by the then defendant to the witness giving in evidence the declarations or confessions of the present defendant.

KILTY, Chief Judge, and MARSHALL, Circuit Justice, directed the jury that this was a joint assault and battery, and that the recovery against Dyson and wife was a bar to this action. Cocke v. Jennor, Hob. 66; Esp. N. P. 416; Broome v. Wooton, Yel. 67; Morton's Case, Cro. Eliz. 30; Parker v. Lawrence, Hob. 70.

CRANCH, Circuit Judge, contra, doubting whether it was a joint assault and battery.

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

Case No. 13,704.

SWOPE v. PURDY.

[1 Dill. 349; [1] 2 West. Jur. 167.]

Circuit Court, D. Kansas. 1870.

TAXATION—KAW HALF-BREED LANDS—INDIAN RESERVATION—TAX TITLES.

1. A sale of lands for taxes in Indian reservation not subject to state taxation is void.

[Cited in Wau-pe-man-qua v. Aldrich, 28 Fed. 497.]

[Cited in Phillips v. Jefferson Co. Com'rs, 5 Kan. 417.]

2. A state statute of limitations is not applicable to a sale of lands exempted, by federal authority, from state taxation.

[Cited in Tayler v. Miles, 5 Kan. 506.]

This action was brought by plaintiff to recover possession of a section on reserve No. 16, of these lands. Plaintiff offered in evidence the treaty made with the Indians in 1825 [7 Stat. 244], in which a reservation of the lands in controversy was made to one Joseph Butler, who conveyed the same to the plaintiff. Defendant offered in evidence a tax deed for the land in controversy, and deed from Joseph Butler, reservee to R. S. Stevens, dated August 15, 1860 (to show outstanding title).

J. T. Morton, for plaintiff.

W. Shannon, for defendant.

MILLER, Circuit Justice, held:

1. That the legal title to the land reserved to Butler did not vest in him by the treaty of 1825.

2. That although the first section of the act of 1860 [12 Stat. 21] concerning these reservations, if standing alone, was sufficient to vest a full fee simple title in Butler, with right of alienation, yet by the second and third sections of that act, the right of alienation was taken away and vested in the United States in trust for Butler. The deed of Butler prior to July 17, 1862, therefore conveyed no title. Stevens v. Smith, 2 Kan. 243; Brown v. Belmarde, 3 Kan. 41.

3. That under the decision of the supreme court of the United States, in the case of

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

Blue Jacket v. Johnson Co., at the December term, 1866, lands so situated were not liable to state taxation. The Kansas Indians, 5 Wall. [72 U. S.] 737.

4. Consequently the tax sale and tax deed were void, and conferred no title.

5. The fifty-seventh section of the tax law of Kansas, which forbids suits to be brought for lands sold for taxes unless brought within two years after the tax deed is recorded, is not applicable to this case, for two reasons: First, that the same act requires a tax deed to be witnessed and acknowledged before it is entitled to be recorded, and this tax deed is not witnessed; second, because the exemption of the land from state taxation, being an exemption prescribed by federal authority, no legislation of the state can extend the effect of its laws for taxation over lands exempted by federal authority.

6. The joint resolution of congress of July 17, 1862 [12 Stat. 628], removed the restriction of the right of alienation imposed by the second and third sections of the act of 1860, and therefore the deed made in 1864, by Butler to plaintiff, conveyed the legal title.

The plaintiff is therefore entitled to recover the possession of the land. Judgment accordingly.

Case No. 13,705.

SWOPE v. SAINE.

[1 Dill. 416.] [1]

Circuit Court, D. Kansas. 1871.

TAXATION—TAX DEEDS—LIMITATION OF ACTIONS.

Where the county clerk assigned without authority of law, a tax sale certificate, and the tax deed was made to the assignee, the same is void on its face, and under the decisions of the supreme court of Kansas, will not support the two years limitation statute applicable to suits to recover lands sold for taxes, no possession having been taken under the deed.

[Cited in brief in Hannibal & St. J. R. Co. v. Clark, 68 Mo. 372.]

Ejectment. The plaintiff showed title in himself by regular conveyances from the patentee. The defendant relied on a tax deed dated January 14, 1865; recorded January 16, 1865 (which was more than two years before suit was brought), reciting a sale for taxes made at an adjourned sale, January 8, 1862, for the taxes of 1860, and upon the two year limitation statute, which is as follows: "Any suit * * * for the recovery of lands sold for taxes, except, &c., shall be commenced within two years from the time of recording the tax deed, and not thereafter." Comp. Laws 1862, § 11. The tax deed recited that the property was sold at an adjourned sale on January 8, 1862, and was bid in by the county treasurer and certificate assigned in June, 1864, by the county clerk; and the tax deed was made to the assignee. The defendant offered the tax deed in evidence, and the plaintiff objected, for that it was void on its face, because (1) there was no authority to sell at any time except on the 1st day of January, 1862, or on the first Tuesday in May of that year, while here the sale was made on the 8th day of January; (2) the county clerk had no authority in June, 1864, to assign certificates of sales made in 1862.

Martin, Burns & Case, for plaintiff.

Mr. Merrill, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

PER CURIAM. The court is inclined against the first objection to the deed, and to hold that the effect of the act of 1861 (Laws 1861, p. 286) was to authorize sales to be made on the 1st day of January, 1862, and on ensuing days by adjournments duly made.

But without deciding this question, the court holds that under the act of March 1, 1864 (Laws 1864, p. 70, §§ 9, 12), the county clerk had no right in June, 1864, to assign the tax certificate of a sale made in 1862, that the assignment was null, and the tax deed made to the assignee was void on its face, and under the decision of the supreme court of Kansas (which this court is bound to follow), it "is insufficient to set the statute of limitations in operation, so as to bar an action for the recovery of the land, in two years." Shoat v. Walker [6 Kan. 65] June term, 1870.

There was no evidence of any actual possession taken, or held, under the tax deed. The tax deed was excluded, and the plaintiff had judgment. Judgment for the plaintiff.

SWORMSTEDT (SMITH v.). See Case No. 13,112.

Case No. 13,706.

The SYBIL.

[Blatchf. Pr. Cas. 615.] [1]

District Court, S. D. New York. Dec., 1864.

PRIZE—SEIZURE—PROBABLE CAUSE—COSTS.

Vessel and cargo acquitted, with costs, there having been no probable cause for their seizure.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured at sea, in the Gulf Stream, in longitude about 76° 52′ west, latitude 33° 18′ north, by the United States vessel of war Iosco, as prize of war, November 20, 1864, and sent to this port, in charge of a prize-master, for adjudication. A libel was here filed in this suit, December 1, and an attachment issued thereon returnable on the 20th of the same month, and such pro-

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

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

ceedings were taken in the cause that on the 7th of December instant, William Stewart, of Liverpool, appeared therein by his agent and attorney, Oliver K. King, and filed his claim and answer to the aforesaid libel, averring, in effect, the capture of the said vessel and her cargo to have been without lawful authority and wrongful, and attaching his test oath to that claim, demanding the discharge of the vessel from seizure in this action, with damages to the claimant because of her arrest. On the same day, Alfred T. Conklin, of the city of New York, appeared and filed his separate answer and claim in the cause, alleging that he is the consignee and owner of 20 bales of cotton, part of the cargo of said vessel seized as prize. His test oath is annexed to the claim and answer, declaring that he is solely interested in the aforesaid cotton, saving the interest which may appertain to Foulke & Wilkes, who are the shippers of it, and are residents of Matamoras, Mexico; and that the vessel was bound from Matamoras to New York. On the same day, Godfrey Knoop, of the city of New York, consignee and agent for the owners of 284 bales of cotton, part of the cargo of said schooner seized in this suit, filed a claim and answer therefor, attaching his test oath thereto, alleging that the said bales of cotton were (in designated parts) the property of Messrs. De Jersey & Co., resident of Manchester, in England, and of Messrs. Foulke & Wilkes, residents of Matamoras, in Mexico; and the answer and claim proceeds to deny that the said cotton was lawfully captured as prize, as alleged in the libel filed in this cause, or was subject to capture as prize; and charges that the claimants are entitled to damages for the seizure to which it has been subjected by such unlawful arrest. None of the answers or claims aver the port of departure or destination of the prize vessel or cargo, otherwise than as it is stated incidentally, in the claims filed, that the cargo of cotton was shipped from Matamoras, in a British ship, bound to New York.

The testimony in preparatorio, in the cause, was taken before the prize commissioners. December 2d and 3d, and the case, with all the proofs, was submitted to the court for decision on the 7th of December instant, without oral argument, or written briefs or points furnished by counsel on either side, and such submission was accepted by the court on the understanding that the cause stood defaulted on the minutes, and that the only point for consideration under the submission was whether the facts in evidence supplied probable cause supporting the default supposed to have been incurred by the claimants. The counsel for all parties were importunate that the case might be disposed of without delay, to save the accumulation of costs and damages, and, as the deposition of the master intimated that the vessel was seized off Wilmington, North Carolina, as he supposed, under suspicion that the cargo on board had come from blockaded states, and as I observed discord in the testimony of two others of the witnesses as to the location of the Sybil adjacent to the Carolina shores at the time of her arrest, I regarded the course taken by the claimants in forbearing to contest the case upon the proofs as an acquiescence in the justness of the judgment upon nil dicit. The district attorney and the proctors for the claimants now apprising the court that such view was a misapprehension, and that the submission of the cause, with all the papers, was to be regarded by the court as intended by the parties to have the effect of placing the case in the same situation as if it had been formally contested, I immediately reopened the order, and proceeded to examine the case in the light of one duly and seriously controverted upon all the issues of law and fact propounded by the pleadings and proofs.

The vessel was American built, her name being the Eagle, and, as appears by her certificate of British registry executed at Nassau, N. P., April 28, 1863, she was there transferred to William Stewart, of Liverpool, England, by the acting registrar at Nassau, and was then named the Sybil. A certificate was indorsed on the registry, at the British consulate in New York, April 7, 1864, that Robert H. Ramsey was that day appointed master, in the room of William E. Askins. The present master was appointed to the command of the Sybil by O. K. King & Co., merchants, of New York, for the voyage upon which she was captured. Portions of the cotton laden on board belonged to that firm. The vessel sailed under the British flag, and had no other on board of her. The crew captured with the vessel was mostly shipped at New York. Two were shipped for the return voyage on the Rio Grande. The outward voyage was with a miscellaneous cargo from New York to Matamoras, and the return cargo, which was captured, was laden at Matamoras, destined to New York. There is no evidence given in the case showing that the cargo seized as prize consisted of articles contraband of war, or had evaded, or attempted to evade, a legal blockade, or was the property of the public enemy. The same course of trade had been followed by the vessel in voyages immediately preceding the one upon which she was arrested in this action—departing from the port of New York, with a lawful cargo, destined to Matamoras, Mexico, and returning, bound to New York, from Matamoras, or Bagdad, the discharge port in Mexico. In practice, the cotton was sent on board the vessel in lighters, to her anchorage at Bagdad, her place of lading and discharge in Mexican waters, at the mouth of the Rio Grande river. The vessel had proceeded directly to that place from New York, and was on her return voyage to New York, with no other papers or vouchers than the regular clearances given

at her ports of departure at each commencement of her voyage, the manifests, bills of lading, etc. Her cargo, shipped at Matamoras, was exclusively cotton, and there is no proof that any portion of it is enemy property. The proof is that the prize had not stopped at any port, after leaving the mouth of the river Rio Grande, until she was captured on her return voyage. The cotton was carried on freight. There is no other proof of its actual ownership than the bills of lading accompanying its assignment. The house of Foulke & Wilkes shipped the cargo from Matamoras, and were apparently natives of Germany.

The prize vessel had on board, when arrested, various letters addressed to individuals. They were not asked for from her by the captors, and the master of the captured ship testifies that he did not offer them to the captors, thinking that, as they in no way related to the vessel or her cargo, but were merely the correspondence of individuals from other vessels lying near the Sybil in Mexico, and intrusted to her for conveyance to their families or friends, they did not belong to her.

The voyage of the Sybil, previous to her last one, was from New York to Matamoras, with an assorted cargo of flour, sugar, corn, soap, raisins, hardware, &c. Her crew consisted of eight men,—the master, two mates, and five seamen, all shipped at New York, and most of them residents there. The voyage was from New York to Matamoras, and back to New York. She did not touch at any port on her return voyage to New York, except Hampton Roads, where she was taken after her capture as prize. She was seized about ten o'clock in the morning, in the Gulf Stream, a hundred miles or more off the coast of South or North Carolina. She was entering no port when arrested. She was steering for New York, and did not alter her course, or take any notice of the Iosco, when pursued by her, till she came alongside. She was sailing under English colors, and had no others on board. Every witness examined in preparatorio from the ship's company testifies with great apparent fairness as to the good conduct of the vessel on her voyage, and no testimony is submitted to the notice of the court impeaching the integrity of the whole course of the voyage, except what has been before alluded to as affording plausible ground of distrust—her running suspiciously near to blockaded ports. But I discern no legal cause for pronouncing that there is proof furnished amounting to probable cause for the seizure of the schooner because of her having evaded or attempted to violate the blockade.

There must be a decree of acquittal of the schooner and cargo, with costs.

SYBIL, The (FISHER v.). See Case No. 4,824.

Case No. 13,707.

In re SYKES.

[10 Ben. 162; 24 Int. Rev. Rec. 414 (391); 26 Pittsb. Leg. J. 64; 18 Alb. Law J. 416; 7 Amer. Law Rec. 370.] [1]

District Court, S. D. New York. Nov. 11, 1878.

WITNESS—CONTEMPT OF COURT—COMPULSORY PRODUCTION OF BOOKS AND PAPERS OF CORPORATIONS—FOREIGN CORPORATION—POWERS OF OFFICERS—WHAT BOOKS AND PAPERS TO BE DEEMED "IN CUSTODY" OF OFFICER.

1. A foreign railroad corporation, organized under the laws of Illinois and other states, having its principal office in Chicago, had an office in New York, where certain books and papers were kept under the control of the vice president, who was also the secretary and treasurer of the corporation. By the established practice of the corporation, these books and papers when no longer required here for present use were sent to the Chicago office. The secretary being served with a subpœna duces tecum, in an action pending in this court, requiring him to produce some of these books and papers which had been so forwarded to the Chicago office four years before the service of the subpœna, failed to produce the same; and it appeared on his examination that the officer at Chicago, the assistant secretary, who had the immediate charge of the books and papers, was a co-ordinate officer, not under the control and direction of the witness, and that, by the by-laws of the company defining the powers of its officers and by the practice of the corporation, the witness could not command the delivery to him of the books and papers to be produced in obedience to the subpœna, although they probably would be sent to him at his request as required for use by him in the business of the corporation. The by-laws provided among other things, that the secretary should "safely keep all documents and papers which shall come into his possession" and "truly keep the books and accounts of the company appertaining to his office, so as at all times to show the real condition of the company's affairs," and should also keep the stock books and surrender certificates of stock. And the laws of Illinois (Rev. St. Ill. p. 283, § 13) required correct books of account of all the business of the corporation to be kept at its principal office, subject to the inspection of its stockholders. Upon motion to punish the witness as for contempt in not producing the books and papers, *held*, that the same were not in his custody within the meaning of section 868 of the New York Code of Civil Procedure, which provides that "the production upon a trial of a book or paper belonging to or under the control of a corporation may be compelled in the like manner as if it was in the hands or under the control of a natural person" and that "for that purpose a subpœna duces tecum, or an order as the case requires, must be directed to the president or other head of the corporation or the officers thereof in whose custody the book or paper is."

2. The statute relates to foreign as well as to domestic corporations.

3. The statute requires the witness only to produce books and papers in his custody, and does not require him to obtain the custody of books and papers not actually in his custody, but which he is able to get into his custody in order to produce them in court.

4. Whether consistently with the law of Illinois these books and papers could be removed from the Chicago office, quere.

5. Whether the statute requires a witness in a court of the United States in any case to travel

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 24 Int. Rev. Rec. 391, and 26 Pittsb. Leg. J. 64, contain only partial reports.]

more than one hundred miles from the place of trial for the purpose of bringing into court books and papers in his custody beyond that distance or to take the risk of having them sent to him, if beyond that distance, without going for them personally, quere.

[In the matter of Martin L. Sykes, held for contempt.]

S. L. Woodford, Dist. Atty., and R. M. Sherman, Asst. Dist. Atty., for plaintiffs.
J. S. Lawrence, for witness.

CHOATE, District Judge. In the case of United States v. Samuel J. Tilden [Case No. 16,520], which has been noticed for trial at the present term, one Martin L. Sykes has been subpœnaed at a witness for the plaintiffs under a subpœna duces tecum directing him to produce certain stock ledgers of the Chicago & Northwestern Railroad Company, also the stock ledger and book of the minutes of the meeting of the directors of the Peninsular Railroad Company, and certain vouchers and receipts for payments of money to the defendant or to one Smith for him by the Chicago & Northwestern Railroad Company, for services as trustee from 1861 to 1873. Upon the first day of the term the witness appeared, but did not bring with him the books and papers described in the subpœna, whereupon an order was granted against the witness, ordering him to show cause why he should not be punished for a contempt in disobeying the subpœna. Upon the return day of the order the witness appeared and presented an affidavit to the effect that he is vice president of the Chicago & Northwestern Railroad Company; that said company is a corporation organized and existing under the laws of Illinois, Wisconsin and Michigan, having its principal office at Chicago; that it also has a branch office at 52 Wall street, New York, kept for the convenience of transacting its Eastern business; that the books and vouchers specified in the subpœna are not now and have not been for four years in his custody; that he has no authority as an officer of the company to order the said books to be brought to New York for the purpose of this case, and that he has no right to exercise any personal control over the said books; that the president of the company resides at Chicago; that he has no knowledge of and has never seen the book of minutes of the Peninsular Railroad Company; that all vouchers of every kind for disbursements at the New York office have been returned monthly to the principal office at Chicago where they are examined and disposed of under the direction of the president; that he had upon the issue of the order to show cause against him telegraphed that fact to the general solicitor of the company at Chicago, to which he had received a reply by telegraph to the effect that he, after consulting with one Hewitt, an officer of the company in Chicago, had already refused to have any books sent to New York.

The witness was then on motion of the district attorney sworn upon his voir dire and the following facts appeared: The witness, besides being vice president of the Chicago & Northwestern Railroad Company, became its secretary and treasurer in 1873 and has since continued to hold those offices. Since he became secretary in 1873, he has had charge and control of the office of the company in New York, when the president is not here. There is an assistant secretary under him in the New York office and another assistant secretary in Chicago. The stock ledgers while in current use have been and are now kept at the New York office. The stock ledgers of this company, referred to in the subpœna, were, while entries were being made in them, kept at the New York office. All the entries in the stock ledgers are made under the direction and supervision of the witness as secretary and have been so since he has held that office. The assistant secretary at Chicago is a co-ordinate officer, not under the control and direction of the witness; the entries in the stock ledgers called for by the subpœna were all made in New York and relate to transactions that took place in New York. These stock ledgers were sent to Chicago in 1874, in pursuance of a practice, which has always obtained in this company, of sending to the central office of the company all books kept at New York, when they are filled up and cease to be in current use. The purpose of sending them there is not alone for convenience of storage, but that they may be at the central office of the company. The witness further testified that he had no reason to believe that the books would be sent to him if he sent for them; that he thought if he had occasion to use them at the office and telegraphed to that effect to the president they might be sent to him.

It further appeared that the meetings of the directors were sometimes held in New York and sometimes in Chicago; that the election of officers took place in Chicago. According to the by-laws the officers of the company include president, first and second vice president, treasurer, secretary, assistant treasurer and assistant secretary. Article 5 provides that "the whole affairs of the company shall be managed and directed" by the board of directors. Article 6 provides that the president among other duties "shall have a general care, supervision and direction of the affairs of the company and of the employees, and shall have such powers and perform such duties as may from time to time be conferred upon him or be prescribed by the board of directors." Article 7 provides among other things as follows: "It shall be the duty of the secretary to safely keep all documents and papers which shall come into his possession," "and truly keep the books and accounts of the company appertaining to his office so as at all times to show the real condition of the

company's affairs, and shall present statements thereof when required by the board; he shall keep books upon which transfers of stock may be made by any stockholder, or his attorney, duly constituted in writing, also a stock ledger and certificate book, prepare new certificates upon the transfer of shares and surrender of the old certificates, and keep a register of all certificates issued." There is no by-law defining the duties of assistant secretary. The laws of Illinois provide that "it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state (Illinois) correct books of account of all its business, and every stockholder in such corporation shall have the right, at all seasonable times, by himself or by his attorney, to examine the records and books of account of the corporation."

The question to be determined is whether upon this state of facts the stock ledgers and vouchers of this corporation described in the subpœna are "in the custody" of the witness within the meaning of section 868 of the Code of Civil Procedure, which is as follows: "The production upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in the like manner as if it was in the hands or under the control of a natural person. For that purpose a subpœna duces tecum, or an order made as prescribed in the last section as the case requires, must be directed to the president or other head of the corporation, or to the officers thereof, in whose custody the book or paper is."

This section of the Code, which is new, and designed to remedy a defect in the existing law, by which corporations were practically exempt from producing their books in court, is highly beneficial to the purposes of justice. There are often cases where the presence of the books themselves in court is the only way in which certain facts sought to be proved can be established, as, for instance, where it is necessary to refresh the recollection of witnesses by exhibiting to them the original entries. In such cases copies may prove insufficient. This section should therefore have a fair and liberal construction, with a view to the purposes designed to be accomplished by it. I do not think, therefore, that it should be construed as limited to domestic corporations, as is suggested by the learned counsel for the witness. If a foreign corporation sees fit for reasons of convenience, profit or necessity, to keep books within the jurisdiction of the courts of New York, I see no reason why those books should not be equally accessible for the purposes of justice here with like books kept by a domestic corporation. The case is equally within the mischief sought to be corrected by the statute, and there is no reason in the policy of the law of New York for giving foreign corporations an exemption from the effects of this statute.

But upon the facts proved I am clearly of opinion that the books and vouchers called for are not, within the meaning of the Code, "in the custody" of the witness. The evidence is sufficient to show that this corporation has removed these books and papers from the New York office to the Chicago office, and that this has been done in pursuance of a standing rule of the company, making the central office of the company in Chicago the place where books not in current use and all vouchers are kept. The books and papers were effectually removed thereby from the custody of the officer in charge of the New York office, and placed under the custody of the officer or officers in charge of the Chicago office. Such a rule is a reasonable and proper regulation for a corporation to make, a part of whose business is done in foreign states. There is nothing in the by-laws to prevent the making of such a rule, nor is it necessary that it should be enacted in the form of a by-law, or passed by a vote of the board of directors. It is shown by the long-continued practice of the corporation to be the rule. The seventh article of the by-laws does not in terms, or by necessary implication, put all the books and papers of the corporation into the exclusive custody of the secretary. He is required to keep safely all that come to his possession. But at any time the corporation may itself remove any of the books and papers not actually in use by the secretary, and put them in the custody of any other proper officer or employee of the company, and this was done in respect to these books four years ago. The witness, upon the testimony, can not claim, by virtue of his office and without the consent of the president or other officers of the company, to take these books and papers from the office in Chicago and bring them to New York. They can not, therefore, be said to be in his custody, because they are not so under his power and control that of his own will, and without obtaining the consent of others, he can take them and bring them into court. If they were in his office in New York, the corporation could, of course, make no rule or regulation as to their being kept there that would or should prevent his bringing them into court on this subpœna, because in that case whatever the regulation might be, they would be in his custody, he being in charge of the office where they are; but the books being in another place which is not in his charge, they can not be said to be constructively in his custody, unless they are in that place under his immediate control, or unless he has plenary power to take them and bring them away. It is said he should be required to use all the measures shown to be in his power to get them, and that he could get leave to bring them here

by asking for it; but it does not appear that he could get such leave, except for some purpose connected with the company's business, and, if he could do so, this section does not impose any such duty upon the witness. Clearly the subpœna does not require him to obtain the custody of books in order to produce them, but simply to produce books and papers that are in his custody.

I have not found it necessary to consider whether, under the laws of Illinois, the books are required to be kept at the office in Chicago, nor whether, the subpœna from a United States court running only a hundred miles, the witness can be required to go to a place more than a hundred miles to get books and papers to bring them into court, or must run the risk of having them sent to him without going personally to get them.

This is not a case of a person expecting to be a witness disabling himself from producing papers by sending them away. It is not, therefore, necessary to consider whether the laws provide any remedy in such a case. Motion for attachment denied.

Case No. 13,708.

In re SYKES.

[5 Biss. 113.] [1]

District Court, N. D. Illinois. March, 1870.

BANKRUPTCY — COMMERCIAL PAPER — REFUSAL TO PAY—ADVICE OF COUNSEL—ESTOPPEL—ACTUAL SOLVENCY — GOOD FAITH — PRACTICE.

1. A note given by a merchant for money loaned is "commercial paper" within the meaning of the bankrupt act [of 1867 (14 Stat. 517)]. The term means negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute.

2. A refusal by a debtor, acting in good faith, under the advice of counsel, to pay his note, on the ground that he had a valid defense, is not an act of bankruptcy.

3. So, if the debtor is in good faith advised by counsel that the holder has not a good title to the note, his refusal to pay it is no act of bankruptcy.

4. Nor does the fact that offers and propositions for the payment of the note had been made, necessarily preclude him from making his defense.

5. The proof must be confined to the acts of bankruptcy charged in the petition; nor can a refusal at a date prior to that stated in the petition be shown in evidence.

6. The fact that the maker is actually solvent and met all his other paper promptly, is a proper element as rebutting any presumption of refusal on the ground of insolvency.

7. A stipulation in a suit at law upon a note, giving time to plead, does not operate as an extension of time upon the note, as against the bankrupt act; but the proceedings in such suit may be given in evidence in determining the good faith of the defense.

In bankruptcy. The petitioner, the Manufacturers' National Bank of Chicago, asks that the respondent, James W. Sykes, be adjudged a bankrupt. The act of bankruptcy set forth is, that Sykes, being a trader, on the 20th and 27th of January, 1870, stopped payment of his commercial paper and did not resume payment thereof for the space of fourteen days. The paper described under the designation of "commercial paper" in the petition, is the note of Sykes for the sum of $13,000, dated on the 21st of October, 1869, payable to his own order, on demand, and duly indorsed by him.

BLODGETT, District Judge (charging jury). It is objected on the part of the respondent that this note, not being negotiable by the law merchant, and having been given for a loan of money, and not for commodities bought or sold on the market in due course of trade and business, is not "commercial paper" within the intent and meaning of the bankrupt act. I do not think, however, that either of these objections are well taken. The phrase "commercial paper" as used in this act, seems to me to mean negotiable paper (that is, promissory notes or bills of exchange), made by a banker, merchant, or trader in the due course of his business as such banker, merchant, or trader, whether the element of negotiability be given the instrument by the law merchant (or common law of merchants) or by statute. It seems to me sufficient that the paper be negotiable, —that is, transferable by indorsement or delivery. And the business of the respondent being that of a trader in produce, carried on mainly through the agency of loans of money negotiated through the banks, to be repaid by drafts drawn against shipments thus bought, such loans are made in due course of that business.

It is further objected on the part of the respondent that, although this note remains unpaid, yet he has not been guilty of an act of bankruptcy by neglecting or refusing to pay the same because he has, or has been advised by counsel that he has, a legal defense to the note—which defense he was in good faith making to an action at law brought on the note at the time this petition was filed.

And the court instructs you that if the respondent did, acting under the advice of counsel, believe, in good faith, at the time this alleged act of bankruptcy was committed, that is, on the 20th day of January last, that he had a valid defense to this note, then his failure to pay the note was not a suspension of payment within the intent of the bankrupt act. But it must be a bona fide belief that he had such a defense; not a mere pretext of a defense, but some tangible and defined idea that he could, by appeal to

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

the courts, avoid the payment of all or a part of the demand.

As I have allowed a wide range to the testimony bearing on this branch of the defense, it seems necessary that I should explain to you the direction and bearing to be given this testimony as applicable to the issue you are to pass upon. The note in question was given for and represents a balance of overdrawn bank account between the respondent and the Fourth National Bank of this city. It is claimed by the respondent that in September or October last he, being then engaged in this city in the business of buying and shipping produce, made a contract with the Fourth National Bank, through Mr. Maynard, its cashier, by which the bank was to advance him funds sufficient to buy and ship 1,000,000 bushels of oats, or other kinds of produce equivalent to that amount; that the bank was to pay his checks as he made purchases, and as fast as he made shipments he was to make drafts against these shipments, which were to be credited to him by the bank, the bank to have the exchange on the drafts as well as interest on the overdraft; that upon the faith of this agreement, he commenced his purchases, and had a portion of them made, when the bank dishonored his checks, thereby seriously impairing his credit, compelling him to change the destination of his shipments, and compelling him to sell at a sacrifice, which he need not have done if the bank had kept faith with him. After this occurrence, he gave the note in question, as he says, merely as a memorandum of the amount of his overdraft, and not as a settlement.

As to whether such an agreement was in fact made, there is a conflict of testimony; the respondent testifying to his version of it and Mr. Maynard contradicting him. It is also insisted under the testimony, that on or about the 27th of November last, an arrangement was entered into between certain of the directors and officers of the Fourth National Bank and the Manufacturers' National Bank of this city, whereby the assets (including the note in question), business and good-will of the Fourth National Bank were all transferred to and merged in the Manufacturers' National Bank, under such circumstances as to make such transfer void and totally inoperative, and that consequently the petitioner is not the owner of the note, and has no right to present it in this or any other form.

You will bear in mind, gentlemen, that we are not trying the question of the validity of this defense, nor the extent to which it may avail the respondent, but only his sincerity in insisting upon it; and the evidence adduced, pro and con, as to the dealings and transactions between the parties, and the transfer of the assets of the Fourth National Bank, is only to be considered by you for the purpose of determining whether the respondent failed or refused to pay this note at the time alleged, because he believed, in good faith, that he had a valid defense to the whole or a part of it.

If he was advised by counsel and believed that he could set off against this note the damages which he had sustained by the failure of the Fourth National Bank to keep its contract with him, he then had the right to interpose that defense in a court of law.

So, too, in regard to petitioner's title to the note. If the respondent had been advised by counsel, that, owing to the circumstances under which the Manufacturers' National Bank obtained this note, they had no title thereto,—that they stood in the same position as a person who had stolen it, and had no right to enforce its collection; that it was still the property of the Fourth National Bank, and he was liable to them and them only thereon,—such advice, if given in good faith, on a fair statement of the facts, would justify a refusal to pay, and an act of bankruptcy could not be predicated upon such refusal.

Nor does the fact that the respondent made divers offers and propositions for the payment of the note or the overdraft before the note was given, necessarily conclude or shut him off from making these defenses at the time of the alleged stoppage of payment. These offers were not accepted, and besides, the respondent testifies that these offers were made under circumstances of great excitement, when his credit had been imperiled, and he was willing to sacrifice much to reinstate it.

In this connection it is proper that I allude to the position taken by counsel for the petitioner, that respondent had been guilty of acts of bankruptcy by refusing payment of this note when demanded at times prior to that alleged in the petition, but I am of opinion, and so instruct you, that the petitioner is confined to the act of bankruptcy alleged in the petition. This being a note on demand, it became due when demanded, and had the petitioners intended to avail themselves of any of the prior demands and refusals or suspensions of payment as constituting acts of bankruptcy, they should have averred or set them out in the petition, in order that the respondent might be prepared to meet them in evidence. The real question is, did he on the 20th or 27th of January last commit an act for which he should be adjudged bankrupt? A legal defense may have occurred after the first demand, which he might have the right to set up when the last demand was made.

It is also insisted in the proof on the part of the respondent, that this is the only paper which he has failed to meet at maturity; that he had other commercial paper extant at the time of the failure to meet this note, and has paid the same promptly as it be-

came due; that he is a man of means, and has not stopped or suspended business on account of the failure to meet this note. These facts, if established by the evidence, should go far toward rebutting any presumption of bankruptcy which might arise from the failure to meet the note in question, and tend to show that the failure to meet this note was not in consequence of insolvency, but from other causes not making him amenable to the bankrupt act.

It is also insisted on the part of the respondent, that the note in question is not "commercial paper," because the same was not given in due course of business, but merely as a memorandum to be charged up to the "bills receivable" of the bank, instead of remaining as an overdraft on the books, and that it was not the expectation or intention of the parties that it should be paid "on demand," or that a payment of the whole amount would be insisted upon at any time, and that a settlement of it had been a constant subject of negotiation between the parties. There is much in the evidence to justify this assumption. But as the question is a new one, I prefer to reserve it and consider it on a motion for a new trial, if the jury shall find a verdict against the respondent on the points already submitted to them.

It is admitted that prior to the commencement of these proceedings, the petitioner had instituted a suit on this note in the superior court of Chicago against the respondent, which suit is still pending, and in which the issues are made up so as to permit the trial of the defenses indicated. And it is insisted that the stipulation giving time to plead in that case operated as an extension upon the note as against the bankrupt act. I do not concur in this view of the matter for reasons which I will not take time to give.

But this stipulation, and the whole proceedings in the suit at law, so far as in evidence, may be considered as circumstances going to prove the fact of the good faith of the respondent in urging his defense at law to this note, and give such weight in that direction as the jury shall decide them worth.

You will then, gentlemen of the jury, only consider whether the evidence, taken altogether, shows, that on the 20th or 27th of January last the respondent, James W. Sykes, influenced by the advice of counsel, given upon a fair statement of the facts, did believe that he had a valid defense to the note in question and refused or neglected payment on that ground. If you are so satisfied, you will find the respondent not guilty of the acts of bankruptcy charged.

But if, on the contrary, you believe that said respondent had no such bona fide belief, and set up such defense merely as a pretext, and without the intent and purpose of prosecuting the same in good faith, you will find him "guilty" as charged.

Verdict and judgment for respondent.

NOTE. See, further, that a note given for borrowed money is commercial paper. In re Kenyon, 6 N. B. R. 238, 245. See, also, In re Hollis [Case No. 6,621]. Contra: In re McDermott Patent Bolt Manuf'g Co. [Id. 8,750].

So an indorser is held as the maker of commercial paper (In re Nickodemus [Case No. 10,254]), whether the note be one of accommodation or not (In re Clemens [Id. 2,878], reversed in [Id. 2,877]; In re Chandler [Id. 2,591]).

That non-payment of commercial paper to which there is a good defense, does not constitute an act of bankruptcy, consult In re Thompson [Case No. 13,936] and cases there cited; also, In re Munn [Id. 9,925].

Consult Unthank v. Travelers' Ins. Co. [Case No. 16,795], as to the effect of a proposition to compromise.

Case No. 13,709.

SYKES v. HAYES.

[5 Biss. 529; [1] 6 Chi. Leg. News, 197.]

Circuit Court, N. D. Illinois. Feb. 1874.

EJECTMENT—SQUATTERS—EVIDENCE OF TITLE.

1. The owner of the fee can maintain ejectment against a squatter who has neither claim nor color of title.

2. Where the squatter had admitted title in the plaintiff's grantor, it is not necessary that the plaintiff produce other evidence of title than the conveyance from his grantor.

[Cited in Chicago & A. R. Co. v. Keegan, 152 Ill. 413, 39 N. E. 36.]

This was an action of ejectment for certain lots in Walker's dock addition to the city of Chicago, which plaintiff claimed in fee. The plaintiff [Martin L. Sykes], to maintain his title, called as witness Samuel J. Walker, who testified that ten or twelve years ago he and a man named Geer owned a large tract of land, including the lots in question; that about the time mentioned he purchased Geer's interest; that about the time he bought out Geer he went upon the land in question, and found defendant [Thomas Hayes] residing there; asked defendant who owned the land, to which defendant replied that it was Mr. Geer's land; witness then told him he had bought Geer's interest, and then owned the land, to which defendant replied in substance that he had squatted there, and would leave when witness wished him to; that witness had frequent conversations afterwards, and from year to year, with defendant, in which defendant always said he was ready to leave the lots whenever witness gave him notice to do so; that he had no rights there, or words of that import. Witness also testified that he had paid all taxes on the land for upwards of twelve years, and had platted and

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

subdivided the same out into lots and blocks. Plaintiff then introduced a deed from Samuel J. Walker to plaintiff, dated Nov. 10, 1871, conveying to plaintiff the lots in question in fee simple; and also proved a demand of possession and notice to quit served on defendant, several months prior to the commencement of this suit. He also proved that he had notified defendant that he, plaintiff, had a deed from Walker, and rested his case. Defendant was then sworn, and testified that he entered upon the lots in question and built a "shanty" about fourteen years ago; that it was then a naked prairie, and he didn't know who owned it; denied that he had ever told Walker that he would leave on request or notice, but admitted that he had always been willing to leave when the owner required him to, and would show a title; claimed no title himself; was a mere squatter, and had never paid any taxes or assessments on the land; had understood, for many years, that Walker claimed to own the land, but Walker would not show him any deed; had never paid any rent to Walker or any one else, nor agreed to pay any.

W. T. Burgess, for plaintiff, citing Jackson v. Denison, 4 Wend. 558.

R. H. Forrester, for defendant, claiming that the plaintiff could not recover unless he showed that the relation of landlord and tenant existed between the parties. [35 Cal. 538; 47 B. Mon. 397; 14 Johns. 223; 3 Barn. & C. 413].[2]

BLODGETT, District Judge (charging jury). That if they believed, from the evidence, that defendant was in possession of the premises in question as a mere squatter, without any claim or color of title; that he had admitted to Walker that he, Walker, was the owner of the premises, and promised to surrender posssession to Walker when notified or requested to do so; that Walker had conveyed his title to the land to plaintiff, and plaintiff now held the same, and that plaintiff had notified defendant of his title from Walker, and demanded possession; then plaintiff is entitled to recover in this action, according to the terms of his title deed, without producing Walker's paper title; that the admission of Walker's ownership of the property, if the jury believed such admission to have been made, was sufficient evidence of title in Walker to sustain the action so long as defendant set up no title and showed no ownership in himself; that the credibility of witnesses was for the jury, and they must determine from all the circumstances, and appearance of the witnesses, Walker and Hayes, which they would believe upon points where they contradict each other.

Verdict for plaintiff.

[2] [From 6 Chi. Leg. News, 197.]

Case No. 13,710.

SYKES v. MANHATTAN ELEVATOR & GRAIN DRYING CO. et al.

[6 Blatchf. 496.] [1]

Circuit Court, S. D. New York. June 30, 1869.

PATENTS — PRELIMINARY INJUNCTION — USE WITHOUT INTERFERENCE—PUBLIC ACQUIESCENCE.

Where, on a motion for a provisional injunction to restrain the infringement of letters patent for a floating grain dryer and elevator, the patent was not attacked for want of novelty, and the infringement was clear, but the patent had never been tried or established, at law or in equity, and no evidence was furnished as to its use, or as to the extent of such use, or as to acquiescence in the patent by the public, and the defendant showed that he had used his apparatus for about three years, and that no claim had been made against it under the patent until about six weeks previously, and the amount invested in the defendant's apparatus and business was large, and the business seemed to be precarious, and nothing appeared as to the defendant's responsibility, an injunction was withheld until the plaintiff should establish satisfactorily the point of acquiescence by the public, and show how the defendant's apparatus had been allowed to be used without interference, and leave was given to the plaintiff to renew his motion, on further papers, but the defendant was required to render sworn periodical accounts of the grain which should in future be treated by his apparatus, and to give satisfactory security, by bond, with sureties, to pay what might be recovered in the suit.

In equity. This was a motion [by James W. Sykes] for a provisional injunction to restrain the infringement of letters patent [No. 34,992].

Charles B. Stoughton, for plaintiff.
Charles F. Blake, for defendants.

BLATCHFORD, District Judge. The papers in this case, on both sides, are exceedingly meagre and incomplete. The plaintiff's patent was granted April 15th, 1862. It has never been tried or established, at law or in equity, and no evidence is furnished as to its use, or as to the extent of such use, or as to acquiescence by the public in the patent, or in the exclusive right of the plaintiff under it, except the usual averment found in the bill, that the invention has been introduced into public use, and that the public generally have acquiesced in the plaintiff's exclusive right to the same. The novelty of the patent is not attacked, nor is the infringement denied. All that is said in defense, on the point of infringement, is, that the grain dryer which forms one element of the plaintiff's combination, is not used in the defendants' combination, but that they use a grain dryer secured by another patent. But they do not set forth what is the construction or arrangement of the grain dryer which they use, or in what particulars it is not the plaintiff's dryer, so that the court can exercise a judgment on the

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

question. In this respect, too, the plaintiff's affidavit is defective, for it merely states that the defendants' grain elevator and dryer is, in its construction and mode of operation, substantially like, and upon the same principles as, the plaintiff's elevator and dryer, in respect to the improvement secured to him in the patent, and is constructed and operated in all respects upon the principle of the plaintiff's patent, and is an infringement thereof. The plaintiff, however, verifies, by oath, a single model, which, he states, correctly represents the improvements and combination used by the defendants, and patented to the plaintiff. But nothing of all this is denied by the defendants, except to say that the dryer they use in their apparatus is not the dryer described in the patent. But the patent is not limited to any particular dryer. It claims the combining with an elevating apparatus, arranged upon a scow or other floating vessel, any interposed drying apparatus, the whole forming a floating grain dryer and elevator, capable of transferring grain from one vessel to another, or from a vessel to a storehouse, or vice versa, and of drying the grain while in the process of being transferred, and the whole apparatus capable of being easily floated from one locality to another, as may be required for the purpose of elevating and drying the grain. The specification states, that the patentee prefers to use Wheeler's dryer, patented October 23d, 1860, but that he can use, in its place, any dryer which will effectually drive the moisture from the grain to be dried and elevated. The infringement is, therefore, sufficiently established.

But, in addition to the want of satisfactory affirmative evidence, on the part of the plaintiff, as to the extent and character of the acquiescence by the public in his exclusive right, the defendants show that the apparatus now in use by them has been in use for about three years past, and that no claim was made against it, under the patent, until about six weeks ago. It is not shown that the plaintiff, who resides at Chicago, Illinois, knew of the existence or use of the defendants' machine, which has been used at New York. It is shown that the capital invested in the defendants' apparatus, and in the business of using the same, is about seventy-five thousand dollars. It does not appear that the defendants are pecuniarily responsible, nor is it shown that they are irresponsible. On the whole, an injunction must be withheld, until the plaintiff establishes satisfactorily the point of acquiescence by the public, and shows how it is that he has allowed the defendants' machine to be used for three years without interference; and he is at liberty to renew his motion, on further papers. But, as the patent is not attacked for want of noveity, and as the infringement of it seems clear, the defendants must render sworn periodical accounts of the grain which shall be treated by their apparatus in future, and must give satisfactory security, by bond, with sureties, to pay what may be recovered in the suit. It appears that the corporation which preceded the present corporation in the business, and from which the present corporation purchased the apparatus, became embarrassed, which would seem to indicate a precarious business. The details of the order will be settled on notice, if not agreed upon.

Case No. 13,711.

The SYLPH.

[4 Blatchf. 24.] [1]

Circuit Court, S. D. New York. April 20, 1857.

COLLISION—RUNNING IN FOG—CUSTOM—FERRY-BOAT—PILOT.

1. Where two steamboats collided in a dense fog, in the harbor of New York, each going at the same rate of speed, and no fault was imputable to either, this court dismissed a libel filed to recover damages caused by the collision.

[Cited in The Lepanto, 21 Fed. 659.]

[See The Albemarle, Case No. 135.]

2. It being the usage, in the harbor of New York, to run steamboats in thick weather, the court did not hold that both vessels were in fault.

3. If, in this case, one of the vessels had been at anchor, the other would have been charged with all the consequences of the disaster.

4. Semble, that, in a dense fog, vessels in the harbor of New York should anchor.

5. So long as the custom continues of running in such a fog, this court will not feel bound, in case of a disaster, to discriminate, with any very great nicety, as to the degree of fault imputable to the one or the other of two vessels which may choose to encounter the hazards of the navigation.

[Cited in The Matteawan, Case No. 9,283; The Joseph W. Gould, 19 Fed. 788.]

6. A steamboat plying on a ferry-line between New York and Port Richmond, is a ferry-boat, within section 42 of the act of August 30, 1852 (10 Stat. 75), and is not obliged to have on board a licensed pilot and a licensed engineer.

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

This was a libel in rem, filed in the district court, to recover damages caused by a collision. There was a decree in favor of the libellants in that court [case unreported], and the claimant appealed to this court.

Welcome R. Beebe for libellants.

Edwin W. Stoughton, for claimant.

NELSON, Circuit Justice. The libel in this case was filed to recover damages for a collision that occurred in the bay of New York on the 17th of December, 1853, in which the steamboat Eagle was seriously damaged, the

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

bow of the Sylph, a ferry-boat, having struck her on her starboard side, some twenty or twenty-five feet abaft her stem, tearing away her bulwarks and deck and cutting her down below the water's edge. The Sylph had started, on the morning of the 17th of December, from the Whitehall dock, on her usual trip to Port Richmond, she being engaged in the ferry line between those two places. The Eagle was coming up to New York from Fort Hamilton, she being engaged in running between the city and Port Monmouth, in New Jersey. The collision occurred between nine and ten o'clock in the forenoon. There was a dense fog, so dense that the hands on either vessel could not see an object ahead beyond the length of their boat. Each was going at the same rate of speed, five knots the hour, which seems to be the rate adopted by steamers in the bay when moving in a fog as thick as that on the present occasion. The fires of both vessels were kept low, so that each could readily slow and stop and back in an emergency—another regulation, it seems, when running in a fog. A person was assigned, on each boat, to ring constantly the alarm bells, and they were heard by the approaching vessels in time for each to give the orders to slow and stop and back; and those orders were obeyed before either was seen by the other as she lifted out of the fog. When they came together there was more or less headway on each vessel, notwithstanding, as is abundantly evident upon the proofs, the hands on board of each exercised their best efforts and skill to check the motion, after hearing the alarm bells. Nothing seems to have been neglected on board of either, within their power at the moment, to avoid the disaster. No fault can be imputed to either, according to the proofs, unless, indeed, it was a fault to run the trips on which the vessels were engaged at all in the state of the weather. And, as to this, both stand on the same footing. Judge Ingersoll, who decided the case below, decreed for the libellants, putting his decision mainly upon the ground that, taking the strength of the Eagle, she being a new vessel, and the description of the wound inflicted, he was inclined to think that the speed of the Sylph was greater than that of the Eagle, and too great for the state of the weather. There are also some experts who express this opinion, from an examination of the wound. But, after the fullest consideration, I cannot concur in it. The proof, by witnesses, of the rate of speed of the Sylph, is as strong and decisive as that of the rate of the Eagle. For aught that appears, as much credit is due to one set of proofs as to the other; and, according to this proof, the rate of speed was the same. Besides, there are facts in the case which fairly enough account for the injury to the Eagle, consistently with the rate of speed of the two boats being equal, and the efforts of each being the same to check it at the instant of the danger. The Sylph was much the heavier boat, according to the proof, and she struck the Eagle head on, and under her bulwarks and deck, tearing up and smashing them by the combined force of the motion of the two vessels. The manner of their coming together gave the advantage to the Sylph, which, together with her greater weight, may well account for the difference in the injuries to the two vessels. There are, also, some considerations that would naturally lead to the conclusion, the rate of speed of each vessel being the same at the time, and the efforts to check the two vessels being the same, that the motion of the Eagle could not be as readily overcome as that of the Sylph. The tide was strong flood, some four miles an hour. The collision occurred some distance below Castle William, in the bay. The Eagle, therefore, had the force of the tide to overcome, besides the motion from her engine; and the Sylph had the co-operation of this force to aid in checking her at the instant.

The case is a most unfortunate one, and may well attract the attention of masters and owners, and lead them to consider whether prudence would not dictate, from a proper regard as well for the lives of passengers as for the safety of property, that, in a port crowded, as is that of New York, with every species of water craft, vessels should anchor in so unusual and dense a fog. The master or pilot may, indeed, by the use of the compass, avoid running upon the shore or against an island, or any other fixed obstruction in the way; but these are trifling contingencies when compared with the chances of running against vessels moving or at anchor, as against which the compass is no security. If the Eagle had been at anchor in this case, and the Sylph had encountered her in that condition, I should not have hesitated to charge the Sylph with all the consequences of the disaster. As the case stands, I cannot see that the one is more in fault than the other; and, from the usage which has come frequently under my observation, of running these boats in thick weather, I am not disposed at present to hold that both were in fault, so as to justify an apportionment of the damages. But this I will say, that, so long as the custom continues, the court will not feel bound, in case of a disaster, to discriminate, with any very great nicety, as to the degree of fault imputable to the one or the other of two vessels which may choose to encounter the hazards of the navigation.

It has been urged that the Sylph was in fault for not having on board a licensed pilot and a licensed engineer, under the act of congress of August 30, 1852 (10 Stat. 61). But the forty-second section of that act excepts steamers used as ferry-boats. The Sylph, I think, comes fairly within this exemption.

The decree of the court below must be reversed, and the libel be dismissed, with costs.

SYLPH, The (BRADSHAW v.). See Case No. 1,791.

SYLPH, The (WILLIAMS v.). See Case No. 17,740.

SYLVAN SHORE, The (CONCKLIN v.). See Case No. 2,090.

Case No. 13,712.

The SYLVESTER HALE.

[6 Ben. 523; 17 Int. Rev. Rec. 196.] [1]

District Court, E. D. New York. May 12, 1873.

COLLISION—LONG ISLAND SOUND—SCHOONERS MEETING—PORTING HELM.

1. Two schooners came in collision in Long Island Sound in a clear night. They were sailing on meeting courses, not varying more than half a point from being exactly opposite courses. Both vessels had the wind free. Neither made any change of course before the collision. *Held*, that the case was one for the application of the eleventh of the rules for avoiding collisions. That both vessels were, therefore, bound to have ported their helms, and, as neither had done so, both vessels were in fault, and the damages must be apportioned.

[Cited in The Decatur H. Miller, 10 C. C. A. 284, 62 Fed. 95.]

2. Whether the eleventh rule is applicable to the case of two sailing vessels meeting end on or nearly so, one being close hauled and the other sailing free quere.

[Cited in The Manitoba, Case No. 9,029.]

In admiralty.

Wilcox & Hobbs, for libellant.

Evarts, Southmayd & Choate, for claimants.

BENEDICT, District Judge. This action is brought to recover the value of the schooner G. R. Murney, a vessel owned and commanded by the libellant, John Murney, which was sunk on the night of the 20th of July, 1872, by colliding with the schooner Sylvester Hale in Long Island Sound. The Murney was a canal schooner laden with coal, upon a voyage from Elizabethport, N. J., to Norwich, Conn. The Hale was a schooner bound from Taunton to Elizabethport light. The Murney was going four or five, the Hale six or seven miles an hour under a good sailing breeze. The night was clear and nearly as light as day.

The libel gives the course of the Murney as east northeast half east, with the wind due north, but claims that she was close hauled and held her course. It charges that the Hale was sailing free, and that, although bound to avoid the Murney, she did nothing, but held her course, and thereby ran into the Murney, striking her upon her lee bow and causing her to sink almost immediately.

The answer presents features calculated to attract attention. It states that the Murney was sailing free, and the Hale close hauled, but also states that the course of the Hale was due west, with the wind north northwest, which makes the Hale free. It states that the Murney appeared to those on the Hale to be bound to the eastward, and upon a course which would have carried her to the southward of the Hale; but the men on the Hale swear that the Murney was taken for a vessel bound to the westward—a statement not always adhered to however by the man at her wheel. The answer also in unequivocal terms states a case of vessels not meeting end on or nearly so, while the argument addressed to me in behalf of the Hale was largely based upon the theory, that the vessels were so meeting. Finally the wrong movement charged upon the Murney in the answer is starboarding, but the movement is there so described, as to show that faulty navigation in allowing the vessels to get into such close proximity, and not any starboarding by the Murney, must have been the cause of the accident.

The testimony offered in support of these pleadings respectively abounds in inexplicable statements, and contradictions which it is vain to attempt to reconcile. A prominent statement is that those on the deck of the Hale were keeping a good lookout, and saw the Murney at a distance to leeward. When the evidence of the two persons who were on the deck of the Hale, as to what they did on board their vessel, is examined, the fact appears that they kept no proper lookout, did not see the Murney, until the instant of collision, and made no change in the helm of the Hale in time to alter her course before the vessels came in contact. This controlling fact is disclosed by the following evidence given by the witnesses for the Hale. The mate was in charge of her deck, and the supposed lookout. He says that he saw a schooner approaching to windward, and at once went aft to the wheel, and inquired of Petersen, the man at the wheel, if he saw her; that when aft he looked at the compass, as was natural, and found the vessel to be sailing west by south, the course which had been given to the wheelsman. He mentions no change in the helm, as being then made, and he directed none; but having looked at the compass, he started forward, and when he arrived at the mainmast stopped to give the winch two or three turns, just enough to taughten the topsail sheet. From the winch he moved towards the steps, to windward, and he had gone but a few feet when the vessels came in contact.

All that was done on board the Hale, with reference to the Murney, transpired during the very short period of time which elapsed between the mate's leaving the wheel and the blow. Petersen, the man at the wheel, says that during this period he looked under his boom twice; that the mate had not reported, nor had he seen the Murney till he first look-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 17 Int. Rev. Rec. 196, contains only a partial report.]

ed under the boom, after the mate left him to go to the winch; that when he first looked, he saw the Murney two points off his bow, but did nothing; that the second time he looked she was still two points off his bow on the same course, but very near him, and that he at once ported his wheel. It is impossible that the Murney should have then been two points off his bow. His statement that, as he stood to leeward on his vessel to look under his boom, he saw the Murney through the parts of the fore-rigging, is more likely to be accurate, and places her nearly ahead and upon him, as the fact was. I conclude, without difficulty, from this evidence, that the Murney was not seen from the Hale, until the instant before the collision, and when no action of the helm could effect any useful change of course.

While considering the testimony of the persons on the deck of the Hale, I may here remark that the mate says, that he saw and reported the Murney to the man at the wheel before he went to the winch, but the statement is contradicted by the statement of the latter and by the action of both; and that the man at the wheel says that he supposed the Murney to be going the same way the Hale was, but the statement is wholly inconsistent with other parts of his testimony and with his acts. These and other misstatements, which appear in the evidence of those responsible for the movements of the Hale, make it difficult to place great reliance upon any of their statements or conclusions. Their own account of what they did contradicts their theory of the case, and shows them guilty of the great negligence of running in the night without keeping a proper lookout, and that they made no change of course to avoid the Murney.

Having thus ascertained the movements of the Hale with reference to the Murney, I turn to consider the movements of the Murney. Upon this point, the testimony of those on the Hale throws no light, for they did not see her till she was upon them. Those on the deck of the Murney say that they had a lookout, who saw the Hale for a long distance. In order to disprove this, evidence has been given tending to show that the man claiming to be the Murney's lookout came on board the Hale in a condition, as to his dress, which indicates that he had been roused from his berth by the collision. Upon a careful examination of the testimony of the various witnesses on this point, the weight is found to favor the allegations of the Murney that she had a lookout and saw the Hale in time.

The actual management of the Murney is indeed more consistent with the idea that the Murney was being sailed without knowledge of the presence of the Hale, until the vessels were close together, than with any other; but it is also consistent with the theory that the Hale was seen and, under the supposition that she was more free than the Murney, it was judged that, if the Murney held her course, the Hale would feel forced to keep out of the way—a result which doubtless would have been attained if any one on the Hale had been looking at the approach of the Murney. But whether the Hale was seen or not, there is no evidence of any change in the course of the Murney prior to the time when the vessels were close together and the collision inevitable.

It thus appearing that no changes occurred in the courses of the vessels calculated to cause the collision, next in order is to determine what the courses were upon which these vessels were thus sailing. As claimed by the respective crews, and as proved by the evidence, the course of the Murney was E. N. E. ½ E., and that of the Hale W. by S. Their divergence was, therefore, half a point. By holding these courses, the vessels came in contact, and it must, therefore, be found that the speed at which these vessels were going respectively was such that the courses they were upon involved risk of collision. The question then arises whether they were crossing, within the meaning of rule 12 of the international rules adopted by the United States in 1868, or meeting end on or nearly so, within the meaning of rule 11.

This brings up for consideration the proper construction to be given to rule 11 of the international rules, a rule which has been often called in question, and, as it appears to me, greatly liable to be misapplied. The practicability of this rule at all in the actual navigation of sailing ships has been, and still is, in some quarters doubted, and at its door have been laid many disastrous collisions, for "the reckless use of port-helm leads to collision."

Perhaps the better opinion now is, that the rule is practicable, provided its application be carefully restricted to the cases to which alone its terms make it applicable. As is well known, the rule originated in England, and stands there as a substitute for a rule differently worded, which was found to be impracticable, and, accordingly, was substantially destroyed by judicial decisions. Lown. Col. p. 22. As at first understood, the rule, in its present form, was greatly criticised, and was defended by claiming it to read as not applicable to ships which must, if both keep on their respective courses, pass clear of each other; but applicable, in the night time, only to cases in which each ship is in such a position as to see both the side lights of the other. This was the construction given by Mr. Thomas Gray, of the British board of trade, and it was approved, in England, by the admiralty, board of trade, and Trinity House, and, in France, by the French government.

By the order in council of July 30, 1868, it became part of the law in England. It was adopted as a supplement to the international rules by the assembly of the senate, at Hamburg, October 16, 1868. This interpretation

was adopted by Russia, by order of the emperor, November, 1868, and by Sweden, December 12, 1868.

(See appendix to "A Few Remarks Respecting the Rule of the Road for Steamships," by Thomas Gray, for the words of the order.)

The paramount importance of having international rules, which are intended to become part of the law of nations, understood alike by all maritime powers, is manifest; and the adoption of any reasonable construction of them, by the maritime powers named, affords sufficient ground for the adoption of a similar construction of our statute by the courts of this country.

For this reason, and because the rule, so understood, will seldom come into play, and, therefore, affect but little the old maritime rules of the seas, which were followed for centuries before the rules, and which are, for the most part, still followed by seamen in the actual navigation of sailing ships, I so construe the rule. But, so understood, it is, nevertheless, applicable here, for the evidence shows the present to be what has been called "the exceptional case,"—the case "hardly determined by the rules," of two sailing vessels meeting, in such a position that each should have seen both the side lights of the other.

I do not overlook the testimony of those on the Murney, that only the green light of the Hale was seen by them, nor the claim of the Hale that only the red light of the Murney was visible to her. But the observation of the Murney by those on the Hale was when danger was imminent, and is not reliable. And, on the other side, the captain of the Murney, who was at her wheel, reconciles his statement that he saw only the green light of the Hale, with the mode in which the vessels were approaching, by the not improbable supposition that the red light of the Hale was hid by her jib. Other facts in the case, and, among them, the nature of the injury upon the starboard bow of the Hale, and the mode in which the blow was delivered, indicate that the vessels were meeting almost exactly end on, and such is the description of the collision as given by the libel.

At this stage of my examination of this case I am brought very near to a question respecting the application of rule 11, of so much importance that, although not called on by the facts of this case to decide it, I do not feel at liberty to allow it to pass without allusion. That question is whether rule 11 is to be considered as subject to the ancient and most universal law of the sea, that a vessel sailing free shall give way to a vessel sailing close-hauled. As worded, the rule contains no exception unless it may be found in the phrase, "so that each may pass on the port side of the other." These words seem to indicate that the rule is only applicable to vessels which have the wind alike, inasmuch as a vessel close-hauled upon the starboard tack, if she ports, will necessarily come into the wind and her way be stopped; therefore if she ports she cannot be said to pass the other at all. Instead of passing she makes herself a stationary object to be avoided by all approaching vessels. The provisions of rules 19 and 20 may also be resorted to, as affording ground for the conclusion that a vessel sailing close-hauled is exempted from the obligation to port. Aside from the wording of the rules, it has been urged that they must be so construed as to be reasonable, and that it is unreasonable to require a vessel to throw herself out of command, or to compel her to work her sails or to run off to leeward, to avoid a vessel which by a movement of her helm can go either way without loss of position.

This consideration was doubtless the ground of the decision of Dr. Lushington in the case of The Halcyon, Lush. 101, where, notwithstanding the statutory rules, a vessel sailing close-hauled upon the starboard tack was held not bound to port. Similar considerations would seem to have force in the case of a vessel close-hauled upon the port tack, for, although a vessel close-hauled on the port tack can port without losing her headway, she cannot do so without making distance to leeward which she must beat to windward to overcome. She can run off with ease, but she cannot regain her original line without tacking. If, without tacking, she resumes her course by the wind, she must do so upon a line parallel to, but to leeward of her original course, to her great disadvantage. The necessary result of porting by a vessel close-hauled upon the port tack is so disadvantageous that it has been said by good authority, that in all ordinary cases a vessel so situated will come into the wind and stop in preference to keeping off. See "The Law of the Port-Helm—An Examination into Its History and Dangerous Action," by Commanders P. H. Colomb and H. W. Brent, H. B. M. Navy, largely quoted in the collation made by Commodore Jenkins, U. S. navy, and published by the navy department in 1819 (page 164). Furthermore, the sailing rules were supposed to be intended to make definite, but not to change, any of the sailing rules known and practiced by seamen everywhere; and it will be found, I think, that such has been the interpretation, in the particular now in question, which has been given to the rules by those whose peculiar business it is to apply them in actual navigation. If this should prove true, any attempt by the courts to adopt a construction at war with the traditions of the sea, and not adapted to the necessities of sailing ships, would, as I fear, prove much worse than useless.

These considerations affecting the construction of rule 11, I have thought proper to state when examining the rule, although I am not now called on to determine as to

their validity, for the reason that upon the evidence in this case I deem it quite clear that neither of the vessels in question was close-hauled. As to the Hale, her own crew say she was sailing free. As to the Murney, her libel, and her master upon the stand, make her half a point free, if the wind was north, and his vessel only able to lie within six points, as he claims, but which is doubted. She was a point and a half free if the wind was N. N. W., as is claimed by the Hale to have been shown. But half a point would have enabled the Murney to port sufficiently to avoid the Hale and still regain her distance to windward, and removes from her any ground of exemption from the obligation to port. Both of these vessels were, therefore, bound to port as they approached each other, unless excused by some peculiar circumstance. This neither did. The libel of the Murney avers that she did not, and the answer avers that the Hale did not. For this omission the evidence furnishes no excuse. In the libel an excuse is suggested for the Murney that the actions of the Hale led the master of the Murney to suppose that the Hale was going to keep off, but there is nothing in the evidence to countenance the suggestion. The answer states, in excuse of the omission by the Hale, that a vessel was to windward of the Murney, and sailing so near to her course, that it was not safe or proper for the Hale to port. But the Hale had abundant time, after these schooners were in plain sight, to have gone to windward of both of them, and she could have done it easily by a movement in time. Nor were the approaching schooners so near together as to prevent her at a subsequent period from luffing sufficiently to clear the Murney and passing between them, without danger of collision with the windward schooner. In fact, the man at her wheel swears that he did luff half a point, but as already shown, all that this man did was done at the instant of collision, when it is doubtful if any movement of his wheel could have any effect upon his course, or did any more than to transfer the blow from the side of the Murney to her bow.

This case, restated then as I find it, is that of two vessels meeting in a clear night end on, both free and each able to port so as to avoid the other. The one bound to the westward runs into the bows of the other without attempting to avoid her, and in fact without seeing her at all, owing to the want of lookout. The one bound to the eastward, and equally bound to port, if she saw the other at all, made no change of course, gave no hail whatever, but held on until her bows were stove by the collision. Both without excuse neglected to obey rule 11, which, if it had been obeyed by either, would have prevented the accident; and both vessels being in fault, the damages resulting must be apportioned.

Let a decree be entered accordingly.

Case No. 13,713.

SYLVIA v. CORYELL.

[1 Cranch, C. C. 32.] [1]

Circuit Court, District of Columbia. July Term, 1801.

SLAVERY—BRINGING INTO STATE—SUIT FOR FREEDOM.

If the owner of a slave in Virginia send his slave out of the state for three years, and bring the slave back, it is not such a bringing into the commonwealth as entitles the slave to freedom, under the second section of the act of 17th December, 1792

Assault and battery, to try the right of the plaintiff [Negro Sylvia] to her freedom.

Verdict for the plaintiff, subject to the opinion of the court on the following case: The plaintiff was born a slave in Virginia, in 1779, and became the property of the defendant [George Coryell], a citizen of Virginia. In June, 1789, the defendant sent her to New Jersey, where she remained three years in the service of the defendant's mother, but continued all that time the property of the defendant. At the end of the three years, the plaintiff returned to Virginia, to the service of the defendant, and has so remained until the time of bringing her action.

Judgment for the defendant, by MARSHALL, Circuit Judge, and CRANCH, Circuit Judge. KILTY, Chief Judge, doubted.

See Act Assem. Va. December 17, 1792 (Ed. 1832) p. 186.

SYLVIA DE GRASSE, The (SETZER v.). See Case No. 12,676.

Case No. 13,714.

SYMES v. IRVINE.

[2 Dall. 383.] [2]

Circuit Court, D. Pennsylvania. 1797.

CONTINUANCES—ABSENCE OF WITNESS—RIGHT TO TAKE DEPOSITION.

[Absence of a material witness may be good ground for a continuance, although he resides more than 100 miles from the place of trial, so that the moving party might have taken his deposition.]

[This was an action of ejectment by Symes' lessee against Irvine.]

The defendant's counsel moved to put off the trial of this cause (which was marked for the 20th of April) upon an affidavit setting forth, "that A. B., a material witness, who lived at Carlisle, in Pennsylvania, (at a distance of more than 100 miles from Philadelphia) was absent; and that he had been sick some time ago, but had promised the defendant to attend at the trial."

Lee, Ingersoll & Rawle objected to the postponement, because it was in the defendant's power, by virtue of the act of congress (volume 1, Swift's Ed., p. 68, § 30 [1 Stat.

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

[2] [Reported by A. J. Dallas, Esq.]

88]) to have taken the deposition of the witness de bene esse. Nor is it sufficient in every case to make a formal affidavit; the court will enquire so far into the testimony, which the witness could give, as to satisfy themselves, that the reason assigned for a postponement is not merely colorable; and if the facts, in the present instance, are material, there can be no injury from allowing the court to hear and decide on them. There can be less occasion, likewise, for indulging such motions in ejectments, than other suits, as the judgment is not conclusive.

E. Tilghman and Mr. Lewis, in support of the motion, stated, that the cause had never yet been put off at the request of the defendant; and they urged the superior importance of viva voce testimony, as a sufficient reason for declining to take the deposition of the witness de bene esse, under the act of congress; whose provisions, in this respect, indeed, they regarded as abhorrent to the principles of natural justice.

PETERS, District Judge. If any delay had heretofore occurred by the defendant's conduct, I should have been disposed to have held him, strictly, to the performance of every thing, by which it was in his power to procure the testimony of the witness. The act of congress, however, appears to be rather harsh; and if no excuse, like the present, could be admitted, it would be declaring, in effect, that whenever witnesses resided more than 100 miles from the court, their depositions must be, indispensably, taken.

IREDELL, Circuit Justice. It is not a sufficient reason for forcing this cause to a trial, in the absence of a material witness, that the act of congress authorised his deposition to be taken. Courts of justice have always been desirous to obtain viva voce testimony, where it was practicable; and even the plaintiff himself has given a proof of his sense of its superior estimation, by bringing his witnesses for this very trial from Richmond in Virginia, though he was equally entitled to take their depositions. The testimony may be of such a nature, as not to admit of all its force being reduced to the form of a deposition. With respect to a disclosure of the facts, which depend on the testimony of the witness, we think that it is not regularly in our power to compel it; and, even if we had the power, it might be essentially wrong, in many cases, to exercise it. Nor, do I think, that, because this is a case of ejectment, the court should be less scrupulous in ordering the trial to proceed: for, it must be recollected, that the defendant is, at present, in possession of the premises, but will be evicted, if the cause is decided against him.

Upon the whole, the court cannot, perhaps, lay down a general rule, for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate trials, or wanton delays. In the present instance, there appears to a fair ground for the postponement; and, therefore, let the cause be continued.

SYMMES (BOUDINOT v.). See Case No. 1,695.

Case No. 13,715.

SYMONDS v. UNION INS. CO.
[See Case No. 12,875.]

Case No. 13,716.

The SYRACUSE.

[9 Ben. 348.] [1]

District Court, E. D. New York. Feb., 1878.

MARITIME LIENS—PROCEEDS OF SALE—MORTGAGE—MERGER.

1. A vessel sold under a final decree in a proceeding in rem is sold free and clear of all incumbrance—all liens or incumbrances upon the vessel are by such a sale transferred from the vessel to the proceeds

2. No confusion of rights arises from the fact that the purchaser at such sale is at the time owner of a mortgage upon the vessel—the mortgage is not extinguished in such a case, but becomes a charge upon the proceeds of the vessel, and the purchaser of the vessel may, upon petition, obtain payment of the amount due upon the mortgage out of such proceeds, all other claims against the vessel having been satisfied.

[In the matter of the surplus and remnants of the steamboats Syracuse, McDonald, and Ohio.]

Leroy S. Gove, for petitioner.
J. J. Allen, for owner.

BENEDICT, District Judge. The three steamboats above named, having been proceeded against in this court to enforce the payment of certain maritime liens to which they were severally subject, have heretofore been sold under decrees rendered in the actions brought by the several lien creditors. In each instance there remains in the registry of the court of the proceeds of the boat a surplus after paying all the maritime liens. In the case of the Syracuse the surplus is $3,863.64. In the case of the McDonald the surplus is $3,441.67, and in the case of the Ohio the surplus is $1,054.73. The total of these sums is the sum of $8,360.14. The boats were all owned by the same person. In each of these cases a petition is filed by Thomas Cornell, asking that the said surplus be paid over to him on account of a chattel mortgage upon the three boats, which he claims to own, and upon which, as he asserts, the sum due is greater than the total surplus proceeds arising from all the boats.

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

The owner of the boats appeared in opposition to the petition, and interposed an oral answer to each petition, denying the right of the petitioner to be paid out of the funds in the registry. The cases were referred to a commissioner to take the proofs, and before the commissioner as well as before the court, the cases were heard together.

Several questions of law and of fact are supposed to be raised by these proceedings, but a single one of which is deemed of sufficient importance to require attention on this occasion. The controversy, it will be observed, is between mortgagor and mortgagee. The vessels have all been sold in proceedings to which all the world were parties. The claims of all parties who have appeared have been paid, save only the claim arising out of a mortgage executed by the owner of the boats, and this owner is the only party before the court that opposes the claim based on the mortgage. The petitioner is an assignee of the mortgage, deriving title from one Belknap, and for the purposes of the present discussion it will be assumed that Belknap was the purchaser of the McDonald and the Syracuse at the marshal's sale, and that he assigned his mortgage to the petitioner subsequent to such sale.

Claiming the facts to be as thus assumed, the owner contends, in respect to these two boats, that the purchase of the boats at the marshal's sale by Belknap, the then holder of the mortgage on the boats, extinguished the mortgage, so that it affords no ground for a claim to the surplus proceeds arising from the sale.

Upon this, the main question of the present controversy, I entertain no doubt. These boats were sold under the decree of a court of admiralty in a proceeding in rem. No right, title, or interest of any one was sold. It was the boats themselves that were sold, and they were sold free and clear of any charge, lien, or encumbrance. It is a misapprehension, therefore, to suppose that what Belknap bought was an equity of redemption. No such interest was exposed for sale. By the sale Belknap became owner of the boats themselves from that time forward, and all prior subsisting liens and encumbrances upon the boats by operation of law passed from the boats to the proceeds of the sale, which thereafter, so far as such liens and encumbrances are concerned, became in law the boats. But the buyer of the boats acquired by his purchase no interest in the proceeds of the sale, nor could he acquire such a right by means of such a purchase. There is no room, therefore, for the application of the doctrine of merger. No confusion of rights arose from the purchase of the boats. On the contrary, the effect of the sale was to prevent the possibility of a confusion of rights.

I am therefore of the opinion that the mortgage, which is the foundation of the petitioner's claim, was not extinguished by the marshal's sale. Some other points were made adverse to the petition, but they do not appear to me to require special attention. One of them, relating to the proof of the amount due upon the mortgage, I understand to be assented to by the petition. All the other objections to the claim of the petitioner are therefore overruled, and the cases sent back to the commissioner for further proof as to the amount due upon the petitioner's mortgage.

Case No. 13,717.

The SYRACUSE.

[6 Blatchf. 2.] [1]

Circuit Court, S. D. New York. Nov. 27, 1867.[2]

TOWAGE — CONTRACT — NEGLIGENCE — NEW YORK HARBOR.

1. A contract by a steamer to tow a canal boat, at the risk of the canal boat, does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.

[Cited in The M. J. Cummings, 18 Fed. 183; The Packer, 28 Fed. 158; The Jonty Jenks, 54 Fed. 1023.]

2. Where a steamboat, with thirty-five boats in tow, is endeavoring to pass around the Battery, at New York, from the North river into the East river, she should, if the harbor is crowded with vessels at anchor, pass around Governor's Island, and come up into the East river through Buttermilk channel.

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

This was a libel, in rem, filed in the district court, against the steamboat Syracuse, by the owner of a canal boat that was being towed by her from Albany to New York, to recover for the damages sustained by the canal boat, by her coming in contact, while so being towed, with a brig which was at anchor near the Battery, at New York. The district court decreed for the libellant [Case No. 8,068], and the claimant appealed to this court.

James C. Carter, for libellant.

Robert D. Benedict, for claimant.

NELSON, Circuit Justice. One ground of defence set up is, that, by the contract of towage, it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is, that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.

On the question of negligence, the court below decided against the steamboat, in ac-

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

[2] [Affirming Case No. 8,068. Decree of circuit court affirmed by supreme court in 12 Wall. (79 U. S.) 167.]

cordance, I think, with the weight of the evidence. The steamboat was making the circuit to get into the East river, the tide being ebb. The weight of the proof is, that there was room sufficient, with the exercise of proper caution and care, to make the turn with safety, and avoid vessels at anchor. Besides, even conceding the crowded condition of the harbor, the steamboat should have followed the precaution of one which, with as large a tow, thirty-five boats, had gone down just ahead of her, and, to avoid danger, had passed around Governor's Island, and come up into the East river through Buttermilk channel. Decree affirmed.

[On appeal to the supreme court, the judgment of the circuit court was affirmed. 12 Wall. (79 U. S.) 167.]

Case No. 13,718.

The SYRACUSE.

[6 Blatchf. 238.] [1]

Circuit Court, S. D. New York. Nov. 20, 1868.[2]

COLLISION—RUNNING AT NIGHT—PRACTICE IN ADMIRALTY—TAKING TESTIMONY.

1. A steamboat was held in fault, in this case, for running at too high a rate of speed through a crowd of vessels, in the night time, the lights of such vessels being seen by her.

2. The practice of taking down by questions and answers, and not by way of narrative, the testimony given viva voce, in open court, in admiralty suits, reprobated.

3. Rules, on that subject, made by the circuit and district courts of this district.

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

This was a libel in rem, filed in the district court, by the owner of the steamboat Rip Van Winkle against the steamboat Syracuse, to recover for the damages caused to the former vessel, by a collision which occurred, on the Hudson river, between one and two o'clock a. m., on the 16th of May, 1866, opposite the buoy on the west bank of Percy's Reach, near the city of Hudson, between the Rip Van Winkle and a barge that was in tow of and lashed to the port side of the Syracuse. The collision took place while the Rip Van Winkle was running diagonally across the river from its western shore to its eastern shore, she being bound up the river, and the Syracuse being bound down. The district court decreed for the libellant [Case unreported], and the claimants appealed to this court.

Dennis McMahon, for libellant.

Erastus C. Benedict and Robert D. Benedict, for claimants.

NELSON, Circuit Justice, after holding, that, on the proofs, the libellant had failed to sustain his position that the Syracuse caused the collision by suddenly altering her course, said: The proofs show that the Rip Van Winkle was clearly in fault in keeping up her high rate of speed while crossing the river at this reach, in the midst of the vessels which at this time occupied it. There were two tugs, with tows, on the western side, and one nearly opposite, on the eastern side. The morning was somewhat dark, with occasional starlight; and one of the pilots on board of the Rip Van Winkle says, that, when he first saw the lights, it appeared as if the river was filled with vessels, and that they became the subject of conversation between him and the other pilot. And yet the pilot who was in charge of the navigation of Rip Van Winkle, admits that he did not slacken his speed, but crossed among these vessels at his usual rate. That rate was seventeen miles an hour.

I cannot avoid referring to the confused and painfully tedious mode of taking the evidence in this case, by questions and answers, and not by way of narrative. The folios are fourfold in number what they would otherwise have been, and the surplus is worse than useless. I trust that this most inconvenient and embarrassing mode of taking testimony will be corrected by the rules recently adopted on the subject by the circuit and district courts. These observations are not intended to apply any more to the present case than to most of the appeals which have come before me for some time past.

The decree below is reversed, and a decree will be entered dismissing the libel.

[On appeal to the supreme court, the above decree was affirmed. 9 Wall. (76 U. S.) 672.]

The following are the rules referred to above:

Circuit Court Rule, November 17th, 1868. On the hearing, in this court, of an appeal from the district court, on any record which shall hereafter be transmitted from the district court, no statement or report found in such record, of any testimony given viva voce, in open court, in the district court, will be considered by this court as evidence, unless such testimony shall appear, on its face, to have been taken down in the same manner as in jury trials in common law issues, and not verbatim, as in depositions de bene esse.

District Court Rule, November 17th, 1868. The clerk of this court, in making up the record to be transmitted to the circuit court, on an appeal, in pursuance of rule No. 53, adopted by the supreme court, at the December term, 1854, as one of the rules for regulating proceedings in admiralty, shall not include in such record, as any portion of the testimony on the part of any party, any statement or report of any testimony given viva voce in open court, unless such testimony shall have been taken down in accordance with rules 124 and 125 of this court, and shall have become the true minutes of such testimony, in accordance with rules 124, 125, 126, and 127 of this court; and no consent of parties shall be of any avail to dispense with or vary so much of said rules 124 and 125 as requires such viva voce testimony given in open court, to be taken down in the same manner as in jury trials in common law issues, and not verbatim, as in

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

[2] [Affirmed in 9 Wall. (76 U. S.) 672.]

depositions de bene esse. Whenever such testimony shall be taken down by the clerk, the legal fees chargeable by him therefor, shall be taxable as part of the costs in the cause.

Rule 124. When either party shall require viva voce testimony given in open court, to be taken down by the clerk, pursuant to the act of congress, it shall be taken in the same manner as in jury trials on common law issues, and not verbatim, as in depositions de bene esse.

Rule 125. The notes of the judge may, by assent of parties, be used as if taken down by the clerk.

Rule 126. Either party desiring to diminish, vary, or enlarge the minutes of proofs taken by the clerk or judge, may, within two days after the trial, serve a statement of proofs on the proctor of the opposite party, and such statement, if assented to, or, if no amendments are proposed thereto, within two days thereafter, by such proctor, shall be regarded the true minutes of the testimony given, and the notes of the judge or clerk be corrected in conformity thereto.

Rule 127. If amendments are proposed, and the parties do not agree therein, the statements and amendments shall be forthwith referred to the judge, and he shall settle or determine how the facts are, and the statement thus settled or adjusted, shall be filed as the true minutes of the testimony given.

SYRACUSE, The (LANGLEY v.). See Case No. 8,068.

T.

Case No. 13,719.

TABB v. GIST et al.

[1 Brock. 33;[1] 6 Call. 279.]

Circuit Court, D. Virginia. Nov. Term, 1802.

JUDGMENT—INSANITY—PARTNERSHIP—AGREEMENT—MEMORANDUM.

1. Although a man may not be so absolutely insane, as to avoid his contracts: yet, if he labours under melancholy, it will excuse inattention to his affairs; and will authorise relief against judgments obtained against him during such a state of mind.

2. The rest of the members of a copartnery, cannot engage the firm in another partnership, so as to bind a member, who was not privy, or consenting to it. But his privity may be presumed from circumstances; and, at any rate, his remaining silent and not dissenting, after he knows of the new establishment, will be considered as acquiescence. Moreover, if it could be proved, that he had withdrawn from the old firm, before the establishment of the new, he would, by such acquiescence, still be responsible for the transactions of the new; especially, if it was generally understood, by other people, that the old firm was united with the new.

3. If there be father and son in trade in this country, and a London merchant writes to the father here, that the son, who was then in London, but about to return to Virginia, will inform him of the terms on which the London merchant will sell tobaccos for the father and son; and the son, afterwards makes a memorandum at the foot of the letter, that it was at 10s. per hogshead, although that memorandum may not have been written in the presence of the London merchant, circumstances may show, that either that or some other remuneration, less than the ordinary commission in London, was agreed upon.

The bill states, that judgments have been obtained by Samuel Gist, in this court, against John Tabb, the complainants' intestate, as surviving partner of Moss Armstead & Co., Richard Hill & Co., Richard Booker & Co., and William Watkins & Co. That, at the time of the commencement of the suits and rendition of the judgments, the intestate was in a state of mind which unfitted him for business. That a deed of trust has been executed, to secure payment thereof with interest. That Tabb was not a partner of the firms of Moss Armstead & Co. and Richard Hill & Co. That, in 1770, he entered into the firm of Richard Booker & Co.; and, in twelve months after, withdrew from it, with the consent of the other partners, although he permitted them still to retain the credit of his name. That subsequent to this event, the other partners of Richard Booker & Co., formed in their partnership character and name, two new partnerships, the one with Moss Armstead, and the other with Richard Hill; but that their intestate, as they believe, never became a member of either of those firms. That, with respect to the other judgments, a re-settlement ought to take place, as well on account of the mental derangement of Tabb, as on account of the probability, from his not being a beneficial partner in the concern of Richard Booker & Co., that the books and papers, necessary for a defence, were not in his possession. That, in and before the year 1768, Thomas Tabb, the father of John Tabb, carried on trade in Amelia county, very extensively. That, in that year, John Tabb, who was associated with his father, formed a connexion with the defendant Samuel Gist. That it was then, and had been, for some time, a custom among the London merchants to charge a commission of three per cent. on the gross amount of their sales of tobaccos consigned to them. By this mode of doing business, the London trade had been injured, because the merchants of the other ports of Great Britain sold at a fixed rate per hogshead; generally ten shillings, but frequently as low as five shillings. That a special agreement was made, by which the defendant Gist bound himself to sell the tobacco of Thomas Tabb & Son, for ten shillings per hogshead. That this special agreement was communicated to Thomas Tabb, in general terms, in

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

a letter of the 31st December, 1768. That it was the practice of Thomas Tabb, in his lifetime, and of his son after his death, to stipulate with their correspondents, for the sale of their tobacco, at a fixed price per hundred, and not at a commission on the gross amount of sales. That, upon a settlement of accounts, upon this principle, it will appear, from a letter addressed by Gist to John Tabb, that he would be indebted to Tabb between two and three thousand pounds sterling, besides a claim, on the same account, for the sales of near 300 hogsheads of tobacco then on hand, and for many other hogsheads shipped afterwards, since even omitting these articles of credit, the balance claimed by the defendant in 1792, amounts only to £246. 18s. 11½d. That, in 1775, or 1776, Gist had in his hands near 300 hogsheads of tobacco, the amount of the sales of which were not returned until after the war; and the plaintiffs have not seen them all; but the defendant states their average price at £20 sterling per hogshead. That they were, in fact, sold for a much higher price; and the plaintiffs therefore, call for an account of sales, stating specifically the time when, and the persons to whom, the several sales were made. Gist, Shore and Bennett, the trustees in the deed of trust, and the several representatives of the deceased partners of the firms, against which the judgments complained of were rendered, are made defendants, and an injunction, with general relief, prayed for. (1) The exhibits, annexed to the bill, are the deed of trust, dated the 2d of January, 1798; a letter of the 26th of February, 1798, from Thomas Shore, the agent of Gist, to Mr. Giles, one of the administrators of Tabb, mentioning the balance alleged to be due, in which he says, he takes no steps, as Mr. Giles appears to be sanguine of making some discovery to do away the claims. (2) A letter from Thomas Shore to Mr. Tabb, of the 30th of December, 1797, stating that he had sent his private account with Mr. Gist, amounting to £998. 17s. sterling, with a request that it should be bonded, which had been refused; and that, if this refusal should be persisted in, he should institute a suit on the private account, and issue executions on the judgments.

The answer of Shore to the allegation in the bill that Tabb withdrew from the firm of Richard Booker & Co., opposes (1) a letter from John Tabb to Gist, announcing the firm, and that he was a member of it; (2) articles of agreement entered into, in January, 1774, with himself, by John Tabb and Theophilus Field, the surviving partners of Richard Booker & Co., for the collection of the debts, and transacting the business of the company; (3) a letter from Tabb to Gist, dated in 1783, long after the death of Field, requiring the account against Richard Booker & Co., and William Watkins & Co., on account of which concerns, he expected to be a considerable sufferer. The answer then states, that the books of Richard Booker & Co. were taken into the possession of Tabb, who collected their debts as surviving partner; and that William Watkins died so long before the rendition of the judgments, that Tabb might have obtained possession of the books; but, even now, the complainants, who are in possession of them, allege no other inaccuracy, in the account, than respects interest. That the defendant does not admit the mental derangement of Tabb. That the defendant cannot answer the allegation of the bill respecting commissions; but supposes, from the showing of the plaintiffs, that the agreement related only to the shipments made by Thomas Tabb & Son. That, as to the shipments made since the war, he avers the allegation to be erroneous, since he well remembers hearing John Tabb say he would ship no more tobacco to Gist; because he refused to sell for a guinea per hogshead; and adhered to the old charge of three per cent. on the amount of sales. That there was an error committed by the jury, as to interest; and, annexing the accounts on which the judgments were rendered, prays that, if an account should be directed, the errors, to the prejudice of Gist, respecting interest, may be corrected. To that answer, the following exhibits are annexed: (1) A letter from John Tabb to Samuel Gist, in which he says: "That I may have some ease and leisure, I have sold two-thirds of two of my stores to Messrs. Theophilus Field and Richard Booker. The first gentleman is a partner of Mr. Call's, and a person of good fortune, at least £25,000; the latter is brought up under my father, and I well know is a careful young man. I am one-third concerned with them, though I have no trouble with the business. Mr. Booker is to have the management of the whole. I have recommended you to them as a correspondent in London, and perhaps Mr. Booker may write to you by this opportunity for some goods. Be pleased to send them, as you may be assured you shall have punctual and timely remittance. The other two stores, I continue on my own account, that I shall have it in my power to send you as much tobacco as you choose." (2) The agreement for the collection of the debts and transaction of the business of Richard Booker & Co., dated the 1st of January, 1774, signed by John Tabb and Theophilus Field. (3) A letter from Tabb to Gist, dated the 1st of August, 1783, in which he expresses a wish to receive the accounts of Richard Booker & Co., and William Watkins & Co., that provision may be made for their discharge, and transmits a bill of £300 to be passed to his credit. (4) A letter from William B. Giles to Thomas Shore, dated 12th December, 1797, in answer to one of the 30th of November, from Shore to him, in which Mr. Giles says, he is informed, by Mr. Tabb, that the debt claimed by Gist on private account was due in consequence of a charge of whole commissions, whereas the agreement

was, that the business should be transacted for half commissions. (5) A letter from Richard Booker & Co. to Gist, promising interest.

The answer of Gist states, that he believes the intestate of the complainants to have been capable of transacting business: and has understood that he assented to the justice of all the claims, with the exception of the charge of commissions, which he had fully explained to Shore in several letters. That the partnership with Richard Booker & Co., and the information respecting it, were given him by Tabb. That he knows nothing of his withdrawing from it; or of his connexion with Moss Armstead & Co., or Richard Hill & Co. That vouchers were sent over to establish the several claims; and Tabb was regularly advised of the amount of the debts from Richard Booker & Co., and William Watkins & Co. That Thomas Tabb & Son were in partnership in 1768, and drew bills to a great amount on Debert, Burkett & Sayre, to whom they shipped tobaccos, for taking them up. That John Tabb arrived in England, and found that house unable to pay his bills, in consequence of which he applied to the defendant to pay his bills, alleging that Debert, Burkett & Sayre were to have sold at ten shillings per hogshead, and he hoped the defendant would sell at the same commission. That the defendant consented from motives of regard to Tabb & Son, and a consideration of their distress; but Tabb soon afterwards sold to him so much of the tobacco as had actually arrived, and no commission was charged. That Tabb, afterwards, proposed to him to sell future consignments on the same terms with Debert, Burkett & Sayre, which he absolutely refused, but engaged to charge two and a half per cent. commission only, on the purchase of their goods, and half per cent. on their premiums of insurance only, although the usual commission, on shipping goods on credit, was five per cent.; and, on insurance, half per cent. on the sum insured. That, notwithstanding the promise of Tabb to pay interest on monies advanced, he never charged any. That this item amounts to £1624. 18s., a statement of which, with the letters of Tabb, are sent to Shore, and are believed now to be in his power. That the accounts were regularly transmitted to Tabb; and he verily believes were perfectly satisfactory. That, in his accounts of sales, the king's allowance, of ten pounds weight of tobacco, on every hogshead, were deducted from such sales, and the duties not charged thereon. That he has been informed, and believes, that about the year 1768, it was usual, for the merchants of London and Bristol, to charge a commission of three per cent. on the gross amount of sales of tobaccos consigned to them; and, for the merchants of Liverpool, to charge five shillings per hogshead, (merely to deceive the eye,) but to deduct six per cent. from the gross weight of such tobacco, whereby their commission, in fact, amounted higher than those of the merchants of London or Bristol. That the defendant admits the letter of December, 1768, but denies any knowledge of what was added by John Tabb. That this letter related to the cargo of the ship Molly, which was sold by Tabb to Lydes Lidderdale and the defendant, and no commission charged. That he also admits the letter of the 25th of March, 1769; and, after speaking of the lowness of the premium, he adds, "This, together with the commission I charge you on the sales of your tobacco, will enable you to ship to this market on such terms as to answer as well, if not better, than to any port in the kingdom." That he likewise admits the letter of the 9th of June, 1770, stating that he had sent sales of 315 hogsheads by the Nancy, last year, made out in the common form, because he did not choose his clerks should know the terms of sale, but he would credit them for the difference in the account current; that this, however, was intended only for the tobacco by the Nancy, which had been consigned to Debert, Burkett & Sayre, and which was sold by the defendant. That he also admits the letter of the 25th of March, 1771, in which he says, "You will perceive, in your account current, that I have not charged you any interest, that shall come in against the commission on your tobacco, which I did not care should be seen in the counting house;" but that this also refers to the cargo of the Nancy. That the defendant believes, that the claims stated in the accounts presented by his agent Shore, in 1792, claiming a balance of £246. 18s. 11½d. are just, so far as he knows or believes: but that errors were afterwards discovered, to the prejudice of the defendant, which occasioned them to be re-stated, when the balance was increased to £659. 6s. 10½d. exclusive of interest. That he denies the allegations of the bill respecting the tobaccos on hand in 1775 or 1776; but admits that he did sell tobaccos when the intercourse between the two countries was stopped: accounts of which sales were transmitted to Tabb, when it was opened; with which accounts, he appeared to be perfectly satisfied. This answer was sworn to on the 27th of October, 1801.

The further answer of Gist states, at large, the letter of the 25th of March, 1769, and says, that the defendant believes, that the expression concerning the commission on tobacco, relates only to the cargo of the Nancy, particularly mentioned in his former answer. That he did agree to sell the tobacco consigned to Debert, Burkett & Sayre, on the same terms they were to have sold on; but avers the agreement to have extended to no other tobacco. That he positively refused to sell other tobaccos, to be consigned in future, on the same terms, which was perfectly understood by Tabb.

That the sale of a large part of the tobaccos consigned to Debert, Burkett & Sayre, by Tabb, altered the contract; and, in his opinion, authorised him to charge the usual commission on the cargo of the Nancy, which alone remained unsold by Tabb. That therefore he did charge on that cargo, the usual commission of two and a half per cent.: which was the condition on which he agreed, with John Tabb, to receive all future consignments, and this is the commission alluded to in the letter of the 25th of March, 1769; and not a commission of ten shillings per hogshead. Neither Thomas, or John Tabb, ever objected to the charge of commission in his accounts, and he believes they were perfectly satisfied with them. That, after the death of Thomas Tabb, John Tabb did complain of the commission charged on the cargo of the Nancy, but he did, for the reasons before mentioned, decline to allow it: in which he thinks himself justifiable, and still insists on retaining the charge. That, with respect to future consignments, he only consented to receive them to be sold on a commission of two and a half per cent., leaving it to Tabb to risk the loss from any failure of a purchaser, or to pay him half per cent. for insurance: and, as Tabb never objected to his accounts, he considered him as acquiescing under the charge, and never debited him with the bad debts, although he sustained very heavy losses in the course of these transactions. That he sold about 2,500 hogsheads on their account; and they never objected to those terms. That the complainants gained the value of the loose tobacco added to the weight; and their accounts of sales were regularly transmitted for seven years, without a single complaint, except as to the cargo of the Nancy. The exhibits attached to this answer, are: (1) Gist's letter to John Tabb, of 6th December, 1768, relating only to a wheat speculation. (2) The letter of December 31, 1768: that of March 25, 1769: that of March 24, 1771; and a letter from Gist of the 31st of March, 1794, to William Watkins & Co. (3) A letter from John Tabb, of the 15th of January, 1774, stating that he expects to collect the whole of the debt of Richard Hill & Co. (4) The letter from Shore to Tabb, of the 30th December, 1797, respecting the private account of Tabb. There are sundry depositions, relative to the state of Mr. Tabb's mind. Doctor Shore proves, that he was confined, in 1785, 1786, on account of its diseased state. Ross, that a change in him took place in 1784, 1785; when he grew melancholy, and thinks he was deranged from that period. T. Bolling was agent for him, and always followed the directions of Mrs. Tabb, thinking him incompetent to do business. S. Bolling that he was deranged in 1785. Piles, his clerk, that the change commenced in August, 1785, and continued during his life.

Hay & Wickham, for plaintiffs, contended:

(1) That Mr. Tabb was so deranged in his mind, that his representatives ought not to be bound by the judgments, which had been rendered against him. That it was proved, that, from the year 1785, to the date of those judgments, he was totally unfit for business of any kind; that, in consequence thereof, he was, by the advice of his physicians, put under confinement for part of the time; grew melancholy, and continued so during the rest of his life.

(2) That Mr. Tabb was neither a partner of, nor security for, Richard Hill & Co. and Moss Armstead & Co. That he was not privy to their establishment; and the other members could not bind him, in such an undertaking, without his knowledge, as the transactions were out of the common course of the copartnery. Wats. Partn. 130. That Shore proved that Mr. Tabb left the concern of Richard Booker & Co. within twelve months after it was formed. That Gist never regarded him as a security; for, in his letter of the 8th of August, 1772, he says that Booker recommended Richard Hill & Co.; but if Mr. Tabb thought them not safe, he was to get security before the goods were delivered. In April, 1773, he repeats the recommendation, and adds, you have not told me who they were. But above all, in April, 1775, he says he has debited Mr. Tabb with the monies received by him, of Richard Hill & Co. and begs him to receive as much as possible from his other debts.

(3) That Gist was bound by the contract to sell the tobaccos consigned for a commission of ten shillings per hogshead only, instead of the three per cent. on the gross sales, charged by him. That the allegations of the bill are express upon that point; and ought to have been answered specifically; which was not done; and Gist's own letters, as well as John Tabb's memorandum upon that of the 31st of December, 1768, were conclusive against him.

(4) That payment of any part of the judgments, ought not to be enforced, until a fair account of the sales of the tobaccos on hand, in 1775, 1776, was rendered.

G. K. Taylor and Mr. Call, contra.

The derangement of Tabb's mind is not established; the most that can be derived from the testimony is, that he was sometimes melancholy, but utter incapacity is not proved. Tabb knew and approved of the establishments of Richard Hill & Co., and Moss Armstead & Co., at the time of their formation: for Booker had been brought up in his father's counting house, and had the entire confidence of Mr. Tabb himself; and therefore, it is impossible to believe that he had not consulted him upon such important affairs. But whether he knew of the formation of them originally, or not, it is plain he knew of them afterwards; and, as he

never dissented, he must be considered as having assented to them from the beginning. Gist was, naturally, led, from the letter of Tabb, and the recommendation of Richard Booker & Co., to believe, that either a partnership, or some agreement for mutual obligation, subsisted between them; which justified his confidence in the responsibility of Richard Booker & Co. for the shipments. Tabb was a continuing partner of Richard Booker & Co.; and responsible for all their undertakings: which is proved by the articles between Tabb and Field, as surviving partners, and Shore; by sundry letters, the advertisement in the newspapers in May, 1784; and various other circumstances. The inference of law is, that the transactions of the firm were founded on the implied agreement of all the partners, as there is a reciprocal confidence in each, that the principal managers will act for the benefit of the whole. The answer is completely responsive to the bill, and must be disproved, or it is conclusive. The accounts exhibited the transactions fairly and fully; and, if wrong, would, and ought, to have been objected to. John Tabb's memorandum to Gist's letter was immaterial, as Gist was not privy to it; and it does not even appear when it was made. The connexion between Richard Booker & Co., and Richard Hill & Co., and Moss Armstead & Co. was matter of general notoriety; which is sufficient in a case of this nature: and, therefore, Tabb ought to prove dissent, or the contrary be presumed. The accounts had all been sent prior to the war, and no exception taken, which precludes the complainants from objecting to them now. 1 Vin. Supp. 44; 1 Eq. Cas. Abr. 13. The plaintiff's own documents prove that Tabb was considered as a partner.

Cur. adv. vult.

MARSHALL, Circuit Justice. This suit is brought to enjoin judgments to a large amount obtained by the defendant Samuel Gist, against the intestate of the complainants, as surviving partner of Moss Armstead & Co., Richard Hill & Co., Richard Booker & Co., and William Watkins & Co. The points made by the counsel for the complainants are: (1) That their intestate was in such a state of mental derangement when the suits were instituted, and the judgments complained of were rendered, that those judgments ought not to bind him; and his representatives ought yet to be permitted to defend his estate against the claims on which they are founded. (2) That he is not liable for the debts of Moss Armstead & Co., and Richard Hill & Co.; because he was never a member of either of those firms. (3) That Samuel Gist is greatly indebted to their intestate on private account; which debt ought to be opposed to the debts due from him as surviving partner of Richard Booker & Co., and William Watkins & Co.

Without going into a minute investigation of the testimony respecting Mr. Tabb's state of mind for several years before his death; or determining, whether its derangement was so complete, during the whole of that time, as to invalidate any specific contract he might have entered into, it is sufficient to observe, that the condition of his mind was certainly such, as might well account for his having failed to search out, and set up, a real defence, at law; and therefore, if he possessed such real defence, the judgments ought not to preclude his representatives from it now. The question, whether he was a partner of either or both the concerns of Richard Hill & Co., and Moss Armstead & Co., is therefore considered as now perfectly open, to be decided on such testimony as may be adduced by either party. It is admitted that Mr. Tabb was a partner of Richard Hill & Co., and that Richard Booker & Co. held an interest in Moss Armstead & Co. and Richard Hill & Co.: But it is denied, that Mr. Tabb knew of that interest; and it is contended, that he could not be made a partner of those firms by any act of his co-partners, or otherwise, than by his own consent. It is also admitted, that Gist was unacquainted with the members of either Richard Hill & Co., or Moss Armstead & Co.; that he did not credit them on the confidence, that Richard Booker & Co. were of the partnership: and, of consequence, that the accountability of Mr. Tabb, for them, cannot be maintained, on the ground of their being led to consider him as a partner.

It was stated by one of the counsel for the defendants, that, being bound by all the acts of the company, Mr. Tabb became a member of any copartnery into which Richard Booker & Co. should enter, whether he did, or did not, assent individually to being engaged. To this opinion, in the latitude in which it was laid down, I cannot subscribe; and, if in the progress of the suit, it should be deemed necessary to insist upon it, and the gentleman who has advanced it, still retains it, I will thank him to furnish me with those authorities, on which, he may rely. The opinion to which I now incline is, that the assent of any member of a particular firm, is neccessary to engage him as a member of a new firm; and that the general authority given by all to each, or even to the acting or managing partners, to bind the whole company, does not extend to the erection of new companies, composed of new members. In order to subject Mr. Tabb as a partner of Richard Hill & Co., and Moss Armstead & Co., his consent to become a partner must be shown. But to show this consent, an express declaration from himself cannot be considered as indispensable; other testimony ought to be received, and circumstances must be resorted to in order to ascertain the fact.

It is relied upon, by the counsel for the defendant, as prima facie evidence of his assent, that Booker and Field cannot be presumed to have engaged the firm in a new partnership,

without his approbation. The circumstances of the company strongly support this presumption. The members of it resided at no great distance, and its business was conducted almost under the eye of Mr. Tabb. In the ordinary course of human affairs, he must frequently have fallen in with his partners, and have made some inquiries into the affairs of the company. It is presuming too much to suppose he could have remained uninformed of a circumstance so interesting to himself, as that Richard Booker & Co., of whom he was one, had entered into a new partnership; and, if he did know it, and made no objection to it, his consent to the transaction would very certainly be implied. It is not stated that the members composing the firms of Richard Hill & Co., and Moss Armstead & Co., were concealed from the world; or less known than is usual on such occasions. Nor is it stated, not to have been a matter of notoriety, that a share in each was held by Richard Booker & Co. I cannot, therefore, presume any extraordinary concealment to have been used, or that Mr. Tabb was unacquainted with a circumstance which it so much concerned him to know, and which it was so much in his power to know

This presumption has been met by the complainants, who state that their intestate withdrew himself in 1771 from the copartnery of Richard Booker & Co., and might therefore very well be presumed no longer to inquire concerning their transactions. The articles of agreement entered into with Shore, in 1774, seem to me to be very strong on this point. In that paper, Tabb states himself to be one of the surviving partners of the company: he contracts with an agent for the management of its affairs; binds himself for the salary of that agent, whom he obliges to account to him as well as to Theophilus Field, and to pay him as well as Field, the money which might be collected. If he had left only his name to the company, and had no real interest in it, this agreement would, most probably, have been expressed in very different terms. Another evidence on this subject is, I think, his opening a letter to Richard Booker & Co. It is a liberty which only a member of that company would have taken. The counsel for Mr. Tabb's administrators, endeavour to account for it by stating that the London mark was on the letter, and might well be considered by him as containing a dun. That, I believe, does not follow. Letters from London to American merchants are not necessarily written for the purpose of demanding money. But should this even be conceded, the fact would still evidence a solicitude to inquire into the affairs of Richard Booker & Co.; and that solicitude would have informed him that they had taken an interest in the other firms.

Another circumstance of some weight with me, is furnished by the correspondence with Gist. Richard Booker & Co. (which Gist considered as Tabb), had recommended Moss Armstead & Co., and Richard Hill & Co.; and Gist complained of their want of punctuality. He inquires who they are, and employs Tabb to collect from them. It is scarcely possible, that, under such circumstances, Tabb should not learn that Richard Booker & Co. were interested with them. That an open letter, directed to Richard Hill & Co., should be among Tabb's papers, is not a circumstance of entire indifference. It is true, that letter may have been obtained by his administrators since his death, or may have been received by himself, after he was rendered liable as a partner. If so, this, or any other circumstance tending to do away with the influence arising from being in possession of such a letter, may, and ought to be shown. It does not appear when Tabb, if he ever did, withdrew from Richard Booker & Co.; or when the two other companies were formed. It is said by the plaintiff's counsel, that he withdrew in 1771; and, in January, 1772, Gist writes to Tabb concerning Richard Hill & Co., as his correspondents, and asks concerning their punctuality. It is probable that the new companies were formed prior to the date of the supposed withdrawing; and if so, then, according to the view I have been taking, he would be responsible, whether he withdrew or not: But, if afterwards, (supposing the withdrawing can be proved), even then, according to the same view, he may be liable to one not knowing that he had withdrawn, as he suffered his name to be used, without any public declaration of dissent. It is unnecessary, however, to decide this question absolutely now; other testimony may be obtained, which may change its present appearance. There may, perhaps, be the testimony of merchants of that day to show that it either was, or was not understood that Richard Booker & Co. had an interest in the two firms of Richard Hill & Co. and Moss Armstead & Co., or other circumstances may be adduced to influence the case. But I have thought it right to signify the impressions received from the testimony now in the cause. If nothing further should appear, the opinion to which I strongly incline is, that Mr. Tabb cannot be considered as ignorant of the copartnership formed by Richard Booker & Co., with Moss Armstead & Co., and Richard Hill & Co.; and, if he was not ignorant of those copartnerships, his silent acquiescence, under their use of the firm, to which he was known to belong, is evidence of his consent that they should use it.

The most material inquiry in the case is, to what commissions was the defendant, Samuel Gist, entitled, on the sales of the tobaccos shipped to him by Tabb? The bill charges expressly, an agreement entered into with Samuel Gist, by John Tabb, while in England, in 1768, that he should sell the tobaccos shipped to him by Thomas Tabb & Son, at a commission of ten shillings per hogshead. The counsel for the complainants suppose this allegation of the bill to have required a much more explicit answer than it has received; and presuming it to have been evaded, infer from

thence a consciousness, in the defendant Gist, of its truth. If this explicit allegation had not been as explicitly answered, the answer might very properly have been excepted to, as insufficient. But, on examining the answer, it does not appear to me liable to the objection which has been made to it. The defendant, Gist, states, that Thomas Tabb & Son had, in 1768, shipped, in different vessels, a very large quantity of tobacco to Debert, Burkett & Sayre, and had drawn bills, on them, to a great amount. That John Tabb preceded both the tobacco and bills, and on his arrival in London, found Debert, Burkett & Sayre unable to pay his bills, and unfit to be trusted with the sale of his tobacco. That, from friendship to Tabb, and compassion for his distress, he consented to sell the tobaccos consigned to Debert, Burkett & Sayre, on the same commission, at which the original consignees were to have sold them. That Tabb applied to him to sell future consignments on the same terms, but he peremptorily refused to do so. The answer then, without stating any agreement respecting commissions on future consignments of tobacco, proceeds to detail the advantageous terms on which he agreed to transact the other business of Thomas Tabb & Son, in London. In this answer no agreement whatever, respecting future commissions on the sales of tobacco, is stated.

In the supplemental answer, this subject is again taken up. The agreement for the ten shillings per hogshead is again declared to have been limited to the sales of the cargoes consigned to Debert, Burkett & Sayre; and that whole transaction is stated more in detail. The answer then proceeds to aver, explicitly, that Gist refused to extend the agreement to future consignments, and that, with respect to them, it was positively contracted that he should sell on a commission of two and a half per cent., with the addition of half per cent. for guaranteeing the debts. The answer adds another circumstance of infinite importance, which, if untrue, it is incumbent on the complainants to disprove. It is, that, for seven years, he continued to transmit accounts of sales and accounts current to Thomas Tabb, and Thomas Tabb & Son, conforming to this idea of the agreement between them, and that they never objected to such accounts. It is, I say, incumbent on the complainants to disprove it, because, if it is untrue, they must be supposed to possess the means of showing its untruth.

The counsel for Mr. Gist have insisted very strongly on the evidence furnished by the answer, which, they say, is explicit, and is responsive to the bill. It is admitted to be so; and unless there be sufficient reason for questioning the verity of these allegations of the answer, they must decide the cause. Without saying what the opinion of the court may be, when that further information shall be received, which will now be required, I think the different avermenfs of the defendant's answer, and the documents referred to, afford sufficient reason for believing that some agreement, other than that stated by Mr. Gist, must have been entered into by the parties; and, consequently, that a decision ought to be suspended for further inquiry.

I shall not rest much, on the omission in the first answer to state what was the real contract to govern future sales to be made, by Gist, for Tabb; because, although such a statement might have been expected, yet the bill does not require it; and the omission to state it was therefore excusable. But I think the motives leading to the contract for ten shillings per hogshead, on the tobaccos consigned to Debert, Burkett & Sayre, deserve some notice. Mr. Gist was aware that his consenting to sell a considerable quantity of tobacco for a commission of ten shillings per hogshead, would lead to the expectation of his continuing to sell on that commission, and might create some presumption that an agreement, to that effect, was actually made. He, therefore, searches for a motive which should discriminate between that particular transaction and the general course of business. The motive which he assigns is friendship and compassion for Tabb. One of the most opulent merchants of Virginia, having near a thousand hogsheads of tobacco at his disposal, is not much an object of compassion. But Mr. Gist very soon forgets the motives assigned for his own conduct. He considers himself as absolved from the contract he had made, by the act of Mr. Tabb in selling himself the cargo of the Molly, which amounted to about five hundred hogsheads. Now, if, from motives of friendship and compassion, he had consented to sell all the tobaccos consigned to Debert, Burkett & Sayre, at a commission which did not compensate his trouble, I cannot conceive how a diminution of the quantity to be sold, on such terms, could be considered as injurious to him. But the compassion and friendship of Mr. Gist, displays itself in a still more extraordinary manner. He represents himself to have purchased originally the whole cargo of the Molly; but that Tabb afterwards sold a part of it for about £400 more than he was to have given. This is a profit to which he thinks himself, in equity, entitled; and because another person in the market purchased the commodity of his friend at a much higher price than his compassion would allow him to give, he considers it as so much profit withdrawn from himself, for which he is entitled to compensation. In still another view, the statements of Mr. Gist on this subject deserve to be noticed. A comparison between the answers of Gist and Shore, on the subject of commission, suggests a remark too, not altogether unworthy of attention. Mr. Gist says that Mr. Tabb objected, since the conclusion of the war, to

the charge of commissions in his accounts, and that he had fully explained that subject in his letters to Mr. Shore. We should expect, then, that Mr. Shore would, in his answer, altogether omit the subject, or give the explanation he had received from Mr. Gist. He does neither. He would appear to have received no information whatever from Gist on this subject, and to remark, only, on the statement made by the complainants in their bill. This would certainly indicate that the explanation, given him by Mr. Gist, was not such as Mr. Shore chose to rely on. The parties admit some agreement in 1768. Tabb says it was for future consignments; Gist, that it was for those addressed to Debert, Burkett & Sayre.

In examining the testimony in the cause, other than is to be found in the answers themselves, the first document is that of October 10, 1768, which says, "Your son, no doubt, has acquainted you with his selling me the Thomas's cargo, and the price, as also the terms on which I have agreed to sell the Molly's cargo when it arrives; but as these things are out of the common road, I must beg you not to mention it to any person living." This letter plainly relates to a single cargo. Not to future consignments, nor to the whole tobacco consigned to Debert, Burkett & Sayre. The next letter is December 31, 1768, which says, "Your son will inform you the terms we are upon as to the commission, as well as that on which I am to sell your tobacco; which I desire may be an entire secret." At the foot of this letter is a memorandum made by Mr. Tabb, at what time is unknown, in these words, "The terms for selling the tobacco was ten shillings per hogshead for commission, and we to have every advantage for king's allowance, &c." This letter is averred by the defendant to relate, only, to the cargo of the Molly, and in this he may be correct; but I will state some reasons in support of a supposition that he has, perhaps, confounded dates, and that this observation was rather designed for the letter of October 10th, than that of December 31st. Mr. Gist had already mentioned the Molly to Mr. Tabb, and had expressed a confidence, that his son had informed him of the terms on which that cargo was to be sold. When speaking of a contract to have related to a single vessel, he uses terms applying only to a single vessel; when, then, he changes his language, and uses terms applicable to the business generally, there is reason to suppose he speaks of a contract embracing the business generally. He says too, "Your son will inform you;" a phraseology which, contrasted with that of the letter of October 10th, strongly indicates a different contract, of which information had not probably been before given. It is the language which would be used, if the son was then about to sail, or had just sailed, for America; and would give the information verbally. The idea, that the fact is so, receives some support from the circumstance that the letter of December 31st, is addressed to Thomas Tabb, and that of March 25th following, is addressed to Thomas Tabb & Son. It is true, that the words "your son will inform you the terms we are upon as to the commission, as well as that on which I am to sell your tobacco," may be limited by other testimony to a single cargo; but it is not less true, that the words naturally import a general contract; and when it is observed that the agreement, respecting the commission, is confessedly a general one, there is the more reason to believe, that that respecting the tobacco, made between the same persons, probably at the same time, relative to a branch of the same business, and communicated in the same sentence, and with the same mode of expression, was of the same extent. The whole agreement then subsisting, may have respected a single cargo, and the agreement may have been extended. This is said to be explained by the letter of October 10th. I think so.

The next letter, upon this subject, is not to me conclusive; but I think it rather less equivocal than that which has just been noticed. It is the letter of the 25th of March, 1769, and is addressed to Thomas Tabb & Son. In that letter, Mr. Gist states his conviction that the extravagant charges on goods, together with the large commissions on tobacco, have driven the consignment business from London: He is therefore determined to do business, with punctual people, on the very best terms. This resolution is, certainly, not limited to a single transaction, but is to govern permanently; for it is to retain the consignment business, which was leaving London in consequence of the "extravagant charges on goods, together with the large commissions on tobacco;" and the business he was determined to do "on the best terms," and clearly on better terms than those which had driven the consignments elsewhere, related to the charges on goods, and the commissions on tobacco. He then proceeds to state to Mr. Tabb, the terms on which he shipped his goods, and did his insurance business, which, he adds, "with the commission I charge on the sale of your tobacco, will enable you to ship tobacco as well to this port, as to any other place in the kingdom: indeed the prices are always better here, but it is the great charge attending it that destroys the sale." A criticism on this sentence cannot be necessary to show that the words, according to their natural import, relate to the general course of doing business; and, if to any specific agreement whatever, to one which extends to the business generally. Mr. Gist, however, in his answer, avers that these expressions allude only to an agreement to sell the cargo of the Nancy, and that no agreement, at the rate at which that cargo was sold, was ever made

for future consignments. This may be true. Admitting it to be true, the necessary inquiry is, what then is the operation of this letter?

An agreement has been made between Gist and the younger Tabb for his father, for the sale of a particular cargo of tobacco, at a specified commission. They separate, and the younger Tabb returns to America, and reports the contract to his father. Gist then writes a letter to Tabb & Son, in which he represents the high charges on goods, and on the sales of tobacco, as the causes which had driven the consignment business from London, whither the price of tobacco would allure it, but for these causes. He is determined to do business on better terms. You perceive, he says, what I have charged on the shipment of your goods, and this, with the commission I charge on your tobacco, will enable you to ship to this port. What commission is here alluded to? Mr. Gist says, the commission on the sales of the cargo of the Nancy. Be it so. But how was that? The letter is clearly designed to affect his future conduct through the medium of his future interest. It must, then, be understood as a proposition for the transaction of future business. The present commission on the cargo of the Nancy, as well as the present charge on insurance, and shipment of goods, must be understood as constituting the rule for future charges, or the letter is deceptive. It would seem as if Mr. Gist was aware of this, and therefore his answer proceeds to state, that in consequence of the sale, by Mr Tabb's agreement, of the greater part of the tobacco consigned to Debert, Burkett & Sayre, he had considered himself as absolved from the contract of selling the cargo of the Nancy at ten shillings per hogshead, and had determined to charge two and a half per cent. on the gross amount of sales, and this was the commission particularly agreed on for the business generally with Tabb, and the particular commission alluded to in his letter of the 25th of March.

Let us inquire how far this explanation will answer the purpose. The letter does not mention the amount of the commission, but plainly alludes to a charge supposed to be known to Mr. Tabb This, he says, was the charge on the sales of the cargo of the Nancy. Mr. John Tabb left England in the expectation that this cargo was to be sold according to the original contract, for Mr. Gist does not allege that he ever told Mr. Tabb he intended to charge a higher commission than was stipulated. The sales of the cargo did not accompany this letter. They were not sent till June in the following year. How then could Mr. Gist refer to two and a half pe_ cent. as the commission on the sales of the cargo, when he had stipulated to sell for ten shillings, and had never informed Mr. Tabb of his internal resolution to charge a higher commission? Admitting Mr. Tabb to understand this as referring to the sales of that cargo, he must understand it as referring to ten shillings per hogshead commission: because that was the agreement, and it was not changed. But it may be supposed, that this is mere inaccuracy of expression, and that the words refer to the general agreement of two and a half per cent. commission asserted in the answer. Even this will not serve the purpose. The letter apparently alludes to a commission lower than that which it complains of as too high, and the answer expressly states, that the commission alluded to was the customary commission. The defendant also states, that he determined to charge a commission of two and a half per cent., when the letter of the 25th of March was written, and that this is the commission that letter alludes to. Yet, in his letter of the 9th June, 1770, he says, "I have already wrote you by this opportunity, and sent sales of your 315 hogsheads by the Nancy last year, which you will see are made out in the common way. as I did not care to let even my clerks know it was to be made out different. I will give you credit for the difference in account current." Even so late as the 24th March, 1771, he says: "You will perceive in your account current, I have not charged you any interest; that shall come in against the commission on your tobacco, which I did not care should be seen in the counting house." Thus, two years after the letter was written, which Mr. Gist asserts alluded to a different commission from that which had been stipulated, he continues to assure Mr. Tabb that the stipulation will be observed. This is not all. There is no reason to suppose the account current, alluded to, contained only the sales of the cargo of the Nancy. His expression is, "I send all your accounts;" and in a different part of the same letter, he speaks of the sales of a different cargo,. as being transmitted. There is no reason to suppose that the commission on the tobacco, which is spoken of generally, is not the commission on all the tobaccos of which accounts of sales were rendered by that conveyance, and the letter makes no discrimination between the commission chargeable on the different cargoes.

I have still another observation to make on this subject. There is much reason to doubt, whether the Nancy was really consigned to Debert, Burkett & Sayre. The allegation of the answer is not, in this respect, responsive to the bill, and, consequently, is not evidence. It does not appear when Mr. Tabb arrived in England. No doubt, on his first arrival, he informed his father of the state of the house of Debert, Burkett & Sayre; and, of consequence, no further consignments would be made to them. How soon this information may have been given, does not appear, but, it certainly, very considerably preceded the 10th of Oc-

tober, 1768; because, on that day, Gist gives his father notice, that he had before that time agreed to sell the cargo of the Molly, and purchased from John Tabb, the cargo of the Thomas, and had loaded her with goods, by John Tabb's order, to the amount of £1137. 8s. 0½d. When the Nancy arrived is not stated; but it was certainly some time in the year 1769. The letter of June, 1770, speaks of her as a vessel arriving in 1769. These dates make it very probable, though by no means certain, that she was originally consigned to Gist himself. These appearances, from the answer and letters, the counsel for Mr. Gist have endeavoured to account for in different ways, but they have used one argument which would have very great weight if true; and which, if clearly supported by the fact, might perhaps be conclusive. It is that the accounts current, transmitted by Mr. Gist, have regularly been received by Mr. Tabb, and never complained of. For this assertion they have the evidence of the answer, and from the nature of mercantile transactions, it must be supposed true, if not disproved by the complainants.

The complainants have adduced several letters on which they rely, but there are two which seem to me really to evidence that Mr. Tabb always considered himself as entitled to the credit he now claims. They are of March 10, 1773, and March 6, 1774. These letters demonstrate that Mr. Tabb claimed a credit for a deduction on account of the commission, and his own secret mode of transacting the business might prevent their complaining in a different manner; but they do not show what that deduction was. For this, the memorandum at the foot of the letter of the 31st of December, is appealed to. This, the answer avers Mr. Gist to be entirely ignorant of, and from the mode of expression used, there is reason to believe that the memorandum was made in Virginia. I will not now say, what its influence ought to be. The answer also admits the contract for the sales of the tobaccos consigned to Debert, Burkett & Sayre, to have stipulated for a commission of ten shillings per hogshead. These circumstances would certainly favour the opinion, that the difference between the commission charged, and ten shillings per hogshead, is the credit to which Mr. Tabb is entitled, if it shall be ultimately determined that he is entitled to any thing. But there are other circumstances of no inconsiderable weight, which would diminish this allowance. The answer, in the most explicit terms, denies an agreement to sell generally at ten shillings; and Mr. Giles in his letter to Mr. Shore, of December 12, 1797, states his information from Mr. Tabb to be, that the business was to be done at half commissions. There is, then, a good deal of difficulty on this point; and if, on the production of the papers which will be directed, the opinion of the court should still be that the complainants are entitled to some deduction, it will then be necessary to determine what that deduction is. It is very apparent, that many letters and papers must have passed between the parties, which would throw light on this subject. The complainants require that Mr. Gist should be directed to produce on oath all the letters he ever received from the intestate of the complainants. I have no objection to making such an order, but I think justice requires, that it should comprehend the complainants likewise. The letter book of Mr. Tabb, in such a case as this, ought to be exhibited. That a merchant doing business as extensively as Mr. Tabb, should be without a letter book, is a phenomenon in the mercantile world, which requires very clear testimony to be credited.

The shipments made since the war, I consider as very clearly out of the contract. There is not only evidence in the case that Gist claimed the customary commission, but I am well satisfied that the war terminated the old contract.

The complainants also require, that Gist should be compelled to exhibit accounts of sales of the tobaccos in his hands in 1775 and 1776. If he has not already exhibited such accounts, it surely would be reasonable that he should do so. The bill does not allege that they have not been received, and the answer states them to have been transmitted. If, therefore, to transmit duplicates would be any inconvenience to Mr. Gist, I certainly should not direct it; but as they may be exhibited without inconvenience, I have no objection to ordering them, though if any expense attends the filing of them, it ought to be defrayed by the complainants.

There is another part of the case which may be of very considerable magnitude. The answer states that several calculations of interest have been omitted, to which the defendant Gist is entitled. The letters leave it not improbable, that these omissions were designed to balance the commissions. Should the fact be so, and Mr. Tabb's estate should be credited with the difference of commissions, it is reasonable that it should be debited with the omissions of interest. I give no opinion as to the fact; but I shall direct the commissioner to notice it in the account.

On these principles, the following decree is to be entered: This cause which abates as to the defendant, Thomas Shore, by his death, came on to be heard on the bill, answers, (that of Thomas Shore being read by consent), the depositions and other exhibits filed in the cause, and was argued by counsel. On consideration whereof, it is the opinion of the court that the complainants ought not to be precluded by the proceedings at law, from setting up in this court a just defence, (if any they have,) against the judgments in the bill mention-

ed. The several claims, therefore, on which the judgments against John Tabb, as surviving partner of Richard Booker & Co., William Watkins & Co., Richard Hill & Co., and Moss Armstead & Co., were referred, are referred to one of the commissioners of this court, who is directed to examine, settle and report the same, stating such matters specially, as either party may require, or he may think fit. And the court is further of opinion, that if, as is in the bill alleged, any balance be due from Samuel Gist to the estate of John Tabb, on the various transactions between them, that balance ought to be set off from the judgments obtained by the said Samuel Gist, against the said John Tabb, as surviving partner of the several trading companies aforementioned, to ascertain which fact, the accounts between the said Samuel Gist and the said John Tabb, are also referred to one of the commissioners of this court to be examined and settled by him. And he is specially directed to state the accounts between the parties on the following principles: (1) So as to show how they will stand, allowing the defendant, Samuel Gist, a commission of ten shillings sterling money of Great Britain, on each hogshead of tobacco shipped to him by Thomas Tabb & Son, and John Tabb, previous to the —— day of ——, 1775, and sold by him on their account, or on the account of either of them subsequent to the 31st of December, in the year 1768. (2) So as to show how the same accounts will stand on an allowance of one and one half per cent. commission on the gross amount of sales of all tobaccos shipped and sold by the same parties respectively, between the same periods. (3) In making up these accounts, he is to calculate interest on the sums due either of the parties, according to any special agreement which may be proved to have subsisted between them, or in default of such agreement being shown, according to the custom of merchants; however, in the accounts rendered, such calculations of interest may have been omitted.

The commissioner is further directed also to state the accounts in such other manner as may be required by either of the parties, stating such matters specially as they or either of them may direct, or he may think fit, and make report to the court in order to a final decree. And the more effectually to enable the commissioner to make up his report, it is further ordered and directed, that the said Samuel Gist do, on oath, exhibit and file with the clerk of this court, all the letters he has ever received from Thomas or John Tabb between the 1st day of January, 1769, and the —— day of ——, 1775, or if it be not in his power to produce such letters, that he state in like manner the cause of such disability. And he is further directed to file with the clerk of this court, such accounts of sales of all the tobaccos received by him prior to the signing the preliminary articles of peace between the United States of America, and his Britannic majesty, to be sold on account of the said John Tabb, as had not been rendered by him previous to the last mentioned time. And it is further ordered, that the complainants do file with the clerk of this court the letter book of the said John Tabb, or copies of all the letters written by him to the said Samuel Gist, previous to the —— day of ——, in the year 1775, verified on oath, or if there be no letter book, that they do, on oath, file all the copies which are, or have been, in their possession. All which matters and things are decreed and ordered this 9th day of December, 1802; and by consent of parties, general commissions are awarded the parties, to be executed before any notary public, upon giving reasonable notice thereof.

TABER (BRUNENT v.). See Case No. 2,054.

TABER (HUNNEWELL v.). See Case No. 6,880.

Case No. 13,720.

TABER et al. v. JENNY et al.

[1 Spr. 315;[1] 19 Law Rep. 27.]

District Court. D. Massachusetts. Jan. 10, 1856.

PLEADING IN ADMIRALTY—REPLICATION—AWARD—WHALE FISHERY—TORTIOUS TAKING OF ANCHORED WHALE—DAMAGES—PROPERTY IN OIL AND BONE.

1. A replication merely denying the truth of the answer, is not required in this district; but where the libellant relies on new matter, in avoidance, he should put it on the record by a supplemental libel, to which the respondents should answer.

[Cited in The Edwin Baxter, 32 Fed. 296.]

2. When a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors.

[Cited in Maltby v. Steam Derrick-Boat, Case No. 9,000; Ghen v. Rich, 8 Fed. 160.]

3. Where such a whale, still anchored, is afterwards found by another ship, there is no usage, or principle of law, by which the property of the original captors is divested, even though the whale may have dragged from its first anchorage.

[Cited in Ghen v. Rich, 8 Fed. 160; Simpson v. The Ceres, Case No. 12,881; Cope v. Vallette Dry-Dock Co., 16 Fed. 926.]

4. Where two vessels are under a contract of mate-ship, there is no such joint property in a whale taken by one of them, as requires the owners of both to join in an action for its tortious conversion.

5. An award, where one of the arbitrators has prejudged the cause, will be set aside.

[Cited in Paddock v. Commercial Ins. Co., 104 Mass. 531. Questioned in The Union, 20 Fed. 541.]

6. An umpire must hear the parties.

[Cited in Day v. Hammond, 57 N. Y. 486; Ingraham v. Whitmore, 75 Ill. 31.]

---

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

7. The measure of damages for the tortious taking of a whale, is to be full indemnity to the libellants for all they have lost by the taking, and no more.

[Cited in Bourne v. Ashley, Case No. 1,699; The Ontario, Id. 10,543; Swift v. Brownell, Id. 13,695; Guibert v. British Ship George Bell, 3 Fed. 585.]

8. The report of an assessor will not be disturbed, unless it be shown that he is wrong.

9. If substantial doubts exist, as to any of the elements of damage, they must operate against the wrong-doer.

10. A seaman, in the whale fishery, has no property in the oil or bone taken; and if this is wrongfully taken away by others, it is the right and duty of the owners to pursue the proper remedy.

[Cited in Lewis v. Chadbourne, 54 Me. 485.]

11. In such suit, no deduction is to be made, because some of the seamen have released their claim to the owners.

12. Nor because the wrong-doer has bestowed labor in securing and transporting the property, where that could have been done, without cost, by the owners.

13. Nor for some uncertainty, whether the owner could have found and secured the property.

This was a libel in admiralty, brought by the owners of the ship Hillman, of New Bedford, against the owners of the ship Zone, of Fairhaven, for damages by the alleged wrongful taking of a whale. The facts sufficiently appear in the opinion of the court.

The respondents, in their answer, in addition to other grounds of defence, set up an award previous to the filing of the libel. The libellants admitted the fact of the award, but contended that it was invalid; first, because one of the referees had formed and expressed an opinion against them, before his appointment; and second, because the umpire appointed upon the disagreement of the original referees, had decided the case merely from the statements of the referees.

To this latter point, the libellants cited Russ. Arb. 230, 231; Falconer v. Montgomery, 4 Dall. [4 U. S.] 233; Passmore v. Pettit, Id. 271; and Salkeld v. Slater, 12 Adol. & E. 767. As to the question of property, they relied on the principles stated in Sandars' Justinian, 181, 182, and Vinnius' Com. lib. 2, tit. 1, §§ 13–16.

T. D. Eliot and R. C. Pitman, for libellants.

L. F. Brigham, for respondents.

SPRAGUE, District Judge. The first question is one of practice: the only pleadings are the libel and answer. According to the practice in this district, a replication, merely denying the truth of the answer, is not necessary; the allegations of the answer are deemed to be in issue, without such formal denial. The answer here sets up an award of referees, as a bar to the libel; the libellants not denying that such an award was made, insist that it was not binding, for two reasons; first, that one of the referees had prejudged the cause; second, that the award was made by an umpire, without hearing the parties. This is new matter, in avoidance of the allegations of the answer, and should have been put on the record. This is sometimes done by a replication; but the more regular mode is by a supplemental libel, to which there should be an answer by the respondents. See note to Gladding v. Constant [Case No. 5,468]. The parties having come prepared to litigate these, as well as other points in controversy, and having engaged that a supplemental libel and answer shall be filed, so that all the issues shall appear upon the record, I proceeded at their request, to hear the cause, and will now state the conclusions at which I have arrived upon the merits.

This is a libel to recover the value of a whale. In the summer of 1852, the ship Hillman, of New Bedford, and the ship Zone, of Fairhaven, were whaling in the Ochotsk Sea. On the morning of the 23d of July, one of the boats of the Hillman pursued and killed a whale, but being alone, and the ship being at a distance, and obscured by a fog, the boat was unable to take the whale to the ship, and for the purpose of securing it, anchored it in fifteen fathoms of water, with an anchor weighing about sixty pounds, and a double tow-line with about thirty-seven fathoms scope, and a waif was fixed upon it. This waif was a staff, about eight feet long, with a flag at its head. After the whale was anchored, the boat lay by it nearly an hour to ascertain that it did not drift; the boat then went to the shore, which was not many miles distant. A few hours after the whale had been thus left by the Hillman's boat, a boat belonging to the Zone, with her captain on board, came across the whale. The captain took down the waif, and then went to his own ship, which was quite near; he there ordered his mate to get into the boat, go the whale, and bring it to the ship. This was done. When the mate reached the whale, he found the tow-line and anchor attached to it, and they were both taken into his boat. The whale having been taken alongside the Zone, the crew of that vessel proceeded to cut it in, that is, to strip off the blubber and take it on board. In doing this they found two irons with the initials H. N. B., which clearly indicated that they had belonged to the Hillman, of New Bedford. These irons were taken on board the Zone, as were also the anchor and rope attached to it. The irons were left on deck, the anchor was put below. The Zone, while cutting in the whale, stood out from the shore, but on the day following, while boiling down, stood in. The Hillman's boat having, after leaving the whale, returned to the ship, and obtained the assistance of other boats, went in search of the whale, but could not find it. This was on the morning of the 24th. During that day the mate of the Hillman seeing the Zone boiling down, went on board of her and ascertained that she had taken the whale. The irons were lying upon

her deck, and he took them away. But he did not see or hear anything of the anchor and tow-line. The anchor was thrown overboard by the captain of the Zone, but at what time does not appear, except that it was before the 26th. The excuse given by him for this, was violent and abusive language in his own cabin, by Captain Bennett. That such language was used, is in proof. But that cannot justify the act of throwing the anchor overboard. On the 25th, Captain Cook, of the Hillman, and Captain Bennett, of the whale ship Massachusetts, went on board of the Zone and demanded of Captain Parker, her master, the bone and oil of the whale, which were refused. They were subsequently brought to Fairhaven, and taken and sold by the respondents. A demand for the proceeds was made upon them by the libellants, and refused.

When the whale had been killed and taken possession of by the boat of the Hillman, it became the property of the owners of that ship, and all was done which was then practicable, in order to secure it. They left it anchored with unequivocal marks of appropriation.

It having thus become the absolute property of the Hillman, was that ownership ever lost? It is contended that it was. First, by the usage peculiar to the whale fishery; or secondly, by the principles of law applicable to the facts of this case. The usage proved, is, that when a whale is found adrift on the ocean, the finding ship may appropriate it to her own use, if those who killed it do not appear and claim it before it is cut in. But, from the evidence, it does not appear that this whale was found adrift. On the contrary, I am satisfied that it was anchored when taken by the boat of the Zone. (The judge here examined the evidence.) Whether it was found in the place where it had been left by the captors, or had dragged the anchor, and if it had dragged, how far, is left in some uncertainty. I do not think it is shown to have dragged, certainly not to any considerable distance, and if it had, there is no proof of usage embracing such a case.

2. By the general principles of law, when property is separated from the owner, at sea, by force of the elements, or even by abandonment from necessity, the person who finds it has not a right to convert it to his own use, and cannot thereby divest the right of the original owner. The finder, in such case, has only the right of a salvor, and must conduct in good faith as such. If he embezzles the property, or wrongfully converts it to his own use, he may thereby forfeit his claim to salvage. In this case, the whale was not derelict, it had not been abandoned by the owner, but had been left with the intention to return, and the captor did in fact return as soon as practicable, and in less than twenty-four hours. Whether the whale, when found by the crew of the Zone, was in a condition of peril so as to be the subject of salvage service, need not now be considered, as that question is not before the court. It is not presented by the pleadings, nor by the propositions, or arguments on either side. Besides this, the conduct of the captain of the Zone was not that of a salvor, and was such as would preclude him from now assuming that character. A ship or merchandize found upon the ocean is still the property of the original owner, however distant he may be, and even although he believes it to be absolutely lost. It may, in such case, be subjected to a lien for salvage, but still the property, subject to such lien, is in the owner, and when such lien is displaced, the ownership is absolute and unincumbered. If such be the law with respect to property found derelict and drifting upon the ocean, for still stronger reasons must the right of the owner remain in full force to property which he has anchored and left only temporarily, soon to return and repossess it. That this would be so as to a vessel or boat so anchored and left, no one would doubt. But the same principle applies to this whale. By capture, killing and possession, it had become the absolute property of the libellants, and the anchor, waif and irons, were unequivocal proofs, not only that it had been killed and appropriated, but of the intention of the captors to reclaim and repossess it. It is in proof that the appearance of the whale was such, as to show to the finders that it could have been killed only a short time, not exceeding twelve hours. A whale not being the product of human care or labor, does not, of itself, purport to be property, and what would have been the right of the finders, if the captors had abandoned it without any marks of appropriation, need not now be considered. One other circumstance has been adverted to by the counsel for the respondents, as in favor of the right of the Zone. It is that the ships Massachusetts and Hillman were under a contract of mate-ship, and that on the morning of the day upon which Captain Parker found this whale, he had been on board of the Massachusetts, and was told by her captain that they had seen no whales for three days, and that Captain Parker was thereby led to the belief that this whale could not belong to either of those ships, and that there were no others near; but the captain of the Hillman was not present at that conversation, and his right is not to be impaired thereby.

It is objected, that the owners of the Massachusetts ought to have joined in this libel, because that vessel was under a contract of mate-ship with the Hillman; but it appears that such contract did not make the whale, when captured, the joint property of the two vessels, but would only give a right to the vessel which at the end of the season should have taken the lesser quantity of oil, to claim of the other one half of the excess, so as to make both equal. It is also insisted by the respondents, that this claim is barred by an

award of referees. It appears, that the matter in controversy was verbally submitted to two persons as referees, with power, if they should not agree, to appoint an umpire.

It further appears, that the referee, who was named by the respondents, had previously formed and expressed an opinion in their favor; and that this was known to their captain, who aided in selecting him. The two referees heard the parties, who introduced the two captains and other persons as witnesses. Not being able to agree, they appointed an umpire, who did not hear the parties, or any of their evidence, but formed his opinion upon the statements of the two referees. And thereupon, an award was made in writing and delivered to the parties, but which the libellants refused to abide by. That award was not binding. The libellants had no knowledge that one of the referees had formed and expressed an opinion adverse to their right, and they never agreed that an umpire should make a decision, without hearing the parties or any of their witnesses. This would have been necessary, even if both the referees had been unexceptionable, but it was peculiarly important that the umpire should not depend merely upon the statements of the two referees, when one of them had prejudged the case. The libellants are entitled to recover.

As to the measure of damages. The libellants claim the whole amount for which the oil and bone sold at Fairhaven. But this is not the measure. They should recover a full indemnity, but no more. they are to have all that they have lost by the taking of the whale from them in the Ochotsk Sea, on the 23d of July, 1852. The case will be sent to an assessor, to ascertain and report the facts necessary to be known, before the court can determine the amount.

After the delivery of the foregoing opinion, the case was sent to E. H. Bennett, Esq., as an assessor, under an order directing him to ascertain and report "what was the value to libellants of said whale, at the time and place it was taken possession of by the Zone —viz., on the 23d of July, 1852, in the Ochotsk Sea," with a direction to receive evidence of the opinion of competent persons, as to the value; and also to report the quantity of oil and bone yielded by the whale.

After hearing the parties, the assessor made a report, which was filed February 29th, in which he reported as follows:—"I report the value of said whale to the libellants, at the time and place it was taken possession of by the Zone, was $2350. The respondents claimed, that by the terms of the order, the assessor should take into consideration, in fixing said value, the risks and uncertainties that the proceeds of said whale would have been in fact realized by the ship Hillman, even if the whale had not been picked up by the ship Zone, and offered some testimony upon that point. If such risks shall be taken into account, I report the value, at the time and place aforesaid, to have been to the Hillman, $2000." He also reported the amount of oil originally yielded by the whale, to have been one hundred and twenty barrels, and the amount of bone, one thousand eight hundred pounds. In the supplemental report, furnished at the call of the respondents, the assessor stated that he had arrived at the sum first reported, by estimating the value of the oil and bone at the prices respectively at which the Hillman sold her cargo, on her arrival at New Bedford, on March 17th, 1854, and deducting therefrom the cost of casks, five per cent. for leakage and shrinkage, insurance on the three-quarters not covered by policy on outfits, and the small incidental charges usually incurred at the home port, such as wharfage, cooperage, &c., amounting in all to $378.80.

Upon the coming in of the assessor's report, the libellants excepted only on one point, viz: the finding of the assessor, as to the quantity, upon the evidence reported, which they claimed should be fixed at one hundred and thirty barrels, instead of one hundred and twenty. The respondents also excepted to the finding of the assessor on this point; claiming that the quantity should be only one hundred and ten barrels, and excepted otherwise to the report in the following particulars:—That no allowance was made for the freight of said oil and bone home; that no allowance was made for the labor of the Zone, in cutting in and boiling out and stowing down said whale; and that no deduction has been made for the crew of the Hillman's share in said oil, which the respondents maintained that the libellants would save, on account of releases given by witnesses, and the lapse of time. These exceptions were argued before the court, February 29th.

SPRAGUE, District Judge. The first question presented is one merely of fact, as to the amount of oil and bone originally yielded by this whale. This is an appeal from an assessor, and I shall not reverse his finding, unless it is shown that he is wrong. (The judge here reviewed the conflicting evidence.) On the whole, I cannot say that the assessor has made a mistake; he seems to have taken the medium, and I shall not disturb his finding. As to the last two exceptions, I have no doubt. The crew's claim is to a share of the proceeds of the voyage; and they have no property in the oil itself. The contract is, that out of the proceeds, when realized, they shall be paid according to their lays. It is the right and duty of the owners to protect the products of the voyage, and if unlawfully taken by any one, to pursue and obtain them, and the seamen have then a right to share in the net avails. The owners must obtain and hold them for this purpose. Otherwise, the seamen could not get redress; they have no title to the property, and could maintain no action for it. If the owners neglect to take proper means to obtain indemnity, they would be

responsible to seamen for that neglect. It is not for the respondents to say that the owners will not pay the crew. The respondents certainly have no right to their share; and an individual might as well say, when sued by a guardian, that perhaps he might never settle with his ward.

The remaining claim is for cutting in the whale, and for labor in boiling down and preserving the proceeds, and freight in bringing them home. The assessor has found that all this could have been done by the Hillman, without expense or loss, and that she has derived no benefit therefrom; and it is not shown that this finding is erroneous. The Hillman certainly would not have been justified in omitting an opportunity, or remitting her exertions, to take whales and fill up. And if she had succeeded in doing so, her loss, by the wrongful conversion of this whale, would have been diminished. But it does not appear that she did take, or could have taken, another whale in its stead, or that her crew were, or could have been, employed in any other beneficial labor, and she came home without a full cargo, and with capacity to have brought the oil and bone of this whale. The exceptions are not sustained.

[This general principle may be illustrated by a case which, at first sight, seems to have little analogy to the present—that of a wrongful discharge of a mariner abroad. Notwithstanding his claim upon the owners, he is bound to earn wages or his passage, coming home, if he can reasonably do so, taking into account his previous capacity; but if he has no opportunity, then he may recover full wages and expenses besides. It is only held that he must use reasonable means and not lie by. Applying this here, the Hillman was to use reasonable means to indemnify herself. She was not to neglect chances of filling up. If she had come home full, that would have diminished her loss. But upon the facts found, she cannot be called on to pay another ship, for what would have cost her nothing. The answer to the claim made for the labor is, that it was done without request by the libellants, and without any benefit to them. In regard to freight it is not quite so clear. But I cannot see that the assessor is in error. I do not find facts enough to show any benefit to the Hillman from the respondents bringing the oil. The burden is upon them to show that the Hillman has been benefitted by their services before they can claim any compensation.] [2]

[After the exceptions had been overruled as above, the libellants then moved that the first value stated by the assessor in his report be accepted. Upon this question whether any allowance shall be made for risks, the parties were heard and a decision reserved until March 8th, when the question was thus disposed of.] [2]

SPRAGUE, District Judge. The question is, whether an allowance should be made to the respondents, from the value of the whale, on the ground that it was uncertain whether the Hillman would have found the whale, cut it in, and stowed down the oil in safety. I think that no such allowance should be made; and I will state the reasons. It has already been decided, that this whale was the property of the libellants, and was wrongfully converted by the respondents to their own use. Now, although I reject the doctrine of punitive or exemplary damages, yet care should be taken, that full indemnity is given. If substantial doubts exist, they must operate against the wrongdoer. In this case, there is an entire uncertainty as to the risk. There is a very high probability, from the weather, and the nearness of the ship, that the Hillman would have obtained the whole value of the whale. To allow anything, would deprive the libellants of so much of their property, upon a conjecture that they might have lost it. I am not aware that any such deduction has ever been made in analogous cases. The whale might, at any time, even after it was alongside the Zone, have been reclaimed, without deduction or compensation.

Another principle in the maritime law is applicable. The claim here is, that the respondents have saved the property from certain hazards. This is in the nature of a salvage claim. But in order to allow salvage, the property must be taken and saved for the owner; want of good faith may forfeit all claim for salvage. I shall, for these reasons, refuse any allowance for the alleged risk, and accept the first value reported by the assessor.

A question being made as to interest, the court allowed it from the time when the Hillman had discharged her cargo, and it was ready for the market. A decree was then entered, in conformity with the above, for the libellants, in the sum of $2625.33, and costs.

TABER (MOODY v.). See Case No. 9,747.

Case No. 13,721.

TABER v. PERROT et al.

[2 Gall. 565.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1815.

JUDGMENT—RES JUDICATA—IDENTITY OF PARTIES—PRINCIPAL AND AGENT—SUBAGENT.

1. A former judgment is no evidence in an action, except between the same parties or their privies. See 1 Greenl. Ev. §§ 523, 524.

[Cited in Greely v. Smith, Case No. 5,749.]

[Cited in Farmer v. Stewart, 2 N. H. 102.]

2. If an agent to collect and receive payment of bills, transmits them to his own private agent

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

[2] [From 19 Law Rep. 27.]

to receive the money, and place the amount, when received, to his private credit, payment to such agent is payment to the original agent; and if there be a failure, it is the loss of the latter, and not of his principal. See Story, Ag. §§ 201, 217a, 232, 233.

[Cited in Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 282, 5 Sup. Ct. 143.]

[Cited in Daly v. Butchers' & Drovers' Bank, 56 Mo. 94; Gerhardt v. Boatman's Sav. Inst., 38 Mo. 67; German Nat. Bank of Denver, v. Burns, 12 Colo. 539, 21 Pac. 715. Cited in brief in Goldsmith v. Manheim, 109 Mass. 190. Cited in Power v. First Nat. Bank of Ft. Benton, 6 Mont. 251, 12 Pac. 604.]

3. A fortiori, this applies, where the money has been drawn for by a bill in favor of a third person, which has been accepted before the failure.

Assumpsit, to recover a sum of money due from the defendants, as agents of the plaintiff, who is surviving partner of the firm of Taber and Gardner, under the following circumstances: Taber and Gardner, in 1802, being owners of certain bills drawn upon the French government by General Le Clerc, sent them to France by their agent Mr. Boss, who was then bound on a voyage to Bordeaux, in the brig Polly, belonging to the plaintiff and his partner. The cargo on board was on the joint account of Boss, Taber, and Gardner; and, on the arrival at Bordeaux, it was consigned to the defendants, who were then merchants in that city, for sale. Mr. Boss, finding that he could not sell the bills placed them in the hands of the defendants, originally for the purpose of having them accepted, and ultimately for the purpose of having the proceeds, when paid by the French government, lodged in the hands of the defendants. In the mean time, the defendants advanced a return cargo for the Polly, upon the joint account of all the concern; and it was agreed, that the proceeds of the bills should, when paid, be carried to the credit of this advance. Perrot, one of the defendants, was a partner in a banking house at Bordeaux, under the firm of Perrot and Bineau, and sometime in September, 1802, the bills were, by direction of the defendants, transmitted by Perrot and Bineau to the banking house of Messrs. D'Hotel, Thomas and Co. at Paris, with instructions to procure acceptance and payment of the same bills, and to carry the amount, when paid, to the credit of Perrot and Bineau. Mr. Boss, soon afterwards, went to Paris, and while there, about the 26th of October, 1802, received a letter from Perrot and Lee, informing him, that the bills had been sent to Messrs. D'Hotel, Thomas and Co. and enclosing an open letter, introducing him to that house, and also containing directions, that the money, when received, was to be placed to the credit of the banking house of Perrot and Bineau. The letter of introduction was duly delivered to Messrs. D'Hotel, Thomas and Co. On the 12th of January, 1803, Mr. Boss called at the banking house of D'Hotel, Thomas and Co. and was there informed, that the bills had been duly accepted and paid by the French government, on the 7th of the same month; and that the amount had been duly credited to the account of Perrot and Bineau; and the credit was accordingly shown to Mr. Boss, in the ledger of the banking house. Mr. Boss immediately gave notice of these facts to the defendants by letter, and requested the amount to be passed to the credit of the voyage of the Polly, but received no answer. On the 25th of January, 1803, Messrs. D'Hotel, Thomas and Co. stopped payment. In the mean time Perrot and Bineau had drawn bills of exchange, at single usance, upon Messrs. D'Hotel, Thomas and Co. for the whole amount of the money so carried to their credit, in favor of a third person, which bills had been duly accepted, and when seen by Mr. Boss, were in the hands of another banking house at Paris. In consequence of the arrival of the Polly, on a second voyage on joint account, at Bordeaux, consigned to the defendants, Mr. Boss returned to Bordeaux about the 26th of February, 1802, and remained there until the sixth day of April following. A day or two before this time, his vessel being fitted for sea with a return cargo, he called on the defendants for an adjustment of accounts, and then was, for the first time, informed by the defendants, that they would not allow the credit of the bills received by them. Mr. Boss remonstrated with them in vain, and was, finally, obliged to settle the accounts and admit a balance due, of 45,762 francs; and at his request, and for his security, on the credit side of the account, the following memorandum was added:—"April 6. By amount of General Le Clerc's bills in the hands of Messrs. D'Hotel, Thomas and Co. not received from these gentlemen, when received to be placed to the credit of this account." The defendants afterwards commenced a suit, in Rhode Island, against Boss, Taber and Gardner, for said balance of 45,762 francs, and finally recovered judgment in said suit, which had been fully satisfied. The present action was brought to recover the amount of the bills received by D'Hotel, Thomas and Co. and carried to the credit of Perrot and Bineau, as above stated. At the trial, the defendants' counsel contended, that the action was res adjudicata, and therefore could not be sustained; and in support of this objection, offered the record of the action of Perrot and Lee v. Boss, Taber and Gardner.

Searle & Robbins, for plaintiff.

Hunter & Burrill, for defendants.

STORY, Circuit Justice. The record cannot be read; it is res inter alios acta. A former judgment can only be evidence, where it is between the same parties, or their privies. The parties here are not the same; so far, therefore, from its being conclusive evidence against the plaintiff, as a

former judgment upon the same cause of action, it is not evidence at all.

The defendant's counsel then contended: 1. That as the money had never actually come into the hands of the defendants, or of their bankers, Perrot and Bineau, no recovery could be had against them. 2. That if a right of action had attached, it was waived by Mr. Boss, by the memorandum on the account.

The counsel for the plaintiffs denied the legal correctness of both positions, and cited Matthews v. Haydon, 2 Esp. 509.

STORY, Circuit Justice. (after summing up the evidence). There seems to be very little dispute as to the facts; and my duty now requires me to state the law on the points, which have been made at the bar. And I am of opinion, that as soon as the money was paid into the hands of D'Hotel, Thomas and Co. and by them, pursuant to their instructions, carried to the credit of Perrot and Bineau, the defendants were answerable, in the same manner as if it had been paid into their own hands. Payment to their agent and credit to their account, by their order, was a payment to themselves. But this cause does not rest upon this principle, plain and incontestable as it seems to me to be. The money was actually drawn for by Perrot and Bineau, payable to a third person, in whose favor an acceptance was made. Here then there was a complete appropriation of the funds to their own use. From the moment of the acceptance, the money was legally transferred to the holder of the exchange, and neither Boss, nor the defendants, nor Perrot and Bineau, had any legal title to it. No possession or use of the property could have been more complete. As to the point of waiver, it is rather a question of fact, than of law. It was competent for the plaintiff to waive his right to hold the defendants to payment, and to agree to look only to D'Hotel, Thomas and Co. But such an agreement ought to be proved by the most clear and satisfactory proof. The agent, Mr. Boss, has sworn explicitly, that he never made such agreement, and that the memorandum on the account was merely introduced at his solicitation, to show to his principals, that he had not misspent their funds. You will take also into consideration the peculiar circumstances in which he was placed, and decide for yourselves, whether an unfair advantage was not taken of them.

Verdict for the plaintiff.

NOTE. This is the same case reported in 9 Cranch [13 U. S.] 39. The cause was originally tried by the district judge some years before Mr. Justice Story came to the bench [case unreported]; and the judgment rendered at that trial was reversed by the supreme court, and the present was a new trial had under the award of a new trial upon the reversal.

Case No. 13,722.

TABER et al. v. UNITED STATES.

[1 Story, 1;[1] 2 Law Rep. 298; Brunner, Col. Cas. 523.]

Circuit Court, D. Massachusetts. Jan. 23, 1839.

SHIPPING — PUBLIC REGULATIONS — FOREIGN VOYAGE — WHALE FISHING — BOND TO COLLECTOR.

1. The terminus of a voyage determines its character; if it be within the limits of foreign jurisdiction it is a foreign voyage, and not otherwise.

2. A whaling voyage is not a foreign voyage within the meaning of the act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], and a bond executed under, but not required by nor in accordance with that act is a nullity.

[Cited in U. S. v. Kimball, Case No. 15,531; U. S. v. Reindeer, Id. 16,145; Harrison v. Vose, 9 How. (50 U. S.) 379. The Antelope, Case No. 484; Frates v. Howland, Id. 5,066; The Ocean Spray, Id. 10,412; Burdett v. Williams, 27 Fed. 117.]

[Cited in Charter Oak Life Ins. Co. v. Hosmer, 1 D. C. 302; Simpson v. Story, 145 Mass. 499, 14 N. E. 641.]

Writ of error to a judgment of the district court of Massachusetts upon a bond given to the collector of New Bedford. The original case came before the district court upon a statement of facts agreed by the parties; and the district judge decided, that the bond was valid, and the United States entitled to judgment. [Case unreported.] The statement of facts was as follows:

This is an action of debt upon a bond given by the defendants [Frederic C. Taber and others] to the collector of the customs for the district of New Bedford, which is in the case, and may be referred to. The defendants are the master and agent of the ship Isabella of Fairhaven, a vessel engaged in the whale fishery. At the time of the execution of the bond referred to, the ship Isabella was fitted for a whaling voyage, and the master, upon the requisition of the collector, in order to obtain his clearance for said voyage, made out and presented to the collector the descriptive list of his crew, a certified copy of which is in the case, and may be referred to. The collector thereupon, knowing that said ship was about to proceed upon a voyage in the whale fishery, took the bond, upon which this action is founded. The ship was a registered vessel, and had always been employed in the whale fishery. The said ship being furnished with the papers aforesaid as a registered vessel, proceeded upon her said voyage on the 2d day of November, A. D. 1834, and returned to New Bedford on the 30th of August, 1838, with a cargo of sperm oil, obtained during said voyage. During her absence she was employed exclusively in the whale fishery, touching at such ports and places only as are usual in the prosecution of the fisheries, for supplies, and during said voyage was not engaged in any foreign trade.

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

If upon this state of facts the court should be of opinion, that the collector was authorized by law to take the bond aforesaid, judgment is to be entered against the defendants for the amount of the penalty. If the court should be of opinion that the defendants were not required by law to execute said bond in order to enable said ship to proceed upon the voyage aforesaid, judgment is to be entered for the defendants.

Either party may except to the decision of the district judge and carry this case to the circuit court upon the foregoing statement of facts.

Colby and Clifford, for Defendants.
John Mills, District Attorney, U. S.

Colby & Clifford, of New Bedford, for plaintiffs in error, argued in substance as follows:

The agreed statement of facts, upon which this case was presented, reduces the whole matter in controversy to the single question, —What is the true judicial construction of the term, "foreign voyage," as it is used in the act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9].

I. For the plaintiff in error it is contended, that this term does not include whaling voyages, and that this was not the intention of congress in framing that act is apparent: 1st. From the act itself. Vide sections 2, 3, where it is described as "from a port in the United States to a foreign port," and requiring a register to be taken out. The reference to "wages," in the act, cannot apply to whaling voyages, as the crew are not paid in these voyages at a stipulated sum, but in a lay or share of the proceeds, which cannot be ascertained till the termination of the voyage. In this respect they are like the ordinary fishing voyages provided for in other acts of congress. 2d. From other statutes of the United States, in which the term foreign voyage is used. Thus, in St. 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 305, c. 8], provision is made for the proper papers to be furnished to ships engaged in the fisheries. They are entirely different from those contemplated for ships engaged in the prosecution of "foreign voyages." See, also, section 2 of this act, giving the form of a license for the "whale fishery," and especially section 8, where the term is used in express contradistinction to voyages in the whale fishery. That congress considered them as totally distinct, and amenable to very different regulations, is apparent from the whole course of legislation upon this subject. Vide Acts 1817, c. 204, § 5 [3 Story's Laws, 1623; 3 Stat. 351, c. 31]; Acts 1813, c. 184, § 3 [2 Story's Laws, 1303; 2 Stat. 809, c. 42]. 3d. If there is no diversity in the meaning attached to this term by congress, in the various statutes, it is no longer an open question. The collector had no right to demand the bond. Vide The Three Brothers [Case No. 14,009]; The Eliza [Id. 4,346]; Curt. Adm. Dig. 470, and cases there cited.

II. It was the duty of the collector to furnish this ship when she sailed on her "whaling voyage," with an enrolment and license, and other papers conformable, under the act of 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 305, c. 8]. If he had thus performed his duty this bond would not have been required or given. See Case of Mutineers of Brig Troy,—U. S. v. Rogers [Case No. 16,189].

III. If it was not demandable by the collector as a statutory bond, the plaintiffs in error were not, in the words of the agreed statement, "required by law to execute it." It cannot be contended successfully, that they gave it voluntarily, and that it may be enforced as a bond valid at common law. For: 1st. They did not give it voluntarily in the sense in which this view of it is urged. The case finds, that it was exacted by the collector before they could obtain a clearance. 2d. To be good as a common law bond it must have resulted in some advantage to the obligors, or have been induced by, or contained some provisions for, their benefit. 3d. The only question, upon which the case contemplates their liability upon it, is, were they "required by law to execute it." In Dixon v. U. S. [Id. 3,934], Mr. Chief Justice Marshall said: "The collector is a ministerial officer, whose business is to pursue the statute, and if he fails to do so the statute will not sanction his act." "The record, as it appears in this court, exhibits a bond not demandable under the statute, and a suit on such bond cannot be sustained." Upon the strict construction to be given to the statute, see Curt. Adm. Dig. 465, and cases there cited.

Dist. Atty. Mills, for the United States, argued è contra.

STORY, Circuit Justice. The act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], supplementary to an act concerning consuls and vice consuls, &c. provides in the first section: "That before a clearance be granted to any vessel, bound on a foreign voyage, the master thereof shall deliver to the collector of the customs a list, containing the names, places of birth, and residence, and a description of the persons, who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, &c. &c. and the said collector shall deliver him a certified copy thereof, &c. &c. &c.; and the master shall moreover enter into bond, with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy to the first boarding officer, at the first port in the United States, at which he shall arrive on his return thereto, and then and there produce the persons named therein to the said boarding officer, &c. &c."; with other specific provisions and

exceptions, which it is unnecessary to recite.

In the present case the requisitions of the act have not been complied with; and it is insisted on behalf of the United States, that the bond is forfeited thereby. On the other hand, it is insisted on behalf of the plaintiffs in error (the original defendants), that the bond itself is a mere nullity, and not by law required to be given by ships engaged in whaling voyages. And the main question, therefore, is whether a ship engaged exclusively in a whaling voyage, is within the descriptive words and sense of the act of 1803, "a vessel bound on a foreign voyage." If she is not, then I am of opinion, that no action can be maintained on the present bond, as it seeks to enforce a supposed statute duty, and is in the nature of a penalty, and has been exacted by the officers of the government, under a mistake, as well of their duty, as of law, and that the judgment ought to be reversed.

It is clear, that it has been for a long period the practice of the custom house officers to take lists of the crew, and bonds from the masters of whaling ships, under the supposed authority of the act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9]. And certainly this practice is entitled to some weight in ascertaining the true interpretation of the act; although it cannot control the true interpretation of it, if the practice does not conform to it. And it is not decisive in a case of this nature, that the mischiefs to be guarded against and remedied by the act of 1803, are equally as applicable to whaling voyages, as to voyages to foreign ports for the general purposes of trade. Where a penalty, or a provision in the nature of a penalty, is to be enforced, the general rule is, that the statute is to be construed strictly; and the language is not to be enlarged to cover a case standing upon similar grounds, if the ordinary interpretation of the terms would not reach it. Now, the ordinary meaning, which we annex in commercial transactions to the words, "a vessel bound on a foreign voyage," is, that it refers to a voyage to some port or place within the territory and jurisdiction of some foreign sovereign. We do not restrict the meaning of the words to voyages carried on beyond the actual territorial limits of the United States, in contradistinction to voyages on our inland waters, or to mere coasting navigation in our sounds and rivers. We should not call a voyage from Boston to New Orleans a foreign voyage, although a great portion of the voyage is out of the limits of the United States. In such a case the terminus of the voyage settles the description. On the other hand, we should call a voyage from Boston to any one of the West India Islands, as for example, to Cuba, a foreign voyage, for the very reason, that one of the termini of the voyage for the purposes of the enterprise is within a foreign territory. So, we never speak of a voyage in the bank and other cod fisheries as a foreign voyage, although in such a voyage the vessel sometimes may touch at a foreign port. Why? Because the ocean is deemed the common highway of all nations, and foreign to none. It is in no just sense within any foreign jurisdiction. And here, again, we are governed in the appellation by the descriptive termini of the fishing voyage, the port from which the vessel proceeds, and to which she is to return. I know no difference in this particular in common usage between fishing voyages and whaling voyages. Whaling voyages are emphatically voyages on the ocean. In short, as a generic expression, "a foreign voyage" means, in the language of trade and commerce, a voyage to some port or place within the territory of a foreign nation. This is emphatically true throughout the provisions of the duties' collection act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], which still constitutes the leading statute to regulate our intercourse with foreign nations for commercial purposes. The words there used in regard to foreign importations, are "goods brought from a foreign port or place," or a vessel arriving "from a foreign port or place." Similar descriptive phraseology will be found in the act for the government and regulation of seamen in the merchant service (Act 1790, c. 56 [1 Story's Laws, 102; 1 Stat. 131, c. 29]), where shipping articles are required on voyages of a ship or vessel "bound from a port of the United States to any foreign port." On the other hand, in the act of 1813, c. 2 [2 Story's Laws, 1315; 3 Stat. 2], regulating shipping articles in the bank and other cod fisheries, the words are, "any vessel bound from a port of the United States to be employed in such fisheries." The navigation act of 1817, c. 204 [3 Story's Laws, 1623; 3 Stat. 351, c. 31], insists throughout upon similar distinctions.

Passing from these general considerations, let us see whether any fixed interpretation of a different sort is to be found in the laws of the United States. If there be not, then, I take it to be clear, upon the established rules of interpretation of statutes respecting commerce, that the common commercial sense of the words is to be adopted, unless there be a distinct controlling sense put upon the words by the legislature. The supreme court of the United States have uniformly acted upon this doctrine. I recollect but two instances, in which the phrase, "foreign voyage," occurs in the laws of the United States; and two only have been pointed out at the argument; and, after such thorough researches by counsel, I presume none other exists. One is in the statute of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], now under consideration. The other is in the act of 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 305, c. 8], for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries. This last act is the

only one specially directed to the whale fisheries, as well as to the cod fisheries. In the eighth section it declares, "that if any ship or vessel enrolled or licensed as aforesaid shall proceed on a foreign voyage without first giving up her enrolment and license," &c., she shall be liable to seizure and forfeiture. Now, here, the words are distinct and appropriate, and applied to the very subject matter of the whale fisheries. "Foreign voyage" is used in contradistinction to fishing voyage and whaling voyage, expressing the clear sense of the legislature, that a fishing voyage or a whaling voyage is not "a foreign voyage." Nearly thirty years ago this very question under that act came before the court in the case of The Three Brothers [Case No. 14,009], and it was then decided, that a fishing vessel, which, according to the course and usage of the fishing employment, went to a foreign port, if it was not for the purpose of trade there, was protected from seizure and forfeiture. In short, she was not engaged in a foreign voyage in the sense of the act.

Here, then, we have a clear expression of the legislature on the very point of the interpretation of the words, "foreign voyage." Upon what ground can this court, then, declare, that a whaling voyage is a foreign voyage, when congress have used the words in contradistinction thereto, in an act pointed to the very subject of the whale fisheries? The act proceeds in another section (section 21) to provide for a permit to whaling ships "to touch and trade at any foreign port or place," thus making a distinction between whaling voyages and trading at foreign ports. The act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], contains no words expressive of a different or more qualified sense. The words of the act are perfectly satisfied by understanding them in the common commercial sense, to mean a voyage to a port or place within the territory of a foreign nation. What is more important is, that the remaining sections of the act are mainly pointed to acts to be done, and to transactions which are to take place, in foreign ports, where we have regular stationed consuls and commercial agents. It would be impracticable, without a violation of all the common rules of interpretation, to apply the regulations of the second and third sections of the act to any whaling voyage, or to any voyage except one strictly for the purposes of general trade to a foreign port. Under such circumstances, the general maxim ought to be applied, "noscitur à sociis." We are to interpret the whole act, as having relation to the same common objects, and to be expressive of the same general relations of vessels in the merchant's service in foreign trade. The act of 1813, c. 184 [2 Story's Laws, 1303; 2 Stat. 809, c. 42], for the regulation of seamen on board of public and private vessels of the United States, seems conclusively to recognise and establish this very construction of the first section of the act of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9]. It declares (section 2), "that in all cases of private vessels of the United States sailing from a port of the United States to a foreign port, the list of the crew, made as heretofore directed by law, shall be examined by the collector for the district, from which the vessel shall clear out, and, if approved by him, shall be certified accordingly." The very object of this provision, and of the accompanying provisions of the act, was to afford protection to American citizens, whose names were borne on the list. This object certainly is equally applicable to whaling voyages and to voyages to foreign ports. And yet the legislature speaks only as to the latter; and thereby plainly shows, that the act of 1803 had reference solely to merchant vessels engaged in trade and bound to foreign ports for the purpose of foreign commerce.

Upon the whole, my judgment is, that a whaling voyage is not, in the common commercial sense of the words, deemed a foreign voyage, any more than a voyage in the cod or other common fisheries; that the words "foreign voyage" are in the common commercial sense applied to voyages to foreign countries, where the main terminus is a foreign port, for the purpose of exportation or importation in the course of trade; and that a voyage, which is to be essentially performed upon the ocean, from its nature and objects, is not deemed foreign to the country. I am also of opinion, that this is the sense, in which the language has been constantly understood by congress in all our public acts; and especially, that this is the natural and just sense of the language in the act of 1803, taking into consideration all the purposes and provisions within the scope of that act. If the question were entirely new, I should have no doubt on the point. But I think, that congress, in the act of 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 305, c. 8], for enrolling and licensing vessels for the whale fisheries, have directly established this very construction; and that no court of justice is at liberty to depart from it.

My judgment, therefore, is, that the judgment of the district court ought to be reversed.

TABER, The MARY E. See Case No. 9,209.

TABER, The WILLIAM. See Case No. 17,757.

Case No. 13,723.

TABOR et al. v. DEXLER et al.

The "NEW DISCOVERY" LODE v. The "LITTLE CHIEF" LODE.

[9 Morr. Min. Rep. 614; Carp. Min. Code, 71.]

Circuit Court, D. Colorado. 1878.

MINES AND MINING—LODE CLAIMS—ORE "IN PLACE."

[Where the mass overlying the ore is mere drift, or a loose deposit, the ore is not "in place," within the meaning of Rev. St. § 2320, so as to give the owners of a claim the right to follow the dip within the lines of an adjoining claim.]

HALLETT, District Judge. This is a bill for an injunction by parties owning the New Discovery lode, in California mining district, against the owners of an adjoining claim called the "Little Chief." It is not alleged that the defendants have entered upon or into the New Discovery ground, or that they have in any way interfered with plaintiffs' possession within the limits of the New Discovery location. The charge is that plaintiffs' lode descends into the Little Chief's ground on its dip, and that defendants are there mining and exhausting the ore. In other words, plaintiffs contend that the top of the lode is in their ground, and that they have the right to follow upon its downward course and through adjoining territory. To maintain this position, it is necessary to show that the lode is in place, within the meaning of section 2320, Rev. St. U. S. And this depends upon the position of the ore or vein matter in the earth, as whether the inclosing mass is fixed and immovable, more than upon the character of the ore itself. Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which can not be in place as required by the act. Not much is known to the court of the deposits on Fryer Hill, but it would seem from the allegations in this bill that they differ materially from the Iron mine, which has a hanging wall as well as a foot wall. For the decision of this motion it is enough to say, that where the mass overlying the ore is a mere drift, or a loose deposit, the ore is not "in place," within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it can not give a right to ore in other territory, although the ore body may extend beyond the lines. The motion will be denied.

Case No. 13,724.

TAGGART v. STANBERY.

[2 McLean, 543.] [1]

Circuit Court, D. Ohio. July Term, 1841.

DEED—ESTOPPEL—VENDOR AND PURCHASER—DEFECT IN TITLE—POWER OF ATTORNEY.

1. The consideration acknowledged to have been received on the face of a deed of conveyance, does not estop the grantor from showing, in an action for the purchase money, that the consideration has not been paid.

[Cited in Stansbury v. Taggart, Case No. 13,292.]

2. So far as regards the effect of the deed, the consideration named can not be controverted.

3. A possession, without claim of title, can afford, from mere lapse of time, no presumption of right.

4. A purchaser who has received a deed, and holds under it, can not set up a defect of title, to avoid the recovery of the purchase money.

5. A compromise of an outstanding claim, without the consent or knowledge of the grantor, can give no claim to an offset, in an action for the consideration money.

6. The liability of the grantor must depend upon the validity of the claim purchased in, and not upon the sum paid for it.

7. A power of attorney, which authorizes a conveyance to be made in as full and ample a manner as the principal could execute, authorizes a deed to be made by the attorney, with covenants of general warranty.

[Cited in Johnson v. Sukeley, Case No. 7,414.]

[Cited in Schultz v. Griffin, 121 N. Y. 299, 24 N. E. 480.]

8. This is especially the case where the deed has been accepted, with a full knowledge of the power.

9. Such instruments are to be construed according to the intent of the parties.

At law.

Mr. Taylor, for plaintiff.

Hunter & Stanbery, for defendant.

OPINION OF THE COURT. Henry Graham purchased from the plaintiff, through his agent, Wallace, a certain tract of land, for which he promised to pay six hundred and nineteen dollars, two hundred and twenty one dollars of which were paid the 11th November, 1831. The defendant, Stanbery, purchased Graham's right, and assumed to pay the balance of the purchase money. In one of his letters to Wallace, as agent of the plaintiff, the defendant stated that the title was involved by a claim of Samuel Kirkland, who was in possession of the premises, and had been in possession for a number of years; and he proposed to pay one half the amount due, and take a quit-claim deed, or to pay the full amount, and receive a deed of general warranty. And, as it would be difficult to prosecute a suit in the name of Taggart, against Kirkland, he requested the agent to forward him a deed for the land, and proposed to secure the

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

payment of the balance of the purchase money by a mortgage, or in some other mode. The deed was forwarded, containing the ordinary covenants of warranty. This action was brought to recover the residue of the purchase money assumed by the defendant. The declaration contained the common money counts, and three counts on the contract. Defendant pleaded nonassumpsit. Sometime after the deed was received by the defendant, he compromised with Kirkland, and paid him, for his right, four hundred dollars. Several questions of law were raised in the course of the trial, which were decided against the defendant, and which were, more at large, considered on a motion for a new trial. Under the instructions of the court, the jury found for the plaintiff the above balance, including interest.

A motion was made for a new trial on four grounds: First, because the court admitted evidence to show that the consideration had not been paid, in contradiction of the deed; second, because the verdict is against evidence; third, because the defendant was surprized by the rejection of the deposition of Samuel Kirkland; fourth, because the letter of attorney to Wallace, by Taggart, did not authorize him to make a deed of warranty for the land.

The deed, in the ordinary form, states the consideration money, and acknowledges the receipt of it, and, from the payment of the same, acquits and discharges the defendant and his heirs. And this, it is contended, is conclusive evidence of the payment of the consideration, and that the plaintiff is estopped from denying the same. The case of Baker v. Dewey, 1 Barn. & C. 704, is cited to sustain this doctrine. In that case it was held that a party, who executes a deed, is estopped, in a court of law, from saying that the facts stated in it are not true; that, as the deed expressly stated the consideration for the purchase had been paid, he was precluded from saying that any part of it was due. And, to the same effect, is the case of Rowntree v. Jacob, 2 Taunt. 144. The same principle is affirmed in Lampon v. Corke, 5 Barn. & Ald. 606; 1 Greenl. 1.

In England, it is usual to take a receipt, on the back of the deed, for the payment of the consideration; but this had no influence in the above cases. In one of the cases it is said that the receipt, not being under seal, is no estoppel, and its truth may be disputed. There can be no doubt that, so far as regards the effect of the deed, the grantor is estopped from denying the consideration named in it, and which is essential to its validity. This would be to deny a fact admitted in an instrument of the highest solemnity. But such is not conceived to be the rule, where the payment of the consideration becomes a question collateral to the deed. A vendor being satisfied with the ability of the purchaser, executes a deed, and takes a promissory note for the purchase money. Now, according to the above decisions, this note would be in contradiction of the deed, and, therefore, could not be received as evidence. This would be contrary to the common understanding and practice of the parties to the deed. And the correctness of any principle of law may well be doubted, which is so diametrically opposed to the common sense of business men. To give effect to a deed, a consideration must be stated or proved; but the parties are not bound to state the consideration paid. It may be more or less, but this does not affect the deed. Having a consideration named on its face, at law, the grantor can not question the payment of the sum named, in any case, to affect the validity of the deed. In the case of Shephard v. Little, 14 Johns. 210, the court held, where the consideration of a conveyance is expressed therein, and that it was paid by the grantee or assignee, parol evidence is, notwithstanding, admissible, to show that it had not been paid. To the same effect are the following cases: Oneale v. Lodge, 3 Har. & McH. 433; Jordon v. Cooper, 3 Serg. & R. 564, 570; Wilkinson v. Scott, 17 Mass. 249; Bowen v. Bell, 20 Johns. 338; Pritchard v. Brown, 4 N. H. 397; Gully v. Grubbs, 1 J. J. Marsh. 388, 390; McCrea v. Purmort, 16 Wend. 460; Lingan v. Henderson, 1 Bland, 249; Steele v. Worthington, 2 Ham. [2 Ohio] 182; Whitbeck v. Whitbeck, 9 Cow. 266, 270.

Under the second ground for a new trial, that the verdict was against evidence, the defendant insists that the title of the plaintiff was shown to be invalid; that the possession of Kirkland commenced in 1809, or the beginning of the year 1810, and was continued up to 1824. The defendant purchased his right, by virtue of which he entered in the possession of the land, and has, even since, occupied it. This possession, it is contended, is, of itself, sufficient to bar, by lapse of time, the title of the plaintiff. And to show that this defence may be set up, to an action for the purchase money, the case of Carpenter v. Bailey, 17 Wend. 244, is cited. In that case the court held, where a vendor covenanted to procure from a third person, a good and sufficient warranty deed of conveyance, for a certain tract of land, together with certain water rights and privileges appurtenant to the land, particularly enumerated in the contract, and to deliver the deed by a fixed day to the purchaser, who, on receiving the same, had agreed to pay part of the consideration money, and to receive the residue by bond and mortgage, it was held, in an action by the vendor against the purchaser, to recover a part of the consideration money, that, in reference to the peculiar terms of the contract in the case, a plea of want of title in the grantor was a good and sufficient answer to the declaration—in other words, that the plaintiff was bound to procure a deed, not only corresponding in form with that stip-

ulated for, but operative and effectual, to convey the title. But, in the case of Harrington v. Higgins, reported in the same volume of Wendell, 376, the court held, where, by the terms of a contract for the sale of land, the purchase money is to be paid by instalments, and the first instalment falls due previous to the time limited for the execution of the conveyance by the vendor, and a suit be brought for the recovery of such instalment, want of title in the vendor is no bar to the action.

As the evidence does not show a want of title in the plaintiff, it becomes unnecessary to decide on the legality of such an offence. From the evidence, it does not appear that the possession of Kirkland was hostile to the plaintiff's title. He may have entered, as tenant, under the title of the plaintiff. No color of right is shown, except the possession. But, if a defect of title in the plaintiff were shown, we are of the opinion it could not avail the defendant in this action. From the letters of the defendant, it appears that he was fully aware of Kirkland's claim; and, indeed, he says that it can not be sustained. But, having this knowledge, he expressly agreed to accept of a deed of general warranty, and pay the balance of the purchase money. And he did accept the deed, and he is now, and has been for many years, in possession of the land, holding under the deed. Under such circumstances, it is clear a defect of title can not be set up to defeat a recovery of a part of the consideration. The defendant can not resist the payment of the consideration, while he remains in possession of the premises, claiming under the deed of the plaintiff. Should he, at any future time, be evicted by a paramount title, his remedy will be on the covenants of the deed. A covenant to make a deed must, generally, mean more than an instrument duly executed. The object of such a contract is substance, and not mere form. A deed, therefore, that shall give not even a shadow of title, can not, except under a very special contract, be held to discharge an obligation to make a deed. The four hundred dollars paid, or agreed to be paid to Kirkland, can not be received as an offset to the demand of the plaintiff. The compromise with Kirkland was made without the assent or knowledge of the plaintiff. Under this compromise, therefore, the defendant can raise no charge against the plaintiff. It was not for the defendant and Kirkland to measure the value of the latter's claim to the land, and, by that means, create a demand against Taggart. And if, in any form, the defendant shall be able to establish a charge against the plaintiff on this ground, it must be by establishing the claim of Kirkland, and not by the estimate of its value, which has been made. The defendant can not complain of surprise, at the rejection of Kirkland's deposition. That deposition could only be read by consent, and consent seems not to have been given. Did the power of attorney, under which Wallace executed the deed to the defendant, authorize him to make it with a general warranty? The deed contains the common covenants of warranty. The power of attorney authorized Wallace to sell and convey the lands of the plaintiff in Ohio, in as full and ample a manner as could be done by himself. It is insisted that this authority does not extend beyond the power to convey the title of the plaintiff, and that the warranty is not binding on him.

It is a principle no where controverted, that, if an agent exceed his authority, he does not bind his principal. In the case of Nixon v. Hyserott, 5 Johns. 58, a case relied on by the defendant, the court held that a power to sell does not, itself, convey a power to warrant the title. So, where the agent was specially authorized to sell a ship, in the same manner that the principals might have sold her, they were held not to be bound by the representations of the agent, that the ship was registered, when, in fact, it was a coasting vessel. Gibson v. Colt, 7 Johns. 390. In the case of Nixon v. Hyserott, the attorney was authorized "to execute, &c., such conveyances and assurances in the law, &c., as should, or might be needful or necessary, according to the judgment of said attorney." The conveyance, executed under this power, contained covenants of seizin, warranty, &c., and the court held that a conveyance or assurance is good and perfect, without either warranty or personal covenants; and, therefore, they are not necessarily implied in a covenant to convey. Between that case, and the one under consideration, a distinction may be drawn; but doubts are entertained, whether that case is sustainable on principle or authority. There was not merely an authority given to convey, but to make such conveyances and assurances as might be needful or necessary, in the judgment of the attorney. Now, here was a reference to the judgment of the attorney, as to the nature of the conveyance to be executed; and a bona fide exercise of his judgment, in this respect, should have been held to bind the principal. That such was the intention of the power, as understood by all the parties, can scarcely be doubted. If such were not the case, why was the discretion of the attorney referred to in the power? It may well be supposed that he could not have sold the land for the price received, had he agreed to execute only a general release, or deed of quitclaim. Sugden on Powers, 459, lays down the rule that, "in considering the extent of a power, the intention of the parties must be the guide. Thus, on one hand, a power limited in terms, has, in favor of the intention, been deemed a general power; whilst, on the other hand, a general power, in terms, has been cut down to a particular purpose." The creation, execution and destruction of powers, depend on the substantial intention and purpose of the parties. Bristow v. Warde, 2 Ves. Jr. 337;

Talbot v. Tipper, Skin. 427; Mildmay's Case, 1 Coke, 175a; Long v. Long, 5 Ves. 445. In the case of Wilson v. Troup, 2 Cow. 195, in the court of errors, a power of attorney from Wilson to Faulkner, authorized him to receive a deed from Williamson, for the land purchased, and to sign, seal, deliver, and acknowledge to the said Williamson, a mortgage, or mortgages of said land, together with a bond, or bonds, for the consideration money, and to do and perform all things necessary and lawful to the obtaining a title to the said land, and securing the consideration money therefor to the said Williamson. A mortgage was executed by the attorney, which gave a power to the mortgagee to sell, on default of payment; and, under this authority, the premises were sold.

It was contended that the power to sell was not a necessary part of the mortgage, and that the attorney, by inserting it, exceeded his powers. And the case of Nixon v. Hyserott, was cited as sustaining this ground. With great plausibility, it was argued that the power to sell was no part of a mortgage, at common law, and that it was wholly unnecessary to the validity of the instrument. In assigning his reasons for the decree, Chancellor Kent says: "A power to mortgage, is a power to give the same security, under that name, in as full and effectual a manner as the party himself, who created the power, could give. The letter of attorney was general in its terms; it was to give 'a mortgage,' and 'to do and perform all things necessary and lawful for securing the consideration money.' If the power to sell was usually inserted in a mortgage, as an ordinary and lawful part of it, under his general power to mortgage, the attorney could do what was necessary and lawful. Every thing incident to a mortgage, which Wilson himself could do, in and by the act of giving a mortgage, Faulkner could do, under the power." In his opinion, Justice Woodworth says: "Faulkner must have understood the contract, as requiring a mortgage in the usual form. It would be a violation of the presumed intent of the parties to construe it otherwise." And the court were unanimously of the opinion that the power authorized the execution of the mortgage.

In 2 H. Bl. 618, it is said that an authority is to be so construed, as to include all necessary or usual means of executing it with effect. An agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer, so as to bind him by that indorsement. Fenn v. Harrison, 3 Term R. 757; 4 Term R. 177. A servant intrusted to sell a horse may warrant, unless forbidden. 5 Esp. 75. And it is not necessary for the party, insisting on the warranty, to show that he had any special authority for the purpose. Alexander v. Gibson, 2 Camp. 555; Rinquist v. Ditchell, Id. 556, note; 3 Esp. N. P. 64. In Liefe v. Saltingstone, 1 Mod. 189; 1 Freem. 149, 163, 176, S. C., the testator devised his farm to his wife, for her natural life, and, by her, to be disposed of to such of his children as she should think fit. She conveyed the estate to her son, in fee, and the power was held well executed, even at law. "The principle of the case was, that where the devisor gives to another a power to dispose, he gives to that person the same power that he, himself, had to dispose." If a tenant, for life, has power to grant leases, "requiring the best improved rents," he may cause to be inserted, in the leases, the usual covenants for payment of the rents, and a clause of re-entry, upon nonpayment, though the power be silent as to any covenants of that kind. These incidental provisions are considered as implied in the power of leasing. Jones v. Verney, Willes 169; Taylor v. Horde, 1 Burrows, 60. In Long v. Long, 5 Ves. 445, it was held that a power to charge an estate with the payment of moneys for the benefit of the children, as he should think fit, would authorize a disposition of the estate itself.

The power under consideration authorized Wallace to sell and convey his lands, in Ohio, in as full and ample a manner as he could do himself. Now, does not this authorize the attorney to convey, with warranty? This is the ordinary form of conveyance in this country. And the grantor does not object to this execution of the power, but the grantee. And the grantee accepted the deed, being satisfied with its covenants, and with the power of the agent to make it. It is unnecessary to inquire whether the power of attorney was before the defendant, when he accepted of the deed. He had a right to inspect it, and, having taken the deed, he must be presumed to have been satisfied with the power. And we can entertain no doubt that the covenants of warranty, in the deed, bind the grantor. The power of the agent was ample—it was general—to sell and convey his lands in Ohio. He was authorized to convey them, in as full and ample a manner as Taggart could himself convey them. Did not all the parties understand this power, as authorizing a conveyance, with warranty, in pursuance of the general practice of the country? We think that the instrument, looking at the circumstances under which it was given, and the objects designed to be accomplished by it, is susceptible of no other construction. The motion for a new trial is overruled.

[NOTE. A bill in equity was subsequently filed by the defendant in this action, in which he asks that certain incumbrances paid off by him on the tract of land purchased from Taggart be set off against a judgment for the purchase money. The injunction was dissolved and the bill dismissed. Case No. 13,292.]

TAGGART (STANSBURY v.). See Case No. 13,292.

Case No. 13,725.

In re TAGGERT.

[16 N. B. R. 351.] [1]

District Court, N. D. New York. Aug. 21, 1877.

BANKRUPTCY — DISCHARGE — PROPORTION OF DEBTS TO ASSETS — AMOUNTS PAID TO LIEN CREDITOR.

1. Payments to judgment creditors who have secured their liens by execution levies are not to be deducted from the gross amount realized by the assignee before ascertaining whether there is the requisite per cent. of assets to entitle a voluntary bankrupt to a discharge.

2. The term assets includes all property of every kind and nature, chargeable with the debts of the bankrupt, that come into the hands of and under the control of the assignee; and the value thereof is not to be considered a less sum than that actually realized out of said property, and received by the assignee for it.

By CHARLES N. BIXBY, Register:

George H. Taggert, the bankrupt, has petitioned for his discharge, and none of his creditors appeared in opposition thereto, upon the day to show cause, January 30, 1877. The number of creditors who proved and filed debts against the estate of the said bankrupt, and who were duly notified by the clerk of the hearing on said 30th day of January, 1877, was eighteen; though, prior to the dividend, in said matter, one other creditor duly proved and filed his debt, in the sum of two hundred and ninety-four dollars and eighty-six cents, and the computation here made includes said debt and creditor. The bankrupt resides in the town of Lawrence, in St. Lawrence county, in the Northern district of New York. No assent of creditors to the discharge of the said bankrupt had been filed herein, on said day to show cause. Since that time, the assent of three of said eighteen creditors has been filed with the register, which three creditors represent, in value, one-third of the indebtedness of the said bankrupt, but not one-fourth in number of his creditors; and the right of the said bankrupt to receive his certificate of discharge depends upon whether there is a sufficiency of assets to entitle him to such certificate. The whole sum of money actually received by the assignee herein was the sum of four thousand two hundred and forty-three dollars and eighty-seven cents; and the total amount of debts proved amounted, on the 21st day of December, 1876, the day of adjudication, to the sum of six thousand nine hundred and thirty dollars and twenty-five cents, thirty per cent. of which is two thousand and seventy-nine dollars and seven cents. The assignee herein paid out the said four thousand two hundred and forty-three dollars and eighty-seven cents so received by him as aforesaid, in the manner following:

Upon order of the court herein, to satisfy and pay the debts of certain judgment creditors, who had sued the said bankrupt, perfected judgment, issued executions, and levied upon his personal property before the petition in bankruptcy herein was filed	$2,737 39
His commissions and disbursements were	606 74
He paid to the said nineteen creditors upon a dividend of $0.12972+	899 74
Making the said	$4,243 87

That there was a sufficiency of assets to entitle him to a discharge—the requisite thirty per cent.—there can be no doubt, if, in the computation to ascertain what the per cent. of assets was, we are to treat and consider all the moneys realized out of the property of the said bankruptcy estate, real and personal, and received by the assignee, as assets. Thirty per cent. of the debts proved, and thirty per cent. of the debts, costs, etc., paid by the assignee, upon order of the court, as above stated, amounts to two thousand nine hundred dollars and twenty-eight cents, which is one thousand three hundred and forty-two dollars and eighty-nine cents less than the sum actually realized out of the said estate, and received by the assignee. Had the judgment creditors not been more diligent in collecting and securing their debts than the other creditors, but, instead, had proved their debts as the other creditors did, and the entire receipts of the assignee, less his commissions and disbursements, been distributed and paid to all the creditors pro rata, they would have, each and all, actually received and been paid a dividend of over thirty-eight per cent. The entire indebtedness was nine thousand six hundred and sixty-seven dollars and sixty-four cents, and the assets actually received by the assignee amount to forty-three per cent., and over, of such indebtedness.

As the law now is, by virtue of divers decisions of the courts, the levies made upon the property of the bankrupt, by the proper officer, by virtue of executions, duly issued, were no doubt liens upon his estate, and therefore the debts of said judgment creditors become secured debts; and the question here arises, should the secured debts be paid, and the amount of the payment thereof be deducted from the gross amount received by the assignee, before the amount of assets to be compared with the thirty per cent. of the indebtedness proved can be ascertained? I find no decision in point, upon the question made, since the amendment of the bankrupt act of June 22, 1874 [18 Stat. 178]; but there are several cases reported prior to that date, when the law was that the assets of the bankrupt must be equal to fifty per cent., instead of thirty per cent., as the law now is. In re Kahley [Case No. 7,594], defines or explains the term "assets," not to express the "net

[1] [Reprinted by permission.]

balance to be divided among the creditors, but to mean the entire estate of the bankrupt irrespective of the use to which it may be appropriated by the court." In re Van Riper [Id. 16,874], "held, that the word 'assets' must be considered to mean money received by the assignee;" and in this case there was an insufficiency of assets to grant a discharge because the assignee did not realize out of and receive for the property of the bankruptcy estate the sufficient amount. In re Vinton [Id. 16,951], is an authority much at variance with the above two cases cited; but the doctrine there laid down would do injustice to the bankrupt, Taggert, in this case, and in my opinion does not accord with the spirit and intent of the bankrupt act [of 1867 (14 Stat. 517)], and its several amendments. In re Lincoln [Case No. 8,353], seems to be a case more analogous to the present one of Taggert, bankrupt, than any that I have found. In this case, the total amount realized out of the bankruptcy estate was not a sum equal to the requisite fifty per cent.; but, upon the hearing, upon the order of reference before the register in charge, proof of the value of the property of the said bankrupts, at the time of their failure, was made, showing that the value thereof then was more than the requisite per cent.; and the opinion of the register, as expressed in this case, was that when the bankrupt had acted in good faith, and performed his duty under the bankrupt law, that he should have his certificate of discharge, if, at the time he filed his petition in bankruptcy, he was possessed of property fairly worth the requisite per cent. of his indebtedness upon which he was liable as principal debtor; and in this case the property sold for, and much less was realized from its sale, than the requisite per cent.

The law of 1874 relating to the question under consideration reads as follows: "And in case of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the demands proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value." I do not think that the term "assets" in the law of 1874, has a different or other meaning than it had at the time the decisions cited were made; and in my opinion, to give it a practical and common-sense definition, it means all the property, of every name, kind and nature, chargeable with the debts of the bankrupt, that come into the hands of, and under the control of the assignee in bankruptcy, by reason of the said property having ever been owned by, and in the possession of the said bankrupt: and the value thereof, or the amount thereof, ought to be considered a sum not less than the sum actually realized out of said property, and received by the assignee for it. And, in the course of events, after the filing of the petition in bankruptcy, many things might occur to deteriorate the value of the property, or destroy it, before it could be converted into money, so that the spirit and intent of the bankrupt act, as amended, would not be carried out; and great injustice might be done to the bankrupt, if the amount of assets be confined to and estimated to be the sum actually realized and received, as the case above cited (In re Lincoln) plainly illustrates. In the case of Taggert, bankrupt, before me, to estimate the amount of his assets to be the amount of money actually realized and received by the assignee for the property which came into his hands as such assignee, would, in my opinion, be but simple justice to the bankrupt, there being no evidence that the said property was worth any more.

Upon the consideration of the interpretation of the meaning of the term "assets," in the bankrupt act, as explained and defined in the cases cited; and the further consideration that the amount of moneys realized out of the property which came into the hands of the assignee, as such, and actually realized by him, was more than thirty per cent. of his entire indebtedness, which was proved and paid upon the orders of the court, as above stated; and also the further consideration that the bankrupt has, for aught that I know, acted in good faith, and performed his duty under the act, and its amendments. I am of the opinion that he should have his certificate of discharge. And therefore I make the accompanying certificate of conformity, and recommend that George H. Taggert, the said bankrupt, be discharged as the law provides.

WALLACE, District Judge, granted a discharge on the 18th of September, 1877, but wrote no opinion.

TAGGERT (BATTEN v.). See Case No. 1,107.

TAINTER, The ALICE. See Cases Nos. 194–196.

TAINTOR (UNITED STATES v.). See Case No. 16,428.

Case No. 13,726.

TAIT et al. v. NEW YORK LIFE INS. CO.

[1 Flip. 288; 19 Int. Rev. Rec. 14; 2 Ins. Law J. 863; 4 Bigelow, Ins. Cas. 479.] [1]

Circuit Court, W. D. Tennessee. Dec. 10, 1873.

INSURANCE—LIFE—POLICY—FORFEITURE—CONDITIONS PRECEDENT.

1. A policy of insurance, which indemnifies a public enemy against loss in time of war, is unlawful; and where entered into before hostilities, is abrogated when they occur. The rela-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 19 Int. Rev. Rec. 14, 2 Ins. Law J. 863, and 4 Bigelow, Ins. Cas. 479, contain only partial reports.]

tions it establishes are illegal between belligerents.

[Cited in Bird v. Pennsylvania Mut. Ins. Co., Case No. 1,430.]

2. Where a life policy provides that it shall be void upon the nonpayment of premiums within the time prescribed, such payment is a condition precedent; time is of the essence of the contract, and there can be no recovery if punctual payment is omitted.

[Cited in Anderson v. St. Louis Mut. Life Ins. Co., Case No. 362.]

3. Where the performance of a condition precedent becomes unlawful, or by the act of God, impossible, this will not authorize a recovery upon the contract without performance. Such case distinguished from those in which subsequent impossibility and illegality are relied upon as a defense.

4. A contract of insurance, the continuance of which depends upon the election and acts of the insured, is not like a debt, the obligation of which is absolute, and which is suspended only by war.

5. The relations between the members of a corporation for mutual insurance present all the evils, and are dissolved by war for the same reasons as those between ordinary copartners.

6. The reasons for the dissolution of executory contracts by war are not alone that such contracts involve intercommunion across the hostile lines, or that they relate to property liable to capture; but more especially because their execution increases the resources of the enemy.

7. A court of equity has no authority to decree the specific performance of an agreement in favor of a party who has failed to perform a condition which is of the essence of the contract, although prevented by its becoming subsequently illegal or impossible by act of God.

8. A court of equity will not relieve a party from the effect of omitting to perform an act, although the omission was caused by subsequent illegality or impossibility arising from the act of God, where such act was merely optional, and the other party had no right to enforce its performance.

9. The agency of one representing an insurance company, authorized to receive premiums and renew policies, becomes unlawful when the insured and insurer become public enemies.

The plaintiffs in this case [W. E. Tait and others] are the legal representatives of Dr. Samuel Bond, who died August 8th, 1862. The facts upon which the principal questions of law in this case rest, are as follows: Dr. Bond, in his lifetime, viz.: on October 17th, 1854, procured a policy of insurance upon his life for the sum of $5,000, from the defendants, the New York Life Insurance Company, then and now a corporation for mutual insurance, organized and doing business under the laws of the state of New York, and having its home office in the city of New York. Dr. Bond then was, and continued until his death, a resident of the state of Tennessee. The policy was issued in the usual manner from the home office of the company in New York, the application being made and the policy being transmitted through their then local agent I. B. Kirtland at Memphis, Tennessee. By the terms of the policy the insured was to pay an annual premium of $224.50 on the 17th day of October in each year during the continuance of the policy; and upon his compliance therewith the defendants were at his death to pay to his representatives the amount of the policy. Amongst other things the policy also provided, that in case the insured "shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine." The annual premiums were duly paid at maturity by the deceased to the local agent at Memphis, up to and including the year 1860; the last payment being made in October of that year. Kirtland continued to act as the agent of the company at that point until sometime in July or August, of the year 1861, when all intercourse between the people of the state of Tennessee and those of the loyal states was cut off by the breaking out of actual hostilities; whereupon he ceased to act further as such agent, and has never since acted in that capacity. On or before the 17th of October, 1861, a tender of the premium due, in that year was made, on behalf of the insured, to the former agent, Kirtland; which tender was refused. Kirtland then had no receipts for the said premium, signed by the home officers of the company, in his possession. The officers of the company had no knowledge of the tender until after the death of Dr. Bond, nor did they ever communicate with Kirtland in reference to the same. The powers and duties of the agent sufficiently appear in the opinion of the court. This suit was brought in October, 1869, to recover the amount of the insurance, less the unpaid premiums.

Humes & Poston, for plaintiffs.

Randolph, Hammond & Jordan, for defendant.

EMMONS, Circuit Judge. This is an action upon a policy of life insurance. The policy was issued some years before the war, and the premiums paid to 1861, when the agency at Memphis ceased in consequence of the war. A tender was afterwards made in due time to the former agent, of all sums due before the death, which was in that year. The contract contains the following clause: "It is the true intent and meaning hereof that if the insured shall not pay the said premiums on or before the said days, together," etc., this policy "shall cease and determine." Across the face of the first and all other receipts taken by the assured for the premiums paid, is printed conspicuously, in large type of italics and capitals and in red ink, the following: "Premiums not paid when due according to the terms of the policy, annuls the same, but it may be renewed at the home office within a reasonable time, upon satisfactory evidence of good health being furnished." The acts by which alone the policy can be continued in life, involve not only the exercise of continuous active duties on the part of agents,

but constant intercommunion across the hostile lines. Every receipt, in unambiguous terms, tells the insured no payment is good unless the party who claims the right to accept it holds an authenticated form, signed by the president, vice-president or actuary, which necessarily must be transmitted from the home office to the local agent from time to time as it is required. There is no general power to receive premiums without this special warrant, issued in each instance. The object of this precaution is manifest: it is so necessary to the prosecution of the scheme, and is so dependent upon regular communications between the agent and the chief officers, that when the latter are interrupted it necessarily follows that the payments, without an alteration of the contract, cannot be made. A life insurance agent who should not make his periodical returns and remittances would be an anomaly. Should a corporation fraudulently or negligently omit to forward the annual receipt in violation of duty under the policy, or by its wrong in any manner prevent performance on the part of the insured, different principles would apply, and a recovery at law or in equity according to circumstances be given.

The only argument submitted by the learned counsel for the plaintiffs consists in the citation of the following four cases: Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614; Hamilton v. Mutual Life Ins. Co. [Case No. 5,986]; Sands v. New York Life Ins. Co., 59 Barb. 556; and New York Life Ins. Co. v. Clopton, 7 Bush, 179, and a dictum in Robinson v. International Life Assur. Soc., 42 N. Y. 54, which expresses a doubt as to the entire clearness of the position that war abrogated the agency. Since the rendition of our judgment, but before the preparation of this opinion, two other decisions, by an influential tribunal, have been added to the list of those which oppose our own. Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, and Sands v. New York Life Ins. Co., Id. 626. These decisions, if acquiesced in, would, each for quite varying reasons, entitle the plaintiffs to judgment. But for them we should have deemed the question whether an insurance company, created and protected by the government, located in and drawing its funds from the loyal region, could continue a policy upon life for the benefit of an enemy as unworthy of argument. We should have confidently held that a state of belligerency dissolved the contract.

That these judgments are at war with the universally received opinion before their pronunciation, we think clear. Another case, however, upon a kindred subject (Kershaw v. Kelsey, 100 Mass. 561), by a court of exceptional learning and repute, quite as much at variance with received opinions, shows there is a pretty common disposition to refuse the application of old and familiar doctrines to the exigencies of our late contest. But we find in our supreme court no indication of a disposition to relax that portion of the laws of war which affects the contracts and business relations of belligerents. Believing there is no judicial authority anywhere, to so far modify the law as to preserve in force this contract, we hold it was abrogated the moment the insured and insurer became public enemies.

The counter-judgments vary greatly in the grounds on which they proceed. Without referring each reason to the decision which asserts it, the leading ones are generally as follows: They are here stated that the occasion for much of our own discussion, which might otherwise seem unnecessary, may be perceived. It is said that contracts and business relations between enemies are lawful so long as actual personal intercourse, between persons in the different territories, is not necessary; and consequently, a business already commenced under an agent, may be continued if he makes no remittances or communications to his principal. The continuance of a life policy and the agency is thus supported. Some of them, overlooking the palpable difference between the duties of an insurance agent and of one to receive a debt, and between the latter and this peculiar contract, requiring for its continued vitality so much affirmative action, continue both upon the same principle. It is said that all the cases and elementary books heretofore announcing the broad doctrine that an insurance of enemy's property is void, and that war abrogates those entered into before it, refer solely to insurances upon maritime commerce, where the subject was not only liable to capture, but employed in unlawful trade and intercourse between the hostile countries, and the insurance void therefore, and not upon the ground that it was opposed to public policy to guaranty against the loss of enemy's property generally, but only where it was so employed, and where it was, by the general laws of war, subject to confiscation. That houses, inland-stored goods, and the lives of non-combatants did not come within the reason of the rule, and might be lawfully insured through resident agents, and belligerency did not in such cases terminate existing policies. Some of them take the broad ground that the punctual payment of the premium is not a condition precedent. Others, conceding that it is so, decide that payment is excused on account of the illegality or the impossibility of performance. Two of them maintain the extraordinary position that the revocation of an agent's power after he becomes a public enemy is a fraud by the loyal company, and estops it to deny the reception of the premiums. And finally, it is ruled that a court of equity will relieve the insured from the duty of performance, upon the ground that the accidents of the war constitute an excuse for nonperformance. These do not exhaust the grounds, but they are the more prominent ones.

The principle that contracts, the continued execution of which during belligerency is op-

posed to national policy, are abrogated by war, is universally conceded. With the single exception of Kershaw v. Kelsey, all admit also, that such policy would be violated by the making or continued execution of any contract which directly increased the material prosperity and power of the enemy. Differences of opinion only exist in reference to the application of this rule to policies of insurance upon the life of a public enemy. Authors and cases which discuss the general rule will be referred to, therefore, only for the reasons by which they support it, and the circumstances to which they have applied it. We think it will appear that the policy before us is abrogated by the rule; and that the distinctions relied upon are wholly excluded by the reasons upon which it rests. There are two main propositions upon which the controversy turns: 1st—Is the continued execution of a life policy inconsistent with political interest? 2d—Is the payment of the premium during war a condition precedent to recovery? These two questions are all that are material to this decision.

The general rule is, that all contracts and intercourse of every description are prohibited during war; and that those agreements, the execution of which increases the power of the enemy, are wholly annulled, and the parties reciprocally discharged from their performance. This generality would include the contract before us. But exceptions have been created to its application, and within these it is contended this case comes.

Relying upon Denniston v. Imbrie [Case No. 3,802] and Ward v. Smith, 7 Wall. [74 U. S.] 447, it is said that debts are suspended, not discharged; and that this is but a debt. The distinction between the two is obvious. Where the consideration has been received and the obligation to pay is complete, no new act or volition, and no continuing business activity is necessary. By suspending all these the debt, without national injury, remains. Under a policy of insurance, when carried out according to the very intention of the parties, and in the only mode compatible with the financial scheme upon which it depends, the most continuous and intimate business relations and intercourse are indispensable. No local agent ever is, or in common prudence can be, trusted for years to receive payments without remittance. Such is their number and widespread localities, that it has been found absolutely necessary to evidence their authority of receiving payment by periodical transmission of authenticated vouchers. These are never sent unless the home office has received full reports of the agent's doings and a satisfactory accounting for all the premiums before then payable. When a premium is tendered in due time, if any violation of the terms of the policy by the insured has become known to the agent, it is his duty to decline receiving the premium, report the circumstances to the home office and await instructions. And when a death occurs the important duty devolves upon the agent of receiving and transmitting to the home office the proofs required to show that the terms of the policy have been complied with by the deceased, and that his death did not result from any of the numerous causes excepted from guaranty by the policy. And although the agent has nominally no authority to allow or disallow a claim, he is, in fact, always relied upon to detect and report any suspicious circumstances which may exist in reference to the death or the character of the proofs, so that, to a very great extent, it rests with him to determine whether the claim shall in any case be contested. It is simply monstrous to suppose that the loyal members of this great scheme are compelled by law to confide this delicate function to a public enemy, who is to exercise it in favor of his fellows in rebellion. The rule would be as unjust as its exercise would be illegal. These forms and duties are well understood by the parties, and constitute a part of the contract between them, and are intended to be specifically and exactly performed. They cannot be so performed without much intercommunion across the lines. To dispense with them is to change the whole nature of the scheme, and involves an unprecedented and wholly unwarrantable interference with the substantial terms of the agreement.

We have no great motive for combating the doctrine which some of these cases hold, that it is from enlightened Christian principle that in modern times debts are not confiscated. We shall, however, better appreciate the rule we are considering, and shall apprehend its true spirit, if we understand that from its inception it has always been aimed solely at the destruction of the enemy and the protection of the home government. When debts are held to be suspended only, it is as purely a political and mercenary policy as that which forbids the continued performance of an executory contract. It is in the interest of home commerce after peace. It is the same motive which leads a nation, when the subjects of a hostile government own portions of its funded debt, to suspend the debt, and even pay the interest upon it till the return of peace. A nation draws but little upon the New Testament when its statesmen omit a policy which would destroy its credit with all the nations of the earth. It could not borrow a dollar from the subjects of neutral countries after it had confiscated the property of its temporary enemies in its public funds. Commerce would be impossible, if upon each occurrence of war, private debts were confiscated. A more suicidal policy could hardly be pursued. These are limitations upon every nation's power of injury, which have sprung, not from the pulpit, but from the workshop and the counting-house. While nations still recognize as lawful inci-

dents of war the bombardment of cities, and the reducing of its women and children to distress, and the taking of human life, it seems almost whimsical and grotesque to attribute the protection of bills and bonds to Christian principle. They are, nevertheless, in fact spared; and whatever may be the motive, the question equally remains, whether the limitation which exempts them is applicable to the exigencies of this record. Do the latter present a case analogous to a complete existing debt? Or do they constitute an executory contract, the continued performance of which, during war, has so frequently been declared unlawful? Like injuries, in some degree, undeniably exist in instances where the law spares the relation, as in those where it annuls it; and some of the benefits secured in exigencies where the rule has been applied, would undoubtedly be secured in others by extending it. We cannot now, nor has it ever been attempted, establish a principle, the reason of which will, in every instance, guide us in decision. But a line has, in fact, been drawn, including some and excluding others, as political policy, balancing benefits and evils, has deemed one or the other to predominate. What we affirm, and shall attempt to show, is, that what is historically established brings the contract before us within the rule which abrogates the contract. A leading, if not the most important motive, for the prohibition is, to prevent the increase of the material power of the enemy. This is equally accomplished by the creation of a new debt, which constitutes a credit upon which the enemy can procure supplies, as by the creation of the products themselves. That this benefit to the enemy is the leading idea, and not solely the prevention of intercourse, is proved from the frequency with which every nation at war from time to time licenses trade with the enemy in such articles as its necessities demand. See Wheaton on International Law. The assumption on the part of the government is, that all trade not so authorized is for the benefit of the enemy. At least it invariably reserves the power, in all cases, of determining whether the trade will be of more benefit to itself than to the hostile government. This balancing of benefits is the test. While the whole power of the nation is exerted to cut off their supplies, and reduce to want and suffering the entire hostile nation, it would be absurd to suffer its efforts to be counteracted by allowing its subjects to perform agreements which would produce or increase what it is endeavoring to destroy; and this we understand to be the essence of the rule.

It is wholly immaterial, so far as this consequence is concerned, that the agreement is made, or the business relation created, before hostilities. A Northern citizen, engaged before the war in carrying on a Southern plantation, or the manufacture of iron, cloth, or leather, through local agents, with ample power to bind him by executory contracts, could not lawfully continue these avocations during hostilities. In reference to all these he would become a public enemy. It is paradoxical to say that a loyal citizen's relations to a business are lawful, the products of which become enemy's property. This is distinctly said by Kent, Story, and Sir Wm. Scott, as we elsewhere show. If such agent had entered into contracts for the reception and manufacture of materials highly useful to the rebel government, it is but an absurdity to say that, because he was appointed before the war, and no intercommunion was necessary, he was either compelled or authorized to carry out the contract, or that the loyal citizen should be subjected to damages because he did not.

A marked difference in the relations existing between enemies under this policy of insurance, and those of ordinary debtors and creditors is, that in the latter the obligation is full before the war. No new value or source of credit is placed in the hands of an enemy during its progress. Here, no obligation whatever exists, but a debt is created by much mutual activity and elections between the parties. A source of credit, and a power of purchase with its proceeds, is thus originated. A value is created which would have had no existence in the hostile country but for the action of one of the very enemies whose government has the power of seizing it. In the instance of a debt paid over to a local agent, no increased obligation, or value of any kind, is subordinated to the hostile state. The debt is equally in its power, whether in the hands of a debtor or paid over to the agent. The debtor only is changed, both residing in enemy's territory. They are so wholly unlike in their circumstances and in practical, financial results, that the same rule should not be applied to each.

The accident in this case—that the rebel government did, in fact, confiscate all debts due from loyal citizens—would render the payment of these premiums unlawful, even if it be conceded that, had a different policy been pursued, it would have been otherwise. When the act of an enemy creates a value which, eo instanti, passes to the enemy's treasury, that it does so is an additional reason why it is unlawful to continue the agreement under which it took place.

Among other reasons for not abrogating this contract, conspicuously urged in this series of judgments, is that the sum insured will not be paid till after the return of peace. It will not, therefore, it is said, furnish material aid to the enemy. This position is a concession that if it does so, it ought, upon principle, to abrogate the contract. But a thousand policies due against solvent companies are among the most certain sources of future payment which could be placed in the hands of our enemies. This

is self-evident, and cannot be rendered plainer by illustration. It would seem singular that a financial fallacy so transparent, as that these obligations are not present aids, should have been resorted to at all. But it is still more singular that it should be reproduced, after having been overruled again and again in the series of judgments which hold that marine policies are annulled by hostilities. In three of the English judgments, hereafter cited, this argument was made at the bar, and was answered by the court, that the obligation was present capital in the hands of the enemy. And it was upon this reason, more than any mere intercourse which was promoted by the insurance, or anything in the nature of the subject matter insured, that the judgments were rested. The leading idea in all these instances is, benefit to the public enemy.

Subject matter of insurance, or cause of loss, is of comparatively little consequence. In the single instance of insuring one subject to be called into the army, there would, indeed, be the additional impolicy of making him more ready to go there. But in a case where the policy forbids military service, such conditions need not be considered. In all other instances, the financial result, the injury to the home government, and the additional power and source of credit given to the enemy, is precisely the same. Whether the insurance be upon ships, upon mills and manufactories in the enemy's territory, or upon the life of a non-combatant; and whether the property and life are destroyed by fire, tempest, or the casualties of war, through raids or sieges; the same sums, in precisely the same legal conditions, pass from the hands of loyal citizens to public enemies. It is impossible to discern, practically or legally, the slightest difference. Let us suppose a fire insurance for a series of years, in the form now used, with premiums payable annually, upon property located in Richmond or Charleston; five of them are destroyed by accidental fire, and five are ignited by the shells of the army. Shall part be paid, and the residue not? A recurrence again to the judgments in reference to maritime insurance will show, that this whole subject is fully discussed and actually decided; and that it is not dictum, as it has been so repeatedly said to be. The point was made, that the policy was not necessarily void in all instances as the subject of insurance might not be captured by the government, but might be destroyed by the accidents of navigation; and that, although it might be impolitic to suffer the enemy to be reimbursed for an injury produced directly by the war, the reason did not apply where it happened from those casualties insured against in time of peace. The reply was, that it was unlawful for a loyal subject to continue to stand guaranty for any loss or damage whatever of a public enemy during war; and that the policies were annulled, no matter what might be the cause of loss.

We esteem it but a perversion of the real reason of this class of judgments, to assert that it reposes solely upon the fact that the insurance was maritime. That instances of other contracts and insurances did not occur in judgment, Sir William Scott, in The Hoop [1 C. Rob. Adm. 196], took pains to say, resulted solely from England's insular position; and that the same principle applicable to marine insurances would affect those of property upon land. Is there any distinction which a court of justice has a right to make in this regard, between property which is engaged in maritime commerce and therefore a little more commonly destroyed, and that which is located in cities subject to siege, or in the territory of the enemy which, by the usages of war for all times as policy demanded it, is laid waste by armies? In the raids of both parties during our late war, mills and manufactories of all kinds, tanneries, tobacco and cotton, corn and every material which could support a people or an army, were destroyed; and the health of non-combatants thus impaired and their lives endangered. And we say here, as we have just said in reference to another point, that what was lawful in a certain war might be unlawful in another, depending upon the political policy of the government which waged it. Where both governments resorted to confiscation, and each laid waste the territory of the other, it is a mere distinction in words, without any practical difference in actual condition, to say that a maritime policy is annulled and one upon inland property or upon the life of a non-combatant continued.

References to the leading authors and judgments upon this subject will not be made for the purpose of verifying those generalities which are mutually conceded; but, by a reproduction of their argument, to show that the reasons upon which they rest the rule, and the exigencies to which they have applied it, include those now in judgment. This can not be successfully done without considerable detail, necessarily involving much prolixity. In view of the great prominence which has in modern criticisms been given to the fact that the earlier judgments referred to contracts involving international intercourse, some pains will be taken to show, as we go over the cases, that this is by no means a material feature. This argument derives importance, less from its real nature than from the accident that it seems to be conceded that if all agreements, irrespective of intercourse, are unlawful between belligerents, then these life policies should not be continued by payment of premiums during the war. It is true they have been likened to mere debts; but the chief reliance is upon the other position.

The most full consideration of the general subject of the illegality of contracts between

belligerents to be found in any one adjudication, is the opinion of Chancellor Kent, in Griswold v. Waddington, 16 Johns. 438. Its doctrine that all agreements made during war, and the continued execution of those which are executory made before, are unlawful, which had been repeatedly announced in anterior federal judgments, is reproduced in his Commentaries (volume 1, pt. 1. § 3), and cited with approbation by every prominent English and American writer upon international law since its delivery. We think we may successfully challenge the citation of a single criticism upon its accuracy, by either author or judge, until the recent decisions in reference to life insurance. It has been accepted as American common law from the day of its delivery down to the recently attempted revolution. Even upon the supposition that some portions of the elaborate treatise contained in his judgment were dicta, its conclusions have so influenced professional and judicial opinion as to constitute it a high authority, irrespective of the facts which produced the judgment. See 2 Brod. & B. 598, per Lord Eldon, and 15 East, 225, per Lord Ellenborough. We cannot better subserve the purposes of our argument than to analyze quite fully Griswold v. Waddington, and reproduce, with considerable fullness, its arguments and citations. It was a suit to recover the balance of an account accruing during war, for bills remitted from this country to England. Two of the firm resided in New York, and the other in the latter country. The whole demand was for items received by the foreign house. It was decided: first, that war ipso facto dissolved the co-partnership, because the relation was incompatible with political duty, and therefore, receipts of money by the English members subsequently, did not obligate those in this country; second, that funds transmitted there could not be recovered, because the transmission itself was unlawful. This was the first judgment which declared directly the effect of war upon a co-partnership between enemies entered into before hostilities existed. Among the numerous grounds urged to distinguish this case from those to which the principles announced by the court had been theretofore applied, was, that the partnership did not necessarily extend to commercial intercourse between enemies, but might, by presumption, be confined to the domestic business and neutral trade of England; and that contracts and business relations were not prohibited so long as actual intercourse between the hostile countries was not involved, and did not in fact result. In answering this argument it became necessary to determine whether it was an essential element that the agreement or commercial relation should involve actual locomotion across hostile lines; or whether the continued execution of the agreement, although entered into before the war, was not unlawful, even though it pertain solely to the domestic trade of Great Britain. We more particularly call attention to these features of this judgment, on account of the recent decision in Kershaw v. Kelsey, where many of its doctrines, and those of similar import declared by the circuit and supreme courts of the United States, are denied, and said to be chiefly dicta. We do not so read the judgment; but consider it pointedly, deciding that all contracts voluntarily made with an enemy during war are void for illegality; and that all such as involve the continuance of any active business relation, or of continuing responsibility for the acts or losses of an enemy, are dissolved by war. The reason why such effect was produced upon the partnership was the fact that all contracts between enemies being unlawful, they could no more be made through the agency of resident copartners than personally. That absence of necessity for personal intercourse was immaterial. The principle is directly applicable to the abrogation of an agency for the making, renewal or continued execution of contracts; and to all sharing of or guarantying against loss—all of which are involved in the partnership relation. Chancellor Kent, at page 451, cites Grotius, lib. 3, c. 22, as saying: "Private contracts with the enemy, touching private actions and things, are unlawful." Gronovius, one of Grotius' commentators, he says, repeats and illustrates the principle. Puffendorf, lib. 8, c. 7, § 14, is said by his illustrations clearly to exclude all contracts, save those made by prisoners and residents in the enemy's country for necessaries and self-protection; and that Barbeyrac, in a note to the passage, declares that private agreements between enemies are forbidden by law. Vat. Law. Nat. bk. 3, c. 16, § 264, confines the right of making private contracts in the same way. This is declared to be all the "indulgence" allowed to private contracts during "war;" and it is further said that no private negotiation by way of business is tolerated. Page 453, Heineccius, is referred to as saying "that it cannot be permitted that one should enter into negotiations with those with whom we are at war. Le Guidon (French treatise) c. 2, § 5, is quoted as saying that no subject of the king can put his hand to an insurance of property belonging to an enemy. It does not say property in transit to or from an enemy's country. It is then shown that the French rule is in conformity with the ordinances of Barcelona of 1484. Cleirac, p. 197, is then referred to as repeating the rule in reference to insurance, and as adding that enemies cannot negotiate with each other. Valin and Emerigon are declared to be full to the same purpose. At page 455, he sums up what thus far had been shown; and among other results he supposes that "private negotiation or contract whatever is admissible, save in case of self-defense." The earlier history of the English common law, and the judicial

announcements in that country of the maritime law, are then minutely traced. The judgments reviewed are in reference to trade between the belligerent countries; but the reasons and declarations of opinion quoted, amply sustain his deduction that contracts are per se void between enemies. The leading federal cases are fully considered in the judgment. At page 483, he says: "There is no authority in law, national, maritime or municipal, for any kind of private, voluntary, unlicensed communication, business or intercourse with an enemy. It is all noxious, and in greater or less degree criminal. Every attempt at drawing distinctions has failed. All intercourse but that which is hostile, or created by the exegencies of the war, is illegal." Thus far, it is true, he was dealing with the proposition that the contract was void because predicated upon an illegal trading between the countries; but he was also preparing the elements for the support of his second and equally necessary proposition, that the contract was dissolved because no contract could be executed which involved continuing performance, and no business relations could exist, whether intercourse was involved or not. At page 488 it is said, war dissolves a copartnership for the reason that "an enemy" (partner) "cannot in that capacity make a contract binding upon the other (partner). This would seem to be the inevitable result of the new relations created by the war." Such a reason is literally applicable to the abrogation of the agent's power in this case; and also terminates the liberty of election by the insured to continue a guaranty in his favor, the moment he becomes a public enemy.

Furtado v. Rogers, 3 Bos. & P. 191; Potts v. Bell, 8 Term. R. 548; Kellner v. Le Mesurier, 4 East, 396; Gamba v. Le Mesurier, Id. 409; Brandon v. Curling, Id. 410; The Hoop, 1 C. Rob. Adm. 196; Esposito v. Bowden, 7 El. & Bl. 763; Avery v. Bowden, 6 El. & Bl. 953,—and the other English cases growing out of the Russian war, are all, as has been said in the judgments which refuse to follow the substantial principle they lay down, cases where the property insured was subject to maritime capture, and where the contracts sued upon involved intercourse with the enemy. From this fact it is argued that their principle abrogates such insurance only, and that those upon inland property and business are not affected. But Chancellor Kent, and all the other elementary writers, and the federal courts, deduce from them the broader doctrine which we announce, and which we have already endeavored to consider upon principle. The unusual length of our judgment compels us to omit our analysis of these cases. It is conceded that their language, their argument and illustrations, literally sustain a rule which would compel judgment against the plaintiff here. It is argued only that the facts in the several judgments did not call for the announcement of so broad a doctrine. If the rule of interpretation is to be applied, which deduces the extent of a doctrine from its reason, and the motives which call for its institution, and which applies it in all circumstances where the very evils are to be prevented against which it was intended to guard, then this list of judgments has not been misinterpreted for half a century, and the novel contrary reading is unjustifiable. And should we accept that other rule of interpretation, which confines the operation of a declared principle to the precise facts, and limits its extent to the actual necessities of the case, calling for its announcement; and should it be conceded that, tested by this rule, the announcements in question are dicta, still we should, in view of their history, consider them entitled to great weight from their having been so long recognized as law. But there is no necessity of resorting to any reverence for oft-repeated dicta here. In no sense is the generality obiter, which declares it unlawful to continue insurance upon the property of an enemy. In Furtado v. Rogers, there was no international communion, because the voyage insured was from one French port to another; and the judgment necessarily rests solely upon the impolicy of insuring enemy's property. But even in the cases where international intercourse was involved, and where the property was subject to confiscation, three objections, distinct, it is true, but all equally arising upon the records, were presented: 1st—That the commerce was international, and unlawful intercommunion would result. 2d—That the property was subject to capture, and so it was unlawful to insure it. And 3d—Which is more particularly applicable here, that the contract was one of continuing performance, where a loyal subject stood continuously bound to guaranty a public enemy against loss. The last was just as appropriately discussed and decided as the first. With precisely the same propriety it may be argued that all which is said about intercourse and confiscation is mere dicta, because unnecessary in a case which might have been disposed of on the ground of continuing performance and guaranty against loss. It is not true, in fact, that all these judgments are rested upon the features of national intercourse, or upon the fact that the property is subject to confiscation. The other objection, that it was unlawful to stand responsible for the losses of a public enemy, however they might happen, was distinctly asserted. The cases, therefore, which so emphatically lay down the doctrine we apply, and which have so long stood for law, must be overruled, or judgment in this case must be given against the plaintiff. In Ex parte Boussmaker, 13 Ves. 71, Lord Chancellor Erskine, in deciding that an alien enemy might prove his debt in bankruptcy, and in reply to an argument at the bar, said: "If

the contract had been made with an enemy during war it could not stand a moment—it would be void. The circumstances involved no intercourse between the hostile countries. A contract between enemies is declared to be illegal." In Brown v. U. S., 8 Cranch [12 U. S.] 110, timber was seized by the government as being maritime property of an enemy, and condemned at the circuit. But, as it had been unladen from the ship, it was deemed by the supreme court upon land; and upon this point the decree was reversed. Justice Story had condemned the property at the circuit, and it there became necessary to pronounce upon the legality of the purchase by the claimant, who, after the commencement of the war, had bought the timber from an agent of the enemy in this country. There was no communication whatever with England in order to consummate this contract. In reference to this sale, he said: "Brown claims by virtue of a contract between enemies during the war. It is of no importance what the character of the agent is. No principle is better settled than that all contracts with an enemy, made during war, are utterly void." This utterance, necessary for the case in the circuit, was not touched by the judgment in the supreme court. It is a decision by a judge, who, if we may except Chancellor Kent, had more thoroughly studied this department of the law than any other American jurist. He decides that a purely domestic contract with an alien enemy, through a loyal citizen agent who had received all his powers and instructions before the war, is void, because it creates an obligation which is capital and present increase of the enemy's available means. This was not a dictum. The learned judge could not have rendered his decree without so ruling. And we repeat, that the reversal of this decree upon other grounds, by a court which has itself so repeatedly announced the same rule, in no way shakes this precedent as an authority for a tribunal circumstanced like this one. The point decided in The Julia, 8 Cranch [12 U. S.] 181, was, that sailing under an English license, even to a neutral port, was unlawful. But in the opinion in the circuit, which was approved and appears as that of the court above, in answer to the argument that the purchase of the license in a home port was lawful, because goods might be bought of enemy's manufacture in a neutral port, it is said that such a purchase from an enemy would be illegal. That it is "unlawful in any manner to lend assistance to the enemy by attaching ourselves to his policy, facilitating his supplies, or separating ourselves from the character of our country." The idea that intercourse is necessary to invalidate, is excluded. In The Rapid, 8 Cranch [12 U. S.] 155, it became necessary to assert the principle upon which the unlawfulness of intercourse with the enemy rested, as there was no purchase or contract, but simply the removal of property owned before the war by the claimant. The court lay down the rule so often asserted by it since, that: "Every individual of one nation must acknowledge every individual of the other as his enemy, because the enemy of his country." "They who compose the belligerent states exist, as to each other, in a state of utter occlusion." It is unnecessary to quote authorities; they are numerous, explicit, respectable, and have been ably commented upon in argument. In this case [Case No. 11,576] the circuit judge, Story, said: "It is difficult to sustain the opinion that trade can subsist in a state of utter hostility, or that contracts and credits can be valid when they are subject to confiscation."

The federal judgments since have in no way limited these principles. Scholefield v. Eichelberger, 7 Pet. [32 U. S.] 586, was a suit for goods bought by the plaintiff from the defendants in England during the war, but not received until peace. The correspondence containing the orders went over in a cartel ship, and was inspected by government officers. The idea of unlawful intelligence was excluded. The court say "the doctrine at this day is not to be doubted, that during hostilities the citizens of the hostile states are incapable of contracting with each other." In suggesting possible limitations to the rule, even in instances where the contracting party is already lawfully within the hostile territory, and where there is no intercourse between the countries, the court mention those for necessaries and for money to return home. All others are said to be illegal. They are far from including leases of real estate, its actual cultivation and the production within the enemy's country of its chief and most valuable staple, such as Kershaw v. Kelsey declared to be lawful. As little do they include the continuance of a guaranty to an enemy creditor against the loss of his demand if his debtor die, such as 20 Grat. sustains. In The William Bagley, 5 Wall. [72 U. S.] 377, the court, with some severity, applied the old doctrine, that the share of a subject or neutral in property of a firm doing business in the enemy's country, was subject to capture; and this, too, where the business was commenced before the war, and the loyal claimant had left the South for a residence in New York. There was no intercommunion; but the produce of business in an enemy's country is, pro hac vice, enemy's property. All the adjudications and elementary writers which lay down and illustrate this familiar rule, show that it rests upon the fact that such business and all manufactures and productions of the enemy's soil, increase his strength and prolong his power of resistance. Between the practical consequences of those acts and relations which these rules declare to be illegal, and those which are begotten by this scheme of mutual insurance, there is not one scintilla of difference. In Coppell v. Hall, 7 Wall.

[74 U. S.] 542, there was a fraudulent use of an English consul's "protection;" and the military permit to cross the lines was held to be unauthorized; but in declaring the purchase of cotton illegal, from a belligerent, by one domiciled at New Orleans, then in Federal possession, the court repeat, in their utmost extension, the principles upon which we rely. Justice Swayne cites and approbates what we elsewhere quote from Wheaton and Kent, and The Hoop, 1 C. Rob. Adm. 196, and at page 556 says: "The objection rests upon the same principle as insuring enemy's property," and refers to Emerigon, Bynkershoeck, Valin, and Phillmore, and various common law authorities, to show that this is everywhere held to be illegal. Illegal not only because it aids maritime commerce, but because, as he forcibly illustrates, it adds to the resources of the enemy. After quoting at length from Chancellor Kent, in Griswold v. Waddington, he cites and approbates what Story, Justice, says in Brown v. U. S., as follows: "No principle of law is better settled, than that all contracts made with an enemy during war are utterly void." And see U. S. v. Lane, 8 Wall. [75 U. S.] 185; McKee v. U. S., Id. 163. This latter case, although not necessarily depending upon such a ground alone, we think is made to rest upon the illegality of a purchase by one lawfully within the Rebel lines, and where there had been no removal of the cotton out of the territory where bought. In U. S. v. Grossmayer, 9 Wall. [76 U. S.] 72, a debtor, being within the Rebel lines, at the request of a creditor in New York, bought cotton and deposited it in payment of a debt, with an agent selected during the war. It was not transferred North, nor intended to be. No money was sent South, and no new consideration paid; but simply an old debt was discharged. It was held that no title vested in the creditor, because the negotiation for the agency was in violation of public duty. In this case we grant that the only element of illegality consisted in the negotiation for the agency. In the act of payment from an enemy to a loyal citizen, through a local agent, without intercommunion of any kind, there is no public injury, actual or presumed. But whenever new arrangements are to be made, elections to be manifested and notified, or any new relations assumed to create which a new meeting of minds is necessary, or an additional act performed, the transaction would be illegal within the judgment in the Grossmayer Case. 1 Duer, Ins. 415, says, it will subsequently discuss the "important question whether the contract is not illegal and void in some cases where the property insured is not liable to confiscation." After stating the reason why marine insurances are illegal to be that "the whole body of insurers become in their hearts the enemies of their own government;" and "that they are under a constant temptation to save themselves from ruin;" on page 418 he adds, it is an ancient doctrine of the common law "that all contracts made with an enemy during war, with a few necessary exceptions, not including insurance, are illegal and void." Justice Story, in The Emulous [Case No. 4,479], is referred to. In the note the only exceptions are stated to be bills by prisoners of war and similar contracts. At page 473, note 2, the English cases are considered and the rule deduced, that an insurance upon enemy's property becomes void by war, whether the loss is by capture or otherwise; and that war occurring subsequently to the policy, abrogates it. He concludes the note by saying that contracts are suspended, only when they give an absolute vested right, irrespective of any further act or volition of the parties, such as notes and bonds; but that an executory agreement, when any additional performance is necessary in order to keep alive the obligation or perfect the right, so far as future performance is concerned, is discharged. His whole treatment of the subject clearly includes a case of life insurance terminating the agency and abrogating the policy. See page 463, note 2. Page 582, says that the reason for the familiar rule that property, suffered to go into an enemy's port on its way to a neutral or home port, is subject to subsequent capture, is "because the property became liable to seizure by the enemy when in its port; and the subject violated his duty to his own government by subjecting it to that hazard." This reason is literally applicable to the creation of credits subject to confiscation by the rebel power. Story, Partn. § 315, says, public enemies "can make no valid contracts with each other and hold no communication of an amicable nature." And see Story, Ag., §§ 461, 462, 481, 482, 599. Bunyon on Life Insurance (19 Law Lib. 28, or 63 Law Lib. N. S. 308), says: "The life of an alien enemy cannot, however, be insured by his creditor, although the latter be a British subject." We might not push the principle upon which we rely quite so far as this learned author. We should be inclined to uphold an insurance by a loyal person, upon the life of an enemy debtor, in a home company. No additional interest in saving the life of the enemy debtor would be created by such a policy; its only effect would be to transfer that interest from the creditor to the insurer. 1 Phil. Ins. p. 126, §§ 223, 224. Arnold, Parsons, and every other elementary writer, by their analyses of judgments and their modes of announcement, assume as settled law, that all contracts, save for necessaries and ransoms, are illegal between enemies; and that all the cases of marine insurance are but instances of the application of this principle. That there is anything in their nature distinguishing them from transactions on land, or contracts made within a hostile country, the effects of which are to increase the resources of the hostile government, is no-

where hinted at. This idea is found solely in the few modern judgments which have upheld contracts for raising cotton in the enemy's country and the continuance of life policies.

That a contract, the performance of which becomes illegal by matter subsequent is discharged, and that this familiar rule is applicable to policies of insurance, see Woods v. Wilder, 43 N. Y. 167; Furtado v. Rogers, 3 Bos. & P. 191; Brewster v. Kitchell, 1 Salk. 198; Leathers v. Commercial Ins. Co., 2 Bush, 298; 2 Pars. Cont. 674; Presbyterian Church v. New York, 5 Cow. 538; Bennett v. Woolfolk, 15 Ga. 213; 1 Pars. Adm. & Shipp. 329; Gray v. Sims [Case No. 5,729]; Odlin v. Insurance Co. of Pennsylvania [Id. 10,433]; Hanger v. Abbott, 6 Wall. [73 U. S.] 532; Esposito v. Bowden, 90 E. C. L. 762, 7 El. & Bl. 763, and the English cases there cited.

Modern authority is not wanting for the judgment we render. Several well-reasoned judgments and opinions of learned judges sustain our views. In Sands v. New York Life Ins. Co., in a painstaking opinion, and after full review of the English and American judgments and elementary writers, showing that no source of opinion was overlooked, Judge Robinson, as referee, holds that a life policy was abrogated by the war; that the continuance of the agency was unlawful, and the payment of the premium a condition precedent, the non-performance of which defeated an action. He shows what a reading of the case would readily suggest, that all which Justice Platt says, in Buchanan v. Curry, 19 Johns. 137, in reference to the completion of executory contracts, and which has been so frequently quoted, is wholly obiter.

In Cohen v. New York Mut. Life Ins. Co., the superior court of New York make a similar ruling, and deny relief in equity. This is the same cause decided differently by the court of appeals. Bliss on Life Insurance, at page 644, cites the decision of the superior court of Baltimore, in Mitchell v. Mutual Life Ins. Co. of New York [unreported], deciding that the policy was abrogated by the war. In this latter case the question is asked, if it could be contended for a moment that the policy would be good upon the life of an Englishman if it provided expressly for its continuance in case of war with his country. Such a policy, it is assumed, would be void. In the superior court of Baltimore, Stephens v. New York Life Ins. Co. [unreported], Judge Dobbin holds that the policy is annulled by hostilities, and says: "Where the contract is executory in its character, and is such as renders commercial intercourse between the respective belligerents necessary in order to perform its conditions," and "where the contract is such as to operate as an indemnity to the party insured against loss of damage occasioned by the other belligerent, there the contract is not merely suspended, but dissolved." Although books are not cited, the learned judge takes pains to say that the question had been several times most thoroughly argued before him, and that he had maturely considered it.

Among the leading and forceful judicial arguments in favor of abrogating these policies, is the dissenting opinion of Judge Christian, in Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614, in which a policy upon the life of a Rebel debtor, taken by a Rebel creditor to secure his debt, was held not to be abrogated by three judges against two. Dillard v. Manhattan Life Ins. Co., 44 Ga. 119, is a decision precisely in point upon a life policy. In a well-reasoned opinion, going over most of the applicable authorities, judgment was given against the plaintiff.

With this long line of adjudications establishing the doctrine that such a continuing contract, and such relations as this mutual scheme creates, are abrogated by war, and after the correctness of such doctrine has been asserted by every elementary writer who has spoken upon the subject, and so often announced by the court of last resort which is to review our judgment, we have no doubt about our duty in rendering judgment against the plaintiff. We should have none, even though we perceived more reason and justice in the adjudications which oppose our own. But after the most painstaking examination of them, and after having given the cause far more consideration than our time permits to most cases, we are with much respect constrained to say, that neither their conclusions nor the grounds upon which they rest commend themselves to our judgment. Irrespective, therefore, of the points hereafter considered, we should deny a recovery in this case, upon the sole ground that the contract became unlawful, and was discharged the moment the parties became public enemies.

We have not had access to the discussions of this subject in the court of claims, but, judging from references to its decisions, we should infer that its opinions accord with our own. See Blakeley's Case, 2 Nott & Hunt. 323; Gearing's Case, 3 Nott & Hunt. 165; Stoddart's Case, 4 Nott & Hunt. 511; Dillon's Case, 5 Nott & Hunt. 587; Grossmayer's Case, 7 Nott & Hunt. 129; Padelford's Case, Id. 144.

It is a distinct ground of defense in this case, that the payment of the premium on the day is a condition precedent, and that, irrespective of the illegality of continuing the indemnity after hostilities, the policy became void by the nonperformance of this condition. Reference will be made to the cases which announce the old and unquestioned rule—that a condition precedent must be performed, in order to furnish grounds for recovery under the contract—only to show that the circumstances relied upon to take this case out of it, attend its most ordinary administration. Impossibility of performance, growing out of unanticipated exigencies, constitutes no exception to its operation. Bliss (Life Ins. pp. 253–274) fairly states the leading American and

English cases, stringently applying the doctrine that payment is a condition precedent. He cites Robert v. North Eastern Mut. Life Ins. Co., 1 Disn. 355; Bergson v. Builders' Ins. Co., 38 Cal. 541; Norton v. Phoenix Mut. Life Ins. Co., 36 Conn. 503; Phœnix Life Assur. Co. v. Sheridan, 8 H. L. Cas. 745. This last case, and 1 Disn. 355 (s. c., 2 Disn. 106), refer to the fact that it is optional with the insured whether he will continue the policy, as an additional and conclusive reason why it must be terminated by his failure to pay on the day. In Simpson v. Accidental Death Ins. Co., 2 C. B. (N. S.) 257, Creswell, J., interrupting counsel, says: "If the insured really means to drop the insurance, but meets with an accident within the twenty days, he may, according to your argument, tender the premiums which he never intended to pay, and make the company liable." Such an interrogatory is still more applicable to the condition of things here. For those who have died, representatives claim compensation; while hundreds of those who survive refuse to continue because they can do better by a new insurance. This company would, beyond all doubt, be quite willing to pay for all who are dead, if all those who survive would pay up back premiums, thus carrying out the scheme according to its intention and financial theory, and affording a fund to pay the losses. In Catoir v. American Life Insurance & Trust Co., 4 Vroom [33 N. J. Law] 487, the court approbate the provision avoiding the policy for nonpayment, and the rules of law applicable to it, as eminently just and necessary for the safety of the company and of the public which relies upon its solvency and punctuality. In Want v. Blunt, 12 East, 183, the insured died within the fifteen days allowed for making the payment. It was a case of great hardship, and was elaborately argued. The form of the policy was substantially like that before the court. Upon full consideration of the doctrine in reference to conditions, it was held that, substantially, the insurance was from quarter to quarter, where the premiums were so paid; that so far as the insured was concerned, it was a new contract each time he elected to pay and continue the insurance. Lord Ellenborough said it was one of insurance, and must be read in view of what the parties undoubtedly intended by the words they had used. This intention, deduced from increased fullness in the stipulations and long practice under them, is still more undoubted now. The subtle and irrational distinction suggested in a note to Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, between the latter case and another in the forty-fourth volume of the same series, was strongly urged upon the court in Want v. Blunt, but was disregarded. In Gamble v. Accident Assur. Co., Ir. R. 4 Com. Law, 204, and Howell v. Knickerbocker Life Ins. Co., 3 Rob. (N. Y.) 232; Id., 44 N. Y. 276, sudden death in one case and paralysis in the other prevented performance on the day, but the rule was applied. Upon this ground Dillard v. Manhattan Life Ins. Co., 44 Ga. 119, is a case in point for the defendants. Premiums there were not paid on account of the war. It was said that where the contract made no exceptions, the court could not treat the occurring of the war of the Rebellion as such. The judgment is well reasoned and amply verified by citations. We see no reason why this familiar principle does not entitle the defendants to judgment, although the war alone prevented payment in time. Some additional reasons relied upon to take this case out of the operation of this rule are elsewhere considered in connection with the judgments where they occur.

Some of the judgments relied on by the plaintiffs decide that, if the war rendered the payment of the premiums impossible, such fact constitutes an excuse; and that a subsequent tender authorizes a recovery. There are but a few cases where subsequent impossibility is an excuse, even where it is relied upon only as a defense. And there is a broad difference, both at law and in equity, between protecting a defendant from an action for damages, and authorizing him to recover against another, where, in like circumstances, he has failed to perform a condition precedent on which his right of action depended. And still wider is the distinction where the condition is optional, the agreement, so far as this feature is concerned, unilateral, and the damages dependent upon some act to be performed at the election of the plaintiff. Before Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614, and Hamilton v. Mutual Life Ins. Co. [Case No. 5,986], we know of no judgment or elementary book which suggested there could be recovery in such case. 2 Pars. Cont. 672, says, no degree of mere hardship will satisfy the rule that the act of God rendering performance impossible is a defense. And in no case is impossibility an excuse, if it refer solely to the personal disability of the promisor, there being no natural impossibility in the thing. See Id. 459. The cases which establish and apply this rule show most clearly, that far greater effort is demanded from the promisor, than that of requiring the insured to leave the rebel region and come within the loyal lines, if he wishes to continue the indemnity; and quite as clearly that it is no answer to say that, in the accidents of his personal circumstances, he was unable to do so. The following American judgments are fully sustained by the English cases they cite and approve. Thompkins v. Dudly, 25 N. Y. 272, was an action to recover back money paid towards the construction of a schoolhouse, which the defendants had covenanted should be built by a day named, but which, just before its completion, was destroyed by fire. The court say, that a contract positively to do an act is not discharged by inevitable accident; and the greatest hardship will not prevent the application of the rule.

School Dist. No. 1 v. Dauchy, 25 Conn. 530, in which the building was destroyed by lightning, is approved. In this latter case, Elsworth, J., says: "In the contract no provision was made for any contingency, and defendant can incorporate none into it, but must abide by his absolute undertaking." This case quite fully cites the leading English and American judgments. In School Trustees of City of Trenton v. Bennett, 3 Dutch. [27 N. J. Law] 514, where, under a similar undertaking, the building fell down, owing to a latent defect in the soil, installments paid were recovered back upon the like ground. It is said "that he who by contract creates a duty upon himself, must perform it, notwithstanding any accident by inevitable necessity; because he might have provided against it in the agreement." The New Jersey court add, that "however apparently harsh the rule may be occasionally, it has its foundation in good sense and inflexible honesty." And see Adams v. Nichols, 19 Pick. 275. In Dermot v. Jones, 2 Wall. [69 U. S.] 1; Bullock v. Dommitt, 6 Term R. 650; Brecknock & A. Canal Navigation v. Pritchard, Id. 750; School Trustees of City of Trenton v. Bennett, 3 Dutch. [27 N. J. Law] 513; Beebe v. Johnson, 19 Wend. 500; Beale v. Thompson, 3 Bos. & P. 420; all extreme applications of the rule, are cited and approved; and the following remarks made by Justice Swayne: "The principle which controlled these cases rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for dispensation, the rule of law can give none." He says that in such cases equity will not interfere. The fact that in this case recovery was had upon the common counts when the defendant had received and occupied the house, in no way qualifies the principles we have quoted from the judgment. And see Chit. Cont. 734; 8 Term R. 259; Ang. Carr. 294; 3 Burrows, 1637; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 204; Co. Litt. 206b.; Shep. Touch. 164; Harmony v. Bingham, 12 N. Y. 99; Oakley v. Morton, 11 N. Y. 25. The case before us is one at law, and even if, in an extreme case, equity would relieve, there can be no pretense that in this action an excuse can be accepted by the court in place of performance. The contract in this case, in the most unambiguous terms, declares the premiums must be paid on the day or the policy is void. There is no exception of difficulties or impossibilities. The agreement is absolute in terms; and the nature of the scheme and the presumed intentions of the parties leave no room for the slightest doubt that they mutually intended its literal enforcement. It bears no possible analogy to the cases of forfeiture and penalties intended to secure acts and payments, where time is not of the essence of the contract; which, in our estimation, are so inapplicably quoted in several of the judgments from which we dissent.

Before the recent decisions cited by the plaintiffs we find no case or author suggesting that a complainant in a court of equity is entitled to relief where he has failed to comply with conditions precedent, which he was under no obligation to perform, and the contract was, in that regard, wholly unilateral. Much less have we been able to discover a single instance of interference where the agreement is in common use, and punctuality is well understood to be of its essence. The distinction between enforcing a right dependent upon conditions, and protection from penalties intended to secure collateral payment, we do not know to have been disregarded in any other judgments. The learning upon this subject is as familiar as any in the law, and will be considered only to insist upon its misapplication in the opposing judgments. There are many exceptions to the rule that equity will relieve even from penalties and forfeitures; and the grounds upon which they rest are applicable for greater reasons to exclude interference here. Story's Equity Jurisprudence contains a full and accurate discussion of most of the older judgments upon the subject. After stating generally, in sections 1302 to 1307, that at law he who enters into a contract which by any possibility can be performed by any one, although impossible for the party himself, is bound by his agreement; and after citing the conflict of authority as to whether the party is discharged at law where by act of God performance subsequently becomes impossible, he announces a rule in equity which in no case interferes with the intention of the parties. It is said in section 1316, a penalty is relieved from only when intended to secure a payment; and all the cases cited demonstrate that it is where there is an absolute obligation to pay money, and the penalty was to enforce it. The idea of relief is completely excluded where, as in this case, an affirmative right is claimed, and no obligation existed to perform the conditions upon which alone the contract accorded such right. That the intention always governs, is further discussed in section 1318, in reference to liquidated damages. An application of this principle, peculiarly germane to the facts in this record, is illustrated in section 1325, where it is said that considerations of public policy, and of what is necessary to carry out corporate objects, frequently render punctual payment necessary. In such cases, it is said, relief is never granted from forfeitures of subscriptions and stock. A perusal of the judgments which sustain this rule, amply justifies its policy, and suggests what is true, that no class of corporations or general process of business more eminently calls for the ad-

ministration of this doctrine than those now before the court. And see sections 287, 288, and the discussions generally of the doctrine of conditions, by this learned author. In Robert v. New England Life Ins. Co., 1 Disn. 355, an action was brought asking relief from what was erroneously called a forfeiture for non-payment of premiums on the day, and a decree asked for the sum insured. In one of the ablest judgments to be found on this subject, by a judge who has few superiors in the American judiciary, Gholson, J., for the court, refused the relief. He says, if the contract for absolute punctuality violates no principle, the parties may insert what terms they please, and the law demands a strict compliance. Easton v. Pennsylvania & O. Canal Co., 13 Ohio, 79; Egan v. Mutual Ins. Co. of Albany, 5 Denio, 326; Beadle v. Chenango Co. Mut. Ins. Co., 3 Hill, 161; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio, 75, are cited, in all which the literal terms of the agreements—such being the presumed intention of the parties as deduced from the nature of the contract—were rigidly enforced. That there can in such a case be no relief in equity, because the real intention was to indemnify only while the premiums were paid, and relief would, therefore, involve the creation of a new agreement by the court, is forcibly shown. It is said that from the very nature of the contract, the punctual payment is of its substance. He cites and approbates the fully applicable case of Davis v. Thomas, 1 Russ. & M. 506, affirmed on appeal, where a purchase was lost by neglect to pay rent on the day, and relief refused, because it was optional, and one party only bound. The agreements in these insurance cases were said to be alike unilateral, the company having no power to force its continuance; and this feature alone was conclusive against relief. The true nature of the agreement, which we think is wholly overlooked in the recent judgments, is stated, and attention called to the fact, that for a few hundred dollars the company was called on to pay $8,000. This would be just if demanded in the conditions upon which alone it was agreed to be paid. But we submit that it would be alike unjust and demoralizing to the law to decree its payment by making in effect a new agreement for the parties. The risk which is run by the company is a full, meritorious and solid consideration for the premiums already received. Some of these judgments speak as if, financially, this element of consideration was not known to the law; or if so, only as a technicality without substantial value. None stand higher, or receive fuller protection, both at law and in equity. The latter courts are full of illustrations of withholding relief where parties have had the benefit of chances. In Wells v. Smith, 2 Edw. Ch. 78, a contract to convey provided that it should be void unless the complainant made certain payments, and mortgages, and other details, by a day named. It was held, upon the distinction between the authority of a court to grant relief from a forfeiture, and that to vest an estate originally where a condition was unperformed, that no relief could be given. These cases are fully cited and reviewed. The decree is affirmed in 7 Paige, 22. Pike v. Butler, 4 Comst. [4 N. Y.] 360, dismissed a bill asking relief from the consequences of failure to erect a building in precise conformity with a contract, where the loss was total without it. Gardiner, J., says: "It is the enforcement of a legal right operating oppressively in the particular case, but against which it is difficult for law or equity to afford relief without substituting the undefined, and therefore dangerous, discretion of a court for the fixed principles upon which the law in relation to contracts, should be administered." And see, also, Crippen v. Heermance, 9 Paige, 211; Benedict v. Lynch, 1 Johns. Ch. 370; 1 Sim. & S. 598, note 2; Wiswall v. McGowan, 1 Hoff. Ch. 139; Gates v. Green, 4 Paige, 355; Holtzapffel v. Baker, 18 Ves. 116.

Time is always deemed of the essence of the contract, where its subject varies in value, or the motives and interest of complainant are subject to change. Doloret v. Rothschild, 1 Sim. & S. 590; Stubbs v. Lister, 1 Young & C. Ch. 94. The cases on this subject are numerous and varied. The health of the insured, his changed circumstances after a few years' delay in non-payment, oftener than otherwise produce an abandonment. This contingency is several times noticed in the judicial discussion of these policies, and most materially affects its interpretation, and the standing in a court of equity of those who seek a recovery where premiums have not been paid. It is but common justice that it should do so. See, in reference to this subject generally, the following cases: Mutual Ben. Life Ins. Co. v. Ruse, 1 Bigelow, Cas. 83; Howell v. Knickerbocker Life Ins. Co., 3 Rob. (N. Y.) 232; Robert v. New England Mut. Life Ins. Co., 1 Bigelow, Cas. 634; Catoir v. American Life Ins. & Trust Co., supra; O'Reily v. Mutual Life Ins. Co. of New York (Super. Ct. Nov. 22, 1866) [2 Abb. Prac. (N. S.) 167]; Koelges v. Guardian Life Ins. Co., 2 Lans. 480.

If this contract were an isolated transaction between individuals, a court of equity would refuse to enforce it against the obligor as unconscientious. See Story, Eq. Jur. § 331 et seq.; Fry, Spec. Perf. § 203 et seq. The judgments on this subject abundantly demonstrate that equity would afford no relief in the enforcement of such an agreement, where the complainant for a few hundred dollars asked as many thousands. The contract becomes just and moral only when it becomes a part of a great system, and rests upon the averages of many thousands of lives. The only rational mode of con-

templating the transaction is to consider all those who live in the loyal states as an aggregate, insuring all those in the disloyal, and to administer such a rule as would do justice generally between the two classes. Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610; Hamilton v. Mutual Life Ins. Co. [Case No. 5,986], and their associate judgments, decide that the body of members who punctually pay shall remain liable to such portion of those who do not pay, as happen to die within the period of suspended payments, while they have not a farthing of claim on that great mass of other delinquents who outlive this period, and refuse to pay their premiums after the war. The financial consequence is identical with that which would result from a deliberate selection and insurance by the officers of the company of a given number of lives which they knew would terminate within five years, and a rejection of a still larger number which it was known would pay premiums for an indefinitely longer period. As is said by the learned Justice Hunt, in his dissenting opinion in Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 286, in arguing an analogous question, the usage would amount to "a practice of receiving small premiums for the issuing of large policies of insurance upon the lives of persons already dead. To bring it to the case of Mr. Howell, who, according to this construction, was only one of a numerous class, the case was this: This company agree with Mr. Howell that if he should die on the 15th of July of any year, after twelve o'clock at noon on that day, or within a few days thereafter, if any one on his behalf should then pay to the company the sum of $138, they would at once issue or renew a policy upon his life for one year for the sum of $5,000. They would, in short, agree positively to pay $5,000 for the consideration of $138. * * * It is, as already stated, an agreement to insure the life of a man who is dead at the time of making the agreement." The entire scheme depends upon the assumption of what is known to be true, that a small number only would die within a short period, while the far greater portion will live and pay premiums to a comparatively advanced age. These modern judgments cut the scheme in two, and say to all those who are public enemies: "None of you need pay your premiums as provided in the contract; but those who happen to die are entitled to the full sum insured, deducting the premiums, while not one of your fellow enemies are compelled to contribute a dollar for this purpose. The money shall be paid by loyal citizens alone." The disastrous effects of such a rule of law upon a mutual insurance company, and the vital importance to them of the prompt payment of premiums by all for whom they stand guaranty, will appear by a simple illustration. It is well known that the whole scheme of life insurance is based upon the law of average. Out of a given number of insured persons, statistics show there will be on the average a certain proportionate number of deaths each year; and in a mutual scheme, the premiums to be paid each year by the whole number insured are fixed at such an amount as will make their sum total just sufficient to meet the losses arising from the average deaths during the year, and to provide for unforeseen fluctuations of the law of average and other contingencies, including necessary expenses. Thus, in a company consisting of one thousand persons, insured for one year for $1,000 each, where the average number of deaths was fixed at ten, each member must pay a premium of $10, making in all $10,000 of premiums, in order to meet the ten death claims—supposing, for the sake of simplicity, that there are no expenses or fluctuations of average. The company would thus meet its liabilities, and be solvent at the end of the year. Now, suppose it start the next year with the same number insured in like manner, and on the same basis, but that five hundred of those who paid premiums in the former year suspend payment in this. Out of the five hundred who pay the average number of deaths will be five, and the amount of premiums paid will be just sufficient to meet those losses—$5,000. But five, also, of those who suspend will die, and under the rule in question the company would be liable to their representatives for $5,000 of death claims, less $53.50 of unpaid premiums and interest, with no means for meeting such a liability, and no claim whatever upon the survivors of those who suspend. If time were thus held not to be of the essence of these unilateral life insurance contracts, it is difficult to see how a mutual company can escape ultimate if not speedy bankruptcy. No one knowing such to be the law would pay a single premium after the first, but would suspend; and if he chanced to die within the time when the amount assured to him would exceed that of his unpaid premiums, his representatives would demand that excess; otherwise he would drop the policy, thus securing to himself all the benefit of his chances of death, while the company have no benefit of his chances of life after the first year. There is but little significance in a name; but our own idea of the result of such a rule of law is expressed by calling it rank injustice rather than the beneficent and kindly interference of a court of equity to prevent wrong. We have no doubt that were this a bill in equity seeking relief from the consequences of the impediments created by the war, as possibly it may be claimed to be, no relief could be given. For a greater reason must judgment be denied in this action at law.

So many of the arguments upon which the following counter-judgments rest have been already considered, that few of their points

will be here noticed, and those by no means the most important. Kershaw v. Kelsey, 100 Mass. 561, adds the considerable influence of the tribunal which decided it to the recent tendencies; but we do not perceive that its argument adds anything to the reasons which sustain them. We know of no more forceful illustration of the impolicy of the rule asserted in that judgment, than the simple statement of the unpatriotic and mercenary conduct it legalized. Indeed, we think we discover in the unparalleled meanness of the defense, that which greatly prejudiced the mind of the court in reference to its legality. A resident of Massachusetts, while his fellow-citizens were hurrying to the battle-field, betakes his capital, his son and himself to the enemy's territory, and renting a portion of it, enters into a contract for raising and preparing for market an article of produce so essential to the power which was endeavoring to overthrow the government, that it was declared subject to seizure by our armies. If every contract, the execution of which adds to the enemy's power of resistance, is void, this one certainly was so.

If it be true that the law presumes the citizen to intend what he ultimately does in its violation, then the circumstances before the Massachusetts court presented a case where that court was bound to presume that the unlawful transportation of the cotton to Massachusetts was one of the original objects of the contract, and to have held the contract void for that reason.

Upon the face of the report, a case was clearly made where the presumption was that the defendant crossed the lines for the purposes of the agreement. Intercommunion was therefore established, and within the reasoning of the case itself, the contract of leasing was unlawful.

A citizen never so loyal, in any way interested in the produce of an enemy's soil, becomes in reference to such products, an enemy. In 1 Kent, Comm. 74–76, it is said: "It was considered by Sir Wm. Scott (The Phœnix, 5 C. Rob. Adm. 21, and in The Vrow Anna Catharina, Id. 161) that the possession of the soil impressed upon the owner the character of the country, so far as the produce of the soil was concerned, wherever the residence of the owner might be. The produce of a hostile soil bears a hostile character for the purpose of capture, when in the process of transportation from an enemy's country." "The enemy's lands are the great source of his wealth and the most solid foundation of his power; and whoever possesses land in the enemy's country, though he may in fact reside elsewhere and be in fact a friend, must be taken to have incorporated himself with the nation, and the produce of the soil is enemy's property." "The reasonableness of this doctrine will be acceded to by all nations, and is particularly recognized by the supreme court of the United States." See 1 Duer, Ins. 451, and Thirty Hogsheads of Sugar, 9 Cranch [13 U. S.] 191, where Chief Justice Marshall uses nearly the same language. The manifold applications of this doctrine, found in Wheaton, Phillimore, Halleck and every European continental writer, show that Kershaw v. Kelsey, in holding legal a lease of land in hostile territory which must result in the production of material aid to an enemy, is clearly at war with it. We have endeavored to show that the only exceptions to the rule that contracts with an enemy are void, are those for ransoms and necessaries. But this judgment sweeps away the rule entirely, and legalizes, not only the continuance, but the creation of every possible agreement for the production of material and the manufacture of supplies in the enemy's territory, where intercommunion across the lines is not involved.

Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, carefully states the correct general principle, and concedes that this contract would be void, if at war with public policy. In arguing that it was not so, the court take the three following positions: 1st—That the insurance of the life of an enemy involves no interests hostile to those of our government; 2d—That it comes within the principles of the decisions which suspend only the right of action upon bonds and notes; and 3d—It approbates the argument in Kershaw v. Kelsey, that intercourse across the hostile lines is necessary to render a contract void. These positions we elsewhere consider in our general argument. The objection that the payment of the premium was a condition precedent, was answered by what was to us a somewhat novel application of the doctrine announced in Brewster v. Kitchin, 1 Ld. Raym. 317; Touteng v. Hubbard, 3 Bos. & P. 291; Wood v. Edwards, 19 Johns. 205; People v. Bartlett, 3 Hill, 570; Wolfe v. Howes, 20 N. Y. 197,—and other similar judgments, where it is held that performance is excused on the part of a defendant when from a change in the law it becomes illegal or, from the act of God, impossible. We have already considered this subject, and recur to it here simply to say, that after a careful examination of the cases cited, we consider all of them, in their arguments and illustrations, as pointedly against the application of the rule made in the judgment. At page 623 it is said that interest compensates for nonpayment of the premiums; and Hamilton v. Mutual Life Ins. Co. [supra], and 7 Bush, 179, make a similar assumption. If a single transaction only is looked at, and we omit to consider the fact that the payment of premiums is not obligatory, and ignore the nature of the mutual scheme which is such that financial injustice of the grossest kind results from compelling the company to pay for those enemy delinquents who die, while few of those who survive pay their premiums at all—then beyond doubt interest, if compounded, would seem to compensate mathematic-

ally for payment. But a moment's consideration will serve to show that it does not in fact compensate. These cases overlook the palpable difference to the company between assuming a risk and assuming a loss. The insurers are entitled to, and do have this interest (i. e., the use of the money,) where the contract is exactly carried out; and in a case where the insured is still living, and is in as good health as when the first unpaid premium fell due, we think interest would compensate on a renewal of the policy, because the risk is then the same as would have been taken had the premium been promptly paid. But where the health of the assured has failed or death has occurred, the insurers are called upon to accept a greater risk or an absolute loss, upon the same terms on which they agreed to accept the risk contemplated by the policy. The ruling of these cases compels the insurers to assume a loss for precisely the same consideration which the policy awarded them for assuming a risk. But such a consideration is wholly foreign to the necessities of this argument. A policy of life insurance is a part of an indivisible scheme, incapable of existence as an isolated transaction; and all arguments which consider it otherwise are but misconceptions of its true nature.

It was urged upon the New York court that this scheme created a copartnership, and that upon conceded principles the relations between the members were therefore dissolved by war. This was answered from the bench by pointing out the familiar difference between a copartnership and a corporation, whose existence is not at all affected by the withdrawal of a portion of its members. We think such a reply involves a misconception of what must have been the objection of the very learned counsel in that cause. They could hardly have made the mistake of supposing, that the judicial personage created by the laws of and doing business in the state of New York was dissolved because a portion of its members, by virtue of the very terms and conditions provided by the contract itself, or otherwise, had ceased to be such. Manifestly, what was intended to be urged was, that the precise evils resulting from continuing commercial partnerships, follow the continuance of this scheme of mutual insurance—meaning what is to us entirely obvious, that a large body of persons in the loyal region would be interested in the health and prosperity of an equally large number of our enemies, and directly affected pecuniarily far beyond the mass of their fellow-citizens, by the bombardment of every rebellious city, and by every raid into their territory, which would deprive of shelter, raiment or food, other members of the corporation; and that therefore, the principle which dissolves a partnership forbids also this relation. This objection was not successfully answered by saying, what no intelligent lawyer would question, that a corporation in these circumstances was not dissolved like a copartnership. The difference between the relations of members in this mutual scheme, and of those in ordinary stock corporations the object of which is to prosecute a business unconnected with its shareholders, is most obvious. Here, each member is personally and directly interested in the health and welfare of every other; thus presenting, in the most efficient form, the precise evils upon which the principle dissolving copartnership rests. In an ordinary corporation, whether there be ten or ten thousand corporators, and whether they be comfortable or uncomfortable, it is wholly indifferent.

Semmes v. Hartford Ins. Co., 13 Wall. [80 U. S.] 158, is relied upon as deciding that the performance of a condition precedent is excused by the war. We think it has no tendencies to sustain such a proposition. The parties had agreed upon a period within which prosecution should be commenced, after every act had been performed and the obligation of the defendant rendered absolute. It was but a conventional statute of limitations. The judgment refers to, and rests upon, the same reasons as the decisions which hold, that belligerency suspends the running of the statute.

In Sands v. New York Life Ins. Co., 50 N. Y. 626, Judge Peckham, for the court, adds to the list of reasons why the policy is not abrogated, one which will somewhat startle the insurance lawyers of the country. He likens the clause for punctual payment to a covenant to pay a quarter's rent on a common lease. That we have the highest respect for that tribunal it is unnecessary to say. But when such an argument is necessarily resorted to to sustain a judgment, it is to us the very highest evidence that those reasons upon which alone we have a right to rely are wanting.

New York Life Ins. Co. v. Clopton, 7 Bush, 179, confines the rule we are considering to policies upon property which, according to the modern usages of war, is ordinarily confiscated when it comes within the power of the enemy. It would continue an insurance upon any branch of industry, without the payment of premiums. It does not take pains to say what would be the judgment, if the subject should be destroyed by raids from the Northern army. In speaking of a non-combatant, this and other cases seem to overlook the fact that they are as necessary to successful war as soldiers. Although learned writers differ as to the percentage which can be spared for the field, common reason shows it has very definite limits. Five hundred non-combatants, as they are termed, might have been selected from the rebel region, whose removal at the outset would have prevented the war; or would have terminated it within twenty days, if effected at any period during its continuance. The Reverend Mr. Clopton of the 7th of Bush, although he did nothing

but pray for Jefferson Davis and his government, was, beyond all controversy, of more consequence as a public enemy than any one obscure private soldier from his rebellious state. The distinction in this regard is without reason. It is not overlooked that, within our own reasoning, we are now considering what is wholly immaterial. We assert it to be so. We express our dissent from the attempted distinction, not because it is of any force against our conclusions, but for the reason that it is so frequently relied upon in counter-judgments. The subject of the insurance is never a criterion. That affects only the degree of impolicy and unlawfulness. The essential inquiry is, is it taken for the benefit of an enemy? No matter whether the subject be a ship, goods upon the ocean, manufactories of the great staples of life, in land or scientific manuscripts—in neither case has the insurance any tendency to increase the sum total of the enemy's property. But the evil consists in placing in the enemy's hands, through the obligations of the policy, that which will indemnify him after loss, thus increasing his resources. That this consideration, and not the subject matter of the insurance or the cause of loss, is the criterion, has been quite fully considered already in our general reasoning, and its illustrations need not be reproduced here.

It may invite a closer scrutiny of this judgment, to call attention to its suggestion that the agent might take a bond for payment of the premium at the end of the war, by way of avoiding the confiscation power of the rebel government. This would require some new headings in insurance books, and cause learned actuaries to study some principles with which they are not familiar.

The case of Hamilton v. Mutual Life Ins. Co. goes upon reasons which would authorize a recovery in a court of law; and, according to the rule familiar in the federal courts, the bill should have been dismissed. The decree of Judge Blatchford, as well as that in Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, must have gone upon the ground that the legal right was imperfect, and are precedents in this action at law for the judgment we render.

The most extraordinary feature of the opinion in Hamilton v. Mutual Life Ins. Co., and one affording a remarkable illustration of the liberties which learned judges will take with fixed rules of law when they stand in the way of what they deem the merits of a just cause, is that part which attempts to answer the forcible objection, that the continuance of an agency to receive premiums became unlawful for the reason that, the instant he received them they were, by operation of the local law, confiscated by the rebel government. With much spirit of expression he declares this is no objection at all, because the agent could refuse the tender, and thus prevent the creation of a debt which the rebel government could seize. The opinion concedes that all agencies, the duties of which cannot be performed without a violation of political duty, are abrogated. When pressed with the fact that the duties of this one came pointedly within the principle, and asked to apply it in justification of its discontinuance, he replies: We will continue the agency, but avoid its illegality by a suspension of its functions. This is no distortion of the position, but almost its literal reproduction. The mind which was forced to resort to such an answer must have been close to the line which separates its judgment from our own. And this, too, is said in an opinion which holds the removal of the agency a fraud which estops the corporation to deny its continuance.

A somewhat singular application is made of Ruse v. Mutual Ben. Life Ins. Co., 26 Barb. 556; Id., 23 N. Y. 516, 24 N. Y. 653; Buckbee v. United States Ins., Annuity & Trust Co., 18 Barb. 541,—and kindred cases, which decide that, where the company, by its own fraud, prevents the payments, it is estopped to deny that they were made. It likens the refusal of a loyal citizen to continue a public enemy as his agent, the performance of whose functions is not only to create without consideration an obligation upon himself, but to call into existence successive debts which pass by the mere act of their creation into the rebel treasury, to those frauds and devices which enlightened judges have declared should not enure to the benefit of the guilty parties. We hardly think comment can be necessary to show the inapplicability of this class of judgments.

Wolfe v. Howes, 20 N. Y. 197; Jones v. Judd, 4 Coms. [4 N. Y.] 411; People v. Tubbs, 37 N. Y. 586,—from the list of judgments which, in modern times, have so justly established the right of a plaintiff to recover upon a quantum meruit, where the whole contract has not been completed, but there has been a partial performance beneficial to the defendant, are cited, in our estimation most erroneously, as grounds for the decree. This doctrine in its proper application, is well settled in the federal courts. The decisions cited are among the most enlightened of their class, and plainly distinguish between the right they protect and that of authorizing a recovery where a condition precedent has not been performed. In Dermott v. Jones [2 Wall. (69 U. S.) 1], Judge Swayne in the same judgment discusses and applies both principles. The short answer to what we deem a misapplication of these decisions is, that in this contract, punctual payment is of its essence; and if this is so, such decisions are wholly inapplicable.

Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614. This case, decided by three judges against two, furnishes slight author-

ity for the plaintiff. It is needless to say that, in our estimation, the reasoning of Judge Christian and his dissenting associate, is the better law. An enemy creditor insured the life of an enemy debtor, in a loyal company; and a distinction between such a contract and one directly upon commerce and property, is still more subtle and fanciful than if the policy were upon the husband or father for the benefit of the widow and children. Still, the reasons upon which the last is protected, just as conclusively sustain a public enemy's insurance of one of his commercial securities.

In opposition to the most familiar judicial history, it is said that no judgment has ever held a partially performed contract abrogated; that the principle is never applied where it will injure the parties; and that the defense is actually immoral. This is quoted and approved in [Hamilton v. Mutual Life Ins. Co., supra]. Every case of marine insurance and all in reference to commercial intercourse involved partially performed contracts, the annulling of which entailed loss upon the parties. No branch of the rule has the slightest reference to personal protection, but in all instances of its assertion has universally subordinated private interests to the policy and presumed good of the nation.

The consequences of the abrogation involve quite different considerations. An executory contract, under which money has been paid, annulled by war, might, in particular circumstances, authorize, after peace, a recovery upon the common counts, as in the case of a rescinded contract. This question is not before us, and is referred to only as an answer to some of the extravagant illustrations employed in the opposing argument.

We are unable to appreciate the argumentative effect which the opinion imputes to the facts that a local statute demanded an agency, and that the policy constituted a Virginia contract; although these features seem to constitute leading reasons for giving judgment for the plaintiff. If the continuance of the contract is against public policy, it is wholly immaterial where it was made. If the functions of the agent could not be lawfully exercised, it is of no consequence that he was originally appointed by the compulsion of the statute. It seems to us that the only important inquiry, viz.: 'Are the substantial relations existing between the parties such as war dissolves?" is overlooked.

Judgment must be rendered for the defendant with costs.

NOTE. This case was affirmed in the supreme court of the United States, by a divided court. [Unreported.] The case of Hamilton v. Mutual Life Ins. Co. was also affirmed on appeal by the same divided court, which asserted a doctrine the opposite of that announced by Judge Emmons. [Unreported.]

[The following note to Smith v. Charter Oak Life Ins. Co. is reprinted from 1 Cent. Law J. 79, by permission, instead of the condensation of the same given in 1 Flip. 339:]

"The reasoning on which Judge Emmons proceeds is, that the keeping alive of such a contract is beneficial to the public enemy. This, it is admitted in the case of Sands v. New York Mut. Life Ins. Co., 50 N. Y. 632, would terminate the contract, if such were the case; but this is denied, especially when the policy contains a provision rendering it void if the assured shall enter the military or naval service, or die in the known violation of any law of the United States. Where the policy contains such a provision, Peckham, J., argues (50 N. Y. 635) that its perpetuation would be injurious to the public enemy. Again, Judge Emmons argues that the fact that the sum insured will not in any event be paid until after the return of peace, does not furnish any reason against the doctrine that such a contract is avoided by war; because, if continued, it remains 'one of the most certain sources of future payment which could be placed in the hands of our enemies.' It constitutes 'present capital in the hands of the enemy.' This argument is forcibly answered by Judge Blatchford in Hamilton v. Mutual Life Ins. Co. [Case No. 5,986], as follows: 'Nor is it perceived how the amount or value of a policy on the life of an alien enemy, who dies during the war, can be availed of to aid the war, by the government of the country of the assured, in any way, or to any extent, in or to which the amount or value of a promissory note, made before the war, and falling due during the war, can be availed of to aid the war, by the government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war.'

"Judge Emmons' opinion places the question entirely, as we understand it, upon grounds of public law, and political duty. In the Georgia case (44 Ga. 122), the same conclusion is reached on a somewhat different ground. McCay, J., pronouncing the judgment of the court, reasons as follows: 'It would have been illegal for Mrs. Dillard (the wife of the insured) to pay the premium to the company, during the war, contrary to the act of congress. And were this a case of forfeiture for a failure, we should hold that a forfeiture was prevented by the illegality of the performance of the condition. But is this such a case? The company contracts to pay so much at the death of the insured, if the annual premiums are paid as stipulated. It is clear from the policy, and from the known practice of all the companies, that the insured has a right, at any time, to refuse to pay, and give up his policy. The contract, upon its face, requires to be renewed from year to year, by the payment of the premium. Indeed, a contract of life insurance is, at best, nothing but an undertaking that the company will take the annual premiums paid, invest them safely, and pay the insured the product, after deducting the expenses of the business. Indeed, if every person insured lived to an average age, this would be exactly the contract. But, as any individual may die at any time, the company agree to pay him what his premium would amount to, making up its losses upon him by the payment of those who live beyond the average age. The regular annual payment of the premium agreed on is thus a condition precedent of the contract, and not a condition subsequent. And it is just here, that the authorities relied on fail to apply. If a condition subsequent becomes illegal, there is no forfeiture; for the estate having once vested, it shall not be divested because the party fails to do an illegal or impossible act. Code, § 2680. But it is different with a condition precedent. If that be illegal, the right never vests. It is not a question of forfeiture, but a failure to do the thing necessary to acquire the right. Broom, Leg. Max. 176. And this, it seems to me, is a distinction based upon principles of justice and

sound sense. If I promise a man to sell him my house, provided he appear on a particular day with the money, and he fails, for whatever reason, other than my fault, he has no right in the house. But if I sell him the house, and it is agreed that he shall forfeit it, if he fail to pay me for it in full, by a particular day, then the cause of his failure may, both in equity and sound sense, become very material.' On the other hand, in the case of Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 623, we find the following counter reasoning: 'At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payment, but the effect of the war was to make the attempt unlawful without any fault on his part. The operation of a condition as express and absolute as in this case, was held suspended during the war, in Semmes v. Hartford Ins. Co., 14 Wall. [81 U. S.] 158. The condition there, as here, was by the act and agreement of the party; and yet its performance being impossible, it was held to be inoperative.'

"The cases which hold that the contract of life insurance was not abrogated by the war, proceed chiefly upon the ground, that such a contract is in part executed by the payment of premiums; that by such payment, the beneficiary acquires a vested right in the benefits promised by the contract, of which he cannot be deprived by a casualty beyond his control, like the breaking out of a war. And some of the cases urge, in forcible language, that to hold the contract abrogated by the war, would be grossly unjust to the person for whose benefit the insurance is effected, and that such a defence on the part of the insurer, is an unconscionable defence. Thus, it is said in the Kentucky case: 'To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of premium, which the law prevented the appellant from a right to receive. * * * A suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting or just.' New York Life Ins. Co. v. Clopton, 7 Bush, 184, 188. In the case of Hamilton v. Mutual Life Ins. Co. [supra] the question is put by Judge Blatchford in this way: 'The defendants in effect say to Goodman (the insured): "It was unlawful for us to receive from you your premiums for 1862, 1863, 1864, and 1865, as they became due; it would have been idle for you to have tendered them to us; yet as the contract was that you should pay them at specified times, the contract is forfeited; our liability to pay you the $5,983.05 is at an end, and besides that, the $2,307.50 paid us as premiums on the policies of 1849, and 1858, is forfeited to us." I do not believe a defence of that kind to a policy of life insurance situated like the present one, was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind.' Equally strong is the language of Anderson, J., speaking for a majority of the court in the Virginia case, where he states the case thus: 'They (the insurers) refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to $5,155, besides interest; and they invoke the intervention of the court to sustain them in these pretensions. * * * It would be a monstrous perversion of law, and repugnant to our every sense of justice, to say that this company, after having received more than half the sum assured, could, by this act, determine the policy, hold on to the money they had received, and say to their confiding victim, "You may whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it."'

"And while the court admit that this language puts the case too strongly, yet they say further on, that the proposition that the company could withhold from the agent the printed receipts by which payment of the premiums was to be acknowledged, 'would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the premiums he had paid—a conclusion against which the sense of mankind would revolt.'

"These extracts indicate, to a partial extent, the reasoning of the courts on the subject. The result of the recent adjudications may be summed up, as follows:

"1. The contract of life insurance is not abrogated, but only suspended, by the outbreak of a war which places the insurer and insured within opposing lines of belligerent occupancy. Smith v. Charter Oak Life Ins. Co., supra; Seyms v. New York Life Ins. Co. (U. S. Cir. Ct. S. D. Miss. Nov. Term, 1873; Hill, J.) [unreported]; Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610; Sands v. New York Life Ins. Co., Id. 626; Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614 (two of the five judges dissenting); New York Life Ins. Co. v. Clopton, 7 Bush, 179; Hamilton v. Mutual Life Ins. Co. [supra]. Contra: Tait v. New York Life Ins. Co. (U. S. Cir. Ct. W. D. Tenn.; Emmons, J.) [Case No. 13,726]; Dillard v. Manhattan Life Ins. Co., 44 Ga. 119.

"2. If the stipulated premiums are paid until the outbreak of the war, but not thereafter, and the assured die during the war, the beneficiary or legal representative may, by giving notice and making proof of death within a reasonable time after the close of the war, demand and compel payment of the sum stipulated in the policy, less the unpaid premiums accruing previously to the death of the insured, with interest. Sands v. New York Life Ins. Co., supra; Seyms v. New York Life Ins. Co., supra; Manhattan Life Ins. Co. v. Warwick, supra (two of the five judges dissenting); Hamilton v. Mutual Life Ins. Co., supra; New York Life Ins. Co. v. Clopton, supra. Contra: Tait v. New York Life Ins. Co., supra; Dillard v. Manhattan Life Ins. Co., supra. And this principle applied to an insurance maintained by a creditor upon the life of his debtor. Manhattan Life Ins. Co. v. Warwick, supra.

"3. If the insured survives the war, and within a reasonable time thereafter the unpaid premiums accruing during the war are tendered by him, and the insurer declines to receive the same, or to acknowledge the policy as in force, the beneficiary in the policy may maintain a bill in equity to reinstate the contract and declare the rights of the parties. Cohen v. New York Mut. Life Ins. Co., supra.

"4. Or, under like circumstances, payment of the premiums having been tendered to, and refused by, the company's agent, during the war, the beneficiary may treat such refusal as a breach of the contract, and may maintain an action at law for damages; and the measure of damages is the value of the policy at the time of such breach of contract. Smith v. Charter Oak Life Ins. Co., supra (principal case).

"5. The relation of principal and agent between an insurance company residing within one of the lines of belligerent occupancy, and its agent residing within the other, is not terminated by the fact of war. Smith v. Charter Oak Life Ins. Co. (principal case) supra; Sands v. New York Life Ins. Co., supra; Hamilton v. Mutual Life Ins. Co., supra; Manhattan Life Ins. Co. v. Warwick, supra; New York Life Ins. Co. v. Clopton, supra. Contra, Tait v. New York Life Ins. Co., supra. And see Ward v. Smith, 7 Wall. [74 U. S.] 447, 452; U. S. v. Grossmeyer, 9 Wall. [76 U. S.] 72, 75. Provided, the agent had been appointed before the war. Id. 75.

"6. And it is the duty of the insurer to provide an agent in the state where the premiums,

by the terms of the policy, are to be paid; and this duty continues, notwithstanding the intervention of war. Hamilton v. Mutual Life Ins. Co., supra.

"7. Although an agent under such circumstances, would not have the power lawfully to enter into new contracts of insurance (New York Life Ins. Co. v. Clopton, supra; Ward v. Smith, 7 Wall. [74 U. S.] 452), nor to transmit money received for premiums across the hostile lines to his principal: yet he might lawfully receive premiums on policies in force before the war, and such the insured might lawfully pay (Manhattan Life Ins. Co. v. Warwick, supra; Sands v. New York Life Ins. Co., supra). At least, a tender to such an agent, and his refusal to receive the premium because of his inability to transmit the same to his principal because of the intervention of a state of war, would save a forfeiture of the policy. Hamilton v. Mutual Life Ins. Co., supra.

"8. Payment of premiums under such circumstances in Confederate money, is a good payment. Sands v. New York Life Ins. Co., supra. But the right of the company through its agent to refuse payment in such funds, is recognized in Manhattan Life Ins. Co. v. Warwick, supra."

[In New York Life Ins. Co. v. Statham, 93 U. S. 24, the supreme court of the United States, per Mr. Justice Bradley, held, in 1876, that if failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is, nevertheless, forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy, arising from the premiums actually paid.

[See, also, New York Life Ins. Co. v. Davis, 95 U. S. 425.]

Case No. 13,727.

In re TALBOT.

[2 N. B. R. 280 (Quarto, 93); 2 Am. Law T. Rep. Bankr. 15; 1 Chi. Leg. News, 107.] [1]

District Court, S. D. Georgia. Dec. 4, 1868.

BANKRUPTCY—MARSHAL'S BILL OF COSTS.

1. On a bill of costs of U. S. marshal as messenger. *Held*, that travel by a U. S. marshal as messenger to make return on warrant of bankruptcy is necessary, and mileage of five cents per mile therefor is a proper charge.

[Cited in Re Donahoe, Case No. 3,979.]

2. A charge of ten cents per folio for preparing notices to creditors is an improper charge.

3. An item for attendance is an improper charge.

By FRANK S. HESSELTINE, Register:

In pursuance of the order of this honorable court, referring to me, as register in bankruptcy, the "messenger's bill of costs," in the above stated matter, to look into and report upon the correctness thereof, I have carefully examined the said bill and so much of the bankrupt act [of 1867 (14 Stat. 517)], as has reference thereto, and do humbly submit the following report.

The "bill of costs" taxed by the messenger is as follows:

1.	For service of warrant.....	$ 2 00
2.	For necessary travel, five hundred and ninety-two miles at five cents per mile	29 60
3.	For notices to creditors, twenty-seven, at ten cents each.....	2 70
4.	For actual and necessary expenses in publication of notices, advertising, four dollars, preparing same, ninety cents, postage, envelopes, eight cents	4 98
5.	For preparing twenty-seven notices, one hundred and eighteen folios, at ten cents	11 80
6.	For stamps and envelopes, twenty-seven notices at four cents each..	1 08
7.	For furnishing two copies of advertisements, at five cents each....	10
8.	For making affidavits to warrants..	50
9.	For drafts and copy costs, one folio at ten cents	10
10.	For attendance	1 50
		$54 36

I find that the first, third, and fourth items are authorized by the forty-seventh section of the bankrupt act.

Item 2. This charge is for the travel of the messenger from Savannah to Albany and back again, made for the purpose of making his return of the warrant and his doings thereon, before the register presiding at the first meeting of creditors held at Albany, in pursuance of the notices published by the authority of the said warrant. The messenger claims that it is authorized by the words in the forty-seventh section: "For all necessary travel at the rate of five cents a mile each way." I. Is this necessary travel? II. If the travel is necessary is the charge for it correct?

First. Section 12 of the bankrupt act (general clause 87, Rice's Manual) provides, that at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon. The warrant addressed to the marshal closes with the words, "And have you then and there this warrant, with your doings thereon." From this it is plain that the travel to the place of the meeting for the purpose of returning the warrant is necessary. As the register who presided over this meeting lives at Savannah, and has his principal office there, and went from there to hold this court at Albany, the necessity for this travel perhaps might have been obviated by a change in the mandate for return, making the warrant returnable before the register at Savannah. This, however, was not done, and I decide that the travel was necessary.

Second. The travel being necessary, is the charge for mileage correct? By section 47 of the bankrupt act the messenger is allowed: "For all necessary travel at the rate of five cents a mile each way;" and this, were there nothing further upon this subject, would be conclusive, and I should decide the charge to be correct; but I find by the same section that the justices of the supreme court of the United States are authorized to pre-

[1] [Reprinted from 2 N. B. R. 280 (Quarto, 93), by permission. 1 Chi. Leg. News, 107, contains only a partial report.]

scribe additional fees, or to reduce those fees prescribed in this section. Have they by virtue of this authority passed any rule or order affecting this fee of mileage? After a careful examination of this subject I can come to no other conclusion than that "Rule 12, General Orders in Bankruptcy," was passed to affect this fee. The rule provides, first, for the payment of the register's travelling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties, in any case or number of cases which may be referred to him; second, it provides that the marshal shall make return of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, publication of notices, and other services, and other actual and necessary expenses paid by him. The act did not provide for the payment of the register's expenses in attending a court of bankruptcy; this rule does, and also provides for the expenses of a clerk or a messenger, who may attend him at the court. The act did provide mileage for the necessary travel of the messenger, in the service of a warrant. This rule changed or reduced it to "actual and necessary expenses in the service of every warrant addressed to him." The act provided for his actual and necessary expenses for custody of property, publication of notices, and other services. Rule 12 added to these the service of warrant, giving him instead of mileage his actual and necessary expenses therefor. If the expenses of the messenger, who attends with the register at the several places of holding courts in this district, and at those courts returns the several warrants returnable at each, are not provided for under the first class of rule 12, are they not under the words "actual and necessary expenses in the service of every warrant" in the second paragraph? I am not at liberty to conclude that the justices of the supreme court, by this rule, only intended to provide for the manner of the messenger's return of his expenses for services, as provided in paragraph 4, § 48, and that the addition of the words "service of warrant," not found in that paragraph, was an oversight. Nor am I at liberty to question their authority for substituting actual and necessary expenses for the service of a warrant, in place of mileage for necessary travel. If I were I might have trouble in harmonizing this rule and section forty-seven, which authorizes the justices to make this change, with section ten, which enacts that "they shall frame general orders, * * * for regulating the fees payable and the charges and costs to be allowed, except such as are established by this act or by law." I can come to no other conclusion than this, that the justices of the supreme court decided that the forty-seventh section of the act gave them the authority to make rule 12, General Orders and Forms, and that they intended by it that the messenger's expenses in the service of every warrant should be in lieu of the mileage granted to him by the act. There were several warrants returned at this court and at other courts held in that vicinity about the same time. It is my construction of this rule, that where expenses are incurred in several cases, as in travelling to hold a court or to make return of a number of warrants, the register or messenger should equitably apportion the expenses among the several cases for which he incurred them.

Item 5. Preparing twenty-seven notices, one hundred and eighteen folios, at ten cents, eleven dollars and eighty cents, I find no authority for in the bankrupt act. I believe that it is claimed under the act of congress of February 26th, 1853 [10 Stat. 161], providing fees for marshals and other officers. I do not sustain this claim. The fee bill of 1853 provided certain fees for the services of a United States marshal. The services rendered in this court are by a messenger. The act establishing the office and duties of messenger has designated the fees appertaining to the office, and I do not think that the messenger can claim for services rendered under the bankrupt act fees which are not designated in the act. The clerk may, for the act so provides, vide section 47, Bankrupt Act, but no other officer of this court can legally do so. The following language, found in the same section of the act, is plain and decisive upon this point: "The assignee shall pay out of the estate to the messenger the following fees, and no more." The United States district court of Kentucky, in Re Dean [Case No. 3,699], has decided that this charge is not sanctioned by the "Fee Bill Act of 1853," and refused to allow it. I might add, that as the number of creditors increases, the number of notices and folios also increases, so that in some cases in this court the fee for printing these notices, by this system of geometrical progression, reaches above two hundred dollars. It cannot have been intended by the framers of this act that a bankrupt must pay for the notices sent to his creditors so large a fee as this. In the language of a member of congress who opposed this act prior to its amendment: "It would cost a man more to take the benefit of it than to pay his debts." It would defeat the end and aim of the law; the poor will be unable to get rid of the burden of debt. I am not able to understand for what service the allowance of ten cents for each written note to creditor is intended, if there is a charge for preparing notices and also one for stamps and envelopes for sending the notices. It is true that this allowance of ten cents for each written note to creditor is inadequate for the service of preparing these notices. And it was with a view, doubtless, to remedy this defect in the act that rule 11 of this court was passed. I know no reason why, whatever the messenger may pay out to the printer for print-

ing these notices, may not be justly allowed to him under the head of expenses for "other services," provided for in rule 12. I desire to call the attention of the court to the paragraph in the forty-seventh section of the act, that "for cause shown and upon hearing thereon such further allowance may be made as the court in its discretion may determine," so that this court is at liberty, whenever it shall decide that the messenger is not properly remunerated for his services, to allow him additional pay in any case.

Items 6, 7, 8, and 9, are for expenses incurred, and are correct.

Item 10. "For attendance, one dollar fifty cents," I find no authority for, and no reason is given for the charge other than that it is found in the bill of fees of the messenger in other districts. It is not approved.

ERSKINE, District Judge. The conclusion at which Mr. Register Hesseltine arrived in the matter of "the messenger's costs" in bankruptcy cases referred to him by the court, on motion of the counsel for the bankrupt, is approved.

TALBOT (BEARD v.). See Case No. 1,182.

TALBOT (BOWIE v.) See Case No. 1,732.

TALBOT (DARNALL v.). See Case No. 3,578.

Case No. 13,728.

TALBOT v. McPHERSON et al.

[2 Cranch, C. C. 281.] [1]

Circuit Court, District of Columbia. Nov. Term, 1821.

LIEN—CONTRACT OF INDEMNITY—RIGHTS OF THIRD PARTIES.

A contract to deliver 300 hides, then in the vat, to the plaintiff, as security to indemnify him for his responsibility for a debt due by the defendants, which has since been satisfied, will not constitute a lien upon the hides, in favor of the plaintiff to indemnify him for his responsibility for another debt of the defendants, for which the plaintiff is liable, where the rights of a third person have intervened.

This was a bill in equity by Elisha Talbot against John McPherson and Daniel McPherson, carrying on the trade of tanning, under the firm of John McPherson & Son, and one Tuley, the foreman of John McPherson & Son. The original bill was filed on the 15th of April, 1819, stating that the plaintiff had purchased of John McPherson & Son 300 hides in the vats, and still remaining there, and that the said J. McPherson & Son had received, for them, a full and valuable consideration; "in other words, have been fairly paid for them;" and he exhibits their bill and receipt, which is in these words: "Elisha Talbot bought of John McPherson & Son, 300 hides sole leather at eight dollars, in the vats, $2,400. Received payment, John McPherson & Son. Alexandria, 4 mo. 6th, 1819." The bill further states that the plaintiff believes J. McPherson & Son to be insolvent; that he had demanded the hides of the defendant Tuley, who is the foreman of the tan-yard, and has possession of the hides, and refuses to deliver them to the plaintiff; that Tuley has not sufficient property to answer in damages; that the plaintiff fears that the defendants will remove, or sell, or dispose of the hides; and that he has no means of obtaining payment for them, as the defendants are insolvent. On the 10th of November, 1819, the plaintiff filed his supplemental bill, stating that he had obtained sixty-eight of the hides, but that the residue had been sold to one D. Dougherty, who has taken possession of them, but had not paid for them; that he believes the sale was made by one John McPherson, Junior, and that it is a contrivance to evade the injunction which had been granted upon his original bill. Both bills prayed that the hides might be specifically delivered to the plaintiff.

The answer of John McPherson & Son, by Daniel McPherson, avers that neither he, nor the firm of John McPherson & Son ever received any compensation for the hides, but that the bill of sale was given as collateral security to indemnify the plaintiff against a debt due to one Silas Wood on a forthcoming bond, in which this plaintiff was bound as security for this defendant; which debt has been discharged by an execution on this defendant's property, a part of which consisted of the hides in question. John McPherson, Jr., who was made a defendant by the supplemental bill, avers that he was a creditor of John McPherson & Son to the amount of $3,201.68, who in April, 1818, engaged to deliver to him one thousand Spanish hides, manufactured into merchantable sole-leather; that in April, 1819, Daniel McPherson delivered to him whatever hides then remained in the tan-yard in part liquidation of his claim, and that he authorized Tuley to dispose of them as his agent; that on the 24th of July, 1819, this defendant sold them to D. Dougherty for $4,500, and they were delivered to him by Tuley. Daniel Dougherty answered to the same effect. The payment of the debt to Silas Wood, by the sale of the property of Daniel McPherson under the execution against him, was proved by the deposition of the deputy marshal.

There were many depositions taken respecting John McPherson, Junior's, circumstances, and his ability to become the creditor of J. McPherson & Son to the amount of $3,000. The cause, upon final hearing, was argued by Mr. Mason and Mr. Jones, for the plaintiff, and by Mr. Swann and Mr. Wise, for the defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The questions arising in

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

this case are: (1) Has the plaintiff made out a title to the three hundred hides, for the specific delivery of which he asks a decree? (2) If he has not, has he proved such a contract for the sale and delivery of those hides as constitutes a lien upon them in the hands of Dougherty, who was a purchaser pendente lite? (3) If the plaintiff has made out such a title, or proved such a contract, can the court decree a specific delivery of the hides?

1. The bill avers that the plaintiff purchased three hundred hides in the vats, but does not aver that he paid for them. It only avers that John McPherson & Son "had received a full and valuable consideration for them; in other words, had been fairly paid for them." It does not aver that any consideration moved from the plaintiff.

The defendant, Daniel McPherson, denies (in direct repugnance to the allegation of the bill) that he, or any of the firm of John McPherson & Son, ever received any compensation for the three hundred hides; and avers that the bill of sale (or more properly the bill of parcels) was given to the plaintiff merely to indemnity him against the debt for which he was bound to Silas Wood & Co.; which debt he avers has been satisfied out of his own property. This statement of the defendant, so far as it denies the allegation of the bill as to consideration, is evidence conclusive, unless contradicted by two witnesses. The plaintiff has produced none. It is true that Thomas Janney proves that he has a judgment against the plaintiff, as surety for the defendant, John McPherson & Son, for $1,280.25, with interest from the 10th of September, 1816, and that the plaintiff had paid $598.69 in part, and was liable for the balance. But there is no evidence to connect the sale of the hides with that transaction. If the plaintiff had possession of the hides, the court of equity would not, perhaps, compel him to give them up to the defendants, until they should indemnify him against that judgment; but the plaintiff's liability alone, without possession, and without a specific contract connecting the hides with that liability, will not authorize a court of equity to take them out of the hands of a third person. The allegation of the defendant that the bill of sale was given to indemnify the plaintiff against the claim of Silas Wood & Co. is corroborated by the fact that the marshal, with the consent of the plaintiff, levied that execution on those hides, and sold a part of them to satisfy that claim; and the marshal's deposition proves that the residue of that claim was paid by other property in the tan-yard, or in the currying-shop.

There having been no consideration paid by the plaintiff for the hides, and the purpose for which the bill of parcels was given having been answered, there does not appear to be any such title made out by the plaintiff, nor any such contract proved, as will authorize a court of equity to decree a specific delivery of the hides, nor any other relief. It is therefore unnecessary to decide the two other questions. We think the bill must be dismissed. Bill dismissed, with costs.

Case No. 13,729.

TALBOT v. SELBY.

[1 Cranch, C. C. 181.] [1]

Circuit Court, District of Columbia. July Term, 1804.

WITNESS—INTEREST—AFFECTING CREDIT—PLEADING AT LAW—VARIANCE WITH PROOF.

1. In an action by an administrator of an insolvent estate, it is not a good objection to the plaintiff's witness that he is a creditor of the intestate, although that circumstance may affect his credit.

2. A declaration in general indebitatus assumpsit for one thousand dollars, for sundry quantities of cattle sold and delivered, is not supported by evidence of a special contract to sell and deliver four yoke of steers at a certain price for each yoke; and a delivery of the cattle under the agreement.

[Cited in Hyde v. Liversee, Case No. 6,972.]

Indebitatus assumpsit for one thousand dollars for sundry quantities of cattle sold and delivered at defendant's request. The evidence offered was an agreement to sell and deliver to the defendant four yoke of steers, at a certain price for each yoke, amounting in the whole to less than one thousand dollars; and a delivery of the cattle under the agreement.

James Harrison, a witness for plaintiff [Talbot, administrator of Robinson], having been sworn and examined, and it appearing that he was a creditor of the intestate, and that the estate was insolvent, Mr. Mason, for the defendant, objected to the competency of the witness.

THE COURT stopped Mr. Key from replying, and said that the interest was too remote to affect his competency, but that it was a circumstance which might affect his credit.

Mr. Mason prayed the court to instruct the jury, "that if, from the evidence given, they are satisfied that there was a special contract made between the intestate and Henry Selby to purchase and sell four yoke of steers, at a particular price between them settled and agreed upon, for each yoke of the steers so contracted for, the price of each yoke being different the one from the other; or that if, from the evidence given in this cause, the jury shall be satisfied that by the contract between the intestate and the defendant a permission or license was given by the intestate, to the defendant to take four yoke of steers, then the property of the intestate, at a certain stipulated price by the intestate fixed upon each

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

yoke of the said steers, and that in pursuance of that permission and license the defendant did afterwards take the said steers, that evidence of either of such contracts is not competent in law to sustain either of the counts in the plaintiff's declaration, and that therefore they ought to find for the defendant."

Mr. Key contended that when there is a special contract, and the plaintiff has performed his part, he may maintain a general indebitatus assumpsit; or, in other words, that the duty having been performed, the law raised the promise; and cited the case of Hannah v. Lee [1 Har. & J. 131],[2] in the court of appeals of Maryland, June term, 1804, in which the court said that "whenever the plaintiff has performed his part of the contract, or has been prevented by the defendant from performing it, an indebitatus assumpsit will lie." [2]

THE COURT gave the instruction as prayed by Mr. Mason.

KILTY, Chief Judge, absent.

Mr. Key had leave to amend on continuance and costs. Mr. Key afterwards obtained a rule to show cause why the costs of this term should not await the issue of the cause, on the ground of the misdirection of the court.

Mr. Key. There are two kinds of assumpsit, a general indebitatus, and a special assumpsit. Bull. N. P. 182; Impey, 171; Moses v. Macferlan, 2 Burrows, 1005; Slade's Case, 4 Coke, 92. The old strictness of pleading has been much relaxed. Gordon v. Martin, Fitzg. 303, recognized in Bull. N. P. 139; Walker v. Witter, Doug. 1. Upon parol contracts, it is almost impossible to state precisely the terms of a contract exactly as they shall turn out in evidence. In general indebitatus assumpsit, you may recover less than you count for. Impey, 172, 200.

Mr. Key also cited the following authorities: Esp. N. P. 130, 138, 140; Rolleston v. Hibbert, 3 Term R. 412; Cates v. Knight, Id. 444; Cutter v. Powell, 6 Term R. 320: Payne v. Bacomb, Doug. 651; Robinson v. Bland, 2 Burrows, 1077, 1078; Prec. Dec. 18, 19.

THE COURT, however, remained of the same opinion, after consulting the following authorities: Seward v. Baker, 1 Term R. 616; Esp. N. P. 130; Weston v. Downes, Doug. 24; Towers v. Barrett, 1 Term R. 134; Toussant v. Martinnant, 2 Term R. 104; Esp. N. P. 138; Anon., 1 Ld. Raym. 735; Hockin v. Cooke, 4 Term R. 314; Bull. N. P. 145; Churchill v. Wilkins, 1 Term R. 449; Esp. N. P. 140; Cutter v. Powell, 6 Term R. 320; Duncomb v. Tickridge, Aleyn, 94; Baker v. Edmonds, Id. 29; Janson v. Colomore, 1 Rolle, 396; Beckingham v. Scot, 2 Keb. 240; Milward v. Ingram, 2 Mod. 43; Gordon v. Martin, Fitzg. 303; Baker's Case of Gray's Inne v. Occould, Godb. 186; Holme v. Lucus, Cro. Car. 6; Cooke v. Samburne, 1 Sid. 182; 1 Vin. Abr. 360; 1 Com. Dig. 193; System of Pleading, 104; Gilb. Ev. 188; Godb. 154; Child v. Guiat, Styles, 243; Giles v. Edwards, 7 Term R. 181; Barker v. Sutton, Trials per Pais (3d Ed.) 186; Franklin v. Walkens, Id. 187; Old Law of Evidence, 158, 160, 165, 166; Cheney v. Hawes, Moore, 466; Tissard v. Warcup, 2 Mod. 280; Gilb. Ev. 189, etc.; Trials per Pais, 504; Mustard v. Hopper, Cro. Eliz. 149; Lea v. Adams, 3 Bulst. 35; Revera v. Baptista, Moore, 470; King v. Robinson, Cro. Eliz. 79; Bagnal v. Sacheverell, Id. 292; Munday v. Martin, Id. 660.

Rule discharged.

At the December term, 1804, the cause was tried upon the amended declaration, and a verdict rendered for the plaintiff for $116.50.

[2] The following note of that case was handed to the court: "John Hannah v. Thomas Lee. Court of Appeals, June term, 1804. In this case, the court of appeals, concur with the general court, and therefore affirm the judgment. As a general proposition, they think the law declared in this direction, correct, but they are of opinion that the general rule admits of exceptions, and that if the evidence offered on the part of the plaintiff was credited by the jury, it brought the plaintiff's case within one of the exceptions to the general rule. In the case of a continuing contract, as the original contract proved between the parties, if that contract had not been waived, and a new one proposed and acceded to, the plaintiff could not support general indebitatus assumpsit, but if the waiver of the original contract had appeared to the jury, and the second contract set up had been proved to their satisfaction, to wit, the covering in of the house, we should have been of opinion, that after the completion of such second contract by the plaintiff, (if that was the case,) the plaintiff might well have supported his general indebitatus assumpsit."

Case No. 13,730.

TALBOT v. SIMPSON.

[Pet. C. C. 188.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

DEEDS—RECORD—EFFECT OF—CERTIFICATE OF EXECUTION—FEME COVERT—CONSTRUCTION OF STATUTES.

1. Ejectment for a tract of land in York county, Pennsylvania. The recording of a deed, in the proper office, is prima facie evidence, and no more, that the deed was regularly proved and admitted of record.

[Cited in Longworth v. Close, Case No. 8,489.]

2. The commission of a justice of the peace, and judge of the court of common pleas, is conclusive evidence of his appointment.

3. The form of the certificate, of the execution, and acknowledgment of a deed by a feme covert, is in conformity with the law of Pennsylvania; if it appear by the certificate, that the directions of the act of assembly are substantially complied with.

[Cited in Hughes v. Lane, 11 Ill. 129; Chauvin v. Wagner, 18 Mo. 545. Cited in brief in Kavanaugh v. Day, 10 R. I. 395.]

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

4. The rules for the construction of statutes, are the same in courts of law as in courts of equity.

This was an ejectment to recover a tract of land, lying in York county. The title to the land was admitted to have been in Elizabeth Simpson, on or before the 25th of September, 1783; on which day, she and her husband, Michael Simpson, executed a conveyance of it in fee, to James Burd; who, on the same day, reconveyed the same to the said Michael Simpson, and to his wife, and to the survivor of them, and to the heirs of the survivor. The plaintiffs claim, as the heirs at law of Elizabeth Simpson, and the defendants, as the heirs of Michael, the husband.

It was objected by the plaintiffs [lessees of Talbot and others], to the reading of the deed from Simpson and wife to James Burd, that William Mitchell, before whom it was acknowledged, in order to its being recorded, ought to have been proved to have been a justice of the court of common pleas for York county; although he states himself to be a justice of that court in the certificate on the deed. The law, which was in force at the time the deed was acknowledged, requires, that the judge receiving the probate, and taking the examination of a feme covert, should be a justice of the court of common pleas, or of the superior courts. 1 Laws Pa. (Dall. Ed.) 536; Id. Append. 58; Const. Pa. 1776, §§ 20, 21, 26, 30; 1 Laws Pa. (Dall. Ed.) 176, 778.

For the defendant, who claims under the deed, it was contended, that the deed being recorded by an officer appointed for that purpose, the regularity of the probate, cannot be in enquired into collaterally, but the record is conclusive, that all things were regularly done. The recorder acts judicially, and not ministerially. Purd. Dig. 90; Act May 28, 1715.

On the other side, it was denied that the recorder is a judicial officer. 2 Bin. 40.

THE COURT decided, that the recording of a deed is prima facie evidence and no more, that the deed was legally proved and admitted to record.

To do away the presumption in favour of the regularity of the probate and recording, the plaintiff read a certificate from the secretary of state's office, dated March, 1782, stating, that Mr. Mitchell was elected a justice of peace for the county of York, and duly commissioned as such. To repel this evidence, the defendant produced a regular commission, dated in 1779, in which William Mitchell is stated to have been duly elected a justice of the peace; appointing him to execute all the duties, &c. of a justice of the peace, in the court of common pleas, orphans' court, or elsewhere, in the county of York.

THE COURT decided, that this commission was conclusive to prove William Mitchell to have been a justice of the common pleas for York county; and the deed was consequently read in evidence.

The jury found a special verdict, and submitted a single point to the court; which was, whether the deed from Simpson and wife, was sufficient to pass the fee simple interest of the wife, in the land in question.

It was contended by B. Tilghman and Duncan for plaintiffs; that this deed was insufficient to pass the right of Elizabeth Simpson, because the certificate of the justice does not state; 1st, that the contents of the deed were made known to her by the justice; 2d, that it does not state, that she acknowledged and executed the same, after her privy examination.

The certificate is in the following words, viz. "The said Michael Simpson and Elizabeth his wife, came before the subscriber, William Mitchell, a justice of the court of common pleas, for the county of York, and acknowledged the within indenture, to be their act and deed, and desired that the same may be recorded as such; the said Elizabeth being by me separately and apart, examined from her husband, she being of full age; 'knowing the contents, and freely consenting thereunto.'" The plaintiffs' counsel cited 1 Dall. Laws Pa. 535; 1 W. Bl. 264; [Davey v. Turner] 1 Dall. [1 U. S.] 11; [Swift v. Hawkins] Id. 17; 1 Bl. Comm. 442; 2 Inst. 514, 515; 1 Burrows, 470; 2 Burrows, 341; 5 Burrows, 296; 1 Term R. 728; Pow. Dev. 129; 3 Har. & McH. 430; Laws Md. p. 1715, c. 47, § 10; 11 Mod. 150; [Priestman v. U. S.] 4 Dall. [4 U. S.] 31, note; [Wilson v. Mason] 1 Cranch [5 U. S.] 97, 98.

Huston & Watt, in support of deed, cited 3 Har. & McH. 581; 6 Bin. 438; 1 Atk. 139.

WASHINGTON, Circuit Justice. The only question, which the special verdict submits to the opinion of the court, is, whether the deed from Simpson and wife, to James Burd, is sufficient to pass the estate of the wife, in the land therein mentioned; the same having belonged to her, at the time of her intermarriage with her said husband. It was admitted, that the conveyance was made, for the purpose of enabling Simpson and wife to receive a reconveyance of the land; which was accordingly executed on the same day, to them, and to the survivor in fee.

The objection to the validity of this deed, to divest Elizabeth Simpson of her estate in the land, is, that the certificate of the justice, who took the examination and acknowledgment of the wife, does not conform to the act of assembly of this state, of the 24th of February, 1770 [1 Smith's Laws, p. 307]. If the opinion of the court should be against the validity of the deed, then judgment must be entered for the lessor of the plaintiff; if otherwise, then for the defendant. The defects alleged against the certificate, are; that it does not state, 1st, that the justice communicated to the wife, the

contents of the deed; and 2dly, that she freely and voluntarily acknowledged the deed, separate, and apart, from her husband.

The act of assembly, of the 24th of February, 1770, directs, "that the husband and wife, having executed the deed, shall appear before one of the justices of the supreme court, or before any justice of the county court of common pleas, for the county where the lands lay, and acknowledge the said deed; which judge or justice shall, and he is authorised and required, to take such acknowledgment; in doing whereof, he shall examine the wife, separate, and apart from her husband, and shall read, or otherwise make known to her, the full contents of such deed; and if, upon such separate examination, she shall declare, that she did, voluntarily and of her own free will and accord, seal, and as her act and deed deliver, the said deed, without any coercion, &c. of her husband," then such deed is declared to be valid in law, in like manner, as if the said wife had been sole.

Both the questions arising in this cause, appear to have been settled in the supreme court of this state, upon great deliberation. We have attentively considered the cases of McIntire's Lessee v. Ward, 5 Bin. 296, and Shaller v. Brand, 6 Bin. 435, and feel no hesitation in declaring our entire approbation of the fundamental principle upon which they are both decided. That principle is, that the form of the certificate is immaterial, provided the directions of the law, are substantially complied with; and what are they? That the wife should freely and voluntarily acknowledge the execution of the deed, by which she parts with her estate and interest in land, having a full knowledge of the contents of the same; and, that the magistrate should satisfy himself, upon these points, by examining her apart from her husband.

The enquiry then is, does it sufficiently appear, by this certificate, that these directions have been complied with? It is stated, that the wife acknowledged the deed to be her act and deed; that she knew the contents of it, and that she freely consented thereto; she being examined separate and apart from her husband. From the phraseology of this certificate, it would appear, that the acknowledgment of the wife was made; her knowledge of the contents of the deed ascertained; and her free consent expressed, during her examination apart from her husband. It would seem to be perfectly reasonable to construe the sentence distributively, that is to say; that the husband acknowledged the deed to be his act; and also, that the wife made the same acknowledgment, she being examined separate and apart from her husband. But even if a stricter construction were adopted, so as to compel the court to say, that her acknowledgment was made in the presence of her husband; still her subsequent privy acknowledgment to the justice, that she had done it freely, or to use the precise words of the certificate, "that she consented thereto;" would, to every intent and purpose, and within the obvious spirit and meaning of the law, amount to an acknowledgment of the deed, apart from her husband. It would be a free and voluntary ratification, in the absence of her husband, of an act done in his presence.

As to her knowledge of the contents of the deed, it is manifest, that unless the magistrate made them known to her, or she to him, he has certified a falsehood, for he states it as a fact, that she knew the contents; which he could not truly certify, unless he had in some way, satisfied himself, that she did know them. And of what importance would it be, whether she obtained this knowledge from the magistrate, from her own examination of the deed, or even from the information of her husband, if the fact certified be true, that she knew the contents? This case is much stronger, as to this point, in favour of the deed, than the case of M'Intire v. Wood [Case No. 8,825], in which the same point was decided; and it is precisely the same, as the case of Shaller v. Brand [supra], in which the other point was decided.

An attempt was made, and ingeniously supported by the plaintiff's counsel, to weaken the authority of these cases in this court; by distinguishing between voluntary deeds, and deeds to bona fide purchasers without notice. The argument was, that a court of chancery will, in the latter case, go far to supply the defective execution of powers, whilst it refuses to afford any aid, in the former case; and, that as the courts in this state, exercise a mixed jurisdiction of law and equity, the judges have been influenced in their decisions, in the cases that were cited, by the above rule of the court of chancery. This argument admits of many answers. The first is, that the judges do not in their opinions, rely upon any such distinctions, as the counsel have mentioned; and in the next place, it would be inapplicable to one of the cases, that of Watson v. Bailey, 1 Bin. 470, in which the general principle was laid down, by which that and the subsequent cases were decided. But lastly, the principle decided in all the cases, depends upon the construction of a law, the rules for which, are the same in courts of equity as in courts of law. Judgment for defendant.

NOTE. The commission to William Mitchell, produced in the above case, was under the great seal of the supreme executive council, dated the 10th of June, 1771; and appointed him a justice of the peace; "to execute and do all the acts and things, which any justice of the peace, in the county aforesaid, by the general commission assigned, lawfully can, may, or ought to do; both in the courts of common pleas, orphans' court and elsewhere; as fully as if his name, amongst others, the justices in the

said general commission nominated, had been particularly inserted."

The commission was admitted to be duly executed, and authenticated according to law; but it was insisted, that it did not constitute him a justice of the court of common pleas; but that he ought to have had a separate commission for that office; and to prove this, two commissions, to some other persons, as a justice of the peace, and as a justice of the court of common pleas, were produced.

The court decided the evidence to be sufficient, as the commission clearly constituted him a justice of the court of common pleas, and it was for the executive council to establish such forms of commissions, as to that body might seem right.

To this opinion, an exception was taken, by the plaintiff's counsel, but no writ of error was prosecuted.

Judgment for the defendant.

Case No. 13,731.

TALBOT et al. v. WAKEMAN et al.

[25 Betts, D. C. MS. 152; 19 How. Prac. 36.] [1]

District Court, S. D. New York. Feb. 14, 1860.

PLEADING IN ADMIRALTY — PROOFS — VARIANCE — CHARTER PARTY—STORAGE.

[1. The charter party, under seal, upon which the suit was founded, was between the master of the vessel of the first part, and T. & Co. and L. & Co. of the second part. In a suit against the owners of the vessel for nonperformance of the contract the libel and proofs showed the cause of action in T. & Co. and the P. Co., and showed that L. & Co. acted merely as the agents of the P. Co. *Held* that, although this was a variance which would be fatal in an action at law, yet that in admiralty it could not avail to defeat libelant's cause of action.]

[2. Where the charter party provided for the freighting of a cargo which from its very nature must have been contemplated should be stored on deck, the vessel is not liable for any loss or damage arising on account of such deck storage.]

[3. Where a cargo of spars is stored on deck under the direction and superintendence of the master, but is stored in so faulty and negligent a manner that loss arises, not on account of the position where stored, but on account of the improper manner of storing, the vessel is liable.]

[This was an action on a charter-party by William C. Talbot and others against William W. Wakeman and others.]

BETTS, District Judge. This action is founded upon a charter party executed January 24, 1855, at San Francisco, between John Briard, master of the brig Eolian, of the first part, and William C. Talbot & Co. and Lubeck & Co. of the second part, for a freighting voyage of the brig from San Francisco to Puget Sound with a cargo of planks, square timber, and spars, thence, to China, and of merchandise and passengers from China back to San Francisco. It is prosecuted in the names of William C. Talbot & Co. and the Puget Mill Company of Puget Sound against William Wakeman, Captain Briard, and eight other persons as owners of the brig, and large damages are demanded because of the nonfulfillment of the charter-party and loss of cargo caused thereby. The case is presented by the pleadings on both sides in a very obscure and indefinite shape, but was brought to hearing upon proofs without any exception by either party to defects or insufficiency in the pleadings. The libel sets out the gravamen of the action in four general allegations and various special paragraphs, but wholly omits stating the name or interest of one of the parties to the charter party (Lubeck & Co.), and makes the Puget Mill Company a party libellant when such company is not named in the charter party. And the answer denies generally all the particular allegations and paragraphs, and puts forth as the facts in the case in avoidance and defense the averment that the master of the brig of "the one part and Lubeck & Co. of the other made a charter party for the affreighting of said vessel, and that she was at all times in proper and seaworthy condition, but to perform the portion of said contract stipulated, but in consequence of the perils of the sea and stress of weather a portion of said cargo was thrown over and another part sold from necessity to make repairs and enable the performance of said contract; and that on the arrival of the vessel at China, the parties acting as agent for the charterers not being able to perform their contract in this: that they would not receive the cargo and could not and would not load the vessel, or furnish her cargo, or in any way carry out said charter, the said vessel and the owners thereof were largely damaged, and to an amount far exceeding the alleged claim of the said libellant." This answer, instead of upholding and adhering to the sweeping and explicit denial of all the charges of the libel, impliedly admits the essential one, and places the defence upon excusatory obligations on the part of the libellants arising subsequent to the execution of the charter, and in the effort of the brig to perform the stipulations of the charter on her part.

On the hearing of the cause, the 15th of December last, various depositions were read in support of the case on the part of the libellants, and the depositions of Capt. Briard and John Watson for the defence. After the hearing in court was terminated by a brief oral argument of counsel for the respective parties, the papers were retained by them under a permission to furnish the court a more full argument on paper with their several points and authorities.

The counsel for the defendants represent that they have since accidentally misplaced or lost the proofs offered in court for the defence. The evidence was wholly on depositions, and accordingly the court has not in possession any of the defendants' testimony in extenso, and no written record or minute of it, nor such recollection of its import retained from hearing it read hastily in the current of public business as to justify relying on such

[1] [19 How. Prac. 36, contains only a partial report.]

impressions to sanction admitting or rejecting facts claimed to be covered by those proofs. After the decision of the cause has been deferred through the terms of December and January to this period in February term (the 14th) to enable the defendants to supply their lost proofs, the court, on the demand and importunity of the libellants' counsel, feels compelled to render its decision in the cause upon the papers as they stand before it.

The defendants raise some points against the adequacy of the libellants' action in law to enable them to demand a decree upon it. It is insisted there is a fatal variance between the case made upon the libel and the proofs offered to support it, inasmuch as the action is founded upon a charter party given to Watson & Co. and Lubeck & Co. by the owners of the brig on the 24th of January, 1855, under seal, whilst the libel sets forth the Puget Mill Co. as parties under the contract, and avers that Lubeck & Co. are not parties, but only agents and commission merchants for the libellants, and that the libellants have the entire interest in the contract, and full authority to enforce the same for their use and benefit in their own name. This variance between the sealed contract and the cause and right of action stated in the libel would undoubtedly be vital at law, and no averments or proofs could be admitted in contravention of the written contract under seal. There is a wider latitude allowed in admiralty practice. In proceedings before those tribunals no technical rules of variance or departure in pleading are observed. Dupont v. Vance, 19 How. [60 U. S.] 162. Particularly commercial contracts, charter parties, &c., are interpreted and enforced with a broad liberality, with a view to enforce the fair understanding and purpose of parties to instruments not contemplated to be artificial and technical. Raymond v. Tyson, 17 How. [58 U. S.] 53; Barreda v. Silsbee, 21 How. [62 U. S.] 147. The witness to the charter contract proved that Lubeck & Co. had no personal interest in it, and the insertion of the Puget Mill Co. may be disregarded and treated as surplusage, no attempt being made to prove any interest or prejudice to them in the transaction.

Again, it is alleged in defence that the libellants cannot claim damages because of lading the spars upon the deck of the brig, as the nature of the articles to be transported necessarily imported that mode of carriage; and it is argued that the libellants are chargeable at law with the responsibility of that mode of conveyance according to the express ruling of the supreme court. Lawrence v. Minturn, 17 How. [58 U. S.] 100. In that case there was evidence that the shipper knew the manner the cargo was stowed and acquiesced in the safety and propriety of its stowage on deck. Here the allegation and proof is that the stowage was faulty and unsafe, and no evidence is offered that the libellants assented to this mode of stowage, or were made acquainted with it. On the contrary, there is direct proof that it was made exclusively under the authority and direction of the master of the vessel, and although from the character of the articles engaged by the charter party and on the bill of lading to be transported on deck, the ship is not chargeable for loss or damage caused to that portion of the cargo from its place of carriage, yet is, if the loss was occasioned by its faulty stowage. Such cause of loss is both averred in the libel and proved on the hearing. In this case there is no evidence furnished excusing the alleged jettison of cargo or disposal of portions of it for the necessities of the vessel, and as the case stands upon the proofs the libellants are no way barred by obligations of law from recovering for the value of the cargo shipped at Puget Sound and not delivered in China, and also for the failure to perform the whole contract embodied in the charter party, both in relation to the outward and home voyage. A decree will be entered accordingly for the libellants with an order of reference to a commissioner to estimate and report those damages to the court.

[NOTE. Subsequently the lost proofs were found, and the court granted a rehearing, at which the decision rendered above was confirmed. Case No. 13,731a.]

Case No. 13,731a.

TALBOT et al. v. WAKEMAN et al.

[25 Betts, D. C. MS. 176.]

District Court, S. D. New York. March 14, 1860.

PLEADING IN ADMIRALTY—PROOFS—VARIANCE—LOSS AND DAMAGE TO CARGO—JETTISON—SALE TO SUPPLY NECESSARIES.

[1. Variations between the contract sued on and the pleadings and proofs, although sufficient in law to defeat the action, will not be so regarded in admiralty, in a case where substantial justice can be done.]

[2. In answer to a libel by freighters for loss and damage to cargo, the defendants alleged that the loss and damage was partly from a necessary jettison on account of perils of the sea, and partly from a sale by the master in order to supply the necessaries of the vessel. *Held*, that the burden is upon the vessel to establish, by clear and conclusive proof, the particulars of this defense.]

[This was a libel by William C. Talbot & Co. and the Puget Mill Company against William Wakeman, Capt. Briard, and eight other persons, owners of the brig Eolian, for damage and loss to a cargo of spars and other timber, shipped by the libelants on board the brig. At the first hearing of the case counsel were allowed to retain the papers for the purpose of preparing a written argument and note of authorities. By some mischance the defendants' counsel mislaid the defendants' proofs, which were in the form of depositions, and the case went to a final hearing without these proofs. There was a decree for the libelants. Case No. 13,731.]

Six days after the above decision was

drawn up, the counsel for the defendants produced to the judge the depositions which had been mislaid, and prayed they might be considered by the court, before judgment should be pronounced in the case; and the counsel for the libelants acquiescing therein, with the reservation of the right on their part to call the attention of the court to a misapprehension of fact in the above decision as to a variance between the libel and the proofs, as to the parties libelant in the cause, the papers are accepted by the court under this reservation, and will be reconsidered at the earliest opportunity.

BETTS, District Judge. In reopening the decision of this cause for the purpose of considering the proofs of the respondents, which have been lost or mislaid since the trial in December last, I will first notice the suggestion of the counsel for the libelants that the court misapprehended the fact of there being a variance between the libel and the proofs offered on the trial in its support. I perceive no reason to change the conviction I announced on the first decision in the case, that by the form of the libel "the Puget Mill Company, of Puget Sound" were introduced into the cause as independent prosecuting parties, and not as copartners with Talbot & Co.; and no evidence being given, from the charter party or orally, that that association possessed any interest in the cause, there was a variance between the libel and proofs. The counsel for the libelants insists that the libel alleges that the Puget Mill Company, of Puget Sound compose a part of the "Company" of W. C. Talbot & Co., of San Francisco. I think this a palpable mistake, not, probably of the fact, but of the force and effect of the allegation in the libel. The parties prosecuting the suit are described in the introductory part of the libel in these words: "The libel and complaint of William C. Talbot, Andrew J. Pope, Josiah O. Keller, and Charles Foster, comprising the firm of William C. Talbot & Co., of San Francisco, and the Puget Mill Company, of Puget Sound, against William W. Wakeman, and others." And then the libel proceeds to charge that the libelants, doing business under the name and firm of M. C. Talbot & Co., entered into the charter. Two witnesses present at the execution of the charter speak of its signature by parties with whom they were personally acquainted, and then at San Francisco, and no intimation is given then, or on the trial, by any witness, that the Puget Mill Company, of Puget Sound, a concern existing as an associated body located many hundreds of miles from San Francisco, had any connection with this transaction. It seems very clear to me, therefore, that on a trial at law the Puget Mill Company, of Puget Sound, would be deemed independent parties and a failure to prove their interest would be fatal to the maintenance of the action; but, as stated in the former ruling upon this point, this is but an irregularity in pleading, not working, in admiralty practice, a defeat of the suit.

In applying the recovered depositions of Capt. Briard and the seaman Watson to the defense in the cause, I cannot find that they furnish any matter materially changing the features of the case presented in the proofs of the libelants. Capt. Briard's testimony, he being part owner of the brig at the time, must necessarily weigh to disadvantage in comparison with the evidence of disinterested witnesses and the documentary proofs produced by the libelants; and Watson's statements are reported so vaguely that I am unable to discover the effect or pertinency of what he was largely examined upon. I still retain the opinion that the vessel was put upon her voyage from Puget Sound in an unseaworthy condition, and that the stowage of cargo on deck was by the master, and was made in a faulty and unsafe manner, and that the respondents are answerable for damages resulting to the cargo from those particulars. The proof is very spare and indefinite as to the necessity of a jettison of cargo, or of a sale of a part of it to supply the necessities of the vessel. It also appears to me the defendants fail to prove a fulfillment of this engagement to receive cargo and passengers in China as return cargo, and transport them to San Francisco. The evidence is, however, too indefinite to enable the court to adjudge the rights of the parties satisfactorily without a fuller exposition of facts upon a report of a commissioner. I shall therefore pronounce in favor of the libelants, that the respondents have not fulfilled the charter party according to their agreement and shall refer the case to a commissioner to ascertain, upon the proofs produced in court on the hearing of the case, and such further competent and pertinent evidence as the parties may respectively produce before the referee, the amount of injury caused to the libelants by occasion of the unseaworthiness of the vessel, at the commencement of the aforesaid voyage, the amount and value of cargo shipped at Puget Sound on said voyage, and of that delivered in China, and the amount and value of said cargo jettisoned by the master on the voyage, and of that sold on the voyage the proceeds of which were applied by the master to the use and necessities of the vessel, and the amount of damages sustained by the libelants by the nonperformance of the charter party on the part of the respondents by shipping and transporting the cargo stipulated to be taken in the vessel from China to San Francisco.

Case No. 13,732.

TALBOTT v. HARTLEY.

[1 Cranch, C. C. 31.] [1]

Circuit Court, District of Columbia. July Term, 1801.

AWARD — NOT CONCLUSIVE — ACTION AFTER DELIVERY.

1. An award is void which is not final and conclusive, and does not embrace all the matter submitted, and settle the dispute.

2. After delivering their award, the arbitrators cannot again act upon the case without new authority.

Assumpsit for the labor of two negro boys, Bill and Hanson. Bowling, the owner of the boys, had by indenture bound them as apprentices to the plaintiff. Bill was to serve until September, 1798, and Hanson until September, 1799. Talbott hired the boys to Hartley, the defendant, who refused to pay him for their labor, alleging that Bowling claimed it. Upon this, Talbott and Bowling submitted the matter to arbitrators.

The submission was in these words: "All our disputes, differences, controversies, &c. concerning two apprentices with said Levi Talbott."

The award was in these words: "We the arbitrators between Robert Bowling and Levi Talbott, do agree that the said negro boy, named Bill, is free from L. Talbott the 13th December, 1797, and likewise the negro boy, named Hanson, is free from Levi Talbott the 31st day of January, 1798. (Signed) Joseph Coleman. Archibald McClish."

It was proved that this award was signed by both arbitrators, who agreed that the original should remain with Coleman, who should give out copies to the parties; and that Coleman did deliver such copies. Afterwards the arbitrators met again and made a different award.

THE COURT decided that the first award was void, because it was not final and conclusive, and did not embrace all the objects submitted. It did not settle the dispute. It did not award a release of the covenants, nor a cancelling of the indentures. And that the second award was also void, because the authority of the arbitrators was spent in making the first award.

Case No. 13,733.

TALBOTT v. WRIGHT.

[2 Cin. Law Bull. 78.]

Circuit Court, D. Indiana. 1877.

LIMITATION OF ACTIONS — EFFECT OF A BAR IN ANOTHER STATE — CONSTITUTIONAL LAW.

[1. The Indiana statute, providing that a cause of action barred by the laws of the place where defendant resided shall be barred in that state, applies to the case of one who contracted a debt while a resident of Indiana, and afterwards removed to a place by the laws of which the cause of action became barred before it would have been barred under the laws of Indiana if he had remained there.]

[2. When a cause of action is once fully barred by the statute of limitations, the legislature has no authority to again revive it by lengthening the period of limitation or excepting certain cases from the operation of the statute.]

[3. The immunity from suit arising when a cause is barred by limitation is a personal immunity, which follows the person of the debtor into whatever state or territory he may go.]

[This was an action by John H. Talbott, administrator of Hiram E. Talbott, against John W. Wright, upon certain notes made by defendant to Hiram E. Talbott.]

Turque & Pierce, for defendant.

DRUMMOND, Circuit Judge. This was an action brought by the plaintiff upon certain notes of the defendant, given to the plaintiff's intestate, amounting in all to $50,000. $30,000 of the paper was payable in New York City, and $20,000 in Hartford, Connecticut. The notes were executed March 17, 1857, and were all payable within one year therefrom. The defendant, among other defenses, pleads, in the sixth and seventh paragraphs of his answer, the statute of limitations. The suit was commenced in August, 1874, in the circuit court of Cass county, and transferred here upon the defendant's application. The defendant sets up, in the sixth paragraph of his answer, that in March, 1860, he removed from Indiana, where he had before that time been residing, and where the notes were made, to Washington City, in the District of Columbia, and continued to reside in said city until November, 1873; that long before and during the whole time of his residence in the District, there had been a law in force in said District limiting actions upon promissory notes to three years from the date of the maturity thereof; that the said action was, by the law of said District, barred therein, and was consequently barred here in Indiana. In the seventh paragraph, the defendant alleges that he is a resident of the state of West Virginia; that he has resided there since November, 1873; that before and during the time of his residence therein, there had been a law in force in the state of West Virginia barring actions upon promissory notes in five years after the maturity thereof; that said action is barred by the said law of West Virginia, and is consequently barred here.

The plaintiff demurs to each of these paragraphs, and the question arises under these pleadings whether these two paragraphs, or either of them, is a good bar to the action. After due consideration, we have come to the conclusion that the paragraphs in question are properly pleaded, and that they constitute a full defense to the plaintiff's action. The state of Indiana, it seems, has a statute of limitations containing, among other provisions, the following: "The time during which the defendant is a non-resident of the

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

state, or absent upon public business, shall not be computed in any periods of limitation; but when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defense here as though it had arisen in this state." [2 Laws Ind. 1852, p. 77, § 217.] We think, under this section, these defenses are well pleaded. Doubtless, the legislature intended by it to encourage immigration to the state, by saying to one desiring to remove here: "You shall, in regard to your indebtedness, be in no worse condition than in the country of your former residence." The plaintiff contends that the legislature certainly did not intend to provide one who had been a citizen of the state with immunity from liability for indebtedness contracted in the state; that the law only applies to indebtedness contracted by one who had not resided in the state, and who has, during his nonresidence, contracted debts out of the state. But this statute is very general in its terms, and such statutes frequently accomplish more than may be wished or desired. Besides, there are just as strong reasons in public policy for encouraging the return of those who have been once residents, as the removal of those who have never been residents. This court generally follows the decision of the highest court of the state on questions of statutory constructions. We may not be technically bound to do so, but such is the uniform practice. The supreme court of the state has three different times, and in one instance in which the same defendant, Wright, was a party, held that the plea of the statute of the foreign state was good, and we shall hold in the same manner.

The plaintiff, however, claims that, since these decisions, in March 13th, 1875, the legislature amended the statute above cited, and that the effect of that amendment is to invalidate the plea. The amendment of 1875 [Laws Ind. 1875, p. 64] reads as follows: "Provided, that the provisions of this section shall be construed to apply only to causes of action arising without this state." The defendant, on the contrary, claims that this proviso does not apply in this case at all; that the cause of action arose on failure to pay at the places designated, New York and Hartford, and did not arise in Indiana. We are of the same opinion,—that the cause of action, in the sense that suit will lie thereon, arises where and when the paper matures and default is made, not where the notes happened to be executed. But there is another principle which fully supports these defenses. It is laid down by the text writers upon the subject of limitation that when a cause of action is once fully barred by the statute in force during such bar, that no subsequent legislation can revive it. The legislature may create a new cause of action. They may lengthen or shorten the periods of limitation as to causes of action in existence; but when, by the statute in force at the time, a cause of action is once barred, no future action of the legislature can give it vitality. The same doctrine has been frequently expressly decided in Indiana, the state in which we are now holding. By the laws of the District of Columbia, and by the laws of the state of West Virginia, the present and former domiciles of the defendant, actions upon this paper were barred many years before the commencement of this suit. Can the legislature, by an act passed in 1875, after its commencement, revive them? We think not. No legislative action could possibly have this effect, or any effect at all, upon causes of action barred before its passage. The proviso of 1875, or any such subsequent legislation, could only affect causes of action in existence at the time of its passage.

Something has been said by the plaintiff, in argument, about the defendant having changed his residence from the District to West Virginia. But we do not conceive that it at all affects his right to plead such foreign domicile as a defense in this action. He lived 12 years in the District of Columbia. One of the incidents of that domicile is the right, under the Indiana statute, to use its law of limitation as a defense. His subsequent removal to West Virginia does not change or alter the fact of his residence in the District. The immunity he thus acquired is a personal one. It follows his person, and no matter in what state or territory he now resides, he may use the right, and plead it whenever he is sued in Indiana. The demurrer to the sixth and seventh paragraphs of the answer is overruled.

TALBURT (FOY v.). See Case No. 5,020.

TALBURT (MARY v.). See Case No. 9,192.

TALCOTT, Ex parte. See Case No. 13,184.

Case No. 13,734.

TALCOTT v. DELAWARE INS. CO.

[2 Wash. C. C. 449.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

NOTARIES — AUTHENTICATION OF COPIES OF RECORDS—SEAL—MARINE INSURANCE—INTEREST—VALUE OF CARGO.

1. The copy of a record of the condemnation of the property insured, was offered in evidence without the seal of the officer who made out the copy; but there were on the margin of each page, flourishes with the pen. No proof was given, that the officer had or had not a seal. The court rejected the evidence.

2. A copy of the manifest of the cargo taken in at Havana, and certified, without a seal, by a notary, with a certificate, signed by three notaries, that full faith and credit ought to be given to the acts of their associate, was not permitted to be read in evidence, because it did not

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

appear that the notary had charge of these papers, and authority to authenticate them.

3. The bill of lading is evidence of interest; and the jury, in the absence of an invoice, can easily estimate the value of the cargo.

This was an insurance on goods, dated July 9th 1806, on board the schooner Commerce, at and from Havana to New-York; premium, 3½ per cent.; warranted American property, to be proved at Philadelphia. The vessel sailed on the voyage insured, and on the 1st of July, was captured by a Spanish privateer, and carried into St. Augustine. One of the counts is for a loss by capture, and the other by barratry of master. Policy open. After evidence was given tending to prove the fraudulent misconduct of the master, to which the loss was imputed, and contrary evidence on the part of the defendants, the record of the proceedings in the tribunal at St. Augustine, was offered in evidence by the defendants. On the former trial of this cause, the court rejected this evidence, upon the ground that the sentence and proceedings, and all the original papers, were in the superior court at Havana, to which the cause had been adjourned; and that this transcript was nothing more than the copy of a copy. A juror was withdrawn, to enable the defendants to obtain better evidence of the proceedings. This, however, they had not done; but relied upon the evidence of Mr. Duponceau, who stated the practice of these courts to be similar to that of the courts of the United States, where, upon a division of the circuit court, the question is adjourned to the supreme court. So, upon a similar division of the tribunal at St. Augustine, the case is adjourned to the superior court at Havana, to which all the papers are sent, and the cause is there finally decided and returned with the papers to the court at St. Augustine, and a mandate to execute the sentence: but Mr. Duponceau admitted, that his information was obtained, not from his own knowledge of the practice and judicial system of the Spanish colonies, but from this record, and similar records which he had seen. Another witness deposed, that he was sent by the defendants to St. Augustine, to obtain information respecting this capture, and also to procure a record of the proceedings; that he got this record by petitioning the governor, and his permit to the notary of the government, who signs and attests this record: that he saw the original papers in his office, was frequently there whilst the officer was copying them, and saw him sign this copy: that he did not know if this officer had a seal, or not; he requested him to authenticate the copy in proper form, and received it as it now appears, without a seal, but with a peculiar flourish of the pen, which is also made on the margin of each page. The objection now made to the record, is, that it is not authenticated by a seal, or the want of a seal by the officer proved.

THE COURT considered the case of Church v. Hubbart [2 Cranch (6 U. S.) 187] conclusive upon this point, against the authenticity of the record. The explanation of the witnesses seems to remove the objection made at the last trial, but the record not being authenticated by a seal, or by proof of its being a true copy, properly and regularly made, it cannot be read.

The defendants offered in evidence a copy of the manifest of the cargo of this vessel, taken in at Havana, certified under the hand of an officer called a notary of registers, without a seal, with a certificate annexed, signed by three notaries, under the seal of the college of notaries, stating that full faith and credit has and ought to be given to the authentications of the notary of registers. This notary certifies, that the paper which he authenticates, is a copy of the manifest of this vessel, made by him at the request of Don Mora, and which is at present in the notarial office, under his charge. Mr. Duponceau was examined as a witness, and stated, that from his experience, and having frequently seen copies of papers of this kind from the Spanish colonies, they are always authenticated in this way; but he admitted that he had never been in the Spanish colonies, and that he derived his opinion from no other source than that above mentioned.

THE COURT thought the evidence inadmissible. It does not appear that this notary has charge of these papers, and that he has authority to authenticate them. The copy should have been proved, in the regular way, to be a true copy.

The defendants moved for a nonsuit; there being no invoice produced of the cargo, and the bill of lading furnishing no evidence of plaintiff's interest, or the value of it.

THE COURT refused to direct the nonsuit. The bill of lading is evidence of interest, and the jury can say, what is the value of the boxes of sugar and segars mentioned in it.

The defendants then permitted the jury to find a verdict, without further argument; intending to move for a new trial.

Case No. 13,735.

TALCOTT v. PINE GROVE.

TAYLOR v. CITY OF BATTLE CREEK.

[1 Flip. 120; 1 Bench & Bar (N. S.) 50.] [1]

Circuit Court, W. D. Michigan. Jan. 16, 1872.[2]

COURTS — FOLLOWING STATE DECISIONS — STATE CONSTITUTION—TAXATION—RAILROAD COMPANIES—MUNICIPAL AID.

1. Where the decision of the highest court of a state holding an act of the legislature unconstitutional is not based upon any provision of the state constitution, but upon certain general

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 1 Bench & Bar (N. S.) 50, contains only a partial report.]

[2] [Affirmed in 19 Wall. (86 U. S.) 666.]

principles applicable alike, if correct, to all the state governments, and that of the United States, the United States courts are not bound to follow such decision.

2. Where such decision of the state court is based upon special provisions of the state constitution, it will be followed by the United States courts as to all matters arising subsequent to the state decision.

3. But where contracts have been made in good faith, based upon state laws, which have long been treated as valid by successive public officers of the state, and by the people of the state generally, and where the prior judicial decisions of the state upon cases analogous in principle, though not upon the precise point, favor such validity, the United States courts, in suits upon such contracts, will not, contrary to their own judgment, follow state decisions holding such laws unconstitutional and such contracts invalid.

4. Laws authorizing municipal aid to railroads are not in conflict with the constitution of Michigan. The decisions of the supreme court of the state holding the opposite view were so contrary to precedent and so unexpected as to operate as a surprise upon the community. The long-continued and frequent legislative action in the passage of such laws, and of other laws involving the same principles, with the action of the state and municipal officers in favor of their validity, and the repeated decisions of the supreme court of the state announcing principles which support such laws, together constituted such evidence that these laws would be held constitutional, that business men were justified in making contracts in reliance upon their validity: and the United States courts will enforce all such contracts brought before them whenever made before the state decisions. In construing contracts made subsequent to the state decisions, they will follow those decisions, irrespective of their own views.

5. The supreme court of the United States have repeatedly held that, in the absence of some provision in the state constitution prohibiting it, the legislature has power to authorize municipalities to issue bonds in aid of railroads designed to benefit the public interests of the community.

6. The decision of the supreme court of Michigan against the validity of these bonds is opposed to an overwhelming weight of decisions in other states with constitutions similar to that of Michigan. Before the constitution of Michigan was adopted, in 1850, the validity of bonds of this character had been settled in states with similar constitutions. In adopting its own constitution, Michigan must be presumed to have adopted the practical and judicial construction of other like constitutions.

7. A railroad corporation, in view of its origin, objects, uses, and the control of government over it, is a public corporation, though its shares may be owned by private individuals. It is a governmental agency for public purposes.

[Cited in Schofield v. Lake Shore & M. S. Ry. Co., 43 Ohio, 596, 3 N. E. 916.]

8. The legislature, and not the judiciary, is to determine what is a public use for purposes of taxation.

9. The taxation authorized in this case is not in violation of the provision of the constitution against depriving a person of property without due process of law. This clause has no reference to the objects and purposes of a statute, but to the mode in which rights are ascertained.

[Cited in Wells v. Oregon Ry. & N. Co., 15 Fed. 571.]

10. The provision in the constitution that the state shall not be a party to, or interested in any work of internal improvement is, on principle, and by repeated and numerous and uniform decisions, and by the legislative action of Michigan, confined to the state as such, and in its corporate character. It in no way touches the right of the legislature to authorize municipalities to make or aid such work. Neither is it against the provision requiring a uniform rule of taxation. That is uniform taxation which is uniform throughout the taxing district. To fix the extent of such district is a legislative, and not a judicial, function.

11. A railroad is not private property—it is devoted to public uses. When the land is taken by authority of the commonwealth under right of eminent domain it becomes a public highway. No corporation has property in it, but it may have franchises annexed to and exercisable within it.

In 1869, the legislature of Michigan passed an act to enable any township, city or village to pledge its aid by loan or donation, to any railroad company, as specified in said act. Laws 1869, p. 89. Under this act, certain bonds were issued in aid of the Kalamazoo & South Haven Railroad Company, by the township of Pine Grove, in the county of Van Buren, Western district of Michigan. An action was brought to recover the amount due on certain of these bonds and on coupons for interest by [Edward B. Talcott,] a citizen of another state, in the United States circuit court for that district. And similar suits were brought against the towns of Port Huron and Battle Creek. The three cases were heard before Judges Emmons, Withey, and Longyear, on demurrer.

D. D. Smith, Walker & Kent, Ashley Pond, and T. Romeyn, for plaintiffs.

Littlejohn, Severens, Douglass, Beakes. Emerson, Canfield & Lothrop, for defendants.

Before EMMONS, Circuit Judge, and WITHEY and LONGYEAR, District Judges.

EMMONS, Circuit Judge. This is an action upon bonds issued by the township of Pine Grove, under an act authorizing municipalities to aid corporations in the construction of railroads. They were issued in full compliance with the statute. The railroad is in successful operation, and the people of Pine Grove have reaped the benefits for which they pledged their credit. Full consideration for the bonds has been paid by Talcott in reliance upon what he deemed well settled rules of law affirming their validity.

Natural justice requires that these bonds should be paid. If, however, there is a rule of law obligatory upon us which forbids judgment in favor of the plaintiff we must follow it, however repugnant it may be to our feelings, or however novel and technical may be the rule.

The case presents but two questions: (1) Is the law which authorized the issuing of the bonds prohibited by the constitution of Michigan? (2) If, in our judgment, it is not, are we bound, contrary to our convictions, to follow the decision of the supreme court of Michigan holding that it is? Both these questions, we think, are determined by the

decisions of the supreme court of the United States, which are mandatory upon us.

We shall first consider the question last stated. As a general rule, to which there are rare exceptions, the United States courts will, in the construction of state statutes or constitutions, follow the decisions of the highest court of the state. Leffingwell v. Warren, 2 Black [67 U. S.] 599, and numerous other judgments so decide. All concede this, and cases need not be further cited.

But the decision of the supreme court of Michigan in People v. Salem, 20 Mich. 452, which the counsel for the defendant claim must control ours, is not based upon any principle peculiar to the state constitution. It is placed on reasons equally affecting those of every state in the Union, and especially that of the national government.

It is said that taxation in support of a railroad owned and controlled by citizens is not within the taxing power of our American governments. This is a broad generality, asserting a principle of jurisprudence and political power having no reference to any particular clauses of the local organic law. It would invalidate the great number of land donations to railroad companies by congress, the laws giving bounties to fishermen, subsidies to steamboat lines, the public money to academies and other schools controlled by individuals, and all that extensive and familiar legislation, the "purpose" of which is, by donations and subsidies, to aid the business of individuals, in which the public have an especial interest, but in the "management of which they have no voice." A thousand state laws, hitherto unquestioned, reaching back to the earliest periods of American history, would fall under this rule.

When such general principles are asserted by the state courts, as a ground for invalidating contracts, they are adopted or disregarded by the federal courts, as they deem them sound or otherwise, and as justice in the class of cases before them demands. A few of the leading cases so ruling will be referred to.

In City of Chicago v. Robbins, 2 Black [67 U. S.] 418, the supreme court refused to follow the decision of the highest court of Illinois in reference to a question of negligence by a municipal corporation, because it depended upon the common law, applicable alike in Illinois and elsewhere.

In Williamson v. Berry, 8 How. [49 U. S.] 495, it disregarded the judgments of the courts of New York upon the construction of a private statute affecting the title to lands, on the ground that such statute was not a part of the general law of the state. See, also, Lane v. Vick, 3 How. [44 U. S.] 464.

In Swift v. Tyson, 16 Pet. [41 U. S.] 1, the decisions of New York, in reference to negotiable paper, were not followed because it was a question of general commercial law not peculiar to New York. See, also, Carpenter v. Insurance Co., 16 Pet. [41 U. S.] 495; Miller v. Austin, 13 How. [54 U. S.] 218; Foxcroft v. Mallett, 4 How. [45 U. S.] 353.

The supreme court of Michigan, some years since, by repeated judgments, decided that certain forms of notices were insufficient to fix the liability of indorsers. Platt v. Drake, 1 Doug. [Mich.] 296; Newberry v. Trowbridge, 4 Mich. 391. Under these decisions hundreds of thousands of dollars were lost. The federal courts refused to follow them. Subsequently the supreme court of the state overruled its former judgments, and adopted the rule of the national courts. Burkam v. Trowbridge, 9 Mich. 209.

But this distinction need not be pursued, as the general rule is not doubted, the question now being whether this judgment of the Michigan court comes within it. We have said that it does, but it is equally unnecessary to discuss this at length, because the undoubted doctrines of the national court make it wholly immaterial whether the judgment in People v. Salem, or the reasons of the later case of People ex rel. Bay City v. State Treasurer, are before us. This later judgment has been rendered since the institution of this action. In addition to the reasons relied upon in the former decision, it is now said that the law is prohibited by three clauses in the state constitution, viz.: that which prohibits the taking of property without due process of law; that which requires uniformity of taxation, and that which forbids the state to engage in works of internal improvement.

To the almost universal rule before announced, that the courts of the Union will implicitly adopt those of the states in reference to local constitutions and laws, there is a single exception in practice, so rarely occurring that, although firmly established, it is frequently overlooked. A brief review will demonstrate that, as to past transactions and contracts, when they will be destroyed by a new local rule, we have no right to adopt the state judgment, if, after careful study, we have no doubt it is wrong.

In the discussion before us the learned counsel for the defendant declined all argument of the rectitude of the state decision, and reposed solely upon the doctrine that its reasons were not subject to review here, and although it destroyed investments, and, in violation of the national constitution, impaired the obligation of contracts, it was in a plenary and judicial sense obligatory upon this court. When such consequences occur, the rule relied on is never applied. They constitute the exception within which, we think, the case of Talcott comes. It is one the justice of which will commend itself to every citizen, and beget nothing but satisfaction so long as it is rigidly confined to the pressing and necessary inducements to its establishment.

The cases are numerous, and differ chiefly

in the facts on which the courts relied in determining that the contracts before them were based upon rules of law deemed settled when they were made. In some instances there had been no state judicial decisions establishing the principles on which contracts were founded, but the supreme court refused to follow subsequent local rulings, denying their validity, solely because they were unwarranted and at war with those general principles upon which all citizens must necessarily rely.

Rowan v. Runnels (1847) 5 How. [46 U. S.] 134. This case, decided nearly a quarter of a century ago, is very instructive as to the degree of local acquiescence and state interpretation which is deemed necessary for the protection of a contract made in reliance upon it. The constitution of Mississippi, adopted in 1833, provided that the importation of slaves should be prohibited. In 1837, the legislature, in compliance with the constitution, passed an act prohibiting such importation. During the four years prior to the passage of the law, the traffic proceeded without question, but no judicial determination was pronounced either in favor of or against its validity until after the contracts before the court had been made. The suit was upon two promissory notes, the sole consideration for which was slaves imported into Mississippi, and sold by plaintiff to defendant before the passage of the statute. In Groves v. Slaughter, 15 Pet. [40 U. S.] 449, the supreme court had affirmed the validity of such contracts, although there had been at that time some judicial determination the other way, by divided courts in Mississippi. Before this suit was brought, however, the courts of Mississippi had directly and repeatedly ruled that the constitution itself prohibited the importation of slaves without a statute to enforce it, and that such contracts were void. The question was, whether, under these circumstances, the decisions of the state court were obligatory upon those of the nation. Not only had there been no decisions in Mississippi prior to the making of the contracts on which they had been based, but there were none of courts involving the same principle in other states. It was the construction of a purely local clause of the state constitution. There had been but one act of the legislature which impliedly sanctioned the construction given by the federal court. There had been but four years of practical construction. But, as many contracts had been made and much property transferred in reliance upon it, the court, after a most full argument, refused to follow the state adjudications which destroyed them. Chief Justice Taney, in delivering the opinion of the court, says: "Undoubtedly this court will always feel itself bound to respect the decisions of the state courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitutions and laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made."

This decision did not depend upon the fact that the same point had been before decided by the United States court. Over and over again it has receded from its construction of local laws and constitutions, when subsequently the state tribunals have ruled otherwise. Green v. Lessee of Neal, 6 Pet. [31 U. S.] 291; Suydam v. Williamson, 20 How. [61 U. S.] 427; Leffingwell v. Warren, 2 Black [67 U. S.] 599.

Nor did it proceed on the ground that the contract was in reliance upon Groves v. Slaughter, for it had been made long before that decision was rendered.

Rowan v. Runnels has been repeatedly quoted in subsequent cases. It is among the most deliberate and frequently approved judgments of the court. In its circumstances it calls for a far more liberal application of the exception to the general rule which requires us to follow the decisions of the state courts than does the case before us. We could not decide this point adversely to the plaintiff without assuming to disregard this judgment of the supreme court.

Pease v. Peck, 18 How. [59 U. S.] 595, arose upon the construction of a Michigan statute of limitations. By an error of the printer, the statute as published had an exception as to persons "beyond seas," and this had been supposed to be correct for many years, but it does not appear that any judicial decisions had been made based upon this reading. The Michigan supreme court decided that the manuscript copy which did not contain the words "beyond seas" must govern. The supreme court of the United States refused to follow this construction on the ground that the other view had been so long supposed to be valid that it had become the basis of contracts.

In State Bank v. Knoop, 16 How. [57 U. S.] 369, the Ohio supreme court decided that a statute regulating the taxation of the plaintiff bank was not a contract, and that if such had been the intention of the law, it was in violation of the constitution of the state. This judgment, on writ of error, was reversed by the national court. It decided that the law did create a contract, and that it was not prohibited by the local constitution. Just what is now asked in the case before us was there done. That the point arose upon writ of error, and that the contract was created more immediately by a statute, are immaterial conditions, will fully appear by subsequent citations. The opinion of Taney, Chief Justice, was delivered in the case of Trust Co. v. Debolt, 16 How. [57 U. S.] 432, at the same time before the court. It is affirmed, after the most searching argument, in Dodge v. Woolsey,

18 How. [59 U. S.] 332; State Bank v. Knoop, 16 How. [57 U. S.] 380; Jefferson Bank v. Skelly, 1 Black [66 U. S.] 436.

Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175, was an action on bonds issued by the city in aid of a railroad company. There had been prior decisions of the supreme court of Iowa holding similar bonds valid. Subsequently to the making of those in suit, that court reversed its former rulings and adopting the same conclusions as those arrived at by the supreme court of Michigan in the Salem Case, declared the law unconstitutional. Justice Swayne says: "The same principle applies when there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To the rule thus enlarged we adhere. It is the law of this court. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." And see, following this principle: Von Hoffman v. Quincy, 4 Wall. [71 U. S.] 535; Meyer v. City of Muscatine, 1 Wall. [68 U. S.] 384; Thomson v. Lee County, 3 Wall. [70 U. S.] 327; Rogers v. Burlington, 3 Wall. [70 U. S.] 654; Mitchell v. Burlington, 4 Wall. [71 U. S.] 270. In Havemeyer v. Iowa City, 3 Wall. [70 U. S.] 294, the doctrines in Gelpcke v. Dubuque, are applied in circumstances going very far beyond the necessities of the case at bar. The question was, whether the law under which the bonds were issued had been so published as to make it effective before the action under it was taken. The state court had expressly decided, subsequent to the creation of the bonds, that it had not. A single prior decision had been made which implied the contrary. But, as the attorney general of the state had published the law, and action had taken place under it, the supreme court say, at page 303, that the former state judgment was a recognition of the public character of the act, and the action of the executive had been in harmony with it. That prior to the changed opinion of the court no intimation had been given that they were otherwise than local, and that it "being posterior to the time the bonds were issued it can have no effect upon them. We can look only to the time when the securities were issued." The rule, it is said, was established upon the most careful consideration, and would be adhered to.

Buttz v. Muscatine, 8 Wall. [75 U. S.] 575. This case is in principle like that of Von Hoffman v. Quincy, in 4 Wall. [71 U. S.] 535, where the power of taxation to pay the bonds was attempted to be taken away by a legislative repeal of the law which authorized it. In this the same effect was produced by judicial decisions. When the bonds were issued, the state law, in the opinion of the federal court, authorized taxation for their payment, although no state decisions so holding had been made. By adjudications of the Iowa courts subsequent to their issue, it was determined that such power did not exist, and the supervisors therefore refused to assess the tax. Mandamus was applied for in the circuit court of the United States to compel it. Judge Swayne, in delivering the judgment of the court, after referring with approbation to the Von Hoffman Case, and to the cases which hold that the remedy is part of the contract, says that here, although it is taken away, not by repeal, but by judicial decisions, the effect is the same; that in the construction and protection of contracts the court must act independently of the state courts, and the fact that a statute was concerned could not vary the result. The rights of the relator, he said, "could no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much our duty to protect the contract from the one as the other." If the construction ultimately given by the state court had preceded the issuing of the bonds that would have been followed.

The two preceding and the following judgments are demonstrative of the adoption by the national courts of a principle broad and comprehensive; wholly unfettered by any narrow limitations which will arrest its application this side of the most complete protection of what was done in good faith in reliance upon existing law. No matter what the form of the action, or howsoever the court is called upon to coerce directly the action of local political officials, it will proceed as freely and minutely as though its action was invoked to correct the refusals of national officers. Judgment was obtained in the national circuit court in disregard of local judgments. The supervisors, in obedience to the state judgments, refused to levy the tax to pay it, and there was no county property subject to levy to satisfy it. The court issued mandamus to compel their action, and the state courts enjoined it. The officers, obeying the state instead of the national court's process, refused still to make the assessment. In these circumstances, Amy v. Supervisors, in 11 Wall. [78 U. S.] 136, held the officers individually liable for a breach of official duty, in refusing to obey the writs of the national court, and judgment was given against them for the amount of the tax it was their duty to have assessed. The whole proceeding, from the rendition of the original judgment to that against the contumacious supervisors, was in direct conflict with repeated rulings in the state court upon every point required to sustain the judgment. See Chicago v. Sheldon, 9 Wall. [76 U. S.] 50; Riggs v. Johnson County, 6 Wall. [73 U. S.] 166; Kenosha v. Lamson, 9 Wall. [76 U. S.] 477.

Although elsewhere fully considered, and not germain to the present argument, it is satisfactory to add that the differing local judgments are all overruled by the local courts which made them. It is then not a right only, but an imperative duty, about the

performance of which this court has no possible discretion to administer the law as, after the most full examination in our power, we believe it to be. This should be made in view of all that effect which we must ever give to a state decision that we know was rendered only after the most thorough argument and full and careful consideration; one which has been made in ignorance of no single condition of the question answered, but in a deliberate and conscientious disregard of the most learned, numerous and persuasive body of opinions ever before given upon any one subject in the whole history of our constitutional law. It did not involve a misconception of these opinions, but it was intentionally revolutionary in doctrine. It asserts independence of precedents, and expressly condemns the old conservative idea of stare decisis if the "first judgment in the series" is believed to be wrong. It of all other judgments presents just that exercise of judicial authority which has called forth the condemnatory and dissenting opinions cited by us, and which demand and sustain the ruling which we feel compelled to make.

The other question is just as conclusively settled by the supreme court, whose judgments we must follow, as the one we have thus far considered. That the law is constitutional, and the contracts valid and obligatory upon the municipalities making them, and that it is our duty to enforce them, has been affirmed in nearly every judgment thus far cited. We have nothing to decide upon principle. The law is settled by adjudication, confirming wide and long-continued usage. Certainly, in the courts of the United States, the question is no longer open.

In Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 205, Judge Swayne, delivering the opinion of the court referring to the decisions holding such statutes to be constitutional, says: "The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen states of this Union. Many of the cases in the other states are marked by the profoundest legal ability. The late case in Iowa, and two other cases in another state, also overruling earlier adjudications, stand out, so far as we are advised, in unenviable solitude and notoriety." Where there is no defect of constitutional power such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the supreme court of Iowa in McMillen v. Boyles [6 Iowa, 304], and again in McMillen v. County Judge and Treasurer of Lee County [Id. 391]. The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject. In Rogers v. Burlington, 3 Wall. [70 U. S.] 663, Judge Clifford, in delivering the opinion of the court, says: "Railways, also, as a matter of usage founded on experience, are so far considered by the court as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business, that a state legislature may authorize the towns and counties of a state through which a railway passes to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same with a view of aiding those engaged in constructing or completing such a public improvement." "Decisions to that effect have very much increased in number within the last few years, and are constantly increasing, both in the state and federal courts, until it may be said that the rule here laid down pervades the jurisprudence of the United States." See, also, Meyer v. Muscatine, 1 Wall. [68 U. S.] 384; Thomson v. Lee Co., 3 Wall. [70 U. S.] 327; Havemeyer v. Iowa Co., 3 Wall. [70 U. S.] 294; Kenosha v. Lamson, 9 Wall. [76 U. S.] 477; Mercer Co. v. Hacket, 1 Wall [68 U. S.] 83; Amy v. Supervisors, 11 Wall. [78 U. S.] 136. These decisions were nearly all made under constitutions containing every clause which is relied on in that of Michigan to invalidate the law of Michigan. Nor is there anything in the history of the state which should give these clauses a peculiar meaning. These decisions are then, virtually, a construction of the constitution of Michigan, which is mandatory upon us.

Much was eloquently said by counsel, in the discussion of this case, about the evils which would follow a decision in opposition to that of the state tribunals. We do not anticipate any such results. The able and experienced lawyers, who constitute the supreme court of Michigan, acted with full knowledge of the doctrine so firmly established by the national court. They knew with certainty that, in the limited class of cases in which bonds issued before their decision could come before this court, we must hold them valid. Nor can we believe that they will regret this. However imperative seemed to them the duty of holding the acts unconstitutional, and for the future preventing all action under them, they will be gratified that bonds for which full consideration has been paid can be made good to the purchaser. Nor do we believe that the people of the municipalities whom our decision renders liable will regret it. Rather, we hope, that they will rejoice that a way has been opened whereby debts contracted with their assent, and for which they have received full consideration, may be paid and they relieved from the appearance of repudiation.

And here ordinarily this opinion would terminate; but the history of the discussion and the circumstances in which the question arises not merely justify, but demand some consideration of the reasons on which our dissent rests, irrespective of the decisions of that court, which we are compelled to follow. It is evident that, in treating subjects involving the nature of our govern-

ments, the general legislative power of the states and the meaning of clauses, some of which are as old as Magna Charta, where so much depends upon the history of their administration, a glance only can be given to each. Much narrower limits suffice for the denial of old and familiar truths than for their demonstration. A portion only of our objections to these judgments can be considered at all. The high character of the judges who pronounced them, the far more than ordinary public confidence in their conscientiousness and great ability, relieve us from all fear that a plain statement of the reasons of our dissent will be construed into disrespect. In discussion, opinions are likely to be stated with confidence, but this does not imply that equal intelligence and desire to be right, might not decide differently.

Having concluded, after much doubt, to add in part our reasons upon principle, we regret greatly that beyond the consideration of the points already treated so little discussion was had at the bar. The defense assumed that it was our duty to follow the state ruling, irrespective of its reasons; and the plaintiff's counsel deemed it too evidently erroneous to demand more than a reference to the numerous decisions it opposes. Our own judgment, rendered in circumstances not permitting that examination which we should have been pleased to make, must necessarily be somewhat imperfect.

The first and most obvious objection to these judgments is that they disregard so great a number of antecedent decisions of the courts of other states, and the United States, directly upon the point, as to render them an extraordinary and unwarrantable departure from well settled judicial action. The rule which is denied had, in fact, become a part of "American jurisprudence."

In order to see this clearly, we cite a series of cases decided in twenty-five states, and all sustaining the doctrines overlooked or overruled by the supreme court of Michigan:

Alabama: Stein v. Mayor of Mobile (1854) 24 Ala. 591; Mayor, etc., of Wetumpka v. Winter (1857) 29 Ala. 651; Gibbons v. Mobile, etc., R. Co. (Plank Road Case; 1860) 36 Ala. 410.

California: Pattison v. Board of Supervisors of Yuba Co. (1859) 13 Cal. 175; Hobart v. Supervisors of Butte Co. (1860) 17 Cal. 23; Robinson v. Bidwell (1863) 22 Cal. 379; French v. Teschemaker (1864) 24 Cal. 518; People v. Coon, 25 Cal. 635; People v. Supervisors of San Francisco (1865) 27 Cal. 655; Stockton & V. R. Co. v. City of Stockton, 51 Cal. 329.

Connecticut: City of Bridgeport v. Housatonic R. Co. (1843) 15 Conn. 475; Society for Savings v. City of New London (1860) 29 Conn. 174.

Delaware: Rice v. Foster (1847) 4 Har. (Del.) 479.

Florida: Cotten v. County Commissioners of Leon Co. (1856) 6 Fla. 610.

Georgia: Winn v. City of Macon (1857) 21 Ga. 275; Powers v. Inferior Court of Dougherty Co. (1857) 23 Ga. 65.

Illinois: Ryder v. Alton & S. R. Co. (1851) 13 Ill. 516; Prettyman v. Supervisors of Tazewell Co. (1858) 19 Ill. 406; Robertson v. City of Rockford (1859) 21 Ill. 451; Johnson v. Stark Co. (1860) 24 Ill. 75; Perkins v. Lewis (1860) Id. 208; Butler v. Dunham (1861) 27 Ill. 474; Clarke v. Board of Supervisors, etc. (1862) Id. 305; Piatt v. People (1862) 29 Ill. 54; King v. Wilson [Case No. 7,810]; Chicago, etc., R. Co. v. Smith (decision just rendered in supreme court for Northern division of Illinois; 1872) not yet reported [62 Ill. 268].

Indiana: City of Aurora v. West (1857) 9 Ind. 74; Evansville, etc., R. Co. v. City of Evansville (1860) 15 Ind. 395; Commissioners, etc., v. Bright (1862) 18 Ind. 93; City of Aurora v. West (1864) 22 Ind. 88; Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 185.

Iowa: Dubuque Co. v. Dubuque & P. R. Co. (1843) 4 G. Greene, 1; State v. Bissell (1854) Id. 328; Clapp v. Cedar Co. (1857) 5 Iowa, 15; Ring v. Johnson Co. (1858) 6 Iowa, 265; McMillen v. Boyles (1858) Id. 304; McMillen v. County Judge, etc., of Lee Co., Id. 391; Whittaker v. Johnson Co. (1859) 10 Iowa, 161; Stewart v. Board of Sup'rs of Polk Co. (late case) reported in pamphlet [30 Iowa, 9].

Kansas: Commissioners of Leavenworth Co. v. Miller (1871) 7 Kan. 479.

Kentucky: Talbot v. Dent (1849) 9 B. Mon. 526; Justices of Clarke County Court v. Paris, W. & K. R. Turnpike Co. (1850) 11 B. Mon. 143; Slack v. Maysville & L. R. Co. (1852) 13 B. Mon. 1; Maddox v. Graham (1859) 2 Metc. 56.

Louisiana: New Orleans, O. & G. W. R. Co. v. McDonogh (1853) 8 La. Ann. 341; Parker v. Scogin (1856) 11 La. Ann. 629; Vicksburg, S. & T. R. Co. v. Parish of Ouachita, Id. 649; City of New Orleans v. Graihle (1854) 9 La. Ann. 561.

Maine: Augusta Bank v. City of Augusta (1860) 49 Me. 507.

Mississippi: Strickland v. Mississippi, etc., R. Co., cited as of 21 (or 27) Miss. 209, and as in 1849.

Missouri: City of St. Louis v. Alexander (1856) 23 Mo. 483; St. Joseph & D. C. R. Co. v. Buchanan County Court (1867) 39 Mo. 485.

New York: Grant v. Courter (1857) 24 Barb. 232; Benson v. Mayor of Albany, Id. 248; Clarke v. City of Rochester, Id. 446; Bank of Rome v. Village of Rome (1858) 18 N. Y. 38; Gould v. Town of Venice (1859) 29 Barb. 442; Starin v. Town of Genoa (1861) 23 N. Y. 439; Clarke v. City of Rochester (1864) 28 N. Y. 605; People v. Mitchell (1865) 45 Barb. 208; People v. Mitchell (1866) 35 N. Y. 551.

North Carolina: Taylor v. Commissioners of Newberne (1855) 2 Jones, Eq. 141 (a navigation case); Caldwell v. Justices of Burke Co. (1858) 4 Jones, Eq. 323.

Ohio: Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co. (1852) 1 Ohio St. 77; Steubenville & I. R. Co. v. Trustees of North Tp., Id. 105; Cass v. Dillon (1853) 2 Ohio St. 607; Thompson v. Kelly, Id. 647; State v. Van Horne (1857) 7 Ohio St. 327; State v. Trustees of Union Tp. (1858) 8 Ohio St. 394; State v. Commissioners of Hancock Co. (1861) 12 Ohio St. 596; Commissioners of Knox Co. v. Nichols (1863) 14 Ohio St. 260; State v. Mayor, etc., of Perrysburg, Id. 472; State v. Trustees of Goshen Tp., Id. 569; Griffith v. Commissioners of Crawford Co., 20 Ohio Append. 1; Bloomington R. Co. v. Gaiger (April, 1871) 4 Law T. St. R. 98.

Pennsylvania: Harvey v. Lloyd (1846) 3 Pa. St. 331; Com. v. McWilliams (1849) 11 Pa. St. 62 (turnpike case); Sharpless v. Mayor of Philadelphia (1853) 21 Pa. St. 147; Moers v. City of Reading, Id. 188; Com. v. Commissioners of Allegheny Co. (1858) 32 Pa. St. 218; Com. v. Councils of Pittsburgh (1861) 41 Pa. St. 278; Com. v. Perkins (1862) 43 Pa. St. 400.

South Carolina: State v. Mayor, etc., of City of Charleston (1857) 10 Rich. Law, 491.

Tennessee: Nichol v. Mayor, etc., of Nashville (1848) 9 Humph. 252; Louisville & N. R. Co. v. Davidson County Court (1854) 1 Sneed, 637.

Texas: City of San Antonio v. Jones, 28 Tex. 19.

Vermont: Cadis v. Town of Swanton (late case; not reported).

Virginia: Goodin v. Crump (1837) 8 Leigh, 120; Harrison Justices v. Holland (1846) 3 Grat. 247.

Wisconsin: Clark v. City of Janesville (1859) 10 Wis. 136; Bushnell v. Beloit (1860) Id. 195; Mills v. Gleason (1860) 11 Wis. 470.

These cases have been frequently collated and the results announced by elementary writers. Among others, Judge Cooley, in his work on Constitutional Law (pages 189–259) quite fully does so. After an extensive discussion of many of the cases cited, and of that large class of authorities embodying the same principle in reference to the payment of bounties to soldiers, granting aid to private schools and works beyond the limits of the municipality, and asserting a distinction between the cases where the donation is permitted and where it is coerced by the law, he says: "If these cases are sound, the limitations which rest upon the power of the legislature to compel municipal corporations to assume and discharge obligations can only be such as spring from the general principles governing taxation, namely: That the purpose shall be such as to constitute a proper charge upon the state or portion of the state taxed to accomplish it. But upon this question the legislature is vested with discretionary and compulsory power, and its decisions are not subject to review by the courts. They must be final, unless clear cases where there is no ground to adjudge the purpose to be a proper one for taxation." The whole chapter is a full and unqualified concession that the purpose of laws like the one under consideration is public, within the meaning of the taxing power, when the road runs through the town granting the aid. The cases where no part of it does so, and where the municipality is compelled, not permitted only, to aid work beyond its limits, are thus criticised: "But those cases which hold it competent for the legislature to give its consent to a municipal corporation engaging in works of internal improvement outside its territorial limits, and become stockholders in a private corporation, have gone to the limits of constitutional power in this direction, and to hold that it may go further and compel them, is introducing a new principle."

On page 536, speaking of taking private property for public use, he justifies the delegation of the right to private corporations upon the ground that experience has shown that "these highways can be better managed for the public benefit in the hands of individuals than in the hands of the state or local municipal officers." He adds that after the legislature has decided that the general benefit is in this mode better promoted, "it would clearly be pressing a constitutional maxim to an absurd extreme to say the public necessity should be provided for only in the way least consistent with the public interest, and the fact that the members have a pecuniary interest such as will give the company the character of private, will not prevent the state from using it to accomplish the public object." The leading cases are cited, several of which in express terms put this power and the taxing power upon the same ground. Judge Cooley quotes with approbation from People v. Smith, 21 N. Y. 597, what is said by the learned and politically experienced Judge Denio. He says: "The necessity for appropriating property to public use is not a judicial question. The power resides in the legislature. It may be exercised directly by the statute or delegated to private corporations established to carry on enterprises in which the public is interested. This power stands on the same ground as the taxing power. Both are emanations from the law-making power. They are attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax, as in appropriating property to public use, the statute itself is 'due process of law.'" Judge Cooley, as an author, shows that it is a well settled axiom of American constitutional law that what is a public use for taxation and appropriation is not a judicial but legislative question. He pro-

nounces the objection "absurd," that when the public object is declared by the legislature it cannot employ for its accomplishment a corporation, because its members have private pecuniary interests in its shares. This is not the theory of an author or speculative opinion. He but fairly and intelligently condenses the unquestioned and numerous judgments he cites. We know of no decisions to the contrary by courts of last resort, save in the single state of Wisconsin and the few short-lived ones in Iowa, now overruled by the court which pronounced them. Those in Wisconsin are accompanied by qualifications so inconsistent as to call for their express rejection by the Michigan courts. It may be said to stand alone, without a concurring, un-overruled judgment in the nation.

Nor is there anything peculiar in the jurisprudence of Michigan. Its decisions upon the precise principle involved are numerous and pointed. But we shall the better understand them if, before their consideration, we clearly ascertain what it is which has been aided in the present instance. It will appear that these corporations are, in the most strict and full sense, governmental agencies, and political trustees, having no resemblance to private mills and hotels, and that the previous local judgments go far beyond the necessities of the plaintiff's case.

Judge Cooley, speaking for the majority of the court in People v. Salem [20 Mich. 452] concedes expressly that such a railroad would be within the taxing power, provided it was controlled by the public. But it is asserted that when the shares are owned by individuals, as the public has no voice in its control, the corporation is strictly private, and the aid is unconstitutional. In the second opinion he wisely disclaims all distinction between donations and subscriptions to stock. If, therefore, nine-tenths of the shares are owned by the towns, the aid would be illegal, but if all are so, it is lawful.

Protesting against the necessity for any such argument, believing that under all our American constitutions, the judiciary has no concern with this clearly legislative question of what shall be the instrument of accomplishing a public purpose, we respectfully suggest that the criticism of the learned court, had in the statute before them, no foundation in fact. The corporations referred to in the statute were not in any sense, here involved, "strictly private." Authors who class these corporations as such, because individuals own their shares, warn the reader against the use of this classification made in People v. Salem. They say most fully that when they are created for public purposes, perform public duties and exercise delegated sovereign rights for that purpose, they are public in their nature. As said in Swan v. Williams [2 Mich. 427], a fourth of a century since, in Michigan, they are quasi public, and stand in a distinct class by themselves.

For all time the setting up of a highway or ferry for conveying persons and property has been deemed, in the common law, a franchise, a matter of governmental concern, a part of the subjects in the immediate possession of the political power, and, to exercise which, demanded a release of this right by the sovereign, by special grant or charter. It is not, in its nature or actual history, like those private avocations of milling, hotel keeping and traffic, which all may pursue at pleasure unless, in the exercise of police power, a restraining statute interferes and requires a license. 3 Kent, Comm. 458, says there are certain franchises which are understood to be royal privileges in the hands of the subject. The right to set up a ferry or a road, and the taking of tolls, is one of them, and in this the public has an interest. In 2 Bl. Comm. 37, it is said that "a franchise is a branch of royal prerogative in the hands of the subject," such as the right of taking toll for a bridge, way or wharf (see 3 Bl. Comm. 219). In 18 Iowa, 327 (Prosser v. Wapello Co.), this subject is fully discussed by Dillon, J., and the leading English and American cases cited, showing that a road for tolls, or a ferry is a franchise, and is held by the citizen when granted as a public office. At pages 334, 335, it is said "that a party cannot set up a ferry even on his own land, without the consent of the state." A long list of state and federal judgments, over forty in number, are referred to. They show, beyond doubt, that these rights are held by the grantee as the agent and trustee of the political power; that they are in no sense private, but continue after, as well as before, the grant, to be but a portion of the public government.

This well-known rule, in reference to all the ways of transit, sprang from the essentially public character of the duties connected with their management. The absolute commercial and business necessity for permanence, when established, forbade, from the earliest periods, the manifest impolicy of leaving this great interest to the laws of supply and demand, which, thus far, have sufficiently supplied the community with inns. So deeply is this founded in the nature of the thing that, in a large degree, such is the law of every country to which our examinations have extended. As civilization advanced, the transmission of intelligence was ranked in the same category. The public mails of all countries, and the penalty on the citizen for performing this duty, show the difference between these great and pervading agencies and a mill. Here, as in England, the telegraph may follow. There is something in this whole department soliciting to its control the hand of political power, which thus far has never released it or suffered it to fall into the ranks of those interests to which it has, we think, most un-

warrantably been likened. And it is not true, we submit, that it is in degree only, that these franchises differ in their relations to the public from mills and inns, as is said in People v. Salem. The one is private property; the other is a political function, which, when resting in the hands of government where originally it resided, or delegated still for the same public use, to either persons or corporations, ever has been, and of right may be, aided by taxation. Whether in the immediate possession of the sovereignty, or placed in legal organizations controlled by public law for the purpose, it is equally controlled by, and the political power has a voice in, its most minute management.

It is for the performance and regulation of this old and familiar governmental duty, in a mode deemed by the legislature most efficient and economical, that in modern times railway and other corporations have been created. And in the most plenary and critical sense, under the general railroad law of Michigan, they are parts of the political organism. The entire duty they perform is a public one, and a charter from the law-making power is necessary to its exercise. A prescribed organization, an amount of capital to secure the public against failure, and an offer of shares by public officers under guarded laws to all citizens alike, eminently distinguished these strictly public corporations from private adventures. The weight of the iron, the speed of trains, the amount of equipment, the duty of officials, the mode and time of their election, the apportionment of their duties, and the tenure of their offices, are all fixed by public law. The time for the commencement and completion of the work, the filing of maps for public information, the power to exercise the highest and most sovereign right in the government—that of seizing, against the will and interest of the owners, the farm, the church, and the homestead—is exercised solely for the public use. In each instance juries must find not only that the land and materials taken are necessary for the contemplated way, but that the way itself is necessary for the public. See Mansfield C. & L. M. R. Co. v. Clark, 23 Mich. 519. They are authorized to cross highways, bridge navigable streams, and enter the streets of our great cities. The road must be built from and to the precise places, and pursue in its whole length the exact route, thus, by successive juries, found to be governmental necessity. These are but portions of the still more minute regulations contained in the statutes for the creation of these public roads. The control over the mode of construction, the place of location, the continuance of the way, and the efficiency of operation is not only equal to, but greatly exceeds, that provided by law in reference to the common highways of the state.

The road, once constructed is, instanter, and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular its cars, engines, rights of ways and property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage, the corporation created by the sovereign power expressly for this sole purpose and no other, is in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice. Every farthing of its tolls is first to be devoted to paying the public tax, and to the continuance of the road, its ample equipment and regular operation as the interests of the community, not those of shareholders, demand. No matter that a dividend is never paid, that the private investment is sunk and worthless, that the interest upon its bonds is not met, and that all its creditors go unpaid, every dollar of its earnings must nevertheless be applied to keep up its maximum efficiency, as required by the political power in the law which created it. The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus, and in Michigan by various statutory proceedings at the suit of the attorney general. This law officer of the state is especially charged by statute with the duty of enforcing them. That a railroad cannot be abandoned after it has become one of the thoroughfares of the country, and that the company will, by proceedings in behalf of the state, be forced to continue its road and perform all its duties to the public, is beyond question.

In State v. Hartford & N. H. R. Co., 29 Conn. 538, a railroad company refused to run trains over a part of its road. It was coerced to do so by mandamus. Ellsworth, J., said: "What right had it to covenant it would not run its cars to tide-water as its charter prescribes and the public accommodation requires?" See People v. Albany & V. R. Co., 24 N. Y. 261, 37 S. C. 216; 16 Eng. Law & Eq. 327; Id. 299. There is nowhere any conflict. York & N. M. Ry. Co. v. Reg., 18 Eng. Law & Eq. 199. The doctrine is applied in every form when the corporation neglects the public duties for which it was created. Among the most stringent applications of this doctrine is that of Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, in which a charter was repealed, and the government took possession of the road, and it was said to be seizing private property. At page 307, Black, J., says: "This act takes nothing but the road. Is that private property? It is a public highway, solemnly devoted to the public use. When the lands were taken, it was for such use, or they could not have been taken at all." "Railroads established upon land taken by the right of eminent domain

by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them." At page 315, after saying that the company agreed to build the road as a public highway for the people, he adds: "In consideration thereof, the state consented to clothe the shareholders with a portion of her sovereignty, the right of eminent domain and the franchise of taking tolls." At page 324, he says: "Railroads built under authority of law are public highways. On this principle alone we decided that municipal subscriptions are valid." He proceeds to enumerate a large number of incidents which attach to them as public, and would not belong to them as "strictly private" corporations. In Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 339, it was held that the land of a railroad company could not be levied upon by a creditor because "of the public interest in the corporation." Its rights, though in some respects private, could not, so far as the public motive for its creation was concerned, be either granted away by the company itself, or sold by a creditor. In 9 Watts & S. 27 (Susquehanna Canal Co. v. Bonham) the same ruling is made: "It would defeat the public object for which they were created." See 13 Serg. & R. 101. In Richardson v. Sibley, 11 Allen, 65, it was decided that a street railway company could not "alienate its property so as to prevent its performing the duties to the public it was created to perform." See Pierce v. Emery, 32 N. H. 504. Redfield on Railways (page 53) says, in speaking of railroad corporations in this country, that nothing more is meant in calling them private than that the shares are owned by individuals. He clearly distinguishes between the public functions and the wholly immaterial accident here, that citizens own its shares. These citations could be greatly multiplied. Most of those hereafter cited assert the same principle.

They who buy under mortgage or other judicial sales, when such proceedings are authorized by statute, succeed only to such property rights as remain after all these public duties are performed. They cannot abandon the road and take away the cars and rails as they could the fixtures of a mill or the furniture of a tavern. 2 Redf. Ry. 514 et seq., and notes.

The immateriality of the ownership of the shares will appear from a consideration of how little they control and how very far they are removed in technical right and practical power from all the incidents of ownership in reference to the company or its possessions. It is a most misleading and unfounded description of their relations to say they own either the corporation or its property. The deed of all the corporators will not pass, even in equity, the corporate lands or rights of any kind. Their admission is not evidence; their knowledge does not charge it; they may be excluded like any other strangers from its cars and grounds; they may sue or be sued by it, and so complete and separable is the legal and equitable character of the stockholders and the corporation itself, that the most deliberate and fair agreements of the former, or by the promoters of the scheme, that the future company shall do acts when organized, cannot bind the latter, although the persons so agreeing own every share in the corporation.

The following cases, being illustrations only of large classes like them, sustain all the foregoing statements, and many other incidents showing the entire absence of all similitude between shareholders' rights to corporate property and those of private owners, and especially the want of identity between them and the corporation itself. That their admission will not bind it, see 21 Me. 507; 1 Cow. & H. notes Phil. Ev. 487, 488; Ang. & A. Corp. §§ 308, 657, 658; 28 Vt. 564; 3 Day, 494; 14 Me. 152.

When notice will affect rights, that all shareholders have it, is immaterial. Ang. & A. §§ 307, 308, and cases cited, say they "do not represent each other in any relation of agency." See, also, 9 Barr. [9 Pa. St.] 27; 10 Watts, 397; 4 Paige, 406, 413; 13 Conn. 182; 2 Law T. (N. S.) 78.

The deed of all the shareholders will not transfer the corporate property. Redf. Ry. 575; 15 Vt. 519; 19 Vt. 230.

The distinctions in equity, where the corporation receives the benefit and under bills for specific performance will itself be decreed to convey on the ground of its own agreement by subsequent adoption, do not affect this question. That the relation even of trustee does not exist in any sense here involved, see Ang. & A. § 313, where it is said that "the relation of trustee and cestui que trust, does not exist between corporators and the corporation, nor are they in the relation of partners, nor are they creditors. The corporation is the mere creature of the law." This, too, is the doctrine of the courts of equity. 3 Paige, 409; 1 Edw. Ch. 87, and other cases in New York; 1 R. I. 312; 1 Freem. Ch. (Miss.) 161; 30 Eng. Law & Eq. 130; Smith v. Poor, 40 Me. 415; 2 Law T. (N. S.) 525; Orr v. Glasgow A. & M. Ry. Co., Id. 550 (and see, per Lord Cranworth, pages 551, 552). Though all covenant and attempt to bind it, it is impossible in the law. 13 Mass. 408, and cases cited ante and post. That they may sue and be sued by it and contract with it like an entire stranger. Ang. & A. Corp. §§ 232, 233; 3 Hill, 391; 2 Doug. (Mich.) 124; 4 Hurl. & N. 87. Obligations of co-partnership, however equitable and however intended to attach to a corporation formed to carry on the same business, cannot be made to do so without the agreement of the corporation when in esse. 16 Pick.; Dance v. Girdler, 1 Bos. &

P. (N. R.) 34; 15 Ind. 219; 6 H. L. Cas. 417. Lord Wensleysdale (page 423) says: "They are distinct persons in the law." So substantial and free from all fiction is their distinct character, that even when the government itself owns a part or all of the shares, the company may be sued, though the government cannot be. 8 Watts, 316; 3 McCord, 377; Bank of the State v. Gibbs, 9 Wheat. [22 U. S.] 907; 6 Ala. 814; and the judgments in relation to the United States Bank in the federal courts. That the promoters and launchers of a company cannot bind it in any way, although all are shareholders, see 27 Conn. 170; 12 Metc. [Mass.] 311; 28 Vt. 401; 5 Jones, Law, 304; 18 Barb. 297; 21 Pa. St. 221; 1 Head, 30. But more particularly on the precise point involved in the last statement, see 39 Eng. Law & Eq. 28 (house of lords; 1857). Lord Cranworth says, in holding that the company is wholly distinct from its promoters and shareholders, that he is going on "no technicality, but what is the mere truth." 35 Eng. Law & Eq. 92; Preston v. Liverpool, etc., R. Co. (house of lords; 1855) Id. 375; same case below, De Gex & S. 743; on appeal in chancery, 1 De Gex, M. & G. 737. The cases before Lord Cottenham, and the courts from which appeal lay to his, where an attempt was temporarily made to override this doctrine in equity, are pointedly overruled. Williams v. St. George's Harbour Co., 30 Law T. 84.

Citizen shareholders, then, thus remotely connected with, and whose pecuniary interests are so subordinated by the statutes and general law to purposes undeniably the proper subjects of municipal aid, can constitute in principle no objection to its application.

In applying to this class of corporations, the familiar principle that contracts beyond charter powers are unlawful, the courts have been influenced by the consideration that their functions are public, and that the objection is taken, not for the shareholders, but in the interest of the government. See 1 Drew & S. 154; Attorney General v. Great Northern R. Co., 2 Law T. (N. S.) 653; Eastern Counties Ry. Co. v. Hawkes (house of lords) 35 Eng. Law & Eq. 8, 17. Lord Cranworth, after showing the public character of these corporations, says: "It is well settled that a railway company cannot devote any of its funds to other purposes, no matter howsoever beneficial it may be to shareholders." Colman v. Eastern Counties R. Co., 10 Beav. 1; Salomons v. Laing, 12 Beav. 339; Bagshaw v. Eastern Union R. Co., 7 Hare, 114, 7 Eng. Law & Eq. 505. In 16 Law & Eq. 180, are a few of the many modern English decisions on the subject. In Pearce v. Madison & I. R. Co., 21 How. [62 U. S.] 441, it is said that the public has an interest in this question, and the court takes pains to say that it cites the modern English cases for the purpose of showing this to be the ground of their judgment. There is no subject upon which decisions are more numerous. There are few state courts which have not repeatedly so ruled, and none more frequently and stringently than those of Michigan. The reason is always the same—the public inerest. Kent, Angell & Ames, Redfield, Pierce, Shelford, and all elementary writers, give the same reason for the rule. What is done ultra vires, is held void; if threatened, it is restrained at the suit of the attorney general, because it is a public offense to divert a fund dedicated by the law to a specified political use. And it is no palliation that, in the instance, the diversion is beneficial to shareholders. The public officer must obey the law. On the contrary, the miller or innkeeper may employ his money in any way he pleases not criminal or immoral. When a donation raised by taxation is given to an organization, thus being a part of and governed by the political power whose funds are thus absolutely and irrevocably bound to such public duties, not one of the objections which would arise if it were bestowed upon a private hotelkeeper has, it seems to us, any application.

It is intimated that if the cars of all other companies could enter upon and use the road, this, too, would make the difference between legality and unconstitutionality. Protesting again that we are utterly unable to see in this anything more than a mere mode of use, in reference to which the law-making power, beyond doubt, is the sole judge, as Judge Cooley, as an author, so clearly shows; nevertheless, we add that this criticism also, we think, is as unfounded in fact as the former one—that the public had "no voice" in their management. The general law already provided for crossings and connections, and for compelling both if the corporations refuse them. It is an irresistible implication from the statute that the loaded cars of other roads shall be received and transported. In two instances the laws expressly compel it in this state. That under the general law this may be done in all cases is certain, and it is equally certain that it will be enforced by special provisions if the unenlightened conduct of these public agents throw impediments in the way of the very best possible mode for public transit or travel. To-day the cars of half the companies in this state are largely off their own roads unloading in the distant depots of the country. Thus far, this plainly implied statutory duty is being satisfactorily performed from the absence of all temptation to neglect it. But the law already forces the companies to prepare for the duty by suffering connections to be made. Can it be said with reason that the municipal aid law is unconstitutional beyond all reasonable doubt, because the legislature, having commanded the duty, leaves it unregulated, only because it believes the pres-

ent condition better secures every public interest?

The rule laid down includes every similar corporation in the state. There are three great public land grant roads in Michigan. They have been mainly built by donations from the national domain. The state of Michigan acted as trustee in the administration of the fund, and still continues a board of public officers, and imposes much official action with reference to it upon its governor. Extra taxation and duties are demanded in consideration of the selection of the donees by the state. The law creating them is subject to amendment, and they have been largely aided by municipal donations. Corporations thus created for great national purposes, subsidized by the national government through the sovereign state, as its agent and trustee; created by law at the public expense, under the guardianship of high political officers, cannot, we respectfully submit, without an extraordinary and novel use of common terms, be called "strictly private," and not to be distinguished in this regard from a mill or country inn. We submit, also, that the voice and control which the government retains in the subject of this taxation greatly exceeds that secured in other familiar instances, the rectitude of which has never been challenged, and which remains uncriticised by the Michigan court. It is, therefore, not only a public purpose, but the instrumentality of its accomplishment is most fully controlled by practical governmental supervision. If, therefore, the novel limitation set up in People v. Salem were true—if, as we cannot suppose, the constitution of Michigan forbids the execution of a clearly public purpose through private agencies—we do not think the fact that citizens own the shares is sufficient to bring these corporations within the rule.

In the light of these familiar doctrines, and the character of these companies, as before said, we shall the better appreciate the extent and force of the rulings in Michigan which had so fully settled the law of that state in conformity with the old maxims of American jurisprudence, in disregard of which People v. Salem has been decided.

In the case of Detroit & H. P. R. Co. v. Fisher, 4 Mich. 37, the statute under consideration gave to a company, all the shares in which were owned by citizens, the right to take and use for a plank road the public highway. The constitutional question was raised, and counsel cited the judgments of other states, where the same rights had been extended to turnpikes and other similar companies. The court sustained the power as it had previously done in Attorney General v. Detroit & E. P. R. Co., 2 Mich. 138. In neither of these cases was any compensation made to the public. Two other such charters were granted in the state. The latter case was affirmed in City of Detroit v. Detroit & E. P. R. Co., 12 Mich. 333. We can discover no difference in principle between these judgments and the case before the court in People v. Salem. That the roads were in the hands of corporations whose shares were owned by citizens, was not deemed an objection. In People v. Board of State Auditors, 9 Mich. 327, it was decided that a donation to salt manufacturers was constitutional, although the property was wholly owned by individuals, and the government retained no control over the amount or duration of the manufacture. It was said that as to salt made before the passage of the repealing act, the right could not be divested. In East Saginaw Manuf'g Co. v. City of East Saginaw, 19 Mich. 259, this case is affirmed. At page 275, Cooley, J., for the court, says: "It was a bounty law to encourage the manufacture of salt, and when this was earned it became a vested right, and we fully agree with 9 Mich. 327." In this view we all concur. The first of these latter judgments necessarily decided the constitutionality of taxation for aid and donations to a "strictly private business, in which the public had no voice." People v. Salem disregarded them. The same questions must now be decided differently if that judgment is adhered to. An earlier and equally pointed and still more literally applicable case is that of Swan v. Williams, 2 Mich. 427. It was objected at the bar that a railroad company, whose shares were all owned by citizens, could not constitutionally condemn property, as it was not for public use. It was held not to be a strictly private corporation, but that it held the land it condemned, and all its rights and franchises, in trust for the public. The precise point decided by it was, in 20 Mich., expressly and definitely ruled the other way. The objection is, that money given for the use of such a company is not a public but a private use. That case overruled the identical objection, and in pointed terms asserted that it was public. A more familiar truth cannot be asserted than that there are numerous subjects of such a private and personal nature that they would not sustain the right of seizing private property as for public use, which, at the same time, are among the familiar and conceded objects of taxation. When you have shown that an object is so far public as to authorize the former, you have exceeded the necessities of the latter. Swan v. Williams not only is conclusive of this case, but goes quite beyond it in the required legal direction. It is needless to refer to the familiar class of cases where the doctrines of Swan v. Williams have been assumed to be law by the bar and bench during the twenty years that they have been administered without question in Michigan. They are numerous.

The practical legislative and departmental action in Michigan is equally conclusive.

Before considering it, we will refer to a few leading judgments and authors to show that upon principle it ought to have influenced the state decision, and must, as a matter of fixed law, guide our own.

It is an axiom in American constitutional law that such departmental and legislative action will conclude the courts in all cases where any possible interpretation can uphold actual investments and contracts. In an early case in the United States court, Stewart v. Laird, 1 Wheat. [14 U. S.] 351, it is said: "It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. This practical exposition is too obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed." In the case of Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 621, Judge Story, speaking of a law, the constitutionality of which had been acquiesced in for many years, said: "Such uniform recognition would entitle it to be considered at rest, unless the interpretation of the constitution is to be delivered over to interminable doubt throughout the whole progress of legislative and governmental operations." Lord Eldon, in 2 Brod. & B. 598, says: "The most enlightened judges who ever sat in Westminster Hall always gave the greatest weight to what obtained in practice." See, also, Bennett v. Watson, 3 Maule & S. 1; 7 Durn. & E. [7 Term R.] 743. In Calton v. Bragg, 15 East, 223, Lord Ellenborough declared "it is not only from decided cases where the point has been raised, upon argument, but also from the * * * practice * * * without objection made, that we collect the rules of law." 1 Turn. & R. 87; 3 Russ. 428; 10 Ves. 272; 3 Bos. & P. 547; [Surgett v. Lapice] 8 How. [49 U. S.] 68; [Bissell v. Penrose] 8 How. [49 U. S.] 338; [Briscoe v. Bank of the Commonwealth of Kentucky] 11 Pet. [36 U. S.] 319; [The Aurora v. United States] 7 Cranch [11 U. S.] 383; Ames v. Howard [Case No. 326]; [M'Keen v. Delancy] 5 Cranch [9 U. S.] 22; 2 Mass. 475; 16 Ohio, 599; 1 Hopk. Ch. 245; and 1 Serg. & R. 105,—are all pointed in applying this rule. In 2 Cow. 552, it is said: "Upon any sound principle of government, the citizen has a right to rely upon the action of the sovereignty." See, also [Martin v. Hunter] 1 Wheat. [14 U. S.] 351; [Cohens v. Virginia] 6 Wheat. [19 U. S.] 418; [Bank of U. S. v. Halstead] 10 Wheat. [23 U. S.] 63; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 290, and numerous other cases from the state and federal courts, cited in Cooley, Const. Lim. at page 69, which, so far as the case before us is concerned, are equally decisive in protecting what has been done in reliance upon practice. They all say in case of doubt it is conclusive. They fully sustain the rule quoted from one of them by Judge Cooley, and by him announced as the fair result of them all, as follows: "If the question involved is really one of doubt, the force of the legislative judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind." This he lays down, after full review, as a general canon of interpretation for our American constitutions.

Michigan has most fully adopted this salutary rule. Its courts have said, not only that in no case of doubt should a court overrule the judgment of the legislature, but have added the additional reason we are now discussing in its fullest application. In Clark v. Mowyer, 5 Mich. 468, most of these judgments, and others kindred to them, are cited and approved. And see, also, 14 Mich. 67.

So obligatory is this rule deemed upon courts, when contracts have been made in good faith, or when action has taken place to overturn, which would result in great evils, that when they could see no possible interpretation of the words of the constitution, or of statutes, to warrant what has been done, they simply declare that the fundamental law has been violated, as an indication of what they would hold in future cases, refusing to apply the rule to the destruction of what had been done in reliance upon the public acquiescence. In Ohio, in clear violation of its constitution, the legislature, usurping judicial functions, granted divorces. In Bingham v. Miller, 17 Ohio, 446, the supreme court, in refusing to declare marriages void, say: "We have said enough to vindicate the constitution, and believe the evil will cease." Had it not ceased, they would have decided a future case differently. In Illinois a similar principle was applied to the creation of railroad corporations. In Johnson v. Joliet & C. R. Co., 23 Ill. 207, the court said it was too late to make the objection. Property had been vested upon the action of the legislature. New York, Pennsylvania, Massachusetts and other courts, following the English rule, have acted upon a like principle. It is applied in every department of the law, and guides our private intercourse and business life. Courts read contracts as parties have construed and acted upon them. Licenses are implied from the toleration of persons and the public, and the most substantial and valuable rights are based upon them. There are no conditions more loudly calling for a full application of this rule than those attending the interpretation of organic laws. None have, in fact, so frequently invoked it in actual judgment.

That the legislative, political and practical business action of Michigan brings this case far, very far, within the limits of this kindly and protective rule, the following citations show: Sess. Laws 1838, pp. 101, 108, 252, 259, by which bounties were given for the manufacture of sugar from beets, for the manufacture of silk, and authorizing loans of the public money for the benefit of certain

railroad companies. In 1848, also, a law was passed, authorizing the Detroit & Erin Plank Road Company to take possession of the Fort Gratiot road and construct a plank road thereon, and other acts of a similar nature were passed in the same year. See Sess. Laws 1848, p. 382. In 1848 state lands were given for the erection of churches to such denominations as chose to apply for them. Laws 1848, p. 348. In 1850, a township was authorized to take stock in a plank road company. Laws 1850, p. 336. In 1853 (Sess. Laws, p. 125), the county of Saginaw was authorized to loan its bonds to a plank road company. In 1855 (Laws 1855, p. 276), certain lots in Lansing were given to churches. In 1861 (Laws 1861, p. 283), twenty-five thousand acres of state swamp lands were given to the German-American Seminary of Detroit. To all these laws, fully acted upon, no word of objection was heard until the unexpected judgment in People v. Salem.

It is a doctrine to which we know of no exceptions, that where one government adopts from another a constitutional clause or a statute, or re-enacts an old one from its own code, it is presumed that the practical and judicial construction which it had before received is also adopted. It would require the most marked and extraordinary conditions to exclude the operation of this principle. The public is quite warranted in presuming that this well-known canon of construction will not be disregarded. See Bemis v. Becker, 1 Kan. 226; Stebbins v. Guthrie, 4 Kan. 353; Pennock v. Dialogue, 2 Pet. [27 U. S.] 1; Campbell v. Quinlin, 4 Ill. 288; Rigg v. Wilton, 13 Ill. 19; Tyler v. Tyler, 19 Ill. 151; Adams v. Field, 21 Vt. 256; State v. Macon Co. Court, 41 Mo. 453; Draper v. Emerson, 22 Wis. 247,—which are but illustrations from an extensive list.

In 1850, when the constitution of Michigan was adopted, decisions establishing the validity of municipal aid to railroads had been made in Connecticut, Kentucky, Pennsylvania and Virginia, by the highest courts of these states, respectively, without one opposing decision. And in the following states, as shown by the briefs of counsel, statutes authorizing municipal aid to private corporations had been passed under constitutions, all of which were like that of Michigan, so far as is material to the decision in People v. Salem.

In Connecticut, Laws 1837, p. 18; 1838, p. 45; 1842, p. 54. In Georgia, Laws 1838, p. 66. In Kentucky, Laws 1833, pp. 526, 543, 643; 1834, pp. 398, 285; 1836–37, p. 341; 1837–38, p. 98; 1838–39, p. 337; 1848–49, p. 212; 1849–50, pp. 285, 403; In Maine, Laws 1848, p. 198; 1849, p. 351; 1850, pp. 461, 530. In Missouri, Laws 1847, p. 348; 1849, p. 159. In Mississippi, Laws 1848, p. 333. In Illinois, Laws 1849, p. 33. In Indiana, Laws 1842, p. 3; 1850, p. 149. In New York, Laws 1837, pp. 457, 341; 1839, p. 313; 1841, p. 329. In South Carolina, Laws 1848, p. 542. In Ohio, Laws 1838–39, pp. 128, 349, 343, 367; 1841–42, p. 100; 1844–45, pp. 232, 109, 46, 403; 1843–44, p. 103; 1845–46, private, pp. 109, 218, 250; 1845–46, general, pp. 167, 192, 250; 1846–47, pp. 56, 65, 87, 95. Numerous like acts are found in the laws of each year until in 1852, when the new constitution went into effect forbidding both state and municipal aid. In Pennsylvania, Laws 1848, p. 273; 1849, p. 360. In Tennessee, Laws 1847–48, p. 58. In Virginia, Laws 1847–48, p. 184. Laws 1848–49, 1849–50, and 1850–51, are crowded with acts authorizing subscriptions to the stock of turnpike and railroad companies by municipalities and by the state. In Michigan, Laws 1850, p. 336. In most of these states it was customary to grant state aid as well as municipal aid to corporations engaged in internal improvements. In Alabama, state aid was granted (Laws 1843–44, p. 136), but so far as we have ascertained, no municipal aid until 1851 (Laws 1851–52, p. 218). In Maryland, state aid was granted (Laws 1836, c. 218, § 16; Laws 1838, resolution 68). In North Carolina, state aid was granted (Laws 1844–45, p. 103; 1848–49, p. 138). In Delaware, state aid was granted (Laws 1843, p. 521; 1847, p. 137).

It would be no more extraordinary for a local court to go back of the old readings of English statutes which have been adopted in this country, than at this day to rely upon the literal meaning of a well known clause in our organic law adopted from those of the older states. The statutes of frauds, of uses and trusts, of limitations, and other familiar enactments, which so many states adopted literally, contained in their letter but slight information of the complex doctrines which the English judiciary has deduced from them. It would be little less than absurdity to go back to the words of those laws to learn what our American legislators meant when they adopted them. The rule is almost without exception that the legislature is presumed to enact, with the statutes themselves, their judicial and practical construction. An hundred unquestioned judgments so rule. With increased force and practical necessity is the doctrine demanded when a court is called upon to uphold or destroy the rights of innocent citizens who have relied upon the rectitude of governmental action.

The opinion in the Salem Case disregards another old and well settled rule limiting judicial authority.

The undoubted opinion of the American judiciary and the bar is that a court cannot declare a statute invalid unless it is prohibited by some express provision of the constitution, or by necessary implication; and that its repugnance to justice, to what the court deemed sound policy, or to general principles of jurisprudence furnishes no ground for a refusal to enforce it.

In Cooley, Const. Lim. (page 87 et seq.) the learned judge, when speaking as an author, says: "There are two fundamental rules by which to measure legislative authority in the

states." The first is that "the people must be understood to have conferred the full and complete power as it rests in the sovereign power of any country, subject only to such restrictions as they have seen fit to impose. The legislature is not a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." He quotes largely from Denio, C. J., in (People v. Draper, 15 N. Y. 543), and from Thorpe v. Railroad Co., 27 Vt. 142, where Redfield, J., said: "The American legislatures have the same unlimited powers as the British parliament, except where restrained by written constitutions. This must be conceded as a fundamental principle in the political organization of the American states. We cannot comprehend how, upon principle, it should be otherwise. The people possess all legislative power. They have committed it, in the most unlimited manner, to the legislature."

At page 159, and onward, he discusses the question, and after illustrating, by many citations, the carefulness and delicacy with which the courts have dealt with legislative enactments, he criticises the dicta which intimate a power to annul a law because it is unjust, or "at war with the social compact." He says, at page 168: "The rule on this subject appears to be that, except when the constitution has imposed limits upon the legislative power, it must be considered practically absolute, whether it operates according to natural justice or not." To this rule he cites over fifty adjudications. They are from nearly every state in the Union, including that of Michigan, and from the national court. After saying that the courts have no power to condemn a law because it is against what may be deemed the spirit of the constitution and the principles of republican government, unless in violation of written limitations, he sums up a farther review of adjudications by saying: "The accepted theory is: 'In every sovereign state there is an absolute, an uncontrolled power of legislation. In England, this rests with parliament; in America, with the people as an organized body politic.' Granting this power in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as they imposed restrictions." At page 73, he adds: "We have before said, a statute cannot be declared void because opposed to some supposed general intent or spirit which it is thought pervades or lies concealed in the constitution, but unexpressed, or because it violates fundamental principles, if it was passed in the exercise of a power which the constitution confers." That the federal constitution is a grant only of specific legislative powers, while, on the contrary, that of the state confers all powers except as limited, is explained, and numerous judgments in Michigan and elsewhere, are cited to this familiar distinction. He ably explains and amply verifies by citations that all general grants of power, and especially that of legislation, are unlimited, unless expressly restricted, and demonstrates, as clearly as history, reason and authority can demonstrate, that, according to the well-known and universally relied upon elementary principles of American jurisprudence, a general, unlimited power of legislation, such as is contained in the Michigan constitution, does include, beyond all possible doubt, the power of passing a law authorizing municipalities to exercise a right so common as that of granting aid to railroad companies. He is the most recent and full commentator upon this precise question, and faithfully condenses the numerous and concurring judgments which deny the extraordinary judicial power exercised in People v. Salem.

The peculiar jurisprudence of Michigan laid no foundation for the judge sitting on its bench to disregard the doctrines so fully announced by the author. The contrary will most fully appear. In Green v. Graves, 1 Doug. (Mich.) 352, it is said: "We adhere to the rule sanctioned by the supreme court of the United States, that to authorize the judiciary to pronounce a law unconstitutional, the conflict between it and the constitution must be palpable and established beyond all reasonable doubt." See, also, Scott v. Smart's Ex'rs, 1 Mich. 306; People v. Gallagher, 4 Mich. 253; Sears v. Cottrell, 5 Mich. 254, which are all equally pointed. In Tyler v. People, 8 Mich. 333, it is said: "We should be able to lay our finger on the part of the constitution violated, and the infraction should be clear beyond reasonable doubt." And see, to the same effect, People v. Mahaney, 13 Mich. 501. In People v. Blodgett, 13 Mich. 151, it is said that "without express limitations the legislative power would have been as absolute and unlimited as that of the parliament of England, subject only to the constitution of the United States."

In a state where the judiciary have said that all laws shall be administered, and all contracts made under them enforced, unless we can "lay our fingers on the constitutional provisions violated," and perceive the conflict so plainly that there can be "no reasonable doubt" of its existence; when this identical legislation has been exercised for half a century by nearly every state in the Union; when the courts of last resort of some twenty-four states have solemnly adjudicated its lawfulness, and the national courts, having a coördinate power in large classes of cases, have condemned a contrary doctrine; and when Michigan, ever since its organization, has over and over again passed and enforced without question similar statutes, it seems to us but a mockery of precedent—a rejection of all the sources from which alone a lawyer can learn the law—it is rendering worse than useless, all our libraries and professional diligence, which can only mislead by their teachings, if, in these conditions, a majority of a court will assume to say that it has no doubt whatever that

all this practical action is a mistake and a blunder, and that all this judicial decision is ignorance and misapprehension. What are the sources of that certainty without which it has so often conceded that it had no authority to annul a statute? No new facts have occurred, and no new views of any kind are taken, but arguments rejected for nearly half a century by hundreds of learned and experienced judges are, without the slightest addition, reproduced. There are certain terms of fixed technical signification, used also in other senses, in common use and metaphysical inquiry—"discretion," "reasonable doubt," "probable cause," "malice," "notice," and the long list of words and phrases, to comprehend which demands the careful study of a whole department of the law. They are all, from time to time, grossly misapplied in judgment by adopting the popular instead of the legal signification. The only sense in which judges have a right to use the term "reasonable doubt," as to the existence of a legal rule, has little reference to its rectitude or its origin. Law becomes such, far oftener than otherwise, by simple administration and successive decisions. And when we look to the mandatory sources of legal judgment, and to those principles upon which the citizen has a right to repose, and see the array of convincing evidence in favor of the validity of the law, the existence of a judicial opinion of its unconstitutionality, beyond all "reasonable doubt," is logically excluded.

The unexpected length of this opinion, due mainly to the impossibility of commanding time for its condensation, forbids a detailed examination of the three additional objections urged in People v. State Treasurer [23 Mich. 499].

It will occur readily that they are all sufficiently answered by the citations and arguments already made. They have been raised and overruled again and again, and unless history cannot settle, unless, in the language of the supreme court, in Prigg's Case [16 Pet. (41 U. S.) 621] "our constitutions are to be handed over to interminable controversy during the whole course of governmental operations," such objections should not at this late day be again urged.

It is said such taxation is not "due process of law," which the constitution demands. This clause has no reference whatever to the objects and purposes of a statute, but to the mode in which rights are ascertained. It is right to decide that A shall pay his debt to B, and to punish arson and larceny. But it would not be so to enact directly that the debt should be paid without affording full trial and defense, or to punish the person for crime without confronting him with his witness. In such cases the process of law would be wanting. To those and analogous instances only has this clause, old as Magna Charta, ever been deemed applicable. It is its well settled meaning in Michigan.

In Sears v. Cottrell, 5 Mich. 251, Manning, J., delivering the opinion of the court, says: "The words 'due process of law' mean the law of the land, and are so to be understood in the constitution. By the 'law of the land' we understand laws that are general in their operation and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws." A similar construction of this phrase is given in Brooks v. McIntyre, 4 Mich. 320.

The objection here is not that due process is wanting, but that the purposes of the taxation are unconstitutional, no matter by whatever mode or plenary form it is assessed. The clause invoked, so far as we can after much reflection perceive, has no application to the objection made. In a loose and untechnical sense, whatever is done in disregard of the constitution is without due legal proceedings. But so interpreted, it becomes meaningless, and declares only that the constitution shall not be violated, remitting us in each violation to some other clause upon which to declare invalid what has been enacted. It is not so unimportant a feature in our American constitutions. It stands there to demand, after all other provisions are complied with, and legislation and public administration are confined to the proper objects and subjects of law, and substantial rights of person and property are all secured, that the processes for ascertaining them shall be such in their substantial features as the common law of England and this country secured. See Hoboken Land Co. v. Murray, 18 How. [59 U. S.] 272; Sears v. Cottrell, 5 Mich. 251.

That the assessment is not, under the local constitution, "uniform taxation," is also said.

The objection is that "all the towns along the road do not contribute" upon some basis fixed by law. As now assessed, the taxing districts are limited to entire towns and cities. Is there constitutional power in the Michigan legislature to prescribe districts for the purpose of local taxation? And if so, what are its limitations?

The best judicial answer is a reference to a long list of judgments in Michigan, concurring with a still longer list in other states, affirming that, in this regard, its discretion is unlimited, and that the courts cannot control it. In Woodbridge v. City of Detroit, 8 Mich. 274, affirming only what had many years before been as fully decided, Judge Campbell says:

"And there is no restriction upon the legislature in defining the size of districts. Our road districts are instances of this. And if a charge is made on a uniform rule within any prescribed district, there can be no very good reason for objecting to it because the district is large or small, if the rest of the city is made to bear its own local burdens on

a substantially similar basis." Judge Christiancy, in the same case, on page 308, speaks of the "acknowledged power of the legislature to establish assessment districts for local purposes." These views are fully sustained by the recent cases of Motz v. City of Detroit, 18 Mich. 495, and Hoyt v. East Saginaw, 19 Mich. 39; and see, also, Williams v. Mayor, 2 Mich. 560. Unless, then, there is in the nature of the road aided some characteristic distinguishing it from the objects of other local assessments, these judgments are quite conclusive. And we suggest again, what may be unnecessary, that the mode of assessing the tax is not invalidated, and the want of constitutional uniformity is not proven by asserting the private nature of the enterprise. The present objection proceeds upon a full concession of the rightfulness of the assessment, if it be, within the meaning of the constitution, made with uniformity within a district which it is lawful for the legislature to create. This question never depends upon the territorial extent of the subject, a part of which, on account of local benefit, is aided or improved by the tax. A harbor, though a part of the lake or ocean, used by the citizens of a municipality, and also by other parties, and a highway leading through and from one city to distant points, are the constitutional subjects of aid by local assessments, without extending the districts throughout the entire length of their common use. The road, for the purpose of taxation, is divisible even into streets and blocks if such is the legislative direction. A contrary idea is wholly novel, and in this form would be rejected by the learned court, whose objection, carried to its inevitable results, necessarily denies the rule. The sole justification for all these local assessments is the real or legally assumed local benefit of the improvement. If that is declared by the legislature, or ascertained by commissioners or juries, or by the citizens in public meeting to equal the local tax, it is absolutely conclusive upon the courts. The mode of its ascertainment, the size of the district, or the character of the improvements, has been over and over again decided to be entirely beyond judicial cognizance. That other districts and citizens are also interested, and did not contribute, has been in manifold forms brought to the attention of the courts as grounds for attacking the frequently hard and severe assessments in our cities for paving, grading and sidewalks. The answer is uniform—equality is impossible. The nature of the right exercised forbids it. It is enough that a party is benefited in legal contemplation to the amount of his tax. It is immaterial that the performance of his duty benefits others. Nor, say the courts, can we hear proof that, in fact, the assessment exceeds all increased value to his land. This is a legislative question which courts cannot control. More familiar truisms than these we do not know. They are nowhere better settled than in Michigan. And still, if we understand this objection as made in the last case of People v. State Treasurer, the decision in it ignores them all, and insists that some undefined length of road must be selected by law, and each town along it compelled to contribute upon the same basis. It seems to be assumed that "the road," the towns along which should all be contributors, is that which some one company constructs and controls. But there may be, and in this state there are, already several companies organized to build a continuous line across the state. These may be consolidated into a single road and corporation. During construction, the road of each company may be divided into sections for the purpose of assessment on stock and control, and become quasi corporations. All, again, under the same general law, may be consolidated with corporations and roads in other states, and become indivisible portions, like other common highways, of great national thoroughfares.

Every consideration, which sustains the decisions in reference to streets and highways, is applicable here. The road may be from one state to another—it may be national; but if the legislature declares there is a local benefit, no matter how many others may be also benefited, the assessment is constitutional. It often happens that one town is actually—in the estimation of its citizens at least—injured by a new road creating new business centers in rivalry of its own. Would it be politic or sensible legislation to force it to contribute upon a legislative arbitrary decision that it was benefited? A more secure and satisfactory mode than the decision of its citizens cannot be devised. Again, in some localities the road will so undeniably pay its projectors, or the necessity of traversing it in order to reach some point beyond it or to connect existing lines, may be such that the construction is certain, and there is no need of aid, or suggestion of aid, in order to secure it. Shall such towns be forced, without any necessity, to contribute because another somewhat off the line, in order to deflect the road in its course through its limits, desires to compensate its projectors for this change in the plans? The theory is not to force all to contribute alike, but far on the other extreme. The very essence of this principle is to suffer each vicinity, by the smallest payment possible, to secure the benefit. Each locality judges for itself, and buys at the smallest price.

It will not be overlooked that in large numbers of the cases decided in other states this novel objection might just as well have been raised; and these cases are, upon well-known principles, precedents against it. The constitutions of Virginia, Louisiana, Indiana, Texas, Wisconsin and California contain similar clauses. It did not occur to courts

or counsel to raise such a question until since the Michigan decision. Counsel have presented it in Indiana, where it has been readily overruled. See Lafayette M. & B. R. Co. v. Geiger [34 Ind. 185].

The provisions which forbid the state to engage in works of internal improvement are also relied on. As said in reference to all other portions of these judgments, so this last reason also should have been withheld in view of numerous decisions declaring it untenable. Similar clauses are found in the constitutions of Ohio, Kentucky, Iowa, Kansas, Illinois, California, New York, Texas, Wisconsin and Louisiana, and the courts of these states have, after elaborate arguments, uniformly decided that prohibitions upon the state are not such upon the municipalities.

Cass v. Dillon, 2 Ohio St. 607; City of New Orleans v. Graihle, 9 La. Ann. 561; Slack v. Maysville & L. R. Co., 13 B. Mon. 1; Prettyman v. Supervisors of Tazewell Co., 19 Ill. 406; Clarke v. City of Rochester, 24 Barb. 446; Clark v. City of Janesville, 10 Wis. 136; Bushnell v. Beloit, Id. 195; Pattison v. Board of Supervisors of Yuba Co. 13 Cal. 175; Dubuque Co. v. Dubuque & P. R. Co., 4 G. Greene (Iowa) 1; Stewart v. Board of Supervisors of Polk Co., 30 Iowa, 15; Commissioners of Leavenworth Co. v. Miller, Kansas, not yet reported, except in pamphlet [7 Kan. 479].

There is no contrary decision. The question ought to be considered settled by these concurring judgments. The frequency with which this power had been exercised before the adoption of the Michigan constitution, peremptorily forbids the legal presumption that the convention intended to prohibit it by mere implication. At that time, municipal aid to private corporations had been authorized by the legislatures of fifteen states, including Michigan, viz.: Connecticut, Georgia, Kentucky, Maine, Missouri, Mississippi, Illinois, Indiana, New York, South Carolina, Ohio, Pennsylvania, Tennessee and Virginia. The legislative action of the state is equally forcible to forbid such an interpretation. Immediately before and after its adoption, this power was exercised without question.

In 1850, a statute authorized a township to aid a plank road company. Some of the members of this legislature were also members of the convention, which subsequently in the same year formed the constitution.

The legislature of 1853 (Sess. Laws, p. 125), some of whose members were in the convention, authorized a county to loan its bonds to a plank road company. This was amended in 1855. These laws are referred to as strong cotemporaneous action only. Our previous citations show this is but a small portion of the similar legislation by this state.

At this time, two similar restrictions in Kentucky and Illinois had been decided not to interfere with such aid by municipalities.

The motives which produced this inhibition in the Michigan constitution we do not think are those supposed by the learned supreme court. That local municipalities should not aid such works, provided they were controlled by individuals, was never intended. A contrary and unquestioned action existed elsewhere and in Michigan, and was continued immediately after and ever since its adoption without question or doubt. It was their aid and management by the state as a government, the corruption which there and elsewhere ever attended the letting of contracts, the purchase of property, the placing of bonds and the control of funds, which constituted the sole objection. That they could be better managed by private shareholders was undoubtedly decided, but there is in this no assertion or the most distant implication that they were not deemed of high public importance, or that the municipalities of Michigan should be deprived of rights exercised then and since, not only by them, but by those of nearly every state in the Union. It is most certain, judicially we are compelled to say, that had this been the intention, it would have been said in plain terms. It would not have been left to implication in a system of laws, which so unqualifiedly forbade the courts to create such a distinction without an express inhibition of the tax.

No portion of the views expressed by the supreme court of Michigan seems to us less warranted than the assertion of a growing judicial and professional dissatisfaction with the numerous decisions, state and national, which hold municipal aid to private corporations constitutional. We are at a loss to imagine the source of such an impression. To the policy of municipal aid to internal improvements there has always existed a spirited opposition. Most objects of public taxation at all removed from the expenses of ordinary administration usually call for much criticism. This one, peculiarly subject to spasmodic action and local excess, has provoked its full share, and the legislative contests—the only constitutional occasion we submit for such discussions—illustrate the violent difference of political opinion which leading citizens entertain in regard to it. But so far from the profession or the public condemning the American judiciary for its consistent and stable course, or looking to it for relief when the policy of such aid was condemned, they have conceded that the whole subject was one for new governmental regulation only, and have accordingly inserted express prohibitions in several modern constitutions. The few judgments in Wisconsin and Iowa, which assumed to disregard the established jurisprudence of the country, did so with an acknowledgment of their own revolutionary character. The latter

court has already receded from its exceptional position. Prior to the determination of People v. Salem, the supreme court of the United States, with all the learning on this subject before it, in one of the most spirited condemnations of local judgments ever uttered by it, had refused to follow a series of decisions in Iowa exactly like that now before us. Such action on its part is never taken save when it is entirely satisfied with the contrary rulings, and that they were in accordance with "the principles of American jurisprudence." So far from there being, during the last few years, a growing judicial dissatisfaction, not only the statutes and the action under them, but the decisions of courts sustaining them, were multiplying with increased rapidity. In the late constitutional convention of Michigan, one of its leading and most learned members, an ex-attorney general of the state, after a thorough examination for the purposes of the opinion, said, in debate, that although he strongly disapproved the political policy of municipal aid to railroads, and recommended its constitutional restriction, the existence of such a legislative power, after so many concurring judgments, "must be considered as settled law." The judges of both of the national district courts of Michigan were members of the convention. There was no dissent from this declaration of the law, nor any intimation that the judiciary could afford relief. Nearly all the leading members of the bar have thus advised, and there was no professional intimation that the character of those numerous rulings authorized the local court to disregard them. We speak with a very large familiarity with the condition of professional opinion upon this point, and we believe that since the organization of the state no single judgment has taken the legal mind with such unrelieved surprise as that from which we are now compelled to dissent.

The great misapprehension on this subject is strikingly illustrated by the fact that, within a few months after the promulgation of the opinion in People v. Salem, the highest courts of five states, with its reasonings before them, have refused to follow it. The judgments of few local courts in our country are of more influence than those of the supreme court of Michigan. Their general learning and character entitle them to the high reputation they have so unquestionably secured. If any judgments could have stimulated a general dissatisfaction into general dissent, that before us would have done so. But Vermont, Texas, California, Indiana and Kansas have all recently disregarded the rulings in the case of People v. Salem. We rejoice that if there may be doubt whether our decision administers the law correctly, there can be none that its results are such as the plainest justice requires.

A change is loudly demanded in our constitution, which shall in some degree limit the destructive effect of judicial interpretation upon contracts made by the citizens in reliance upon action of the sovereign power of the state. Without this, the list of cases already referred to where it was said that constitutional criticisms came too late, and those yielding blindly to practical construction with little reference to the clause construed, must be greatly lengthened. Without some organic remedy, the indications are that the courts, from the abundance of the law's technicalities, its presumptions of law when the proof of actual fact is excluded, its estoppels in pais when good faith closes the mouth of objection because the hand is full of another man's money, will deduce some rule which will enable them to declare an act unconstitutional and at the same time protect past transactions and an innocent community from the consequences of its invalidity. We think, indeed, that no greater step in the law's growth is now needed for that purpose than the one taken by the learned supreme court of Michigan in the repressive policy it deemed it its duty to enforce. And this, in its practical effect, is the whole scope of those decisions of the supreme court of the United States, which we now follow. There is no attempt to mould the institutions of the state in violation of the opinions of the local courts. The rule adopted is so narrowed in its application, and so respectful and kindly in its adaptation to the relations in which it is administered, that thus far, in our harmonious history, the power which upholds it has hardly attracted general attention. Resorted to only when the claims of good faith demand it, in each instance of its exercise all severe criticism is silenced.

Talcott's bonds, bought in reliance upon the sovereign action of the state, action taken in conformity with principles which the court of last resort in the nation had before their issue decided to be part of the national jurisprudence, are enforced. Should he, tomorrow, bring here other bonds, the steps to create which had been taken since the state judgments holding them invalid, he would be told that those judgments were not subject to criticism here; that this court would administer their doctrines, in all their results, wholly irrespective of our own opinions.

Nor will any conflict of jurisdiction result. When a subject has been finally decided by one tribunal it is res adjudicata, and the other will never rejudge it. If A's bonds are held invalid by a state tribunal, no other court will, in a second suit upon the same bonds, entertain the question. There can be no conflict if the citizens yield, as all those of Michigan undoubtedly will, a ready obedience to the judgment of each court, state or national, which has jurisdiction in the instance. There will be none of those anticipatory rulings, or of that retrospective legislation intended to cut off the power of

satisfying the final process of this court which has been so intelligently and promptly rendered abortive elsewhere.

WITHEY, District Judge. The opinion of the court pronounced by my Brother EMMONS, is complete and exhaustive of every question touched upon in the decision or discussed at the bar. I can add nothing which will strengthen that opinion; and yet, the methods by which I have reached conclusions embrace so very limited a range of discussion, and are so disregardful of many of the questions elaborately explained in the opinion of the court, as announced by the very learned circuit judge, as to induce me to state briefly the views I have taken in reaching a result in this cause. In saying this I am not to be understood as dissenting from the views expressed by my Brother EMMONS.

The supreme court of the United States have, in repeated decisions, settled the following propositions:

1st. That the United States courts will always respect the decisions of the state courts, and from the time they are made, will regard them as conclusive in all cases upon the construction of their own constitution and laws.

2d. But the courts of the United States will not give to the decisions of a state court a retroactive effect, and allow them to invalidate contracts entered into with citizens of other states, which, in the judgment of the courts of the United States, were lawfully made; and this principle applies to all contracts which come within the jurisdiction of these courts: Rowan v. Runnels, 5 How. [46 U. S.] 138; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. [57 U. S.] 432. The doctrine of these cases has been frequently re-asserted.

3d. The broad proposition that the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature or decision of the state courts. Ohio Life Ins. & Trust Co. v. Debolt, supra; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 206.

4th. The supreme court of the United States has repeatedly held that, in the absence of some provision in the state constitution prohibiting it, the legislature has power to authorize municipalities to issue bonds in aid of railroads designed to benefit the public interests of the locality.

In Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 203, the court say, "Where there is no defect of constitutional power, such legislation * * * is valid," citing Wilkinson v. Leland, 2 Pet. [27 U. S.] 626; Satterlee v. Matthewson, Id. 380; Baltimore & S. R. Co. v. Nesbit, 10 How. [51 U. S.] 395; White Water Valley Canal Co. v. Vallette, 21 How. [62 U. S.] 425.

From the foregoing principles, firmly established by the repeated decisions of that judicial tribunal whose adjudications are a law unto this court, I proceed briefly to state my conclusions:

There is, confessedly, no provision of the state constitution expressly prohibiting legislation to authorize the issue of municipal aid in bonds. In the absence of the two decisions made since the bonds involved in this litigation were issued, I should not hesitate to hold that there is nothing in the organic law of the state which could be construed as prohibitory of that legislation. The opinion of the court in this case abundantly justifies this conclusion. But the state court having recently held, in one case at least, that there is want of legislative power to pass the law, because of the restraining effect of certain constitutional provisions, it is clear that as to all bonds issued after the date of such state decision the courts of the United States are bound to follow the state court, as the effect of its decision upon future issues is precisely as though the law had been repealed.

Nevertheless, as to bonds issued prior to the time of the state decision, in view of the principles already stated, a different rule prevails. If there had been a construction by all the departments of the state government in favor of the legislative power to pass such laws, and if that construction had been uniform, acted upon and acquiesced in by the public, then the state law would afford a valid basis for the contract made by the township of Pine Grove, represented by these bonds, and the rule of comity, which requires the federal courts to adopt the decisions of the state tribunals in reference to local laws, cannot be invoked to defeat a recovery here, nor can it be successfully asserted that the state decisions declaring the law invalid are, on any ground, binding on this court.

We are not called upon, by anything presented in this case, to decide whether, in the absence of such practical construction, under our view of the power of a legislature, in the absence of limitations in the organic law of the state, the federal tribunals must or must not hold all bonds issued prior to the state decisions valid.

Now, that there had been a construction by all departments of the state government in favor of the legislative power to enact the law authorizing municipalities to issue bonds to aid railroads, and that such construction had, up to the decision of the Salem Case by the state court, in 20 Mich., been uniform, acted upon and generally acquiesced in by the public, admits of no doubt. As far back as 1838, under the then constitution, which was silent on the subject of legislative power in this regard, a law was passed giving bounty for the manufacture of sugar

from beets; for the manufacture of silk, and authorizing loans of the public money for the benefit of railroad companies.

In 1850, a township was authorized to take stock in a plank road company. In 1853, a county was authorized to loan its bonds to a plank-road company. In 1865, the legislature authorized municipal aid to railroads. Following this, up to 1860, are numerous laws to authorize municipal aid. A law of 1859 gave a bounty of ten cents a bushel to salt manufacturing companies. I need not enumerate other instances to show the uniform assertion of the legislative department of its powers under the constitution.

In 1867 the attorney general of the state gave his opinion to the legislature of its power to pass laws authorizing municipal aid to railroads. All the governors of the state exercising executive functions when such laws were passed, except one, have approved those aid and bounty laws.

The supreme court of Michigan have, in more than one instance, decided questions which, by analogy and upon principle, have contributed largely to uphold and sanction such departmental construction. People v. Board of State Auditors (1861) 9 Mich. 327; East Saginaw Manuf'g Co. v. City of East Saginaw (1869) 19 Mich. 275.

In Twitchell v. Blodgett, 13 Mich. 127, it was, in substance, held, that to declare an act of the legislature unconstitutional there must be some express provision of the organic law which is violated, which must be pointed out, and the act must be so clearly in conflict with the provision as to be free from reasonable doubt.

I do not understand the state court to claim, in the recent cases, when the aid law was under consideration, that this law violates any express provision of the constitution.

But I have said enough to indicate the grounds upon which I hold the legislative, executive and judicial departments of the state to have upheld, prior to the decision of the Salem Case, the legislative power to pass the law in question. I shall take no time to show that the departmental construction has been acted upon and generally acquiesced in by the people of the state, by the legal profession, by bankers and by capitalists and financial men of every class. This is well known by all whose business interests have turned their attention to the subject.

I desire, however, to mention one exhibition of public opinion, as demonstrating what the general construction as to the power of the legislature has been. The constitutional convention of 1867, composed of one hundred members, from all parts of the state, and embracing gentlemen of intelligence from various pursuits and professions, had this subject under consideration. The journals of that body exhibited the fact that there was entire harmony of views; that, as the constitution then stood, there was no restraint upon legislative action in allowing municipal aid to railroads. Hence, the only provision submitted by the convention to be voted on, as part of the proposed new constitution, was of limitation, to prevent the legislature authorizing a municipality to pledge its credit in aid of railroads beyond ten per cent. of its assessed valuation.

On the faith and stability of such a condition of public opinion, having its basis in a long series of legislative enactments, sanctioned by the executive branch, and, as I think, may be justly asserted, approved by the courts of justice of the state, the plaintiff became the owner of the bonds in this case, and in my opinion is entitled to judgment.

In the case of Taylor v. City of Battle Creek, LONGYEAR, District Judge, gave the following opinion:

On a full and careful consideration of the course of decision in the supreme court of the United States upon the question of the binding character of state decisions affecting questions arising under state statutes, I deduce the following rules, which I think are established by those decisions:

1st. That such state decisions will be adopted as rules of decision in the federal courts upon all questions and in all cases relative to transactions arising after such state decisions were made.

2d. That such state decisions will also be adopted as rules of decision in the federal courts in relation to transactions arising before such state decisions were made, in all cases in which such state decisions do not, in their effect and operation, in any manner conflict with the constitution of the United States or any act of congress.

3d. That when there is such conflict such state decisions are not adopted as rules of decision in the federal courts.

4th. That where a state statute by its terms constitutes in and of itself a contract or a basis of a contract by the state, or where such statute purports to authorize or empower municipalities, public or private corporations, or citizens to enter into contracts, and such contracts have been entered into in good faith, a decision of a state court afterward made, declaring such statute inoperative and void, or in any manner so construing such statute as to invalidate such contracts so previously entered into, or in any manner impairing their obligation, is prima facie in conflict with that provision of the constitution prohibiting a state from passing any law impairing the obligation of contracts. Art. 1, § 10.

5th. That in such cases as last above named, the federal courts will go behind the state court decision and inquire whether, in the state of the law as practically construed by the legislative, executive and judicial branches of the state government, at the

time the transactions in question took place, such transactions constitute a contract; and, if so, the federal courts will then enforce such contracts, independently and irrespectively of such state court decision.

I deduce these propositions from a long line of decisions of the supreme court, commencing with the case of Rowan v. Runnels, 5 How. [46 U. S.] 134, in 1847, and ending with Butz v. City of Muscatine, 8 Wall. [75 U. S.] 575, in 1869. These cases are so fully stated, commented upon and elucidated in the opinion of my Brother EMMONS, that it is quite unnecessary for me to notice them further.

That this case falls within the third, fourth and fifth propositions, I think, is clearly, fully and conclusively shown by the exhaustive opinions of Judges EMMONS and WITHEY in the case of Talcott v. Pine Grove; and, therefore, without comment or argument of my own, I fully concur in their opinion and judgment, that the demurrer must be overruled.

In the case against the city of Port Huron, Judge LONGYEAR, on a subsequent day, ordered the demurrer to be overruled.

Talcott v. Pine Grove was affirmed in the United States supreme court, October term, 1873 [19 Wall. (86 U. S.) 666].

TALENT, The (FERRARA v.). See Case No. 4,745.

Case No. 13,736.

In re TALIAFERO.

[3 Hughes, 422.] [1]

Circuit Court, E. D. Virginia. Spring Term. 1874.

BANKRUPTCY—REVIEW BY CIRCUIT COURT—LIENS.

1. Any creditor holding a lien upon lands of the bankrupt may appeal from a decree affecting his rights to the supervisory jurisdiction of the circuit court.

2. Before lands of bankrupts covered with liens can be sold free of liens by the bankruptcy court, all liens and their priorities must be definitely ascertained, after personal notice to lien creditors; otherwise, the lien creditors not bound.

3. Where other courts have taken full jurisdiction of property on which liens are asserted, the bankruptcy courts should, in general, not interfere.

[In review of the action of the district court of the United States for the Eastern district of Virginia.]

Petition for review [in the matter of John F. Taliafero] under the second section of the bankrupt act [of 1867 (14 Stat. 518)].

John Hunter, for a lien creditor, appellant.

L. L. Lewis, for assignee.

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

Before WAITE, Circuit Justice, and BOND, Circuit Judge.

WAITE, Circuit Justice. Previous to the year 1870 judgments to a large amount had been rendered against Taliafero, the bankrupt, which were liens on his lands. During that year the present petitioners, being part of the judgment creditors, filed a bill in the circuit court of Orange county, praying a sale of the lands to pay the judgments. Upon this bill such proceedings were had that, on the 3d day of October, 1872, that court rendered a decree confirming the report of a master to whom a reference had been made to ascertain the liens and their priorities, and appointing certain commissioners to sell the lands on the premises, at public auction to the highest and best bidder, after notice of the time and place of sale, for at least 30 days by publication in such paper or papers as the commissioners should select, and by printed handbills posted on the front door of the courthouse, and in three other public places in the county. The commissioners were also authorized, at their discretion, to sell the property at private sale, and upon the following terms, to wit: Cash in hand sufficient to pay all costs and the expenses of the sale, and the residue in five equal annual installments, the purchaser giving bond with approved security for the deferred payments, and the title to be retained until the final payment was made. They were also authorized to sell the property as a whole, or in parcels, as they should think most judicious. The amount of the liens, as reported by the master, exceeded $12,000, with interest to be added from August 20, 1870. The proceeds of the sale when made were to be applied to the payment of the lien debts in the order of their priority.

Taliafero was adjudged a bankrupt on the 9th June, 1870, upon his own petition. An assignee was appointed on the 14th July. On the 16th September, the assignee filed his petition in the district court as follows: "To the Honorable, etc.: The petition of, etc., assignee, etc., respectfully represents that a certain portion of said bankrupt's estate, to wit, a tract of several hundred acres of land lying in said county of Orange, is surrendered by him as forming a part of his assets, and as such assigned by this court to your petitioner; that it is averred that certain liens affect such property, but as no evidence of this fact appears upon the proceedings, your petitioner believes it will be for the best interests of the whole creditors that said property be sold at public auction under an order of this court, and that the liens, if any exist, be under said order transferred from this property to the fund released. Wherefore your petitioner prays that an order of court may be made, authorizing a meeting of the creditors of said bankrupt to be held in terms

of rule xvii., of 'General Orders in Bankruptcy,' and for the purposes herein stated." Signed by the assignee and sworn to.

Upon the filing of the petition the district judge (Underwood) made the following order: "Alexandria, Va., September 17th, 1873. It is ordered that the petitioner be, and he hereby is, authorized to call a meeting of the creditors of John F. Taliafero, bankrupt, to be held in the office of the register in bankruptcy at Richmond, on the 25th day of October, 1873, at ten o'clock a. m., that cause be shown why the prayer of this petition should not be granted. And it is further ordered that he shall publish notice of said meeting in the State Journal, and that he shall also serve notice by mail on all known lien creditors." Signed by the district judge.

It nowhere appears, from the papers or proofs, that the notice required by this order was given, but we assume that the proper publication in the newspapers was made; and it is stated by the petitioners themselves in their petition for this review, that they and other judgment creditors appeared before the register on the day appointed for the meeting, and objected to a sale of the property by the assignee. In support of their objection they exhibited, as they claim, a copy of the decree of the circuit court of Orange, and of the report of the master on which it was predicated.

On the 19th February, 1874, the register made the following report: "Richmond, Va., Oct. 25th, 1873. I, etc., register in bankruptcy for the Eastern district, do hereby certify: On the 25th day of October, 1873, I held a meeting of the creditors of said John F. Taliafero, bankrupt, and cause was shown against the sale of the within mentioned property, but the register is of the opinion that no sufficient reason has been shown why the court should not order the sale." Signed by the register, February 19th, 1874.

Upon the filing of this report, and on the same day, the district judge made the following order: "Richmond, Va., February 19th, 1874. In respect that the order of this court of September 17th, 1873, has been complied with, and the meeting of parties interested in the estate of ——, bankrupt aforesaid, has been held, and no sufficient cause having been shown why the prayer of the petition of the assignee aforesaid should not be granted, it is ordered that the said, etc., assignee be, and he is hereby, authorized and empowered to sell the property of said bankrupt by public auction, as follows, to wit, in whole or in parcels, as may seem best. (1) That the day and place of sale shall be advertised twice a week for three weeks in the State Journal, published at Richmond, and by placards posted at three or more public places in the county in which such property is located. Sale to be made on some county court day at the courthouse of Orange county, Va. (2) That the terms of sale shall be one-fourth cash, and the balance on credit of twelve and twenty-four months, with interest at the rate of six per cent. per annum, the purchaser to give notes with approved security for the deferred payments, and the title to be retained by the assignee until said notes are paid. (3) The assignee to report his proceedings to this court immediately on completion of the sale." Signed by the judge.

Important interests, such as are here involved, ought not to be dealt with in this summary manner. An assignee in bankruptcy is especially the representative of the unsecured or general creditors. He is in no respect the agent or representative of secured creditors, who do not prove their debts. He cannot deprive them of the benefit of their securities. His only interest is in what remains after the secured debts are paid. If the security is not more than sufficient to pay the debt, he ought not to interfere with it. Whenever he invokes the action of the bankrupt court in respect to such property, it should be by petition, setting forth the facts. He should describe the property and the incumbrances, so far as they can be ascertained by an examination of the public records, or in any other manner by the exercise of reasonable diligence. All parties whose names are known, or whose interests appear of record, should be summoned, or in some form notified to appear and answer the petition. Their rights may be affected by the order that is to be made. They should, therefore, be permitted to have their day in court, and to speak in their own behalf. The action of the court should be such as, having due regard to the rights of the secured creditors, will best protect the interests of the unsecured. A sale ought not to be ordered free of incumbrances, unless it is reasonably certain that the proceeds will be more than sufficient to discharge the liens. Especially should this be the case where the secured creditors oppose the order, and have themselves asked the interposition of a court of competent jurisdiction in their behalf, and obtained a decree for a sale upon terms which, in their judgment, will best promote their interests. The court should, therefore, be accurately informed as to the facts before it is called upon to make any order. This cannot operate to the injury of the assignee or those whom he represents. He can, if proceedings have already been commenced by the creditors, ask to be made a party in the place of the bankrupt, and thus be put in a condition to avail himself of all the powers of the court in which they are pending that may properly be exercised in his behalf. If unwilling to do this, he may at any time sell the property subject to the incumbrances, or he may himself commence proceedings in the bankrupt court to marshal the liens, and obtain a sale under the control of that court. All that is necessary for that purpose is that he make all lienholders

and incumbrancers parties to such proceedings, and have their rights settled in the court before which he calls them. If disputes arise as to the amount or validity of liens they can be settled and adjusted there, and, when settled, the court can act intelligently, with a view to the promotion of the interests of all parties. If the assignee does not wish to move himself, he may wait until the creditors proceed. To any such proceeding he will be a necessary party, and, being a party, can see that those whom he represents are properly cared for. The assignee ought not to invoke the action of the court until he has informed himself, as fully as he can, of the actual condition of the property. He is in one sense an officer of the court. He was appointed to manage the estate, and to dispose of it for the benefit of those who have submitted their interests in its distribution to the protection of the court. His duty is to advise the court of the facts, in order that it may act understandingly in the execution of its trust.

It is perfectly certain that, when the district judge made the order complained of in this case, he had no knowledge of the actual condition of the liens upon the property or of the rights of the parties to be affected by the sale. He had before him no means whatever of determining for himself whether or not it would be for the interest of the unsecured creditors that a sale should be ordered free of incumbrances, or whether such an order would affect injuriously the rights of others. He relied, as under ordinary circumstances, in the absence of opposition, it was proper he should, upon the information furnished by the assignee and the report of the register. The petition presented by the assignee for the allowance of the order contained only the most general statements. It did not even describe the lands, much less the incumbrances as they existed or appeared to exist. Not a single lienholder is named, and it is in terms stated that the proceedings in the bankrupt court, up to that time, furnished no evidence of the condition of the liens. The assignee asked, however, that a meeting of the creditors might be called to show cause, if any they had, why the court should not grant the prayer of the petition. Under the order of the court this meeting was held, but the creditors who alone could act (those who had proven their debts) made no attempt to ascertain the condition of the property. In fact, it may fairly be inferred that they were unwilling to do so. In the answer filed with us, it is said that certain of the secured creditors did appear and state verbally that such a decree as is now shown had been rendered, but that no sufficient evidence of that fact was filed. This statement, whether properly sustained by the proof or not, was sufficient to put those who were acting in the premises on inquiry. Information as to the existence of the records and the place where they were to be found was then given. The meeting was held on the 25th October, but the report was not made until the 19th February following. In the meantime no new showing was made. The report, when made, was as general as the petition. It does not even state that any objection had been made to the sale, or that the attention of the register had been in any manner called to the proceedings in the state court.

It is claimed that no objection was made to the order on the hearing before the district judge. But this objection ought not to influence us in sustaining the order, since it was made immediately on the filing of the report, and without notice. It is also urged that a part of the lien debts have been paid, and that this can be made to appear if opportunity is given. So, too, it is said, that the interest which accrued upon the lien debts during the war was included in the judgments upon which the decree is predicated, and that it would be unjust and unfair to compel the unsecured creditors to go before the state courts to have these and other questions settled. All this would be very proper for the consideration of the assignee when determining whether he ought, in justice to those whom he represents, to proceed in the bankrupt court to have the rights of the several parties determined; but, so far from influencing the court to make an order of sale free of incumbrances without inquiry as to the facts, it ought to have caused it to refuse such an order until all such questions were settled.

Again, it is said that only $2,000 of the lien debts have been proven against the estate. A failure to prove the debt does not affect the lien. The debt is still in force against the property, although it may not be entitled to a dividend from the general fund. If it exists in fact, it must be considered by the court in all matters connected with the security which it holds.

It is further insisted that one of the petitioning creditors has not proven her debt against the estate, and, for that reason, she cannot call upon this court to act under its supervisory jurisdiction. The supervisory power of this court is not confined to the petitions of creditors who have proven their debts. The language of the second section of the act is, "Shall have general superintendence and jurisdiction of all cases and questions arising under this act." All persons, therefore, parties to or affected by any proceedings under the bankrupt jurisdiction of the district court, may invoke the supervisory powers of this court. Creditors who have proven their debts are, in effect, parties to all proceedings, and are always supposed to have an interest in all that is done. Whenever they appear, therefore, they are recognized in their character as creditors, and entitled to consideration as parties. If one who has not proven his debt appears, and asks relief, he must aver

and establish his special interest in the matter to be revised. That being done, he is entitled to a hearing. These petitioners have established such a special interest. The district judge ordered that all lienholders should be notified to appear and show cause why the prayer of the petition of the assignee should not be granted. The petitioners were lienholders. They were, therefore, proper persons to appear in the district court. They did appear, and become parties to the proceeding, although not named. Their interests are directly affected by the order which has been made, and they may ask to be relieved against it.

The order of the district court is reversed. If the assignee still considers that it will be for the interest of the general estate to have a sale of the property free of incumbrances, he can commence his proceeding again, making the necessary parties, and, upon a proper showing, obtain his order. All we decide now is that, upon the petition in its present form, and with the showing that has been made, the order of the 19th February ought not to have been passed, and we are satisfied that, if the district judge had known the facts disclosed in the petition and answer filed with us, at the time he made his order, we should not have been called upon to revise his action.

NOTE. Some months previously to this decision of the chief justice, and but a few weeks after Judge Hughes came upon the bench, he had established as rules of practice in bankruptcy the following regulations (see Rules of Practice in Bankruptcy [Fed. Cas. Append.] 2 Hughes 554, 555):

Petitions by assignees or creditors to sell real estate free from incumbrances, and to transfer the liens from the realty to the fund in court, shall be filed before the court, and an order to show cause may be issued notifying all creditors claiming liens on the said real estate to appear before the register on some day in such order named. A copy of such order shall be served on each of the creditors at least ten days before the day of appearance, unless notice by publication or mail be ordered by the court, instead of personal notice.

Sales of real estate free from all incumbrances will not be ordered unless all liens on the property shall have been previously ascertained, with their priorities, etc.

This decision was rendered before the passage of the Revised Statutes of the United States, on June 20, 1874, containing section 711, cl. 6 [18 Stat. 115], operating in connection with section 4972, cls. 3, 4.

Case No. 13,737.

TALLAHASSEE v. NEWBY.

[This case was decided by the court of appeals of Florida, and is reported in 3 N. Y. Leg. Obs. 110.]

TALLAPOOSA CO. (SMITH v.). See Cases Nos. 13,113 and 13,114.

TALLEY (HEAD v.). See Case No. 6,293.

Case No. 13,738.

In re TALLMADGE.

[Betts' Scr. Bk. 109.]

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

BANKRUPTCY PROCEEDINGS—PARTIES.

[The stockholders of a creditor bank are not parties in interest, so as to be entitled to object to a decree.]

[In the matter of David B. Tallmadge, a bankrupt.]

Objections were interposed to a decree by the stockholders of the North American Trust & Banking Company, and the petitioner objects to such objections being received, on the ground that the stockholders of a creditor bank are not persons in interest.

BETTS, District Judge, said: The court has on several occasions been called upon to consider the effect of the clause "others in interest" used in the bankrupt act, and determine whether particular classes of persons were comprehended within it, and has held that it is of broader signification than the term "creditors." It has never, however, been understood to reach beyond interests, then in esse, which, without change of parties, or their relationship to each other, might arise and be recognized in law as entitled to a remedy and protection in the courts. Imaginary and merely possible cases cannot be regarded as contemplated or provided for in that phrase. For instance, the legal heirs of a creditor, during his life, could not be recognized as persons in interest, because of the possibility of a failure of a future right to the debt. It must relate to those rights actually existing which may afford the basis of a remedy by course of law, without the accession of any additional title or authorization,—such as the right of cestuis que trustent to a debt made payable to a trustee or agent of heirs at law, and claims represented by executors, administrators, etc. The debt due a bank is due to the corporate person absolutely, and can only be represented or claimed by such corporation. There is no authority, express or implied, with the individual stockholders, and no power in them to act with respect to the debt, otherwise than through their corporate representation. Such individuals cannot, accordingly, be allowed to interpose and contest a bankrupt's proceedings, because of that corporate debt.

Case No. 13,739.

In re TALLMAN.

[2 Ben. 348; 1 N. B. R. 462 (Quarto, 122); 1 Am. Law T. Rep. Bankr. 122.] [1]

District Court, S. D. New York. April, 1868.

BANKRUPTCY—FRAUDULENT DEBT—DISCHARGE.

Where, in bankruptcy proceedings before the register, one of the creditors offered evidence to show that his debt was fraudulently contracted by the bankrupt, *held*, that the evidence was immaterial.

[Cited in Re Rosenfield, Case No. 12,058; Re Wright, Id. 18,065.]

[In the matter of Darius Tallman, a bankrupt.]

[Counsel for Joseph Hacker, one of the creditors, proposes to introduce witnesses to prove the nature of the transaction out of which his debt arose, and that the debt was contracted by fraud, for the purpose of showing that this debt cannot be discharged under these proceedings. James M. Smith, Attorney for Joseph Hacker. April 1, 1868.

[The bankrupt, Darius Tallman, objects that such inquiry is irrelevant; that the question cannot arise in these proceedings; that such a debt is not discharged, and can be collected notwithstanding such discharge; and that such question can only arise when it is undertaken to collect such debt after the discharge is granted. Warren G. Brown, Attorney for Bankrupt.

[It is conceded that the debt referred to, and the fraud alleged by the creditor, was so contracted, and that the alleged fraud took place in the year 1864, and that the debt is in judgment. Warren G. Brown, Attorney for Bankrupt. James M. Smith, Attorney for Creditor. April 1, 1868.][2]

By THE REGISTER:

[Southern District of New York, ss.: I, Isaac Dayton, one of the registers in said court of bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the foregoing question arose before me pertinent to the said proceedings and was stated, and agreed to, by the counsel for the opposing parties, as hereinbefore set forth, and the said parties requested that the same should be certified to the judge for his opinion thereon. Dated 6th April, 1868.

[The thirty-third section of the bankrupt act [14 Stat. 533], declares "that no debt created by the fraud of the bankrupt shall be discharged under the act, but the debt may be proved and the dividend thereon shall be a payment on account of the said debt." The fact that the debt was created by fraud does not therefore constitute a ground of opposition to the discharge of the bankrupt; and as the examination of the bankrupt is for the purpose of ascertaining whether or not the bankrupt is entitled to a discharge under the act, evidence of fraud in the creation of the debt is not admissible.] [2]

BLATCHFORD, District Judge. The register is correct in his view. The clerk will certify this decision to the register, Isaac Dayton, Esq.

[See Case No. 13,740.]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 122, contains only a partial report.]

[2] [From 1 N. B. R. 462 (Quarto, 122).]

Case No. 13,740.

In re TALLMAN.

[2 Ben. 404; [1] 1 N. B. R. 540 (Quarto, 145).]

District Court, S. D. New York. May, 1868.

BANKRUPTCY—DISCHARGE—TIME TO FILE SPECIFICATIONS OF OBJECTION.

Where creditors were required to show cause on a certain day, why a bankrupt should not be discharged, and on that day creditors appeared, and the proceedings on the order were adjourned till a subsequent day: *Held*, that the ten days, within which specifications of objections to the discharge were to be filed, dated from the adjourned day.

[Cited in Re Seabury, Case No. 12,573.]

[In the matter of Darius Tallman, a bankrupt.]

By the Register:

[I, Isaac Dayton, register in bankruptcy to whom was referred the order to show cause why the said bankrupt should not be discharged as a bankrupt from his debts, do certify that by an order granted by me, the creditors of the said bankrupt were required to show cause before me why the bankrupt should not be discharged from his debts returnable before me on the 20th day of April, 1868. That on the last-named day Joseph Hacher, an opposing creditor of said bankrupt, duly entered his appearance as such opposing creditor, and the proceedings upon such order to show cause were thereupon adjourned to the 2d day of May, 1868, at 12 o'clock, the day being fixed two days beyond the time limited by the rule for filing objections to the discharge of the bankrupt. That on the 2d day of May, 1868, the said Joseph Hacher appeared by attorney and presented his objections in writing to the discharge of said bankrupt, and asked to have the same filed, to which the counsel for the said bankrupt objected on the ground that by the 24th rule they should have been filed within ten days after the day on which the creditors were required to show cause. The register sustained the objection and refused to file the paper and proceeded to take the last examination of the bankrupt. And this certificate is made for the purpose of obtaining the decision of the honorable district judge, whether the register ought to

[2] [From 1 N. B. R. 462 (Quarto, 122).]

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

have filed the paper, or ought to have suspended proceedings upon the objections of the bankrupt for his discharge, to enable the creditor to apply to the court to be allowed to file his specifications of objections.

[By the 4th section of the statute [14 Stat. 519], the register has the power, and it is made his duty, to pass the last examination of the bankrupt in cases where the assignee or a creditor does not oppose. By the order of the court made in this bankruptcy on the 29th day of January, 1868, the register is directed to sit in chambers on the return of the order to show cause, and to pass the last examination of the bankrupt if there be no objection. The 24th general rule requires that the specifications of objections to the discharge of the bankrupt shall be filed within ten days after the day when the creditors are required to show cause. Such specifications not having been filed within the ten days thus limited, there was not any opposition to the discharge of the bankrupt, and by the statute and the order of the court it was the duty of the register to proceed to pass the last examination of the bankrupt, and in respect to the performance of this duty the register had not any discretion.][2]

[See Case No. 13,739.]

BLATCHFORD, District Judge. The register states that the proceedings upon the order to show cause, were, on the 20th day of April, 1868, adjourned to the 2d day of May, 1868. This being so, the case stood as if the 2d day of May was the day originally fixed for the creditor to show cause; and any creditor, entitled to show cause, could do so on the 2d day of May, and could file his specifications within ten days after the 2d day of May. Therefore, the creditor, in this case, was entitled to file his specifications on the 2d day of May, and the register ought to have received them. By the terms of the adjournment, the register made the 2d day of May, within general order No. 24, the day when the creditors were required to show cause. If there had been no adjournment, the case would have been different.

TALLMAN (MASON v.). See Case No. 9,254.

TALLMAN (UNITED STATES v.). See Case No. 16,429.

TALLY HO, The. See Case No. 16,803.

TALLY HO, The (O'CONNELL v.). See Case No. 10,418.

TALMADGE (MAURY v.). See Case No. 9,315.

TALMAN (WEST v.) See Case No. 17,426.

TAMINEND, The (BERGEN v.). See Case No. 1,339.

[2] [From 1 N. B. R. 540 (Quarto, 145).]

Case No. 13,741.

The TAMPICO.

[Blatchf. Pr. Cas. 554.] [1]

District Court, S. D. New York. Oct. 16, 1863.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured by the United States ship-of-war Cayuga, April 3, 1863, off the coast of Texas, just after she escaped from Sabine Pass, a blockaded port. The libel was filed May 25, 1863, and the monition issued thereon was returned in court June 16th thereafter. At that time the British consul appeared in open court, and interposed a claim of ownership to the vessel and cargo in behalf of British subjects. This appearance and claim was no further prosecuted in court; and the proofs in the cause having been submitted to the consideration of the court, on motion of the United States attorney for a decree of condemnation and forfeiture of the vessel and cargo as prize of war the evidence produced by the libellants in support of the motion has been examined and considered with a view to ascertain the character and conduct of the vessel and her cargo.

It appears upon the vessel's papers that she was built in New York, in 1856. No disposition of the right and title out of the then owner is proved by the papers, other than an informal statement by David J. Jolly, given at Tampico, June 25, that he is a British subject, and a further declaration of the British consul at Tampico, June 26, attached to a provisional register of the vessel at that port, to the said Jolly, asserting that Jolly had purchased the vessel, and that Harry Shepherd was her master. No proof is exhibited, on the papers of the vessel and otherwise, of any consideration paid on the sale of the vessel, or as to who was the vender, or as to the time or place at which the sale was made, or as to the execution of a bill of sale. Thomas Paulson, who was the master of the vessel when the seizure was made, testifies, on his examination in preparatorio, that the vessel was captured about 35 miles from Sabine Pass, and sent into New Orleans; that she was seized for running out of Sabine Pass in evasion of the blockade; that the British consul at Tampico appointed the witness master of the vessel; that he took possession of her there; that the crew were all shipped there; that the vessel had a clearance from the collector of Sabine and was bound to Honduras and Matamoras; that Jolly is a British subject, and lives at Tampico; that the cargo was laden on board at Sabine; that the laders resided at Sabine;

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

that the witness knew of the blockade; that the vessel passed out of the port at 12 o'clock in the night, and was seized at 5 o'clock the next morning; that he had seen the blockading squadron before running out of the port; and that he sailed out intending to elude the blockade. The mate, Lawrence, testifies that the master of the vessel resides at Houston, Texas; that he does not know to what port or place the vessel was bound, or where the voyage was to end; that the vessel was captured about daylight in the morning; that he knew that the port was under blockade; that the vessel attempted to elude it; and that the pilot told him and the captain that the time was a good one to get out, the blockading vessels not being in sight. Nagle, the supercargo and agent of the cargo, says that the laders of it were residents in Houston, Texas, and that he believes that the cargo is owned in Liverpool.

The evidence all tends to one conclusion: That the whole enterprise, in the procurement of the vessel, her lading, and her despatch, was undertaken with knowledge of its illegality, and with the purpose, on the part of all the parties interested in it, to violate the blockade of the port of Sabine Pass. The vessel and cargo are, for that cause, subject to forfeiture. Besides, the alleged owner, Jolly, the claimant of the vessel, establishes by proof no legal or equitable title to the vessel. Even if he had paid a fair consideration, and obtained her conveyance to him by a regular bill of sale, he would not be allowed to purchase an enemy vessel in an enemy country, and employ her in commerce and trade in the productions and property of the enemy's country. Upt. Mar. W. 146–151; Wheat. Capt. Mar. c. 3. The trade he was pursuing was accordingly illegitimate as to him, and his interest in the vessel is liable to confiscation.

There must therefore be a judgment of condemnation and forfeiture of the vessel and cargo seized.

Case No. 13,742.

The TAN BARK CASE.

[Brown, Adm. 131.] [1]

District Court, E. D. Michigan. May, 1866.

AFFREIGHTMENT—RELEASE OF LIEN BY DELIVERY OF CARGO—BILL OF LADING—LIABILITY OF CARRIER FOR LOSS BY FREEZING.

1. The delivery of a cargo to the consignee without demanding freight or notifying him of the master's lien therefor, will, in the absence of special agreement or local usage to the contrary, discharge such lien.

2. The mere intention of the master to retain his lien is not sufficient as against a consignee who has bought and paid for the cargo.

3. The bill of lading, though not conclusive, is very strong evidence of the apparent condition of the cargo.

4. A master who lays his vessel up for the winter, with cargo on board, is bound to take precautions to prevent injury from dampness or mold, and to protect his deck load from the effects of snow and ice.

5. When, by his negligence, the cargo is exposed to injury by an excepted peril, the carrier is liable. He is bound to take such precautions as he can foresee are necessary under the circumstances of the case.

Libel for freight. The libel averred that, in December, 1864, John Becker, as master of the schooner John Thursby, received on board of the schooner, at Goderich, 112½ cords of tan bark, to be carried to Detroit; that it was then very late in the season, and cold weather coming on suddenly, the schooner was frozen in and compelled to lie up at Goderich for the winter. That in the month of April following the schooner completed her voyage, and discharged her cargo at the dock of Jewell & Sons, at Detroit, with the understanding that they had bought the same, and would pay the freight thereon. That the bark was worth between $500 and $600; that their freight was to be $3.50 per cord, and that, at the time of discharging the bark, libellants notified Jewell & Sons that they claimed a lien for freight, which they would not release without payment. That Jewell & Sons promised to pay the freight, did pay $38 to apply upon it, but refused to pay the residue, or surrender possession of the bark. The answer averred that the charter had been effected in October, and the bark sold in Detroit "to arrive" at $9.50 per cord, but that, owing to the delay of the vessel, the sale had been rescinded, and claimant had made another bargain to sell to Jewell & Sons at $6 per cord, if delivered in good order. That upon reaching Detroit it was found to be so badly injured by wet, dampness and mold, as to be nearly worthless, and that this damage had been occasioned by bad stowage and insufficient care. The agreement by Jewell & Sons to pay freight was denied, as well as notice of the master's lien for the same, and it was claimed that delivery of the cargo had discharged the lien. Upon the trial it appeared that a bill of lading had been signed by the mate, certifying the bark to be "shipped in good order and condition." There was some conflict of testimony, however, as to its actual state at the time of shipment. The weather became so cold after the bark was laden on board that the vessel was unable to proceed on her voyage, and the master left her, with instructions to strip her of her sails and rigging, and lay her up for the winter. The hatches were fastened down, but not so tightly but that water dripped into the hold; the deck load had been put on board in the usual manner, but had not been roofed or otherwise protected from the weather, so that ice had gathered thick upon deck, and a portion of the bark had to be chopped out and thrown away. In being discharged, it was found

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

the cargo was wet, molded, and damaged about one-half its value. There was a preponderance of evidence to the effect that the master had delivered the cargo to Jewell & Sons, who were assignees of the bill of lading, without notice of his lien for freight. While the bark was being unloaded, the master went to Cleveland upon other business, returned two days after the vessel had finished discharging, and demanded his freight, which was refused.

W. A. Moore, for libellant.

The delivery of the cargo was not made with the intention of releasing the lien. Ang. Carr. § 370; The Volunteer [Case No. 16,991]; Certain Logs of Mahogany [Id. 2,559]; The Kimball, 3 Wall. [70 U. S.] 37; 151 Tons of Coal [Case No. 10,520].

The vessel is not responsible for the damage to the bark by freezing. Clark v. Barnwell, 12 How. [53 U. S.] 272; Lamb v. Parkman [Case No. 8,020]; Baxter v. Leland [Id. 1,124].

The bill of lading is not conclusive evidence of the condition of the cargo at the time of shipment. Bissell v. Price, 16 Ill. 408; Ellis v. Willard, 5 Seld. [9 N. Y.] 529.

J. S. Newberry, for claimant.

WILKINS, District Judge. I think it established by a preponderance of testimony that the master delivered the bark to Jewell & Sons without demanding freight or notifying them of his lien. It is true that $38 was paid by them to Capt. Becker, while the cargo was being unloaded, but it was charged not to the master but to the shipper, Mr. Paul, and was allowed by him on his settlement with Jewell & Sons. The fact that the shipper was then in Detroit, and was present at the unloading of the vessel, taken in connection with the master's departure for Cleveland, and his failure to return until two days after the vessel had finished discharging, would naturally lead them to suppose he had waived his lien, and relied upon the personal responsibility of the shipper.

Prima facie, the delivery of the cargo to the consignee releases the lien for freight; it may be preserved, however, by a special agreement, by notice that the delivery is made subject to the lien, or by a local usage to that effect, but the mere intention of the master to retain his lien, not communicated to the consignee, is insufficient. Ang. Carr. §§ 370–374; Bigelow v. Heaton, 4 Denio, 496; Bags of Linseed, 1 Black [66 U. S.] 108. As Jewell & Sons bought and paid for the bark before notice of the master's lien, it would be manifestly unjust to permit him now to enforce it.

Independently of this, however, the claimant is entitled to recoup the damage suffered by the cargo. The evidence fails to satisfy me that it was not in good condition when shipped on board, notwithstanding the testimony of the master and mate that they told the shipper it was damaged and refused to receipt for it in good order. As matter of fact the mate did certify that it had been "shipped in good order and condition," and although a bill of lading may be contradicted in its recitals of number, quantity and quality, and is but slight evidence of the condition of goods packed in boxes or otherwise not open to inspection, it is very strong evidence of the outward condition of the cargo at the time of shipment.

In one case at least (Benjamin v. Sinclair, 1 Bailey, 174), it has been held conclusive evidence, though I cannot see that the doctrine of estoppel has any application to the case. It would be a premium, however, upon gross negligence to permit it to be controlled, except by clear evidence. In this case not only does the consignor testify that the bark was in good order when shipped, but it is admitted that the top layers of the deck load, which would naturally have come from the bottom of the pile as it lay upon the bank, and consequently most exposed to moisture, were in perfectly good condition when delivered.

Although a loss by freezing is an excepted peril, the carrier must be free from negligence. It was a contingency which, in this case, must have been foreseen, and should have been provided against. There is no evidence, however, that any precautions were taken to preserve the cargo from the effects of frost. Immediately upon the harbor being closed, the master left for home, leaving the vessel in charge of two men, with instructions to strip her and lay her up for the winter. He put no shipkeeper on board, but, as he says, paid a man $5 "to keep an eye on her" during the winter. There is no evidence of what was done after his departure. No precautions, however, appear to have been taken to ventilate the hold, or to prevent dampness from collecting and injuring the bark. Where a cargo gathers moisture, as sometimes occurs in passing from a warm to a cold climate, it has been held the carrier is not responsible; but where the gathering of dampness and mold is the usual effect of laying a vessel up for several months, I think the master is bound to use some precautions by ventilating his hold, or otherwise to obviate injury. At least he should have exercised the ordinary prudence of roofing over his deck load, and preventing the ice from gathering upon the deck.

Where the negligence of the carrier exposes the goods to injury by an excepted peril, the authorities are uniform that he must respond in damages. He is bound to take not merely the usual precautions against frost, but all such as he could foresee were necessary to be taken under all the circumstances of the case. Edw. Bailm. 456–478; Ang. Carr. §§ 160–164; Abb. Shipp. p. 485; Semler v. Commissioners, 1 Hilt. 244; Bow-

man v. Teall, 23 Wend. 306; Clark v. Barnwell, 12 How. [53 U. S.] 272; New Jersey Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 385.

As the damage to the cargo in this case exceeds the freight, the libellant is not entitled to recover. Libel dismissed.

NOTE. Upon the question of release of lien, see also the following cases: The Eddy, 5 Wall. [72 U. S.] 481; The Bird of Paradise, Id. 545; Tamvaco v. Simpson, L. R. 1 C. P. 363; Paynter v. James, L. R. 2 C. P. 348; Kirchner v. Venus, 12 Moore, P. C. 361.

Case No. 13,743.

The TANGIER.

PIERSON et al. v. RICHARDSON et al.

[1 Cliff. 383.] [1]

Circuit Court, D. Massachusetts. May Term, 1860.

HOLIDAYS — "FAST DAY" — DELIVERY OF CARGO — MASSACHUSETTS.

1. Under the decision of the supreme court in Richardson v. Goddard, 23 How. [64 U. S.] 28, the master of a merchant vessel is fully authorized to continue and complete the discharge of his cargo, and the delivery of the respective consignments on fast-day, when he had commenced the work prior to the occurrence of that day.

[Cited in McAndrew v. Whitlock, 52 N. Y. 51.]

2. For the purpose of lading or unlading ships engaged in maritime commerce, it is also held that, in the absence of any statute to the contrary, or established general usage, fast-day must be considered as an ordinary working-day.

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

This was an admiralty appeal in a cause of contract, civil and maritime. The libellants [John H. Pierson and others] were the consignees of one hundred bales of cotton, shipped at Apalachicola, in the state of Florida, on board the bark Tangier, to be transported to Boston for a specified freight. On the 6th of April, 1856, the bark arrived in safety at the port of destination with the cargo on board; but the libel alleged that the cotton, excepting twenty-five bales, had not been delivered, and that the master neglected and refused to deliver the residue. Full performance on the part of the respondents [Samuel Richardson and others] was set up in the answer, and it was denied that the libellants had suffered any damage by reason of any neglect or refusal on the part of the owners or their agents. An amendment to the libel was subsequently filed, in which it was alleged that, on the 7th of April, 1856, the libellants received notice that some of their cotton was landed on the wharf; that they took all such away, except two bales, which were so covered up by other merchandise that they could not then be delivered, and that on the evening of that day the rest of their consignment was still in the vessel, and not in a condition to be removed; that the libellants did not receive notice, and did not know that any more of their cotton had been discharged from the vessel, or was ready for delivery; that on the morning of the 11th of April the master of the bark informed them that the balance had been destroyed by fire, and that the claimants pretended that it had been taken out of the vessel the day previous and placed on the wharf, of which they were ignorant. As a further defence, the amendment alleged that if the libellants had received notice, they were still not bound to accept and receive the delivery of the residue on the day it was taken out of the vessel, because the 10th of that month had been set apart by the governor and council as a day of "public humiliation, fasting, and prayer," and that, by an immemorial custom and usage sanctioned by law, the annual fast-day of the state was a day on which no secular labor was performed. To the amended libel the respondents replied that libellants had notice of the intended discharge of the cargo on the 10th, and had assented thereto, and agreed to receive and take away their merchandise, and that there was no custom among persons engaged in commerce not to do any secular work on fast-day; but averred that the custom of the port authorized masters of vessels to discharge their cargoes, and that the libellants were bound to receive and take it away. A decree was entered in the district court dismissing the libel. [Case unreported.]

C. P. Curtis and C. P. Curtis, Jr., for libellants.

R. Choate and J. M. Bell, for respondents.

CLIFFORD, Circuit Justice. Notice was given to the libellants of the arrival of the vessel, and of the master's readiness to deliver the cotton at the same time, and by the same messenger who notified the other consignees. Some twenty-seven bales or more of the libellants' cotton were discharged on Monday and Tuesday, before the work was suspended by the stevedore. After the notice was received by the libellants, they employed a truckman to attend to the business of removing the cotton from the wharf, and gave him directions in regard to the whole consignment. None of the cotton, however, was removed on Monday, and on Tuesday they were again notified and told that the cotton was out and ready, and that the stevedore had been obliged to suspend the work because the wharf was blocked up. Failing to get the cotton removed, the master went to their counting-room on Wednesday morning, and told one of the firm that the cotton was lying on the wharf. On that occasion the truckman was sent for, and the master was referred to him for the necessary explanations; and, as an excuse for his remissness, he said, in effect, that

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

being much pressed with business, he supposed that he could delay this work for a while. He was examined as a witness, and testified that he went to the wharf on Tuesday, but found none of the cotton, except two bales, which were not accessible, and that he went again on Wednesday, after the interview at the counting-room, and took away twenty-five bales, which were all he could find on the wharf. Near sunset of that day the master says he saw the truckman on the wharf, and that the truckman told him that he would come the next day and take the cotton away, if the stevedore would put it on the wharf. But the truckman expressly denies that he ever held any such conversation. Be that as it may, it is nevertheless clearly to be inferred, from all the circumstances, that he must have known that the work of discharging the vessel would be resumed as soon as the obstacles which had occasioned it to be suspended were removed. All of the other facts respecting the unloading of the vessel are substantially the same as those exhibited in the case appealed to the supreme court. Assuming that Thursday was a suitable time for the unlading of the bark and for the delivery of the consignment, it is quite obvious that the acts performed by the master were fully equivalent to an actual delivery of the goods, within the principles laid down in that case. He gave due and reasonable notice of the arrival of the vessel, and of his readiness to deliver the consignment. All the goods were properly discharged from the vessel, and duly landed on a suitable wharf and at a suitable time, and the consignment was properly separated from the others, and the goods so placed upon the wharf as to be conveniently accessible for the purpose of removal. But it is insisted by the libellants that Thursday, being the annual fast of the state for that year, was not a suitable day for the performance of those acts; and that is the only remaining question to be considered. Much discrepancy exists in the testimony of the witnesses upon this point. Some affirm that the custom of the port is not to unlade, deliver, or receive goods on that day. Others state the proposition either with many exceptions or with material qualifications. But the weight of the evidence fully sustains the conclusion that there is no such general custom to abstain from labor on that day as forbids the master of a merchant vessel, in a case where he has previously commenced to discharge his vessel, from completing the unlading on fast day, and delivering the consignment. On the contrary, the evidence taken as a whole clearly shows that the custom is not to suspend under such circumstances, but that the stevedores almost invariably continue the work, and when practicable complete it. Such being the state of the evidence, it is clear that the question is closed by the decision of the supreme court. Richardson v. Goddard, 23 How. [64 U. S.] 28. Whatever differences of opinion there may be as to the true interpretation of the judgment of the court in that case, all must agree that the master of a merchant vessel, within the principles there laid down, is fully authorized to continue and complete the discharge of the cargo and the delivery of the respective consignments on fast-day, in a case where he had commenced the work prior to the occurrence of that day. To that extent the decision clearly goes; and in the judgment of this court it goes much further, and fully justifies the position assumed by the counsel of the respondents, that, for the purpose of lading or unlading ships engaged in maritime commerce, fast-day, in the absence of any statute to the contrary or established general usage, must be considered as an ordinary working-day. Nothing less can be inferred from the language of the court when they say: "This inquiry involves the right of the carrier to labor on that day and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of the ship usually has a certain number of lay-days. He is bound to expedite the unlading of his vessel in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think proper to keep Saturday as his Sabbath, and to observe Friday as a fast-day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as an insurer of his property to suit his convenience or conscience." Other parts of the opinion are to the same effect, and even more decisive; as, for example, the court say: "The proclamation of the governor is but a recommendation. It had not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary and not of compulsion, and holiday is a privilege and not a duty. In almost every state in the Union a day of thanksgiving is appointed in the fall of the year, by the governor, because there is no ecclesiastical authority which would be acknowledged by the different denominations. It is an excellent custom, but it binds no man's conscience, or requires him to abstain from labor. Nor is it necessary to a literal com-

pliance with the recommended fast-day, that all labor should cease, and the day be observed as a Sabbath or a holiday. It is not so treated by those who conscientiously observe every Friday as a fast-day." Having come to the conclusion that the question is controlled by the decision of the supreme court, it is unnecessary to enter into any further discussion upon the subject. It being understood that a new hearing was granted at the last term, the proper decree is, that the decree of the district court be affirmed, with costs.

Case No. 13,744.

The TANGIER.

[2 Lowell, 7.] [1]

District Court, D. Massachusetts. April, 1871.

MARITIME LIEN—ADVANCES—SUBROGATION.

1. One who advances money in good faith, to enable the master of a foreign vessel arriving here to pay the custom-house charges and the wages of his crew, has a privilege against the vessel for these advances.

[Cited in Nippert v. The Williams, 39 Fed. 828, 42 Fed. 542.]

2. To create a privilege on the ship, it is enough that the advances are necessary to free her from debts previously due, which are a charge on the ship

3. If the person making the advances were not himself a material-man, he might yet have a privilege by subrogation to the rights of the seamen and others whose claims he has paid.

[Cited in Nippert v. The Williams, 39 Fed. 828.]

4. The doctrine of subrogation in the admiralty, and the case of The Larch [Case No. 8,085], discussed.

[Cited in Re Low, Case No. 8,558; The J. A. Brown, Id. 7,118; The Sarah J. Weed, Id. 12,350; The J. C. Williams, 15 Fed. 559; The H. E. Willard, 53 Fed. 601.]

The libellants, ship-chandlers of Boston, furnished money to the master of the brig Tangier, of Bangor, to pay off his crew, who had arrived here at the end of a voyage from Savannah, by way of the West Indies; and the money, or most of it, was proved to have been applied to the purposes for which it was borrowed. There was evidence tending to show that Capt. Grant, the master of the vessel, had not followed the instructions of the owners in going to Savannah, and that they had determined to remove him, and had sent one of their number to Boston for that purpose. The vessel was consigned to Messrs. Lewis & Hall, of Boston; and this fact was known to the libellants, but they did not know that one of the owners was here. This owner, Mr. Huckins, had an interview with the master soon after his arrival, and before most of the money had been advanced, though after it had been promised, in which he notified him of his removal; but this, too, was unknown to the libellants, who afterwards went to the custom-house with the master, and entered the vessel and paid the dues, and made the further advances. When the libellants presented the bill to the consignees they referred him to Mr. Huckins, who refused to pay the bill, saying, that the master had been displaced.

The claimants in their answer denied that Capt. Grant was master of the vessel at the dates mentioned in the libel, and alleged that the owners were known to the libellants, and were in good credit in Boston, and that one of the owners was present with ample funds to meet all disbursements, and that the master himself had funds, all which might have been ascertained on due inquiry. That the libellants had already brought an action in the superior court for the county of Suffolk against the master, in which they had summoned the consignees of the cargo as trustees, and another action against the owners, or some of them, in the same court; both of which actions were still pending. There was evidence to sustain the allegations of the credit enjoyed by the owners, and of the previous action brought by the libellants, but not that the libellants knew who the owners were. They made no inquiries excepting of the master. There was some evidence that the master remained in actual command until the cargo was unladen.

J. C. Dodge, for libellants.

We made due and sufficient inquiry of the person whom we had a right to consider the representative of the ship. The Grapeshot, 9 Wall. [76 U. S.] 129. The merchant who furnishes money for supplies, repairs, and other necessaries in a foreign port has the same privilege with the person who makes the repairs or furnishes the supplies, &c. Thomas v. Osborn, 19 How. [60 U. S.] 29; Davis v. Child [Case No. 3,628]. That there was a lien for such necessaries as were furnished in this case, notwithstanding the voyage, or one definite part of it, ended at this port, see The Edmond, Lush. 57; The Vibilia, 1 W. Rob. Adm. 1. The William F. Safford, Lush. 69, shows that we may be subrogated to the privilege of the crew. If the master sailed the vessel on shares, this lien is necessary for our protection. The James Guy, 9 Wall. [76 U. S.] 758.

R. D. Smith, for claimants.

A lien cannot be asserted here, because there was no necessity for the supplies nor for the credit. Pratt v. Reed, 19 How. [60 U. S.] 359. The payment of a debt due for necessaries is very different from advancing money to procure necessaries. Beldon v. Campbell, 6 Exch. 886, explaining Robinson v. Lyall, 7 Price, 592. Here the master had ceased to be the agent of the ship, and could no longer bind it by his contracts. Webb v. Peirce [Case No. 17,320].

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

LOWELL, District Judge. In the case of The A. R. Dunlap [Case No. 513], I expressed the opinion that Pratt v. Reed [supra] must have been decided on its own peculiar facts, which certainly tended strongly to show an exclusive personal credit for the supplies which were furnished to the vessel. In the late case of The Grapeshot, 9 Wall. [76 U. S.] 129, the supreme court have conclusively settled this vexed question, and the lien is now re-established on its ancient foundation, or nearly so. It cannot be doubted that the privilege of the material-man who supplies a foreign ship extends to the creditor who advances money for the purchase of necessaries, as well as to the ship-chandler or mechanic who actually supplies them. Davis v. Child [supra], approved in Thomas v. Osborn, 19 How. [60 U. S.] 29. See acc. The Emily Souder, 17 Wall. [84 U. S.] 667; The Riga, L. R. 3 Adm. & Ecc. 516. And so is the law of England. The Sophie, 1 W. Rob. Adm. 368; The Onni, Lush. 154; The Afina Van Linge, Swab. 515. A distinction, however, is taken by the claimants between the advance of money for necessaries to be furnished, and an advance for the payment of an already existing debt for necessaries. A master, it is said, cannot hypothecate his vessel, excepting for the purpose of helping on her voyage; and such necessity is not presumed to exist in respect to personal debts of the owner or of the master, even though the latter be imprisoned in a foreign port for non-payment of such debts. The Prince George, 4 Moore, P. C. 21; The N. R. Gosfabrick, Swab. 344. This doctrine extends to bottomry bonds as well as to tacit or implied hypothecations. So that, for instance, the necessity of liquidating damages incurred in respect to outward cargo does not authorize the master to give a bottomry bond for the amount, unless the claim would be a lien on the ship by the law of the place where the payment is made; but where there is such a lien, the presumption is against a personal credit, and the bond is well justified. The Vibilia, 1 W. Rob. Adm. 1. So at common law it has been held, that one who has advanced money to the master to pay a debt contracted for towage is a mere volunteer, and cannot maintain an action against the owner. Beldon v. Campbell, 6 Exch. 886. That decision has no very great importance in the admiralty, excepting as it illustrates this point; for, by the civil law, a mere volunteer may maintain an action under like circumstances, though he might not be entitled to subrogation to a privilege. The important difference beween that case and this is, that the towage in the former was a mere contract. If the vessel had been foreign, the rule would have been different. That one who pays my debt upon the request of my authorized agent is a volunteer would be a somewhat remarkable notion. There is no sort of doubt that the master has such authority in respect to such a debt in a foreign port. In Massachusetts, a master may pledge the credit of his owners, who live in New York, for the payment of wages already earned. Stearns v. Doe, 12 Gray, 482. The question in this part of the case is whether a merchant or ship-broker who advances money to pay the crew is a material-man, or is merely a creditor who volunteers to pay an antecedent debt. And I confess myself unable to see any less necessity for the present payment of the crew of a vessel in a foreign port, if their wages are due them there, than for procuring supplies and repairs for the further prosecution of the voyage. And, so far as my examination has extended, the decisions confirm this opinion. In many of the cases, the particular necessities of the ship which have been supplied by the material-man are not set out; but, so far as can be discovered, the cases put money for wages already earned on the footing of necessaries. The Duke of Bedford, 2 Hagg. Adm. 294; The Bombay, The Unity, 3 Hagg. Adm. 148, note. I am aware, of course, that the decision in the case of The Neptune, in a note to which these two last cases are cited, was reversed by the privy council, and rightly, but not on any question of this sort; and these cases are still valid decisions to the point to which I cite them, and I have found none of a different tendency. Then there is the case of The William F. Safford, Lush. 69, cited at the bar, where an American whaling-ship was arrested at Liverpool for a debt for necessaries, and several other similar actions were entered against her, including one on a bottomry bond and one by John Da Costa, of Liverpool, for necessaries, which were wages paid by him to the crew at the request of the master, on account of the ship. Da Costa's claim was ordered to be paid first. "If he had not advanced the money," says the learned judge, "the seamen would have no doubt arrested the ship, and enforced their right to priority of payment." The distinction, therefore, between paying a past debt and contracting a new one ought not to be extended to a payment for wages due in the foreign port, and for which the crew have a present privilege against the ship. It has not been so extended by the courts.

In the present case there is no evidence of any fraud or negligence on the part of the libellants, and there is evidence, though not wholly uncontradicted, that the necessity was real. It appears that the bank check given to the master was actually applied to pay the crew, and that the master was not in fact displaced till after the advances were made, but entered the vessel at the custom-house, and did all the usual work of a master, until several days after this time. Every thing concurs to give the libellants the position of material-men.

The libellants claim a lien upon another

and distinct ground, that of subrogation. It must be admitted that the law of this circuit refuses to the master himself a lien on the ship for his disbursements. See Ex parte Clark [Case No. 2,796], and notes; The Larch [Id. 8,085]. The reasoning in the case of The Larch goes much beyond the decision; and seems to assert, if I do not misunderstand it, that, independently of the general and difficult question, whether the master himself, holding a peculiar and confidential relation to the owners, ought to have a privilege on the ship, however derived, the doctrine of substitution or subrogation would not aid him, because, when he has paid one of the ship's debts, it is paid, and at an end, and that subrogation can never be decreed unless there is some actual outstanding legal title, like a mortgage, upon which to attach it. If that is the meaning of the decision, its adoption would make sad havoc with subrogation. The opinion cites the famous case of Copis v. Middleton, 1 Turn. & R. 224, and one or two others which followed it, as authority for this broad and sweeping destruction of the law of subrogation. In that case, Lord Eldon decided, contrary to the whole current of decisions on analogous subjects, that a surety on bond who paid the debt did not thereby become a specialty creditor of his principal. It was very much like those decisions in which it used to be the fashion to say that an implied promise could not be maritime, and within the jurisdiction of the admiralty. The decision was never approved in England, and was repealed by act of parliament (19 & 20 Vict. c. 97, § 5) about the time that The Larch was decided. Its doctrine never was the law of this country. In the few states of this Union in which the distinction between creditors by bond and creditors by simple contract is or was preserved in the distribution of assets, the doctrine of Copis v. Middleton was not generally admitted. Lidderdale v. Robinson, 12 Wheat. [25 U. S.] 594; Shultz v. Carter, 1 Speer, Eq. 533; Croft v. Moore, 9 Watts, 451; Smith v. Swain, 7 Rich. Eq. 112. So in those states where a judgment has priority, the surety, whether joined in the judgment as a defendant or not, is entitled to the lien. Lathrop's Appeal, 1 Barr [1 Pa. St.] 512; Cottrell's Appeal, 23 Pa. St. (11 Har.) 294; Goodyear v. Watson, 14 Barb. 481; Speiglemyer v. Crawford, 6 Paige, 254; Baily v. Brownfield, 20 Pa. St. (8 Har.) 41. The learned editors of the Leading Cases in Equity (2 White & T. Lead. Cas. Eq. [3d Ed.] pp. 226 et seq.; Id. [4th Ed.] pp. 278 et seq.) in their notes to Aldrich v. Cooper, writing while Copis v. Middleton was, or was supposed to be, still in force there, though they pointed out its discrepancy with other English decisions, say: "In this country, however, the courts proceed on the more liberal principle of regarding payments made by a surety to the creditor as prima facie intended to advance and not to defeat his rights against the principal." And they support this statement by ample citations.

Besides, the doctrine of that decision, while it lasted, was never applied in England to a case where there was any mortgage, pledge, or lien of any kind to the benefit of which the surety could be substituted, but was confined to the mere case of one paying what the court was pleased to call his own debt. The distinction taken in the opinion of The Larch [supra], between our law and that of Rome,—namely, that the latter by a laudable fiction presumed an assignment, when, in fact, there had been a mere payment, while our law recognizes no such fiction,—cannot be maintained. Our law, in numerous instances, adopts that precise fiction, and subrogates a surety, or other person equitably entitled to that remedy, not only where the debt has been paid, but where the security has been actually discharged, whether by fraud or mistake, or however otherwise. Even at law the right of an insurer to subrogation to a cause of action against a wrong-doer cannot be discharged by the assured on receiving full payment from the wrong-doer. Hart v. Western Railroad Corp., 13 Metc. [Mass.] 99. A mortgage discharged in all due form will be considered assigned when equity requires it; and so in many other well-known cases. The courts of law, equity, admiralty, and bankruptcy, each in its own mode, all recognize subrogation to liens and privileges in a great variety of circumstances analogous to those at bar. I do not, of course, mean to say that a debt may not be extinguished, if such is the true intent of the parties; nor that a mere volunteer is entitled to a privilege; but the evidence here shows an advance, in a foreign port, to one who appeared to be the master of the ship, which excludes both of these considerations.

In trover by the assignees of a bankrupt, the defendant, who held a ship by a bill of sale from the bankrupt that was absolutely void under the registry acts, was permitted to deduct from the value of the vessel the sums he had paid in a foreign port for salvage and wages, as well as certain damages, for which the vessel had been attached for non-fulfilment of a contract of affreightment. Richardson v. Campbell, 5 Barn. & Ald. 196, 203, note. This allowance is put on the ground of lien; and it could have no other basis, because there was no mutual credit between the bankrupt and the defendant, and no right of set-off at that time in trover; so that the lien could avail the defendant only by subrogation. A surety on bond to the government who pays the debt is subrogated to the priority of the sovereign. Hunter v. U. S., 5 Pet. [30 U. S.] 172; Dias v. Bouchaud, 10 Paige, 445; Reg. v. Salter, 1 Hurl. & N. 274. A surety in bankruptcy is subrogated to all the rights of the creditor, and so the creditor may insist on all the ad-

vantages given to the surety. It is usual and good practice in the admiralty, wnen a ship is under arrest, for one of the parties plaintiff to obtain leave to pay off the crew with full subrogation. The Kammerhevie Rosenkrants, 1 Hagg. Adm. 62; The John Fehrman, 16 Jur. 1122. When such a petition is denied, it is because the owners are not before the court, so that it is improper at that stage of the case to go into the question whether the wages are in fact due. The Adolph, 3 Hagg. Adm. 249. It has been the practice lately in England to require the person who pays the wages to apply to the court before he makes the payment; but such previous authority is not insisted on, as yet, in all cases. The Cornelia Henrietta, L. R. 1 Adm. & Ecc. 51. In this country a bondholder has been rebuked for requiring an assignment from the seamen of their claims, the court saying, that if the bondholder paid the wages, the law would make the assignment, and that he could recover the whole sum for his bond debt and wages, in one libel. The Cabot [Case No. 2,277].

It was not contended that the suits which are pending at common law, and are resisted by the owners or in their interest, can be availed of as a bar. Nor do I understand that the claimants deny that a few of the items, such as the custom-house dues, and the wages of the steward, who still remained on board, would be a charge on the ship, provided the master were still capable of representing the vessel when those moneys were paid. It is impossible, upon the evidence, to say that the master was actually deprived of command so early as the answer represents it; but, if he were, and the owners intrusted him with the duty of entering the vessel and paying off the crew, it will hardly do to say that he was not their agent for those purposes as fully as if they had never removed him at all. If his agency had ceased, the equitable doctrine of subrogation might be invoked. Either way, the libellants must succeed. Decree for libellants for $451.24 and costs.

TANGIER, The (GODDARD v.). See Case No. 5,494.

TANGIER, The (SALMON FALLS MANUF'G CO. v.). See Cases Nos. 12,265–12,267.

Case No. 13,745.

In re TANNER.

[1 Lowell, 215; 15 Pittsb. Leg. J. 244; 2 Ben. 211; 1 N. B. R. 316 (Quarto, 59); 35 How. Pr. 20; 1 Am. Law T. Rep. Bankr. 121.] [1]

District Court, D. Massachusetts. Feb., 1868.

BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHT TO CONSULT ATTORNEY.

1. A bankrupt under examination has no right to consult with his attorney before answering, except when the examining magistrate shall see good cause for allowing it.

[Cited in Re Dole, Case No. 3,965. Approved in Re Judson, Id. 7,562.]

2. The attorney may attend, and object to improper questions.

[In the matter of E. P. Tanner, a bankrupt.]

LOWELL, District Judge. The register, by agreement of the parties, has certified to me the question whether a bankrupt, upon his examination under section 26 [of the act of 1867 (14 Stat. 529)], has a right to answer by the mouth of his attorney. The law provides for an examination of the bankrupt in writing as to all matters concerning his trade, dealings, property, &c. It is plain, upon the whole tenor of the section, that the examination may be had before the court or before a register, and that the debtor is to be personally present, and to make answer substantially like a witness, and not merely to have interrogatories filed or propounded after the manner adopted in equity and admiralty in certain cases. Whether the requirement that it shall be in writing, means that the questions shall always be in writing, if required by either party, I do not now decide, but it is not intended that the bankrupt himself, or his attorney, shall write the answers, but merely that the deposition shall be reduced to writing, and signed by the bankrupt.

Since the examination may extend to the bankrupt's whole business life, and may involve large interests of himself and his family, and of other persons who have dealt with him, he should have every proper facility for refreshing his recollection, and for making true and careful answer. He may need to consult books and papers, and sometimes, no doubt, to consult counsel; but it seems to me impossible to lay down any general or peremptory rule of law governing such consultations.

In an early case under the insolvent law of Massachusetts, the supreme court is said to have held that the insolvent is absolutely entitled to this privilege: In re Winsor, 8 Law Rep. 514. The case is very briefly reported, and without reasons given, but it has been accepted and acted upon ever since. The practice which has followed this adjudication has been, as I believe the bar will generally concede, unfavorable to the ascertainment of the truth in these investigations, by reason of the great labor and delay of proceeding in that mode; and there is some reason to believe, that if the question were new, the same court might now decide it differently; for in Peabody v. Harmon, 3 Gray, 113, they refused this privilege to a creditor under examination in support of his debt, and many of the reasons for the decision apply with great force to all examinations; and the rule there laid down, that such matters must be left to the judgment of the examining magistrate, appears to me to be the true one. It is not to be supposed that a register will deny the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 121, contains only a partial report.]

bankrupt, or a witness, such reasonable opportunity to see his books, and to consult concerning his rights, as will enable him to answer understandingly, and with all proper reservations, the questions that may be asked him. In England, Lord Chancellor Hardwicke refused to make a peremptory order in a similar case, but recommended that the petitioner (a woman) should be allowed the privilege: Ex parte Parsons, 1 Atk. 204. And see Ex parte Bland, Id. 205. And such appears to have remained the rule of practice there: 1 Christ. Bankr. 385; 1 Mont. & A. Bankr. (2d Ed.) 385. [I do not say that on a motion to commit for not answering, or in some other mode, the judgment of the register might not, in some cases, be received; but that there is no general rule of law to be laid down upon the subject, and that, as a matter of practice, it is highly inconvenient that one should be adopted which should tend to mischievous delay without any corresponding advantage.] [2]

The questions to a bankrupt are usually concerning matters of fact, and in the vast majority of cases, involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called to the stand as a witness in his own cause in any other court, and with the further reserved right to advise with him concerning his answers, when the register can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard. Certificate to the register accordingly.

TANNER (OLNEY v.). See Case No. 10,506.

TANNER (UNITED STATES v.). See Case No. 16,430.

TAPLEY (SNOW v.). See Case No. 13,147.

TAPPAN (BEARDSLEY v.). See Cases Nos. 1,188, 1,189.

TAPPAN (CARLOCK v.). See Case No. 2,412.

Case No. 13,746.

TAPPAN v. DARLING.

[3 Mason, 101.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

DECEIT—FALSE AFFIRMATION OF CREDIT—GOOD FAITH—GIST OF ACTION.

In an action for a false affirmation of the credit of another, the action is not sustained, if the representation was in substance true, according to the party's knowledge and belief. The gist of such an action is fraud.

Case for a false affirmation of the credit of one Samuel Darling, the brother of the defendant [Joshua Darling], whereby the plaintiff [Charles Tappan] was induced to trust him for $665 75, with the usual averment, that the plaintiff had wholly lost the same, Samuel Darling being insolvent, &c. At the trial, a letter, addressed by the defendant to the plaintiff on the 6th of October, 1818, with an indorsement on it of Samuel Darling as bearer, was produced, containing this clause: "All I can say, he (Samuel Darling) has always met his payments well in Boston, and owes little or nothing there now. I have none of your fifty per cent. profit, and therefore dont indorse for him, because my brother dont ask it." Upon the faith of this letter the plaintiff, on the 1st of November, 1818, trusted Samuel Darling for merchandise bought, to the amount of $665 75. There was a good deal of evidence in the cause, to show that, some years before this period, Samuel Darling had been in embarrassed circumstances, and had failed, and was obliged to compromise with his creditors, and that his credit was not afterwards good. On the other hand, it was proved, that the defendant had trusted Samuel Darling, in 1818, to a considerable extent; and that he might have obtained credit for sums not large.

Willard Phillips, for plaintiff.
Mr. Webster, for defendant.

STORY, Circuit Justice, in summing up the case to the jury, told them, that the question was, whether the representation was true in substance, according to the defendant's knowledge and belief. If so, the action could not be maintained, for it was founded on a supposed fraud; and that fraud must be proved, as it formed the gist of the action. Verdict for defendant.

Case No. 13,747.

TAPPAN v. NATIONAL BANK NOTE CO.

[See Case No. 14,100.]

TAPPAN (OCEANIC STEAMSHIP CO. v.). See Case No. 10,405.

Case No. 13,748.

TAPPAN et al. v. SMITH et al.

[5 Biss. 73.] [1]

Circuit Court, D. Wisconsin. July Term, 1863.

PARTIES—ASSIGNMENT PENDENTE LITE—SUPPLEMENTAL BILL.

Where a complainant has assigned his interest in the subject-matter of the litigation pending the suit, his assignee cannot on a supplemental bill be substituted to his rights. He must file an original bill in the nature of a supplemental bill.

[Cited in Campbell v. New York, 35 Fed. 14.]

[Cited in Fulton v. Greacen, 44 N. J. Eq. 446, 449, 15 Atl. 828, 830.]

---

[2] [From 1 N. B. R. 316 (Quarto, 59).]

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

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

In equity.

MILLER, District Judge. The complainants bring this bill by way of supplement and revivor, against A. Hyatt Smith and others.

The bill shows that on or about the 19th day of June, 1858, the complainants, Henry C. Bowen, McNamee, Holmes, and Stone, exhibited their original bill against the same defendants, thereby stating such several matters and things as are therein for that purpose more particularly mentioned and set forth, and praying, etc. (giving the several prayers of said original bill); that process had issued against said defendants which was duly served; that testimony has been taken in said cause, and the same is ready for hearing; that on or about the 7th of December, 1861, the said complainants in said original bill made a general assignment to the said Lewis Tappan for the benefit of their creditors, and that the judgment or claim upon which said bill is filed is a part of the choses in action, or assets so assigned; and the said Lewis Tappan thereby and for the purpose of said assignment has become interested in the subject of said suit. And the bill further represents that said suit and proceedings have become defective by reason of said assignment; and complainants are advised that said Lewis Tappan as such assignee is entitled to be made a party complainant in said suit, and to have the said suit and proceedings revived against the said defendants, and to have the same benefit of the proceedings in said suit as if the same had been instituted by him as assignee as aforesaid, concluding with a prayer for this purpose, and for a subpœna etc.

To this bill the defendants filed a demurrer, showing for cause of demurrer that the original complainants, having voluntarily assigned their interest in the judgment mentioned in their bill, the complainants, Lewis Tappan and others, cannot revive and continue said suit commenced by the original bill, by supplemental bill or bill of revivor or both, but must file an original bill in the nature of a supplemental bill on notice and leave of court.

This bill was filed under equity rule 57: "Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill the defendant shall demur, plead or answer thereto," etc.

This rule does not specify the kind of bill to be filed in any given case, whereby the suit may become defective. The intention of the rule is to allow a judge on any rule day to grant leave to file the bill; and then to direct the manner of pleading to it. It leaves the kind of bill to be filed to be prepared by the pleader according to the circumstances of the case; and requires the defendant to demur, plead or answer thereto.

By rule 90, "in all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court should be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

The only case I can find in the reports of the supreme court of the United States, bearing on this subject, is Greenleaf v. Queen, 1 Pet. [26 U. S.] 138. The trustee in a deed of trust for the sale of real estate and payment of debts of the grantor was a party defendant. During the pendency of the suit the trustee died, and a new trustee was appointed by the court. The court hold that the original suit, which abated by the death of the trustee, became also defective by the termination of his powers and the appointment of a new trustee, and could only be prosecuted against him by way of a supplemental bill, in the nature of a bill of revivor. This decision is in conformity with the chancery practice in England. The reason is that by the death of the party suing or sued in autre droit, there is no change of interest, upon the appointment of a successor, and the suit may be revived by supplemental bill. Mitf. Eq. Pl. 64 (Lord Redesdale).

Where a sole plaintiff, suing in his own right, assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be brought by an original bill in the nature of a supplemental bill. Mitf. Eq. Pl. 65. In 2 Daniell, Ch. Pl. & Prac. 1518, the same position is quoted from Lord Redesdale, and the reason for the distinction between a supplemental bill and a bill in the nature of a supplemental bill is there given. In the first case the original suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendant must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff; but in the case of an original bill in the nature of a supplemental bill, the whole case is open.

The same principle is copied by Judge Story in his Equity Pleadings (sections 348, 349).

I have carefully examined all the cases referred to at the argument; and although there are rulings by vice-chancellors and chancellors that might cast some doubt on

the propriety of this rule, and induce the court to disregard it under the belief that, in the case here presented, the requirement of a bill in the nature of a supplemental bill is more technical than wise, and is unnecessarily burdensome to parties, yet this court, being subordinate to the supreme court of the United States, is obliged to follow the rules adopted by them. That court follows with great particularity the rules of practice as given by Daniell in his volumes of Practice. The bill sets forth an absolute assignment of the judgment by the sole plaintiffs suing in their own right to Tappan, as assets for the payment of debts, and that thereby the title is vested in the assignee.

I feel obliged by the rules to sustain the demurrer and to dismiss the bill. It should have been an original bill in the nature of a supplemental bill.

As to the character of an original in the nature of a supplemental bill, and when properly brought, consult 2 Barb. Ch. Prac. p. 84, note 1; and Butler v. Cunningham, 1 Barb. 85.

Case No. 13,749.

TAPPAN et al. v. UNITED STATES.

[2 Mason, 393.] [1]

Circuit Court, D. Massachusetts. May Term, 1822.

CUSTOMS DUTIES — APPRAISEMENT — ACTUAL COST — FRAUDULENT INVOICES.

1. An appraisement regularly made under the act of 20th of April 1818, c. 74 [3 Story's Laws, 1679; 3 Stat. 433, c. 79], for the purpose of ascertaining the value of goods subject to an ad valorem duty, is conclusive as to the value on which the duty is to be estimated, and no evidence is admissible to prove, that the actual cost or value is different.

[Cited in U. S. v. Twenty-Five Cases of Cloths, Case No. 16,563; Rankin v. Hoyt, 4 How. (45 U. S.) 335; U. S. v. Twenty-Six Cases of Rubber Boots, Case No. 16,571; Saxonville Mills v. Russell, 1 Fed. 123; U. S. v. Earnshaw, 12 Fed. 286; U. S. v. Leng, 18 Fed. 22; Oelberman v. Merritt, 19 Fed. 409; Hilton v. Merritt, 110 U. S. 105, 3 Sup. Ct. 553.]

[See Bailey v. Goodrich, Case No. 735.]

2. That act is strictly constitutional. But it has not changed the basis of the valuation, on which duties are ordinarily to be estimated. The "actual cost" is still the true basis; and an appraisement under the 11th section, is never to be ordered by the collector, unless he personally suspects, that the invoice is undervalued; for that section applies only to fraudulent invoices.

[Cited in Alfonso v. U. S., Case No. 188.]

This was a writ of error from the judgment of the district court of Massachusetts, rendered in an action of debt upon a bond for duties due at the custom house. The defendants [John Tappan and others] after oyer of the bond and conditions, pleaded a tender of the duties due, and brought the amount into court; the replication of the United States alleged a larger sum to be due for duties, and upon this point an issue was joined by the parties, upon which a verdict was returned in favour of the government. At the trial, a bill of exceptions was taken by the defendants, which was in substance as follows, viz.: "Upon the trial of the issue in this action, it appeared in evidence, that the said John Tappan imported into the United States from France, and entered at the custom house in Boston, nine packages of goods, which were purchased in France a short time before they were exported thence, and of the cost of which, and the charges, he produced an invoice to the collector, and took the oaths required by law respecting the invoice so produced; and that the amount of duties estimated at the legal rate upon the invoice prices would have been $1,114.30, the bond, on which this action was commenced, being given to secure one third part of the duties arising on said goods; and that the appraisers appointed by the government, having examined said goods, represented to the collector, that they were invoiced below their true value in their actual state of manufacture, at the time and place of exportation. Whereupon the collector as a proceeding of course, and without examining said goods himself, and without considering, whether there were grounds to suspect, that they were invoiced below their value, otherwise than by adopting and acting upon the judgment and representation of said appraisers, conceiving it to be his duty to be governed by their opinion in this respect, issued a warrant of appraisement to the said appraisers; and Samuel H. Foster was named on the part of the importer as an appraiser. That said Foster appraised said goods at the invoice prices; that the appraisers appointed by government appraised seven cases at the invoice prices, but appraised a case of levantine silks, being a part of said goods, at about ten per cent. over the invoice price, making an additional amount of duties, if calculated at the legal rate on the amount, at which the same were so appraised by them, of $4.63; and that they appraised another case of said goods, being a case of Leghorn hats, at a sum exceeding by more than twenty-five per cent. the invoice price of the same; and that the duties being calculated at the legal rate on the amount, at which said hats were so appraised, with the addition of fifty, instead of ten per cent. to such amount, would make an additional amount of duties of $237.16; and that these two additions were made by the collector in estimating the duties, one third part of which, as estimated by the said collector, being $452.09; and, that if the said sum of $452.09, was one third part of the amount of said duties, the interest due on said bond was $4.58; and, that the appraisers appointed by government, being requested at the time of making said appraisement to state any facts, that had come to their knowledge respecting the price of such goods in France,

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

at the time of the exportation of those in question, which induced them to fix the value above the invoice prices, refused to make known the grounds, on which they made their estimate. Whereupon the defendants offered to prove, that said goods were invoiced in the invoice produced at the custom house, and sworn to by said John Tappan as aforesaid, at the actual cost, and the fair and usual market price at the time and place of exportation, and at their true value at such time and place in their actual state of manufacture; and the counsel for the said defendants insisted before the said judge, that the said testimony ought to be admitted; and the said judge refused to admit said testimony, and allow the same to be given in evidence on the said trial; and the counsel for the said defendants insisted before the said judge, that the matters so given in evidence as aforesaid, were not sufficient, and ought not to entitle the said United States to recover a verdict against the said defendants for the said sum of $456.67; and the said judge declared his opinion to the jury, that the matters so given in evidence as aforesaid were sufficient, and ought to entitle the said United States to recover a verdict against the said John, Isaac and Lewis, for the sum of $456.67."

Phillips & Webster, for plaintiffs in error.

Mr. Blake, Dist. Atty., for the United States.

STORY, Circuit Justice. Several objections have been taken by one of the learned counsel for the plaintiffs in error to the constitutionality of the act of 20th of April, 1818, c. 74 [3 Story's Laws, 1679; 3 Stat. 433, c. 79], under which the duties in this case were by an appraisement, ascertained. I do not feel myself called upon to discuss these objections minutely, however ingeniously they were urged, because it seems to me, that they may be disposed of by the single remark, that as congress has the constitutional power "to lay and collect taxes and duties," and "to regulate commerce with foreign nations," it possesses the incidental right to prescribe the manner, in which the duties shall be levied, and the value of the goods shall be ascertained, and the conditions upon which the importation shall be permitted. It might, therefore, direct, if such should be its pleasure, that all ad valorem duties should be ascertained by appraisement, as the condition upon which alone the importation of goods should be allowed. And a fortiori it may require such an appraisement in a few specified cases. The act of 1818, c. 74, is an uniform law in the sense of the constitution in relation to duties, for it is in its terms equally applicable to all parts of the United States, and makes no distinction between them. That it may be differently construed or administered in point of fact in different districts, forms no solid objection to the law itself; and may with as much force be urged against many other laws, whose constitutional character will not be doubted. Even under the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], what constituted the "actual cost" or "real and true value" of goods was matter of some diversity of opinion and practice in the different custom houses; and, doubtless, invoices were not made out by the merchants to be exhibited there by any uniform rule of estimating the value. So that in point of fact, different persons, according to their honesty, or their fraud, their ignorance, or their judgment, must often have paid different sums in duties upon goods having the same intrinsic value, or purchased under similar circumstances. This is an infirmity in the practical operation of all laws of this nature, and is probably beyond the reach of any legislative remedy, which deals with a system of ad valorem duties.

The principal question, however (most important it is in its consequences), is, whether the evidence rejected at the trial by the district court was admissible. That depends upon another question, whether the appraisement made under the act of 1818, as disclosed in the bill of exceptions, is conclusive of the value of the goods, so far as respects the ascertainment of the duties. If so, then the decision of the court was right; if otherwise, then the judgment must be reversed.

Before proceeding to the consideration of the act of 1818, it is necessary to notice an argument, upon which considerable stress was laid by the counsel for the plaintiffs in error, and that is, that such an appraisement was not conclusive on the subject of duties under the former revenue laws of the government. That is a point, upon which I entertain exceeding doubts. The revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], has been referred to in illustration of this subject; but I do not find, that there is in that statute any clause, which takes from an appraisement made in pursuance of its provisions a conclusive effect in the ascertainment of ad valorem duties. In cases, where appraisements are made on account of defect of proper invoices, or of damage during the voyage, under the 52d section of the act, it is manifest, and indeed was admitted at the argument, that the appraisement is conclusive on both parties. And as to appraisements under the 66th section, in cases where the collector suspects the goods to be invoiced below their usual price in the country of their exportation, the clause expressly requires the appraisers to be chosen and appointed as in the case of damaged goods, and authorizes the collector to retain the goods, "until the duties, arising according to such valuation, shall be paid or secured to be paid as required by the act in other cases of importation." It is true, that there is a proviso, that "such an appraisement shall not be construed to exclude other proof, upon the trial, of the actual and real cost of

the goods at the place of exportation;" but this proviso is not coextensive with the whole enactment, but is in terms confined to prosecutions for the forfeiture of the goods or their value, which the preceding part of the section inflicts, where the goods "shall not be invoiced according to the actual cost at the place of exportation with design to evade the duties thereupon." The proviso, therefore, leaves the effect of the appraisement, so far as respects the ascertainment of duties, untouched; and I confess myself to have extreme difficulty in distinguishing this case from that of an appraisement made under the 52d section, as to its conclusiveness upon the value. We may then dismiss the consideration of this particular point, since it does not repel the construction contended for in behalf of the government, and pass to the consideration of the act of 1818, upon the true intent and meaning of which the case must after all essentially depend.

The first question, which arises upon the act, is whether it has changed the basis, upon which ad valorem duties were previously calculated. That basis, as is apparent from the whole series of statutes cited at the bar (Act of July 31, 1789, c. 5, § 17 [1 Stat. 41]; Act of August 4, 1790, c. 35, § 39 [1 Stat. 167]; Act of January 29, 1795, c. 82, § 3 [1 Story's Laws, 377; 1 Stat. 411, c. 17]), and particularly from the 36th and 61st sections of the revenue act of 1799, c. 128 [1 Story's Laws, 606, 626; 1 Stat. 655, 673; c. 22], and the 2d section of 3d of March, 1801, c. 99 [1 Story's Laws, 820; 2 Stat. 121, c. 28], was beyond all controversy the "actual cost" of the goods, which is sometimes denominated the "prime cost," and sometimes the "actual value" in the provisions on this subject (Act 1799, c. 128, § 36; Id. § 52 [1 Story's Laws, 606, 617; 1 Stat. 655, 665, c. 22]). The district attorney, however, contends, that this basis is taken away by the act of 1818, and that of the "actual value" at the place of exportation, without any reference to the cost, is substituted in its place. The counsel on the other side deny this position, and refer to the fourth section of the act as decisive of the question. That section, which is, substantially, in the same terms as the former enactments on the same subject, declares, "that the ad valorem rates of duty upon goods, &c. shall be estimated by adding 20 per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any island, port or place beyond the same, and ten per cent. on the actual cost thereof, if imported from any other place or country, including all charges, except commissions, outside packages, and insurance." The first section of the act also denies an entry of the goods, unless "the original invoice thereof" shall be produced to the collector, and upon the non production subjects the goods to an appraisement in the manner provided for by the act. The fifth section goes on to provide, that in addition to the oath before required by law to be taken by the owner, &c. on the entry of goods, &c. he shall on the entry of any goods imported and subject to an ad valorem duty, "declare on oath, that the invoice produced by him exhibits the true value of such goods, &c. in their actual state of manufacture at the place, from which the same were imported." This is the section mainly relied on by the government in support of the supposed change of the basis of valuation. The argument is, that "true value" here means something distinct from "actual cost" of the goods. That it means, what is called in the 8th section of the act the "current value," or the common marketable price of the goods at the place of exportation, without any reference to what price the importer actually gave for them. The 9th section too, is thought to corroborate this construction, because it requires the appraisers to report, in cases submitted to them, "to the best of their knowledge and belief, the true value thereof, when purchased, at the place or places, from whence the same were imported." Upon the most careful examination of the subject, it appears to me, that this is not the true interpretation of the act, and would involve it in the most manifest inconsistencies. It is in direct opposition to the language of the fourth section, the just and natural interpretation of which is settled by the uniform practice under the former laws where the same terms occur. And it would be a strange interpretation of any section of an act, to reject its whole obvious meaning, confirmed by long usage, for the purpose of supporting a doctrine built upon the ambiguous phraseology of another clause. This is not all. The very section (the fifth) on which the argument relies, shows, that the new oath is not to abrogate the old oath required by the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], upon the importation and entry of goods. It purports to be an auxiliary clause only; and if so, it surely cannot carry in its bosom a requisition directly contradictory to the true intent and meaning of the old oath. The legislature cannot have required of an importer, that he shall swear to two facts in all cases, one of which is wholly immaterial in all, and would be wholly untrue in many cases. Now, the 36th section of the act of 1799, c. 128 [1 Story's Laws, 606; 1 Stat. 655, c. 22], in explicit terms requires the importer to make oath, that the invoice of the goods produced at the custom house, "contains a just and true account of the cost thereof, including all charges;" and that the invoice is a true and genuine invoice. And yet the argument supposes, that the act of 1818 [3 Story's Laws, 1679; 3 Stat. 433, c. 79] requires, that the importer should make oath, that the same invoice "exhibits the true value of the same goods," which "true value" is interpreted to be the common market price of the goods, which in many instances must be

different from the actual cost of the goods to the importer. Surely the legislature cannot be presumed to authorize, much less to require, any person to commit a solemn perjury. The words "true value" must, therefore, be interpreted in a sense consistent with "actual cost;" and the new oath can mean no more than a more solemn and direct asseveration, to cut short any mental evasions or reserves, that the actual cost in the invoice is the true cost or price at which the goods were purchased by the importer. The original and supplemental oaths would then be perfectly consistent in all cases; and the proceedings would exactly coincide with the apparent intent of the 9th section of the act, for the appraisers would in the cases referred to them, pursuing the general policy of the act, appraise the goods at "the true value thereof, when purchased" by the importer, "at the place or places from whence the same were imported." The 8th section, in my judgment, confirms this construction of the act; for it provides for cases, where the manufacturer is the importer, and in such cases substitutes in the oath the "current value" of the goods at the place of the manufacture for the "actual cost." Surely, if the legislature had intended the "current value" to be in all cases the rule, it would not have provided for this as an excepted class. The "true value" of goods in this predicament may well be deemed the "current value" of them to the importer; since in the language of the act, it is the same "as he would have received, if the same had been there sold in the usual course of trade;" and if so sold, the "current value" to the purchaser, would have been the "actual cost" or "true value" of his purchase. The 11th section does not, in the slightest degree, impair the construction, which I have already asserted. Upon that section I shall have occasion more particularly to comment; at present it is sufficient to say, that it is manifest, that the "correct and regular invoices according to law," alluded to in that section, are such as contain the "actual cost" of the goods; and that the provisions of that section are addressed, as the 13th section in terms declares, "to the case of fraudulent invoices."

My judgment accordingly is, that the act of 1818 has not changed the basis of the valuation, by which duties are to be estimated; and that it is still the duty of the importer to make out his original invoices according to the "actual cost" of his purchase; and it is still the duty of the collector in cases of bona fide invoices to compute the duties by that standard, pursuant to the 4th section of the act of 1818. It is only where such invoices are not produced, or if produced are infected with the suspicion of fraud; or where, as in cases of damaged or wrecked goods or of goods imported by the manufacturer, this basis becomes inapplicable, that the collector is at liberty to direct an appraisement. And it is obvious, that upon such appraisements the object is to arrive at the same result, viz. the "actual cost" by the only means within the reach of the law, the ascertainment of the "true value" at the place of exportation.

Having disposed of this point, which was the more necessary to be fully considered, because it was pressed with great earnestness at the bar, and was asserted to have occasioned great inconveniences from a diversity of opinion and practice, it remains to consider the question, on which the cause mainly hinges, as to the conclusiveness of the appraisement when rightfully made. And I think it may be taken as conceded, or at least as not denied, that the appraisement is conclusive of the value in cases of damage, wreck, and non-production of the original invoices, and indeed in all the cases arising under the act, excepting those provided for in the 11th section. That section declares, "that whenever in the opinion of the collector, there shall be just grounds to suspect, that goods, &c. subject to an ad valorem duty, and imported into his district, have been invoiced below the true value of such goods, &c. in their actual state of manufacture at the place, from which they were imported, such collector shall direct them to be appraised in the manner prescribed by the ninth section of this act; and if the value at which they shall be appraised shall exceed by twenty-five per cent. the invoice prices thereof, then in addition to the ten or twenty per cent., as the same may be upon correct and regular invoices according to law, there shall be added fifty per cent. on the appraised value, on which aggregate amount the duties on such goods, &c. shall be estimated." It is clear, as has been already stated, that this section applies only to cases of fraudulent invoices, and is designed to operate as a penalty for meditated deception. And I accede to the argument at the bar, that it was never designed to be applied, unless in cases, where the collector himself, exercising his own judgment honestly and carefully, does entertain the opinion, that there are just grounds of suspicion, that the invoice is below the true cost. The law has intrusted him with a high discretion on this subject, which he is not at liberty to waive or to surrender to other persons, however respectable they may be; and considering the serious nature of the imputation and the penal effects, which the appraisement may involve, the merchant has a right to claim, that the collector shall not, without satisfactory inquiry on his own part, direct it to be made. The collector has a right to get information from any quarter he may please; but he must at last act, not on the suspicion of others, but on his own, under the just responsibility of his official character. I accede, also, to the doctrine, that the appraisers have nothing to do with the classification of the goods,

whether liable to the addition of the ten or twenty per cent.; or, whether included in one or another description of ad valorem duties; their duty is simply to ascertain and report the value of the goods, and this done, they are functi officio. But it does not appear to me, that either of these concessions change the posture of this case. I cannot perceive any construction of the act, which does not absolutely require, that the appraisement, when rightfully made, shall be conclusive. The more the provision is fenced round and guarded to prevent abuses in the exercise of the power, the more it shews the opinion of the legislature, that the party had no other remedy. Of what practical use would it be to require such formal appraisements, if, after all, they could always be revised and overturned at the will of the importer? How are we to get over the positive declaration of the legislature, that the duties shall be estimated upon the appraised value, with the addition of 50 per cent. if it exceed the invoice value by 25 per cent; if by less than 25 per cent., then that "such appraised value shall be considered the true value of the goods, upon which the duty is to be estimated?" If the appraised value shall be less than the invoiced value, then that "the duty shall be charged in the invoice value, in the same manner as if no appraisement had been made (Act of 1818, c. 74, §§ 11, 12 [3 Story's Laws, 1682; 3 Stat. 432])?" It appears to me, that when the legislature has specified a particular mode of estimating the duties in any case, that excludes any other mode of estimating them. Upon any other principle of interpretation it might be contended, that the invoice value even upon bona fide importations admitted to entry is not conclusive as to the computation of duties. The court has been referred to the 45th section of the revenue act of 1799, c. 128, [1 Story's Laws, 612; 1 Stat. 661, c. 22], as containing an analogous provision, not conclusive, for the estimation of duties by the collector, upon what he may deem an excess of sea stores. The clause does not strike me in that light. I think the manifest intent of that enactment is to give the collector a right to estimate the amount of duties upon such excess, and that his decision is conclusive.

Upon the whole, I am of opinion that an appraisement regularly made under the act of 1818, is conclusive upon the duty and value of the goods; and that no evidence can be admitted at the trial to show, that this is not the "actual cost," "prime cost," or "true value," as it is variously phrased in the statutes on this subject.

But it is said, that supposing the appraisement, if regularly made according to law, would be conclusive, and under such circumstances the evidence of the original cost was properly rejected; yet the direction of the district judge, as to the sufficiency of the evidence to maintain the action for the duties claimed by the United States, was wrong for two reasons. The first is, because the evidence demonstrates, that the collector did not in fact suspect, or exercise any judgment, whether there was any just grounds to suspect, that the invoice produced by the importer was fraudulent or undervalued. The second is, because the appraisers had in fact prejudged the case, before they were appointed to make the appraisement; and thus the impartial judgment contemplated by law was not and could not be obtained.

I confess, that these constitute the principal difficulties, which I have felt in the consideration of this record. That what was done in this particular case did not result from any intended omission of duty on the part of the collector was admitted at the argument, and could not be doubted by any persons acquainted with his high and honourable character. If there has been any error, it is an unintentional error in the construction of the law, and in the general practice under it. And I must say, that the collector has acted under a mistake, if he ever has ordered an appraisement, where he did not personally entertain the opinion, that there were just grounds of suspicion, that the invoice of the goods was below the cost. I think he has no authority under the 11th section of the act, to order an appraisement, unless he honestly entertains such an opinion; and so far from its being his duty to be governed as a proceeding of course, by the opinions of others in this respect, it is his duty to exercise his own judgment, and to regard the opinions of others, no farther than their knowledge and skill entitle them to weight in forming that judgment. I admit, also, that the practice of allowing the government appraisers to examine the invoices of the goods for the purpose of reporting their judgment on the case, before any appraisement has been decided upon, and with a view to that object, is liable to objections, and may open the door to serious abuses. The law, in authorizing the appointment of government appraisers, supposes them to be perfectly impartial, and when called upon to exercise their duty, to be free from all improper bias. They are to make the appraisement, not by themselves, but in conjunction with a third appraiser chosen by the importer. The judgment of all the appraisers is to act upon the subject matter, not separately, but in union. They may be truly said to be legislative referees; and it would certainly be no recommendation in such a case, that they had already settled the question. The practice has probably crept in with a view to public despatch as well as private convenience; and where the parties in interest assent to it, there may be no solid objection to it. But if there is no such assent, in my judgment the government appraisers might with propriety abstain from all examination, until

they are called upon to make it in the regular course of duty. But, whatever may be my opinion on these points, I am bound to consider, in the absence of all contrary evidence, that the collector did exercise his judgment as to the grounds of suspicion; and his directing an appraisement is prima facie evidence of that fact. The law presumes every public officer to act according to his duty, and it will not impute a contrary intention to him, unless upon plenary proof. And I think the proof in a case like the present ought to be direct; for such conduct would indicate a negligence in the discharge of his official duty, which no court ought to impute without very strong evidence.

As to the other point, it appears to me, that if the appraisement be fraudulently made, it is not conclusive; but no evidence of a bias or previous opinion in any of the appraisers, which is consistent with honesty, can invalidate the appraisement. It is not even surmised, that the appraisers in this case were guilty of any fraud, and the very circumstance, that what they did was according to the ordinary course of practice would sufficiently repudiate such a notion. I am, therefore, of opinion, that as there is no proof in the record (and with that only I have any right to deal) that the appraisement was fraudulent or unauthorized, the grounds for holding it invalid are completely taken away. The judgment of the district court is therefore affirmed with costs.

[NOTE. See 11 Wheat. (24 U. S.) 419.]

TAPPAN (UNITED STATES v.). See Case No. 16,431.

Case No. 13,750.

TAPPAN v. WHITTEMORE et al.

[15 Blatchf. 440; 18 Am. Law Reg. (N. S.) 191; 7 Reporter, 173.] [1]

Circuit Court, S. D. New York. Jan. 9, 1879.

BANKRUPTCY—GENERAL ASSIGNMENT—LIMITATION OF ACTION—TIME WHEN CAUSE ACCRUED.

B. made a general assignment, for the benefit of his creditors, to J. Two days afterwards he paid to W. money, the title to which had passed to J. by the assignment. Subsequently, T. became trustee in bankruptcy of B., and, in a suit brought by him for the purpose, obtained a decree setting aside the assignment to J., as being void under the bankrupt act [of 1867 (14 Stat. 517)], and became vested with J.'s title under the assignment. He then brought suit against W. to recover said money, within 2 years after he became vested with J.'s title, but more than 2 years after the assignment in bankruptcy was made to him, as trustee: *Held*, that, under section 5057 of the Revised Statutes of the United States, the cause of action did not accrue for the trustee until he became vested with J.'s title.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 173, contains only a partial report.]

[This was an action by J. Nelson Tappan, trustee in bankruptcy of Archibald Baxter and Duncan C. Ralston, against Theodore W. Whittemore and Richard B. Whittemore. For prior proceedings in this litigation, see Cases Nos. 1,119–1,121.]

Abbott Bros., for plaintiffs.
Edward B. Merrill, for defendants.

WALLACE, District Judge. This case presents the single question, whether, upon the facts alleged in the complaint, which are admitted to be true, the defence of the statutory limitation of actions, prescribed by section 5057 of the Revised Statutes of the United States, can prevail. That section provides, that "no suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." The complaint shows, that the plaintiff was appointed and confirmed as trustee in bankruptcy of the estate of Archibald Baxter & Co., bankrupts, and, as such trustee, received an assignment of their estate, on the 28th of March, 1876. On the 26th of April, 1878, the plaintiff brought the present suit, to recover $2,500, paid by the bankrupts to the defendants, on the 9th of August, 1875. The complaint does not allege that the sum thus paid was paid in contravention of the bankrupt act or in fraud of the creditors of Baxter & Co., but alleges that, in fact, the money belonged to one Dwight Johnson, to whom Baxter & Co. had made a general assignment of all their property, in trust for creditors, two days before the payment, and that, when the defendants received the money, they had knowledge of the assignment, and that the money belonged to Johnson.

Upon these facts, it seems quite clear, that the cause of action did not accrue to the plaintiff at the time when, as trustee, he received an assignment of the bankrupts' estate. He could not, at that time, have maintained an action against the defendants. Of course, the bankrupts had no right of action to recover the money back, and the plaintiff, as trustee, acquired no better right than the bankrupts had, except as to property conveyed in fraud of creditors, or money or property transferred in contravention of the bankrupt act. The money which was received by the defendants was not the money of Baxter & Co. but that of Johnson, and no one, except Johnson, could have recovered it of the defendants. Subsequently, the plaintiff became vested with the cause of action. As appears by the complaint, he filed a bill to set aside the general assignment from Baxter & Co., to Johnson, as a transfer in contravention of the bankrupt act, and as

void as to the plaintiff, because made with a view to prevent the property of the assignors from being distributed under the bankrupt act; and, on the 15th of May, 1877, a decree was rendered in that action, setting aside the assignment as to the plaintiff. By force of this decree and a transfer made in obedience to it, all the property and rights of action which had passed to Johnson, under the general assignment, became vested in the plaintiff. Then, and not until then, the plaintiff was in a position to maintain an action against the defendants for the money, which, under the assignment, belonged to Johnson, but which the defendants had received without authority from Johnson. Then, and not until then, the cause of action accrued for the trustee. The statute begins to run only from the time when the assignee has a cause of action upon which he can bring suit. It is a statute to enforce vigilance and promptitude on the part of assignees, and neither its language nor the object it is designed to effect, authorizes a construction which might debar an assignee from enforcing a claim because two years may have elapsed before he has become vested with the right of action. If, in the present case, the trustee had failed, without any fault or want of diligence on his part, to obtain the decree setting aside the assignment until two years had elapsed, under the construction claimed by the defendant, he could not have maintained an action, but would have been met and defeated by the statutory bar. Thus he would be barred of his action, although he never had a cause of action. This, surely, cannot be the intent of the statute. While the cause of action arose when the money was received by the defendants, it did not accrue to the trustee until he could avail himself of it.

If it had appeared that Baxter & Co. paid the money to the defendants in contravention of the bankrupt act, or in fraud of creditors, a different result would follow, because, in such case, the plaintiff could have maintained an action against the defendants as soon as he was appointed trustee and received an assignment of the bankrupt's estate, and Johnson's title to the money would not have stood in his way. In such a case, the plaintiff would not have derived title through Johnson, or through the assignment, but through the statute, which invested him with the right of action to recover all property conveyed by the bankrupt in fraud of his creditors, or in fraud of the provisions of the bankrupt act (sections 5046, 5128, Rev. St.); and the defendants could not have interposed the assignment and Johnson's title under it, as a defence, because, as against the plaintiff, the assignment was void. Undoubtedly, when the assignment was set aside, at the suit of the trustee in bankruptcy, the title of the trustee related back to the time of the assignment. But the doctrine of relation is never applied to defeat a remedy, and cannot be invoked to subject the plaintiff to a disability which otherwise would not exist.

Judgment is ordered for the plaintiff.

[For subsequent proceedings in this litigation, see Case No. 1,122.]

TAPSCOT (WATSON v.). See Case No. 17,290.

TAPSCOTT (MORGAN v.). See Case No. 9,808.

Case No. 13,751.

The TARANTO.

BRUCE et al. v. SWASEY et al.

[1 Spr. 170;[1] 12 Law Rep. 5; 6 West. Law J. 418.]

District Court, D. Massachusetts. March, 1849.

SHIPPING—TITLE—ASSOCIATION—MISCONDUCT OF AGENTS.

1. Where sixty persons formed a voluntary association for mining and trading in California, and purchased a vessel and stores for a voyage to San Francisco, and took a conveyance thereof, in the name of certain persons, as their agents: *Held*, that the members of the association had a right to a decree for the title and possession of the vessel, and the stores on board of her.

[Cited in The Daisy, 29 Fed. 301.]

2. But from this decree was excepted a portion of the stores, which the association had not paid for, and which had been purchased without their authority.

3. Compensation to the agents was refused, by reason of their misconduct.

4. In a petitory, or possessory suit, material men cannot intervene to enforce a lien, which they may have upon the vessel.

5. Such a lien will not be affected by the decree, in such suit.

6. An attachment of the vessel, at common law, by a creditor of the agents, in a suit against them, was no obstacle to a decree in favor of the association, for title and possession.

The libellants [A. C. Bruce and others], sixty in number, were a joint-stock company, called "The Shawmut Mining and Trading Association," with a capital of $18,000, in sixty shares, of $300 each, for the purpose of mining and trading in California. They had appointed the respondents, Thomas H. Swasey & Co., their agents and treasurers, and had paid to them their subscriptions. The Messrs. Swasey purchased the brig Taranto with this money, and fitted her for sea, with stores for the use of the association, for eighteen months. Just as the association was about to sail, the Messrs. Swasey presented their account, which made the association indebted to them about $4,000, above the capital stock. The association, on examination of this account, became dissatisfied with the conduct of their agents, and with

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

the state of their accounts; the more so, on finding that they had got possession of, and destroyed, the bond given by them to the association, for the faithful performance of their duty. The Messrs. Swasey, having taken the bill of sale and custom-house documents in their own name, and in that of J. M. Merrill, the master, who was in their interest, and having the possession of the vessel, with all the stores on board, refused to give them up, or permit the vessel to go to sea, unless their account was allowed and paid by the association.

The libel alleged, that the libellants were the lawful owners of the brig Taranto, her tackle, apparel, and furniture, and of the sea-stores on board, and entitled to the possession thereof. The prayer of the libel was in these words, after the prayer for process: "And that this honorable court would be pleased to decree that the libellants have a right to the title and possession of said brig Taranto, her tackle, apparel, and furniture, and to the sea-stores now on board said brig, and that the title to the same be decreed to be vested in Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and M. A. Thomas, lawful agents of the libellants, for the use of the libellants; and to decree that the possession of said brig, her tackle, apparel, and furniture, and of the sea-stores now on board said brig, be delivered to the libellants, or to the said Adams, Dingley, Danforth, Gill, and Thomas, for the use of the libellants; and to decree that the said Thomas H. Swasey, Edward Swasey, and John M. Merrill, do deliver to the libellants, or to the said Adams, Dingley, Danforth, Gill, and Thomas, for the use of the libellants, the bill of sale, certificate of registry, enrolment, or license, and all other documents belonging to said vessel, in their possession," ending with the prayer for general relief and for costs.

There were three sets of claimants. Thomas H. Swasey & Co., agents of the association, holders of the bill of sale, and register of the vessel, claimed a lien upon them and the vessel, for the amount of their account against the association. J. M. Merrill, master of the vessel, claimed a lien for security against liabilities which he might be under, as master, to persons who had furnished labor or materials for the vessel. Messrs. Thayer & Merrill, who had furnished provisions and ship chandlery to a large amount, claimed a lien for their account, under the statute of Massachusetts, 1848 (chapter 290), which creates a lien on vessels, in the home port, for labor, materials, provisions, or stores furnished. They had, also, before the filing of the libel, attached the vessel in a suit at common law, in the state court, against the Messrs. Swasey, for these provisions, and denied the right of this court to defeat the attachment. The trial and arguments occupied several days; and more than thirty witnesses were examined on the merits.

R. H. Dana, Jr., for libellants.

This court has jurisdiction to decree title as well as possession, and full power to pass upon litigated questions of title. The Tilton [Case No. 14,054]; Dunl. Adm. Prac. 69, 296; Betts, Adm. Prac. 16; Rules of the Circuit Court in Admiralty, xx.; 1 Kaufman, Mack. (Modern Civil Law) § 193, note. It will take jurisdiction over the sea-stores, as incidental and auxiliary to the vessel, as in cases of cargo and freight. This court has jurisdiction, by a personal admonition, to require a respondent to deliver up documents of title, and revenue papers. Hall, Adm. Prac. 199; Conkl. Adm. Prac. (1st Ed.) 892; Marr. Form. 337. The Messrs. Swasey, as ship's husbands, or as agents, have no lien, by the general maritime law. There was no contract for a lien, and their conduct has been such as to defeat any equitable claim for a lien which they may set up. John M. Merrill, as master, has no lien, by the general maritime law, and in his case, as in that of the Messrs. Swasey, there was neither a special contract for a lien, nor equities which might lead the court to decline taking the vessel from him. As to the claim of Thayer & Merrill, if they have any lien, by the statute of Massachusetts, it cannot be affected by the decree prayed for, as the decree only affects title and possession, and the lien set up is irrespective of either title or possession. The decree could produce no other effect on the lien under the statute, than would be produced by a sale and delivery of title and possession, out of court. The prayer of Messrs. Thayer & Merrill, to have their lien enforced, is inadmissible. They are not in a position to enforce a lien, having simply come into court as respondents to a petitory libel, against which their lien is no defence. Also, they do not submit themselves to the jurisdiction of the court, but insist on the preservation of their attachment at the common law, which is inconsistent with the enforcement of their lien. Moreover, their attachment is a waiver of their lien. The attachment of the vessel, at common law, by Thayer & Merrill, is no obstacle to this decree. They have not proceeded in rem, against the vessel, for which they have furnished supplies, nor against any particular fund. The common law knows no such process. They have attached the vessel, simply, as the property of the Messrs. Swasey, in the same manner that they would attach their house or furniture, and hold it by no other or better claim. As between Thayer & Merrill, as attaching creditors, and the libellants, who claim the vessel as their own, the only question is, in whom is the property in the vessel? One of the objects of this suit is to contest the validity of the attachment, which can be contested as well in a petitory suit in admiralty, as in a suit of replevin, at common law. Betts. Adm. Prac. 17. As to their attachment, Thayer & Mer-

rill have no better claim than any other creditor of the Messrs. Swasey, who should attach the vessel, for a demand arising either ex contractu, or ex delicto. The common law attachment is founded solely on property, and has no relation to the subject-matter of the suit, to the equities between the parties, or to the particular fund benefited or credited.

Edward D. Sohier, for respondents, contended that:

On the evidence, the Messrs. Swasey had a lien by special contract; and that, if the court was not satisfied of this, yet they had made advances and incurred liabilities, for the benefit of the vessel, relying upon her as security, and the court, governed by equitable considerations, would not, under such circumstances, take the vessel from them, while their claims remained unsatisfied and unsecured. That the legal title, by the bill of sale, being in them, the court would not enforce a merely equitable title. The Guardian, 3 C. Rob. Adm. 93; Abb. Shipp. 132; Ohl v. Eagle Ins. Co. [Case No. 10,473]. As to Thayer & Merrill, he contended that their lien under the state law could be enforced in this proceeding. The Robert Fulton [Id. 11,890]. Their attachment, also, was valid, because the legal title to the vessel was in the Messrs. Swasey, and this court could not defeat the attachment which depends on the legal title, in favor of a merely equitable title. Moreover, the libellants, by permitting the Messrs. Swasey to have the bill of sale and custom-house documents, in their own name, held them out to the world as owners, and could not now set up a title in themselves, against third persons, who had given credit to the Messrs. Swasey, on the faith of their apparent ownership. By the attachment, the vessel was in the custody of the law, and could not afterwards be taken by the marshal. He should have returned the fact, that the vessel was attached in the state court, and then this suit in rem could not have gone forward. The Robert Fulton [supra].

Mr. Dana, in reply.

The case of The Robert Fulton was a proceeding for the enforcement of a lien, and the respondents, having liens also, properly intervened to have their claims satisfied from the proceeds. But this is not a suit for the enforcement of a lien. Also, in that case, the appellants had proceeded in rem, under the local statute, and not by attachment. An attachment is no objection to a proceeding in rem, as in the case of seamen's wages, bottomry, or salvage.

SPRAGUE, District Judge, in delivering his opinion, said, in substance, that he was satisfied, upon the evidence, that the following was the true state of the facts: The Messrs. Swasey were the originators of this enterprise, for the purpose of being made agents, and for the commissions and other profits of doing the business. They advertised for persons to join the company, prepared a constitution, which gave them the office of agent and treasurer, and fixed the capital stock at $15,000, in fifty shares of $300 each. They gave strong assurances to inquiries, that they had made careful estimates, and that this sum was ample to buy, fit out, and provision the vessel for two years. These assurances were not fulfilled, and were made without sufficient foundation. On the faith of them, however, the requisite number of persons joined the company, a meeting was called, and the constitution adopted. As prepared by the Messrs. Swasey, this constitution gave no security to the company for the fidelity of the agents, but an amendment was made, requiring of them a bond in $20,000 for the faithful discharge of their duties. This bond was given, with proper sureties. The Swaseys then announced to the company, that it would require $3000 more to pay all expenses; and gave the strongest assurances that this would be sufficient, and leave a handsome balance for contingencies; and said that they had then obtained all their bills of any consequence, and knew what the expenses would be. On the faith of these assurances, the company enlarged their number, by creating ten new shares, which were subscribed for and chiefly paid in. The bill of sale of the vessel was permitted, by a vote of the company, to stand in the name of Messrs. Swasey, and of Captain Merrill. On this point the evidence is complete and uncontradicted,—that the bill of sale was so left, merely as matter of convenience, and in reliance upon the bond which had been given, and without any view to its being security to the agents or master. At the time of this vote, there was no idea that the company would, or could, be in debt to the Messrs. Swasey. Indeed, the Swaseys had no authority to spend anything, beyond the amount of the capital stock. Between themselves and the association, they were merely disbursing agents.

About the middle of February, the Swaseys summoned the members to the city, and on the 21st, with the knowledge of the Swaseys, it was voted to sail on the 24th. The vessel was now loaded, the hatches on, the boats stowed, and everything ready for sea. On the afternoon of the 22d, the Swaseys, for the first time, announced to the company, that it was in debt to them about $4000. I have no doubt, from the evidence, that they knew the state of the accounts long before this, and delayed the announcement intentionally, until the company was placed under the disadvantage of being all assembled, most of them at a distance from their homes, and in the expectation of going immediately to sea. The company was dissatisfied, the more so on inquiry into the purchases made by the Swaseys and, on looking for the bond, it was ascertained that Mr. T. H. Swasey had obtained it, in some manner unknown to the company, and

destroyed it. This act, his counsel very properly has not attempted to defend.

On inquiry, it appeared that the Swaseys had charged the company with the face of the bills of goods purchased by them, of Thayer & Merrill, when in fact there had been, (as to a part of the bill,) a discount of three per cent.; and $100 was discounted from the price of the vessel, which was not communicated to the company.

I am satisfied that there was no contract between the Swaseys and the association, by which they have any lien upon the ship or her stores. As to a right in general equity, which an agent has to retain property against his principal, on which he has made advances, it is enough to say, that the conduct of the Swaseys has not been such as to entitle them to enforce any such equities, in this court, against the association. As against these respondents, therefore, the decree must be for the libellants.

As to the claim of Captain Merrill, he has no lien by contract, nor by the general maritime law, and there is no evidence that he has incurred any liabilities, nor had he authority from the company to do so.

The respondents, Thayer & Merrill, claim a lien for their provisions and chandlery advanced, under the Massachusetts statute of 1848 (chapter 290). This statute creates a lien on a vessel, in the ports of the state, under certain limitations, in favor of parties who have furnished labor, materials, stores, or provisions. It provides no means of enforcing the lien by any process from the state courts, and the parties are left to pursue their remedy in admiralty. These respondents have not done so. It is not necessary to decide whether they had a lien, or whether it is waived; for they are not properly before the court, for the enforcement of a lien. They are not libellants; no notice is given to the world to show cause against their claim, and the libel to which they respond, is diverso intuitu. It would be unprecedented, in a petitory or possessory suit, to enforce a lien of a party who comes in merely as a respondent. If the libel itself were for the enforcement of a lien, the situation of these respondents might be different, as in the case of The Robert Fulton [Case No. 11,890]. Neither is their lien, if any they have, an objection to the granting of the decree prayed for. The lien created by the state statute, is independent of the title or possession now in controversy, and cannot be affected by the decree.

But Messrs. Thayer & Merrill have attached the vessel, at common law, in a suit against the Messrs. Swasey, and claim to have that attachment preserved. They have not proceeded in rem, and their attachment is valid only in case the property attached is the property of Messrs. Swasey. It is partly to determine this very question, whether the vessel is the property of the Messrs. Swasey, or of the libellants, that this suit is brought. We are liable to be misled, in the first view of this point, by an impression that their attachment is in the nature of a proceeding against certain specific property, on which they have a claim arising out of the nature and circumstances of their debt. But their attachment is no better, at the common law, than the attachment of any other creditor of the Messrs. Swasey, for a different cause of action, or than if laid upon any other property of the Messrs. Swasey.

Being satisfied that the ship and stores were not the property of the Messrs. Swasey, when the attachment was made, and that Thayer & Merrill knew, when the debt was contracted, that the property libelled was bought with the money of the company, and held by the Messrs. Swasey merely as agents, their attachment is no obstacle to the decree prayed for.

A portion of the stores have not been paid for. These, of course, the libellants cannot retain, without being bound for their value, though originally purchased without authority. The decree, as to the stores, must therefore be for those which have been paid for. In this view, my attention has been called by counsel to the commissions charged by the Messrs. Swasey. They were to have commissions for services rendered, but I do not think that they have rendered valuable services to the company, and their conduct has been such that they are not entitled to compensation. I shall therefore treat the libellants as entitled to the whole amount which they have paid to the Swaseys, except actual expenses.

After this opinion was pronounced, the libellants made an arrangement with Messrs. Thayer & Merrill, to return so much of the goods, as exceeded in value the amount which the libellants had paid to the Messrs. Swasey; and it was decreed that the libellants had a right to the possession of the ship, and of the stores on board of her, and that the title thereto should be vested in certain persons who had been named by the libellants, as their agents for that purpose, and that possession of the ship and stores should be delivered to the libellants, or to said persons, as their agents, and that the libellants recover costs.

["And now after, &c. . . . the court doth order, adjudge, and decree that the libellants have a right to the title and possession of the brig Taranto, her tackle, apparel, and furniture, and of the sea-stores now on board said brig; also doth decree that the title to said brig, her tackle, apparel, and furniture, and to the sea stores now on board said brig, be vested in Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and Marcus A. Thomas, for the use of the libellants; also doth order, adjudge, and decree that the possession of said brig, her tackle, apparel, and furniture, and of the sea stores now on board said brig be delivered to the libellants, or to the said Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and Marcus A. Thomas, for the use of the libellants; also

doth order, adjudge, and decree that the said Thomas H. Swasey, Edward Swasey and John M. Merrill, deliver the bill of sale of said brig Taranto, and the certificates of registry, enrolment, and license, and all other documents in their possession, belonging to said brig, and required by the laws of the United States, to the libellants, or to the said Nathaniel Adams, John T. Dingley, C. P. Danforth, C. G. Gill, and M. A. Thomas, for the use of the libellants; also doth order, adjudge, and decree that the said Thomas H. Swasey, Edward Swasey, and John M. Merrill pay to the libellants costs taxed at —— dollars.] [2]

TARBELL, Ex parte See Case No. 2,783.

TARBELL (CRAMTON v.). See Case No. 3,349.

TARBOX (DANIELS v.). See Case No. 3,568.

Case No. 13,752.

TARDY et al. v. MORGAN.

[3 McLean, 358.] [1]

Circuit Court, D. Indiana. May Term, 1844.

COURTS—JURISDICTION—EQUITY—CONVEYANCE—PURCHASER WITH NOTICE—FRAUD.

1. A court of chancery in any other state, than that in which land is situated, can make no decree which can affect the title to such land.

2. But having jurisdiction of the person of the owner of the land, they may decree a conveyance, and enforce the decree, by attachment or otherwise.

3. A conveyance executed under a decree, operates by virtue of the conveyance, and not by force of the decree.

4. In such a case, the chancery suit does not constitute a part of the title, and need not be presented as such. The proceeding in chancery may be looked at as showing the ground on which the conveyance was made. A knowledge of facts, which if traced and understood, will lead to a knowledge of title, is sufficient to charge a purchaser.

[Cited in Janvrin v. Janvrin, 60 N. H. 172; Galley v. Ward, Id. 332. Cited in brief in Garrard v. Pittsburgh & C. R. Co., 29 Pa. St. 157; Hill v. Epley, 31 Pa. St. 332; Woods v. Wilson, 37 Pa. St. 380.]

5. Fraud may be proved by circumstances.

[This was a bill by Tardy and others against Lewis Morgan.]

Mr. Smith, for complainants.

Mr. Dunn, for defendant.

OPINION OF THE COURT. The bill states that the complainant, under a decree of the chancery court of Virginia, purchased the two half quarter sections in Shelby county, Indiana, which was conveyed to him by William Craddy, dated 28th May, 1842. That the deed was not recorded until the 5th September, 1843; before which time, Craddy had fraudulently sold the said land to Morgan, the defendant, who had notice of the previous purchase and deed; and that under this fraudulent purchase, he received a deed for the land from John Craddy and William Craddy, dated 21st November, 1842, which was recorded on the next day. The answer admits the procurement of the title by the defendant, and denies any notice which can charge him.

The statute of Indiana gives effect to the deed first recorded, where a prior deed has not been recorded within twelve months. But, if the junior deed first recorded has been obtained fraudulently, the statute does not protect it. The court in Virginia could exercise no jurisdiction over this land in Indiana. A decree of such court, could not by the mere force of its own power, reach the title or affect it. But having jurisdiction of the person, it had power to enforce its decree against him by attachment or otherwise. And it seems, that in obedience to its decree, the conveyance to the complainant by William Craddy was executed. This deed is the foundation of the complainants' title. And the proceeding of the court could not be referred to. It is insisted that the chancery proceedings constitute a part of the complainants' title; and that the extract of those proceedings, as certified and offered in evidence, are not admissible. But this objection is not sustainable. The deed was the act of the party, and is binding without a reference to the decree, if a consideration be named in it. And the reference to the chancery proceeding need be considered for no other purpose, except as showing a consideration.

The case must turn upon the question of notice. This the defendant does not sufficiently deny. The first letter to him from Houston, one of the complainants, dated 11th December, 1841, informed defendant that he and others had purchased the land, under a decree of the court, and inquired as to the quality of the land, and what amount of taxes were due upon it. Also, he inquired whether defendant, who had previously been Craddy's agent respecting the land, would act for the complainants. The answer of the defendant, dated 27th December, 1841, gives an account of the land, amount of taxes paid, &c. He wished to know at what time the land was purchased, what kind of deed was given, and at what price the land could be purchased. Also, whether a deed of general warranty could be given. A letter from William Craddy to defendant, dated June, 1842, complains of the proceedings of the court, of the sheriff in breaking open his doors, &c., and represented that he had been applied to for a deed which he would never give. That the proceedings were not binding, &c. The deed had been executed by Craddy in May preceding the date of this letter. This correspondence shows a knowledge of facts by the defendant, which should,

[2] [From 12 Law Rep. 5.]

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

at least, have put him upon inquiry. Indeed, the last letter to him from Craddy was, of itself, sufficient for this purpose. It is true he denied having executed a deed for the land, but there was enough in the letter to excite a prudent man to cause the chancery proceeding in Virginia to be examined. There are circumstances connected with the execution of the deed to the defendant, which create some doubt whether it was a bona fide transaction. The sum of twelve hundred dollars is named as the consideration in this deed. And the defendant alleges that this was paid by a conveyance of one hundred and sixty acres of land to the children of William Craddy.

In the cross bill filed by the defendant, he states that in 1834, William Craddy agreed to convey to John Craddy the tracts here in dispute, in consideration that he should assume a certain debt of seven hundred and eighty dollars, due by William Craddy to one Kyle, in which John was security. And complainant avers, that John did comply with the agreement, by paying the said sum of money, before the purchase by complainants. And it is averred that complainants knew of this contract. In their answer the complainants deny every material allegation in the cross bill, and especially that they had any notice of the contract between William and John Craddy. And they deny that John had any interest in the land. The deed to defendant was executed by William Craddy and John Craddy, by William Craddy, his attorney; but no power of attorney was proved. Nor was there any proof that John Craddy paid the sum which, as security, it is alleged he agreed to pay. On the contrary the defendant states he paid the consideration by conveying other lands to the children of William Craddy.

In the first place we think the defendant had notice to charge him, and this, connected with the circumstances referred to, go to establish the fact that this purchase was not bona fide, and that the complainant is entitled to the relief he prays for. Decree, &c.

TARDY (UNITED STATES v.). See Case No. 16,432.

Case No. 13,753.

TARLETON et al. v. MALLORY et al.

[10 Ben. 46.] [1]

District Court, S. D. New York. July, 1878.

SEAMEN'S WAGES—WRECK—TIME OF DISCHARGE.

A steamer went ashore on February 4, 1876. The master did not abandon hope of getting the vessel off till March 10th. Up to February 16th the crew remained on the shore by the vessel, engaged under the master's orders in taking the cargo out and stripping the vessel. On the 16th of February the provisions gave out, and the crew were sent to Nassau, N. P., where they were retained by the master's direction till March 10th, when they were discharged. They were paid wages up till February 4th, and on returning to New York they filed a libel against the owners, claiming to recover wages up to March 10th. The owners defendant, claiming that under section 4526 of the Revised Statutes of the United States, the seamen's right to wages ceased on the wreck of the vessel on February 4th, and that for their subsequent services they would be entitled only to salvage compensation, to be paid out of the proceeds of the wreck. *Held*, that the seamen were bound to continue their services as long as there was any hope of saving the ship; that the master must be held to have the power, as a general rule, to determine whether there is any hope of getting the ship afloat, and until he gives it up, the owners cannot object to paying wages on the ground that there was no chance of saving her; and that the libellants, therefore, were entitled to recover.

[This was a libel for seamen's wages by John R. Tarleton and others against Charles Mallory and others.]

Benedict, Taft & Benedict, for libellants.
Owen & Gray, for defendants.

CHOATE, District Judge. This is a libel in personam against the owners of the steamship Galveston for seamen's wages. The steamship went ashore on the 4th of February, 1876, on a coral reef on the island of Maryguane, on her voyage from New York to Port au Prince and return. The master did not discharge the crew, but under his orders they remained by the steamship, living on the beach till the 16th of February, and during this time they were engaged under his orders in taking the cargo on shore and protecting it, in stripping the ship and taking on shore whatever was taken from the vessel. On the 16th of February they were sent to Nassau by direction of the master, and there remained till the 10th of March, when they were discharged. The reason for sending them to Nassau was that provisions gave out at the place of the wreck. Up to the 10th of March the master had not abandoned all hope of getting the steamship off, and he kept the crew at Nassau in order that, if he got her off, they might go on in her. The crew have been paid up to February 4th. The question is whether they are entitled to their wages to any later time, and if so to what time? Rev. St. § 4526, provides: "In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the wreck or loss of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period."

It is claimed by the defendants, the owners of the steamship, that in this case the service was terminated by the wreck or loss of the vessel on the 4th of February, when she got aground. The statute implies that by the wreck or loss of the vessel the agreement of the seamen is terminated. It does not introduce any new rule as to when the

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

service will terminate, but refers to the established rule of the maritime law. And the law undoubtedly is, that upon a disaster befalling a ship, as by stranding in this case, the seamen are bound by their contract to stand by her so long as there is any hope of saving the ship or the cargo, and the master may, until such hope is abandoned, command their services, and they are entitled to be paid their wages while thus held by the master after the stranding. And it is wages they are entitled to, and not a salvage compensation out of what may be saved from the wreck, as the defendants claim. Now, although this vessel was in a desperate condition after the 4th of February, the seamen continued to serve in saving the cargo and parts of the ship, and were lawfully kept in readiness to continue the voyage if she should be got afloat. The master must be held to have the power, as a general rule, to determine whether there is any hope of getting the ship afloat, and until he gives it up the owners cannot object to paying the wages on the ground that there was no chance of saving her. The case of The M. M. Caleb [Case No. 9,682], cited by defendants, is not in point. There the ship had actually sunk. It did not admit of any question that she was lost. That necessarily terminated the service of the seamen. The law of the present case is carefully stated in the case of The Warrior, Lush. 476. Decree for libellants, with costs, and reference to compute.

Case No. 13,754.

TARLTON v. TIPPETT.

[2 Cranch, C. C. 463.] [1]

Circuit Court, District of Columbia. April Term, 1824.

SLAVERY—PETITION FOR FREEDOM—RETURN FROM FOREIGN COUNTRY—RESIDENCE.

1. If the owner of a slave in the county of Washington carries her to a foreign country with intent there to reside permanently, and does there reside with her for more than twelve months and is then compelled to quit that country, and returns to the county of Washington, bringing the slave with him there to reside, the slave, by such importation, becomes entitled to her freedom.

2. But if the owner be sent to such foreign country as a special agent of the government of the United States, at a stated salary, with an uncertainty, depending upon contingencies, whether he should remain there or return after accomplishing the purpose of his mission, and is compelled to leave the country before he had actually settled himself as a permanent resident there, then the taking the slave with him and bringing her back, is not an importation against the Maryland act of 1796, c. 67.

[This was an action by negro Fanny Tarlton against Cartwright Tippett.]

Petition for freedom. Mr. Alexander Scott had been appointed by the president of the United States, an agent to Caraccas in South America. He went with an intention to remain permanently, if certain events should happen. He took the petitioner with him, and she remained there with him more than a year. The event not having occurred upon which his decision to reside there permanently was to be founded, he returned to reside here, and brought her with him.

Mr. Turner, for petitioner, moved the court to instruct the jury that "if they should believe from the evidence that Mr. Scott, at the time of his leaving the District of Columbia, for Caraccas, meant permanently to reside there, with his family, and did so reside for upwards of twelve months, carrying with him and there retaining the petitioner; and that his leaving there was owing to compulsion, and not to his will, then the petitioner is entitled to a verdict in her favor."

THE COURT (MORSELL, Circuit Judge, contrà) gave the instruction.

Whereupon Mr. Jones, for the defendant, prayed the court to instruct the jury "that if they find from the evidence that the said Scott proceeded to Caraccas in a public character on a secret mission for the government, and on a stated salary; that he also had some ulterior and contingent views of remaining longer at Caraccas than was necessary for the purposes of his mission, and of engaging there in business; but that when he departed from the District for Caraccas, the duration of his abode there and the business he should engage in, were undetermined and uncertain, and dependent upon circumstances; and that, at the time of his being compelled to leave Caraccas, he had not actually settled himself as a permanent resident there, but still remained there undecided as to the duration of his residence, or the footing on which he should establish himself, then the bringing the petitioner back from Caraccas to Maryland and from Maryland to this District, was not an importation against the act of assembly."

Which instruction THE COURT gave, as prayed (THRUSTON, Circuit Judge, dissenting).

TARLTON (UNITED STATES v.). See Case No. 16,433.

Case No. 13,755.

The TARQUIN.

[2 Lowell, 358.] [1]

District Court, D. Massachusetts. Dec., 1874.

SEAMEN—WAGES—FISHING VOYAGE.

1. Courts of admiralty may admit parol evidence that illiterate seamen signed a contract not read to them, which differed from their oral agreement; and may, in some cases, re-form a written contract by oral testimony.

2. A usage or practice being proved to put on board only a part of the bait for a fishing voyage to be conducted off the coast of Nova Scotia, the owners relying on catching suitable fish to

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

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

supply the deficiency, was *held* to be reasonable; and, where the vessel, having failed to catch bait, put into port for a supply, causing a delay of a few days, *held*, that this would not authorize the seamen to refuse further duty.

[Distinguished in Burgess v. Equitable Ins. Co., 126 Mass. 78.]

3. Where the seamen refused duty before their fishing voyage was ended, and obliged the master to come home with only part of a fare,—*held*, they had forfeited their wages.

Two seamen libelled the bark Tarquin for wages; alleging that in May, 1874, they engaged for a fishing voyage from Provincetown to the Banquereau Banks, for the round sum of $150; that the vessel returned to Provincetown, in August, with a cargo of fish, and the libellants were duly discharged, having performed their duty throughout the voyage. The fourth article of the libel propounded that the voyage was broken up in July, at St. Peters, Nova Scotia, for some cause to the libellants unknown; and that the vessel from that time to the time of the libellants' discharge was engaged in the coasting trade, and had earned freight. The answer admitted the contract, excepting that it set up an engagement for the season, and not for a single voyage. It then averred that the libellants refused duty at St. Peters; and that the fishing voyage was thereby broken up, to the great damage of the owners; and that the libellants were then and there discharged, and came home in the vessel at nominal wages. It denied that a coasting voyage was undertaken; but alleged that some wood was taken on board at or near St. Peters, as ballast, to trim the vessel for her voyage home. The shipping articles required the defendants to serve for the season; but the libellants produced evidence, which was not contradicted, that they were unable to read, and that the articles were not read or explained to them, and that their bargain with the master was for one trip only. There was evidence that, when the contract is for a single trip, it is usually considered to be fully performed when the salt or the bait, or other necessary outfits, are all expended; that in this case the bait was all used up early in July, when less than half a full fare of fish had been obtained; and that the vessel having put into St. Peters for bait, the libellants and others of the crew refused duty, alleging that their trip was closed. The owner of the ship testified that, for three or four years last past, the fishing vessels had not been fully fitted out with bait before sailing, because better bait could be taken on the banks; that his vessel was fitted as usual for the year 1874, but, for the first time for several years, the bait had failed at the fishing grounds, and that his vessel and many others had been obliged to put into port for a supply. This evidence was not contradicted.

H. M. Knowlton, for libellants.

F. Dodge, for claimant.

LOWELL, District Judge. Courts of admiralty, acting upon an equitable practice, though not precisely like courts of equity, may admit oral evidence to prove that illiterate seamen have signed a contract which was not read to them, and which differed from their parol engagement, even without proof that any fraud was intended to be practised upon them. This upon two grounds: that the variation in favor of the ship-owner operates a practical fraud; and that this court has a right to re-form a written contract, in some cases, by oral testimony.

Taking it to be proved that the seamen agreed for one trip or voyage only, what were the rights of the parties? I find the evidence to be, that, if the vessel is full, or if every reasonable attempt has been made to fill her, it is to be considered that the trip is ended. This is usually measured by the expenditure of the salt or bait or provisions for the voyage. And this is the meaning of the usage testified to. The owners furnish these things; they pay a lump sum for the trip or voyage; and, when the supplies are gone, it is taken for granted that the men have served out their time.

But now comes in the modification that, of late years, all the bait has not been put on board for the trip in such voyages as this, and, when what is put on board has been used, can the men insist on going home? Upon the evidence, I think not. The reliance which the owners placed on catching bait appears, under the circumstances, to be reasonable; and, when it failed, the men were taking a rather sharp point, not conforming to the spirit of the rule, when they insisted that, the bait being out, their time was up. In fact, the usual time had not elapsed; a full fare had not been caught; the men knew very well that the short supply of bait was accidental. To put into St. Peters might extend their trip a few days; and for that it is possible they might have claimed compensation. What they insisted on was that they had made one constructive trip. Courts of admiralty do not encourage constructive performance of a fair contract.

There was no cruelty, hardship, or imposition practised on the men, nor even what in such a voyage can be called a deviation. The owners had failed to supply enough bait, and might perhaps be required to pay for any time which they lost, because it was part of their duty to furnish bait. But they had acted on reasonable and probable grounds; and the action of the men brought the voyage to a losing termination.

Under these circumstances, I think the libellants cannot truly allege that they have performed their contract. And, as it does not appear that the owners have been benefited by their services, they are not entitled to a quantum meruit.

Libel dismissed.

Case No. 13,756.

TARR et al. v. FOLSOM.

[1 Ban. & A. 24; 1 Holmes, 312; 5 O. G. 92.] [1]

Circuit Court, D. Massachusetts. Jan. 1, 1874.

PATENTS—REISSUE—IDENTITY—DEPOSIT IN PATENT OFFICE—PAINT FOR SHIPS' BOTTOMS.

1. The original patent for paints for ships' bottoms, describes the paint as compounded of a vehicle, and oxide of copper finely pulverized. In another part of the specification, the patentees describe the oxide of copper to be used, as "copper ore in the form of an oxide," and say: "We prefer to employ the pyritous friable ores, which are easily reduced to a fine powder." In a reissue of the patent, it is stated that the pyritous friable ores contain mineral and earthy substances, such as various other metallic oxides, sulphur, etc., which serve to divide the particles of oxide of copper, interposing between them substances which dissolve more slowly than they do, or which do not dissolve at all. The patentees say in the reissue: "We prefer to employ the oxide of copper, made from pyritous friable ores," that is, the oxide of copper made by roasting the pyritous ores exposed to air and heat, and thus converting the copper, which they contain, into oxide. It is proved that the oxide of copper, thus manufactured, was well known in the arts prior to the patent: *Held*, that the reissued patent is not for an invention different from the one substantially described in the original specification.

[Followed in Wonson v. Peterson, Case No. 17,934.]

2. A failure to deposit in the patent office, a sample of one of the ingredients of a composition of matter, does not invalidate a patent for such composition, when the specification describes all the ingredients.

3. It is for the commissioner to decide, before the granting of the patent, whether the deposit of the ingredients of a composition has been made, and after the patent is granted for such composition, it cannot be impeached on the ground that such deposit has not been made.

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

4. A paint for ships' bottoms, composed of oxide of copper, yielding in seawater a poisonous solution, with a suitable vehicle or medium and a base of earthy or mineral matter, is not an equivalent to a paint composed of a combination of oxide of copper, an alloy of antimony, and copper with the same vehicle; the three elements operating together to produce the poisonous action.

[Cited in Wonson v. Gilman, Case No. 17,933.]

5. The omission of one of the ingredients of a composition, before supposed to be essential, is a patentable subject, under certain circumstances.

6. A paint for ships' bottoms, composed of a combination of oxide of copper, yielding in seawater a poisonous solution, with a suitable vehicle or medium, and a base of earthy or mineral matter, which serves to divide the particles of oxide of copper, interposing between them substances which dissolve more slowly than they do, or which do not dissolve at all, is infringed by the use of a paint composed of the same vehicle, oxide of copper, and Brandon red, which is an oxide of iron associated with more or less of earthy matter, which, by its imperfect solution in seawater, retards the solution of the oxide of copper.

[Cited in Wonson v. Gilman, Case No. 17,933.]

[Bill in equity [by James G. Tarr and others against Charles E. Folsom] to restrain alleged infringement of reissued letters-patent [Nos. 4,598 and 4,599] for a paint for ships' bottoms, granted James G. Tarr and A. H. Wonson, Oct. 17, 1871. The original patent was granted Nov. 3, 1863 [No. 40,515].[2]

Causten Browne and Jabez S. Holmes, for complainants.

T. W. Clarke, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity for an alleged infringement of letters-patent granted to complainants on the third day of November, 1863, and reissued on the seventeenth day of October, 1871, in two divisions, for an improved paint for ships' bottoms, or marine paint. The answer sets up in defence that the patent was surreptitiously obtained by the complainants for what was the invention of one Owen Jones; but no evidence was introduced to sustain this defence. The answer also sets up that the specifications in the reissue describe substantially different inventions from any described and shown in the original patent, or in the specification thereof, or in the samples filed in the patent office in illustration thereof.

The original patent describes the paint as compounded of a vehicle consisting of tar and naphtha mixed together, and oxide of copper finely pulverized, in the described proportions. In another part of the specification the patentees describe the oxide of copper to be used as "copper ore in the form of an oxide." The specification also says, "we prefer to employ the pyritous friable ores, which are easily reduced to a fine powder."

In division B of the reissue the patentees state that the pyritous friable ores contain mineral and earthy substances, such as various other metallic oxides, sulphur, &c., which serve to divide the particles of oxide of copper, interposing between them substances which dissolve more slowly than they do, or which do not dissolve at all. They say in the reissue, division B: "We prefer to employ the oxide of copper made from pyritous friable ores;" that is, the oxide of copper made by roasting the pyritous ores exposed to air and heat, and thus converting the copper which they contain into oxide. The description in the original patent of "copper ore in the form of an oxide," taken in connection with "the pyritous friable ores" subsequently referred to, substantially suggests, if it does not accurately describe, the oxide of copper made by roasting the pyritous friable ores described in the reissue, especially when we take into account the fact that ox-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 24, and the statement is from 1 Holmes, 312.]

[2] [From 1 Holmes, 312.]

ide of copper thus manufactured is proved to have been well known in the arts and manufactured in large quantities prior to 1863, and therefore the description was sufficiently intelligible to those to whom it was addressed. It cannot, therefore, with justice, be said that the reissued patent is on its face for an invention different from the one substantially—though not in exact and precise language—described in the original specification.

Evidence also is introduced tending to show that the sample deposited in the patent office was not such an oxide of copper combined with an earthy matter or base as is described in the reissued patent. As the specification clearly describes the composition of matter, and all the ingredients and proportions, in language perfectly intelligible to those skilled in the art, it would not be invalidated by the failure to deposit in the patent office a sample of one of the ingredients. This requirement, like some others, is made obligatory before the granting of the patent. It is for the commissioner to decide, before granting the letters-patent, whether it has been complied with. If he does so decide, and grants the letters-patent, that cannot be subsequently impeached by evidence tending to show a want of compliance with the law as to giving notice, or paying fees, or performing the other acts required to be done before the patent is granted, and the performance of which is to be proved to the satisfaction of the commissioner, whose decision on these questions is final where he has jurisdiction.

In considering the questions of novelty and infringement in this case, I shall consider them only with reference to their application to division B. In this aspect of the case it is not necessary to decide whether the views expressed in an opinion given by the learned judge of the district court of the Eastern district of New York, denying the motion for a preliminary injunction based upon an alleged infringement of division A, which opinion was based upon the evidence before him on ex parte affidavits, would justify similar conclusions upon such a state of the evidence as is exhibited upon the final hearing in this case. It is apparent that the testimony in this record, aided by the elaborate investigation and learned arguments of the counsel on both sides, has presented this question, so far as it relates to division A, in many new and different lights from those brought to bear upon it in the presentation of the question before that learned judge. But the infringement, if there were any in this case, was of the composition of matter described in division B. I shall confine my decision to that branch of the patent. Thus confining it, I do not think the invention described in that division had ever been anticipated, and I do think it describes a patentable invention. Division B is for an improved paint to prevent the fouling of ships' bottoms by the adhesion of barnacles, sea-weeds, and other substances; a paint which can be applied with a brush like ordinary paint, and which is compounded, first, of a suitable vehicle or medium; second, of the oxide of copper yielding a poisonous solution in water; third, together with such earthy and mineral matters as separate the particles of the oxide and retard such solution. This composition, the patentees state, practically protects ships' bottoms as well as copper sheathing or yellow metals, and at much less cost.

Reliance is placed by the defendant principally upon the paint of Charles Wetterstedt, as anticipating this invention. Letters-patent were issued by the United States, Aug. 5, 1851, to Charles Keenan, assignee of Charles Wetterstedt, for a new and useful improvement in metallic alloy paints. This was a well-known paint in common use at the time complainants made their application, and was referred to and disclaimed by them in their specification, and consequently decided by the commissioner of patents as not interfering with their application. We have already seen that complainants' paint, division B, was a combination of oxide of copper, yielding a poisonous solution with a suitable vehicle or medium, and a base of earthy or mineral matter. Wetterstedt describes the basis of his invention "to consist in the combination of regulus of antimony in various proportions with copper, tin, zinc, or lead."

In enumerating the advantages of his antimonial paints, he states that antimony, as a constituent of metallic paints, possesses the property of hardness and power to resist mechanical abrasion from the friction of water, and that it imparts this property to its alloys, as in case of type-metal; also that the regulus and its alloys are more brittle than other simple metals and their compounds; and, lastly, he claims that the covering of copper, yellow metal, or iron ships' bottoms, with antimony, protects them, in consequence of the protective effects of its galvanic action. "The oxide of copper is influenced by the antimony in a manner similar to that of metallic copper, and hence, when used to form paint with antimony or its alloys, it is but slightly affected, in consequence of the protective influence of the antimony, but is allowed to dissolve just sufficiently to produce poisoning of animals, and adhering to the surface."

When his paint was to be used or iron surfaces, after painting the surfaces with two coats of a paint made with antimony and lead, he directs, in addition to those two coats of paint, another compound of two pounds of the alloy of antimony and copper with four pounds of oxide of copper mixed with five pints of the mixture of tar and naphtha, and three pints of pure naphtha. This latter paint of Wetterstedt differed from the composition described in division B, in the absence of the earthy or mineral basis,

which is intended in the composition of complainants to protect the oxide of copper by dissolving more slowly than that does, and also in the fact that, while the same or an equivalent vehicle is used in both, the Wetterstedt paint has in combination with that vehicle, in addition to the oxide of copper, an alloy of antimony and copper, the three elements operating together to produce the poisonous action; while in complainants' paint there is no equivalent for the alloy of antimony and copper in Wetterstedt's paint. This omission of one of the ingredients before supposed to be essential would be, under circumstances like these, a patentable subject. The mixture of antimony, copper, and the oxide of copper, to make the protective paint of Wetterstedt, involved, according to the description in his specification, a complicated and expensive process; and when the paint was made, it required the use of another and different paint as an auxiliary protective agent, when used as a marine paint. The marine paint described in division B is comparatively simple and inexpensive in preparation, and, according to the testimony in the case, at least equally effective in its application.

Ford's patent, which was for a process for purifying oil of turpentine and naphtha, and for dissolving therein India-rubber, gutta-percha, and like gums, and applying such solutions as a cement, varnish, paint, or water-proofing agent, contains a suggestion that such solutions may be combined with oxides or salts of copper to be employed as a coating for iron ships' bottoms. He does not seem to have been aware that the application of his paint to the bottoms of iron ships would be worse than useless, as proved by the evidence of the experts in this case. The other patents set up as anticipating the complainants' invention seem to have been introduced principally to show the state of the art, and do not require any more extended notice in connection with the question of novelty further than the simple statement that they furnish no defence on that ground. The evidence of infringement is clear. The vehicle used by defendant is substantially for this purpose the same as complainants'. He uses the same protective agent, the oxide of copper; and the Brandon red which he uses, being an oxide of iron associated with more or less of earthy matter, and which, by its imperfect solution in sea-water, retards the solution of the oxide of copper, is, in operation in the combination, the equivalent of the mineral or earthy base in complainants' composition.

Decree for injunction on division B, and for an account.

[For other cases involving this patent, see note to Tarr v. Webb, Case No. 13,757.]

TARR (UNITED STATES v.). See Case No. 16,434.

Case No. 13,757.

TARR et al. v. WEBB.

[10 Blatchf. 96; 5 Fish. Pat. Cas. 593; 2 O. G. 568.] [1]

Circuit Court, E. D. New York. July 20, 1872.

PATENTS—WELL-KNOWN SUBSTANCES—MONOPOLY—WANT OF NOVELTY—PAINT FOR SHIPS' BOTTOMS.

1. The claim of the reissued letters patent, No. 4,598, division A, granted October 17, 1871, to James G. Tarr and Augustus H. Wonson, for an "improvement in paint for ships' bottoms," the original patent having been granted to them November 3, 1863, and reissued August 6, 1867, and again reissued in two divisions, October 17, 1871, namely: "A paint, consisting of oxide of copper, with a suitable vehicle or medium, substantially as described," read in the light of the specification attached, seeks to secure any mixture capable of being applied as a paint, in which oxide of copper is an ingredient, and, so understood, is invalid.

2. The poisonous effect of oxide of copper was known, and the protection of surfaces by applying compounds to them was known.

3. A monopoly of the use of a well-known substance, in a particular but well-known form, cannot be secured.

4. The subject matter of the patent, even if patentable, was not new.

5. In the reissue, under section 53 of the act of July 8, 1870 (16 Stat. 205), of a chemical patent, it is necessary to its validity, that the subject matter of it should be found described in the original patent.

[Cited in Giant-Powder Co. v. California Powder Works, Case No. 5,379.]

[This was a bill in equity by James G. Tarr and Augustus H. Wonson against H. P. Webb.]

Motion for provisional injunction, to restrain the infringement of reissued letters patent No. 4,598, division A, granted October 17, 1871, to James G. Tarr and Augustus H. Wonson, for an "improvement in paints for ships' bottoms," the original patent having been granted to them November 3, 1863 [No. 40,515], and reissued August 6, 1867, and again reissued, in two divisions, October 17, 1871 [Nos. 4,598 and 4,599]. The specification said: "The object of our invention is to prevent the fouling of the bottoms of ships by the adhesion of barnacles, sea-weeds and other substances; and this we effect by means of our improved paint or composition, which is applied to the hull of the vessel, with a brush, in the ordinary manner." It then described the mode of making the paint, the ingredients, and their quantities. The ingredients were Stockholm tar, benzine or naphtha, and pulverized, dry oxide of copper. It said: "We prefer to employ the oxide of copper made from the pyritous, friable ores, because, besides being easily reduced to fine powder, these contain mineral and earthy substances, such as various other metallic oxides, sulphur, &c., which serve to divide the particles of oxide

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

of copper, interspersing between them substances which dissolve more slowly than they do, or which do not dissolve at all, it being desirable, for the sake of economy, that the solution should be less rapid than would take place with a pure oxide of copper, and yet sufficient to give the necessary protection to the bottom. * * * All that is desired is, that there should be a proper base, such as these earthy or mineral matters furnish, to retard the solution of oxide of copper, and give durability to the paint. Such a base, however, although desirable, in our judgment, and, as such, claimed as an element in the composition of paint which we have patented in another reissue taken at the same time with this one, is not indispensable; and, therefore, in this present specification, we do not intend to limit ourselves to its use, for a good paint may be made by the use of oxide of copper alone, with the vehicle herein described, the oxide of copper, which yields a poisonous solution in water, furnishing the necessary protection against animal and vegetable growth. * * * The proportions of tar and benzine above described are specified simply as, in our judgment, the most suitable, and they may be greatly varied according to the kind and quality of the tar employed, as they are designed merely for a vehicle or medium. In place of the naphtha or benzine, any known diluent may be employed. The result of mixing should be the production of a vehicle of about the consistency of linseed oil." The claim was this: "A paint, consisting of oxide of copper, with a suitable vehicle or medium, substantially as described."

Miles B. Andrus, for plaintiffs.
Whitney & Betts, for defendant.

BENEDICT, District Judge. The claim of the patent, read in the light of the specification attached, seeks to secure to the patentees any mixture capable of being applied as a paint, in which oxide of copper is an ingredient. The patent is not for a process, but for a compound which the patentees claim as their own discovery. In this compound, two elements, and no others, are described as essential. There must be oxide of copper in the compound, and there must be a vehicle which will permit it to be applied to surfaces, after the manner of applying paints. It is not pretended that any new property of oxide of copper is developed, or brought into action, by this manner of using it, nor does the compound itself produce any effect not before known. All the benefit derived from the use of the compound arises from the poisonous effect of oxide of copper—an effect long well known. So understood, the patent is invalid. It discloses no discovery to be rewarded. Oxide of copper, and its poisonous effects, have long been known. Compounds capable of being applied to surfaces, in order to protect the same, are in universal use; and there was nothing new in the idea that oxide of copper could in this way be applied to surfaces.

The efforts of the patentees have been, to secure the sole right to use oxide of copper in any form which renders it capable of being applied to surfaces after the manner of applying paint. A monopoly of the use of a well known substance, in a particular but well known form, cannot be thus secured. Strychnine will poison dogs, and some one may yet discover that it can also be used to poison the worms of the sea; but that will not entitle the discoverer to an exclusive property in all mixtures which contain strychnine, and are capable of being spread on surfaces.

Furthermore, it appears, that, in 1849, prior to the plaintiffs' patent, Dr. Ure gave, in his Dictionary, a description of a metallic pigment, to be made with pure oxide of copper, which description would enable any one skilled in the art to make a compound similar, in all respects, to, and having the same qualities as, the compound described in this patent. This being so, the subject matter of this reissue, if it be patentable, cannot be secured to the plaintiffs, because it is not new.

A further objection taken to this reissue is, that the subject matter of it is not to be found in the original patent. To this one answer made is, that, under the patent act of 1870, it is not necessary, in the case of a chemical invention, that the subject matter of the reissue should be found described in the original patent; that it is sufficient if proof be made that the subject matter of the reissue was, in fact, part of the original invention; and that the grant of the reissue is decisive that proof was furnished. My opinion upon other branches of the case having been expressed, I deem it unnecessary to notice this objection to the patent in question, further than to say, that I am of the opinion that no such effect can be given to the act of 1870 as the plaintiffs claim, but that, in the case of a chemical patent reissued, it is necessary to its validity, that the subject matter be found described in the original patent.

The motion for an injunction is denied.

[For other cases involving this patent, see Wonson v. Gilman, Case No. 17,933; Tarr v. Folsom, Id. 13,756; Wonson v. Peterson, Id. 17,934.]

Case No. 13,758.

TARROW v. BROWN.

[Cited in Brook v. Brown, Case No. 1,931. Nowhere reported; opinion not now accessible.]

Case No. 13,759.

Ex parte TATEM.

[1 Hughes, 588.] [1]

District Court, E. D. Virginia. Jan. 16, 1877.

COURTS — FEDERAL JURISDICTION — NAVY YARD — CONTIGUOUS WATERS — HABEAS CORPUS.

1. The courts of the United States have, by section 711 of the Revised Statutes of the United States, jurisdiction exclusive of the state courts of crimes committed in the Gosport Navy Yard in Virginia.

2. By navy yard is meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float vessels of the navy while at the navy yard.

3. An arrest by the state authorities of a person accused of a crime committed in one of the places mentioned in section 711 is a violation of a law of the United States in contemplation of section 753; that is to say, is a violation of section 711, and a United States court may issue the writ of habeas corpus for a person so arrested by state authorities, and in jail under such arrest.

On habeas corpus.

The prisoner was represented by William H. C. Ellis.

David J. Godwin, commonwealth's attorney, appeared in behalf of the Portsmouth authorities.

HUGHES, District Judge. A prosecution is pending in this court by the United States against John W. Tatem, charged with shooting and killing one Michael Joyce on board the United States steamer Canandaigua, on the night of January 1, 1877. The ship was lying at the wharf of the United States, in the navy yard of the United States at Gosport, which is situated near the city of Portsmouth, in the county of Norfolk. By an act of assembly of January 25, 1800, and deeds made in pursuance thereof, and by subsequent acts and deeds (see Acts 1846–47, c. 12, pp. 14, 15, and Acts 1833, c. 33, p. 25), the commonwealth of Virginia ceded to the United States the territory and all the jurisdiction which the commonwealth possessed, over the public lands known by the name of Gosport, and certain lands immediately opposite, for the purpose of a navy yard. By navy yard is meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the navy yard. The land ceded lies on both sides of the water at Gosport. By section 5431 of the Revised Statutes of the United States it is enacted that every person who unlawfully and wilfully, but without malice, shoots and kills another within any fort, arsenal, dockyard, magazine or place or country under the exclusive jurisdiction of the United States, shall be guilty of manslaughter and punished by fine and imprisonment (as prescribed by section 5343). Section 711 of the Revised Statutes enacts that the jurisdiction vested in the courts of the United States over crimes and offences cognizable under the laws of the United States shall be exclusive of that of the courts of the several states.

The death of the deceased occurred on the premises of the United States, where he was taken immediately after the shooting. Complaint of the killing was promptly made before United States Commissioner Barry, and after an examination of witnesses, the accused was allowed to give bail in the sum of $1,000 for his appearance at the next grand jury term of this court. Subsequently to his release, upon recognizance, he was arrested upon a charge of murder under a warrant of the mayor of Portsmouth, and committed to the jail of Portsmouth upon a mittimus which contained an indorsement authorizing the prisoner's discharge, upon giving bail in the sum of $1,000. And it appears in evidence that this commitment by the mayor of Portsmouth was for the same act of killing and shooting the deceased, Michael Joyce, on board the ship Canandaigua, lying at the wharf of the Gosport Navy Yard, for which he is under prosecution by the United States. The prisoner being therefore under two prosecutions for the same act, filed his petition before me on the 13th instant, reciting the facts and praying for a writ of habeas corpus requiring the jailer of Portsmouth to produce his body before this court to-day; and the prisoner is now here in custody of the sergeant of Portsmouth.

The act complained of having been committed within a place, all jurisdiction within which has been ceded by Virginia; and the United States courts having exclusive jurisdiction of the offence committed therein, any prosecution for the same act in a state court is in violation of section 711 of the Revised Statutes, giving the United States courts jurisdiction exclusive of the state courts. And section 753 of these Revised Statutes authorizes the issuing of the writ of habeas corpus by the United States court in any case of a violation of the constitution, or a law, or a treaty of the United States, where the prisoner is in jail, under whatever authority.

Nothing could be more scandalous or barbarous than a contest between two courts for the jurisdiction of a criminal prosecution involving the character, liberty, and property of an accused person. Any court of proper sentiments so far from seeking to secure such jurisdiction would rather avoid it if that could legally be done. In the present case there can be no doubt that the jurisdiction is in the United States. It is there by express cession from the commonwealth of Virginia; it is exclusively there by the statutes and constitution of the United States. In addition to these considerations, the cognizance of this particular offence had already been taken, and a prosecution institut-

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

ed by the United States before the state authorities had taken possession of the prisoner; and, therefore, I do not perceive how this court could abrogate its powers and duties in this case. If this court had concurrent jurisdiction with the state authorities, I should at once send this case to those authorities for prosecution. The courts of the United States prefer to take that course in all cases of concurrent jurisdiction. Not long ago the circuit court for this district tried an indictment for murder on board a ship lying in or near Hampton Roads. There was a verdict of guilty. But some doubt arose whether the vessel was lying within the body of a county—that is to say, within the fauces terræ of one of the counties contiguous to the Roads. On this point there was no evidence. On account of this doubt the United States court refused to enter judgment or pronounce sentence upon the prisoners, who had been thus committed. So here, if there were any room for doubt that the act complained of had been committed within the limits of the jurisdiction ceded by Virginia to the United States, and in which the jurisdiction of the courts of the United States is made by an express law exclusive, I would remand the prisoner with alacrity to the authorities of Virginia. The facts concerning the jurisdiction, however, being positive, all doubt is removed, and I am concluded in my action. See U. S. v. Cornell [Case No. 14,867]; U. S. v. Ames [Id. 14,441], and cases cited therein.

I should have preferred that this writ had been asked of a superior court of the state; but as the petition has been presented here, I have entertained it as a matter of duty. The prisoner must be discharged.

Case No. 13,760.

TATHAM et al. v. LE ROY et al.

[2 Blatchf. 474.] [1]

Circuit Court, S. D. New York. Nov., 1852.

PATENTS — IDENTITY — PRODUCING DIFFERENT EFFECT — WHAT IS — INFRINGEMENT — MEASURE OF DAMAGES — MACHINE FOR MAKING LEAD PIPE.

1. The history of improvements in machinery for making lead pipe by pressure, given.

2. The rules of law for determining the question of identity between two machines, stated.

3. Effect of a mere change in form or proportions, or of the mere substitution of one mechanical equivalent for another.

[Cited in Norton v. Jensen, 49 Fed. 866.]

4. Tests for determining what is a substantial change in a machine.

[Cited in Worswick Manuf'g Co. v. City of Kansas, 38 Fed. 248; Kane v. Huggins Cracker & Candy Co., 44 Fed. 292.]

5. Where the plaintiff was the first to apply a hollow ram sliding upon a core in a cylinder to the making of lead pipe by pressure; (a cylinder sliding upon a rod not being new in machinery,) and, in his patent, claimed as his invention the constructing of the ram hollow, so as to slide upon the core, and the combination of the same with the core: *Held*, that the mere use of a hollow ram in combination with a core, in a machine for making lead pipe by pressure, would not be an infringement of the patent, but that there must be a use of such combination, in such a machine, in substantially the same way in which the plaintiff had applied it.

6. Where the change from a patented machine produces an effect, in the operation of the machine, different in kind, such difference in effect is evidence of a substantial change, although, without connecting the new effect with the change, the change might be only formal and unsubstantial.

7. But such new effect, in order to give materiality to an apparently formal change, must not consist in merely doing more work in a given time or in merely requiring less power. These results, if found, must follow from the different effect in kind.

8. The rule of damages for the infringement of a patent, stated.

9. Interest, by way of damages, may be given by the jury, in an action for the infringement of a patent.

This was an action on the case, tried before NELSON, Circuit Justice, for the infringement of letters patent granted to the plaintiffs [Benjamin Tatham, Jr., and George N. Tatham] October 11th, 1841, for an "improvement in the machinery for making pipes or tubes of lead, tin, and other metallic substances." [See Case No. 13,762 and note][2]. The defendants [Thomas O. Le Roy and David Smith] had used, in the manufacture of lead pipe, machinery constructed in accordance with the specification of letters patent granted to Samuel G. Cornell, August 21st, 1847, for an "improvement in lead pipe machinery." The material defence was non-infringement. The following extracts from the specification of Cornell's patent are sufficient to show the construction and operation of the machinery used by the defendants:

"My machine is applicable to the manufacture of pipes and tubes of lead, and such other metals and their alloys as are capable of being squeezed or forced, by means of great pressure, from a cylinder or receiver, through or between apertures, dies, cores or mandrels, when in a solid or semi-fluid state, and is mainly referable, in its general construction and purposes, to the machine patented by Thomas Burr in Great Britain, and described in the first volume of the first series of the London Journal of Arts and Sciences. * * * In my machine, I use the hydraulic press, the lead cylinder or receiver, the columns or pillars connecting the hydraulic press with the lead cylinder, the movable ram for pressing the piston upon the lead in the cylinder or receiver, the dies and cores to give the pipes the required form and calibre and dimensions, and such other parts of the old machines as may be necessary, substantially similar to the machine

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

[2] [See note at end of case.]

of the said Thomas Burr, now in common use. * * * In the machines heretofore used, the die is placed in the lead cylinder—at the top thereof when the power is applied at the bottom, and at the bottom thereof when the power is applied at the top—and the core which forms the inner surface of the pipe and determines its calibre, is either attached to the piston, advancing before it through the lead, according to the method of Thomas Burr, or attached to a long stationary core-holder, passing through the platform of the press, through the piston or ram, and through the centre of the lead cylinder to its discharging end, and the core being attached to the upper end thereof, and passing through the centre of the die, adjusted and secured so as to remain stationary in its proper position; and the pipe is formed by pressing the whole mass of the lead upwards by means of the piston, forcing it through the aperture between the die and the core. This long core-holder is secured to the platform of the press and lead receiver, so as to remain stationary the one to the other, and the piston slides over it. This is the method of George N. and Benjamin Tatham, as described in their patent granted October 11th, 1841. In these methods, the core and core-holder, or other apparatus used for like purposes, are liable to be broken, or twisted, or bent, or otherwise displaced by the upward or the lateral pressure caused by the piston pressing against the metal, which may be of unequal density, or from any other cause, so that the pipes will be imperfect, and often useless, and the machinery often injured or broken. To obviate these difficulties, a bridge, cross-bar or guide-piece has been placed in the upper part of the lead cylinder, near the die, closely fitting the core-holder which passes through it, and firmly secured to the interior of the cylinder by means of arms extending from the bridge to the inner surface of the cylinder, and there secured. This apparatus is to support the short or stationary core, or to guide the long core, and prevent its being displaced, or the core from being broken or bent. But it will be seen that in this method the mass of the lead in the cylinder, on being pressed upwards through the same, is divided by the arms into as many parts as there are arms, and, after passing the arms, is united and pressed together so as to adhere in its passage through the die. It is obvious, however, that the adhesion of these divisions will be more or less imperfect, and that the pipe formed in this way will be liable to burst under any considerable pressure. In all these methods, the great pressure required to lift the whole mass of the lead contained in the cylinder and force it through the die will, besides displacing or breaking the cores or the mandrels, often burst the lead cylinder and destroy the machine.

"The object attained by my improvement is, the forming of pipe in all cases at the point of contact of the piston and the lead, where the pressure is applied, without moving forward the whole mass of lead in the cylinder. This is the leading feature of my invention, and the various apparatus and the different arrangements and combinations thereof, hereinafter described, are all subsidiary to the accomplishment of this object, being the different methods by which it is accomplished. In my machine, instead of fixing the die in the upper or lower end of the lead cylinder, and there forming the pipe, in the manner above mentioned, I usually place and secure the die in the end of the piston which is to enter the lead cylinder and press against the lead. * * * Around the die proper packing is placed, to make it fit the lower orifice of the lead cylinder into which it is to pass. The piston is hollow, with an opening or openings * * * near the bottom, to permit the passage of the formed pipe downward through it, and thence out at one of the openings. In a right line with the centre of the piston, I place a long movable core-holder, extending from the top of the piston upward * * * through the middle of the lead cylinder, and beyond to the top of the frame. * * * This core-holder is of sufficient size and strength to sustain any pressure required, without being broken or bent, or otherwise displaced, and is connected with the ram by means of * * * cross-heads, * * * one of which is secured to the piston, and the other to the movable core-holder by * * * keys, * * * and the cross-heads are connected together and kept in their proper relative position by * * * connecting rods, * * * which are secured to the cross-heads by * * * nuts, * * * the die-holder or piston and the core-holder being thus relatively stationary the one to the other. The upper cross-head moves in, and is guided by a strong cast-iron frame * * * secured to the lead cylinder by bolts, or otherwise. The frame extends above the lead cylinder to which it is secured. * * * In the top of the frame is placed an iron collar or bush, * * * through which the movable core-holder passes, and is adjusted and kept in its place by means of * * * set screws. * * * The upper cross-head, in the working of the machine, slides up and down in the frame, by means of which arrangement the movable core-holder is always kept in its proper position, that is, in right line with the centre of the piston. To the lower end of the movable core-holder I attach and properly secure the short core which is to form the interior surface of the pipe and determine its calibre, * * * which is not required to be more than an inch or an inch and a half long in the working machine. The nuts * * * at the lower ends of the connecting rods * * * may be turned off to permit the

cross-heads to be moved further apart, thus separating the piston from the core-holder, to allow the die and core to be replaced or changed at pleasure. This being done, the core at the end of the core-holder may be inserted in the centre of the die * * * and properly adjusted. The nuts are then screwed on, bringing the operating parts of the machine into their proper relative position, and there firmly securing them.

"The machine is thus made ready for operation. The piston, by means of the hydraulic ram, being moved up to the lower orifice of the lead cylinder, * * * the machine is charged with the metal in the ordinary way, and, when the metal is sufficiently set and cooled, the power is applied to the ram in the usual manner, causing it to press the piston upwards against the metal, which immediately flows downwards from the point where the pressure is applied, through the die and over the core, thus forming the pipe. The pipe, as it is formed, passes downward through the hollow piston, and out at the aperture, and is reeled in the ordinary way. When the metal in the cylinder is thus pressed out, the ram descends to the proper point, the cylinder is re-charged, and the process repeated in the usual manner. In my method, much less power is required than in the methods heretofore employed, as the pipe is formed at the head of the piston, by the pressure upon the lower portion of the metal, instead of being formed at the top of the cylinder, by forcing the whole mass of the lead upward through the die there placed. By reason of this greatly diminished pressure, and the peculiar construction and arrangement of the parts in my machine, neither the core nor core-holder is liable to be broken or bent, or otherwise injured or displaced; nor is the cylinder liable to burst by the lateral pressure. There being no division of the metal in the cylinder into parts by the bridge or guide before mentioned, as used in Hanson's plan, the pipe is much stronger and every way more perfect.

"Another great advantage of my method is the facility with which the dies and cores may be changed; it being only necessary for that purpose to drop the piston a little below the lead cylinder, and loosen the nuts at the lower ends of the connecting rods, thereby separating the die and the core, which are readily renewed, and different ones substituted, and the nuts again screwed up and the parts adjusted as before. By placing the die in the movable core-holder or mandrel, as it may in this case be called, and fixing the short core to the piston, and adjusting the parts as before, the pipe will be formed in the movable mandrel, which may be made hollow for that purpose, instead of being formed in the piston, and will in that case pass upwards through the hollow mandrel, and out at the top. * * * But the machinery employed, and the principles upon which I form the pipe will be substantially the same in both methods, and the advantages over the old method equally important. * * *

"What I claim as my invention, and desire to secure by letters patent, is placing the die for forming the exterior surface of the pipe in the piston or the hollow mandrel, as the case may be, substantially as described, instead of placing it in the head of the lead cylinder, as has been heretofore done; so that, as the piston is forced into the cylinder, or the cylinder forced over the piston, the pipe will be formed at the point of pressure, without moving the mass of lead relatively to the cylinder; and, in combination therewith, I claim the cores for forming the interior surface of the pipe—the die and core being adjusted and held in their proper relative positions by any of the known methods."

Charles O'Conor, Francis B. Cutting, and George C. Goddard, for plaintiffs.

Daniel Lord, William Curtis Noyes, Charles M. Keller, and Edwin W. Stoughton, for defendants.

NELSON, Circuit Justice (charging jury). The first machine for making lead pipe by pressure was the Burr machine, which was constructed in 1820. In that machine, the core which formed the bore of the pipe was fastened into the face of the ram, and extended through the cylinder and into the die. Burr was the first person to whom it occurred that lead pipe could be made out of set or hard lead, by means of pressure. This machine was his contrivance to carry that idea into practical effect. It virtually failed, especially so in respect to the manufacture of pipe of the usual or ordinary size. It seems, from the testimony, to have been successful so far as respected the manufacture of pipe of two inches or two inches and a half in diameter, and above that size; but, for the ordinary size —under two inches—it was a failure, and it went out of use. What constituted the real difficulty in the way of the successful operation of the Burr machine is a matter of controversy, as you have seen during the course of this trial.

In 1837, an improvement was made upon this machine of Burr by the Hansons, which went into successful operation. This machine was patented by them in England on the 21st of August, 1837. The improvement consisted in making a bridge at the bottom or near the bottom of the cylinder, for the purpose of holding a short core, and was founded upon the development of a new and beautiful idea. They had discovered, for the first time, that lead, like steel or iron, was susceptible of being welded together after separation when solid; and they were thus enabled to construct a bridge at the bottom or near the bottom of the cylinder, in which they could insert a short core, where it could be kept firm and steady. The lead had to be forced through

the apertures in this bridge, which separated the mass when in a solid state; but it became re-united and welded together by means of pressure in the chamber beneath the bridge, and in the formation of the pipe as it was forced out of the die. The improvement was successful, and enabled the Hansons to make good merchantable pipe, and to make it cheaper and better than by any previous mode of manufacturing it, so that it superseded all prior methods of making lead pipe. The correctness of this idea, that lead could be separated when hard, and re-united by pressure, like the re-union of welded iron or steel, has been fully established on a trial in this court, in which the Hanson machine was involved. The truth of this idea was denied by the most eminent chemists in New York upon that trial, and, as a consequence of their disbelief of the fact that this property belonged to the metal, they testified that the pipe was made, in the Hanson machine, while in a fluid state, because the welding of the lead in a set state was a physical impossibility. They stated that they had never known this property as belonging to lead. But the fact was proved, by actual experiment on the trial, to their entire satisfaction, and they afterwards came into court and admitted they were mistaken.

Now, although this machine thus constructed manufactured merchantable pipe, and superseded all modes of manufacture known at that time, yet it was subject to an imperfection which embarrassed the manufacturer. The re-union of the lead, after its separation in passing through the bridge, was not at all times complete throughout the length of the pipe made from a given charge; and hence, when the pipe was subjected to a considerable pressure of water, a flaw would sometimes appear. This, I believe, was the only defect ever imputed to the article manufactured by the Hanson machine.

The next improvement upon the Burr machine was the plaintiffs', in 1841—the one in question in this suit. They bored the solid ram of Burr, and, instead of fastening the core on the face of the ram, extended it through the ram, and fixed it firmly to the cross-head of the frame—the core extending, also, through the cylinder into the die. The bore of the ram is fitted to the core or core-holder, either by adapting the aperture to it, or by packing, so that, when the machine is put in operation, the ram slides upon the core. The core, in the first place, is fastened to the cross-head, which is firm and immovable, differing in this respect from the Burr machine, in which the core was movable with the ram, being fastened upon its face. The core in the plaintiff's machine is also steadied by the aperture in the hollow ram, or by packing. The advantage in this over the arrangement of Burr, is in steadying the core or core-holder, and in preserving its centrality in reference to the die. This machine appears to have been entirely successful in the manufacture of lead pipe of any dimension.

I will now call your attention to what is claimed as new in the plaintiffs' patent. After the description of the construction of the machine, which is minutely given, the patentees wind up by claiming, first, "the long core or core-holder, formed and held stationary with relation to the dies, as described;" and, secondly, "the constructing of the piston B hollow, in the manner described, and the combination of the same with the long core or core-holder upon which the piston slides." The third claim relates to the reversed arrangement of the machinery in the working machine, which it is not important to describe.

The first and third claims are not in controversy, and may be left out of the case. The dispute between the parties is confined to the second claim. It is insisted by the plaintiffs that the peculiar arrangement covered by that claim gets rid of the defect in the Burr machine, of the unsteadiness of the core in the manufacturing of pipe of the ordinary size, and also gets rid of the defect in the Hanson machine, because it dispenses with the bridge; and that this arrangement has been infringed by the defendants. The arrangement enables the plaintiffs to use a strong core or core-holder, and to fix it firmly at the cross-head, and, by the aperture in the ram and the packing, to preserve its centrality in relation to the die; by reason of which they have succeeded in making perfect pipe. This is, in substance, the new arrangement of the plaintiffs, and these are the advantages which they claim to have derived from the change, and from the improvement upon the previous machines.

Let me now call your attention to the construction of the defendants' machine. This, also, is claimed to be an improvement on the Burr machine. It was constructed some five or six years after the plaintiffs' improvement. It is arranged by boring the solid ram of Burr, and placing the die in the face of it, at the same time closing the bottom of Burr's cylinder, and fixing the core firmly at the bottom, where Burr's die was placed. The core extends through the cylinder and into the die thus fixed in the face of the ram. In the operation of the machine, the core passes through the die and into the hollow ram nearly the length of it, the pipe, of course, passing through the same aperture above.

It will be necessary for you to examine the arrangement and construction of these two machines, in the particulars that I have mentioned, with great care and attention, because the determination of the case will hinge mainly, if not exclusively, upon the judgment you shall form in respect to them and their operation. In other words, the case depends upon the opinion you shall form of the substantial identity or want of identity between the two, as it respects the arrangement of the hollow piston and the core or core-holder found in them, and the operation and effect of the same in the manufacture of pipe. If, in looking at the arrangement and combination of the two, you arrive at the conclusion that they

are substantially the same, then the use of the defendants' is an infringement of the plaintiffs'. If, on the contrary, you arrive at the conclusion that they are not substantially the same, then the defendants will be entitled to your verdict.

These questions of identity between two opposing machines are frequently exceedingly difficult, and often the most difficult questions involved in these patent cases. The question is ultimately one of fact, and the jury must examine it with a consciousness that they are to be responsible for its determination.

There are some principles of law bearing upon these questions which may shed some light upon your examination of them, and which it is proper should be stated. A change in form from the construction of an existing machine, is not a substantial change in the eye of the patent law; nor is a change in proportions. These changes require no great ingenuity, at all events they do not call for the exercise of the inventive faculties. They are simply the work of a mechanic of ordinary skill, and, therefore, are entitled to no particular consideration when we are inquiring into the question of identity between the construction of two machines. So, also, the substitution of a mechanical equivalent, as it is termed, in the construction of a machine, is not a substantial change. There are many devices in construction that can be made by a skilful mechanic, differing very much from each other in appearance, but which, in the eye of the patent law, are regarded as identical. For instance, an inventor, in the construction of his machine, desires a given power, in order to give practical operation and effect to his discovery. One mechanic may furnish the power by means of a lever, another by means of a screw—two very different instruments—yet, so far as the use of the instruments and so far as their purpose to furnish the power is concerned, they are regarded simply as mechanical equivalents, and the use of one in one machine does not distinguish that machine, from a machine in which the other is found. So, too, a given power may be obtained by a spring or by a weight, or by a pulley—apparently very different devices. Yet, as they are used for the same purpose, and to accomplish the same end in machinery, they are regarded as substantially identical. It is also proper to state, in this connection, that a patentee is not confined to the precise arrangement, in the construction of his machine, which he has described in his patent. This is obvious from the principles already stated. Formal changes are nothing—mere mechanical changes are nothing—all these may be made outside of the description to be found in the patent; and yet the machine, after it has been thus changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation. A familiar illustration of the principle that I am endeavoring to develop, and one bearing directly upon the issue between the parties here, will be found in the instance of the large core-holder or core described in the plaintiffs' patent. It is said, that the description in the patent is confined to a large core or core-holder. But, admitting this to be so, the change to a small one, if a small one can be used successfully, is but a change in proportions, as the larger includes the smaller one. Any person that could make a large one could make a small one, and could pack it to fit the aperture in the ram just as well as the large one, without anything more than the application of a little common sense, and ordinary skill in the working of the machine.

In addition to these instances which I have given you, in which the patentee is not tied down to the precise description given in his patent, there is another suggestion I wish to make, in connection with this branch of the case, and it is one that commends itself to the common sense of the jury. Any machine which has been constructed as an improvement upon a previous one, or as an entirely new manufacture, may be very considerably changed in its mechanical arrangement and construction, the description of it may be very much departed from in the construction, and yet it may accomplish the object and purpose for which it was designed. It may not be as perfect, in producing the result intended, but still it may, though changed and varied very much, do its work satisfactorily. It is proper also to remark, that any change or alteration which is suggested to the skilful operator from the working of the machine, and in the course of its operation—any useful change that may be the result of the practical working of the machine—is clearly a change that belongs, not to the operator, but to the original inventor of the improvement. Upon this branch of the case, and in this line of observation, I wish to guard you from falling into any error, because I am desirous that you shall comprehend accurately and clearly the principles of law that properly enter into the examination and decision of this difficult and somewhat metaphysical question. I, therefore, wish to prevent your being misled into extending these principles beyond the fair limit and scope that belong to them. What I mean to say is this—that, in order to ascertain and determine whether the change in the arrangement and construction of an existing machine is to be considered as a substantial change or not, you must ascertain and determine whether the change is the result of mechanical skill, worked out by mechanical devices—of a knowledge that belongs to that department of labor—or whether the change is the result of mind, of genius, of invention, in which you discover something more than mere mechanical skill and ingenuity. A change in the arrangement and construction

is not substantial, unless you find embodied in it, over and beyond the skill of the mechanic, that inventive element of the mind which is to be found in every machine or improvement that is the proper subject of a patent. If you find that, then the change is a substantial one, that entitles the party to a patent. Then it is a change that has added something to the useful knowledge of mankind and to the business interests of the country.

It will be seen, from these observations, that a difference in the mechanical arrangement and construction of the two machines is not necessarily a test by which to determine that the two are not identical. They may be, apparently, very different externally, and still embrace the same substantial identity in principle or mode of operation. So, on the other hand, the converse of the proposition is equally true. The two may, apparently, be very similar externally, and still, in principle and mode of operation, be very different. I do not know any better mode of examining a question of this kind, than to inquire whether the mechanical arrangement and construction of the two embrace the same set of ideas, the same leading features or ideas, which, in practical operation, produce the useful result. In other words, whether the arrangement and combination of the parts of machinery found in each are substantially the same, and operate in substantially the same way in producing the result. Heuce, the real question in this case, as it respects the identity of the two machines, looks simply to their mechanical arrangement and construction, as to whether or not the defendants' incorporates, in its structure and operation, the spirit and substance of the plaintiffs' improvement—that is, uses the arrangement and mechanism of the plaintiffs' to perform the same functions or produce the same effect in the same way, or substantially the same way.

I will read to you two passages upon this branch of the case, which embody very fully and clearly the views that I desire to impress upon you, and which, being in the words of another, (Chief Justice Tindal, of the common pleas,) may, perhaps, take hold of your minds more strongly, from the variety of the illustration, than anything that I have said or could say. In Walton v. Potter, Webst. Pat. Cas. 590, Curt. Pat. § 255, note 1, Chief Justice Tindal remarked: "Now, there can be no doubt whatever, that although one man has obtained a patent for a given object, there are many modes still open for other men of ingenuity to obtain a patent for the same object; there may be many roads leading to one place; and, if a man has, by dint of his own genius and discovery, after a patent has been obtained, been able to give the public, without reference to the former one, or borrowing from the former one, a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose. But he has no right whatever to take, if I may so say, a leaf out of his neighbor's book, for he must be contented to rest upon his own skill and labor for the discovery, and he must not avail himself of that which had before been granted exclusively to another; and, therefore, the question again comes around to this—whether you are are of opinion that the subject-matter of this second patent is perfectly distinct from the former, or whether it is virtually bottomed upon the former, varying only in circumstances which are not material to the principle and substance of the invention." I read another passage from the same case. Webst. Pat. Cas. 586, Curt. Pat. § 202, note 1: "Where a party has obtained a patent for a new invention, or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances, the nature or subject-matter of that discovery, to obtain either a patent for it himself, or to use it without the leave of the patentee, because that would be, in effect and in substance, an invasion of the right; and, therefore, what you have to look at upon the present occasion, is not simply whether, in form or in circumstances, that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent, but to see whether, in reality, in substance and in effect, the defendants have availed themselves of the plaintiff's invention in order to make that fabric, or to make that article which they have sold in the way of their trade; whether, in order to make that, they have availed themselves of the invention of the plaintiff."

There is one other observation that I desire to make, and that is a practical one, which bears more directly upon the real point in issue between these parties than perhaps any of the general observations to which I have called your attention. You have seen that, after all, the case comes down to this naked question, as it respects this branch of it, and that is, whether or not the defendants' machine embraces, within its arrangement, the combination of the hollow ram and core or core-holder, patented to the plaintiffs. I am bound to say that I do not think the question is simply whether or not the defendants use the hollow ram in combination with the core; because I think that the combination of the hollow ram and the core or core-holder alone and in the abstract, is not the invention or improvement of the plaintiffs. Cylinders, sliding upon rods, had previously existed in mechanical constructions and in practical use, which is all that is found in the combination of the hollow ram and the core or core-holder upon which the hollow ram slides. That alone, and in the abstract, is not the invention of the plaintiffs, and, although the hollow ram and the core in combination may be found in

the defendants' machine, that alone will not constitute an infringement. The question, in my judgment, is this. It has been conceded throughout, that the plaintiffs were the first persons who applied this peculiar combination to the purpose of making lead pipe by pressure. They were the first to conceive of the adaptation of this peculiar combination (which of itself was not new) to the purpose of producing this useful and practical result; and it is in this idea that the novelty of their improvement consists. The point in the case is, whether or not the defendants have applied this combination substantially in the same way for the same purpose. If they have, then they have appropriated the improvement which belongs exclusively to the plaintiffs, and the use of their machine is an infringement of the plaintiffs' patent. To this point you must turn your attention, and upon this, in my judgment, the question on this branch of the case must turn. Have the defendants applied this combination of the hollow ram and the core substantially in the same way that the plaintiffs have applied it, for the purpose of making lead pipe by pressure? If they have, they are guilty of infringing; if they have not, then they are not guilty.

The remarks which I have made to you thus far apply simply to the question of the identity of the mechanical arrangement and construction of the two opposing machines. There is another question involved in the case, which bears upon this, and to which it is necessary to call your attention. The defendants contend that, admitting there is an apparent substantial identity in the arrangement and construction of the two machines, and in their principle of operation, yet, in point of fact, the practical operation and effect of the two upon the mass of lead, in forming the pipe, are essentially different, and that such effect in the defendants' is highly beneficial in the operation of the machine. In other words, that because the defendants' forms the pipe at the point of pressure, at the face of the ram, the operation and effect of the power thus used upon the mass of lead are new. In this view of the case, and in respect to this branch of it, the law looks more to the result of the mechanical arrangement than to the arrangement itself. The new and different effect in the operation of the machine reflects back upon the mechanical arrangement and construction, and characterizes the change, and may authorize an inference of a substantial change, which the arrangement, disconnected from the new and different effect, would not. Without connecting the new effect with the change, the change might be only formal and unsubstantial. The case of the improvement in the mould-board of the cast-iron plough referred to by some of the learned counsel, illustrates this principle. It was there held, that a change in the shape of the mould-board, though apparently formal and one of proportion, and of itself amounting to nothing, became a substantial change by producing a new and different effect, in its operation, from that which was produced in the previous plough. It must be borne in mind, however, that the new effect, which is to give such materiality and importance to the apparently formal change, must not be looked for in the simple production of a larger quantity of pipe in a given time, or in the reduced amount of power required to operate the machine. All this may depend upon other considerations, as upon superior mechanical skill in the construction and arrangement of the machinery. But the new enect to which I am now calling your attention must be different in kind. The operation and effect upon the lead in the defendants' machine must be new and different from the operation and effect upon the lead in the plaintiffs'. And the capability of the defendants' machine to make a greater quantity of pipe in a given time, or to use a reduced amount of power, must be the result of the new and different operation and effect of the arrangement upon the mass of lead. This principle, which has been brought into the defense in this case, is, in the aspect in which it is presented, a very important one. I am desirous, therefore, that you should thoroughly comprehend it, and also the qualifications which belong to it, and which should be kept in mind in applying it.

It is well known that new machines which have been devised for the purpose of carrying into practical effect an improvement or invention, oftentimes exhibit, when first constructed, and until tested by practical use, great imperfections in their results. It requires time and experience, and the observation derived from the practical working of the machine, to perfect it. Hence, the mere fact that a machine constructed and arranged, apparently or externally, like a previous one, produces a result more beneficial, is not always a safe test to determine that the two are substantially different. The result may be one derived from experience in the use of the previous machine. The new result, in the present case, must be a result derived from a different mechanical operation and effect upon the mass of lead in the cylinder, and not from the same operation and effect. This is a question of fact, and you will readily, from the time that has been consumed upon this branch of the case, call to mind the evidence bearing upon it—first, the examination of the experts on both sides, as regards the difference in the operation and effect of the two machines upon the mass of lead, in producing the pipe—also, the various experiments, many of them exhibited in your presence, others made elsewhere and detailed by the experts, tending, on the one side, to make out this new and different effect upon the mass of lead, in manufacturing pipe, and, on the other side, to discredit and disprove it. The question is thus raised, up-

on this evidence, for your determination. You must decide on which side the weight of the evidence lies. If it is in favor of the view taken by the defendants, that there is a new and different operation and effect upon the mass of lead in the cylinder, on account of the arrangement in the defendants' machine, then, I think, as a matter of law, that such new operation and effect give character to the mechanical arrangement and afford evidence of a substantial change. If, on the other hand, you think that the weight of the evidence is with the plaintiffs, and that there is no material or essential difference in the effect and operation of the two machines upon the mass, then you will be obliged to go back to the first question presented to you—whether or not there is, in the defendants' machine, a substantial change in the mechanical arrangement and construction, and in the operation of the same, from the combination, arrangement and operation of the plaintiffs' machine.

One word upon the question of damages. As there has been no serious question made on the subject, I shall simply call your attention to the principle that must govern. It seems that the defendants have made 711,551 pounds of pipe in their machine within the time for which the plaintiffs claim they have been guilty of infringing. The price of lead pipe, during that time, was six cents per pound, except for a small quantity, which was sold at five cents and three quarters per pound. The price of pig lead was about four cents and a half per pound, during the same period. That would make a difference of one cent and a half per pound. But, out of this, the cost of manufacturing the pipe must be taken. What that is, is open to a good deal of observation. One witness states that the plaintiffs could have made it, in very large quantities, for one-eighth of a cent per pound. The rule in these cases is to give the actual damage or loss incurred by reason of the infringement, and that is the profits which the plaintiffs would have made if they had not been embarrassed by the interference of the defendants' machine. Because, the law presumes that the plaintiffs would have had the patronage which was diverted by the defendants. The profits which the plaintiffs have lost in consequence of the infringement, afford, therefore, a criterion by which to determine the amount of damages they have sustained.

The infringement claimed on the part of the plaintiffs took place between September, 1847, and April, 1848. It is claimed that they are entitled to the damages which they have actually sustained, together with interest upon the same from that time down to the present. My own view of this question is, that the jury, in estimating the damages, may take into account the interest, if they choose, and give it by way of damages. They may take into account in estimating the damages, the fact that the party has been deprived of them from the time the infringement took place down to the present time.

NOTE. The specification of the plaintiffs' patent was as follows:

"The schedule referred to in these letters patent, and making part of the same: Be it known that we, George N. Tatham and Benjamin Tatham, Junr., both of the city of Philadelphia, and state of Pennsylvania, have invented certain new and useful improvements in machinery or apparatus for making and manufacturing pipes and tubes of lead, tin and other metallic substances, and their alloys. And we do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the accompanying drawings, making part of this specification: Our invention of these certain improvements applies principally to the 'machinery or apparatus for making or manufacturing pipes and tubes from lead, or a mixture or compound of lead with other metals, as tin, or zinc, or any other compound or alloy of soft metals capable of being squeezed or forced, by means of great pressure, from out of a cylinder or receiver, through or between apertures, dies and cores, when in a solid state,' described and set forth in the specification of a patent granted to Thomas Burr, of Great Britain, and also described in the first volume of the first series of the London Journal of Arts and Sciences, as therein will appear; and our said invention is applicable in part also to other machinery for manufacturing leaden and other metallic pipes, which will be hereinafter referred to. In the plan described by Thomas Burr, the core (for the formation of the inner diameter or calibre of the pipe) is attached to the end of the piston, and, advancing before it through the cylinder, became bent and twisted out of centre with the dies, thus preventing or destroying the uniformity of thickness or the centrality of the bore of the pipes. This defect resulted from the difference of expansion and contraction, and from the extreme pressure required to drive out the solid metal, and from several other causes, the effect of which was to render that plan ineffective and ineligible. These defects it is the object of our improvements to remedy. Our said improvements may be fully understood by referring to the accompanying drawings, and to the explanations thereof contained in this specification. We use a powerful hydraulic press, which is partially represented at figure 1. In this figure a a, is the cap or top of the press; b b, the base or frame of the bottom thereof, inclosing the great cylinder and the ram, which are not here exhibited. C C C C, are the upright wrought iron pillars of the press. The pipes, the safety-valve and other parts of the hydraulic press are not here represented. This engine is so well known, and may be constructed in such variety of forms, as to render a description of it unnecessary, and the figure in the annexed drawings is intended only to exhibit the relative arrangements of the other parts of the apparatus. We use a strong iron cylinder, constructed in a manner substantially resembling that described by Thomas Burr, and intended for precisely the same purposes. The die is secured at the upper end of the cylinder between a circular plate and the top of the cylinder, in an aperture or recess fitted to receive it. The top of the cylinder is attached by means of screws or bolts, or otherwise, thereto, so as to be easily removed and replaced. The cylinder, with its several appurtenances, is to be firmly bolted or secured to the top of the hydraulic press. It is represented in perspective at A, in figure 1, and in section at A A, in figure 2. k k, figure 2, is a section of the die, which is a polished steel ring. m. m. is the circular plate with a large aperture through it for the passage of the metal towards

the die. n. n. is the top of the cylinder. X X, figure 2, is a section of a part of the top of the hydraulic press, which part has an aperture (i i) in the form of an inverted cone, to allow access to the cylinder, for the purpose of charging it through the dies or other apertures, and for the passage of the pipes or tubes. The aperture is hidden at figure 1. The piston, B B, (operating within the cylinder,) is bored accurately throughout its length, so as to receive and fit a long core-holder, upon which it is to move or slide easily up and down, being at the same time furnished with proper packing. The hollow piston is exhibited in its place, in perspective, at B, figure 1; and in section, at B B, figure 2. Its parts are shown detached at a and b, in figure 5, and a section of the face at C. Its packing (around the long core-holder) consists of tight rings occupying the places indicated at figure 2 by the letters x x; but it may be packed in other ways in common use, and well known to machinists. The face C should be made of cast-steel. It is secured to the body of the piston by means of bolts or screws. The piston is secured in its place, upon the table or platform of the hydraulic press, in any convenient manner. We employ a cast iron fixture, open in front to receive the piston-head, grasping the same, and, being firmly bolted to the table, is strong enough to bear the high degree of force often required to extract the piston from the cylinder, after it has been driven home. This instrument is represented in its place upon the table at C, in figure 1, and in plan at figure 3, y, and in transverse section at z. We employ a long core-holder, which is a strong round rod of iron or steel, accurately turned and polished, so as to move or slide easily and truly through the hollow piston, fitting the same exactly. One end of this long core-holder is to be securely attached (by a pin or otherwise) to strong iron frame-work, below the table or platform of the press. The core-holder is to be sufficiently long to pass upwards through the table or platform, through the piston, and through the middle of the cylinder, to its discharging end, where it is to hold (in the centre of the die) a core or mandrel, attached, screwed or bolted into its end; or is itself to be tapered, if necessary, to the size required for the interior diameter or calibre of the pipes or tubes. The long core-holder is exhibited in its place at D, figure 1, and in section at D, figure 2, and detached at D, figure 4, where several different plans for its construction next the core are exhibited. The iron framework securing the end of the long core-holder is to be made with several arms, each to be firmly attached to one of the wrought-iron pillars of the hydraulic press. This frame is represented in perspective, in its place, at E E, in figure 1, and in plan, at figure 6, where the relative positions of the pillars that support the table or platform of the press are exhibited at e, h, g. The lower part of the framework must be placed at such a distance above the hydraulic ram-head as not to interfere with the rising of the same, when the press is in action. This distance should be of the length of the piston at the least. The table or platform of the press is to be supported by strong iron pillars, two, three or four in number, standing between the arms of the framework fixture last described. The table is seen at F F, figure 1. It is to slide upon the wrought-iron pillars of the press, which thus serve as guides to it. The pillars supporting the table are represented at G G G, in figure 1. They are to stand upon the ram-head, which is a solid iron fixture upon the top of the ram itself, and is seen at H, in figure 1. The ram-head is to contain an aperture large enough to permit the end of the long core-holder to descend into the hollow of the ram, when occasion may require the removal of the piston, or a change in any of the different instruments. The operation of the machinery is, in most respects, the same as that described by Thomas Burr, to whose specification we here particularly refer. The several parts being adjusted in their places, as at figure 1, the piston being lowered, the cylinder is filled with melted metal, through the aperture between the die and the core; or, if preferred, through an aperture made for the purpose in the cylinder, which is to be stopped with a screw-plug or otherwise. The space occupied by the metal in the cylinder is represented in the sectional drawings by a tint of red color. Upon the metal in the cylinder becoming 'set' or solid, the press is to be set in action, and, as the ram of the press rises upwards, carrying with it the pillars, and the table or platform upon them, the piston (sliding upon the stationary long core-holder) is driven into the cylinder, and the metal therein is forced upwards between the core and the die, and issues above the top of the press in the shape of a pipe or tube. Lead perfectly cold, and even harder metal, may be driven by this machinery, and formed into pipes or tubes.

"We do not intend to limit or confine ourselves to the precise plan here above described of forcing the piston upwards into the cylinder, and of causing the pipe to issue above the press, since the same results will be produced when the action of the machinery is reversed, by securing the piston to the under part of the top of the hydraulic press, and bolting the cylinder upon the table or platform; thereby causing the cylinder to advance upon the stationary piston, and forcing the pipe downwards through an aperture in the table made to admit its passage. In this reversed mode of operation, it would be necessary to construct upright shafts or pillars, standing upon and secured to the table, and made to slide through boxes fitted in the top of the press. These uprights are to be connected above the top of the press, by a strong cross-beam, to the centre of which the end of the long core-holder is to be attached. The core-holder should slide through a box in the top of the press, and also through the stationary hollow piston, and, reaching to the bottom of the cylinder, it must there hold a core or mandrel in the centre of the die, as before described. When the press is set in motion, the core-holder will rise with the upright framework and the cylinder, fixedly preserving its relative position with the die at the bottom of the cylinder. Figure 7 is a representation (partly in section) of this reversed mode of operation. A, is the cylinder reversed, having the die now at the bottom. B, is the hollow piston, secured to the top of the press. C C, are the upright pillars of the frame-work. D D, is the cross-beam thereof. E, is the long core-holder depending from the cross-beam. In this latter form or manner of arrangement we intend to apply the foregoing improvements to the apparatus for manufacturing pipes or tubes from lead or other metallic substances, invented by Charles and John Hanson, of Great Britain, for which letters patent of the United States were granted to the present inventor, Benjamin Tatham, Junr., and to Henry B. Tatham, of the city of Philadelphia, under assignment from the said Charles and John Hanson, before patent issued, and recorded preparatory thereto, which letters patent are dated the twenty-ninth day of March, eighteen hundred and forty-one. We do not claim as our invention any part of the cylinder, nor of the dies, nor of the arrangement thereof in the cylinder, nor the manner of adapting these to the hydraulic press, nor the mode of operation generally, all of which have been substantially described in the specifications of the patents of Thomas Burr, and of Benjamin and Henry B. Tatham, assignees of Charles and John Hanson, heretofore referred to. But what we do claim as constituting our invention, and desire to secure by letters patent, are: First. The long core, or core-holder, formed and held stationary with relation to the dies as described. Secondly. We claim the constructing of the piston B, hollow, in the manner described; and the combination of the same with the long core, or core-holder, upon which the piston slides. Thirdly. We claim, as a modification of our invention, the arrangement and

combination of the several parts above mentioned as exhibited in what has been termed 'The Reversed Arrangement,' shown at figure 7, in the accompanying drawings."

Case No. 13,761.

TATHAM v. LE ROY.

Circuit Court, S. D. New York. 1849.

PATENTS—ALIEN PATENTEE—COMBINATIONS—INFRINGEMENT—WHO ARE INFRINGERS—NEW AND USEFUL RESULT.

1. Under section 15 of the act of 1836 [5 Stat. 123], it is not essential that an alien patentee or his assignee should take active means for the purpose of putting the patented invention in the market, and forcing a sale, within 18 months after the date of the patent, but only that he should be ready at all times to sell at a fair price, when a reasonable offer is made.

2. It is a question for the jury to determine whether the invention was so put and continued on sale.

3. If a combination is new, and produces a new and useful result, it is the proper subject of a patent.

4. Though a mere combination of machinery in the abstract may not be new, yet if used and applied in connection with the practical development of a newly-discovered principle, producing a new and useful result, the subject is patentable.

5. Under section 15 of the act of 1836, providing, in the case of a patent granted to an alien patentee, that it should be a good defense that such patentee had omitted to put and continue his invention on sale, upon reasonable terms, within 18 months after the patent was granted, it is not essential that such patentee should take active means for the purpose of putting his invention in market, and forcing a sale; but it is a sufficient compliance with the law that he should at all times be ready to sell at a fair price, when a reasonable offer is made.

6. Where A. and B. agreed with C. to purchase of the latter all of a certain article (lead pipe) which he should make, A. and B. agreeing to furnish the lead, and pay C. a given price for manufacturing, and C. used in such manufacture a machine patented to plaintiff's assignor, *held*, in an action for infringement against A., B. and C., that if A. and B. had no connection with the manufacture, except to furnish the lead and pay a given price, they were not liable for infringement.

7. But if the agreement was only colorable, and entered into for the purpose of securing the profits of the business, without assuming the responsibility for the use of the invention, then they would be liable. Aiding and assisting a person in carrying on such a business and in operating the machinery, will implicate the parties so engaged.

8. It is a question for the jury to determine whether an alien patentee has put and continued on sale the invention patented to him within 18 months from the date of the patent.

9. The question of identity between two opposing machines is ultimately one of fact to be determined by the jury.

10. The discovery of a new principle is not patentable, but it must be embodied and brought into operation by machinery so as to produce a new and useful result.

[Cited in Law's Pat. Dig. 128, 183, 244, 371, 456, 489, 581, and 592, to the points as stated above. Nowhere reported; opinion not now accessible.]

[See Case No. 13,762, and note.

Case No. 13,762.

TATHAM et al. v. LE ROY et al.

[7 West. Law J. 431.]

Circuit Court, S. D. New York. 1850.

PATENTS — WHAT CONSTITUTES INFRINGEMENT — LEAD-PIPE MACHINE.

[1. Even if an alleged infringing machine is not, in its arrangement, substantially different from that of the patent, yet there is no infringement if its action upon the material operated on is essentially different, and the result is new; otherwise if there are merely formal changes, without any new mode of action or the accomplishment of a new result.]

[2. The Tatham patent, No. 1,980, for a lead-pipe machine, analyzed and construed in a charge to a jury.]

[This was a bill in equity by George N. Tatham, Benjamin Tatham, Jr., and Henry B. Tatham against Thomas Le Roy, Robert Lowber, and David Smith, for a provisional injunction to restrain the infringement of letters patent No. 1,980, granted to Benjamin Tatham, Jr., and H. B. Tatham, as assignees of John and Charles Hanson (who had procured an English patent), and reissued to all the complainants March 14, 1846, for improvements in the machines for making or manufacturing lead pipes and tubes. The court held that the acts of congress (5 Stat. 193, and Id. 123) regulating foreign patents did not apply to American patentees. Case No. 13,764.

[Before the cause was again before the court, Lowber, one of the defendants, was stricken out as a party.

[A suit at law was then begun to recover damages for the infringement. There were two trials. At the first the verdict rendered by the jury was in favor of the plaintiffs (case unreported). This the court set aside, and awarded a new trial, upon which the case is now before the court.]

Cutting, Staples & Goddard, for plaintiffs.

Stoughton, Noyes & Harrington, for defendants.

This is an action for infringement of a patent granted to the plaintiffs, October 11, 1841, for improvements in lead-pipe machinery. The defendants are using a machine under the patent granted to Samuel G. Cornell, August 21, 1847. The plaintiffs alleged that Cornell's improvements, for which the patent was granted to him, consist of transpositions of the parts of their machine, and were not substantially different from those described in their patent. The defendants contend that their machine is not only substantially different from that of the plaintiffs, but possesses very great advantages over all lead-pipe machines heretofore known. It appeared in evidence that the defendants, by employing one-half of the pressure necessary to work the other machines, could make three times the quantity of lead pipe that could be made by any other method.

The trial occupied the court and jury five days, and Judge NELSON, in charging the jury, after giving a very clear and succinct history of the former methods of manufacturing lead pipe, and of the various improvements that had been made in the machinery used for that purpose, charged, that both the patent granted to the plaintiffs and that granted to Mr. Cornell were for improvements upon the machine invented by Thomas Burr in 1820; that, in Burr's machine the die was placed in the end of the lead cylinder, opposite to that at which the piston entered; and the core being fastened in the end of the piston, and advancing before it through the lead in the cylinder, was bent and twisted out of its central position in relation to the die, by reason of the great pressure required to force the whole mass of lead through the cylinder and out through the die; that this difficulty was found to be so great in practice, that the use of that arrangement had been abandoned; that the object of the plaintiffs' improvement was to remedy this defect, and they attempted to do so by using a long coreholder of sufficient size and strength to withstand the unequal pressure and friction, into the end of which was fastened a short core of the size required to form the inner diameter of the pipe. This coreholder is fastened to a strong framework below the platform on which the piston rests, extending through the platform, through the center of the piston, which is bored accurately throughout for that purpose, and through the center of the lead cylinder to its discharging end; and the short core is there inserted in the center of the die. This coreholder is always held stationary with relation to the die, so that, when the piston advances, it slides over the coreholder, forces the whole mass of lead forward in the cylinder and out at the die, in the same manner as in Burr's machine. The coreholder being of large size, firmly secured to the framework, and supported by the piston which slides over it, would not be bent or twisted out of its proper position; and thus it was thought the defects of Burr's machine were overcome.

This was the plaintiffs' invention; and it was necessary for the jury to consider whether the invention of Mr. Cornell, which the defendants used, was substantially the same, or a different improvement. That Mr. Cornell had the same object in view in his improvements that the plaintiffs had, viz., to overcome the difficulties of Burr's machine. To do this, he takes the long, slender core of Burr, and fixes it firmly in the bottom of the lead cylinder, and then places the die in the end of the piston, which is made hollow for the purpose of permitting the pipe to escape through it; so that, as the piston is forced into the cylinder, or the cylinder is forced over the piston, the pipe is formed at the point of pressure where the piston comes in contact with the lead, and passes out through the hollow piston. Mr. Cornell claims that there are very material advantages in his improvement. In the first place, it is alleged that the core is fixed in the bottom of the lead cylinder, and extending upward through it to the die; so that, when the lead in the cylinder becomes set, or solid, it forms a support for the core up to the very point where the pipe is formed during the whole operation. In the next place, as the pipe is formed at the point of pressure, without moving forward the whole mass of lead in the cylinder,—as must be done in all other machines,—Mr. Cornell alleges that a very great amount of friction is avoided, and that the action of the machinery upon the lead, in the operation of making pipe, is entirely different from any other method. The defendants, therefore, insist: (1) That these arrangements of machinery are new, and substantially different from the plaintiffs' machine. (2) That even if these arrangements of machinery are not, in themselves, substantially different from those of the plaintiffs, yet, as the result, the action upon the lead is essentially different. This, if so, makes the improvement novel and patentable. That, if the jury believed that the changes made in the machine by Mr. Cornell were slight and formal, such as are contained in, or readily suggested by, the plaintiffs' specification and drawings, and that no new result in the action of the machinery upon the lead is produced, they were to find a verdict for the plaintiffs. But, if they believed that the arrangements of Mr. Cornell were substantially different from those of the plaintiffs, or that, by means of different arrangements, though not in themselves wholly unlike the plaintiffs', a new and useful result in the mode of operation of the machine is produced, which was not known to the plaintiffs, and not found in any other machine, then Mr. Cornell was entitled to his patent; and the defendants, in using his machine, had not infringed the plaintiffs' patent.

His honor then illustrated, by a variety of adjudged cases, what was necessary to constitute novelty in machinery according to the rules of law, and instructed the jury to apply those principles of law to the question of fact in the present case, and find their verdict accordingly. His honor adverted to the very great importance of the case, as well on account of the large interests of the parties which depended upon their verdict, as of the interesting character of the points in controversy.

After two hours absence, the jury returned to the bar, and found a verdict in favor of the defendants.

[NOTE. The verdict rendered above was set aside by the court, and a new trial granted (case unreported). Upon the new trial (May, 1849) there was a verdict for plaintiff for $11,394 damages (case unreported). Judgment on this

verdict was reversed in error by the supreme court, and a new trial ordered. 14 How. (55 U. S.) 156. Case No. 13,760 would seem to be the new trial were it not that it appears to have been tried in November, 1852, while the case in the supreme court was heard at the December term, 1852; and further in the hearing in the chancery case, in 22 How. (63 U. S.) 132, it is stated that by stipulation the action at law was not to be tried again. For an action by the same plaintiffs against other defendants in Massachusetts, see Case No. 13,763. For the chancery cases related to this proceeding, and pending at the same time, see Cases Nos. 13,764 and 13,765.]

Case No. 13,763.

TATHAM et al. v. LORING.

[5 N. Y. Leg. Obs. 207.]

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

PATENTS—ASSIGNMENT BY NONRESIDENT ALIEN—TITLE OF PATENTEE.

1. Assignees of an invention can take only such rights as the inventors.

2. Where a patent was taken out by the assignees of the inventors in their own name, such assignees being citizens of the United States, but it appeared that the inventors were aliens, and had never been residents of the United States, or put their invention on sale there, *held*, that the assignees had no title to such patent.

Case for the infringement of "a new and useful improvement in the machine for making or manufacturing pipes and tubes from lead and other metallic substances." The plaintiffs [George N. Tatham and others] claimed as assignees of John and Charles Hanson, the inventors; and the patent was granted to the assignees on the 29th of March, 1841. The breach assigned in the declaration was for making and using the patented machine, and the plea was the general issue, with a specification of special matters of defence.

Mr. Dexter, for plaintiffs, in the opening, stated that the patent was for improvements on Thomas Burr's invention. His patent was granted in 1820, and was a total failure. The plaintiffs claimed several improvements, some of which were equivalents of each other. He cited 41 Repertory of Arts (1822) p. 267, and Journal of Arts, No. 6, p. 41, for November, 1820.

B. R. Curtiss and Mr. Hoar, for defendant [David Loring] made several points in defence: (1) That there was no novelty in the supposed invention in the patent; and they cited 8 Jour. Fr. Inst. p. 136, N. F. 1831; 5 London Journal of Arts, p. 76. (2) That the machine used by the defendant was not the same combination as that of the plaintiffs, in the apparatus or the mode of operation. (3) That the supposed inventors are aliens; and although the assignees are citizens, they can take only such rights as the inventors could take, and here had not shown any title in conformity to the patent acts. For this they cited Patent Act 1836, c. 357, §§ 6, 9, 10, 12, 15 [5 Stat. 117]; Patent Act 1837, c. 45, § 6 [5 Stat. 193]; Patent Act 1839, c. 88 [5 Stat. 353].

STORY, Circuit Justice. The plaintiffs insist that the defendant has violated their patent by using what is called the fixed cone, and also the chamber in their machine. In respect to the chamber, the defendant insists that the patent by its term is limited to a chamber of conical form, whereas he uses a simple cylindrical form. The defendant also insists that he uses the short cone and holder, and that it is not included in the specification. In respect to the first objection, I incline to think that the plaintiff, by his specification, claims only the conical form of the chamber, and has made that form a material part of his invention. In respect to the cone, I have more doubt; but incline to think that the cone, although not distinctly claimed in the specification, is nevertheless, by implication, included as a part of the improvements claimed in the patent. However, it is not necessary to decide either point. The great objection is as to the validity of the patent. The inventors are confessedly aliens, and the assignees can claim nothing except what the aliens could have claimed if they had taken out the patent. They take by assignment the rights of the inventors, and can take no more. Their being citizens of the United States makes no difference in the case. The inventors are not, and have never been, residents in the United States, and they have not put their invention on sale to the public in the United States. These facts are conceded. Now the ninth section of the patent act of 1836 (chapter 357) expressly requires that the applicant for a patent, if an alien, shall have been a resident in the United States for one year next preceding his application, and shall have made oath of his intention to become a citizen. The fifteen section of the same act makes it a good matter of defence, and bar to the suit for a violation of the patent, that the patentee, if an alien at the time when the patent was granted, had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public on reasonable terms the invention or discovery for which the patent issued. The eleventh section of the same act makes every patent assignable; and the sixth section of the act of 1837 (chapter 45) enables the assignee of any invention to take out a patent therefor in his own name. But the section contains no clause authorizing a patent to be granted to the assignee, where the inventor himself would not be entitled to a patent. That would be to place the assignee in a better situation, and to give him a higher and yet different claim from that of the inventor himself. No such policy can possibly be deduced from the nature or objects of the patent act; and if the doctrine were well founded, a nonresident alien might evade the whole provisions

of the patent acts, and enjoy an unrestricted monopoly of his patent by a single transfer thereof to a citizen. My opinion is that the present objection is fatal to the suit.

Upon this opinion being expressed, the plaintiff asked leave to become nonsuit, with leave to move for a new trial upon the last point, if he should, upon further consideration, elect so to do.

[See Case No. 13,762, and note.]

Case No. 13,764.

TATHAM et al. v. LOWBER et al.

[2 Blatchf. 49;[1] 1 Fish. Pat. Rep. 149; 44 Jour. Fr. Just. 188; Betts' Scr. Bk. 118.]

Circuit Court, S. D. New York. April 21, 1847.

PATENTS—ALIEN PATENTEE—PUTTING UPON MARKET—WHAT NECESSARY—ASSIGNEE.

1. An American assignee of an alien inventor, who obtains letters patent in his own name from the United States, under section 6 of the act of March 3, 1837 (5 Stat. 193), is not within the alien clause of section 15 of the act of July 4, 1836 (5 Stat. 123), which requires the patentee, if an alien at the time the patent was granted, to put and continue on sale to the public, on reasonable terms, the invention for which the patent issued. That clause applies only to an alien patentee.

2. It is not necessary, under that clause, for an alien patentee to prove that he hawked the patented invention to obtain a market for it, or that he endeavored to sell it to any person.

3. But it rests on those who seek to defeat the patent, to prove that the patentee neglected or refused to sell the patented invention for reasonable prices when application was made to him to purchase.

In equity. This was an application for a provisional injunction to restrain the infringement of re-issued letters patent granted to the plaintiffs, March 14, 1846, for fourteen years from August 31, 1837, for "improvements in the machine for making or manufacturing pipes and tubes from lead or other metallic substances." The invention was one made by John Hanson and Charles Hanson, of Huddersfield, England, and for which letters patent were granted to them in England dated August 31, 1837. The original patent in the United States was issued on the 29th of March, 1841, to Benjamin Tatham, Jr. and Henry B. Tatham, two of the plaintiffs, as assignees of the Hansons. The other plaintiff, George N. Tatham, became interested in the patent before the re-issue. The plaintiffs were all citizens of the United States. In opposition to the motion, it was attempted to be shown that application had been made [by Robert W. Lowber and others] to the plaintiffs to purchase an interest under their patent, but that they refused to sell, desiring themselves exclusively to manufacture lead pipe under their patent, and to control the business. It was insisted that the plaintiffs had thereby subjected themselves to the operation of the clause in section 15 of the patent act of July 4, 1836 (5 Stat. 123), which provides that a defendant, in an action on the case for an infringement of a patent, may, under a previous notice to that effect, show that the patentee, if an alien at the time the patent was granted, had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued, and that, in that case, judgment shall be rendered for the defendant, with costs. The plaintiffs offered evidence to show that they had not neglected or refused to sell rights under their patent in a manner to bring themselves within the statute.

Seth P. Staples, Charles O'Connor, and George C. Goddard, for plaintiffs.

Daniel Lord and William Curtis Noyes, for defendants.

Before NELSON, Circuit Justice, and BETTS, District Judge.

THE COURT held: [That the specification of the patent to plaintiffs (re-issued March 16, 1846) claims as the invention a combination of arrangement of the parts of machinery described, by which pipe, with the operation of hydraulic pressure, is made with lead in a set or semifluid state. That the machine used by the defendants is in substance the same as plaintiffs. That the patentees can legally take out the re-issued patent for more than is described in the surrendered one, if it does not exceed the actual discovery when the first was taken out. That the evidence satisfactorily establishes that the Hansons were the first and original discoverers of the combination of arrangement embraced in the patent.][2] That the plaintiffs, on the grant of patent to them upon the assignment of the alien inventors, took and held it with all the privileges belonging to American patentees, and that the alien clause in section 15 of the act of 1836 applied only to alien patentees, and not to American patentees who became such as assignees of alien inventors under the sixth section of the act of March 3, 1837 (5 Stat. 193). That even if the plaintiffs took their right with the condition attached to alien patentees, yet they had satisfied the statute. That they need not prove that they hawked the patented improvement to obtain a market for it, or that they endeavored to sell it to any person, but that it rested upon those who sought to defeat the patent to prove that the plaintiffs neglected or refused to sell the patented invention for reasonable prices when application was made to them to purchase. [That the sales by the plaintiffs, and those they proposed and offered,

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

[2] [From Betts' Scr. Bk. 118.]

were of the invention or discovery within the meaning of the act. That the proof is sufficient to charge all the defendants directly and indirectly with using the machinery in violation of the plaintiff's right. Let an injunction therefore issue.] [2]

[At the final hearing of the case there was a decree in favor of the complainant. See Case No. 13,765. This was affirmed upon appeal by the supreme court. 22 How. (63 U. S.) 132.]

Case No. 13,765.

TATHAM et al. v. LOWBER et al.

[4 Blatchf. 86.] [1]

Circuit Court, S. D. New York. Sept. 14, 1857.[2]

PATENTS—ACCOUNTING—PROFITS—APPORTIONING LIABILITY—INTEREST.

1. In a patent suit, in equity, the proper practice is, in taking an account of profits before a master, to take it down to the time of the hearing before the master, if the infringement continues to that period.

[Cited in Morss v. Knapp, 35 Fed. 219; Untermeyer v. Freund, 7 C. C. A. 183, 58 Fed. 212.]

2. Where the defendants have not all of them been jointly concerned in the infringement, for the whole time covered by the account, their several liability must be apportioned, in making up the decree.

3. The mode of arriving at such profits, under a patent for machinery for the manufacture of lead pipe.

4. Interest allowed on such profits to the date of the master's report.

This was a hearing on exceptions to the report of a master as to the amount recoverable by the plaintiffs in a suit in equity [by Benjamin Tatham and others against Robert W. Lowber and others] for the infringement of letters patent for machinery for the manufacture of lead pipe.

[For the opinion in the motion for preliminary injunction, see Case No. 13,764.]

George C. Goddard, for plaintiffs.

William Curtis Noyes, for defendants.

NELSON, Circuit Justice. The first objection to the report is, that an account of the profits of the defendants, as damages, has been taken for a period subsequent to the time of the filing of the bill, whereas it is claimed that it should have been limited to the time of the commencement of the suit. The objection is not well taken. The practice in such cases, in equity, is to take the account down to the time of the hearing before the master, if the infringement continues to that period, thereby preventing the necessity and expense of a new suit; and I can perceive no well-founded objection to this practice. The right as between the parties to the litigation, in respect to the use of the patent, has been determined, leaving in dispute no question but the damages. If a second suit were brought, the decree in the first would be conclusive of the right, and the only question open would be that of damages; and, as to that question, the same defence may be made on taking the account for a time subsequent to the commencement of the suit, which could be made in case a new suit were instituted. It is common, in the case of a bill filed for an infringement, and a motion made for a preliminary injunction, where the question of infringement is not manifest, and enjoining the defendant would produce serious hardship or derangement of his business, to withhold the injunction on the defendant's keeping an account, or giving security for the damages accruing, which assumes the right of the plaintiff to recover damages for the alleged infringement subsequently to the commencement of the suit.

Another objection is, that the account should have been taken for the time during which all the defendants were jointly concerned in the infringement. A portion of the account taken accrued after Lowber left the concern, and that portion has been reported against the remaining parties, Leroy and Smith. I perceive no difficulty in the case, as the liability of the defendants may be apportioned in making up the decree. No decree should be entered against Lowber for profits which accrued after he withdrew from the concern.

The master arrived at the profits by taking the difference between the average price of pig-lead during the period covered by the accounting and the average price of lead-pipe during the same period, such difference being the value added to the lead by its manufacture into pipe. From that difference he deducted the cost of manufacturing the lead into the pipe, and the remainder he called the profits made by the defendants upon the manufacture, and to the sum thus ascertained he added interest to the date of his report. I concur with the report of the master as to the extent of the profits, and I think that the interest was properly chargeable.

Exceptions overruled.

[NOTE. The decree entered was for $16,815.57, with interest to the date of the master's report, making an aggregate of $27,133.34. An appeal from the decree was taken by the defendants to the supreme court. The decree was affirmed, except as to the amount of the recovery, which was limited to the amount of the decree without interest. This reverses the opinion above. 22 How. (63 U. S.) 132. For the cases at law, see Case No. 13,762, and note.]

---

[2] [From Betts' Scr. Bk. 118.]

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

[2] [Reversed in 22 How. (63 U. S.) 132.]

Case No. 13,766.

TATUM v. LOFTON et al.

[Brun. Col. Cas. 175; [1] 1 Cooke, 115.]

Circuit Court, D. Tennessee, 1812.

WITNESS—WHEN INCAPACITATED BY INTEREST.

A witness will be compelled to testify, though he be interested, if he voluntarily became interested after he had acquired his knowledge on the subject. But if this interest is created by act of law or of the party who calls him, he cannot be so compelled to testify.

On the trial of this cause the plaintiffs [Tatum's executors] produced one Donnelson for the purpose of proving their beginning corner. Donnelson objected to being sworn upon the ground that he was interested, having purchased a part of the land in controversy from one of the defendants. It appeared that Donnelson was the locator and surveyor of the land claimed by the plaintiffs; and that long after these circumstances he purchased of the defendant Anderson, but before the commencement of this suit. The question was, whether, under these circumstances, he could be compelled to give testimony.

Mr. Haywood, for plaintiffs.

It is a good, general rule of law that no man is bound to give testimony against himself; but it is equally true that where the interest arises, after the witness derives his knowledge upon the subject, by some act of the witness or the person against whom he is called, he will be compelled to give testimony. 1 Peake, Ev. 157; 1 Strange, 652; 3 Term R. 27. It were monstrous indeed, if by any act of the witness or the party against whom he is called, the person who once had a right to coerce the evidence would be deprived of the benefit of it. The true rule is, that if the interest of the witness is occasioned by the act of the person introducing him, or by the act of the law, the witness shall not be compelled to give testimony. If the interest arises from the act of the witness he shall be compelled to swear, and surely the principle will operate with infinitely more force when it is recollected that in this case it arises from the joint act of the witness and the defendant. Why is not the subscribing witness who voluntarily creates an after interest protected? Because, as he once was in such a situation that the party had a right to coerce his evidence, he shall not, by his own act, be permitted to deprive another of his privileges. 1 Strange, 652. So if a person lays a wager that such a one will gain his cause, or if he wagers that a person prosecuted will be convicted, he cannot be allowed to say that he will not give testimony when called upon by those against whom he is interested; because, as his knowledge existed before his interest, it was his own fault to bring them in contact. Therefore, if there must be a loser, let it be him who has voluntarily become interested against his knowledge. Skin. 586.

Mr. Whiteside, for defendants.

The rule contended for by Mr. Haywood only applies to instrumentary witnesses. As a general principle, none is better established than that a man shall not be compelled to give evidence against himself. The reason for this is that the law will not put a man in a situation where he will have so great an inducement to act dishonestly. It is certainly contrary to every principle of moral justice that any rule should be established by which a temptation would be holden out for the commission of perjury. Swift, 73, 77. There is no question but that the same reasoning does not apply to the case of voluntary evidence; but it should be an extreme case indeed to justify coercion. Kirby, 203.

The case in Strange, upon which Mr. Peake principally establishes his rule, was the case of an instrumentary witness. The subscribing witness to the note had become the defendant's bail, and was therefore interested. Under these circumstances the court said he might be compelled to give testimony. This decision was not made because his interest had accrued after the plaintiff had right to call upon him as a witness, but because he was a witness of a particular description who had been called upon by both parties to become so. The compulsion used resulted from the necessity of the measure, and the particular circumstances of that and similar cases. But I imagine no case can be shown where the knowledge of the witness has arisen in the ordinary and common course of affairs that he has been compelled to give evidence if he has subsequently become interested. It would be monstrous to say that, because I happen to get knowledge of a certain fact I shall thereby be tied up and deprived in effect of making an advantageous bargain. The law never did contemplate the rule contended for should apply to any such case, or to any other except the case of instrumentary witnesses. I admit, if the witness acquires this after interest with a view to defeat the claim of the other, or by the practice of any fraud, he might, perhaps, be compelled to give evidence; but nothing of that kind is pretended here, and indeed the contrary is expressly proven. It would seem, then, that the only cases where a witness thus situated can be compelled to swear are those where he has by some act of his own agreed to become a witness. There is, perhaps, an exception to this rule, where the witness has become interested by making a wager. In that case his conduct is improper, and he shall not be permitted to avail himself of an interest arising in a moral wrong.

In the case cited from 3 Term R. 27, the

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

only perceivable ground upon which the court reversed the judgment below was because it did not appear, but that the witness might have answered some questions without affecting his interest, and because the evidence had been wholly rejected, the decision of the inferior court was ordered to be set aside.

Mr. Haywood, in reply.

It is laid down by Mr. Peake, in his treatise on Evidence (page 157), that, for the purpose of protecting a witness upon the ground of interest, the interest must exist at the time the fact which the witness is called to prove happened, or be thrown upon him afterwards by the operation of law, or the act of the party who requires his testimony. Now, sir, can there be any doubt but that this exception to the general rules of law is founded upon strict moral justice? See, but for a moment, what disastrous consequences would naturally flow from the establishment of the rule as contended for on the other side. A. anticipates a suit against him by B. for a considerable sum of money, which can be proved by C. If the testimony of C. is out of the way, he will have a certain prospect of depriving B. of an honest and bona fide claim. The next question is, how is this to be done? He understands that if C. can be made interested he cannot be compelled to give testimony. With this knowledge on his part he goes to C., who is, perhaps, his friend, and between them an interest is created. Do not the court perceive at once to what monstrous consequences this would lead? Would any man, if he owed a large demand, and the witness or witnesses should be friendly to him, ever be made to pay a cent? For if there should be more than one witness the inducement might be sufficiently great to require the same course to be pursued toward them all. It was, therefore, to prevent such an evil as this that the excellent rule I contend for was established, and not because the witness was an instrumentary one. I will not outrage the understanding of the court by entering into a detail of the consequences of Mr. Whiteside's ideas as applicable to real estates in this country. In many cases where property to an enormous amount is involved, there is but one witness to prove the beginning. Such a doctrine would open a direct and inviting door to fraud, and would, in a short time, overwhelm the country in ruin.

Lord Holt said that where a person hath made himself a party in interest, after the plaintiff or defendant has an interest in his testimony, he shall not by this deprive the plaintiff or defendant of the benefit of his testimony. Skin. 586. And Lord Kenyon, in the case of Bent v. Baker, 3 Term R. 27, expressly sanctions the opinion of Holt, which is also done by the whole court. And Grose, J., in the same case, remarks that a person in whose evidence another has gained an interest shall not by his own act deprive the other of the benefit of his testimony. 1 Peake, Ev. Append. p. 25, § 6.

McNAIRY, District Judge. I am perfectly satisfied that the witness should be compelled to give testimony. There can be no reasonable doubt but that the rule, which is the foundation of that compulsion, is supported by the principles of justice. But independent of this consideration, a train of well-settled adjudications has put the question to rest. The books do not recognize any such distinction as is contended for by the gentleman who appears for the defendants. The witness is not coerced to give his testimony because he happens to have agreed to become a witness, but because, as there once was a period when the plaintiff had a right to the benefit of his testimony, the witness shall not be permitted, by his own act, or the act of the party against whom he is called, to deprive him of that right. The rule is, however, different where the interest is occasioned by the act of law, or the party who requires the benefit of the testimony. But where it arises, as before remarked, by the act of the witness, it is a wrong in the witness, of which, from a well-known rule of law, he shall not take advantage. Let him be sworn.

TATUM (PATTERSON v.). See Case No. 10,830.

TAUSZKY (SAGE v.). See Case No. 12,214.

TAVEL (YOUNG v.). See Case No. 18,175.

Case No. 13,767.

TAVENNER v. HUNTER.

[1 Hayw. & H. 81.] [1]

Circuit Court, District of Columbia. April 30, 1842.

REPLEVIN—CUSTODY UNDER LEVY.

A plaintiff is not entitled to recover in an action of replevin where the goods to be replevied are in the hands of defendant as an officer of the law by virtue of an attachment.

This is an action of replevin brought by [Charles H. Tavenner] the plaintiff against [Alexander Hunter] the defendant, who was marshal of the District, for the possession of a cow and calf, the property of said plaintiff. The writ was directed to the coroner of Washington county, in the District of Columbia, commanding him to replevy said cow and calf.

Brent & Brent, for plaintiff.
Clement Cox, for defendant.

The following instruction was given by THE COURT: "If the jury believe from the

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

evidence that, at the time the writ of replevin in this cause was sued out and levied on the cow and calf therein mentioned, the same were in the custody of the defendant by virtue of the levy thereon of the attachment given in evidence, then the plaintiff is not entitled to recover under the issue joined in this cause."

The following is the verdict of the jury: "The jury find for the defendant, and assess his damages at one cent. They also find the property mentioned in the replevin to be in plaintiff, and the replevin bond given by the plaintiff to be in no wise answerable to the defendant."

Judgment on the verdict for one cent damages and costs. No return of property awarded or to be awarded.

TA-WAN-GA-CA (UNITED STATES v.). See Case No. 16,435.

Case No. 13,768.

Ex Parte TAWS.

[2 Wash. C. C. 353.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

JAIL—SAFETY OF PRISONER—DISCRETION OF JAILER.

The court will not interfere with the jailer, who has custody of a prisoner under process, in the exercise of the discretion vested in him, as to the security of his prisoner; unless it appears that he has misconducted himself, by an abuse of that discretion, for the purposes of oppression.

The court was applied to for a habeas corpus, for the purpose of inquiring into the cause of the petitioner's confinement, without the privilege being allowed him of the yard adjoining the debtors' apartment. It appeared by affidavits, that Taws was confined, on process from the district court, to recover the penalty for violating the embargo, in which he was held to bail in twenty thousand dollars. That he had been permitted the use of the yard, until, in consequence of some threats that he would escape, the jailer thought it prudent to keep him in a room of the debtors' apartment, which did not appear to be an uncomfortable one. It also appeared, that the wall surrounding the yard, was not very secure.

BY THE COURT. We do not think it right to interfere with the jailer in the exercise of the discretion vested in him, as to the security of his prisoners; unless it appeared that he misused it for purposes of oppression, of which there is no evidence in this case.

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

TAYLOE (BARNARD v.). See Case No. 1,008.

TAYLOE (CENTRAL BANK v.). See Case No. 2,548.

Case No. 13,769.

TAYLOE v. DAVIDSON.

[2 Cranch, C. C. 434.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

NOTES—INDORSER—PAYMENT DEMANDED OF MAKERS—BY WHOM MADE.

1. Upon a promissory note, dated at Georgetown, D. C., by which T. C. and J. W. (not being in partnership, and one of them residing in Maryland,) jointly and severally promise to pay to L. G. D. or order, $600, eighteen months after date, it is necessary, in order to charge the indorser, that payment should have been, in due time, demanded of each of the makers of the note, although one of them resided in Maryland, out of the jurisdiction of this court, when the note was given, and when it became payable.

2. It is not necessary that payment of a promissory note should be demanded by a notary public.

3. The demand may be made by any other agent of the holder.

Assumpsit [by John Tayloe], against the indorser of a promissory note, made by Thomas Crawford, and John Winemiller, dated at Georgetown, D. C., May 10th, 1820, by which, eighteen months after date, they did "jointly and severally agree and promise to pay to Lewis Grant Davidson, or order, $600, for value received." This note was indorsed by the payee, the defendant, to the plaintiff. The plaintiff in his declaration avers, that on the 13th day of November, 1821, "he showed and presented the said note, with the indorsement so made thereon, as aforesaid, to the said Thomas Crawford and John Winemiller, and each of them, and then and there required the said Thomas Crawford and John Winemiller, and each of them, to pay the same; but the said Thomas and John, or either of them, did not pay," &c. Mr. Whetcroft, the notary public, who resides in the city of Washington, at the request of the Bank of the Metropolis, whose banking house is in Washington, demanded payment of Crawford, who resides in Georgetown, (but did not demand payment of Winemiller, who resided in Montgomery county in Maryland, a few miles from Georgetown,) on the 3d day of grace, and on the following day, put a letter into the post office in Washington, directed to the defendant at Georgetown, in time for the mail of that day, informing him that the note had been delivered to him by the Bank of the Metropolis, and that, not being paid, he had protested it and returned it to the bank.

Mr. Key and Mr. Dunlop, for defendant, contended that the defendant was not liable because payment had not been demanded of

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

both of the makers of the note, and a verdict for the plaintiff was taken, by consent, subject to the opinion of the court upon that point.

Mr. Forrest and Fleet Smith, for plaintiff, contended that Crawford and Winemiller were to be considered as joint partners. De Berkom v. Smith, 1 Esp. 29. The notary, perhaps, could not have made the demand upon both on the same day. If the drawee of a bill never resided at the place in which he is stated in the bill to reside, it excuses the want of demand, because the drawer undertakes that the drawee shall be found in that place. 1 Chit. 213, 214, 335; Ireland v. Kip, 11 Johns. 231. The note is joint and several. The plaintiff may elect to treat it as a several note. If both drawers had resided in Georgetown, a demand upon one would have been sufficient. Anderson v. Drake, 14 Johns. 114. Winemiller resided out of the District of Columbia, which is as distinct from Maryland as Albany was from Canada in the case of Anderson v. Drake, 14 Johns. 114. Chit. 49; Carvick v. Vickery, 2 Doug. 653, note; Whitcomb v. Whiting, Id. 651; Caswell v. Coare, 2 Camp. 82.

THE COURT took time, till the next term, to consider, and on the 14th of April, 1824, CRANCH, Chief Judge (the other judges assenting), delivered the following opinion:

I have not been able to find any case in the books exactly in point. In Carvick v. Vickery, 2 Doug. 653, the bill was drawn by two who were not in partnership, in this form: "Pay to us or our order," and was indorsed by one only. The court held that they were to be considered as partners in that transaction, and that the indorsement of one alone was sufficient; but on the trial it was proved by bankers, that by the uniform custom and usage of business, the indorsement of both was necessary, and so the jury decided, and I think correctly. Even in cases of general partnership, if the transaction be with one of the firm for his own separate benefit, the others are not bound, unless they had notice. Bignold v. Waterhouse, 1 Maule & S. 259. If a bill be drawn on two persons, not partners, an acceptance by one is not sufficient. Marius, 16; Carvick v. Vickery, 2 Doug. 653. It seems from this, that such a bill must be presented to both for acceptance; and if accepted, must be presented to both for payment before it could be so dishonored as to make the drawer liable. It seems to me that the undertaking of the defendant in the present case, as indorser of the note, was, that he would pay it, if the makers of the note did not, when payment should have been properly demanded of them. If either of them should pay it, the indorser would be discharged. He did not undertake, that if either of the makers should refuse to pay it, he would; but that if all of them refused to pay it, then he would be responsible. Otherwise the greater the number of makers, the greater the risk he would run of being obliged to pay it in the first instance; for the holder might choose to demand it of the only insolvent among them.

Upon general principles, then, I think that payment should have been demanded of each of the makers. But it is said that Winemiller, upon whom no demand was made, resided in Maryland, out of the jurisdiction of the court, and therefore the plaintiff was not bound to demand payment from him; and a case in 14 Johns. 114, is relied upon. That case is only alluded to by the judge, who does not even give the name of the case, nor of the court by which it was decided, nor the date of the decision. It was also a case of removal. But Winemiller has always resided in Maryland, since and before the date of the note; at least there is no evidence to the contrary. If he had been the sole maker of the note, and had always resided in Maryland, I should suppose there could be no doubt that the demand must have been made upon him. The circumstance that another is jointly and severally bound with him, cannot, in my opinion make any difference in that respect.

In Fisher v. Evans, 5 Bin. 541, it is decided that it is not sufficient to look for the drawer at the place where the bill is dated, if his residence be elsewhere. His being out of the jurisdiction of the court makes no difference. The notary who made the demand upon Crawford in Georgetown, was not bound, as a notary, to go out of his jurisdiction, whatever may have been his duty as agent of the plaintiff; but this did not discharge the plaintiff from the obligation of making the demand. It was not necessary that it should be made by a notary public; a demand by any other agent would have been sufficient. From the circumstance that the note is dated at Georgetown, I think it cannot be inferred that it was to be paid there, or that the defendant undertook that the makers should be found there when the note became payable, so as to dispense with a demand of payment at the actual residence of the makers.

It is said that where there are a great number of joint and several makers of a note, it may be impossible to make demand upon all of them on the same day. This is true; and if such were the case, the law would not require the demand to be made upon all on the same day, for it never requires impossibilities. But this would go only to dispense with the time of the demand, not with the demand itself. Freeman v. Boynton, 7 Mass. 483. The drawer of a bill undertakes that the drawee shall be found at the place of his residence described in the bill, when presented for acceptance; but he does not undertake that he shall remain or be found there when the bill becomes payable. If he be found there when the bill is presented for acceptance, and accept the bill, and afterwards remove, I apprehend the holder is bound to use due diligence to ascertain the place to which he had removed, and to demand payment there. In

the absence of direct authority on the subject, I feel bound, upon general principles in analogous cases, to decide that the defendant is discharged from his liability by the neglect of the plaintiff to demand payment from Winemiller, one of the joint and several makers of the note.

Judgment for the defendant.

TAYLOE (RIGGS v.). See Case No. 11,832.

TAYLOE (SOMERS v.). See Case No. 13,170.

Case No. 13,770.

TAYLOE v. TURNER.

[2 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. June Term, 1820.

DAMAGES—MEASURE OF—STOCK.

The rule of damages for not transferring stock according to contract, is the price of the stock on the day on which it ought to have been transferred.

Debt on bond conditioned to transfer stock of the Washington Bridge Company.

THE COURT (nem. con.), at the prayer of the plaintiff's counsel, instructed the jury that the rule of damages was the price of the stock on the day on which it ought to have been transferred according to the contract. See Shepherd v. Hampton, 3 Wheat. [16 U. S.] 200.

Case No. 13,771.

TAYLOE v. VARDEN.

[2 Cranch, C. C. 37.] [1]

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

TRESPASS — POSSESSION NECESSARY TO MAINTAIN.

Possession in fact, or in law, is necessary to maintain trespass quare clausum fregit.

Upon a case stated, the question was whether Tayloe had such a possession as would authorize him to bring trespass. Varden, in 1806, took possession while the title to the freehold was in H. Lee, who never had any other seisin or possession than what was conveyed to him by the deed of bargain and sale from Pollock. Varden was in possession when Lee made the deed of bargain and sale to Tayloe, and continued in possession until this suit was brought. Tayloe never had entered, even if he had a right to enter.

THE COURT (FITZHUGH, Circuit Judge, absent) was clearly of opinion that, as Lee was out of possession when he made the deed of bargain and sale to Tayloe, the latter had not the possession, either in fact, or by construction of law; and therefore could not maintain an action of trespass.

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

Case No. 13,772.

TAYLOE v. WHARFIELD.

[2 Cranch, C. C. 248.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

Amendment of scire facias.

In one of the recitals in the writ of scire facias, the name of Tayloe had been written for that of Wharfield, by mistake of the clerk.

THE COURT (nem. con.) suffered it to be amended.

Case No. 13,773.

Ex parte TAYLOR.

[1 Hughes, 617; 16 N. B. R. 40; 24 Pittsb. Leg. J. 205.] [2]

Circuit Court, E. D. Virginia. June, 1877.

BANKRUPTCY — PROCEEDINGS FOR DISCOVERY OF ESTATE — BEFORE WHOM TO BE TAKEN — FIDUCIARY DEBTS—HABEAS CORPUS.

1. Where a decree operating as a lien upon defendant's estate has been obtained in a state court, and the defendant afterwards goes into bankruptcy, proceedings under state statute will not lie before a state officer against defendant for discovery of his estate, similar to those given by section 5086 of the Revised Statutes of the United States; they must be taken in the bankruptcy court.

2. Where such proceedings are taken before a state officer, and the bankrupt is imprisoned by him, he will be released on habeas corpus by a United States court, where the decree of the state court is not for a fiduciary debt of the bankrupt.

3. Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.

In June, 1876, a decree was rendered by the circuit court of Accomac county, Virginia, in favor of William H. Walters and Mary E. E. Walters, infants, for $4,500, against their guardian and his sureties, one of whom was Samuel T. Taylor, in a suit in chancery for a settlement of the guardian's account. Execution was issued upon this decree which proved unavailing, but established a lien upon the estate of Taylor. In the course of time, steps were taken under section 5, c. 184, p. 1180, of the Code of Virginia, to elicit from Taylor by interrogatories, before Montcalm Oldham, a commissioner in chancery of said circuit court, a disclosure of his estate; the object of the proceeding being to make good the lien of the decree against the estate of Taylor when discovered. On the 25th April, 1877, Taylor filed his petition in bankruptcy and was adjudicated one, and received from the register a certificate of protection. On the 9th day of May, 1877, he was arrested under an attachment issued by said Oldham, commissioner, to com-

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

[2] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 24 Pittsb. Leg. J. 205, contains only a partial report.]

pel him to answer interrogatories filed in said circuit court of Accomac, as before described, and held in prison by the county sheriff. On application to the judge of said court for release on habeas corpus, his petition was refused, for the reason as stated by counsel, that the state judge was of opinion that the jurisdiction for that purpose was in the bankruptcy court. On the 11th June, 1877, Taylor petitioned the judges of the United States circuit court for a writ of habeas corpus, which was awarded by the circuit judge, and on these proceedings the matter was heard by the district judge at Norfolk, the sheriff of Accomac county having brought the petitioner before the court, and made return according to the facts already stated.

HUGHES, District Judge. The first inquiry is, as to the jurisdiction of Commissioner Oldham to take the proceedings against Taylor, the petitioner, which are mentioned in the return made by the sheriff, the object of which is the enforcement of the lien of the decree of the complainant, obtained upon the estate of Taylor in the suit of Walters v. Byrd, a copy of the record of which is filed with the sheriff's return, the validity of which lien is not disputed. It is a proceeding by one creditor of the bankrupt in another court, analogous to that which is given the assignee in bankruptcy in the bankruptcy court, by sections 5086 and 5104 of the Revised Statutes of the United States. The proceeding of this commissioner raises the question, which court has jurisdiction to ascertain and liquidate liens upon the estate of the bankrupt, and to require the bankrupt to make discovery of his estate. The question would seem to be answered in the mere statement of it.

Section 711, Rev. St. U. S., gives the United States courts jurisdiction exclusive of the courts of the several states, amongst other things, over "all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; the collection of all the assets of the bankrupt; the ascertainment and liquidation of the liens thereon; the adjustment of the various priorities and conflicting interests of all parties," etc., etc. Ancillary to this jurisdiction, section 5086 empowers the district court, "on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times to require the bankrupt to submit to examination, under oath, upon all matters relating to the disposal or disposition of his property."

Therefore, the bankruptcy court not only has exclusive jurisdiction over the estate of the bankrupt, but of all "proceedings," such as that in question, looking to a liquidation, among others, of the lien of the decree of the complainants in the writ of Walters v. Byrd; and those creditors have even more ample power to probe the bankrupt's conscience and obtain a disclosure of his estate in the bankruptcy court, than they could have in the proceeding taken against him by Commissioner Oldham, even if that proceeding were legal. That such a proceeding before a state officer, when against a debtor after he files his petition and is adjudicated in bankruptcy, is illegal, seems to me to be as clear as any proposition of law can be. The proceeding before Commissioner Oldham being illegal and nugatory, the petitioner (the bankrupt), is not legally in the custody of the sheriff of Accomac.

II. The second inquiry is, as to the jurisdiction of this court to discharge the bankrupt from the illegal custody. Section 5091 provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." So that the only question on this latter head is, whether or not the obligation of a surety upon a guardian's bond is one from which a bankrupt is released by his discharge in bankruptcy. There can be no doubt on this subject. The obligation of the guardian is a fiduciary one, from which the guardian himself could not be discharged in bankruptcy; but that of the surety is not fiduciary within the terms and meaning of section 5117 of the bankruptcy law. The language of that section is, that no debt of a bankrupt "created while acting in a fiduciary character, shall be discharged under this act,"—language which refers only to the fiduciary himself, and not his sureties.

The prisoner must therefore be discharged; but I will at once require him to submit, before the register in bankruptcy, to such interrogatories as the creditors in the decree of the state court shall desire to propound.

Case No. 13,774.

In re TAYLOR.

[12 Chi. Leg. News, 17; 13 West. Jur. 505; 25 Int. Rev. Rec. 321; 8 N. Y. Wkly. Dig. 554.]

District Court, D. Minnesota. Oct. 4, 1879.

HABEAS CORPUS — FEDERAL JURISDICTION — COMMITMENT COGNIZABLE BY STATE LAWS—MOTION TO QUASH.

The petition on its face showed that the petitioner is confined upon a regular charge and commitment for a criminal offense, after examination had by a court of competent jurisdiction; that the offense is exclusively cognizable by the laws of the state, and that the petitioner was not restrained of his liberty without due process of law, contrary to the constitution of the United States. *Held*, on motion to quash the petition and proceedings, that the federal courts had not jurisdiction to grant the prayer of the petition.

Charles H. Taylor, the petitioner, is confined in the Ramsey county jail, upon a commitment, after examination, upon a charge

of assault to commit rape, before the judge of the police court of the city of Saint Paul. He presented a petition for a writ of habeas corpus to Judge Nelson, U. S. district judge. Attached to the petition are copies of the complaint, the warrant issued thereon, and the commitment after hearing. The complaint charges the offense to have been committed by "one Taylor, whose Christian name is unknown." The warrant of arrest follows the complaint in this regard, while the commitment recites that Charles H. Taylor was brought before the court, charged on oath, etc., and after examination duly had, etc., the court adjudged the offense had been committed, and that there was probable cause to believe the said defendant, Charles H. Taylor, guilty thereof, etc. The petition alleged that the complaint and warrant are void upon their face, as not particularly describing the person charged and to be apprehended, and therefore the commitment is also void, being predicated upon a void complaint and warrant, and the detention of the petitioner thereunder is in violation of the constitution of the United States. The petition further discloses that the petitioner has had a hearing on a writ of habeas corpus before a competent state officer, and it alleges that since such hearing, new testimony has been discovered tending to exonerate the petitioner; that such officer is now absent from the state; that he has applied to all of the other state officers within the county where he is imprisoned for a second writ, and also to a majority of the judges of the supreme court of the state, and that his application has been refused, wherefore he claims that "the privilege of the writ of habeas corpus is suspended and denied, and the petitioner deprived of his liberty without due process of law."

A writ of habeas corpus was granted by Judge NELSON, and the petitioner was brought before him, when a motion was made to quash all proceedings.

E. G. Rogers, Co. Atty., for the motion.
Kerr, Wilson & Benton, contra.

NELSON, District Judge. The general rule is that a sufficient prima facie case must appear in the petition, and probable cause must be shown before the writ of habeas corpus will be granted. In some instances an order to show cause why the writ should not issue is entered, and notice of the return day served on the person in whose custody the petitioner may be; but in all cases, unless some statute makes the granting of the writ imperative, the court or judge may decide upon the application whether the petition shows the party entitled thereto, and if satisfied that a discharge cannot be granted, will deny the application and refuse to grant the writ. Again, if in doubt, the court grants the writ and disposes of the cause on the return day, when the prisoner is brought before him. The suit is then subject to the rules of practice, as any other, and a motion to quash all proceedings for the reason that the petition shows no jurisdiction in the court to further consider the case, which is equivalent to a motion to remand the prisoner, notwithstanding the fact alleged in the petition, is proper. Such a motion admits the allegations in the petition, and the court must decide upon the legal questions thus raised. In this case, a motion is made to quash for want of jurisdiction upon the face of the petition, and is allowed for the following reasons:

First. It appears that the prisoner is confined upon a regular charge and commitment for a criminal offense, after examination duly had by a court of competent jurisdiction. Second. The petition shows that the offense is exclusively cognizable in the courts of Minnesota. Third. The prisoner is not restrained of his liberty without due process of law, contrary to the constitution of the United States.

The first two points merely repeat the general rule established and necessary for the due administration of justice. Every government would be stripped of all power to execute its laws if the jurisdiction of its courts, in the exercise of their legal duties, was subject to the determination of another.

In regard to the third point there is a charge that the petitioner is imprisoned without due process of law, but it is based wholly upon an alleged refusal of one or more of the judges of the state to grant him the writ of habeas corpus with a hearing. The laws of this state providing for the issuance of the writ, prescribe in detail the essential prerequisites. The officer empowered to act upon a petition can judicially determine whether upon the case made out by the petitioner it should be granted, and may refuse if in his judgment, upon the facts prescribed upon a hearing, the result would be that the prisoner would be remanded. These laws are not in violation of the fourteenth amendment to the constitution of the United States. The writ is not granted, as a matter of course, and ought not to be granted unless the petitioner shows, in the first instance, that he is entitled to it. In the Case of Sims, 7 Cush. 285, the learned judge lays down correctly the above doctrine, which has been recognized repeatedly by other courts, both state and federal. A court has the right to refuse the writ, and its duty requires a refusal in many cases, but whether its judgment was right or wrong, such refusal does not work an immunity from further imprisonment. A denial of the writ is not a deprivation of liberty without due process of law. If it is, there would be no need of penitentiaries and prisons, for jail doors could be thrown open as fast as decisions are obtained refusing to

grant the writ when applied for. The motion to quash all proceedings is granted and the prisoner is remanded to the sheriff.

Case No. 13,775.

In re TAYLOR.

[3 N. B. R. 157 (Quarto, 38).] [1]

District Court, S. D. Georgia. 1869.

HOMESTEAD—"HEAD OF FAMILY"—RIGHT TO SUPPORT.

Where bankrupt, residing in Georgia, rented a house, hired servants, and made his home therein with a widow not related by blood to him, but whom he and his wife had educated and regarded as their adopted daughter, but had failed to adopt her in accordance with law, *held*, that he is head of a family, and entitled to exemption as such of fifty acres of land as a homestead, but is not entitled to five acres additional for each of three children of the widow residing with them, and forming part of the household, inasmuch as he is not legally bound to support them.

Years ago Dr. William Taylor and his wife had one child, and never had any more. A sister of Mrs. Taylor, on her dying bed, and as a parting request, asked Mrs. Taylor to take her infant and raise it for her. Mrs. Taylor, by consent of her husband, Dr. Taylor, took her sister's child, thus left an orphan (mother and father both being dead), to her home, and treated it in all respects as one of her own. Dr. Taylor's own child died, and then the orphan was the only child in the family. Dr. Taylor and his wife doated on the child, gave her a good education, and reared her in all respects as they would have reared a child of their own. In fact, they regarded her as an adopted child, but never by any legislative or judicial act adopted her so as to make her a legal heir. In process of time Mrs. Taylor died, and the child they had reared from her infancy became Mrs. Carswell. Mrs. Carswell always regarded Dr. Taylor as a father, and he regarded her as a daughter. Col. Carswell, in 1867, resided in a rented house in Irwinton. In the fall of that year he was taken sick, and lingering till February, 1868, he died, leaving Mrs. Carswell a widow with three children. The rent of the house having expired with the year 1867, Dr. Taylor came in immediately on the death of Col. Carswell, re-rented the house, hired the necessary servants for the comfort and convenience of Mrs. Carswell and children, and made that his home. The plantation of Dr. Taylor is in the fork of Commissioner's creek and Oconee river, and being nearly surrounded by swamp, is considered an unhealthy location for a residence. This is the only real estate he owned at the time of filing his petition in bankruptcy. On the 1st of June, 1868, while thus residing in Irwinton, Mrs. Carswell, her three children, and the hired servants constituting the family, Dr. Taylor filed his petition in bankruptcy. The assignee, in setting apart the property exempted by law for the use of the bankrupt, included in the exempt list sixty-five acres of land laid out from the plantation; that is to say, fifty acres for Dr. Taylor as head of a family, and five acres additional for each of the three children of Mrs. Carswell. To this exemption by the assignee, Col. Cumming, as counsel for creditors, excepts, and files the following specifications: First. That Dr. Taylor was not the head of a family, and was not entitled by law to any homestead exemption. Second. That Mrs. Carswell and her children having already had an exemption out of the estate of Col. N. A. Carswell, have no right to an exemption out of Dr. Taylor's estate.

By ALEXANDER G. MURRAY, Register:

On the 1st day of June, 1868, Dr. William Taylor, then residing in a house in Irwinton, which he had rented, having as his family Mrs. Carswell, her three children, and two or more hired servants, which were hired by him, and were under his control, was the head of a family; and, as he still continues to so reside, his position as head of a family still continues. As the head of a family, he is entitled to an exemption of fifty acres of land, under the exemption laws of Georgia of force in 1864. Code Ga. § 2013. To constitute a head of a family, it is not necessary that a man shall have either a wife or child. If he reside in a house of which he is proprietor, and have no other inmates than hired servants, he is in law the head of a family. See Case of Cobb [Case No. 2,920]. But as Mrs. Carswell and her children are not related by blood to Dr. Taylor, however strong his social relations may be, and with whatever affection he may regard them, he is not legally bound to support them, nor can they be regarded as his legal heirs. Hence, he is not entitled to any enlargement of his exemption on account of the three children of Mrs. Carswell.

ERSKINE, District Judge. The decision of Mr. Register Murray is affirmed. The clerk will so certify.

An opposite conclusion was reached in a case under the Texas law. See In re Summers [Case No. 13,604].

[1] [Reprinted by permission.]

Case No. 13,776.

In re TAYLOR et al.

[1 Wkly. Notes Cas. 16.]

District Court, E. D. Pennsylvania. Oct. 1, 1874.

BANKRUPTCY—AMENDED ACT—EFFECT ON PENDING PROCEEDINGS—READJUDICATION.

Adjudication under section 12, Act 1874 [18 Stat. 182], when petition filed before act.

[In the matter of William N. Taylor & Co., bankrupts.]

A petition for adjudication was filed in this case previous to the passage of the amendments of June 22, 1874. An adjudication was not had, however, thereon, until subsequent thereto, section 12 of said amendment being retrospective. A petition signed by the requisite amount in number and value of their creditors was filed, praying the court to make such order of confirmation or adjudication as would validate such proceedings.

Mr. Cleeman, for petitioning creditors.

THE COURT vacated the warrant heretofore issued, and newly adjudged said firm bankrupts, and ordered the issuing of a new order of adjudication.

TAYLOR, In re. See Case No. 11,977.

Case No. 13,777.

TAYLOR v. The ANN D. RICHARDSON.

[See Case No. 410.]

Case No. 13,778.

TAYLOR v. ARCHER et al.

[8 Blatchf. 315; 4 Fish. Pat. Cas. 449.] [1]

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

PATENTS—DISCLAIMER—EQUIVALENTS—FIRST INVENTOR—COSTS—FLEXIBLE GAS TUBING.

1. Letters patent were granted to William B. S. Taylor, February 21st, 1865, for an "improved flexible tubing for illuminating gas." The assignee of the patent brought this suit, and, during its pendency, died. His administrator was substituted as plaintiff. The claim of the patent was, "the use and application of glue, or glue composition, in the tubing, substantially as described, for the purpose of making the flexible tubing gas tight, whether of cloth, or rubber, or other gum." During the pendency of the suit, the plaintiff, as sole owner of the patent, filed in the patent office a disclaimer to that part of the claim of the patent "which claims, as an improvement in flexible tubing for illuminating gas, the use and application of glue, thereby limiting the claim to the use and application of glue composition in the tubing, substantially as described, for the purpose of making the flexible tubing gas tight, whether of cloth, rubber, or other gum." *Held*, that the disclaimer was valid.

[Cited in Smith v. Nichols, 21 Wall. (88 U. S.) 117; Dunbar v. Meyers, 94 U. S. 194; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135.]

2. The glue composition of the plaintiff's patent was made of glue, dissolved in water, with molasses, (or, by substitution, glycerine,) honey or syrup added to preserve the glue in a flexible state. The defendant's tubes were made by the use of glue and glycerine in connection with animal intestines, used in a tubular form. Animal intestines were shown to have been, at the date of the patent, a known equivalent, in the making of flexible gas tubes, for the cloth or rubber or gum spoken of in the patent. The plaintiff used the glue to render the tube gas tight, and the glycerine to keep the glue moist. Glue was shown to be practically impervious to gas. The glycerine, in the defendant's tubes, kept the intestine moist, and the glue moist also, and the glue acted, also, to keep the glycerine limpid. *Held*, that the defendant's tubes infringed the patent.

3. The said patent to Taylor is valid.

4. Although the patentee may have started later in his experiments towards the invention than another person did, yet, as he first made the completed successful invention and followed it up by his patent, he must, in the race of diligence, be *held* to be the first inventor.

5. The plaintiff was *held* not to be entitled to recover costs, his disclaimer having been filed during the pendency of the suit.

[Cited in Guarantee Trust & Safe-Deposit Co. v. New Haven Gaslight Co., 39 Fed. 269.]

[This was a bill in equity, filed to restrain the defendants [Ellis S. Archer and others] from infringing letters patent [No. 46,507] for an "improved flexible tubing for illuminating gas," granted to William B. S. Taylor, February 21, 1865, and assigned to Frederick R. Taylor, July 10, 1866.] [2]

Charles M. Keller and Charles F. Blake, for plaintiff.

George Gifford, for defendants.

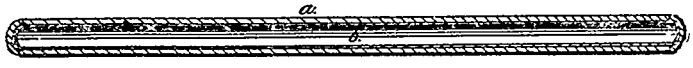
BLATCHFORD, District Judge. This suit was brought in August, 1866, by Frederick R. Taylor, as plaintiff. He died in October, 1866, and his administrator, William B. S. Taylor, was substituted as plaintiff. The suit is founded on letters patent granted to William B. S. Taylor, February 21st, 1865, for an "improved flexible tubing for illuminating gas," and assigned to Frederick R. Taylor, July 10th, 1866.

The specification says: "My said invention consists in the use of glue, or a composition of which glue forms a principal ingredient, as a coating or lining for flexible tubing used for the conduction of illuminating gas, and for the purpose of making such tubing impervious to the gas or its fluids." Four figures of drawings are then given, one showing a section of a rubber tube, with an inner lining or coating of glue; one showing a rubber tube, with a glue coating and a rubber covering; one showing a cloth tube, with a glue coating and a cloth covering; and one showing a cloth tube saturated with glue and having a covering of rubber or cloth. The specification proceeds: "I depend upon the glue to prevent the gas from penetrating through the tubing. In coating or saturating the tubing, the glue may be dissolved in water, and a portion, say one-third, of molasses, honey, or syrup added, to preserve the glue in a flexible state. Glycerine will answer as a substitute for molasses. The glue or glue composition is applied hot.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 315, and the statement is from 4 Fish. Pat. Cas. 449.]

[2] [From 4 Fish. Pat. Cas. 449.]

[Drawing of patent No. 46,507, granted February, 21, 1865, to W. B. S. Taylor. Published from the records of the United States patent office.]



In the case of the tube shown in Fig. 1, where the glue is used as a lining or inner coating, the glue may be poured into the tube so as to fill it, and, after standing long enough to form a film or coating of the desired thickness, the rest is poured out. To cover or coat the tubing on the outside, or to saturate it, the glue may be applied with a brush, or by dipping the tubing in a trough of hot glue. When the tubing has an exterior cover of cloth or rubber, it is put on while the glue is adhesive, or it may be suffered to dry and a coat of rubber cement applied over the glue and the outer cover secured by it." The claim is, "the use and application of glue, or glue composition, in the tubing, substantially as described, for the purpose of making the flexible tubing gas tight, whether of cloth or rubber or other gum."

The defences set up in the answer are, non-infringement and want of novelty. On the question of novelty patents are set up, granted in England, to Brockedon and Hancock, and enrolled May 19th, 1847, to Margaret Henrietta Marshall, and enrolled April 4th, 1844, to Marius Pellen, and dated September 26th, 1856, and to Edward Joseph Hughes, and dated June 8th, 1857; and a description in a printed public work published in London, England, in 1857, by Thomas Hancock, on the India rubber manufacture. It is also set up, that prior knowledge of the invention was possessed by Edwin M. Chaffee, John F. Holt, William H. Luther, Thomas W. Prentice, Isaac A. Brownell, and Theodore Sweet, at Providence, Rhode Island; and by Charles T. Hartwell, Augustus Lacy, and Edwin R. Walker, at the city of New York. Of the English patents so set up, the only one relied on in the proofs is that to Brockedon and Hancock, and the printed public work referred to was not put in evidence. The other evidence relied on, as to a want of novelty, relates to an alleged prior invention at Providence, Rhode Island, by one Thomas L. Reed, and to another alleged prior invention, at the same place, by Thomas L. Reed and David K. Hoxsie. This evidence was put in without objection.

During the pendency of the suit, and after considerable of the testimony had been taken, the plaintiff, as administrator of Frederick R. Taylor, and sole owner of the patent, filed in the patent office a disclaimer, dated December 22d, 1870, to that part of the claim of the patent "which claims, as an improvement in flexible tubing for illuminating gas, the use and application of glue, thereby limiting the claim to the use and application of glue composition in the tubing, substantially as described, for the purpose of making the flexible tubing gas tight, whether of cloth, rubber, or other gum."

The validity of this disclaimer is challenged. But I see no difficulty in upholding it. It is substantially such a disclaimer, and operates under substantially the same circumstances, as the disclaimer which was sustained by this court, in Tuck v. Bramhill [Case No. 14,213]. Nor is there any obscurity created in the specification, by engrafting on it, or incorporating in it, the language of the disclaimer. The disclaimer is only to a portion of the claim. It leaves unaffected the descriptive part of the specification. It merely strikes out from the claim the words "glue or." The use and application of glue composition in the tubing, for the purpose of making it gas tight, while it possesses the property of flexibility, is adequately described in the specification, and is properly claimed in the claim as it stands, with the disclaimer applied to it. The 54th and 60th sections of the act of July 8th, 1870 (16 Stat. 206, 207), contain substantially the same provisions, in regard to disclaimers, as the 7th and 9th sections of the act of March 3d, 1837 (5 Stat. 193, 194).

The flexible gas tubes sold by the defendants, and alleged to infringe the patent, were made by the use of glue and glycerine, in connection with animal intestines, the intestines being used in tubular form, and several being drawn one over the other. As animal intestines are shown to have been, at the date of the patent, a known equivalent, in the making of flexible gas tubes, for the cloth, or rubber, or gum, spoken of in the specification of the patent, the only point that could remain for consideration, on the question of infringement, would be, whether the glue and glycerine were used in the defendants' tubes for the purpose of making the tubes impervious to gas while capable of flexure. The ingenious theory constructed by the counsel for the defendants, and sought to be supported by testimony and by elaborate arguments, is, that the office of the glue in the plaintiff's patent is to render the tube practically gas-tight, and that the office of the molasses, honey, syrup, or glycerine, in that patent, is to keep the glue moist, and prevent it from cracking when the tube is bent; that, in the defendants' tubes, the intestines are used to render the tube practically gas tight, the glycerine is used to keep the intestines moist, and prevent their becoming dry, and then cracking by being bent, and thus becoming leaky of gas, and the glue is used to thicken the glycerine, and keep it from running off through limpidity; and that, therefore, the defendants' tubes do not infringe. But this conclusion by no means

follows from the premises. The object, in the tubes of both parties, is to have a tube that will bend without becoming leaky of gas, and that will stand the wear and tear of constant flexure in being moved. The object is not to make gas tight an immovable tube that is not to be subjected to flexure. The patent is for a "flexible tubing." The evidence is, that the intestines in the defendants' tubes will become dry, and then will be liable to crack by being bent, and thus to leak gas, unless they are kept moist. The defendants use the glue and glycerine. The glue is practically impervious to gas. The defendants completely coat the tubing with the mixture of glue and glycerine. The effect of this coating is to make a gas-tight film, and, at the same time, to keep the intestine moist, and free from liability to crack, the glycerine keeping the glue moist also. The intestine being of close texture, the proportion of glue used in the mixture, when the intestine is used, is less than when a foundation of less close texture than the intestine is used. The glue needs to be thicker or thinner, as the orifices it is to bridge over are less or more minute. This is the evidence. Not only so, but the specification of the patent to Hoxsie and Reed, of November 21st, 1865, in accordance with which the defendants' tubes were made, states that when the compound of glue and glycerine is to be applied directly to the surface of the intestine, it is to consist of equal parts of glue and glycerine, but that, when it is to be applied to a braided cotton covering, which covers the spiral wire coil which gives form to the tube, to render that impervious, the relative proportions should be about two-fifths glycerine to three-fifths glue, and that the glue may be in still greater excess according to the consistency required by the nature of the fabric. The reason for this is shown to be, that the pores of the intestine are finer than the pores of the cotton covering, and, therefore, require less glue in the compound to ensure an unbroken continuity in the film, when applied and set. Now, if the defendants use the film of glue and glycerine, they do not infringe the patent any the less because they use, in place of a foundation of cloth, or rubber, or other gum, a foundation of intestine, which is the equivalent, in law and in fact, of the cloth, or rubber, or other gum, although of closer texture, and so requiring a less proportion of glue than is named in the patent. Nor do they the less infringe because the glycerine, in addition to keeping the glue flexible, keeps the intestine, also, flexible. The compound of glue and glycerine is used, and, inasmuch as the glue is, in fact, impervious to gas, and its imperviousness is preserved, under flexure, by the presence of the glycerine, the compound is used by the defendants for the same purpose specified in the plaintiff's patent, namely, to make the tube impervious to gas under flexure. The glue acts to prevent the gas from penetrating. It must so act, from its nature. So acting and being used, it must be held to be used for the purpose of so acting, notwithstanding it may also act to prevent the glycerine from being so limpid as to run away. The glycerine acts to moisten the glue, and keep it from cracking, and thus leaking under flexure. It must so act from its nature. So acting and being used, it must be held to be used for the purpose of so acting, notwithstanding it may, in addition, act to moisten the intestine, and keep it also from cracking, and thus leaking under flexure. It is entirely clear that the defendants' tubes made of intestines, with the use of glue and glycerine, are an infringement of the plaintiff's patent.

Taylor's invention was completed as early as the first part of November, 1864. The patent was applied for January 16th, 1865, the specification having been sworn to January 14th, 1865. Neither Reed nor Reed and Hoxsie made a successful flexible tube, coated with glue and glycerine, until the early part of 1865. Taylor may have started later in his experiments towards the invention than either Reed or Reed and Hoxsie did, but he arrived first at the goal, and first made the completed successful invention, and followed it up by his patent. In the race of diligence, he must be held to be the first inventor.

As to the tubing of the Brockedon and Hancock patent, it is clear, from that patent and the evidence, that it was not intended for gas tubing, and that it could not have been flexible gas-tight tubing; and it is more than doubtful whether it would have been gas-tight, even though not submitted to flexure.

There must be a decree for the plaintiff for a perpetual injunction, and an account, but without costs. Tuck v. Bramhill, before cited; Act March 3, 1837, §§ 7, 9 (5 Stat. 193, 194); Act July 8, 1870, §§ 54, 60, 111 (16 Stat. 206, 207, 216).

TAYLOR (BAKER v.). See Case No. 782.

TAYLOR (BANK OF ALEXANDRIA v.). See Case No. 854.

TAYLOR v. BATTLE CREEK. See Case No. 13,735.

TAYLOR (BATTLE CREEK v.). See Case No. 13,735.

Case No. 13,779.

TAYLOR v. BEMIS.

[4 Biss. 406; Cox, Manual Trade-Mark Cas. 132.] [1]

Circuit Court, N. D. Illinois. Jan., 1864.

TRADE-MARK — INTANGIBLE INTERESTS — EQUITY — DECREE FOR SALE.

1. A court of equity has no power to decree the sale of a partner's interest in a firm brand

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Cox, Manual Trade-Mark Cas. 132, contains only partial report.]

or trade-mark. Such an interest is too intangible.

2. Before decreeing a sale of an alleged interest of a partner, the court must be satisfied that the object or interest sought to be sold has some substantial, tangible value.

The bill in this case alleged the recovery of a judgment in the superior court of Chicago in favor of plaintiffs against H. V. Bemis; that an execution was returned not satisfied, and that the judgment was still due and unpaid; that Bemis was engaged in business in Chicago, as a member of the firm of Downer, Bemis & Co., manufacturers and dealers in ale, his interest in which firm this bill designed to reach. The bill alleged that Washington Smith held the property of Bemis under a mortgage, and that this mortgage was only a pretended mortgage and made to cover up Bemis's property. Answers were filed by Bemis, Downer, Washington Smith and others, admitting some of the facts alleged in the bill, but denying that Bemis had any interest or property which could be levied upon.

E. S. Smith, for complainant.

F. B. Peabody, for defendant.

DRUMMOND, District Judge. The proof shows Bemis was engaged in a partnership with Mr. Downer, under the firm name of Downer, Bemis & Co., agents and vendors of ale, and that they carried on a very considerable business—the manufacture and sale of ale; and it also appears that the brand of Downer, Bemis & Co. had acquired a certain reputation, and it is claimed that the interest of Bemis in this brand is subject to the disposition of a court of equity, in order to enable the plaintiffs to recover a part if not the whole of their judgment. This is the first point made by the plaintiffs' counsel, which affects the interest of Bemis and is called the trade-mark of Downer, Bemis & Co., as manufacturers and vendors of ale.

It is, secondly, claimed that Bemis had an interest in the assets of the firm of Stauver, Bemis & Murray, that formerly transacted business in Cleveland before Bemis came to Chicago, and that it is subject to the disposition of a court of equity, in order to enable the plaintiffs to realize their judgment.

These are the grounds on which the plaintiffs ask for a decree, and I do not think either of them is tenable.

First. As to the right of the court to order the sale of the interest of Bemis in the brand or name of Downer, Bemis & Co., agents and manufacturers and vendors of ale: Downer says in his examination that he and Bemis, not Bemis alone, established the name together. He also says that he had no more right in the name than Bemis. It is true that he says he has no interest in the name, but that is merely his opinion, and he expresses the same of Bemis's interest. The interest of Bemis would be merely his right to a part of the name or brand, and I cannot see that he has any distinct, tangible value separate from its connection, which is the subject of sale or upon which the decree of the court can act. One of the arguments of plaintiffs' counsel is that Downer himself admits he has no interest in the name, and therefore the conclusion is that Bemis has all the interest. It is clear from the proof that Downer has just as much interest as Bemis. They both established the name or brand together; they both carry on the business together; and he (Downer) says in his testimony that he has no interest, and he thinks that Bemis has none.

There do not appear to be any special circumstances in the case to authorize the court to decree the sale of the indefinite, intangible interest of Bemis in this mere name or brand. It is too shadowy a right for the court to interfere. The court cannot see distinctly that there is any substantial interest which is the subject of sale, because, as I have already said, the interest of Bemis would be his right to a part of the name or brand and no more, and of course it would be only a company interest, whatever that might be, which might or might not be of some value. It does not affirmatively appear that it is of any distinct or tangible value.

Second. This same principle is applicable to the interest of Bemis in the partnership of Stauver, Bemis & Murray. The court has no means of knowing whether the separate interest after the settlement of the firm is of any value whatever, and I think a court of equity ought to know before making a decree in such a case that there is some tangible interest which can be sold which would be of some value. Here it rather affirmatively appears it would be of no value whatever.

The bill will be dismissed.

TAYLOR (BISPHAM v.). See Cases Nos. 1,443 and 1,444.

Case No. 13,780.

TAYLOR v. BOTHIN.

[5 Sawy. 584; 8 Reporter, 516; Cox, Manual Trade-Mark Cas. 387.] [1]

Circuit Court, D. California. Sept. 1, 1879.

TRADE-MARK — JOINT INTEREST — DISSOLUTION OF PARTNERSHIP.

Where two persons, associated in business for the manufacture and sale of a commodity, jointly adopted a trade-mark for it, they are equally entitled to its use after the dissolution of their connection; and if one of the parties obtain letters of registration in his own name, he may be compelled to transfer an equal interest to his associate.

This was a suit in equity [by James S. Taylor against Henry E. Bothin] to compel

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Reporter, 516, and Cox, Manual Trade-Mark Cas. 387, contain only partial reports.]

the defendant to transfer to the complainant letters of registration by which a right to use a certain trade-mark was obtained.

John L. Boone, for complainant.
David Freidenrich, for defendant.

FIELD, Circuit Justice. It appears from the evidence in this case that, previous to the first of August, 1876, the complainant had discovered a process for making a valuable yeast powder, and that during that year he was engaged under a contract with other parties in its manufacture and sale in the city of San Francisco, designating the powder as Sea Moss baking powder; that his contract with his associates having come to an end from their inability to furnish the required means, he applied to the defendant and proposed a connection with him in its manufacture and sale. At that time the defendant was engaged in the business of selling coffee and spices, and knew nothing about the manufacture of yeast powders. After satisfying himself of the quality of the powder, the defendant agreed to give the complainant space in his establishment for its manufacture, the defendant to sell it as sole agent. As the complainant was without means and had a family to support, it was stipulated that he should receive an advance of ten dollars a week for four weeks, and if the business proved a success he was afterwards to receive one half of the profits. The business proved a success, and at the end of the first year the parties agreed to continue their connection for another year, with a stipulation that the complainant should relinquish his half interest in the profits of the yeast powder business, and receive in return one fourth of the profits of the entire business of the defendant, including that arising from the manufacture and sale of the yeast powders and that arising from dealing in coffee and spices.

After the first arrangement was made between the parties, and before any powders were manufactured, the complainant informed the defendant that another designation than that of Sea Moss should be given to the powder, as his former associates might lay some claim to the use of that designation. The name of "Mrs. Mill's Cream" for that of Sea Moss was accordingly suggested and adopted. The powders manufactured and sold under the name of "Mrs. Mill's Cream Yeast Powders" came into general use, and the business accordingly became very profitable.

During the second year of the connection, after a large demand for the powders had been created, the defendant, apparently apprehensive that the complainant might withdraw the manufacture from his establishment, secretly applied to the patent office at Washington and obtained letters of registration, giving him an exclusive right to the use of the name "Mrs. Mill's Cream" as a trade-mark of the powders. The complainant, therefore, brings this suit, and prays the court to adjudge the trade-mark to be his property, and to order the defendant to transfer the letters of registration to him, or that such other and further relief may be granted as the nature of the case may require.

Upon the statement of these facts, the only serious question for deliberation is whether the complainant is entitled to the exclusive use of the trade-mark or only to a joint or equal use of it with the defendant. Had the name been suggested and used by the complainant before the business connection with the defendant there would be no doubt of his exclusive right to it. But having been suggested and adopted after that connection was formed, upon a consultation of the parties on the subject, and then used for their joint benefit, we are led to the conclusion that they are equally entitled to its use after that connection ceased. Clearly the defendant has no such exclusive right, and the representations which he must have made to obtain the letters of registration required by law, "that no other person, firm or corporation" had the right to its use, are inconsistent with the facts. It matters not whether the arrangement between the parties constituted a partnership, or whether the complainant was to receive a portion of the profits of the business as his salary; in either case, it was his process of making a valuable powder, which was to be used, and it was to his discovery that the name was to be given. We do not understand that when the complainant said he gave his process to the defendant he intended to abandon all right to the use of it, and to the manufacture of the powder designated by its new name, but only that he made the defendant acquainted with the secret of the process—the manner in which the powder was to be made. Having imparted that knowledge, and the two, in conjunction, having subsequently adopted the name, they must be regarded as equally having the right to use it.

A decree must be entered for the complainant, adjudging him equally entitled with the defendant to the use of the trade-mark in question, and directing the defendant to execute a transfer to the complainant of an equal interest in the letters of registration, and it is so ordered.

Case No. 13,781.

TAYLOR v. BRIGHAM et al.

[3 Woods, 377.] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1876.

PLEADING AT LAW—FOLLOWING STATE PRACTICE—SHIPPING—LIABILITY OF OWNERS FOR MASTER'S TORTS.

1. Since the passage of the act of June 1, 1872 (17 Stat. 196), the federal courts will fol-

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

low the decisions of the state supreme court on questions of pleading.

2. The part owners of a steamboat are liable for the torts of the master, who is also a part owner, done in the execution of the business in which the boat is engaged.

[Cited in The Albany, 44 Fed. 435.]

Heard on motion for new trial. On February 4, 1856, the steamer Charles Hartridge, when passing up the Ocmulgee river, found a lot of cotton, the property of plaintiff [Charles E. Taylor], at Nest-Egg landing, which had been left there for transportation down the river to Savannah. The captain took the cotton aboard, with the purpose of carrying it to Savannah, and proceeded up the river on his trip. His object in not waiting until he came back to Nest-Egg landing from his trip up the river, and then taking the cotton on board, was to forestall any other boat, and make sure of the freight. He gave no bill of lading at the time, and took the cotton without authority of the owner. While proceeding up the river, the boat was snagged and took fire. The boat and cargo, including 42 bales of the cotton of the plaintiff, were consumed. The plaintiff sued in trover the owners of the boat, among whom was the captain, for the value of his cotton so lost.

The jury found for the plaintiff, and the defendants [Brigham & Kelly and others] here move for a new trial, which they base on two grounds: First. Because the court erred in not awarding a nonsuit on the motion of defendants, based on the ground that the suit should have been in case and not in trover; and, second, because the court erred in charging the jury, that if Taylor, as captain of the boat, and one of its part owners, did, while in the prosecution of the business in which the boat was engaged, convert the cotton, all of the defendants, as part owners of the boat, are liable for his act.

Richard F. Lyon, for the motion.
W. B. Hill, contra.

WOODS, Circuit Judge. The first ground of the motion is not well taken. By express act of congress, the practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held. 17 Stat. 196. In a suit brought in trover by other parties against these same defendants to recover for cotton lost in the same disaster, and under precisely similar circumstances, the supreme court of Georgia held trover and not case was the proper form of action: Phillips v. Brigham, 26 Ga. 617. In that case the court said, that if there was a conversion of the cotton, trover was the proper remedy, and that both the taking of the cotton without authority and the deviation from the ordinary route, constituted a conversion. This decision, upon a question of pleading in the state courts, is under the act of congress just quoted, binding upon this court.

Second. Were the defendants, as part owners of the boat, all liable for the act of the captain in converting the cotton while in the prosecution of the business in which the boat was engaged? The law treats the captain of a boat as in some sort a subrogated principal, or qualified owner of the ship, possessing authority in the nature of exercitorial power for the time being. And his liability, founded upon this consideration, extends not merely to his contracts, but to his own negligences, malfeasances and misfeasances, as well as to those of his officers and crew. Hence it is that the master of a general or carrier-ship, as well as the owner, is treated as a common carrier. Story, Ag. §§ 314, 315. All owners of a vessel are liable for the consequences of a wrongful act of a person employed by them, or of one part owner, so far as he is acting as the agent and representative of the others, if the tort be committed in obedience to positive direction, or while in the actual discharge of a duty committed to him, or as a part of a service committed to him, and this rule extends to all cases of mere negligence, however gross. Pars. Partn. 572. The owners of a ship are liable for the misconduct of the master to third persons, and for the conduct of the master and crew in the execution of the business in which they are engaged. Joy v. Allen [Case No. 7,552]; Dias v. The Revenge [Id. 3,877]; Ralston v. The State Rights [Id. 11,540]; Sunday v. Gordon [Id. 13,616]; McGuire v. The Golden Gate [Id. 8,815]; L'Invincible, 1 Wheat. [14 U. S.] 237; The Anna Maria, 2 Wheat. [15 U. S.] 327. The owners are even liable for the willful and malicious acts of the master, done in the course and scope of his employment. Andrews v. Essex Fire & Marine Ins. Co. [Case No. 374]; Coffin v. Newburyport Ins. Co., 9 Mass. 436; Hazard v. Israel, 1 Bin. 240; Lyons v. Martin, 8 Adol. & E. 512; M'Manus v. Crickett, 1 East, 106; Jones v. Hart, 2 Salk. 441; Middleton v. Fowler, 1 Salk. 282; Quarman v. Burnett, 6 Mees. & W. 499; Bowcher v. Noidstrom, 1 Taunt. 568. The authorities cited fully sustain the charge of the court, which is complained of.

Neither of the grounds on which the motion for a new trial is asked is well taken. The motion must, therefore, be overruled.

Case No. 13,782.

TAYLOR et al. v. BUCKNER.

[4 Cranch, C. C. 540.] [1]

Circuit Court, District of Columbia. May Term, 1835.

SLAVERY — ILLEGAL BRINGING INTO STATE — SUIT FOR FREEDOM—REVERSIONER'S INTEREST.

1. An importation of slaves by a person who has only a life estate in them is an importation within the Maryland act of 1796, c. 67, § 1 [1 Dor. Md. Laws, 1796, p. 334], and the consent of the reversioner to the importation is not necessary to give freedom to the slaves thus imported.

2. The question of the intent with which the importation is made is for the jury.

Petition for freedom by Negro Charles Taylor, and others; six cases; removed from Washington to Alexandria county for a fair trial.

The petitioners claim freedom by reason of their importation from Virginia into the county of Washington "to reside," contrary to the Maryland act of 1796, c. 67, § 1.

Mr. Taylor, for the defendant [Ariss Buckner], having offered evidence that some of the petitioners, namely, Fanny and her children, were the property of the defendant for the life of his wife only, prayed the court to instruct the jury, that the importation of those petitioners by the defendant could not give them any right to freedom under the first section of the Maryland act of 1796, c. 67, and cited Negro Sally v. Ball, 1 Wheat. [14 U. S.] 1, and the Virginia law of 1819, §§ 48, 49 (2 Rev. Code, 431).

But THE COURT (MORSELL, Circuit Judge, not having heard the argument, gave no opinion) refused to give the instruction.

Mr. Taylor then prayed the court to instruct the jury that such importation, without the consent of the reversioners, could not give those petitioners a right to freedom under the first section of the Maryland act of 1796, c. 67, which THE COURT still refused to give, notwithstanding the case of Negro Sally v. Ball, 1 Wheat. [14 U. S.] 5, considering the words, "since it is the property of the person importing the slave which is forfeited," as dictum only; that point not being necessary to the decision of that cause, the slave in that case not having been brought in to reside or for sale, but only for a year's service, and having been, in the course of the year, carried back to Virginia.

Mr. Key, for petitioners, contended that the hiring out in Washington of the slave of a non-resident, for more than a year, is evidence that the bringing in was "to reside," contrary to the first section; and that it had been so decided by this court.

Mr. Jones denied it; and appealed to the court.

THE COURT (nem. con.) said that they did not recollect any such decision; but that the question was always left open to the jury, as to the intent with which the importation was made.

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

Case No. 13,783.

TAYLOR et al. v. BURLINGTON, C. R. & M. RY. CO.

[4 Dill. 570; 4 Law & Eq. Rep. 74, 101; 11 West. Jur. 337; 9 Chi. Leg. News, 329; 4 Cent. Law J. 535, 536.] [1]

Circuit Court, D. Iowa. May Term, 1877.

MECHANIC'S LIEN — RAILWAYS — RELATIVE RIGHTS AND PRIORITIES OF MECHANICS AND MORTGAGEES UNDER THE LEGISLATION OF IOWA.

1. Under the legislation of Iowa, mechanics and material-men are entitled to a lien on railways for their work and labor.

2. Such lien dates from the commencement of the building of the railway, and is prior to a mortgage executed pending the building of the railway, and before the particular work was done or materials furnished for which the lien is claimed.

[Cited in James River Lumber Co. v. Danner (N. D.) 57 N. W. 345; Thomas v. Mowers, 27 Kan. 268.]

3. Under the legislation of Iowa, the relative rights and priorities of mechanics and mortgagees considered and determined.

4. Within what time mechanics' liens must be filed and enforced.

The plaintiffs in the main suit, [Frederick] Taylor et al., are trustees in railway mortgages on the Burlington, Cedar Rapids & Minnesota Railway Company. These mortgages include all existing and future to be acquired property of the company, including rolling stock, and rents, and income, and were executed and recorded before the work was done and the materials furnished by the intervening petitioners. Prior to the execution of the mortgages the railway was projected and partially surveyed from Burlington to Plymouth (in the north part of the state), and about $155,000 expended in grading and preparing the road-bed along different parts of the line. The Muscatine Division was purchased from another company, which had graded and tied about twenty-five miles thereof; after the purchase thereof by the Burlington, Cedar Rapids & Minnesota Railway Company, to-wit, July, 1872, the latter company executed the mortgage thereon, which was duly recorded. The main line was built in three divisions—the last being completed December 1, 1872—but all are and were designed to be one railroad, and all are included in the mortgage to plaintiffs, which was recorded after work was begun on the second division.

Wells, French & Co., pending the foreclosure suit against the railway company, came into court and filed a petition setting up their

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 74, 101, contains only a partial report.]

claims and asking an order on the receiver to pay them. This petition was amended, asking to establish a mechanic's lien on the railroad for one span of a truss bridge over Mud creek, on the main line; for two spans of a truss bridge over the Iowa river, on the Muscatine Division, and for forty coal cars. The dates and amounts of their claims are as follows:

1. For one span Howe truss bridge furnished for main line, over Mud creek, between Vinton and Cedar Rapids, February 24, 1874, amount due..... With ten per cent. interest from April 12, 1874.	$ 1,404 50
2. For two spans Howe truss bridge over Iowa river, Muscatine Division, delivered December, 1873, balance due December 4, 1873 ..... With ten per cent. interest from that date.	1,313 85
3. For balance due on forty coal cars sold and delivered August 14, 1873, after payments and settlements up to November 1, 1874 ..... With interest at seven per cent. from that date.	9,397 83
4. On April 1, 1875, all the above were thrown into one statement, on which, with added interest, there was then due to Wells, French & Co.....	13,108 04
5. On April 12, 1875, the railway company paid.. $ 500 On May 1, 1875, same paid 1000	1,500 00
Leaving general balance due...	$11,608 04

The last $1,500 was applied on interest due and balance on first note for cars.

In respect to these Howe truss bridges, the parties agreed as follows: That the span of Howe truss bridge of seventy-five feet, which was sold in 1874, was sold in lumber and iron in Chicago, and delivered there in separate pieces and put up across Mud creek, and iron put over it by the railroad company on the main line, on the division between Cedar Rapids and Waterloo, after the main line was finished and in operation, and was put up to supply the place of a bridge at the same place which was broken down or carried away by high water. That the two spans of Howe truss bridge furnished in 1873, for the Iowa river, on the Muscatine Division, were sold and delivered at the date named, in 1873, at Chicago, and placed in place by the railroad company, and iron and ties put over them by the railroad company. That the said Burlington, Cedar Rapids & Minnesota Railway Company purchased the Muscatine Division when it was graded and tied for about twenty-five miles, of another railroad company, and placed the mortgage on that division, and recorded it, before the said Burlington, Cedar Rapids & Minnesota Railway Company commenced any work on the division, but after it was graded by the other company. The date of delivery of the span over Mud creek, was on the 24th day of February, 1874. The date of the delivery of the two spans over the Iowa river, on the Muscatine Division, was on the 26th day of December, 1873. The contract to furnish forty coal cars is in writing, dated August 3, 1873, and the cars were sold and delivered without any condition, and this contract was made and the cars delivered long after the main line of the railroad was completed. On November 9, 1875, Wells, French & Co. filed statements for liens in Benton and Johnson counties for the bridges, and on November 18, filed statement in Linn county for balance due on cars. On December 14, 1875, Wells, French & Co. filed amended petition to enforce and establish these liens, and claimed and prayed a lien on the whole road for each amount. December 28, 1875, the trustees answered the petition, setting up the statute of limitations against the lien, and averring that Wells, French & Co. were not entitled to a lien as against the mortgage. The question is, whether Wells, French & Co. are entitled to a mechanic's lien for all or any part of these claims, and if so, whether it is prior or subsequent to the lien of the mortgages. The provisions of the statute upon which this question depends, are mainly sections 2130, 2137, 2139–2141, 2143, 2510, and 2539 of the Code of Iowa of 1873, which, so far as material, are referred to in the opinion of the court.

Hubbard & Deacon, for Wells, French & Co.

James Grant, for railway mortgage trustees.

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

DILLON, Circuit Judge. In the various railway foreclosure cases in this court, there are probably forty intervening petitions filed seeking to establish, on behalf of the claimants, mechanic's lien on the property covered by the railway mortgages. The trustees, in these mortgages, resist the right to any lien whatever, in many cases, and particularly resist the establishment of a mechanic's lien in any case where the labor was done, or the materials were furnished, after the recording of the mortgage, which shall have priority over the mortgage. There are also questions as to the lien for repairs after the road has been completed, as distinguished from the right to a lien for original construction; and questions, also, as to limitation of the lien of the mechanic.

The most important of these questions are presented in the case of Wells, French & Co., and that has, therefore, been selected as the one in which to state the conclusions at which the court has arrived. In many respects nothing is more unlike than the erection of an ordinary building and the construction and equipment of a line of railway, and much of the difficulty in construing the legislation of the state has arisen out of the grouping of the two by the leg-

islature and making an uniform or single provision for both. The duty of the court is to feel its way to the legislative intent and give that intent effect as far as it may. Wherever the statute has been construed by the supreme court of the state, that construction will be accepted as a rule of decision by this court. While we have considered every decision of the state supreme court which bears upon the questions before us, and also the full and exhaustive discussions of counsel, it is not proposed to go into an elaborate exposition of the different provisions of the statute, but mainly to state the results to which our examination has brought us.

The mechanic's lien statute (Code, §§ 2130, 2132) extends, inter alia, to all persons "who construct or repair any work of internal improvement," including railways, and gives a lien "for labor done, or materials, machinery, or fixtures furnished," upon "such building, erection, or improvement, and upon the land belonging to the owner, on which the same is situated." Section 2130.

Another section provides for the filing of the claim with the county clerk within ninety days after the work is done, and declares what shall be the effect of a failure to file. Section 2137.

Section 2139 first provides for the priority of mechanics' liens as among themselves, making the same depend upon the order of filing, and then proceeds to exact that such liens "shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or improvement." The lien extends to the entire land to the extent of the interest of the person for whom the mechanic did the work or furnished materials, and to a leasehold interest, as to which the provision is that the forfeiture of the lease shall not impair the mechanic's lien as to the buildings, but the same may be sold to satisfy the lien and be moved off within thirty days after the sale. Section 2140.

Section 2141 provides for still another case in these words: "The lien for the things aforesaid, or work, shall attach to the buildings, erection, or improvements for which they were furnished or done, in preference to any prior lien, or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." The suit to enforce a mechanic's lien must be in equity. Section 2510.

We hold as follows:

1. Section 2139 contemplates and provides for a case where, at the time of the commencement of the building or railway, there is no recorded lien or incumbrance thereon, and where such lien or incumbrance is created subsequent to the commencement of the building or railway; in which case the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done, or his materials were furnished, after a mortgage was recorded, or lien created.

As to an ordinary building, the proposition just stated admits of no doubt; indeed, it has been expressly decided to be correct by the supreme court of the United States, in respect of an enactment copied from the Iowa statute. Davis v. Bisland, 18 Wall. [85 U. S.] 659.

As to the application of this principle to railways, the decision of the supreme court of Iowa is conclusive. Neilson v. Iowa Eastern R. Co. (Sept. term, 1876) 44 Iowa, 71.

Construing section 1853 (the same as section 2139 of the Code of 1873), it was decided, in the case last cited, that the lien of the mechanic dates from the commencement of the railway, treating it as an entirety, and has priority over a mortgage executed after the work of constructing some portion of the railway has been commenced, and before the particular work was done, or materials furnished, for which the mechanic's lien is claimed.

2. Section 2141 makes provision for a still different case. This section contemplates and provides for a case where there is a mortgage, lien, or incumbrance upon the land prior to the time when the owner commences "a building, erection, or other improvement thereon." What, then, are the relative rights of such prior incumbrancers and the mechanic? This is plainly determined by the section itself. As to the land, the mortgage is declared to retain its priority; but as to the buildings, erections, or improvements put upon the land subsequent to the mortgage, the mechanic has priority over the mortgage—may enforce his lien accordingly, and have the building, erection, or improvement sold on execution, and remove the same within a reasonable time.

The mechanic has, in such a case, the same right as against the mortgagee that he has as against the lessor under the preceding section.

This view, to the extent just stated, is in accordance with the decision of the supreme court of the state in Getchell v. Allen, 34 Iowa, 559, which case, so far as it relates to an "independent erection on the land," is undoubtedly correct, and is approved, at least to this extent, by the same court in the subsequent case of Neilson v. Iowa Eastern R. Co., supra.

3. But suppose the prior mortgage attaches not only to land, but to a completed house, or other erection or improvement thereon, and the house or other improvement is re-

paired by the mechanic, at the instance of the owner—what, then, are the relative rights of the mortgagee and the mechanic? This was the question which gave so much trouble to the state supreme court, as will be seen by reference to Getchell v. Allen, and the first opinion of that court in the Neilson Case. Under section 2130, undoubtedly the mechanic has a lien for repairs to a building erected and completed before the repairs were begun. That section uses the word "repairs," and reparations by a mechanic are within the remedial purpose of the legislature. But when does such a lien attach, and how is it to be enforced? As against the owner, the lien attaches from the time the repairs are begun. This is plain enough, and just. But when does this lien attach as against a prior mortgagee of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgage out of existence by making repairs ad libitum, and furnishing the owner the necessary credit therefor, by giving the mechanic and material-man a lien paramount to the mortgage. Such a view has neither law, justice, equity, nor public policy to recommend it. This conclusion accords with the opinion of the supreme court on this point in one branch of the case of Getchell v. Allen. To such a case section 2141 of the Code does not apply —that section only applying to cases where the lien of the mechanic is sought with respect to improvements which were not on the land when the prior mortgage was taken, and on the security of which the mortgage did not rely.

Suppose a lessee improves the house of the lessor, it would hardly be contended, under section 2140, that the mechanic could sell the whole house under his lien, and move it away. Nor, under section 2141, can he do this with respect to a building covered by a prior lien. The provisions and purpose of the two sections, in this regard, are the same.

Where there is a prior lien on the building or railway, these once having been completed, if a mechanic subsequently does work, or furnishes materials, he has a lien, but a lien subordinate to the mortgage, and which must be enforced as such, and it is accompanied with no right of removal. This view accords with the language of the statute and with its policy, and leads to just results. Any other view leads to confusion and injustice.

Applying these principles to the case of Wells, French & Co., the result is this:

1. As respects the bridge furnished in 1874, after the execution of plaintiffs' mortgage, and after the road had been completed, to replace a bridge which had been carried away, any lien which it would be possible to get therefor would be subsequent to the mortgage.

2. The same principle applies to the coal cars furnished in 1873, even if it were conceded that there was a lien upon a railroad for cars furnished to use thereon, which is at least doubtful. New England Car Spring Co. v. Baltimore & O. R. Co., 11 Md. 81.

3. As to the two spans of bridge furnished in December, 1873, for the original construction of the Muscatine Division, the petitioners are entitled to a lien, if they have complied with the provisions of the statute in respect to filing their claim and bringing suit to enforce it. Code, §§ 2137, 2138, 2529. As these were delivered December 26, 1873, the case falls within the Code of 1873, and not the Revision of 1860.

Under the Code of 1873 (section 2137), the mechanic may file his lien within ninety days, etc., "but a failure to file the same within the time aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the ninety days and before any claim for the lien was filed."

"Actions to enforce a mechanic's lien must be brought within two years from the time of filing the statement in the clerk's office." Section 2529. The two bridge spans in question were delivered December 26, 1873; statement for lien filed November 9, 1875, and the petition filed to enforce and establish the lien December 14, 1875, which was within the two years. As against the railway company, the failure to file the statement for a lien does not defeat the lien, and there are no incumbrancers or purchasers whose rights accrued after the ninety days and before the same was filed. The supposed defect in the statement, if not cured by the stipulation, is not of such a nature as to defeat the lien. For the amount due for these two spans, $1,313.85, with interest, the petitioners are entitled to a lien prior to the mortgage. Decree accordingly.

In Re Intervening Petition of the Union Rolling Mill Company.

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

DILLON, Circuit Judge. At a period distinctly after the railroad was finished, and had long been operated, the rolling mill company "furnished to the railway company (in April, June, August, and December, 1874) iron and steel rails for the repair of their lines of railway; which rails were placed in their said railway, and have ever since been and are now used as part of the track thereof." The mortgages were recorded years before.

This petition raises the single question

whether a lien exists, under the mechanic's lien statute, for repairs to a railway previously completed and in operation, which is superior to the lien of a mortgage made and recorded before the repairs but subsequent to the original commencement of the work of constructing the railway.

This question is covered by the principles laid down in the case of Wells, French & Co. The petitioners have a lien, but it is subsequent to the mortgage. The result would have been different if the rails had been furnished for the original or first construction of the road.

In the Matter of the Intervening Petition of the United States Wind Engine & Pump Company.

The material facts are, in brief, as follows: 1. Between April 14, 1870, and March 5, 1875, intervenor sold and delivered to the Burlington, Cedar Rapids & Minnesota Railway Company, wind engines and fixtures to the value of $11,137.17, of which has been paid $7,167.43, leaving balance due $3,969.74—$2,626.02 bearing interest at ten per cent, and $1,343.72 bearing interest at six per cent—as shown by agreed statement, and from dates there given. 2. They were all sold under a verbal agreement "that the title to the engines should not vest in the railway company till paid for." It was, of course, not recorded. 3. December 6, 1875, petitioner (United States Wind Engine & Pump Company) filed its petition asking payment from the receiver for the balance due, or the right to remove the engines, etc., or other relief; and on same day the trustees in the railway mortgages filed answer averring that the agreement for title was not good, because not recorded, as required by act of 1872 (Code, § 1922), and averring title in the railway company, and through it were subject to the mortgage, etc.; and on same day a general replication was filed. 4. April 5, 1876, intervenor amended, by leave of the court, and claimed mechanic's lien on entire road, etc., under statements for liens filed in all counties where engines were situated on March 27 and 28, 1876. May 1, 1876, the trustees answered, claiming priority for their mortgages, denying intervenor's right to a lien, because not filed within one year after the last engines were sold, and because they were no part of the construction or repairs of the road. May 6, 1876, replication filed. The amount due petitioner was not disputed. The parties stipulated as to the facts.

Hubbard & Deacon, for petitioner.

James Grant, for trustees in the railway mortgages.

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

DILLON, Circuit Judge. The petitioner, on December 6, 1875, filed its petition to recover out of the fund in court, or have returned to them certain wind-mills, and articles supplied to repair the same furnished on and since November 30, 1873. The petition alleges that pumps and engines had been furnished before that, but all that were furnished prior to November 15, 1873, had been paid for. It alleges that said mills and fixtures were furnished to said railway company by virtue of a "verbal agreement that they were to be paid for in monthly installments, and the wind company were not to relinquish their title until they were paid; and it was expressly understood, in case of default the plaintiff should have the right to take and remove the mills and fixtures" (see the first bill). The defendant answered, denying the agreement as to title, and averring that said contract was not in writing, acknowledged and recorded, and could not be enforced. Upon the coming in of this answer, the plaintiff, on the 21st of March, 1876, filed a mechanic's lien claim, and amended its bill, claiming alternatively a mechanic's lien, not only for the wind-mills and pumps, but for the supplies and repairs of the same. The right to a mechanic's lien is denied by an answer filed to the amended petition. The material stipulation in the agreed facts is as follows: "An agreement or understanding existed between the United States Wind Engine and Pump Company and said railway company that the title to all the property delivered should not vest in the railway company until paid for; but said agreement was not in writing, and was never recorded."

The petitioner asks alternative relief.

1. They claim that effect should be given to the verbal agreement as to the title remaining in the petitioners until payment for the engines was made. The answer of the trustees is that the agreement not being recorded, it cannot avail as against them without notice of it. All the engines delivered before November, 1873, have been paid for. It is those delivered after that date that are in controversy. If regarded as realty, the recording statute would give the priority to the mortgagee without notice. If personal property, the act of 1872 (Code, § 1922) declares the condition as to retaining title invalid against creditors without notice, unless the investment be in writing and recorded. It was neither in writing nor recorded. Nor is it shown that the trustees in the railway mortgage had notice thereof. It is not stated in the stipulation when the agreement as to title remaining in the seller was made, but as engines were sold from time to time, beginning in April, 1870, it is argued that the agreement must have been made prior to that time, and hence it was a continuing agreement, antedating the statute, and hence, under our decision in the Haskell & B. Car Co. Case [unreported], it need not be recorded. But

in that case there was an agreement in writing prior to the statute, and specifically relating to the cars in dispute. In this case it is not shown that, prior to the statute of 1872 (Code, § 1922), the parties made a contract which bound the petitioners to furnish and the railway company to receive the engines now in dispute, viz., those delivered after November, 1873. The statute (section 1922), therefore, applies, and must have effect if the trustees in the railway mortgage are "creditors" of the railway company within the meaning of the section.

The railway mortgages, under which the trustees claim, were made and recorded prior to the delivery of the engines here in question. The statute of the state authorizes railway companies not only to mortgage their existing property, "but also property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property was in possession at the time of the execution thereof" (Code, § 1284); and the recording thereof "shall be notice to all the world of the rights of all parties under the same" (Id. § 1285).

The railway mortgages were executed and recorded prior to the delivery of the engines not paid for, and cover all after-acquired property pertaining to the railway. These engines are on the right of way, are essential to the use of the railway, and are part of it. They fall within the property embraced in the mortgage. But it is claimed that, as to after-acquired property, the mortgagee must take it cum onere (U. S. v. New Orleans, 12 Wall. [79 U. S.] 362); and as the stipulation as to title being retained by the seller is good between the parties, it is likewise good as to the mortgagee or trustees. Treating these engines as in the nature of personalty or removable fixtures,

I am inclined to think, aside from the requirements of section 1922 of the Code, that this position would be sound. But the mortgagees are creditors of the railway company, and such verbal unrecorded agreements are declared to be invalid against "any creditor" (prior or subsequent) without notice, and are probably ineffectual as against the trustees in the railway mortgage in actual possession under the mortgage.

2. As to the claim for a mechanic's lien, section 2129 of the Code enacts that "no person shall be entitled to a mechanic's lien who takes collateral security on the same contract."

It is admitted that, for the purpose of securing payment, the vendors made a contract to retain the title. This would be good between the parties, and would be good against creditors if it had been reduced to writing, acknowledged and recorded.

A seller who undertakes to secure himself in this specific way, showing that he does not rely upon the lien given by the statute to the mechanic or material-man—a way inconsistent in its nature with a right to a lien under the statute—takes "collateral security" within the meaning of the statute, and hence is not entitled to a mechanic's lien. Petition dismissed.

Case No. 13,784.

TAYLOR et al. v. CARPENTER.

[3 Story, 458; 7 Law Rep. 437; 2 West. Law J. 187; Cox, Manual Trade-Mark Cas. 14, 41; Cox, Am. Trade-Mark Cas. 14.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1844.

TRADE MARKS—ALIENS—EQUITABLE RELIEF.

1. Where the plaintiffs were manufacturers, in England, of "Taylor's Persian Thread,"—and the defendants, in America, imitated their names, trade marks, envelopes, and labels, and placed them on thread of a different manufacture; it was *held*, that it was a fraudulent infringement by the defendants of the right of the plaintiff, for which equity would grant relief; whether other persons had, or had not done the same.

[Cited in Perkins v. Currier, Case No. 10,985; Cuervo v. Jacob Henkell Co., 50 Fed. 472; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 145.]

[Cited in Julian v. Hoosier Drill Co., 78 Ind. 414; Gilman v. Hunnewell, 122 Mass. 151; Connell v. Reed, 128 Mass. 477. Cited in brief in Caswell v. Davis, 58 N. Y. 225.]

2. In the courts of the United States, alien friends are entitled to claim the same protection of their rights, as citizens.

[Cited in U. S. v. Wong Dep Ken, 57 Fed. 212.]

[Cited in Derringer v. Plate, 29 Cal. 296.]

Bill in equity [by John Taylor and others against Daniel Carpenter] for an injunction and other relief. The bill in substance stated: "That the plaintiffs are subjects of the queen of Great Britain, and for many years past have been very extensively engaged in manufacturing and selling cotton sewing thread, as well in the United States as in England, which is put up for sale on spools labelled on the top 'Taylor's Persian Thread,' and on the bottom 'J. & W. Taylor, Leicester,' with the number of the thread, and number of yards on each spool, and with other devices thereon, for the purpose of distinguishing their spool threads described in the said bill, from spool thread manufactured by others. A portion of said spools were red, and a portion of them black, according to the number of yards on each; that the complainants have established agencies in the United States for the sale of their threads in Boston, New York, &c., and have employed, and employ a general agent, viz: B. Warburton, who resides in New York; that in order to guard against frauds, the complainants caused their threads to be enclosed in envelopes, some bearing a stamp of a coat of arms and motto, others bearing

[1] [Reported by William W. Story, Esq. 2 West Law J. 187, contains only a partial report.]

a stamp, inscription or caution to purchasers in the words following: 'The Persian thread made by J. & W. Taylor is labelled on the top of each spool, "Taylor's Persian Thread," and on the bottom "J. & W. Taylor, Leicester." The above is for the protection of buyers against piratical articles of inferior quality, fraudulently labelled with the name of Taylor.' That the defendant has extensively manufactured and sold spurious threads of inferior quality, put up on spools similar to those used by complainants, and colored, stamped and labelled, and enclosed in envelopes resembling exactly the spools, labels, devices, trade marks and envelopes used by the complainants; that this conduct of the defendant has greatly injured the complainants, not only by depriving them of the profits on the sale of large quantities of their own threads, but by the prejudice to the reputation of the article manufactured by them, caused by the inferior quality of the threads sold by the defendant."

The complainants further state, that they have obtained specimens of such spurious threads, &c., which they are ready to exhibit to the court; that they filed their bill against the defendant, before the chancellor of New York, substantially alleging the same grievances as are set forth in this bill; —that the defendant by his answer admitted, that he had used the name, and trade marks of the complainants as set forth in their said bill, but denied that the article manufactured by him was inferior to that of the complainants. They charge, that the said conduct of the defendant is a fraud, as well on them, as on the citizens of this commonwealth, and of the United States, purchasing said spurious threads as genuine, and they pray for an injunction against the defendant, and for an account.

The defendant in his answer admits, that the plaintiffs are aliens residing in Leicester, England, and they, or others, using the said name, have been engaged in vending sewing cotton threads, in New York and Boston; but he does not admit that they are the manufacturers thereof, but alleges, that they purchase, and wind it on spools labelled and marked as in the bill set forth, and enclosed in envelopes as described in the bill; that the threads so vended by complainants have acquired a good reputation in the United States, but that the reputation of the same had fallen off before he began to put up threads; that he has been informed and believes, that during the last three or four years, large quantities of thread have been spooled and labelled and packed as "Taylor's Thread" or "Persian Thread," in England, by persons other than complainants, and exported to the United States as the thread of the complainants, so publicly, that the complainants knew the same, or were legally affected with notice thereof; that his thread is as good as that of the complainants; that he has put up thread on black spools labelled as aforesaid, in envelopes similar to those described by complainants as being printed in raised letters; but that he never put up thread in envelopes bearing a coat of arms, &c., on red spools, or on spools labelled 300 yards, or with a coat of arms, &c. That he has consigned his thread to F. D. Ellis for sale, as his agent, and always instructed him to inform purchasers, that they were of domestic manufacture; that he is informed by Ellis, and believes, that he never pretended that the said threads were those vended by complainants, and that he, the defendant, never sold any under such pretence—on the contrary they always informed purchasers, that the said threads were of domestic manufacture, and not made or put up by the complainants; that the complainants are aliens, and have no exclusive right of vending spool cotton thread, put up, labelled and marked in the manner set forth by the bill; that the defendant had full right and lawful authority to manufacture and put up on spools, and with labels, in all respects similar to those of the complainants, and to sell the same in the United States, without becoming liable to the plaintiffs for so doing. He denies, that any citizens of the United States have been damnified. He avers that for six or seven years before, and ever since he commenced putting up threads as aforesaid, divers persons other than the complainants or defendants, have manufactured and put up thread on spools, colored, labelled, &c., in the same manner as alleged by the complainants, for sale, in the United States, so publicly, that the complainants or their agents, either knew the same or were affected with notice thereof; that according to the custom of trade, he, the defendant, is not liable or accountable to the complainants, or to any foreign manufacturer or trader, for using in the United States their marks, numbers, labels, names, stamps, figures, designs, &c. The defendant admits the commencement of a suit by the complainant against him in New York, and that he answered the same in haste, &c., and he submits, that as the matter in dispute here is involved in the suit in New York, he ought not to be held further to answer before the court here.

The cause was briefly argued by C. P. & B. R. Curtis, for plaintiff, as follows:

The points of defense set up by the answer seem to be: (1) That the complainants are aliens, and for this cause not entitled to the protection sought by the bill. (2) That persons other than the complainants have manufactured and put up for sale, and have vended threads on spools, &c., similar to those of the complainants, and with their knowledge, express or constructive. (3) That the defendant has not sold thread put up on red spools, nor contained in any but one description of the complainants' envelopes. (4) That the defendant has not sold any threads put up, &c., in imitation of the complainants' with-

out giving notice to the purchasers, that they were not threads of the manufacture of complainants.

The defendant admits that he has imitated the names, trade marks, &c., of the complainants, on black spools, and has sold a large quantity of them contained in envelopes, with the inscription in raised letters, set forth in the bill. The depositions filed in the case, show that Ellis, the defendant's agent, has sold threads marked, put up, &c., in imitation of the plaintiff's threads, on both descriptions of spools, and without giving notice to the purchaser of its not being genuine "Taylor's Persian Thread." No evidence is produced by the defendant to show that other persons have imitated the manufacture of the plaintiffs, and sold the simulated article, with or without plaintiff's knowledge. And, if proved, it would be immaterial, unless shown to be so general and so well known to the plaintiffs as to be evidence of an abandonment by them of their names and trade marks. An alien (friend) is entitled to the same civil remedies in the courts of the United States, at law or in equity, that a citizen of the United States enjoys. Act Cong. Sept. 24, 1789, § 11 [1 Stat. 78]. In Snowden v. Noah, 1 Hopk. Ch. 347, and Bell v. Locke, 8 Paige, 75, the doctrine was held, that a bill for an injunction might be maintained by a citizen of the United States, against one who assumes the name of the complainants' newspaper, for the purpose of imposing on the public and supplanting complainant in the good-will of his paper. This principle is the same as that which is contended for the plaintiffs. The recent case of Coates v. Thayer [unreported], before Judge Story, is also directly in point. That was a bill for an injunction by alien plaintiffs against engravers. An injunction was ordered, notwithstanding the defendant's exceptions to the alienage of the plaintiffs. The plaintiffs in this suit are entitled, by the course and proceedings of courts of equity, to call on this court to restrain the defendant from fraudulently using the names of the plaintiffs. An injunction was granted, on the filing of the bill in this case, which the complainants now ask to have made perpetual.

STORY, Circuit Justice. I have not the slightest doubt, in the present case, that a perpetual injunction ought to be granted. The case presented is one of unmitigated and designed infringement of the rights of the plaintiffs, for the purpose of defrauding the public and taking from the plaintiffs the fair earnings of their skill, labor and enterprise.

Various grounds of objection are suggested in the answer of the defendant, none of which appear to me to be of any validity. First, it is suggested, that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretence to say, that if a similar false imitation and use of the labels of a citizen put upon his own manufactured articles, had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated.

Another objection is, that the defendant has not had all descriptions of thread put up on spools, and labelled by the plaintiffs. That, if true, would make no difference. It is sufficient, if there be a violation of their rights by the defendant, in imitating and using any of the labels and spools, with a view to deceive the public. There is no evidence to establish, that the public were either forewarned, or forearmed, as to the deception. In point of fact, it appears from the evidence, that the defendant has imitated, and sold both descriptions of spools and labels, red and black, of the plaintiffs. Again, it is said, that other persons have imitated the same spools and labels of the plaintiffs, and sold the manufacture. But this rather aggravates, than excuses the misconduct, unless done with the consent, or acquiescence of the plaintiffs, which there is not the slightest evidence to establish; or that the plaintiffs ever intended to surrender their rights to the public at large, or to the invaders thereof, in particular. I do not quote cases, to establish the principles above stated. They are very familiar to the profession; and are not now susceptible of any judicial doubt. See 2 Story, Eq. Jur. § 951. I shall accordingly decree a perpetual injunction.

[NOTE. An action on the case was subsequently brought to recover damages for the infringement of the trade mark, to the amount of $20,000. At the trial a verdict was found for plaintiffs for $800. The defendant then moved the court to set aside this verdict, and grant a new trial. The new trial was refused, and judgment had on the verdict. Case No. 13,785.]

Case No. 13,785.

TAYLOR et al. v. CARPENTER.

[2 Woodb. & M. 1; 10 Law Rep. 35; Cox, Am. Trade-Mark Cas. 32; Cox, Manual Trade-Mark Cas. 44; 9 Law T. (Eng.) 514.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

APPEAL—CERTIFICATE OF DIVISION—EXEMPLIFIED COPY OF JUDGMENT—EVIDENCE—USAGE—DAMAGES—PARTIES—ALIEN.

1. The judges of this court, on a motion for a new trial, cannot certify to a division of opinion at the trial itself, unless both were present, and it will not it seems enable the parties to carry the case up, if certifying to it in respect to the motion for a new trial.

2. A document, attested by the clerk of a court, with its seal, and the certificate of its

[1] [Reported by Charles L. Woodbury, Esq., and by George Minot, Esq. 10 Law Rep. 35, contains only a partial report.]

presiding judge, and called an "exemplified copy," is competent evidence of the judgment described in it, under the act of congress—though it may not conform to the mode at common law, or in the state where the judgment was rendered.

3. The force and effect of the judgment itself, depends on other principles.

4. A witness may testify generally as to what accounts and results of sales were rendered to him, without their being produced; but he cannot give their respective contents without producing them, if called for.

5. Where an action is brought for a deceit in using the plaintiff's trade marks on defendant's goods; and selling them as and for the plaintiff's, evidence may be offered of any number of such sales, under a count for selling on a particular day, and divers others between that and the date of the writ.

6. Evidence in such a case of a usage abroad and in England to use such marks of others when aliens, with impunity, is not a competent defence to the jury, and such a usage being a bad one and not in existence here, cannot affect the law here.

7. It might be offered in mitigation of vindictive damages, if requested, and a long delay of the plaintiffs to prosecute after knowing the wrong, might be competent proof to show their acquiescence in it, but could be no absolute bar to a recovery, unless extending to the period of the statute of limitations.

[Cited in Cuervo v. Jacob Henkell Co., 50 Fed. 472; Menendez v. Holt, 128 U. S. 524, 9 Sup. Ct. 145.]

8. An alien friend can bring here, when injured, any personal action which a citizen can. And though he is not admitted to the same political and municipal rights, which citizens are entitled to, the protection of his person and property against frauds and wrongs is due, and is just.

[Cited in The Passenger Cases, 7 How. (48 U. S.) 532; La Croix v. May, 15 Fed. 237.]

9. When the marks to his goods are used by others, and sold by them on their goods, as and for his, it is a wrong, and he is entitled to recover to the extent of his damages by the loss of sales, and their profits.

[Cited in Hostetter v. Vowinkle, Case No. 6,714.]

10. He is entitled to that extent, though the articles sold as and for his were not inferior in quality to his.

11. It is not a bar to such a suit that a remedy is not reciprocally allowed like this to aliens in the country to which he belongs.

12. Nor is the remedy in this case obliged to be pursued by taking out a patent for his marks under the patent laws.

13. Laws and pleas are to be construed more favorably to alien friends than formerly, when a low state of commercial intercourse and of civilization regarded almost all foreigners as barbarians, if not enemies.

14. The damages in such cases should be full, ample—but not vindictive or beyond what has been really suffered, and if the language used by the judge was "exemplary damages," and open to be construed beyond this rule, yet if the jury appear not to have gone beyond the actual injury sustained, the verdict will not be disturbed.

[Cited in Jay v. Almy, Case No. 7,236; Hull v. Richmond, Id. 6,861; Mason v. Crosby, Id. 9,236; Aiken v. Bemis, Id. 109.]

This was an action on the case, brought by the plaintiffs [John Taylor and others], citizens of Great Britain, against the defendant [Daniel Carpenter], a citizen of Massachusetts, for imitating and using from January, 1842, to January, 1845, in this state, the trade marks of the plaintiffs, on thread of the defendant, and selling great quantities thereof, as and for the plaintiffs' thread, to their damage in the sum of $20,000. The defendant pleaded the general issue, and at the trial here at an adjournment of the October term, 1845, a verdict was found for the plaintiffs for $800. [See note to Case No. 13,784.] The defendant moved the court to set aside this verdict, and to grant a new trial for the reasons assigned in a motion, embracing various alleged misdirections and omissions by Judge Sprague, before whom the case was tried.

The motion was argued at the May term, 1846, by Choate & Plympton in its favor and for Carpenter, and by B. R. Curtis against it and for Taylor & Co.

WOODBURY, Circuit Justice. Not being present at the trial of this cause, I am unable to decide how far the exceptions made, accord with what actually took place. But where the counsel differ upon that, as they do in some important particulars, it will be necessary to be governed by the minutes and recollection of my associate, who made the rulings complained of. In each case, after settling in that way the true extent of the exceptions, I shall offer my views on their sufficiency for obtaining a new trial. As there seemed to be a wish on the defendant's part to carry the questions raised in this case to the supreme court, and as some of the points are important and novel, I felt disposed to oblige the parties as far as might be proper by some arrangement under a division of opinion in the court pro forma for that purpose. See the usage in Jones v. Van Zandt, 5 How. [46 U. S.] 215. But after time allowed to counsel to make such an arrangement, and their failure to effect it, I do not feel authorized, when not present at the trial, to have a difference of views certified, as if there existing in order to enable the parties to carry the case to the supreme court, because such a difference was neither real nor possible. And if a difference should be formally certified as existing now, which is possible, neither party could probably carry the cause up, as it would be a difference on a matter resting, as a new trial does, in the mere discretion of the court. U. S. v. Daniels, 6 Wheat. [19 U. S.] 542; [M'Millan v. M'Neill] 4 Wheat. [17 U. S.] 213; [Henderson v. Moore] 5 Cranch [9 U. S.] 11; [Marine Ins. Co. v. Young] Id. 187; Lanning v. London [Case No. 8,075]. In this condition of things we are both compelled to examine the questions presented seriatim and with care, and if we divide, the motion will fail, and final judgment be rendered on the verdict. Such will, also, be the case if we agree against the

motion. While if we agree in favor of it, then the verdict being set aside and a new trial had, it may be possible, that if both judges are present, some division of opinion may occur, which will enable either side to obtain the decision of the supreme court upon it, but only in that event.

1. The first cause assigned for a new trial is, that the judge admitted a document to prove a bill and answer in chancery in New York, which was not legal evidence. The document offered here had the attestation of the clerk, and seal of the court, with the proper attestation of the presiding judge; and the copy is said to be "exemplified," which means, a true copy. Such a copy seems to me to be competent evidence of a judgment, under the act of congress of May 26, 1790 (1 Stat. 122). See Craig v. Brown [Case No. 3,328]; [Ferguson v. Harwood] 7 Cranch [11 U. S.] 408; [Mills v. Duryee] Id. 481; [Drummond v. Magruder] 9 Cranch [13 U. S.] 122; [Hampton v. M'Connel] 3 Wheat. [16 U. S.] 234. What force will be given to the judgment itself in another state depends on the expression in the law, that it shall be the same as in the state where it is rendered, and on the construction given to that law, and the constitution bearing on it in various cases, which have been decided. [Mills v. Duryee] 7 Cranch [11 U. S.] 481; [Armstrong v. Carson] 2 Dall. [2 U. S.] 302; Green v. Sarmiento [Case No. 5,760]; Field v. Gibbs [Id. 4,766]; Campbell v. Cladius [Id. 2,356]; [Mayhew v. Thatcher] 6 Wheat. [19 U. S.] 129; Serg. Const. Law, 388; [M'Elmoyle v. Cohen] 13 Pet. [38 U. S.] 312; [Walden v. Craig] 14 Pet. [39 U. S.] 147. The expression in the law does not relate to the force of the copy thus certified, because each state is of course to prescribe its own wishes and views as to what shall be good evidence in its own courts. But relating to the force of the judgment as just shown, it is a different question, and one which it is not necessary to discuss here, as the question concerning the force and effect of the judgment itself does not arise here, but may be seen as settled in the cases already cited. Conceding, then, that this copy is not such as is used in the New York state courts (2 Rev. Laws, p. 403); nor such as is usual at common law (2 Burrows, 1179; 4 Barn. & C. 85); yet it is such as the act of congress prescribes in such a case, and was, therefore, as before shown, properly admitted.

2. The second objection is, that a witness, Warburton, was allowed to testify as to the amounts of certain sales and receipts of thread for the plaintiffs, without producing the letters or accounts of sales, from which he derived the information. It seems, on examination, that the plaintiffs found a falling off in their sales; and the witness, who was an agent or correspondent, through whom orders and receipts passed, was questioned by the plaintiffs, to show the diminution of such sales. After doing it, on the cross-examination, he was asked by the counsel for the defendant, if some of this information was not derived from letters addressed to him and accounts rendered, and on his replying in the affirmative, the defendant objected to the evidence without a production of the letters and accounts. If this point ended here, I should think that the witness could not state in detail the contents of letters without producing them. When having named certain specific results, without its first appearing that they had been obtained from letters, but appearing so afterwards, I think that the statements should then be withdrawn, if due notice is given to produce the letters, and they are withheld. 1 Greenl. Ev. p. 403, § 84, note; Swett's Case, 2 Mass. 569; [Taylor v. Riggs] 1 Pet. [26 U. S.] 591–596. It is immaterial in my view, whether the facts as to his means of knowledge being from letters came out, on questions put by the defendant or the plaintiffs. But here it is said, that after such notice, and the letters not being produced, the statements were ruled out. That is the first answer to the objection. Again, it is said, that the witness did not state the special contents of any letters, but the mere results or general impressions derived from numerous letters and accounts rendered, and rather testified, that such letters and accounts were rendered, than detailed their particular contents. This may be permissible. 3 Camp. 310; Steph. N. P. 215; Peake, Ad. Cas. 83; 2 Starkie, 274; 1 Greenl. Ev. § 101; 1 Starkie, Ev. (Am. Ed.) 154. And as there is no reason to believe the results were not correctly stated, the verdict was not changed by the admission, and should not therefore be set aside for a mere technical doubt on this point, and the more especially, if the evidence was ultimately ruled out, as seems to be the impression on one side.

3. The third objection as to the orders, rests on the same foundation.

4. So does the fourth objection as to the aggregate of the sales during six years previous to 1843, derived from such letters and accounts.

5. The fifth exception is, that the court under an allegation of sales by the defendant, within a certain period; viz., on 4th of January, 1842, and on divers days between that and the purchase of the writ, (4th January, 1845,) allowed evidence to be given of several sales on different days within that period. But I am aware of no principle to prevent a recovery for several torts or wrongs of a like character, and on different days, in one count, if stating the times broad enough to cover all. 8 Went. Pl. 434; Webs. Pat. 111; 2 Chit. Pl. 765; Gould, Pl. 104. And though it is true, that where only one wrong is sued for, it may in such counts be shown to have happened on any one day within the time, there is nothing in this principle to forbid several trespasses on different days to be proved. On any different rule a separate

count might be required for every skein or spool of thread sold, amounting, as in this case, to many thousands of spools. It seems to me, also, that a judgment under such a count would be prima facie a bar to any other suit for a sale within the time covered. And if so, then of course the evidence of any sales within the period is competent.

6. The sixth objection is, that the court excluded evidence of a general custom in the United States, England, Germany, and France, for the last twenty years, to use and imitate the marks of foreigners with impunity, and that such custom was generally known in the commercial world, and not contrary to the laws of such countries.

7. The seventh exception is similar to the sixth, except that the custom is to have the marks of aliens thus imitated, with a view to have the goods received and used there as if made by those aliens. In respect to these two objections, I am not aware of any principle, by which a usage in this or a foreign country is competent evidence in defence of a wrong. To be sure it may be weighed by a court in settling the law, if a usage existed here and was ancient and universal, as such an usage sometimes makes law, when there is nothing in it forbidden by the constitution or acts of congress. 1 Bl. Comm. 62, 75; 1 Hale, Com. Law, 1, 2; 1 Reeve, Eng. Law, 1; 3 Salk. 112; 1 Taunt. 241; U. S. v. McDaniels, 7 Pet. [32 U. S.] 15. A custom may be good, though against private rights (1 Law Rep. 217), and though against a bad by-law (1 Saund. 312, note; 7 Dowl. & R. p. 747). But usage cannot alter a law,—[U. S. v. McDaniels] 7 Pet. [32 U. S.] 15,—though it may be shown against those acquainted with the usage, and conforming to it, to show the law is rescinded, which might otherwise apply, as in case of notice of non-payment of notes. See Pierpont v. Fowle [Case No. 11,152]; Conkendorfer v. Preston, 4 How. [45 U. S.] 317. Again, this usage here was not offered to the court to prove what was law here or abroad, but to the jury; nor was it offered as an ancient usage, which is the gist of it, when affecting the law. Nor as one ever existing and tolerated in this country by judicial decisions. Nor offered to the jury in mere mitigation of damages, for which purpose it might be competent, so far as regards smart money, or any vindictive damage, if any such were permissible in a case like this. 2 Greenl. Ev. § 266. See Scott, N. R. 574–594.

The defendant now argues, that this evidence was competent to show an acquiescence by the plaintiffs, in the use of their marks, or to show a dedication of them to the public, as they knew that marks of theirs as well as others were used in this way, and without redress, in this country as well as abroad. On this he cites 5 Scott, 562; Bull. N. P. 30a; Wyeth v. Stone [Case No. 18,107]; 2 Greenl. Ev. § 250; 3 Barn. & C. 543; 8 Sim. 477. But I am not aware that a neglect to prosecute, because one believed he had no rights, or from mere procrastination, is any defence at law, whatever it may be in equity, —Wyeth v. Stone [supra],—except under the statute of limitations, pleaded and relied on; or, under some positive statute, like that as to patents, which avoids the right, if the inventor permits the public to use the patent some time before taking out letters. It will be seen, likewise, that the defendant had the benefit of this evidence under another head more appropriate. There is something very abhorrent in allowing such a defence to a wrong, which consists in counterfeiting other's marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruits of their "good name," merely because they have shown forbearance and kindness. A custom ought to be, at least, moral and reasonable in order to be upheld. Bac. Abr. "Custom," C. A party can hardly set up his own bad conduct or character in defence to an action, nor justify them when prosecuted, because they may not have been materially worse than those of some other persons. 15 Pick. 506. It is rather an aggravation to the plaintiffs, that many others have injured them as well as the defendant; and it is only an argument ad hominem to them, that in England an alien in a case like this cannot recover, (if such be the usage and law,) but cannot affect our own sense here of what is moral towards others, what is due to our own self-respect in punishing frauds, and what seems to be demanded from us, both by justice and law, however others may conduct in like cases.

The eighth objection is, that the court refused to instruct the jury that the plaintiffs could not recover, because citizens and residents of Great Britain, or foreigners. This seems to be the point most labored and most relied on. The first inquiry under this head is, whether the subject-matter here is one over which this court has jurisdiction, and can be prosecuted here at all by an alien friend. Being an action for a tort or wrong to a foreigner, gives to this court general jurisdiction. But being an action for a particular kind of wrong, an injurious deceit to the damage of the plaintiffs, practised here, though they live abroad, is said to give them no cause of action. It is not argued, that such conduct towards a citizen by another citizen may not have been held to be actionable, as many suits and legal proceedings of that kind have been sustained (25 Am. Jur. 273; Hopk. 347; Bell v. Locke, 8 Paige, 75; Thomson v. Winchester, 19 Pick. 214; Eden, Inj. p. 226; Knott v. Morgan, 2 Keen, 213; Day v. Binning, Coop. 489; Millington v. Fox, 3 Mylne & C. 338; 4 Barn. & Ald. 410; 4 Barn. & C. 541; Canham v. Jones, 2 Ves. & B. 218); but the counsel for the defendant question the soundness on which these cases have proceeded, and rely on Blanchard v.

Hill, 2 Atk. 484, in support of their views. But in Blanchard v. Hill, 2 Atk. 484, it was merely decided, that the court would not enjoin one tradesman from using the same mark with another, a generic one, "The Great Mogul." They admitted, as in Southern v. How, Poph. 143, it was decided right, that if one used the same mark "to draw away customers from the other," or, "to put off bad goods," or, "with any fraudulent design," it was actionable. Ransome v. Bentall, 3 Law J. Ch. (N. S.) 161; Gout v. Parkinson, 5 London Leg. Obs. 495; 8 Ves. 215. So Thomson v. Winchester, 19 Pick. 214; 8 Paige, 75; 4 Man. & G. 386; Sykes v. Sykes, 3 Barn. & C. 541, 5 Dowl. & R. 292. The law is to be deemed settled there as between citizens, that a suit lies for such a wrong, because it violates what one has appropriated and made profitable. It impairs public security also in the quality of the article. Scott, N. R. 573.

It has been recently held, that if the quality of an article, such as pork, sold under one's brand, is inferior, the maker of the brand is liable, and it is made expressly punishable or actionable by the French Code (B 3, tit. 2, § 4), to use another's mark. In the next place, in this country, proceedings have been sustained in favor of aliens, as to their marks, as well as citizens, holding, that the former have all the rights in such personal matters here, as citizens against forgery and deceit, and can resort to this court for their protection. Taylor v. Carpenter [Case No. 13,784]. Case in New York, same parties, and confirmed in court of errors on appeal, 1847. The solicitude has been such to remove any doubt on this point, that, in the largest commercial state in the Union, on the 14th May, 1845, an act was passed, not only forbidding the counterfeiting of marks on goods, but punishing it with imprisonment, and inflicting a like punishment on one who sells such merchandise with forged marks knowingly. See New York statute, May 14th, 1845. The exceptions to this position, as to the rights of foreigners, I take to be twofold, if no more. One is, that it is not reciprocal, no such right being granted to exist, and which may be prosecuted by our citizens in Great Britain where this plaintiff resides. But this might be a good reason for legislation by congress, not allowing aliens to have any rights, or to prosecute them in this court, unless they are reciprocal and allowed to our people in their respective countries. But no such discrimination has ever been made by congress, and no court could make it by mere construction, without an exercise of judicial legislation. The cannibal of the Fejees may sue here in a personal action, though having no courts at home for us to resort to. Another exception is, that the right to one's marks, if existing at all in foreigners, must be vindicated and prosecuted in conformity to the patent laws, and not by an action on the case like this, independent of those laws. In support of this, is urged the analogy from the decision in Millar v. Taylor, 4 Burrows, 2377, that if a common law right existed to the copy of a book, and to sue for violations of it, the interest given by the statute of Anne was a substitute or merger of the common law right, and no suit could be sustained except under the statute. See, also, Phil. Pat. 91; W. Bl. 403. But it has been held here, in the cases before cited, that the action in this instance still lay at common law, though this point was, perhaps, not raised and pressed there so elaborately as here. Nor is it pretended, that the right of action here, as at common law, is expressly taken away by the statute. But if taken away, it is done merely by implication. I have no doubt the statute in this case meant to confer some benefit as to copyrights and marks on aliens, which the latter did not before possess, instead of stripping them of any old rights.

Our law as to the mere patents and copyrights seems to proceed on the ground, that at common law they did not exist. But here no claim is made for them or under them. It is made not for copying, but copying and selling as if the original, and thus is for deceit and fraud. The statute undertakes to confer patents and copyrights, when desired; and it was adjudged in Wheaton v. Peters, 8 Pet. [33 U. S.] 591, that no copyright, as by common law, existed here to a book. But any claims or rights, which did exist before in the manuscript, or in a mark, or for deception and fraud, remain untouched. This last right is like that to any particular tool or machine, made by an individual; and any injury to it, or deceit in relation to it, may be prosecuted as at common law. But a mere open and acknowledged copy or imitation of it might probably not be prosecuted, except under the statute. The statute confers such additional protection under a constitutional injunction, though with a more sparing hand on foreigners than citizens.

There is still another exception, which is urged to this right existing at common law in aliens. It is, that a trade mark may be regarded merely as a generic name, when it comes here from abroad; and that our people have a right to use any generic name for their goods which they please. Thus, that "James Fever Powders" are now rather a generic name to distinguish a certain chemical substance, than a mark of any individual in which he has a monopoly. See 19 Pick. 216. It is contended, that no property exists here in mere words or marks, and that they are unlike the good will in a trade or store for business. And it is further urged, that if a foreigner can obtain no redress in such a case, and a citizen might, he should not complain, and may remain at home, as in many things he is not allowed here all the rights and privileges of a citizen, and ought not to be. He cannot by the constitution be president. He cannot in many states vote.

He cannot hold land in many, or take by descent, though in others he can. He cannot take out patents and copyrights in all cases, and under like rules with a citizen. He cannot own vessels here. He cannot engage in the coasting trade here. He cannot in the conflict of laws enforce some rights, in cases of discharges in insolvency, which citizens may. Story, Confl. Laws, 33, 415; Towne v. Smith [Case No. 14,115].

But an alien is not now regarded as "the outside barbarian," he is considered in China, and the struggle in all commercial countries for some centuries, has been to enlarge his privileges and powers as to all matters of property and trade. It was one of the grievances in Magna Charta, as well as the Declaration of Independence, that the naturalization of foreigners had been too much obstructed. So too heavy taxation of alien merchants was guarded against in Magna Charta, allowing them "to go, and come, and buy, and sell, without any evil tolts." 1 Stat. art. 30; Thomp. Charters, p. 55. It is hence, undoubtedly, that Montesquieu observed, "that the English have made the protection of foreign merchants an article of their national liberty;" and Thomp. Charters, p. 232, says, that once they enjoyed it even in war, "in common with the clergy and husbandmen, in order that those who prayed, ploughed and trafficked, might be at peace." For many years it has been held, that pleas of alienage are to be discouraged; and are a defence not favored in the law. 8 Term R. 71, 166; 2 W. Bl. 1326; 13 East, 332; 10 East, 326; 1 Bos. & P. 163, 170; 9 East, 321; Steph. Pl. 67; Society for Prop. Gosp. v. Wheeler [Case No. 13,156]. Even as long ago as the time of Lord Chancellor Justice Hale, he "saith, that the law of England rather contracts than extends the disability of aliens, because the shutting out of aliens tends to the loss of people, who, when laboriously employed are the true riches of any country." Bac. Abr. "Aliens," C, note; Went. Pl. 427; 2 Rolle, 94. An alien may bring an action for slander of his character. Bac. Abr. "Aliens" D; Yel. 198. And by 31 Hen. VI. c. 4, he may sue for any injury on sea or in the realm. Personal actions, being transitory, are not limited to any particular country. Story, Confl. Laws, p. 450; 3 Bl. Comm. 249. And "the laws of a sovereign rightfully extend over persons, who are domiciled within his territory, and even property which is there situate." Id. § 539. "And he may deem all in his limits as subjects, and legislate over them, as to contracts and property." Id. § 541. "Suits for trespasses to property, lie in the country where committed." Id. § 554. Though sometimes they are brought for injuries in unsettled countries, to person, but not to real estate, in the place where the offender is found. Camp. 180; 4 Term R. 503; Livingston v. Jefferson [Case No. 8,411]; Batture Case.

Here the wrong was committed, and the defendant found here. Our duties are such to redress wrongs to foreigners, that they are by the constitution allowed to sue in the United States' courts, so as to secure greater exemption from local partialities or prejudices against them; and a refusal of justice to them in judicial tribunals is one just cause of war. 4 Elliott, Deb. 167. The 11th section of the judiciary act [1 Stat. 78] confers the same power on this court to sustain suits where an alien is a party, as where a citizen is. Aliens may sue here as extensively as in the state courts. 19 Pick. 214. In Barry's Case, so notorious for eight or ten years past in both the courts of New York and of the Union, he, though an alien, has been allowed as to regaining the custody of his child from his wife and her connections, the same remedies and principles as are granted to citizens. Barry's Case, 2 How. [43 U. S.] 65; Mercein v. People, 25 Wend. 64; Barry's Case, 5 How. [46 U. S.] 103. An alien gets the right of protection, from his obedience, industry, and care while here, and the usefulness of his capital and skill employed here, when he resides abroad. In Story, Confl. Laws, § 565, he says: "It may be laid down, as a general rule, that all foreigners, sui juris, and not otherwise specially disabled by the law of the place where the suit is brought, may there maintain suits to vindicate their rights and redress their wrongs." 2 Bligh, 31; 1 Dow. & C. 169; 1 Clark & F. 333; 2 Sim. 94; 8 Barn. & C. 427; 9 Ves. 347; 4 Johns. Ch. 370; and [Bank of Augusta v. Earle] 13 Pet. [38 U. S.] 519, extends comity of suits to corporations out of a state.

A person from abroad suing in this country is to enjoy no greater nor less rights than citizens. "He is to have the same rights which all the subjects of this kingdom are entitled to." Lord Tenterden in De La Vega v. Vianna, 1 Barn. & Adol. 284; 2 Cow. 626; Willings v. Consequa [Case No. 17,767]; Courtois v. Carpenter [Id. 3,286]; 2 Johns. 345; [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; Henry, For. Laws, 81–86. Foreign contracts, as well as laws, are respected and enforced only from comity, not proprio vigore, but almost invariably enforced. Story, Confl. Laws, § 244. Much more should we allow to persons protection and redress by comity, than to contracts and laws, made abroad, as we do daily, in every appropriate case. Alien merchants may not only sue for personal property, but, if resident in England, be allowed the benefit of their bankrupt laws. Bac. Abr. "Merchants."

The whole system of modern facilities for intercourse through consuls and ambassadors, through less rigid exclusions, through improved roads and steamships, through free trade and lower duties, and the greater brotherhood caused by the art of printing, the mariner's compass, and Christianity, all tend to connect nations closer, and equalize their rights and privileges in business. The progress of civilization and commerce, and the

whole character of our institutions and laws, are more and more friendly to foreigners, regarding them more as brethren, of one blood and origin, and hope, rather than barbarians and enemies. So as to permitting them to trade here, to sell and buy, to recover for conversions, or injuries, or sales of their property, to sue for frauds and deceits in relation to it as well as contracts, this has been the law ever since the constitution empowered congress to have courts to try suits, where an alien was a party, and ever since congress confirmed that power in 1789 in the circuit court. We, as well as the state courts, have yearly sustained alien friends in vindicating their personal rights, as fully as we do citizens, in all analogous cases. Courts, acting under the law of nations, as does the district court sometimes, and this one on appeals, are said to be less rigorous as to aliens than even common law courts. Crawford v. The William Penn [Case No. 3,372]. Indeed, by the very nature of our institutions encouraging emigration here and naturalization, and filling up our waste lands with the industrious of all nations, a more liberal course has always been entertained here in respect to foreigners than in England. Thus says Tucker: "An alien in America, antecedent to the Revolution, was entitled to all the rights and privileges of an alien in England, and many more; to all that an alien in England could claim." Again, "An alien in America was also entitled to many more rights than an alien in England." 1 Bl. Comm. pt. 2, App. 99, by Tucker.

The modern system of reciprocal treaties with foreign nations adopted by us, has, for a quarter of a century, been breaking down the barriers against aliens. The alien being a resident abroad, makes no difference in his right, or in our jurisdiction, if the subject-matter of the action arises here. If he is an alien, in order to give jurisdiction—[Breedlove v. Nicolet] 7 Pet. [32 U. S.] 413—he may reside either abroad or here. Again, the complaint here is not so much taking the mark of the plaintiff, as a generic or any other name, as it is selling the thread with such a mark as and for the plaintiffs. That is the gist of the wrong. That is a deceit and injury. See cases first cited, as to 2 Atk. 584. And I do not see why it is not one of those injuries to the personal rights and personal property of the plaintiffs, which, when committed here, should be redressed here in favor of alien friends, no less than citizens. We reprint, to be sure, foreign books, as Hallam's History, and put "Hallam's History" on the title-page. But we do not add to it the words, showing it to be a London, or Paris, or Dublin edition, and sell it as and for such. If we did, it would be reprehensible, and to be discountenanced. So in manufactures, we may strive to imitate the goods fabrics of other countries, or try to surpass them. That is one thing, and is commendable. But if we go farther, and adopt their peculiar marks, and sell our goods as and for theirs, we deceive and injure foreigners who owned them, and this, whether the fabric be of as good a quality or not. 8 Paige, Ch. 75; Blofeld v. Payne, 4 Barn. & Adol. 410. If it is inferior, we injure our own people also, in a pecuniary view, as well as in the moral tone of trade, and in national liberality. It is said, we are not bound to sacrifice our interests to promote those of others. Chit. Cont. 26. But that is a very different thing from taking what is valuable from them without acknowledgment or compensation. So we may be, it is said, "reasonably selfish." But we should not cheat, lie, and deceive to the injury of individuals, whether aliens or citizens.

Comity and courtesy are due to all friendly strangers, rather than imposition or pillage. Taking their marks and using them, as and for theirs, to their damage, is like preying on a visitor, or inhospitably plundering a wreck on shore. To elevate our own character as a nation, and the purity of our judicial tribunals, it seems to me we ought to go as far in the redress and punishment of these deceptions as can be vindicated on any sound principle. Some of the statutes, passed in what we consider a comparatively barbarous age, are not without admonitory lessons on this subject. Beside, one before referred to, the 9 Edw. III. St. 2, c. 1, empowers alien merchants to sell and buy freely any where, and to have redress if disturbed and damages. 1 Stat. 212. And 27 Edw. III. St. 2 cc. 18, 19, provides, that as such merchants "cannot often long tarry in one place, we will and grant that speedy right be to them done from day to day and from hour to hour, according to the laws," &c. 1 Stat. 281. Again, in the 3d article of our treaty of 1794 with England, each power is authorized in America "freely to carry on trade and commerce with each other." So, we are under treaty obligations to Great Britain and most other European powers to admit their merchandise on favorable terms, and to allow their merchants to trade here as those of favored nations. But it would be a mockery of such provisions and engagements, if we prevented them from selling their goods after arriving here (Chief Justice Marshall in Brown v. Maryland, 12 Wheat. [25 U. S.] 447); unless noxious to health or morals; or if we made onerous discriminations against them, or prevented their receiving the proceeds of their goods, or abstained from yielding protection against injuries to them, or to their marks. See Taylor v. Carpenter [Case No. 13,784]. I am not satisfied, then, that the judge at the trial did wrong in not charging on this point as desired by the defendant. Nor am I dissatisfied with the verdict in law or fact, in this respect.

9. The ninth objection is, that the judge did not charge, that the plaintiffs had forfeited their right to sue, if they knew for a long time these forgeries and sales, and did not sue. We have before shown, that there

is no legal principle to bar such a suit unless the delay to prosecute is equal to the time fixed in the statute of limitations, or as in patents, the inventor permits a public use so long, as by the express statutory provision, to be estopped.

10. The tenth objection is, that the judge did not instruct the jury, that it was competent to infer from certain depositions in the case, that the plaintiffs had abandoned their marks to be used by the public. But the further statement under this head, as to what the judge did charge the jury on this point, repels the idea that any error occurred. For he instructed them, that if the use was for such a length of time, and under such circumstances as to indicate a dedication or abandonment of the marks to the public, or a license to use them, the plaintiffs could not recover. This accords with the views in Wyeth v. Stone [Case No. 18,107], and Pidding v. How, 8 Sim. 479.

11. The eleventh objection is, that the court did not instruct the jury, that if the thread made by the defendant was not inferior in value to the plaintiffs', the latter ought not to recover. I concur in the judge's views, that it was no defence as to the plaintiffs' injury; as the defendant could not have sold his thread so extensively, and thus lessened the plaintiffs' sales, without accompanying it by the mark of the plaintiffs', which had obtained an established reputation. The public might not have so much reason to complain if they got as good an article. They would, however, run more risk, not having the guarantee of goodness, which they expected, as Taylor's forged name and mark were palmed on them for the genuine. 4 Barn. & Ald. 410; 3 Barn. & C. 541; 4 Man. & G. 179. Nor would they have the remedy against the plaintiffs, which they otherwise might have if the article proved inferior to what had been sold under the genuine brand. To be sure the plaintiffs, in their declaration, aver, that the thread sold by the defendant was inferior in quality. But the proof of this is no condition precedent to recover damages for the loss of sales, though it would be to recover damages for loss for any injury to the character of their thread. Not proving that last injury, they did not recover for it, but proving large sales by the defendant as and for the plaintiffs, they proved a probable loss of such sales by themselves, and ought to recover for that, as they lost the usual profits on sales to that amount. Blofeld v. Payne, 4 Barn. & Adol. 410.

12. The next objection was, that the plaintiffs, in such last case, should recover only nominal damages. But the actual damage, suffered by loss of sales by the plaintiffs, which was the ground of recovery, was just as great as if the thread had been inferior, though the credit of their mark and thread might not suffer so much thereby, if it did at all.

13. The next objection conveys an idea not exactly correct, as the judge informed the jury, that though a large dealer buying of the defendant, might know or be told that the mark was imitated, yet if the defendant knew the thread was to be sold again at retail, without giving that information, and it was so sold, the plaintiffs should recover. This was undoubtedly right; for the defendant was thus accessory to the eventual sales of the thread, under a forged stamp as if a true stamp; and he thus took the profits of sales, which would otherwise have gone to the plaintiffs and their agents. 3 Barn. & C. 541; 5 Dowl. & R. 292.

14. On the question of damages, however, in respect to giving "exemplary" ones, there is some doubt, whether the charge was in the exact form deemed proper under modern analyses and decisions on this point. 3 Am. Jur. 287–308, by Metcalf; 2 Greenl. Ev. §§ 266–272; 19 Pick. 216; Wilson v. Turner [Case No. 17,845]. That the jury should have given more than nominal damages, I have no doubt, and I have as little doubt that there were materials enough in the case, from which to estimate actual damages, such as the probable extent of sales by the defendant under these marks, and the loss of sales and profits therein by the plaintiffs. The jury would, in a case like this, if a known and deliberate imitation, often renewed and very prejudicial to the plaintiffs, not be very nice in their data and inferences, but be sure to give enough to cover all losses, and prove an ample indemnity. 2 Maule & S. 77; 13 Conn. 320; 6 Cow. 254; 7 Mann. 251. Not "smart money," or "vindictive damages," but full atonement for the wrong done. 8 Car. & P. 7; 7 Man. & G. 1033; 5 Watts, 375; 5 Taunt. 442. In a case like this, if in any, no reason exists for giving greater damages than have actually been sustained, or what have been called compensatory. Tracy v. Swartwout, 10 Pet. [35 U. S.] 81. There is nothing peculiarly atrocious in the conduct of the defendant, to be punished by damages, and in no other way, as a public example, considering the blamable usages which exist on this subject. So in very corrupt or flagitious wrongs, if a criminal prosecution lies for the public offence, I do not see much justification for what are called vindictive damages there, or smart money in the civil suit, as the criminal one covers them. Sinclair v. Tarbox, 2 N. H. 135. Yet what may be allowable in other cases it may not be proper to decide here, but leave them to be considered when those of a different character from this occur. See Sedg. Dam. 39; 2 Greenl. Ev. §§ 253–256, and books before cited; Sanborn v. Neilson, 4 N. H. 501; Whipple v. Walpole, 10 N. H. 130. If here, by "exemplary damages," the judge meant a full indemnity for the individual wrong in every equitable view, and thus, by such an example, operating in a preventive manner

the more effectually against a repetition of such injuries, then no error happened on his part. So, if he, in the hurry of the trial, used language which the jury were likely to construe as going beyond that range of indemnity, yet, in point of fact, the jury did not give more than was sufficient to make the plaintiffs whole, but rather less than that amount; this state of things does not seem to constitute a good ground for a new trial.

It would be idle and worthless, even to the defendant, to have another trial, with no probability of lessening the amount of the verdict. My associate, who tried the cause, entertaining this opinion as to the verdict for $800, and seeing nothing myself which is apparently exorbitant in that sum, I do not feel justified in disturbing it. Wiggin v. Coffin [Case No. 17,624].

SPRAGUE, District Judge, expressed his concurrence in this opinion.

New trial refused, and judgment on the verdict.

Case No. 13,786.

TAYLOR et al. v. The CATO.

[1 Pet. Adm. 48.] [1]

District Court, D. Pennsylvania. 1806.

SALVAGE — CLAIM BY CREW OF SALVED VESSEL — ABANDONMENT — RETURN — AMOUNT OF COMPENSATION.

1. The brig Alexander, on a voyage from Havanna to Philadelphia, met the Cato at sea in distress, and took all her crew and some part of her cargo on board, and left her. Six days after she again fell in with the Cato—The crew of the Cato assisted in saving other parts of the cargo. Salvage claimed by the crew of the Cato and half a share each allowed to those who had been active.

[Cited in Brevor v. The Fair American, Case No. 1,847; Clayton v. The Harmony, Id. 2,871; Bell v. The Ann, Id. 1,245; The Two Catherines, Id. 14,288; Lewis v. The Elizabeth and Jane, Id. 8,321; Poland v. The Spartan, Id. 11,246; The Waterloo, Id. 17,257; The Henry Ewbank, Id. 6,376; The Nathaniel Hooper, Id. 10,032; The Dawn, Id. 3,666. Approved in Cartwell v. The John Taylor, Id. 2,482. Cited in The Massasoit. Id. 9,260; The Niphon's Crew, Id. 10,277; The D. M. Hall v. The John Land, Id. 3,939; Hollingsworth v. Seventy Doubloons & Three Small Pieces of Gold, Id. 6,620; The Persian Monarch, 23 Fed. 822; The Dupuy De Lome, 55 Fed. 97.]

2. About two-fifths of the gross sales allowed as salvage.

[Followed in Bell v. The Ann, Case No. 1,245. Cited in Hand v. The Elvira, Id. 6,015.]

In admiralty.

PETERS, District Judge. The brig Alexander, Heartwell, master, laden with a valuable cargo, on her passage from Havana for Philadelphia, on the sixth of September last, met, on the high seas, with the ship Cato, Pyle, master, on a voyage from New Orleans to Bordeaux, in great distress, and on the point of perishing. The master and crew of the Cato were taken on board of the Alexander, with part of the cargo, consisting of 6 seroons of indigo, thirteen bags of coffee, and as much provisions as supported those of the Cato's equipage, while on board the Alexander. The Alexander then pursued her voyage; but on the twelfth of the same month, fell in again with the Cato, and found near her a vessel taking out goods. Captain Heartwell sent his boat, in which went Captain Pyle, the second mate, and the boatswain of the Cato, and saved from the abandoned vessel 20 bales of cotton, 9 seroons of indigo, a new hawser, some beef, and other articles. It appears by the testimony, that "it was blowing hard." The Alexander arrived in Philadelphia with the articles saved (a small part whereof consisted of articles of furniture, and apparel of the ship) and the master and crew of the Cato, on the 25th of the same September. It does not appear that any extraordinary risk was run, or exertions made. The time occupied in saving the goods was but short, "a few hours," at each meeting with the Cato.

This case, in all its essential features relating to the situation of the vessel, the mode of obtaining the articles saved, the assistance given by the crew of the deserted ship, and all the leading circumstances bears, by a curious coincidence, an exact resemblance to that of The Belle Creole [Case No. 17,165], determined in this court in 1792.

But a dispute in this cause arises between the crew of the deserted ship Cato, and the salvors, the officers and crew of the brig Alexander. The crew of the Cato insist on sharing the part to be allotted to the crew of the brig Alexander, on equal terms. They alledge that, by the knowledge of the master, and others of the Cato's equipage, who adventured in a second enterprise for saving, after the Cato had been left by the brig Alexander for several days, and again discovered, the most valuable goods were rescued from destruction by their position in the ship being pointed out. The master and some of the crew assisted in this salvage, at personal risks, while others of them navigated the brig Alexander, which would have been exposed to hazard, and perhaps loss, without these assistants; as the crew of the brig were incompetent to navigate and to save goods out of the Cato at the same time. It was said that assurances were given to the Cato's crew (at the time) of equal benefit of salvage.

On these points I must refer to the opinion I gave in the case of The Belle Creole, in which the same kind of circumstance and agreement occurred. Much reliance was placed by the counsel for the crew of the Cato, who laboured to increase the quantum of salvage as a common concern, on the case

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

of The Aquila, 1 C. Rob. Adm. 42, 45, &c. It is a mere difference of the interpretation of the word derelict, as it respects "boats, or other vessels, forsaken and found on the sea, without any person in them,"—which creates any shadow of distinction between the application of the word in the case of The Aquila, and my definition or understanding of the term, as given in the decree alluded to. Sir William Scott has the same ideas of the civil law meaning of derelict, to which a right in the first occupant attaches. The abandonment must be voluntary, and not produced by force or necessity. All maritime derelicts (vessels deserted) are subjects of salvage, and not rights in toto, acquired by mere possession. When I was under the necessity of deciding a variety of points on the subject of salvage, it would much have relieved me, to have seen the decisions of the cases of The Aquila, 1 C. Rob. Adm. 42; and that of The Two Friends, Id. 278. There is so evident a coincidence of opinion, in the principal points so much laboured in several salvage cases here, that I was the more confirmed in the decisions I then gave, by the concurrence of sentiment evidenced by Sir William Scott in both these cases, which I had not seen till long after my decisions on similar points. One point has never been stirred, as no occasion called it forth, i. e. that deserted ships and goods, where no owners appear, are national droits, paying salvage to those who find and save them. This excludes, however, all idea of occupantis fiunt derelicta. It will be seen there (and in other modern elementary writers and reporters) concisely stated that the old and unjust claims of nations to wrecks, jettisons, &c. &c. to the exclusion of owners, are now obsolete, as they were ever unjust. The old rule of allowing half to the finder, or salvor, of deserted vessels, jettisons, wrecks, &c. without regard to degree of merit, labour, or difficulty, has been long exploded, as hath also been the antiquated idea of its being necessary that some living animal should be found in a deserted ship. Any mark by which the property can be known is a sufficient designation of ownership.

The third article of the laws of Oleron (Sea Laws, 123), has been produced, together, with the commentaries upon it, to shew that seamen saving from wreck are entitled to reward (where sufficient property is saved) beyond the amount of wages. I never disputed this doctrine in the cases to which it seemed applicable. Seamen are entitled or not to wages, in cases of wreck, according to the merit of their services in that distressing exigency. Those who do not assist, do not receive their wages, which are lost by the wreck, and recovered in equivalent, by the services in saving. But the amount of wages recoverable is not precisely fixed; whether it shall be to the time of wreck, or for the voyage, is discretionary. Regard must be had to merit and to the value of goods saved. I have thought it best to make the allowance to the crew of the deserted ship as an increase of the quantum of wages in account between them and the owners of the articles saved. I have kept the cases of the actual salvors, i. e. the owners, officers and crew of the ship saving, and those of the persons saved out of the perishing vessel, distinct and separate. I do not say that there may not be a case where the reward should exceed any wages; but, I consider the vessel affording the means of saving the lives of the perishing ship's company and her cargo, and her officers and crew, as the real and substantial salvors. The others only act vicariously, and hold subordinate situations. Without the ship and crew which afford them refuge and safety, of what avail would be all the efforts of the equipage of the perishing ship? The latter are bound, by every tie, to afford the former all assistance to return an obligation; and they are legally bound to assist in saving the goods to revive their claim to wages. What the amount shall be is to be considered as between them and the owners. They are not on a footing with the crew of the auxiliary vessel mentioned in the case of The Aquila. These had neither duties to perform or obligations to return. Yet they were placed in a secondary grade of merit.

In this case a decree of generosity has been evidenced by the salvors, who gave up to the crew of the Cato such of their private adventures as were in part saved. Another vessel, of the same owner, was found at the second discovery of the Cato, saving of goods, and keeping her from going down. I have heard of no claims brought forward on the part of this vessel. On the whole, I deem it best for the crew of the Cato, not herein provided for, to apply by petition for a distribution of the remnants and surplus, when their case, as between them and the owner, will be considered. I do not exactly recollect by what rule I estimated the quantum of the wages I ordered to be paid out of the surplus to the officers and crew of the Belle Creole, but I think it was beyond the wages due at the time of abandonment of the vessel. The officers of the vessel also had their private property restored. On some they paid a small salvage. I considered the captain as entitled to wages in quality of an auxiliary salvor, having a lien on the articles saved.

There is a mistake, evidenced by some of the counsel in this, and other salvage cases, as to the principles regulating the payment of wages to seamen in cases of wreck. The old law was, that they were payable only out of such parts of the wreck of the ship, her tackle and furniture, as were saved, but it was found that under this impression the whole attention of the mariners was occupied in saving those articles from which they derived advantage; and to ensure these they suffered the goods to perish. Modern au-

thorities are clear, that both ship and cargo, or such parts as are saved, are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials or furniture saved, should be exhausted before the cargo be made answerable. There is no foundation, in my recollection, for the assertion, that so much of the goods must be saved as will produce an amount of freight equal to wages. Freight, in cases of wreck, is not the rule, as it is in ordinary circumstances: freight and wages growing out of it, are lost by wreck, unless the goods are sent on to their destination. The claim of the sailor is not under his contract for wages out of freight, but in a new character, as a salvor, he regains a rightful claim to wages, restored by his exertions in rescuing the articles saved (whether parts of the ship or cargo) from the perils and loss to which the wreck had exposed them. The same principles apply in cases like that now before me.

Thus far I had proceeded with intent to close my observations, under the idea that the claimants in the Alexander had acquiesced in the decision in the case of The Belle Creole. But I found, on a second hearing, that their views were extended beyond the proportion of salvage given in that case. Much reliance was placed on precedents of greater proportions in other cases, determined both in England, and in the United States. But precedents seldom apply as to quantum. The whole subject is open to discretion; which is seldom alike in different individuals, determining on similar circumstances. It very rarely happens, that cases resemble each other so nearly as the present and that of The Belle Creole.

The case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, determined in the supreme court of the United States, was now, and not before, produced. It was relied on by the counsel for the salvors in the Alexander, as well as the counsel for the crew of the Cato. It is very easy for counsel, among the items of inducements to salvage, to enumerate that of the value of property risked. It will appear that I have, in no instance, disregarded this circumstance; but it is difficult for any one to fix the proportion of weight it should have in the final adjustment; more than it could be with any accuracy ascertained, what was the relative value of exertion between a strong, or less athletic individual. It has never struck me as forcibly as its advocates seem to consider it. Extended as far as some have carried it, the whole value of the articles saved, with a sum paid in addition, would not compensate for the risk. But a leading and dominant consideration ought to be, the benefit arising to the owner. This may be afforded by a coaster of small value, as well as by an East Indiaman. The owner of the goods saved should pay salvage in proportion to his property saved, and the advantage he receives, adding a reward as an example and incentive to others, and not according to the property of the salvor. I cannot depreciate the services performed by the officers and crew of a vessel of small value, in any thing like the proportion of value of a vessel and cargo of great amount. All such considerations render the subject difficult, arbitrary and uncertain. In the case of Mason v. The Blaireau [supra], there were great varieties of opinion, as will ever happen where no rules are, or can be, immutably fixed, between the judges of the several courts, on important points. In one of no small import, I know that one of the judges of the supreme court (Washington) on the point of Toole's participating in salvage, differed from all the others; he thought him not entitled to a share. It is not therefore surprising that in this court, it should be found impracticable to fix satisfactory rules either for the payer or receiver of salvage; both being generally discontented. Merchants give as little satisfaction as courts. Few salvors or owners give themselves the trouble of gaining information, farther than the immediate object of pursuit. Many years ago a case of salvage, of considerable importance, was referred by consent to three of the principal merchants in Philadelphia. They reported in favour of the salvors about $160; when no court could have been justified in decreeing less than ten times that sum. It was for me an unlucky decision, for no case of salvage, originating in this court, has been since referred to merchants.

There is now a better, though not yet a perfect understanding of this subject, among traders. Liberality and attention to general interests must qualify particular pursuits after gain. Cupidity, always disposed to be bribed, must have a douceur to unlock the generous feelings of the heart. But if salvors are too grasping, owners will err in refusing an adequate reward. They will suppose that they might as well abandon the property to the first occupant, as to suffer it to be consumed in remuneration and expenses.

I perceive in the decision of the case of Mason v. The Blaireau [supra], no opposition to the general principles of my decrees on this subject, on former occasions. I shall deem myself controlled by it, wherever I differ in opinion. The reward to Toole, was given from the peculiarity of the circumstances; this is always discretionary, and governed by the facts of every case: he received no wages in addition; he was remunerated for his uncommon exertions precedent to the salvage, as well as those made in navigating the wreck under great perils, during a long passage. I do not perceive any peculiar merit in the crew of the Cato, comparable to that of Toole. I join in feeling the policy and humanity displayed by the chief justice in behalf of the court, when the amount of property risked was

held up to encrease the quantum of salvage, and doubts expressed as to loss of insurance by such risk. I said in the case of The Belle Creole, that it was a risk "justified to the heart, but not to the law." I can find no adjudged case declaring the delay or deviation to save lives or goods, not to be a forfeiture of insurance. The argument of the chief justice in delivering the opinion of the court (Mason v. The Blaireau, 2 Cranch [6 U. S.] 268, 269) may be considered as deciding the point so far as was incidentally required, in the case before the court. He alledges that the owner is made "his own insurer," which seems to decide that if others had taken his risk under common circumstances, this was a casualty not insured against, and a deviation putting the policy in jeopardy. Sir William Scott has made a similar and equally laudable declaration, on the subject of this risk, not creating a loss of insurance. It ought to be settled by the general consent of all merchants, in whatever capacity they find themselves, that these exertions to save life or property, should incur no loss to the salvors. It is for the general interests of commerce, that no discouragements should exist to deter from acts of humanity, which all in their turn may require. If it be agreed that this risk does not incur a loss of insurance, it lessens the pecuniary merit of the salvors; and diminishes the force of all arguments grounded on the amount of property put to risk.

The case before me differs in no material circumstances from that of The Belle Creole, except, that the amount of the property saved is less. Some consideration may be due to this circumstance, though the case is otherwise one of no extraordinary merit. The Amiable loitered and risked with a view to further saving, after taking out the officers and crew of the Creole and some goods. But the second meeting of the Alexander with the Cato, was purely accidental, the gulf stream having wafted the Cato in a direction to be overtaken by the Alexander, driven from or retarded in her course, by adverse winds. Although it was said to have "blowed hard," it could not have been dangerous to a ship, when an open boat could live, and transport goods in safety. The delay of the brig was short; having been only "a few hours" at each meeting with the Cato. I therefore decree a compensation nearly in the proportion allowed in the case of The Belle Creole. I throw all costs and charges on the gross amount of sales, and out of the balance, allow, for salvage, a fixed sum of fifteen hundred dollars. This creates little difference, (though it throws some advantage in amount to the salvors, who risked as much to save less) between the proportion allotted in the case of The Creole and this case. I perceive that the superior court ([Mason v. The Blaireau] 2 Cranch [6 U. S.] 240), whose decisions direct all inferior jurisdictions, have considered the proportions established in the ordinance of France, quoted in the case of The Belle Creole, as just and exemplary in cases of maritime derelicts. I am therefore bound to respect this opinion, as directory, when cases are similar in circumstances.

In compliance with the principle established in the case of The Blaireau, I allow half the share of a mariner, to each of the officers and crew of the Cato who assisted in the second salvage. In this arrangement, I follow the example of Sir W. Scott, in the case of The Aquila; considering the crew of the Cato only in a secondary character. The other mariners of the Cato are left on the footing I have usually placed them, by the decisions of this court before stated. But those who have saved their adventures and paid no salvage, are not to receive the half share. I give this half share to those, (except as before excepted) who were actually employed in the second saving, because the amount of wages due was inconsiderable. The distribution of the salvage, among the owners and salvors, as formerly established, was according to the agreements, or articles of ships, having letters of marque, and capturing prizes. I chose these for my guide, in preference to privateers, because they paid wages and had cargoes at risk. But the decision in the case of Mason v. The Blaireau, seems to direct a less allowance to owners of ships employed in saving; and a portion of that is allotted to the freighters or owners of the cargo—a remuneration not common, if ever before made. In this case, the owners claim a greater allowance as having risked the goods of the freighters. Only the owners of the brig Alexander, come forward to claim salvage in this case. In argument, it was said, they risked the goods and freight. I have heretofore, when the point has occurred between owners and freighters of ships, considered those who take vessels on freight or charter, as having only a qualified use of the ship, to wit, for the mere purpose of transporting their cargoes. But all advantages of salvage, I have supposed to belong to the owners of the vessel, who would be answerable to the freighters, if losses were incurred, without their assent to this extra-employment of the ship. If this opinion is controlled by the decision in the case of The Blaireau, I must yield to it. This will depend on its being a question decided for general direction, or only as it respects that particular case.

I have fixed the whole salvage at near two-fifths, following in a degree that case, though the amount saved was not proportionate to the risk, if that forms any rule. An accurate one cannot be established from this circumstance. I shall, where the amount is considerable, adhere to the rule taken in the case of The Belle Creole. My former mode of distributing among the own-

ers of the vessel and the crew, seems to be controlled by the case of The Blaireau. There one third was assigned to the owner, and two thirds to the salvors. I think in the spirit of that case, the risk of the owners, in this case, was more disproportionate to the amount saved. I therefore direct that one half the salvage be paid to the owners.

Out of the monies in court[2] (after deducting the sum decreed for salvage) the balance of wages due to the seamen of the Cato, to the time of their arrival at Philadelphia, will be paid. All the officers and seamen of the Cato will receive this balance. The half share, to those who actually saved the goods at the second meeting with the Cato, is an addition to wages to those persons whose adventures were not delivered to them, as before stated, free of salvage. If they pay salvage on their adventures, the half share must be paid to them. I believe these adventures, were among the articles saved at the first meeting with the Cato, and compose no part of the second salvage.

I do therefore adjudge, order and decree, that the libellants in this cause, have and recover in full satisfaction for and as salvage, the sum of fifteen hundred dollars.

This sum of fifteen hundred dollars was divided among the salvors by the decree, in the following manner. James Taylor, Isaac W. Norris and Larkin Milnor, the owners of the said brig Alexander, received one half of the said sum $750. The remaining half, was distributed amongst the master and crew of the brig Alexander, and Samuel Pyle master, and James Parlecatur boatswain of the ship Cato as follows, to wit:

John Heartwell, master of the brig Alexander, received 8 shares, or.....	$300 00
Thomas Newark, the mate, 4 shares, or	150 00
John Burkett, seaman, 1 share, or....	37 50
Manuel Hers	37 50
Andrew Guniss	37 50
Charles Engram	37 50
Antoin Frazer	37 50
Robert Williams, cook	37 50
David Marshall, boy, one-half share..	18 75
John Williams, boy	18 75
Samuel Pyle, master of the ship Cato.	18 75
James Parlecatur, boatswain of said ship	18 75

[2] This balance, as are all monies brought into court, was deposited in the bank of the United States. By a rule of the court, no monies are drawn from the bank but by a check, on which the order of the court is endorsed. In the case of The Belle Creole, the French crew were paid wages with part of the balance in bank. Ships and goods deserted, and found at sea, are national droits, if no owners appear. This is now law, and the old barbarous doctrines and practices as to these, wrecks, etc., are obsolete. See The Aquila, 1 C. Rob. Adm. 42, etc. The produce of ships and goods unclaimed (after payment of salvage) is, it should seem, also a national droit. But there should be, as in several maritime countries, some time, and that liberal, fixed for claims by owners.

Case No. 13,787.

TAYLOR v. The COMMONWEALTH.

[14 Am. Law Reg. (N. S.) 86.]

Circuit Court, E. D. Missouri. 1875.[1]

MARITIME LIEN — REPAIRS — HOME PORT — OTHER SECURITY — PLEADING — SETTING UP DIFFERENT LIEN.

1. A maritime lien will be created for repairs done on a boat or vessel at the home port, if the repairs are made on the credit of the boat or vessel; but where the person doing the work stipulates for other and different security from that of the boat or vessel, the maritime lien is waived and cannot be enforced.

2. Where a party in his libel sets up an admiralty lien, he cannot be allowed if that fails to set up and rely upon a common-law or statutory lien.

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

This was an appeal from a decree of the district court upon a libel in rem. [The libel was filed by Daniel G. Taylor, administrator, to recover for repairs made on the steamboat Commonwealth.] The facts appear in the report of the case when before the district court. [Case No. 13,788.]

G. Campbell, for the steamboat, appellant.
Krum & Patrick, for libellant.

MILLER, Circuit Justice. The owner of the steamboat Commonwealth is a resident of St. Louis; the repairs therefore were done in what, in admiralty, is technically known as the "home port" of the vessel, and our supreme courts have decided for forty or fifty years that no admiralty lien exists by reason of supplies and repairs furnished in the home port of the vessel. There is no decision of the supreme court of the United States reversing or changing that doctrine, but the sentiments of the profession of the country—that part of the profession which devotes itself to the admiralty practice—and the sentiment, I think, of the parties interested in vessels, has been that that doctrine is not the correct one. It is a doctrine which we have derived from the English courts, and it is the doctrine of the English courts that no such admiralty lien can be had in the home port of the country. The English courts say, that when a man has a lien on a vessel of that kind, he holds possession of her, like the lien of a carpenter or a carriage-maker for repairing anything in his trade; and while he holds possession of that lien, if he keeps possession, he may have such statutory lien as the laws of the land give him; but he has no maritime lien for such services in a home port, and we have followed that doctrine. It is not the doctrine of the continental countries, it was not the doctrine of the civil law. The doctrine is the

[1] [Reversing Case No. 13,788.]

other way in all the continental courts. Our courts, however, have followed the English courts in that, and held that if supplies or repairs are furnished in a foreign port, that is in any port where the vessel is found needing those supplies or repairs, other than that in which the owner lives, the admiralty law creates a lien on the vessel. Supplies and repairs can be furnished, and the man that furnishes them has a lien on the vessel on the ground that the owner is not there, that it is necessary that the repairs should be made, that they are necessary to the vessel in order to enable it to prosecute a voyage, and that the master having ordered them, the merchant may furnish them in a foreign port to the master and have a lien on the vessel. We have followed that doctrine in the courts of the United States, but as I said before there has been a very strong feeling that the doctrine ought to extend to the home ports, and a rule which the supreme court of the United States had prescribed for the proceedings and practice in admiralty courts, which forbids the bringing of a suit in rem in that class of cases, has been repealed by the supreme court. I violate no propriety, I think, in saying that the supreme court repealed that rule with a view for consideration, and it will come up; and it is involved in this case to come extent, or is supposed to be involved in this case. I have no hesitation myself in saying in this case that if there was nothing more than the fact stated originally, that Captain Taylor repaired this vessel to the extent of $21,000, I would affirm the judgment of the district court, which confirmed the lien and ordered the vessel to be sold and the money to be appropriated to pay that debt. I believe that that will be the doctrine which will be held by the supreme court, and I have no doubt that the law adopted by the English courts is not the general maritime law. In this country we are governed, where it is a question of maritime law, by the maritime law, the continental law, or the law as it may be gathered from all the maritime nations of the world. The English law, on the contrary, has been the result of the conflict between the courts of common law, especially the court of king's bench in Great Britain, which was jealous alike of all other courts, as it was of the court of admiralty and ecclesiastical courts, which was always issuing its prohibitions in defence of what it supposed to be the exclusive right of the common-law courts, and to that spirit of asserting the extended and exclusive jurisdiction of the common-law courts in opposition to the admiralty courts. To this is due alone the fact that the English courts adopted the rule that for work and labor done on a vessel in a home port there was no lien on the vessel other than the common-law lien of possession, and that when that was parted with the lien was gone.

I have no hesitation in saying myself, therefore, that the rule of allowing a lien for these repairs ought to be extended to a vessel in a home port, as well as to a vessel in a foreign port, and that this vessel, and this work and labor, are of a character which, in my opinion, probably constitute such a lien, if the parties had permitted it to rest on the implied results of the work and labor done under such circumstances. But, unfortunately, they did not. They entered into a specified contract for this work. There is no doubt about that contract, although some little doubt is expressed as to the precise reliance placed upon it by Mr. Taylor. The contract itself, I think, shows for itself what he did rely on, and that is the trouble in this case. Before the vessel was docked, and before any work was done on her, they made a specific agreement, which was reduced to writing, not signed by the parties, but a memorandum made by the agent of the wrecking company, and that agreement is this: That if the repairs did not exceed $10,000 they were to be paid for one-half in cash, and the balance in an endorsed note; if they exceeded $10,000 they were to be paid one-third in cash and the balance in endorsed notes, payable, I think, in thirty, sixty and ninety days. As to what "endorsed notes" meant, there is no controversy. It meant personal security. Now, the contract was: "That for this work I am going to do for you, you are to pay me a considerable portion in cash, as the work progresses, or before you get the vessel, and at the end of it you are to pay me the balance in good negotiable notes, with proper and sufficient security." I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel, and under some circumstances against the master; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that Captain Taylor, in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. What better payment can a man have than secured papers? And what is the use of his relying on the vessel as security when he says: "Before you get this vessel out of my hands, you are to pay me one-half cash, and the balance in endorsed notes with good security."

I think, having made an express contract for an express security, he cannot say, "I did this work on the credit of the vessel." In other words, I think if there is any question of admiralty lien, a lien for supplies and repairs, that it must have been the intention

in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel; and although in a foreign port (and I suppose the same thing would apply here when the supplies and repairs are necessary, and nothing is said to the contrary), the law presumes a reliance on the vessel, yet it is only a presumption. But it is said that in foreign ports such is the presumption, because the man who furnishes the supplies is not there and may not know anything of the owner. If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien. I am sorry for this result, because it seems this corporation is a mere sham, and whether any party belonging to it may be individually liable or not, I do not know. But the result of it is that this decree must be reversed. Now it has been very ably urged that if there was no maritime lien, there were two other liens under which this court ought to give relief. The first was that the plaintiff never parted with the possession of the vessel, that he instituted this suit when he had possession, and therefore he has the lien of common law, the lien of a man who has done work on any instrument, or vehicle, or piece of property, and retained the possession until he is paid. I have no doubt he had the lien, or of the existence of it. It is also said that the state gave a lien for these repairs on the vessel. I have no doubt about that. But neither of these liens is subject to the implication in regard to the maritime lien, and it cannot be held, and it is not an admissible doctrine, that a man can go into an admiralty court and assert an admiralty lien, and when he fails in that, turn around and say: "To be sure, I did not have a lien that would give jurisdiction, but now that you have got hold of the thing, you must go on and enforce some other lien." If such a condition of things existed, the result would be, that any party could come into an admiralty court when he failed in maintaining an admiralty lien, having seized the vessel, and say: "You have got possession of the vessel and now you must turn round and administer the state law," and cite authorities to show that the admiralty court will enforce the lien of the state law. That is not now the doctrine of our courts. These cases have been reversed and decided several times, and this court in admiralty will not enforce the lien of the state laws. Decree reversed.

Case No. 13,788.

TAYLOR v. The COMMONWEALTH.

[6 Chi. Leg. News, 334; 13 Am. Law Reg. (N. S.) 502; 20 Int. Rev. Rec. 64.]

District Court, E. D. Missouri. 1874.[1]

MARITIME LIENS — HOME AND FOREIGN PORTS — AUTHORITY OF MASTER TO BIND — REPAIRS—SUPPLIES.

1. While in foreign ports the presumption of a necessity for relying upon the credit of the vessel for repairs arises from the necessity of repairs to enable the vessel to prosecute the voyage; in home ports the presumption of a necessity for relying upon the credit of the vessel does not exist.

2. In a foreign port the master, as performing the duties of that officer, has authority to bind the vessel and her owners for the necessary expenses of the boat, but in the home port he has not that right.

3. While in a foreign port the necessary repairs are restricted to such as will enable the vessel to pursue her voyage with safety, the repairs in the home port, where they may be ordered by the owners, are not of necessity restricted within such narrow limits.

4. Those who in a home port furnish repairs and supplies, must show affirmatively, in order to have a lien on the vessel, that it was necessary to rely on the credit of the vessel; or, in other words, that the credit of the owners was not such as would justify a prudent man in furnishing the supplies and repairs solely on their personal credit.

[This was a libel for repairs by Daniel G. Taylor, administrator, against the steamboat Commonwealth.]

TREAT, District Judge. This is a suit in rem for repairs in the home port, and many of the questions involved are equally novel and important.

The libelant, under the orders of the probate court of St. Louis county, was charged with the duty of administering upon the assets of a copartnership known as the St. Louis Sectional Dock Company—some of the partners having died. Under those orders he was authorized to continue the operations of the docks until they could be sold. Previously the superintendent, Henry Adkins, had been accustomed to make contracts for the company to dock and repair vessels. Upon entering upon the discharge of his official duties, the libelant gave public notice that no contracts for the company would thereafter be recognized or deemed valid unless expressly made or certified by him. The steamboat Commonwealth was owned by a corporation, the stockholders being the masters of the boat, J. S. Snydam, J. N. Bofinger and the copartnership of Stilwell, Powell & Co., which latter copartnership transferred its stock to McCord, a former master. Stilwell, Powell & Co. became bankrupts soon after they transferred their shares of stock. In that condition of affairs, the inspector of the board of underwriters at St. Louis informed the master, Snydam, that

[1] [Reversed in Case No. 13,787.]

the boat must be repaired in order to become seaworthy and pass inspection. Thereupon a cursory examination was had to ascertain the probable cost of the needed repairs. Adkins reported that about $6,000 would be sufficient, and that the vessel was not in so bad a condition as the inspector supposed. That fact having been reported to Bofinger, the boat was ordered on libelant's docks, where she was stripped and examined. The result of that examination was a fuller estimate by Adkins, which he reported to Bofinger and Snydam, viz.: that making a liberal estimate the cost of repairs would not probably exceed $13,000, but that Captain Snydam thought that the expense would run up to $14,000. At first Bofinger was inclined to tear up or "wreck" the boat rather than incur so great an expense, but, on consultation with Snydam, consented to the repairs being made, with the understanding on his part that the cost would not exceed the sum stated. The further understanding was, that Snydam should superintend the repairs on the part of the boat, which the inspector would, as usual in such cases, be required to make. The report made to the libelant was that the boat was to be repainted—that $5,000 cash were to be paid as the work progressed—but if the cost of repairs exceeded $15,000, then one-third of said cost should be so paid in cash—the balance in either event to be in good indorsed paper at thirty, sixty and ninety days. When the report was thus made, the libelant assented to the terms and made a memorandum accordingly. Thereupon the inspector directed from time to time what work should be done; and Capt. Snydam sometimes objecting at first, assented finally thereto, and the whole cost of repairs while the boat was on the docks amounted to $21,298.72, of which $4,229.63 were paid, leaving a balance claimed to be due of $17,069.09. When the boat was put off the docks, because more cash had not been paid as requested, about $2,200 additional were needed to complete the repairs.

Upon the foregoing brief summary of facts several important propositions are presented; preliminary to which is the question whether there was a specific contract between libelant and the claimant, that the former should do any prescribed or designated amount of repairs at a fixed sum or within a named time. Upon that point the court holds that the only contract on the part of the libelant, was to dock the boat and make such repairs on her as might be designated from time to time, and on the terms for payment above stated.

First. As the repairs were in the home port, the first point presented is whether a proceeding in rem can be maintained. The new twelfth rule settles that question. It is as follows: "In all suits by material men for supplies or repairs, or other necessaries, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam." Grave questions are raised as to the true interpretation of that rule in the light of the many adjudications had with respect to supplies in the home and foreign ports, and in cases where the owners are present or absent. It would require a more elaborate discussion than can now be given, if this court should undertake to analyze, historically or otherwise, the shifting views on those points which have prevailed from time to time, and to comment upon them with due regard to elemental principles. The last utterance of the United States supreme court indicates that, in accordance with the opinions generally expressed by bench and bar, for many years, it will hold as was done by this court last term, and was strongly instructed by the United States circuit court here in 1857 (Hill v. Golden Gate [Case No. 6,491]), that the existence or non-existence of a maritime lien is wholly independent of the fact that the vessel was repaired in the home instead of a foreign port. The primary maxim is that, as a vessel is made to plow the seas instead of lying by the wall, whoever furnishes the necessary means for prosecuting her voyage will have therefore a maritime lien upon or tacit hypothecation of the vessel, unless the master had adequate funds in the foreign port, or the owners in such port, or in the home port, had ample credit. As this court ruled at the last term, so it now holds; that the question as to maritime lien does not depend upon the port where the repairs are made.

Second. In a foreign port the master has authority to order necessary repairs to enable the vessel to pursue her voyage. As held in the cases of The Grapeshot, 9 Wall. [76 U. S.] 129; The Kalorama, 10 Wall. [77 U. S.] 204; the Lulu, Id. 192; The Patapsco, 13 Wall. [80 U. S.] 333; the necessity for credit upon the vessel whence a maritime lien springs, must be presumed, where the master in a foreign port orders repairs which are necessary; the burthen of showing the contrary being thrown upon owner or contestant. That doctrine was repeated by the United States supreme court at its last term, in the case of Merchants' Mut. Ins. Co. v. Baring [20 Wall. (87 U. S.) 159]. That court says: "Contracts for supplies and repairs may be made by the master to enable the vessel to proceed on her voyage, and it appears that they were necessary for the purpose, and that they were made and furnished to a foreign vessel, or to a vessel of the United States, in a port other than a port of the state to which the vessel belongs. The prima facie presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless it appears that the master had funds on hand or at his command which he ought to have applied to the accomplishment of those objects, and that the material

men knew the fact, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that behalf, they might have ascertained that the master had no authority to contract such repairs and supplies on the credit of the vessel. Whenever the necessity for the repairs and supplies are once made out, it is incumbent on the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the material men knew the same or were put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party." This is the last opinion of the supreme court upon the subject, and in it reference is made to the cases cited above, and also to the case of Thomas v. Osborne, 19 How. [60 U. S.] 22. The necessity for repairs referred to is an apparent necessity — such as a reasonably prudent man, charged with the interests at stake, would make for their safety. It is the good faith of those concerned that the court considers. If the owner be present in the foreign port, it has always been held that the presumption of necessity for relying upon the credit of the vessel is repelled, and that, therefore, the material man must show that the owner had not the needed credit in such foreign port. How rigorously the last rule might now be applied, is not important to discuss. The master's authority in a foreign port in the absence of the owner was always held to be greater than in the presence of the latter.

Third. If their repairs and supplies are furnished in the home port, where the owner resides, it may be safely asserted that the master has no authority unless express —that is, unless he is duly authorized by the owners to order the same. Abroad, the master orders reasonably necessary repairs to enable the vessel to prosecute the undertaking voyage; for his authority to act springs from the necessity of the case in the absence of the owner. At home the owner may order more than temporary repairs—whatever he deems proper—not for one voyage, but for the permanent and thorough overhauling of the vessel. The authority of the owner is not limited as that of the master; he may, in the home port, give his own orders in that respect, or entrust the master with full power to act. There is, then, no cargo at risk—no pending voyage. The owner's power over the vessel is not then confined to merely what is essential to the success of a pending voyage. Hence, in passing upon the necessity of repairs, ordered or authorized by an owner under such circumstances, a more liberal rule should prevail. He is supposed to understand the necessity. and policy of the repairs he orders to be made.

In the case under consideration, the owners of a large majority of interest in the boat, including the president, were not only present here in the home port, but authorized the master, who was also a large owner, to superintend the repairs. It seems to have been conceded that what the inspector ordered as necessary was to be done. The master and all others acted upon that hypothesis. The reason is manifest: for a boat upon which no insurance could be had could procure no shipments, and would therefore be effectively tied up to the wall. The necessity of repairs, then, in this, the home port, is, so far as the material man in this case is concerned, determined by the orders given by the inspector and acquiesced in by the master. Hence there was, in the meaning of the maritime rule, a necessity for the repairs.

Fourth. Was there a necessity for relying upon the credit of the vessel? The reason for insisting upon this necessity, as well as the necessity for repairs, has reference to the many interests which are constantly springing up, creating maritime liens or tacit hypothecations other than the owner's interests may be involved, consequently, if he can, independent of the rights of others, fasten these secret liens upon the vessel, those who, under these rules of necessity, furnish repairs and supplies, may find themselves without supposed and adequate security. Still, that danger is less in the home than in a foreign port, for in the former the voyage is at an end, while in the latter the voyage is in progress and its future incidents cannot be predicted. On the arrival of the vessel at her home port all who have demands against her can enforce them at once. If they choose to lie by while she is undergoing repairs to fit her for new voyages, they have no just ground for complaint, certainly not if the vessel, before her departure, is seized and sold to answer the demands against her. The new repairs are to be considered as giving enhanced value, and thus increasing the proceeds received from the sale. Why, then, should the last material man be deprived of the fruits of his advances, or his additions to the vessel's value be appropriated to the payment of prior and unenforced demands? But it is said that in this case the credit was not given solely to the vessel, and that if it was there was no necessity for so doing. The libelant swears that he would not have done the work solely on the credit of the vessel; and therefore he insisted on part payment in cash as the work progressed, and good indorsed paper for the balance. The boat's paper was finally offered in payment and refused. When, in the course of the work, the proportionate cash payments failed, the libelant, after repeated warnings, put the vessel off the docks so soon as practicable, with due regard to her safety, and ceased further repairs. The promised or understood tender of indorsed

paper was not made and the material man was left unsecured in that way. Has he, because he insisted upon that security from the beginning, been deprived of a lien on the boat? If he had received that security he could not have enforced his demand in rem in any event until that paper matured, or, if negotiable, had been surrendered. It seems that there is some misunderstanding upon this point. The libelant swears that he did not consider the vessel alone adequate security for the value of the work to be done, and therefore he insisted upon security which he never obtained. The conduct of the stockholders illustrates this point. He urged him after his work was done to take the vessel as security for his unpaid balance, and he refused, insisting upon what he claimed was the original agreement. He was thus left to make his demand out of the vessel or her owner. The owner was a corporation with no other property or assets, except this vessel, upon which there were many liens already existing. The statements of witnesses as to her value, independent of the repairs made by libelant, have very little force, for she was subject to seizure and sale to meet the existing liens upon her; and after being repaired at the cost of the owner ($21,000) brought at the marshal's sale less than $19,000. The result of that sale shows that the libelant was prudent in demanding more than the credit of the vessel for his security. The court can not hold that because he agreed to receive other security, which was never given, he is therefore deprived of all security upon the vessel. The necessity for relying upon other credit than that of the vessel is demonstrated from what has been said as to the ownership. The stock of that corporation was owned by three persons, and, to say the least, it is a grave question whether that fact could have the slightest effect upon the credit of the corporation. If these stockholders did not choose to make themselves individually liable, how could their personal credit give credit to the corporation itself, which had none independent of this vessel—the only property owned by it? The owner—the corporation—had no credit, and as it would give no outside security, the libelant was compelled to fall back on the partial and inadequate credit of the vessel itself.

There has been no attempt in this discussion to dwell upon the fact that the owner was a corporation doing business in this port, and to criticise the mode in which that corporate owner acted through its president and the master of the vessel, who was the principal stockholder. The corporation did act through its president, and with the assent and co-operation of the master—those two persons owning largely more than a majority of the stock. It is apprehended that under such circumstances the rights of a material man can not be defeated on the ground that a mere formal or technical mode of assent or action by the corporation would be proper. Its interests were controlled and managed by its president, and by a majority in interest, and, for all essential purposes, the corporation did assent and act. Whatever may have been the misunderstanding or expectations of the president of the corporation, or of the master expressly entrusted with the superintendence of the repairs, as might be ordered from time to time to be paid therefor, part in cash, as the work progressed, and the balance in good indorsed paper. This is the more probable from the fact that his position was merely fiduciary. Under the orders of the probate court specific duties were imposed on him, requiring especial prudence and circumspection. He was not entrusted with control of funds belonging to the estate to be expended in work, for the payment of which no adequate security was given, but merely to prevent the cessation of business and consequent loss of the estate; he was requested to operate the docks for a time with a view to their advantageous sale. In other words, charged with a special trust, he was not at liberty to act as if he were proprietor of the docks in his own right. Hence, it seems, he insisted upon retaining the sole power to enter upon or make contracts. There was no specific or expressed contract as to the amount of work to be done or the time in which it should be done; the implied contract was that such work should be done as was requested from time to time at reasonable rates and with reasonable promptitude; and on the terms above stated he is entitled to recover accordingly.

This court holds that this marked distinction exists as to maritime liens for repairs and supplies in foreign or home ports respectively, as follows:

1. That while in foreign ports the presumption of a necessity for relying upon the credit of the vessel for repairs arises from the necessity of repairs to enable the vessel to prosecute the voyage; in home ports the presumption of a necessity for relying upon the credit of the vessel does not exist.

2. That in a foreign port the master, as performing the duties of that officer, has authority to bind the vessel and her owners for the necessary expenses of the boat, but in the home port he has not that right.

3. That while in a foreign port the necessary repairs are restricted to such as will enable the vessel to pursue her voyage with safety, the repairs in the home port where they may be ordered by the owners, are not of necessity restricted within such narrow limits.

4. Those who in a home port furnish repairs and supplies must show affirmatively, in order to have a lien on the vessel, that it was necessary to rely on the credit of the vessel; or, in other words, that the credit of the owners was not such as would justify a

prudent man in furnishing the repairs and supplies solely on their personal credit. Many persons in the home ports have been accustomed, in consequence of the state boat acts, to suppose that repairs and supplies furnished there at the instance of the master, gave a lien irrespective of all other considerations, but as they, so far as they trespass upon admiralty jurisdiction, are void, it is important that material men in home ports, bear in mind the distinction above stated, and the elements out of which a lien in a home port springs.

If the owners are in good credit, there is no necessity for relying on the credit of the vessel, and, consequently, no lien is created.

In the case on hearing it appears that the corporation had no credit within the meaning of the rule, and therefore the libelant had a right to rely upon the credit of the vessel. His demand must be allowed so far as proved, and classed as a maritime lien. The amount found to be due is $17,054.19. The stress has been laid upon the fact that the boat was still in the possession of the libelant when the libel was filed and the warrant in rem. As to whether that strengthens his demand it is not necessary to discuss.

It may be a serious and embarrassing question whether the ordinary rules governing corporations and stockholders are to be rigidly recognized in admiralty. If three or more owners of a vessel can become a corporation and transfer said vessel to the corporation, each owner taking an equivalent proportion of stock for his interest in the boat, and only the corporation as such and its corporate assets, viz., the vessel, be liable for maritime contracts and maritime torts, of what practical force is the liability of the owners in personam as well as of the vessel in rem? It is a well-settled rule that supplies furnished by a part owner do not give a maritime lien; but if he, in the manner stated, became a technical stockholder instead of a technical owner, is the force of that important rule to be thus abrogated? True, a corporation may own many vessels and be wholly responsible, and governed by the ordinary rules applied to corporations; but on the other hand, as in this case and in others frequently occurring, a few more owners of a vessel become a corporation, thus claiming exemption personally from the duties of ownership. Will the courts of admiralty look at the substance rather than the form—at the actual ownership rather than the formal? If they go behind the acts of incorporation, will they in all cases treat the stockholders as owners, and if not, where shall the line be drawn, or what facts will justify going behind the act of incorporation?

In this case the cross libel is dismissed, $17,054.19 being allowed libelant as maritime lien, and the costs being against the claimant and the interveners.

[On appeal to the circuit court the above decree was reversed. Case No. 13,787.]

Case No. 13,789.

TAYLOR et al. v. COOK et al.

[2 McLean, 516.] [1]

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

COURTS — FEDERAL JURISDICTION — CITIZENSHIP — VOLUNTARY APPEARANCE.

1. By the constitution, jurisdiction is given to the courts of the United States, between citizens of different states.

[Cited in brief in Cooper v. Newell, 15 Sup. Ct. 356.]

2. The act of 1789 [1 Stat. 73] restricts the exercise of this jurisdiction to cases where one of the parties are citizens of the state where suit is brought.

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

3. And by the settled construction of this act, where there are more than one party, plaintiff and defendant, the court must have jurisdiction between each party, plaintiff and defendant.

[Cited in Wiggins v. European & N. A. Ry. Co., Case No. 17,626.]

4. This produced great embarrassment in the proceedings before the circuit courts. And to remedy this inconvenience the act of 1839 [5 Stat. 321] was passed, which enables a party defendant, who may not reside in the district, voluntarily to become a party to the suit.

[Approved in McCloskey v. Cobb, Case No. 8,702. Cited in Sands v. Smith, Id. 12,305.]

5. By his submitting himself in this form to the jurisdiction of the court the jurisdiction is not ousted.

[This was an action by John W. Taylor and others against Cook and Spaulding. See Case No. 13,952.]

Mr. Morris, for plaintiffs.

Mr. Arnold, for defendants.

OPINION OF THE COURT. The plaintiffs are citizens of New York; the writ was served on Cook, a citizen of Illinois; and Spaulding, a citizen of Missouri, enters a voluntary appearance. A question is raised whether the court can take jurisdiction as the case now stands. By the constitution of the United States, the judicial power extends to all cases in law and equity arising under the constitution, &c., and to controversies between citizens of different states, &c. The 11th section of the judiciary act of 1789 provides: "That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. And no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he was an inhabitant, or in

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

which he shall be found at the time of serving the writ." Under this section it was settled that, as between each plaintiff and each defendant, where there were more than one plaintiff and defendant, the court must have jurisdiction. So that, by this construction, the court could not take jurisdiction of this case; for, as between the plaintiffs who are citizens of New York and the defendant, Spaulding, who is a citizen of Missouri, the court could exercise no jurisdiction in the state of Illinois; because in that case neither party would reside in the state where suit is brought. And, under the decisions, the consent of Spaulding (it appearing that he was a citizen of Missouri) could give no jurisdiction. This created great embarrassment to the proceedings in the circuit courts. Unless they could act on the interests of the defendants properly before the court, without prejudice to those who were interested and who did not reside within the district, they could exercise no jurisdiction in the case. To remedy this inconvenience the act of the 28th February, 1839, was passed. The first section of that act provides, "that where, in any suit at law or equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, &c.; but the judgment or decree therein shall not prejudice parties not served with process, or not voluntarily appearing to answer." By the constitution jurisdiction is given to the courts of the United States, of all controversies between citizens of different states. And congress have, unquestionably, the power to regulate the exercise of that jurisdiction in any mode which they shall deem expedient. Unless required by the act of congress it would not be necessary that either party should be a citizen of the state where suit is brought. This provision of the act of 1789, however, is not repealed by the above act, but it is modified. It enables a party who is sued, with others, but who does not reside in the district, voluntarily to become a party to the suit. Where this is done the court can exercise jurisdiction over him, the same as if he were a citizen of the district and process had been served on him. The suggestion that by voluntarily becoming a party he ousts the jurisdiction of the court, would give a most absurd effect to the statute. It gives a right to the party to appear, and yet by such appearance the jurisdiction is taken away. This would be a most singular mode of remedying an inconvenience which has long been felt and acknowledged. That it was intended the court should exercise jurisdiction over the person who thus voluntarily appears, by the fact of his being made a party to the suit, but also from the subsequent part of the section, which declares that the judgment or decree shall only affect the parties who have been served with process or who have voluntarily appeared. We can entertain no doubt that the court have a right to exercise jurisdiction over Spaulding, under the act of 1839.

Case No. 13,790.

TAYLOR et al. v. DEBLOIS et al.

[4 Mason, 131.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

ADMINISTRATOR — BECOMING GUARDIAN — SUIT ON BOND — SURETIES.

1. An administratrix, after a decree of the probate court ascertaining the distributive shares of the intestate's estate, took guardianship of one of the persons entitled to a share, who was a minor; it was *held*, that by operation of law, she held the amount by way of retainer, as guardian, and not as administratrix.

[Cited in Pratt v. Northam, Case No. 11,376.] [Cited in White v. Ditson, 140 Mass. 355, 4 N. E. 606.]

2. No suit lay against her sureties upon the administration bond for the amount due her ward.

[Cited in Bell v. People, 94 Ill. 236; White v. Ditson, 140 Mass. 355, 4 N. E. 606; Proctor v. Robinson, 35 Mich. 290; Carroll v. Bosley, 6 Yerg. 223. Distinguished in Smith v. Gregory, 26 Grat. 261. Cited in brief in Swope v. Chambers, 2 Grat. 322.]

This was an action of debt brought officially by the judges of the court of probate for the benefit of Jane Deblois, a citizen of Massachusetts, upon an administration bond given by her mother, Jane Deblois, with sureties, upon taking administration of the estate of her late husband, Stephen Deblois. The suit was brought against the defendants, as heirs at law of Silas Dean, one of the sureties upon the administration bond, according to the local law, which makes the estate of the ancestor assets for the payment of his debts in the hands of his heirs. Dig. R. I. Laws 1798, pp. 305, 306, 308. See, also, Brown v. Strode, 5 Cranch [9 U. S.] 303. The object of the suit was to recover the amount of the distributive share of Jane Deblois, the daughter, in her father's estate, which had been declared, by the court of probate, to be $3704.79. The pleadings were somewhat complicated, and all terminated in demurrers, so that upon the whole the case stood for the judgment of the court upon questions of law. The material facts, stripped of the artificial form of the pleadings, were as follows: Mrs. Deblois took the administration of her husband's estate in February, 1805, and gave the usual bonds, in which the father of the defendants joined, as surety. She soon afterwards appointed her son Stephen, as her attorney, to transact the whole business of the administration, which he accordingly executed. In March, 1807, an administration account was settled in the probate office, by which the shares due to the

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

heirs were ascertained, and, among others, of Jane, the daughter, amounting in the whole, as has been stated, to the sum of $3704.79. The distributive shares of several of the heirs, who were of age, were duly paid; but Jane, the daughter, being a minor under twelve years of age, was incapable by law of receiving her share. Her mother (the administratrix), in May, 1808, was duly appointed her guardian by the court of probate, as well as guardian of another minor child, and in September following she gave the usual bonds with sureties for the performance of that trust. In October, 1808, she signed a certificate to the court of probate, stating that as guardian she had in "her possession or control" the full amount of the distributive shares of these minors; and thereupon the court ordered a quietus to be given to her as administratrix of her husband. This quietus, in substance, stated that she having fully administered the estate, the court ordered "that she be, and hereby is, from henceforth acquitted and discharged of the same." The pleadings on behalf of the plaintiffs [Nicholas Taylor and others] proceeded farther to assert that, in point of fact, Mrs. Deblois, at the time of signing the certificate, had not "in her possession or actual control," the distributive shares of the minors, but that the same were then, and always before and after, in the possession and control of Stephen Deblois, her attorney, who wasted the same, and converted them to his own use. And the pleadings on behalf of the defendants, after relying upon the decree and settlement in the court of probate, farther asserted, that at the time of her taking the guardianship aforementioned, the mother and her sureties, as well as her attorney, were all solvent, and possessed of ample means to pay the distributive shares of the minors.

Pitman & Pearce, for plaintiffs.
Hunter & Robbins, for defendants.

STORY, Circuit Justice. Much discussion has taken place as to the nature and effect of the quietus granted by the court of probate. I am not aware, however, that it is any where denied, that the court of probate has complete jurisdiction in the settlement of the accounts of administrators; or that its decree, when rightfully made, is not of binding authority. Indeed, it would be difficult to support such a denial upon principles of general law, since it is a decree of a court of competent and peculiar jurisdiction. But the statute of Rhode Island puts this matter entirely at rest. It declares (Dig. R. I. Laws 1798, p. 304, § 25) "that the settlement of the accounts of any executor, administrator, or guardian by the court of probate, or in case of appeal by the supreme court of probate, shall be final and conclusive on all parties concerned, and shall not be subject to re-examination in any way or manner whatsoever." Nor do I understand, that it is contended that the court of probate has not, upon a final settlement of accounts, a right to grant to the administrator a decree, exonerating him from any farther accountability in the premises. If it has authority conclusively to settle his accounts, it certainly has authority to decree that the settlement is final, and to acquit him of farther proceedings. This is the whole nature and effect of a quietus, a process familiar in the court of exchequer (Com. Dig. "Quietus"), and probably not unknown in the ecclesiastical courts, and at all events used and approved by the court of probate in Rhode Island, as a proceeding emanating from its general jurisdiction. It is not for me to revise its mode of administering its acknowledged powers. But consistently with giving a conclusive effect to a decree of the court of probate it may be admitted, that fraud will vitiate them; for that is a principle common to all judgments, however high. And the conclusiveness of a decree extends no farther in its effects, than to the direct subject matter in controversy, and certainly not to collateral things. A decree obtained by fraud may therefore be avoided for that cause, upon due allegations and proof; and a substantive matter, not directly included in the decree, as, for instance, the subsequent receipt of assets, or the subsequent payment of a distributive share, is certainly open to controversy. Whatever may be perfectly true, consistently with the verity of the decree, or does not impeach it, may be put in contestation.

In the present case, giving the strongest import to the pleadings, there is no allegation that the decree of the court of probate was obtained by fraud. Now nothing is better settled, than that fraud is not to be presumed, but must be proved. And not only must it be proved, but it must be averred in the pleadings; so that it may be put in issue, if the intention is to overthrow the decree by impeaching its integrity. So far, then, as the argument calls upon the court for its judgment in favor of the plaintiffs, upon the ground of fraud, it is a sufficient answer, that the pleadings put no such allegation. The only averment, bearing at all upon the point, is, that the certificate of Mrs. Deblois to the court of probate, on which the decree of the latter proceeded, was untrue, because the money for the distributive shares of the minors was not in her possession, or under her "actual control." But this may be true, and yet the certificate have been given in entire good faith and purity. It may have proceeded upon a mistake of fact or of law. It is one thing to impeach a decree for mistake, and quite a different thing to impeach it for fraud. It is not, however, permissible in pleading to aver facts, from which fraud may be conjectured or inferred; the ultimate fact of fraud must itself be stated; and the circumstances are mere matters of evidence. But I confess myself unable to discern upon the pleadings any

fact, which establishes the certificate to have been false. It is not averred, that the attorney had at that time wasted or converted the portions of the minors to his own use. For aught that appears, he was then in the possession and control of them; and his possession and control was the possession and control of his principal. The pleadings seek to make a distinction between the possession and "actual control" of the administratrix, and her legal possession and control in virtue of those of her agent. But the certificate states nothing of actual control, and in its simplicity of phrase comports with the other facts.

In this view, there is no ground on which the court can overturn the conclusiveness of the decree upon the suggestion of fraud.

The real and the only question in the case is, whether Mrs. Deblois, being at the same time administratrix and guardian, could by any act of her own, or by operation of law, transfer the property, which was in her hands as assets of the intestate, so as to make it the property of the minors, who were her wards, and thus exonerate herself from any farther liability as administratrix, and by consequence also exonerate the sureties upon her administration-bond. My opinion is that she could; and that the certificate was to all intents and purposes a conclusive election to hold the property as guardian, and not as administratrix.

But independent of this special ground, there is another, which appears to me to dispose of the case upon general principles. It is an established principle of the common law, that an administrator has a right to retain the effects of his intestate to the amount of the debt due to himself; and if the debt amounts to the whole effects of the intestate, and there is no debt of a higher degree, he is entitled to the whole effects. In such a case there is a complete transmutation of the property in favor of the administrator by the mere act and operation of law, and it is equivalent to a judgment and execution, for he is incapable of suing himself. So the law was laid down by the judges in Woodward v. Lord Darcy, Plow. 184, 185,[2] who declared, that in such a case "the operation of law was equivalent to a recovery and execution for him, and the property is as strongly attested as it could be by recovery and execution. So that the reason, why the action is gone is, because he has full satisfaction by the alteration of the property." The doctrine here stated is applied to the case of a creditor, or, as Plowden calls him, debtee, in his own right. But the same principle also applies to a creditor in autre droit. So was the case of Burnet v. Dixe, reported in 1 Rolle, Abr. "Executors," lib. 3, and somewhat differently, and probably not quite so accurately, in 2 Brownl. & G. 50. There A was indebted to B and to C, by several obligations, and died, and D took administration; and afterwards B made D his executor, and died; and it was held, that D might retain goods, which came to his hands, as administrator of A, to satisfy the debt due to him as executor of B. In Brownlow's Reports the court admitted the general doctrine, but is made to say, that the election to retain ought to be before suit brought by another creditor. This part of the opinion is not noticed by Rolle, and seems contrary to the doctrine of other cases. See Weeks v. Gore, 3 P. Wms. 184, Cox's note B; 11 Vin. Abr. "Executors," (L), pl. 12; Williamson v. Norwitch, Style, 337; Toller, Ex'rs, bk. 3, c. 3; 3 Bac. Abr. "Executors and Administrators," A, 9; Cock v. Cross, 2 Lev. 73.

If then it be a right of the administrator to retain a debt due to him, in his own right, or in the right of another, the doctrine equally applies, where he unites in himself the character of guardian, and has assets in his hands to discharge the debt due to his ward. I go further and consider it the duty of the administrator, under such circumstances, to retain; and if he were to yield up the assets without such retainer, it would, in my judgment, be a mal-administration of his guardianship, for which, in case of loss, he and his sureties might be justly held responsible upon the guardianship-bond. Suppose, for instance, in the present case, the sureties upon the administration-bond were insolvent, and those upon the guardianship-bond were solvent, it would be difficult to perceive upon what ground the latter could resist payment of the amount of the distributive shares of the minors, since the administratrix would be bound to retain as guardian, and must be presumed to do her duty. That the right of retainer exists in other cases, as well as in that of administrations of different estates, is clearly established by Plumer v. Marchant, 3 Burrows, 1380, where the defendant united in himself the character of trustee as well as administrator; and the court held, that he was entitled to retain for a debt due to himself, as co-trustee, from the estate of his intestate.

In short, the general principle, in cases of retainer is, that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands. Therefore, in the common case of a creditor-executor his action is gone for ever, if he has assets in his hands; "because," as the court, in Plow. 185, said, "in judgment of law he is satisfied before; for if the executor has as much goods in his own hands as his own debt amounts to, the property of these goods is altered, and vested in himself; that is, he has them as his own proper goods in satisfaction of his debt, and not as executor." Fryer v. Gildridge, Hob. 10, is a strong illustration of the principle. There, two were bound jointly and severally in an obligation. The

[2] See, also, Toller, Ex'rs, bk. 2, c. 7; Id. bk. 3, cc. 3, 4, § 9.

obligee made the wife of one of the obligors his executrix, and died. The wife administered, and then her husband (the obligor) made her his executrix, and died, leaving assets to pay the debt. Then she died; and the plaintiff took administration, de bonis non, upon the estate of the obligee, and brought his action against the surviving obligor; and the court held the obligation gone, for two reasons; the first was, that, when the obligee made the wife of one of the obligors his executrix, the action was at least suspended, and the rule is, that a personal action, once suspended, is extinct. But the second reason (it was said) is the surer, when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied by way of retainer, and consequently no new action can be had for that debt. The last reason is directly applicable to the present case, and, in my judgment, governs it. Here, after the guardianship, the administratrix having assets to pay the amount of the distributive shares, it was presently satisfied by way of retainer, and by operation of law there was a transmutation of the same to her as guardian and she no longer held the same as administratrix. Upon this general ground there was no longer any demand against her as administratrix, and by consequence her sureties on the administration bond are relieved from all further responsibility. Judgment therefore must, upon the pleadings, be rendered for the defendants. Judgment accordingly.

TAYLOR (DRAKE v.). See Case No. 4,067.

TAYLOR (FIELDS v.). See Case No. 4,777.

Case No. 13,791.

TAYLOR v. GARDNER.

[2 Wash. C. C. 488.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

ATTACHMENT—FUNDS IN HANDS OF GARNISHEE—DEBT DUE GARNISHEE.

On the 14th of September, 1807, a foreign attachment was laid on the property of L., in the hands of the defendant. On the 19th of September, the defendant received goods belonging to L., who, at that time, was under acceptances of bills endorsed by L. and which, on their protest for nonpayment by L., the defendant paid. The attachment entitled the plaintiff to the proceeds of the goods in the hands of the defendant, notwithstanding his liability for, and subsequent payment of the bills endorsed by him.

[Cited in Wanzer v. Truly, 17 How. (58 U. S.) 586; McLaughlin v. Swann, 18 How. (59 U. S.) 223.]

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

This was a scire facias against the garnishee, upon an attachment and judgment against Lees. The question of law arose upon the following facts: The attachment was laid on the 14th of September, 1807. In answer to the interrogatories put to the defendant, under the act of assembly, he stated, that on the 19th of September, 1807, he received fifty crates of earthenware, belonging to William Lees, which netted nine hundred dollars; but that William Lees was under acceptances of certain bills endorsed by the defendant, which the defendant had been obliged to pay, the bills having been protested for nonpayment. These bills were protested in August, and were taken up and paid by the defendant, in October and November, 1807.

Mr. Levy, for plaintiff.

Mr. Hopkinson, for defendant.

WASHINGTON, Circuit Justice (charging jury). This is a hard case upon the defendant, who at the time this attachment was levied, was liable to pay these bills, as endorser, to a much greater amount than the value of the funds of Lees in his hands, and if he had then paid them, he most undoubtedly would not have had in his hands any effects of Lees, as he could not have been liable for more than the balance of account between him and Lees. But until he paid them, he was not a creditor of Lees; and of course, the attachment bound the effects of Lees in his hands, at the time it was laid, which could not be affected by subsequent credits, to which he might be entitled. The law of this state is too strong to be resisted. It not only declares, that the goods and effects of the absent debtor, in the hands of the garnishee, shall be bound by the attachment, but that the defendant to the scire facias shall plead that he had no goods and effects of the debtor in his hands, when the attachment was levied, nor at any time since, on which the plaintiff is to take issue, and the jury are to find the fact put in issue, one way or the other. Now, until these bills were paid by the defendant, he had no claim against Lees; and on the 19th of September, he had goods of Lees in his hands, which must decide the issue in favour of the plaintiff. The case must be decided precisely in the same manner as if this cause had come on before those bills were paid by the defendant. Your verdict, therefore, must be for the plaintiff, to the amount of the effects acknowledged by the defendant to have been in his hands, independent of those bills.

Verdict for the plaintiff.

Case No. 13,792.

TAYLOR v. GARRETSON et al.

[9 Blatchf. 156; 5 Fish. Pat. Cas. 116.] [1]

Circuit Court, N. D. New York. Sept. 28, 1871.

PATENTS — MECHANICAL EQUIVALENT — IMPROVED MOP HEAD.

1. The first claim of the reissued letters patent granted to Luke Taylor, October 19th, 1869, for an "improved mop-head," the original letters patent having been granted to him February 15th, 1859, and reissued November 10th, 1868, and again reissued November 24th, 1868, namely, "In a mop-head, in which the cross-head, or stationary jaw, is attached permanently and immovably to the handle, operating the movable jaw or binder by means of a tubular screw or socket, fitted in the handle, and having its screw-thread on its exterior, in combination with a nut encompassing the screw, and connected with the movable jaw, so as to operate substantially as shown and described," is, in substance, a claim for the described devices, arrangement and organization for operating the movable jaw of a mop-head, in which the cross-head or stationary jaw is attached permanently and immovably to the handle, by means of the screw formed on the exterior of the collar described in the specification, so fitted to, and fixed upon, the handle, as to revolve therein without longitudinal motion, in combination with a nut encompassing the screw, and connected with the movable jaw, so as to operate substantially as shown and described in the specification.

2. The mere substitution of a mechanical equivalent or equivalents for one or more of the elements constituting the combinations and organizations thus claimed, or any merely formal or fraudulently evasive change in the parts or arrangement embraced in the claim, will not relieve a party from liability as an infringer.

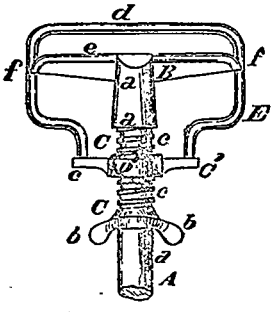
3. The second claim of the said reissued patent, namely, "In a mop-head, in which the movable jaw or binder is operated through the medium of a screw-nut or collar, by means of thumb-ears attached to, or formed with, the said screw-nut or collar, placing the said ears outside the yoke or bow of the movable jaw or binder aforesaid, as herein described, for the purpose set forth," is, in substance, a claim to the invention of the described location and use of the thumb-ears attached to the tubular screw or collar, with a screw on its exterior, constructed and operated substantially as described, in a mop-head in which its movable jaw is operated through the medium of such tubular screw or collar, with screw-threads on its exterior, in connection with a proper nut encompassing and acting with such screw.

4. A mop-head constructed in accordance with the description contained in letters patent granted to Oliver S. Garretson, August 13th, 1867, for an "improved mop-head," is not an infringement of the said reissued patent to Taylor, as it does not contain Taylor's revolving collar, with a screw-threaded exterior, or any mechanical equivalent therefor.

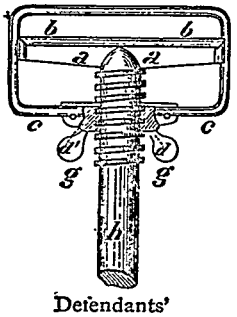
[This was a bill in equity by Luke Taylor against Oliver S. Garretson, John G. Garretson, Albert Garretson, and John D. Shepard.]

[Final hearing on pleadings and proofs.

[Suit brought on letters patent [No. 22,990] for an "improved mop-head," granted to plaintiff, February 15, 1859; reissued November 10, 1868 [No. 3,682]; again November 24, 1868, and again October 19, 1869. The specifications and claims of the last reissued patent, and those of letters patent for an "improved mop-head," granted O. S. Garretson, one of the defendants, April 13, 1867 [No. 67,643], will be found in the opinion, and will be fully understood by reference to the accompanying engravings; noting that the screw-thread upon the complainant's device is cut upon an iron collar, c, c, which is turned freely upon the handle by the thumb-pieces, b, b; while, in the mop-head of the defendants', the thread is cut upon the handle, or firmly attached to



Complainant's.



Defendants'

it, the movable jaw being operated by a screw-nut d, d', attached to the thumb-pieces, g, g.] [2]

George M. Plympton, for plaintiff.
Sprague & Hyatt, for defendants.

HALL, District Judge. This is a suit in equity, for an injunction and account, founded upon reissued letters patent, for an "improved mop-head," dated October 19th, 1869, and which were issued to the plaintiff upon the surrender of reissued letters patent dated November 24th, 1868. The original letters patent were granted to the plaintiff February 15th, 1859, and were surrendered by the plaintiff, and reissued letters patent taken, dated November 10th, 1868. These

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 156, and the statement is from 5 Fish. Pat. Cas. 116.]

[2] [From 5 Fish. Pat. Cas. 116.]

were afterwards surrendered, and the before-mentioned reissued letters patent of November 24th, 1868, were issued in lieu thereof.

The specification and claim annexed to the reissued letters patent upon which this suit was brought, are as follows: "To all to whom it may concern, be it known, that I, Luke Taylor, of Springfield, in the county of Windsor, and state of Vermont, have invented a new and improved mop-head; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the annexed drawings, making a part of this specification, in which figure 1 is an external view of my invention, figure 2 is a longitudinal section of the same, taken in line XX, fig. 1, similar letters of reference indicating corresponding parts in the two figures. To enable those skilled in the art to fully understand and construct my invention, I will proceed to describe it: A represents the handle of the mop-head, said handle being constructed of a tough, elastic wood, and B represents the stationary jaw of the head, which is of T form, one portion, a, being a socket, which is fitted on the end of the handle A, and secured permanently thereto by means of rivets, a', one or more. On the handle A, below the socket, a, and between said socket and a shoulder, a*, on the handle, a collar, C, of cast iron, is placed, and allowed to turn freely, the lower end of said collar having projections, b, attached, for the purpose of allowing said collar to be readily turned by the hand or thumb and fingers. On this collar there is cast a screw thread, c, on which a nut, D, works. The nut, D, is provided with projecting ears, c', c', at opposite sides of it, and to these ears, c', c', the ends of a jaw, E, are attached. The jaw, E, is formed of a curved wrought-iron rod, so bent that a portion, d, of it will be parallel with the portion, e, of the stationary jaw, B, and the remaining portions, f, f, so bent, that they will pass around the ends of the stationary jaw, B, fitting in recesses therein, and serving as guides, and their lower parts curved, so as to be attached to the projecting ears, c', c', of the nut, D, as shown clearly in fig. 1. The stationary jaw, B, may be of cast iron, malleable, if desired, and the collar, C, with its screw, c, may be of the same material. From the above description, it will be seen, that, by simply turning the collar, C, the jaw, E, will be moved in and out from the stationary jaw, B, and the cloth or mop firmly secured in the head, or between the two jaws, and also readily released or detached therefrom, when necessary. I am aware that the nut operating the movable jaws or binders of mop-heads have been manipulated by means of a nut, with ears or projections placed between the movable jaws or binders and the cross-head. I am, also, aware that mop-heads have been made with an external screw-thread of wrought iron or wood, cut on the handle or shaft, and working into a wrought-iron nut, or internal screw, cut into the cross-head or yoke of a movable jaw; but the wooden screw, by reason of its swelling and binding, when wet, and the wrought iron screw rusting and binding, and the fineness or closeness of the screw-threads, made the process of tightening and loosening the mop a slow process, and rendering the mop-head, thus constructed, inoperative and of little value. These, therefore, I do not claim, broadly, or in themselves considered; but what I do claim as new, and desire to secure by letters patent, is: (1) In a mop-head, in which the cross-head, or stationary jaw, is attached permanently and immovably to the handle, operating the movable jaw or binder by means of a tubular screw or socket, fitted on the handle, and having its screw thread on its exterior, in combination with a nut encompassing the screw, and connected with the movable jaw, so as to operate substantially as shown and described. (2) In a mop-head, in which the movable jaw or binder is operated through the medium of a screw-nut or collar, by means of thumb ears attached to, or formed with, the said screw-nut or collar, placing the said ears outside the yoke or bow of the movable jaw or binder aforesaid, as herein described, for the purpose set forth."

From this description of the plaintiff's improved mop-head, any person familiar with the forms of improved mop-heads generally used can, it is believed, obtain a sufficient knowledge of the characteristics and peculiarities of the plaintiff's invention, and of its construction and operation, to understand the questions presented in this case, although the drawings annexed to the specification would, of course, greatly aid one in readily obtaining a full and perfect comprehension of its construction and operation.

The specification and drawings annexed to the original letters patent were, in substance, like those annexed to the last re-issue, except that there was only a single claim, and that of a different character, and that, instead of the two paragraphs which immediately precede the statement of the plaintiff's claims in the foregoing specification, and which relate to prior constructions, the following paragraphs were inserted: "I am aware that a screw has been attached to the handle of a mop-head, and a nut fitted on the screw to actuate the movable jaw; but, as far as I am aware, the handle is turned with the screw in order to actuate the nut. In my invention the screw is fitted loosely to the handle, and turns separately, and the device is thereby rendered more durable, and the movable jaw may be actuated with greater facility than by the plan alluded to. I do not claim separately any of the parts described."

Immediately following these paragraphs is

the claim, in these words: "But I do claim as new, and desire to secure by letters patent, as an improved article of manufacture, a mop-head, having a loose collar, C, provided with a screw thread, and otherwise made as described."

On the 13th of August, 1867, the defendant Oliver S. Garretson obtained letters patent for an "improved mop-head;" and, in the specification and drawings annexed, he fully described the construction of the mop-head subsequently manufactured and sold by him and by John G. Garretson, and which, it is claimed, was an infringement of the plaintiff's patent. These letters patent were somewhat relied on by the defendants; but, as the only claim made in the specification was, (as will be presently seen,) the "making of the collar of the loose jaw" (or immovable part of the clamp in which the material of the mop is held) "in two parts, so that the nut" (therein referred to as d d) "may be placed between them, and, when connected together, the collar surrounds the nut, and retains it in position, for the purpose above set forth," it is not deemed important upon the question of the infringement of the plaintiff's patent. Indeed, its effect as evidence is more favorable to the plaintiff than to the defendants, for it is fairly to be presumed, either that Garretson did not originally claim any device now claimed to be covered by the plaintiff's patent, or else that such claim was disallowed by the patent office.

The construction and character of the mop-head alleged to be an infringement of the plaintiff's patent, and the precise invention patented to Oliver S. Garretson, may, perhaps, be best shown by copying the specification and claim annexed to his patent. They are in the following words: "To all whom it may concern, be it known, that I, O. S. Garretson, of the city of Cincinnati, in the county of Hamilton, and state of Ohio, have invented a new and useful improvement in the construction of mop-heads, and I do hereby declare that the following is a full, clear and exact description thereof, reference being had to the accompanying drawings, making a part of this specification, in which figure 1 is a perspective view of the head, with a part of the handle attached, the parts being put together complete. Figure 2 is an elevation of the same, part of the nut and part of the collar of the loose jaw being removed, to show the manner in which the flange of the nut enters the collar, and, by being rotated, acts on the screw of the shank or handle, and makes the loose jaw recede from or approach the fixed jaw or cross-head; also, the manner of connecting the parts of the loose jaw together. Figure 3 is a perspective view of that part of the loose jaw that forms the collar, broken in two, to show the recess in which the flange of the nut plays, and the recess designed to receive and retain the smaller parts of the same; or that part that may be formed of wire, as here represented, with the holes by which, with rivets, the parts are secured together. Figure 4 is the nut, shown in perspective. Like letters indicate corresponding parts of all the figures. My improvement in mop-heads chiefly consists in constructing that part of the loose jaw that forms the collar in two parts or halves, with the inner surfaces properly grooved to receive and retain the flange or wings of the nut, and to allow it to have a free rotary motion, by which means the parts with the recesses and rivet-holes may be cast complete, requiring no drilling or reaming in putting together. As represented in Fig. 1, a, a, is the fixed jaw or cross-head, and is cast hollow, to receive the handle, h. In Fig. 2 the loose jaw is marked b, b, c, c; and here one part of it, marked c, c, is removed, the better to show the recess in which the flange of the nut, d, d, plays. Part of the nut is also removed, to show how the thread of the screw on its inner surface acts on the screw on the shank or handle, h, and the flange is retained in the recess in the loose jaw, when, by rotating the nut by the thumb-pieces, g, g, Fig. 4, the loose jaw, b, b, c, c, must recede from or approach the fixed jaw for the purpose of receiving and retaining the mop. Fig. 4 is the nut, shown in perspective, with one thread of a screw on its inner surface, to match the screw on the shank or handle, h, with its thumb-pieces, g, g, by which it is rotated. Part of the flange on its outer surface is also lacking, better to adapt it to be moulded and cast without coring. The important advantage gained by my construction of the mop-head is, that, by constructing that part of the loose jaw that forms the collar for the nut in two parts or halves, it, with its recesses and rivet-holes, may be cast complete, and will require no drilling or reaming in putting together, a great saving of labor in constructing, and, when done, forms a neat, compact and durable article. The operation or manner of using it is, to turn the nut by its thumb-pieces, g, g, Fig. 4, and the loose jaw recedes from the fixed jaw or cross-head, and the mop may be inserted. Turning the nut in an opposite direction brings the loose jaw and the cross-head near together, and the mop is held firmly in position. What I claim as my invention, and desire to secure by letters patent, is, making the collar of the loose jaw in two parts, so that the nut, d, d, may be placed between them, and, when connected together, the collar surrounds the nut, and retains it in position for the purpose above set forth."

It is the manufacture and sale of the mop-head thus described, which, and which alone, is insisted upon as an infringement of the plaintiff's patent. Such manufacture and sale by the first-named two defendants are admitted, but it is denied that this was an infringement of the plaintiff's rights. The validity of the patent on which the suit is

brought is also denied upon the ground of the want of novelty. It was also insisted that both claims of the plaintiff's patent were invalid, (1) because they are broader than the alleged invention shown and described in the specification; (2) because they each include inoperative devices; (3) because they are each ambiguous and uncertain.

It was conceded, at the hearing, that there was no proof that the defendants Albert Garretson and John D. Shepard, or either of them, had infringed the plaintiff's patent, and as to them the plaintiff's bill must, of course, be dismissed.

The question of novelty in the actual invention of the plaintiff may be summarily disposed of. There can be no doubt, upon the evidence in the case, that the plaintiff was the first to introduce into a mop-head in which the cross-head or stationary jaw was rigidly and permanently attached to the handle, the described and peculiar arrangement and devices for forcing in either direction the movable jaw of such mop-head, and holding it in place when the required degree of pressure upon the material of the mop proper had been attained. Whether the plaintiff's claims are broader than his actual invention must depend upon the construction to be given to the language used by the patentee, and this construction will be presently considered.

The limited character and scope of the plaintiff's claims, the carefully expressed disclaimers contained in his specification, and the evidence given in respect to the devices and organizations which had been used for similar purposes prior to the time of the plaintiff's invention, satisfactorily prove that the plaintiff's invention was simply an improvement upon the previously existing organizations and devices for moving, and holding in position, as might be desired, the movable jaw of a mop-head, by means of a single screw. This must be constantly borne in mind, while considering the scope and character of the plaintiff's actual invention, and the construction proper to be given to the claims contained in his last amended specification, and also in determining the question of infringement. The plaintiff's invention being only an improvement of certain parts of a known machine, he cannot treat another as an infringer because he has improved the previously existing machine or machines, by using a form, construction, device or combination substantially different from that invented and patented by the plaintiff, though performing the same functions (McCormick v. Talcott, 20 How. [61 U. S.] 402; Burr v. Duryee, 1 Wall. [68 U. S.] 531, 573, 574); and it may be well, also, to bear this in mind, in considering the question of construction, as it must be borne in mind and regarded in considering the question of infringement.

Ordinarily, the claim of a patentee should be so construed as to secure to him the exclusive right to control the use of his actual invention, if this can be done without violence to the language of his claims; but this general rule would hardly be acted upon in a case where it was evident that his claims had been expressed in loose, ambiguous or general terms, for the fraudulent purpose of apparently covering subsequent inventions, especially where the objectionable claim had been first introduced in a re-issue, for the purpose of covering the subsequent invention of another. Burr v. Duryee, 1 Wall. [68 U. S.] 531, 575; Case v. Brown, 2 Wall. [69 U. S.] 320.

Under the general rule last stated, the first claim of the plaintiff's patent is, in substance, a claim for the described devices, arrangement and organization for operating the movable jaw of a mop-head, in which the cross-head or stationary jaw is attached permanently and immovably to the handle, by means of the screw formed on the exterior of the collar described in the plaintiff's specifications, so fitted to, and fixed upon, the handle, as to revolve thereon without longitudinal motion, in combination with a nut encompassing the screw, and connected with the movable jaw, so as to operate substantially as shown and described in the plaintiff's specification. Of course, the mere substitution of a mechanical equivalent or equivalents for one or more of the elements constituting the combinations and organizations thus claimed, or any merely formal or fraudulently evasive change in the parts or arrangement embraced in the claim, would not relieve a party from liability as an infringer.

The addition, in this first claim, of the term, "socket," if intended as the alternative of the term, "tubular screw," and to refer to the same thing, was unnecessary, and, perhaps, improper; and it can have no effect, unless it can properly be construed to extend the claim to the socket and screw upon its exterior, found in the Garretson mop-head. If so construed, it would certainly be extended beyond the limits of the plaintiff's actual invention; and, perhaps, it ought to be considered, that the term, "socket" was so inserted, upon the re-issue, for the fraudulent purpose of suppressing Garretson's subsequent invention. But, as this case will be here determined upon other grounds, this question will not be discussed or decided.

The second claim of the plaintiff, under the general rule before stated, is, in substance, a claim to the invention of the described location and use of the thumb-ears attached to the tubular screw or collar, with a screw on its exterior, constructed and operated substantially as described, in a mop-head in which its movable jaw is operated through the medium of such tubular screw or collar, with screw threads on its exterior, in connection with a proper nut encompassing and acting with such screw. The insertion of the term, "screw-nut," in this claim, was unnecessary and improper, and justifies, at

least, a suspicion, that it was inserted for the fraudulent purpose of suppressing the subsequent invention of Garretson.

In confirmation of the view taken of the scope and character of the plaintiff's claims, and of his actual invention, and, also, as preparatory to a discussion of the character, office and operation of the devices and arrangement used in the Garretson mop-head for like purposes, with a view to the proper determination of the question of infringement, it may be well, at this point, to refer to and describe the devices and arrangements adopted for similar purposes in two previously existing organizations. The first of these is the mop-head described in letters patent granted to Alexander Barnes, November 20th, 1855; and the other the mop-head marked "defendants' Exhibit F;" it being satisfactorily proved, that mop-heads of the same character had been in use long prior to the plaintiff's invention. Both of these, in most of the parts not now in controversy, or not presently referred to and described, are quite similar, in their general organization, and in their principles, or modes of operation, to both the Taylor and Garretson mop-heads; and, taken together, they may be properly considered as representing the state of the art at the time of the plaintiff's invention.

In the first, the cross-bar, which forms what is termed, in the plaintiff's claim, the cross-head or stationary jaw, was so arranged and fixed as to revolve upon the end of an iron rod inserted in the wooden portion of the handle of the mop, and upon which iron rod was cut the operative screw by which the movable jaw of the mop-head was moved and held in place. The movable jaw was similar to that of the Taylor mop-head, with its arms or ends connected together by a short cross-bar, having a female screw in the middle lines of its length and breadth, being, in fact, a nut with ears, like that in the plaintiff's mop-head, except that its screw threads were finer, and that the diameter of the screw required to fit and fill it (the screw being of wrought iron) was not so large. The screw threads on the exterior of the iron rod to which the stationary jaw was so fixed, corresponded and co-operated with those in the short cross-bar or nut with ears, before referred to. The movable jaw in this organization was, therefore, moved and operated by turning the handle and its screw, while the stationary jaw was so held as to prevent its revolution. The construction and arrangement just described were objectionable, because an unequal pressure upon the different arms of the mop-head might give it a revolving motion, in such manner and direction as to open or loosen its jaws, and release their firm hold upon the materials of the mop proper. The fineness of the threads of the screw, and the danger that rust upon its surface might interfere with its uniform and successful operation, may, also, have been slight objeections to its general adoption.

In the construction shown by the defendants' Exhibit F, the iron rod and screw of the Barnes mop-head were rigidly and permanently attached to the stationary jaw, as well as to the wooden portion of the handle of the mop, and there was, therefore, no female screw cut in the short cross-bar through which the screw passed, as in the Barnes mop-head; but, the required action of the movable jaw, for the purpose of effectually clamping and holding, or of releasing, the material of the mop, was produced by turning a nut with thumb ears, placed upon the screw between the short cross-bar and the stationary jaw. This construction was objectionable, because the position of the nut with thumb ears was inside the yoke or bow of the movable jaw, and, therefore, not so easily operated; and the fineness of the screw and the danger of rust, as before stated, in respect to the Barnes mop-head, may, also, have been considered slight objections to its general adoption and use.

As an improvement upon the Barnes mop-head, the plaintiff's invention was, in substance, this: He attached the stationary jaw to the handle in such manner that the handle could not revolve without a corresponding motion of the mop-head; and, in order that the proper motion and action might be given to the movable jaw, by means of a screw on the handle of the mop, working in the eared nut or female screw of the short cross-bar, he cut the proper screw threads upon the exterior of a collar placed and fixed upon the handle, instead of cutting the screw upon the main body of the handle itself. This construction enabled him to place his thumb-ears outside the bow of the stationary jaw, instead of inside of it, as had been done in the mop-head represented by the defendants' Exhibit F, and in the other organizations referred to in the plaintiff's disclaimer. The great and distinguishing feature of his invention was, therefore, the introduction and use of a screw revolving, without longitudinal movement, around the main body of the mop-handle, and operated by the use of thumb-ears outside the bow of the movable jaw.

Considered as an improvement upon mop-heads like those represented by the defendants' Exhibit F, the plaintiff's invention consisted in converting the short cross-bar of the movable jaw into an eared nut, and giving it motion in both directions, and securing it in place, by the introduction and action of the collar and its exterior screw, this collar, with its exterior screw, thus constituting, as before stated, the principal and distinguishing feature of his invention.

Neither of the separate parts of the plaintiff's new arrangement and organization was claimed, or could have been claimed, as new; for, all of them, including the revolving collar, with the screw upon its exterior,

and working in a nut, to produce longitudinal motion, while it was itself so held as to prevent its moving longitudinally, had been before used in other organizations. Such screw collars had been used for an analogous or similar purpose in larger wrenches, a specimen of which was given in evidence.

The Garretson mop-head is an extremely limited, but, doubtless, valuable, improvement upon the mop-head represented by the defendants' Exhibit F. Garretson's improvement consists, mainly, in casting the short cross-bar of the movable jaw in two longitudinal sections or pieces, of such form, that, when united, there shall be a large circular orifice in the middle lines of their united length and breadth, with a channel or recess cast or formed therein, of such form and dimensions as may be required to receive and hold, as against any but a revolving motion, a nut with an exterior flange fitted to, and revolving in, the channel or recess so provided for it in the short cross-bar, thus enabling the operator to move in either direction, and fix in its proper position the movable jaw of the mop-head, by revolving the nut upon the screw cast upon the socket or iron portion of the mop-handle. This having been accomplished, it was obvious, that the thumb ears of the nut should be placed, outside the bow of the movable jaw, and this location of the thumb ears of the nut was, accordingly, adopted.

The Garretson device has, perhaps, no advantage over that of the plaintiff, except in cheapness of cost of construction, and, possibly (judging from the statement in regard to the swelling of wooden screws, in the plaintiff's specification), in avoiding the danger of failure in the proper or easy action of the plaintiff's device, by reason of the swelling of the wooden portion of the mop-handle upon which it is intended to revolve.

The iron rod in the Barnes mop-head and in that represented by the defendants' Exhibit F, on which the screw was cut, and the socket cast upon the stationary jaw of the Taylor and the Garretson mop-heads, are parts of the mop handles to which the stationary jaws are attached; and the placing of the screw upon the socket of the Garretson mop-head, and the use of coarser threads in the operating screws, are only differences of degree and in mechanical construction; and a change from one to the other is not a patentable invention.

The changes in the arrangement, form and construction of the parts concerned in the mechanical movement and retention in place of the movable jaw of the mop-head in use prior to the invention of Taylor, which were made by him and by Garretson, were both meritorious improvements upon such mop-heads, and patentable inventions; and, in my judgment, the two devices, in construction and arrangement, are substantially and essentially different, and, also, substantially different in their modes of operation. The Garretson mop-head does not contain the revolving collar with a screw-threaded exterior; and the introduction and use of this collar is the main and most essential feature of the plaintiff's invention. Nor does it contain any mechanical equivalent of such screw-threaded revolving collar, which could have been substituted for it without meritorious and substantial invention. Imparting motion to the movable jaw of a mop-head, by means of a revolving nut, working upon a screw cut upon the socket or handle rigidly attached to the mop-head, and also connected with the short cross-bar of the movable jaw in such manner as to allow it to revolve upon the screw without any other motion separate from that of the cross-bar, required the exercise of the inventive faculty in no small degree; and it is quite certain that the Garretson device, in its construction and arrangement of parts, and in its principle and mode of operation, is substantially and essentially different from the actual invention of the plaintiff. The two devices are supposed to be equally efficient and useful; but it was testified by one of the defendants' experts, and not disproved, that the Garretson device was to be preferred, because the cost of its construction was less than the cost of the device invented by the plaintiff.

In short, no infringement of the plaintiff's right has been established, and, for that reason, the plaintiff's bill is dismissed, with costs. The other questions presented by the learned counsel of the respective parties may, therefore, properly be left without further discussion.

[Patent No. 67,643 was granted to O. S. Garretson, August 13, 1867. For other cases involving this patent, see Garretson v. Clark, Case No. 5,248; Id., 111 U. S. 120, 4 Sup. Ct. 291.]

Case No. 13,793.

TAYLOR v. GERMANIA INS. CO.

[2 Dill. 282.] [1]

Circuit Court, D. Nebraska. 1871.

INSURANCE — LOCAL AGENT — POWER TO MAKE VERBAL CONTRACT TO RENEW INSURANCE.

1. The local agent of a foreign fire insurance company, with power to effect insurance, to sign and deliver policies, and to collect premiums, is, in favor of third persons acting in good faith, presumptively authorized to make a verbal contract to renew a risk, and to give day for the payment of the premium in whole or in part.

2. If, by such a verbal contract to renew the insurance, the premium was to be paid on the first day of the succeeding month, which was Sunday, an offer to pay the next day (Monday) would be sufficient, although the house insured had burned down on Sunday.

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

Action on an alleged verbal contract of insurance. No questions were made upon the form or sufficiency of the pleadings.

Mr. Delaney, for plaintiff.
Mr. Poppleton and Mr. Swartzlander, for defendant.

DILLON, Circuit Judge. 1. An insurance agent, with power to make and effect insurance, and to issue and deliver policies, to receive and collect premiums, has the power, if no restriction on it be shown, to bind his company by a verbal contract with the assured at the expiration of the policy, to renew the insurance, and to waive the payment of the premium for the time being, or to give assured time for its payment.

2. In this case the plaintiff sets up such a verbal contract, made, as he alleges, on the 15th day of July, 1869, to extend his insurance for one year from that date, and that the agent of the defendant agreed to wait on him for the premium (except a portion of it paid at the time) until the 1st day of August, 1869. On the 1st day of August, which was Sunday, the property was consumed by fire; and the plaintiff claims that he tendered or offered to pay the premium the next day (Monday), and that the agent refused to receive it. The defendant denies that any such contract was made, and this presents a question of fact for the jury to decide upon the whole evidence and all the circumstances of the case.

3. If such a contract was not made, and the burden of proof to satisfy you of its existence is on the plaintiff, then you should find a verdict for the defendant.

4. If any contract of renewal, and to give time of payment, was made, you should very closely inquire, from the evidence, just what that contract was; and, having ascertained what it was, then whether the plaintiff performed it on his part according to the true meaning, spirit and intent of the contract. You cannot hold the company liable, upon any custom or usage, to renew policies and give time for the payment of premiums, and such evidence, so far as it has been admitted, was admitted only as bearing (so far as you think it has any weight) upon the question whether any such contract as the plaintiff alleges and relies upon was in fact made.

5. If the only contract of renewal was that the defendant was to call in a day or two, or a few days, and pay the premium, and if this time had expired before the fire, then the company would not be liable, even if after the fire the amount was tendered or offered them.

6. If the contract, if any was made, was that the risk should be renewed, and that the premium was to be paid on the first day of the next month (August), and if the 1st day of August was Sunday, and if the house took fire and was burned on Sunday, an offer to pay the premium on the next day (Monday) would be sufficient. 2 Pars. Cont. (5th Ed.) 665; Hammond v. American Mut. Life Ins. Co., 10 Gray, 306. But there must be an offer to pay at the time, but this may be by the assured or his agent, and if such offer was made, and if the agent of the company denied any liability, or waived payment, and said he would call for the premium, and did not, this would be a sufficient compliance with the duty of the plaintiff to pay the premium.

Power of local agent to make verbal contract to renew. Baubie v. Aetna Ins. Co. [Case No. 1,111], and cases cited in note.

TAYLOR (GREEN v.). See Case No. 5,761.

Case No. 13,794.

TAYLOR v. HARWOOD et al.

[1 Taney, 437.] [1]

Circuit Court, D. Maryland. Nov. Term, 1845.

CONTINUANCE—ABSENCE OF WITNESS—COLLISION—WEIGHT OF EVIDENCE — APPEAL — ADMIRALTY JURISDICTION.

1. Where a witness was summoned to testify in a case in the district court, and did not attend, but no continuance was sought on that ground, and no summons was issued for his attendance in the circuit court, until five days before the case on appeal was called for trial, and his name was not called till the case was called for trial: *Held*, that his absence was no cause for a continuance.

[Cited in brief in Re Hawkins, 13 Sup. Ct. 521.]

2. The court of admiralty never suffers the substantial justice of the case to be defeated by matters of form.

3. If any persons have joined in a libel who are not competent to sue for the matter complained of, the circuit court, although an appellate court, will give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits.

4. The admiralty court has jurisdiction in cases of collision happening upon tide-water in the Chesapeake Bay, or the rivers emptying therein: the jurisdiction has been settled by the decision of this court, and has been acted upon on several occasions, and cannot now be considered as open for argument.

5. The omission of a known legal duty, is such strong evidence of negligence and carelessness, that in a case of collision, where one of the vessels did not carry the light required by law, she should be held altogether in fault, unless clear and indisputable evidence be established to the contrary.

[Cited in The Sunnyside, Case No. 13,620; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 26 Fed. 602; Meyer's Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 828; The Athabasca, 45 Fed. 655.]

6. When all the witnesses are equally trustworthy, it is not by the number that the court must be governed; but rather by the means of knowledge they respectively possessed.

---

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

7. In an appeal from the district court, the judgment of that court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case involving purely a question of fact, depending upon the testimony of a multitude of witnesses, whose statements are inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, nothing but the firmest and clearest conviction that the district court has fallen into error, will justify the circuit court in reversing the judgment.

[Cited in The Lord Derby, 17 Fed. 268.]

[Cited in Reed v. Reed, 114 Mass. 373.]

[See Baker v. Smith, Case No. 781; Bearse v. Three Hundred and Forty Pigs of Copper, Id. 1,193.]

8. New testimony introduced in an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court

[Cited in The Saunders, 23 Fed. 304.]

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

The libel was filed on the 16th of June 1845, by the appellees [James Harwood and others], owners of the steamboat Fredericksburg, against [Robert Taylor, claimant of] the steamboat Boston, to recover damages for injuries sustained by a collision in the Chesapeake Bay. Both the steamers were owned by citizens of Maryland, and were engaged in performing voyages within the limits of that state, and were within those limits at the time of the collision. A great deal of conflicting testimony was taken in the case, the effect of which is stated in the opinion of the court. The decree of the district court was in favor of the libellants [case unreported], from which decree an appeal was taken to this court. When the case was about to be heard on the appeal, an application for a continuance was made by the appellant, on the ground of the absence of a material witness, and an affidavit filed to sustain his application. This application was refused by the court, and the following reasons assigned.

George M. Gill, for appellant.

J. Mason Campbell, for appellees.

TANEY, Circuit Justice. It is admitted in this case, that the witness was summoned to the district court, but did not attend, and was not examined; he sails in a vessel, trading between this place and Havre de Grace; if he were present the party would be entitled to examine him, according to the practice of the admiralty courts. This practice, so contrary to that of chancery and common law, in cases of appeal or writ of error, can only be justified from the character and pursuits of witnesses usually required in admiralty proceedings, whose occupations most commonly prevent them from remaining long at one place, and often therefore make it difficult to procure their attendance at the moment they are wanted. And the same principle prohibits the court, when sitting on an appeal, from continuing the case over to another term; for, if the party might continue to seek out new testimony, and thus delay the appeal until he can get it, the appeal might never be tried; he cannot, when he appeals, crave time to make out a new case; he must come prepared with his new testimony, if he desires to use it. This has always been the decision of this court, and was so ruled several years ago.

There is this strong reason in this case to refuse the continuance, that it was not sought in the district court on account of the absence of this witness. After the disobedience of the witness to the process of that court, he ought to have been summoned earlier to this, and process of attachment prayed against him, if he did not attend; due diligence required this; but summons did not issue for him until five days ago, and he was never called until to-day. When witnesses have been examined in the district court, it is the duty of the party to have their depositions reduced to writing, if he contemplates an appeal in case of a decision against him; and if he fails to do so, and the witness does not attend upon summons, it will, in general, be no ground of continuance; because the party has not used proper diligence to procure his testimony, unless he requires his testimony to be reduced to writing in the district court. There may be a case where special circumstances of surprise upon the party, or sickness of the witness might except it out of the rule, but it must be a strong case that would induce this court to except it; because, from the nature of the greater part of cases in admiralty, the character and pursuits of the witnesses make it essential to the principles and administration of justice that appeals should be promptly heard and decided.

The appeal having been tried at this term, the following opinion was delivered by—

TANEY, Circuit Justice. The case, as presented to the circuit court, is merely a question of fact upon the testimony offered. The points of law which were raised and discussed on the trial in the district court, have been waived in this court by the counsel for the appellants; and very properly waived, for they are either unimportant to the decision of the controversy, or have been too long and too well settled, to be now open for argument. For, as to the suggestion, that some of the libellants have no interest in the Fredericksburg, and are, therefore, improperly made parties to the libel, it is not supported by the proofs, so far as any have been offered on this point; and if it had been otherwise, yet the court of admiralty never suffers the substantial justice of the case to be defeated by matters of form. If any persons had joined in the libel, who were not competent to sue for the matter complained of, this court, al-

though it is the appellate court, would give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits.

As regards the jurisdiction of the admiralty court, in cases of collision happening upon tide-water in the Chesapeake Bay, or the rivers emptying therein, the point was adjudged in this court, and the jurisdiction sustained, before I came upon the bench; and has since, on several occasions, been exercised, without question, so that it cannot now be considered as open for argument.

Upon the facts in controversy, a multitude of witnesses have been examined, and as almost always happens on such occasions, there is much contrariety and conflict in the testimony produced by the different parties. This difference does not generally arise from any desire to misrepresent the transaction, but from the different points of view from which it was observed, from the different times at which their attention was first called to the danger, from the different degrees of coolness and composure with which it was viewed, the different degrees of knowledge which the parties possess as to the management of the vessel, and perhaps, above all, to the prejudices excited on board the different boats, by the representations of those more immediately responsible, made immediately after the collision has taken place, when each one is desirous of justifying himself, and throwing the blame upon the other. But whatever may be the cause, it is evident that, in this case, any attempt to reconcile the statements of the different witnesses would be utterly hopeless, and the court must proceed to decide the case according to the weight of the testimony, and the degree of credit to which, under all the circumstances, it thinks the respective witnesses are entitled.

It is unnecessary, in this opinion, to enter into a detailed examination of the various statements made by the different witnesses; indeed, such an examination would fill a volume. It is sufficient to say, that after a careful and minute analysis of the whole testimony, and deliberately considering the arguments of the counsel for the respective parties, I have come to the following conclusions:

1. That the Boston ran into the Fredericksburg nearly stem on, striking the Fredericksburg on her starboard bow, and causing the injuries complained of. I think this conclusion inevitable, not only from the marks on the bow of the Fredericksburg, so frequently spoken of and described by the witnesses, but also from the nature of the injuries sustained by the canal-boats, which the two steamboats had in tow at the time. Each of the steamboats had two canal-boats on each side, and the canal-boats, of course, headed precisely in the same direction with the steamboats to which they were attached; when the collision took place, the outer canal-boat, on the side of the Boston, had her stem broken, and the planks and timbers of her bows forced open, so that she was in danger of sinking, and so directly upon her stem was the blow given, that the fastenings which bound her to the inner boat were broken, and she drifted away and did not press the inner boat against the side of the Boston; the head of the inner boat was also injured, but not so much as the outer one. But the outer boat on the starboard side of the Fredericksburg, had, in the language of the witness, "her side knocked in, her bow deck knocked over and jammed off, and her stern-post broken, and one of her timber-heads;". and she was pressed so forcibly against the inner canal-boat, that the latter was driven under the wheel of the Fredericksburg, where it became so fastened that it required some time and exertion to release it, when the collision was over, and the steamboats had separated. These circumstances, about which there is no dispute, and no conflict in the testimony, show that the Boston came into collision head on; and they confirm the testimony of Campbell, the pilot of the Fredericksburg, who was then at the helm, who stated that the canal-boats at the side of the Fredericksburg were first struck, and that the Boston then glanced off and struck the blow on the bow described by the witnesses; he is also confirmed by the testimony of Worthington, a passenger on board, who swears that there were two shocks from the collision, one rapidly succeeding the other; and he mentions circumstances which show that, in this matter, he cannot have been mistaken.

2. It is also established by the testimony, that when they came so near as to render the collision inevitable, unless the course of the boats was changed, the pilot caused the engine of the Fredericksburg to be stopped, and putting his helm hard to starboard, the vessel was falling off to the larboard side at the moment she was struck; but on the part of the Boston, the engine was not stopped, until she actually struck, and no effort appears to have been made to check her speed or lighten the blow.

3. When the two boats came in sight of each other, the Fredericksburg had just turned Locust Point, and the Boston, Sandy Beach, being the two opposite ends of the Shesutie Island. The weather was rough, and the Fredericksburg being a small boat, with five canal-boats in tow, it was deemed necessary, or at all events prudent, to keep her head to wind, which was adverse to her; and this directed her course further out from the island, and nearer to the eastern shore, than she would have pursued with more favorable weather. When she was first seen by the Boston, the latter was heading north-by-west, which is the ordinary and proper course up the bay along Shesutie Island, when a boat is bound for Havre de Grace; but after the course of the Fredericksburg was observed, and she was seen standing more over towards the eastern land than usual, the

Boston changed her course from north-by-west to north-by-east, and continued afterwards to bear more and more to the eastward, until she was heading about E. N. E., when the collision took place; and had, by the admission of her own commander at the time, gone at least two miles out of her ordinary and appropriate course.

The excuse offered for this otherwise unaccountable proceeding of the Boston, is, that it is the established usage with steamboats to go to the right when they are meeting one another; and moreover, that there was an agreement to that effect between the owners of these boats, and that the changes in the course of the boat, and the deviations from the usual track, were made in order to execute that agreement. But it is impossible to give such a construction to the agreement, or to the maritime usage, as would justify the course pursued by the Boston. The meaning of the contract and the maritime usage upon the subject, are precisely the same, that is to say, if two boats are meeting each other, each shall veer to the right to avoid collision; but when the course of the Fredericksburg was making a considerable angle with the line on which the Boston was at first proceeding, and which was, moreover, the ordinary and proper course of the Boston, and when, from the direction the Fredericksburg was steering, she was every moment increasing her distance from the path in which the Boston was expected to pass, there is no maritime usage, and no reasonable construction of the contract mentioned in the testimony, that can excuse the commander of the Boston from deviating six or seven points from his usual and proper course, and going two miles out of his way, in order to cross the bow of the Fredericksburg, and pass her on her larboard side; the more especially, as every change of course most obviously and necessarily increased the danger of coming into collision. I think the conduct of the Boston in this matter to be altogether inexcusable.

4. But what appears to me to remove all doubt upon the question of who was in fault, is the want of the signal-light on board the Boston, which the law requires to be carried from sunset to sunrise. This light, on board the Fredericksburg, was in proper order and in its proper place; but on board the Boston, at the moment the Fredericksburg came in sight, it was found to be flickering only, or nearly out, and was immediately taken away, and was not replaced during the whole time the boats were nearing one another, nor until after the collision had actually taken place. It is true, that another light, said to have been a strong one, was burning under the upper deck near the machinery, it is stated in the testimony, might have been seen on board the Fredericksburg; but this was not the signal-light prescribed by law, which, by universal usage, is placed in an elevated position at the head of the vessel; and in this position the Boston herself was accustomed to bear it.

Experienced commanders of steamboats have testified, that the light thus placed enables you to determine not only the place of the boat but the course she is steering. But however that may be, the duty is enjoined by law; and the omission of a known legal duty is such strong evidence of negligence and carelessness, that, in every case of collision happening under such circumstances, I should hold the offending vessel as altogether in fault, unless clear and indisputable evidence established the contrary. Certainly, in this case, no such evidence has been offered in behalf of the Boston, as can vindicate her from the presumptions of carelessness and negligence, which justly arise from her disregard of a legal duty, and that, too, at a time when the boats were approaching one another, and the signal-light particularly important.

Upon these considerations, I am decidedly of opinion, that the entire fault was on the part of the Boston, and that she is justly chargeable with the damage done to the boat of the libellants.

The remaining question is, upon the amount of damage, and upon this point there is nearly as much contrariety in the statements of the witnesses, as there was upon the point already disposed of. The witnesses, too, are all skilful workmen, respectable citizens, and of undoubted integrity and truth. The greater number of them estimate the damage far below the amount awarded by the district court. But when all are trustworthy, it is not by the number that the court must be governed, but rather by the means of knowledge they respectively possessed, and their previous knowledge of the boat; the time when the examination was made, and the manner of it, also, must be chiefly regarded. For, it is evident, that a single witness who made the examination soon after the disaster happened, when the marks of the injury were yet fresh, who made his examination in detail, and by items estimating the cost of repairing each particular injury, and who had had opportunities of being well acquainted with the previous condition of the boat, is more to be relied on than the testimony of many witnesses who had made only general examinations and general estimates, and that, too, long after the injury was received, and when she had been lying for months dismantled and exposed to the weather. And in this view of the subject, I adopt the estimate of Mr. Brown, who is admitted on all hands to be a man of undoubted skill and unquestionable character, and who had the best opportunity of knowing the condition of the boat previously to the collision, who examined her immediately after the injury was done; whose examination was made in detail, with separate estimates of the cost of repairing the several specific injuries which the vessel had sustained, and with those in-

juries immediately before him when he made his estimates. The estimates of Mr. Brown were adopted by the district court; and, I think, rightly adopted.

So far I have treated this case as if it were a new one, coming as an original cause before this court, without any previous examination or decision. But this is not the point of view in which the court regards it; it is an appeal from the district court; and the judgment of that court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case like this, which is purely a question of fact, depending upon the testimony of a multitude of witnesses, whose statements are often inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, nothing less than the firmest and clearest conviction that the district court had fallen into error, could justify this court in reversing its judgment; and the more especially when, as in this case, it appears from the written opinion filed by the judge, that the whole case was most carefully and elaborately considered and decided in that court.

It is true, that some new testimony has been offered here, which was not given in the district court. But new testimony introduced into an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the district court; as it is always liable to the imputation of having been sought for in order to meet the new condition of the controversy, arising from the decree of the district court, and is, moreover, calculated to take the opposite party by surprise, in the court of last resort. But I do not perceive that the new testimony, in any view, is entitled to much weight, or can materially change the aspect of the case, as it was presented to the district court; for, as to the two new witnesses, who testified concerning the collision, and were particularly referred to in the argument, Captain Brown saw nothing, until after the collision had actually taken place, and the vessels were endeavoring to disengage themselves from each other, and then his stay upon deck was only for a few minutes; and according to his own account, even while there, he took very little interest in the matter, and bestowed upon it but little attention; and as relates to Mr. Allison, he was on board of his own vessel, lying under, Shesutie Island, about two miles distant from the place of collision, and, of course, very little able to determine on the course and management of the boats, as they approached one another, especially as one of them had no bow-light. The notion which he seemed to entertain, that the Fredericksburg was pursuing the Boston, and changing her course in order to meet her, is inconsistent with the weight of testimony hereinbefore considered, and inconsistent, too, with the strongest motives which, in ordinary cases, govern human actions; for the Fredericksburg being so much smaller and weaker than the Boston, it can hardly be believed, that it sought a collision, which must inevitably end in disaster to their boat, and put in jeopardy the lives of those on board.

As respects the new testimony in relation to the amount of damage, I have already expressed my opinion upon it, and of the degree of weight to which it is entitled in comparison with that of Mr. Brown; that these same witnesses were not examined in the district court, and if the testimony was regarded as material at that time, it was in the power of the appellant to have brought it forward. It must be a very strong case, and the omission to examine must appear to have arisen from some sufficient and peculiar circumstance, before the circuit court would reverse an assessment of damages made by the district court, where both parties consented to try the question upon the testimony then offered, without producing other testimony then in their power. Upon the whole, I see no ground upon which to question the correctness of the decree of the district court; and affirm its decree, with costs.

TAYLOR v. The HASBROUCK. See Case No. 7,324.

Case No. 13,794a.

TAYLOR v. HOGAN.

[1 Hempst. 16.] [1]

Supreme Court, Territory of Arkansas. Aug., 1822.

JUSTICE OF PEACE—APPEAL—TRIAL DE NOVO.

It is no ground for reversing the judgment of a justice rendered on a specialty, that neither the plaintiff nor his agent appeared at the trial, and the appellate court, instead of determining the cause on the transcript from the justice, should have tried it de novo on the merits.

Error to Pulaski circuit court.

[This was an action by John Taylor against Edmund Hogan.]

OPINION OF THE COURT. This was an appeal from a justice of the peace to the court below, where the judgment was reversed on the ground that the plaintiff did not appear before the justice in person, or by agent duly empowered by letter of attorney, on the day of trial. We are of opinion that the court erred in reversing the judgment of the justice on that ground, the suit having been brought on a specialty; and also erred in determining the case on the transcript from the justice alone, when it shou...

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

have been tried on the merits as though the suit had originated in that court. Geyer, Dig. 390. Reversed.

TAYLOR (HUTCHINS v.). See Case No. 6,953.

Case No. 13,795.

TAYLOR et al. v. The JOSEPH WALKER.

[17 Leg. Int. 255.] [1]

District Court, S. D. New York. 1860.

WHARFAGE—JURISDICTION—LOCAL LIEN.

[Cited in Town of Pelham v. The B. F. Woolsey, 16 Fed. 422, to the point that admiralty cannot enforce a claim for wharfage for the period during which the vessel lay sunk, and therefore not supplied with wharfage services.]

[This was a libel for wharfage by Moses Taylor and others against the ship Joseph Walker.]

BETTS, District Judge. This was an action to recover wharfage. The ship was lying at a pier in the East river, and having caught fire, was pulled away from the pier, scuttled and sunk in the middle of the slip, and lay there some time longer.

Held by the court: That if there is a lien on vessel for wharfage, it is exclusively so by statute usage, or special contract, and is enforced upon that right and not as maritime obligation.

That the vessel being a domestic vessel, a lien on her to the owner of the wharf springs out of the usage of the trade or business of wharfinger, and is local of its character, and except when imparted by express statute, only follows the actual possession of the thing.

That if this case falls within the cognizance of this court, it is so because the cause of action is for supplies furnished the vessel in her home port. But the supreme court have decided that the jurisdiction of admiralty does not embrace such cases. [Chamberlain v. Ward] 21 How. [62 U. S.] 548. And it does not affect the powers of the court that the action was instituted previous to May 1, 1859. Sup. Ct. Rule, 12. That the action cannot be maintained for the period the vessel was sunk and was not supplied with wharfage services.

Libel dismissed with costs.

TAYLOR (JUANDO v.). See Case No. 7,558.

TAYLOR (KILLINGLY v.). See Case No. 7,776.

TAYLOR (KIMBALL v.). See Case No. 7,775.

TAYLOR (LONGWORTH v.). See Cases Nos. 8,490 and 8,491.

[1] [Reprinted by permission.]

Case No. 13,796.

TAYLOR et al. v. LUTHER.

[2 Sumn. 228.] [1]

Circuit Court, D. Rhode Island. June Term, 1835.

PLEADING IN EQUITY—PLEAS—GENERAL ANSWER—EVASION—STATUTE OF FRAUDS—WITNESS—COMPETENCY—INTEREST.

1. A general answer in chancery overrules the pleas.

[Cited in U. S. v. Parrott, Case No. 15,998.]

2. Where the plaintiff, in his bill in chancery, directly charged upon the defendant, that he had made and entered into a certain agreement, a simple denial by the defendant in his answer "according to his recollection and belief" is insufficient, and must be treated as a mere evasion.

[Cited in Miles v. Miles, 27 N. H. 447.]

3. There is nothing in the Statute of Frauds in Rhode Island (which is a copy of the English statute, 29 Car. II. c. 3, § 4), rendering parol evidence inadmissible, to show, that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.

[Cited in Jenkins v. Eldredge, Case No. 7,266; Bentley v. Phelps, Id. 1,331; Tufts v. Tufts, Id. 14,233; Wyman v. Babcock, Id. 18,113; Babcock v. Wyman, 19 How. (60 U. S.) 299; Tobey v. Leonard, Case No. 14,067; Alexander v. Rodriguez, Id. 172; Amory v. Lawrence, Id. 336; Peugh v. Davis, 96 U. S. 337; Brick v. Brick, 98 U. S. 516.]

[Cited in note in Hayworth v. Worthington, 5 Blackf. 362. Cited in brief in Scanlan v. Scanlan, 134 Ill. 636, 25 N. E. 652; McIntire v. Bowden, 61 Me. 158. Cited in Hinckley v. Hinckley, 79 Me. 323, 9 Atl. 897; Newton v. Fay, 92 Mass. (10 Allen) 510; Glass v. Hulbert, 102 Mass. 37; Campbell v. Dearborn, 109 Mass. 139; Stahl v. Dehn, 72 Mich. 646, 40 N. W. 922; Johnson v. Huston, 17 Mo. 61. Cited in brief in Hodges v. Tennessee M. & F. Ins. Co., 8 N. Y. 420. Cited in Westerly Sav. Bank v. Stillman Manuf'g Co., 16 R. I. 499, 17 Atl. 918; Nease v. Capehart, 8 W. Va. 127.]

4. The grantors, in deeds of release and quitclaim, are competent witnesses to show, that their estate was not absolute, but a mortgage, of which their grantees had notice at the time of the conveyance to them.

[Cited in Holbrook v. Worcester Bank, Case No. 6,597.]

5. Semble, that the grantor, as well as the grantee, if not otherwise interested, is a competent witness, to establish the original deed to be fraudulent.

6. There can be no proofs offered of matters not put in issue.

Bill in equity [by Richard Taylor and wife, against Martin Luther] to redeem premises asserted to be mortgaged, and for relief under the circumstances, there being no written declaration of a mortgage.

The bill alleged, that a certain conveyance of lands in Rhode Island originally made in October, 1821, by the plaintiffs in the right of the wife, to one Joseph Almey, and afterwards, in March, 1821, assigned by Almey,

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

by a release and quitclaim, to one Josiah Westcott, and afterwards in January, 1826, by a like release and quitclaim, assigned by Westcott to the defendant, Martin Luther, and afterwards in January, 1826, mortgaged by Luther to the Central Bank in Rhode Island, for the sum of $500, was made to Almey upon mortgage as security for a debt due to him; although the conveyance purported on its face to be absolute, upon a parol agreement between the parties; that the assignments thereof were successively made to Westcott and Luther, with full knowledge thereof; and that the latter, on receiving the assignment to him, agreed to execute a written defeasance to this effect; and that the mortgage to the Central Bank was made with the consent of the plaintiffs, to discharge the prior incumbrances. The prayer of the bill was to have a declaration, that Luther so held the premises in mortgage, and that the plaintiffs might be permitted to redeem the mortgage, or that Luther might be decreed to execute a written defeasance, so as to make the conveyance operate as a mortgage; and that the plaintiffs might have such other relief as the circumstances might require. No other person but Luther was made a party defendant to the bill. The defendant put in three several and distinct pleas in bar to the suit, and then put in a general answer. The matter of these pleas in effect, was, that the original conveyance to Almey was absolute, and without any defeasance or written condition; and, that, without such defeasance or written condition, under the statutes of Rhode Island respecting conveyances, and frauds, and perjuries, there could not be any relief to the plaintiffs against the assignees. The cause now came on for argument, upon the whole merits, upon the pleadings, and answer and proofs in the cause, the general replication being put in to the answer.

Mr. Whipple, for plaintiffs, cited 1 Pow. Mortg. (Rand's Ed.) 121, note; 4 Kent, Comm. (2d Ed.) 142, 143; Roach v. Cosine, 9 Wend. 227; Inhabitants of Town of Reading v. Inhabitants of Town of Weston, 8 Conn. 120; Brown v. Dean, 3 Wend. 208; Howel v. Price, 1 P. Wms. 291; Floyer v. Lavington, Id. 271.

J. L. Tillinghast, for defendant, cited, with regard to the difference between a trust to reconvey and a mortgage, Conway v. Alexander, 7 Cranch [11 U. S.] 479; Lloyd v. Inglis' Ex'rs, 1 Desaus. Eq. 333; Fitzpatrick v. Smith, Id. 341; St. John v. Benedict, 6 Johns. Ch. 111. Parol evidence cannot extend or limit what is written. 1 Phil. Ev. 423, 448; Countess of Rutland's Case, 5 Coke, 26. A contract cannot rest partly in writing and partly in parol. Parkhurst v. Van Cortlandt, 1 Johns. Ch. 282; Stackpole v. Arnold, 11 Mass. 27; [Grant v. Naylor] 4 Cranch [8 U. S.] 235; 2 Ves. Jr. 243; 6 Ves. 376; 7 Ves. 211; 13 Ves. 377; Schoales & L. 36; 4 Brown, Ch. 514.

STORY, Circuit Justice. Before proceeding to the merits of the cause it may be proper to say a few words on the pleas in bar put in by the defendant. I do not go into the particulars of these pleas, though I have no doubt, that they are all bad in substance, because, in the first place, in a court of equity, double pleading of this sort is not allowable; and in the next place, because the answer, not being special, and merely in support of the matter of the pleas, but being general, overrules the pleas, upon the settled doctrines of the court. So, that the pleas may at once be dismissed without further observation, and the cause must stand solely upon the bill, the answer, replication, and proofs in support of the averments on either side.

There is no doubt, that the defendant claims as assignee of the premises, under the releases and quitclaims stated in the bill, and by his answer he expressly so admits. The defendant also, in his answer, expressly denies, that "to his recollection or belief" he did then and there, or ever make or enter into any agreement with Westcott or the plaintiffs or Almey, that the deed should operate as a mortgage, or that the premises should be redeemable upon the payment or raising of any sum of money, &c. as stated in the bill. Now, these matters being directly and expressly charged upon the defendant in the bill, and so recent, it is not sufficient for him to deny the facts "according to his recollection or belief." To such allegations under such circumstances, he was bound to make a positive and direct denial; and a denial, according to his recollection or belief, must under such circumstances, be treated in a court of equity as a mere evasion. See Har. Ch. Prac. 181, 182; Coop. Eq. Pl. 314. The defendant also denies, according "to his recollection or belief" (but in no other manner) notice of any such agreements with Almey and Westcott, as are set up in the bill. And I must say, that this does not appear to be a matter of mere inadvertence and mistake; but in the whole structure of the answer, there is a studied choice of phraseology to escape from any direct answer to the allegations in the bill, as to an agreement on his own part, or as to any parol agreements between the plaintiffs and Almey or Westcott, to cut down the absolute conveyance to a mere mortgage.

The defence, as asserted in the answer, (for to that only can the court look, and not travel into other matters not contained in the bill or answer,) is in substance, that the plaintiffs are not, upon their own shewing, entitled to maintain their bill, because a parol agreement to turn a conveyance, which is absolute upon its face, into a mortgage, is utterly void, being contrary to the statute of frauds and perjuries, and the statute respecting conveyances in Rhode Island. If this defence fails, then it is further asserted,

that there are no sufficient proofs in the cause to establish the existence of such a parol agreement.

Let us, in the first place, consider, how the case stands upon the matter of law. The statute of frauds and perjuries of Rhode Island (Dig. 1798, p. 473), is like the English statute of frauds and perjuries (St. 29 Car. II. c. 3, § 4), and requires every contract for the sale of lands to be in writing. But nothing is better settled than, that the true construction of this statute does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been very emphatically said, that would be to make a statute purposely made to prevent frauds, the veriest instrument of frauds. See Walker v. Walker, 2 Atk. 100. The whole class of cases, in which courts of equity act in enforcing contracts for the sale of lands in cases of part performance, turns upon this general doctrine. It is laid down with great clearness and strength by my learned friend Mr. Chancellor Kent, in his Commentaries (volume 4, p. 143), and he is fully borne out by the authorities, which he has cited (which I also have examined), and also by other authorities in pari materia. He states it thus: "A deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show, that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake." See, also, Pym v. Blackburn, 3 Ves. 38, note a; 1 Pow. Mortg. (Rand's Ed.) 120, note 2; Walker v. Walker, 2 Atk. 98, 99; Sugd. Vend. (7th Ed.) p. 103, c. 3, art. 3, § 3; Clark v. Henry, 2 Cow. 324; Slee v. President, etc., of Manhattan Co., 1 Paige, 48; Roach v. Cosine, 9 Wend. 227; Inhabitants of Town of Reading v. Inhabitants of Town of Weston, 8 Conn. 120. It is the same, if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice. I do not comment upon this subject at large, because it seems to me wholly unnecessary, in the present state of the law, to do more, than to enunciate the principles, which govern cases of this nature, and which are as well established as any, which govern any branch of our jurisprudence. In the present case there is no pretence to say that Almey, or Westcott, or the defendant, have ever paid to the plaintiffs the full value of the land; and, indeed, the defendant does not himself assert it, as a distinct matter of defence. So that, if the facts are fully made out, and the plaintiffs are remediless, there will have been perpetrated a gross fraud and injustice upon the plaintiffs, and the defendant will reap the full reward of an iniquitous bargain on his side, obtained by meditated fraud and deceit. It is to be hoped, that the morals of a court of equity will at all times be found too strong, to suffer such injustice to go unredressed.

The other statute of Rhode Island, regulating conveyances of real estate (Dig. 1798, pp. 263–269), provides in substance, that all conveyances of lands and all deeds of trust and mortgage whatsoever, hereafter executed, shall be void, unless they shall be acknowledged and recorded in the manner prescribed by the act. But there is a proviso, that the same deed, between the parties and their heirs shall nevertheless be binding. This clause presupposes the conveyance to be in writing, and otherwise duly executed, except as to its acknowledgment and registration. It is intended for the protection of subsequent bona fide purchasers, for a valuable consideration without notice; and it is difficult to perceive any application whatsoever, that it has to the case before the court. It is not doubted or denied in this case, that if the present defendant were a bona fide purchaser, for a valuable consideration, without any notice of the trust or agreement set up in this case, he would be completely protected against the present claim.

There is another clause in the same statute, which provides, that, whenever any bond or defeasance or other instrument shall be executed, which shall cause any deed or other conveyance of lands to operate as a mortgage, or to pass an estate redeemable, such deed or instrument shall be recorded, and it shall not cause the deed, to which it relates, to operate as a mortgage, against any bona fide purchaser, without notice of the incumbrance. This clause admits of similar observations; and so far as it bears upon the present case, it demonstrates that notice of the incumbrance would deprive the party of his absolute title, and subject him to be deemed a mere mortgagee.

So that we may dismiss all farther consideration of the statutes set up in the defence; and proceed at once to the consideration of the facts of the case. And, here the question is, in the first place, whether the original conveyance to Almey was intentionally designed, as between the parties, to be a mortgage; and if so, whether knowledge of the facts was brought home to Westcott, at the time of his purchase; and to Luther, at the time of his purchase. Now, neither Almey nor Westcott are made parties to the bill (as with great propriety they might have been); but their depositions have been taken as witnesses in the case, in behalf of the plaintiffs. And the first objection taken by the defendant is, to the competency of their testimony. It is said, that they are both grantors, directly or me-

diately to the defendant, and that as grantors, it is not competent for them to be witnesses, to show, that the estate in them was not absolute, but a mortgage, for that would be to contradict the nature and purport of their grants.

Now, in the first place, the deeds from Almey to Westcott, and from Westcott to the defendant, are mere releases of all the right, title and interest, that they respectively had at the date of their deeds, in the premises, without any covenant of any sort or kind whatsoever. It is the case, therefore, of a naked release of all the title, which the witnesses had in the premises, not warranting that they had any title whatsoever. And they are now called upon to establish, not that they had no title in the premises; but that they had a title in mortgage only, which they did convey to the defendant, and of which he had full notice at the time of the conveyance. I confess myself utterly unable to see, under such circumstances, what ground of incompetency exists against their testimony. They have no interest whatsoever; and they are not called upon to defeat the operation of their deed; but only to state what their right, title and interest in the premises was.

The ground of objection, which seems to be relied on, is, that the witness, qua grantor, is inadmissible. But I know of no such disqualification to such an extent. I understand, that in this country it has been settled in many states, contrary to the doctrine now established in England that a party to a negotiable note or bill of exchange, shall not be admitted as a witness to show, that it was originally void. But even such a party is admissible, to establish any subsequent facts, not affecting its original validity, when he gave currency to it. But the same principle has not been applied to parties to instruments not negotiable, nor indeed to all negotiable instruments. On the contrary, in Massachusetts it has been held, that the rule (which in that state strictly excludes parties to negotiable notes and bills,) has never been applied to parties to bills of lading (see Brown v. Babcock, 3 Mass. 29; Hill v. Payson, Id. 559); or to parties to deeds, who were not otherwise interested (Inhabitants of Worcester v. Eaton, 11 Mass. 368; Hill v. Payson, 3 Mass. 559; Bridge v. Eggleston, 14 Mass. 245; Loker v. Haynes, 11 Mass. 498). It has been upon this ground held, that the grantor as well as the grantee, if not otherwise interested, is a competent witness to establish the original deed to be fraudulent. This is a much stronger case, than the present; for it goes to establish the original invalidity of the deed, and that nothing passed by it from the grantor. But I am not aware, that the doctrine of these cases has been overturned; and though I do not wish now to decide the point, I confess, that I do not perceive any well-founded objection to it. But I have no doubt in the present case, that Almey and Westcott are competent witnesses. And if they are so, their testimony is quite decisive, to establish the merits of the plaintiff's case. There is, besides, a good deal of corroborative evidence; and it is by no means an insignificant circumstance, that the defendant claims a title merely by release; and that the consideration stated in the deed, falls so very far below that stated in the deed to Almey or Westcott, which by their own evidence was not the true consideration; and (as I have already said), it no where appears, that the value paid by the defendant for this release approached to the real value of a free and absolute title in the premises. On the contrary, the evidence establishes, that it is little more than a quarter part of the value.

The only doubt, that could be entertained in the present case, is upon the structure of the bill itself, alleging the mortgage to the Central Bank, but not making the corporation a party to the bill for a redemption and an account. It now appears, indeed, from the evidence on both sides, that that mortgage has been paid and discharged by the defendant, after an assignment thereof to some other persons; so that it is entirely extinguished. How it should have happened, that this most material fact should not have found its way into the bill, as a dispensation from making the bank or its assignees parties thereto, I do not well understand. But, as it now in fact appears, that the mortgage is extinguished, and the defendant has not put any matter of defence upon this head, it does not seem to me impracticable, for the court to grant the relief asked, without requiring an amendment of the bill in this particular.

In regard to the mortgages of the premises, by the defendant to Edmund S. Waldron, it is impossible for the court judicially to take notice of them. There is no obligation in the bill or answer, that brings them before the court; and the probata must be according to the allegata; or in other words, there can be no proofs offered of matters not put in issue. But there is another fatal objection in their way, if the technical difficulty could (which it cannot) be overcome. The first of these mortgages, given before the bill was filed, has been discharged. The second was given after the bill was filed, and pendente lite. So that neither can be properly available.

There must be a decree, declaring the premises to be redeemable, and the cause to be referred to a master, to take an account on the footing of the conveyance, as a mortgage; and upon the coming in of the master's report, a final decree will be made.

The following is a sketch of the decree, which was entered on the foregoing opinion:

This cause came on to be heard upon the bill and answer, and replication and evi-

dence in the cause, &c. On consideration, &c., It is ordered, adjudged and decreed by the court, that the said conveyance, by way of release and assignment of the premises, in the pleadings mentioned, to the said Martin Luther (the defendant,) be and hereby is declared to be, not an absolute conveyance and assignment, but a mere mortgage of the premises to the said defendant, and as such, the plaintiffs are entitled to redeem the same, upon payment of all moneys and just claims, which the said defendant hath secured to him by and in the same premises, in virtue of and under the same conveyance and assignment; and it is hereby decreed, that the plaintiffs be allowed so to redeem the same accordingly.

And it is further ordered, adjudged and decreed, that it be referred to a master for this purpose, to take an account in the premises, making all due allowances, and charging the defendant with all receipts and profits in the premises, with the usual powers of masters in such cases, to examine the parties, and to take other evidence in the premises, and to call for all proper vouchers and papers; and to make report of his doings in the premises.

And all further orders and decrees are reserved until the coming in of the master's report.

TAYLOR (McCULLOCH v.). See Case No. 8,740.

Case No. 13,797.

TAYLOR et al. v. The MARCELLA.

[1 Woods, 302.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1873.

DAMAGES—PENALTY—ACTUAL AND LIQUIDATED DAMAGE—CONTRACT.

The owners of a steamer entered into a contract for the carriage of 70,000 staves, in which was this stipulation: "We agree to forfeit $1,000 if we fail to carry out this contract." The contract was partly performed by the carriage of 57,000 staves, and the part performance accepted. *Held*, that the contract provided for a penalty to cover actual damages, and did not provide for liquidated damages, and as no actual damage was shown, none was allowed.

[Cited in The City of Alexandria, 17 Fed. 397; Charleston Fruit Co. v. Bond, 26 Fed. 21; Watts v. Camors, 115 U. S. 361, 6 Sup. Ct. 94.]

[Cited in Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 138; Eakin v. Scott, 70 Tex. 442, 7 S. W. 779.]

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

In admiralty.

R. De Gray and B. Egan, for libellants.

G. L. Bright, for claimants.

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

WOODS, Circuit Judge. This is a libel brought by certain mariners for their wages, against the steamer Marcella, and against the freight earned by her on 57,000 staves. Avendano & Bros., the owners of the staves have been made defendants, and to the claim of libellants, answer in substance: That on the 16th of April, 1863, they made an agreement in writing with the owners of the Marcella, whereby the latter contracted to transport on board the Marcella, from Richland parish to New Orleans, 70,000 staves, for the freight of $55 per thousand, and to make two trips if all the staves could not be brought at one trip. Avendano & Bros. agreed to pay freight on 70,000 staves, whether they furnished that number for transportation or not, and the owners of the boat agreed "to forfeit the sum of one thousand dollars," if they failed to carry out the contract, except by reason of accidents beyond their control. The answer admits that the Marcella transported under the contract about 57,000 staves, on which the freight amounted to $3,132.80, but claims that respondents are entitled to a credit on this amount for $1,011.40, for certain staves not delivered, and for cash advanced and costs paid, leaving a balance due of $2,121.40, from which latter sum the respondents claim should be deducted the $1,000 named in the contract, as the amount to be paid by the owners of the Marcella in case they did not perform the contract.

The only point in the case is whether the respondents, Avendano & Bros., are entitled to the credit of $1,000 by reason of the failure of the Marcella to transport the 13,000 staves, the residue of the 70,000 named in the contract. No question is made of the right of the Marcella to the freight earned on the 57,000 staves, although the contract was only partially performed. The precise point to be determined is whether the $1,000 named in the contract is to be considered a penalty merely, or as liquidated damages. Suppose the Marcella had refused to perform any part of the contract, could the Avendano Bros. have recovered the $1,000 for the breach? In answering this question, it is to be noted first, that where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. Bearden v. Smith, 11 Rich. Law, 554. One of the tests by which this question is to be solved is the language of the contract. In the contract under consideration, the word "damages" is not used. The language is, "We, the owners of the Marcella, agree to forfeit $1,000 if we fail to carry out this contract." While no particular phraseology is held to govern absolutely, and although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by other very strong considerations. Higginson v. Weld, 14 Gray,

165; Richards v. Edick, 17 Barb. 260; Leggett v. Insurance Co., 50 Barb. 616; Powell v. Burroughs, 54 Pa. St. 329. The word "penalty" is not used in this contract, but the word "forfeit" is, which may fairly be regarded as an equivalent. The verb "to forfeit" is defined, "to lose by some breach of condition; to lose by some offense." The noun "forfeit" is defined to be "a forfeiture, a fine, a mulct." The noun "penalty" is defined, "forfeiture, or a sum to be forfeited for noncompliance with an agreement, a fine." See Worcester's Dictionary. These definitions show that the words "forfeit" and "penalty" are substantially synonymous, so that when the owners of the Marcella agreed, that in a certain contingency they would forfeit $1,000, their meaning was, that the penalty for nonperformance should be that sum. So that the contract under consideration provided for a penalty to cover actual damages, and did not stipulate for liquidated damages. The damages sustained by a breach of this contract were such as could, without difficulty, be ascertained. This is another reason for construing the contract to provide for a penalty to cover actual damages only. Kemble v. Farren, 6 Bing. 141; Lampman v. Cochran, 16 N. Y. 275; Higginson v. Weld, 14 Gray, 165; Berry v. Wisdom, 3 Ohio St. 241. In Taylor v. Sandford, 7 Wheat. [20 U. S.] 13, Marshall, C. J., said: "In general, a sum of money to be paid in gross for the nonperformance of an agreement is considered a penalty. It will not, of course, be considered as liquidated damages." But in the case under consideration there had been a part performance of the contract; by far the larger part of the service to be done had been performed, and there appears to have been an acceptance of such part performance. In such a case the rule has been laid down, that when the contract is such that it can be separated, as to performance, so as to admit of an assessment of damages for a breach of one part and not of another, a party should not, for a small omission, be made responsible for the whole amount of damages specified. Colwell v. Lawrence, 38 Barb. 643; Fitzpatrick v. Cottingham, 14 Wis. 219. In the case of Shute v. Taylor, 5 Metc. [Mass.] 61, the supreme court of Massachusetts, after stating it to be the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages, held it decisive against the latter construction, that in the case before them there had been a part performance and an acceptance of such part performance.

These rules of construction and authorities, it seems to me, settle beyond controversy that the $1,000 named in the contract of the Marcella is to be considered as a penalty only, to cover the actual damage arising from the nonperformance of the contract. The Avendano Bros. are, therefore, entitled to deduct in equity from the freight carried, only the actual damage sustained by the nonperformance of the contract, and cannot claim a credit for the $1,000 as liquidated damages in full. As there is no actual damage shown or even claimed, they are not entitled to any reduction from the freight actually carried. I have considered the question just as if the Marcella had attempted to offer no excuse for the nonperformance in full of her contract. It is claimed on her part, that she was disabled, and that the water in the bayou became so low as to be unnavigable for her, and that these facts excused the full performance of the contract, which provided for a failure arising from accidents beyond control. But in the view I have taken of the contract, it is unnecessary to consider this question.

Let there be a decree that Avendano & Bros. pay into the registry of the court the sum of $2,121.40, the freight due the Marcella, with interest from date of judicial demand, and without any deduction for damages.

TAYLOR (MARTIN v.). See Case No. 9,166.

TAYLOR (MAYO v.). See Case No. 9,357.

TAYLOR (MECHANICS' BANK v.). See Case No. 9,383.

TAYLOR (MECHANICS' BANK OF ALEXANDRIA v.). See Case No. 9,386.

Case No. 13,798.

TAYLOR v. MOORE et al.

[5 Cranch, C. C. 317.] [1]

Circuit Court, District of Columbia. Oct. Term, 1837.

ASSIGNMENT—DEATH OF ASSIGNOR—RENTS.

An assignment of rents, with a power of attorney to collect them as they shall become due, is a valid assignment in equity, although the assignor should die before they are collected.

Chancery attachment.

CRANCH, Chief Judge, delivered the opinion of the court.

The bill states that W. S. Moore was in debt to the plaintiff [Harrison Taylor] $55, and that James Green was indebted to Moore in a larger amount; that Moore was an absent debtor, and that Green resided in Alexandria. The attachment was served on the 19th of July, 1830. Moore died some time in September, 1830. The attachment was returnable to November term, 1830. Green, in his answer, admits that on the 19th of July, 1830, he was indebted to Moore $208.83½, and afterwards paid to Thomas Irwin, Jr., executor of Thomas Irwin, deceased, $217.83½, which he claimed under a power of attorney from Moore. This settlement of the rents with Green was made on

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

the 17th of September, 1830, the account having been made up to the 18th of July, 1830; and left with Green by Irwin on the 5th of July, 1830, and paid by Green on the 2d of October, 1830, after the death of Moore. It appeared by Irwin's answer that Moore, being largely indebted to him as executor of Thomas Irwin, deceased, on the 1st of May, 1827, for the purpose of making some provision for the payment of the debt, agreed to appropriate towards the payment thereof, the rents of Moore's property in Alexandria which had been before conveyed to R. I. Taylor, in trust to secure the debt; and in pursuance of that agreement gave the defendant, Irwin, a letter of attorney to enable him to collect the rents and apply them towards the payment of the debt; accompanied by a letter to Mr. R. I. Taylor, of the same date, namely, May 1, 1827. The rents in question became wholly due in the lifetime of Moore, while the letter of attorney was in full force, and Mr. Irwin had a legal right to receive them and apply them to his own use as executor, and Green was bound to pay them to him before the attachment was levied.

Equity will consider that as done which ought to have been done. The power of attorney and letter to Mr. Taylor, and the answer of Mr. Irwin, are evidence of an assignment of those rents to Mr. Irwin; so that at the time of the attachment, Mr. Irwin and not Mr. Moore was the creditor of Green, and there was nothing in his hands upon which the attachment could operate.

The court being of this opinion, it is not necessary to decide upon the other objection made by Mr. Taylor, the defendant's counsel, that the attachment was dissolved by the death of Mr. Moore before the return of the writ. The plaintiff's bill must be dismissed, with costs.

Case No. 13,799.

TAYLOR et al. v. MORTON.

[2 Curt. 454.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.[2]

TREATIES—POLITICAL QUESTION—CUSTOMS DUTIES.

1. Though a treaty is a law of the land, under the constitution of the United States, congress may repeal it, so far as it is a municipal law, provided its subject-matter is within the legislative power of congress.

[Cited in Buckner v. Street, Case No. 2,098; U. S. v. Tobacco Factory, Id. 16,528; U. S. v. Bridleman, 7 Fed. 902; Bartram v. Robertson, 15 Fed. 214; Castro v. De Uriarte, 16 Fed. 97; In re Ah Lung, 18 Fed. 29; The Head-Money Cases, Id. 141; Re Chae Chan Ping, 36 Fed. 434. Approved in dissenting opinions in Scott v. Sandford, 19 How. (60 U. S.) 629, and in Chew Heong v. U. S., 112 U. S. 563, 5 Sup. Ct. 255.]

2. A promise in a treaty, that the products of one country shall not be subjected to a higher rate of duty than like products imported into the United States from other countries, addresses itself to the political and not to the judicial department of the government, and the courts cannot try the question whether it has been observed, or not.

[Cited in Ropes v. Clinch, Case No. 12,041; Netherclift v. Robertson, 27 Fed. 741; North German Lloyd S. S. Co. v. Hedden, 43 Fed. 22. Cited in dissenting opinion in Baldwin v. Franks, 120 U. S. 703, 7 Sup. Ct. 764. Approved in Whitney v. Robertson, 124 U. S. 194, 8 Sup. Ct. 458. Cited in Botiller v. Dominguez, 130 U. S. 247, 9 Sup. Ct. 527. Applied in Chae Chan Ping v. U. S., 130 U. S. 602, 9 Sup. Ct. 628.]

3. Though the treaty with Russia, of December 18, 1832 (8 Stat. 444), stipulated that no higher rate of duties should be imposed on goods imported from Russia than on like articles imported from other places, this court cannot try the question, whether a certain species of hemp, on which a duty of twenty-five dollars per ton is imposed by an act of congress, is "like" Russian hemp, within the meaning of the treaty. This is a question for congress, not for the courts.

[Cited in Cherokee Tobacco v. U. S., 11 Wall. (78 U. S.) 621; Edye v. Robertson, 112 U. S. 598, 5 Sup. Ct. 247.]

This action of assumpsit [by Charles G. Taylor and others], for money had and received, was against [Marcus Morton] the collector of customs of the port of Boston and Charlestown, and came on to be tried before the district judge, at a former term. The parties put in their evidence, and then agreed that the case should be taken from the jury, and submitted to the court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence; and that a verdict should be entered as the court might think proper upon the law and the evidence.

Choate & Bell, for plaintiffs.

Hallett, Dist. Atty., and C. J. Loring, contra.

CURTIS, Circuit Justice. This is an action of assumpsit for money had and received, brought against the defendant as collector of the customs of the port of Boston, to recover back moneys alleged to have been illegally exacted by him in payment of duties, upon a quantity of hemp imported by the plaintiffs from Russia, while the tariff act of 1842 (5 Stat. 548) was in operation. The duties charged were at the rate of forty dollars per ton. The plaintiffs allege that twenty-five dollars per ton was the true rate. The commercial treaty between the United States and Russia of the 18th December, 1832, stipulated, in substance, that no higher rates of duty should be imposed on the products of Russia imported from that country into the United States, than on the like articles imported from other countries. The tariff act of 1842 imposed a duty of forty dollars per ton on all hemp excepting Manilla, Suera, and other hemps of India, on

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

[2] [Affirmed in 2 Black (67 U. S.) 481.]

which a duty of twenty-five dollars only was to be levied.

The plaintiff's counsel insists, that the import now in question is, within the meaning of the treaty, an article "like" Bombay hemp; that congress has levied upon Bombay hemp a duty of twenty-five dollars per ton; that as soon as this lower duty had been levied on an article like Russian hemp, the stipulation in the treaty at once took effect, as part of our municipal law, and reduced the duty leviable on Russian hemp to twenty-five dollars per ton; and so, that under the laws of the United States, the amount beyond twenty-five dollars per ton, was illegally exacted, and can be recovered back in this action.

Several questions, involved in this position, require examination. One of them, when stated abstractly, is this,—if an act of congress should levy a duty upon imports, which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied? The second section of the fourth article of the constitution is: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." There is nothing in the language of this clause which enables us to say, that in the case supposed, the treaty, and not the act of congress, is to afford the rule. Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct. This provision of our constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is made, even in respect to the constitution itself. It is named in conjunction with treaties and acts of congress, as one of the supreme laws, but no supremacy, is in terms assigned to one over the other. And when it became necessary to determine whether an act of congress repugnant to the constitution could be deemed by the judicial power an operative law, the solution of the question was found, by considering the nature and objects of each species of law, the authority from which each emanated, and the consequences of allowing or denying the paramount effect of the constitution. It is only by a similar course of inquiry that we can determine the question now under consideration.

In commencing this inquiry I think it material to observe, that it is solely a question of municipal, as distinguished from public law. The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is, exclusively, for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one department, or another, neither the treaty itself, nor any implication drawn from it, gives him any right to inquire. If the people of the United States were to repeal so much of their constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern. We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not, whether the act of congress is consistent with the treaty, but whether that is a judicial question to be here tried. If the act of congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just interpretation of the treaty, or an accurate knowledge of the facts of likeness or unlikeness of the articles, or whether it was an accidental or purposed departure from the treaty; and if the latter, whether the reasons for that departure are such as commend themselves to the just judgment of mankind. It is sufficient that the law is so written, and, if I mistake not, we shall find by further examination, great reasons for not entering into these inquiries. By the eighth section of the first article of the constitution, power is conferred on congress to regulate commerce with foreign nations, and to lay duties, and to make all laws necessary and proper for carrying those powers into execution. That the act now in question is within the legislative power of congress, unless that power is controlled by the treaty, is not doubted. It must be admitted, also, that in general, power to legislate on a particular subject, includes power to modify and repeal existing laws on that subject, and either substitute new laws in their place, or leave the subject without regulation, in those particulars to which the repealed laws applied. There is therefore nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by the legislative power, at its pleasure.

The first and most obvious distinction between a treaty and an act of congress is, that the former is made by the president and ratified by two thirds of the senators present; the latter by majorities of both houses of congress and the president, or by the houses only, by constitutional majorities, if the president refuses his assent. Ordinarily, it is certainly

true, that the powers of enacting and repealing laws reside in the same persons. But there is no reason, in the nature of things, why it may not be otherwise. In the country from which we have derived many political principles, the king, by force of his prerogative makes laws for the colonies, which parliament repeals or modifies at its discretion. Campbell v. Hall, Cowp. 204. I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible. It is not only inconsistent with the necessities of a nation, but negatived by the express words of the constitution. That gives to congress, in so many words, power to declare war, an act which, ipso jure, repeals all provisions of all existing treaties with the hostile nation, inconsistent with a state of war. It is true this particular power to repeal laws found in treaties, is expressly given, and is applicable only to a case of war; but, in the first place, it is sufficient to prove the position stated above, that there is nothing, in the nature of things, which requires that the same persons who make the law by a treaty, should alone have power to repeal it. In the next place, it is also true, that the powers to regulate commerce and to levy duties are as expressly given, as the power to declare war; and the former are as absolute and unrestrained as the latter.

It may be said that a declaration of war, being necessarily inconsistent with existing treaties with the hostile nation, the power to declare it is necessarily a power to repeal such treaties; but that power to regulate commerce and impose duties might be and was expected to be exercised in conformity with existing treaties. To a certain extent this may be admitted. But it cannot be admitted that these powers can be, or were expected to be exerted, under all circumstances, which might possibly occur in the life of a nation, in subordination to an existing treaty; nor that the only modes of escape from the effect of an existing treaty, were the consent of the other party to it, or a declaration of war. To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence. That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to congress. That, inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed, and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects, which the constitution has placed under that legislative power. In conformity with these views was the action of congress, in passing the act of July 7, 1798 (1 Stat. 578), declaring the treaties with France no longer obligatory on the United States.

It is pertinent, to advert briefly to some of the consequences of holding an opposite doctrine, which are directly presented by the case at bar. If the treaty were held to be paramount to the act of congress on this trial, it would be necessary to determine, first, what is the true interpretation of the words, "like article"; and this would be a question of law to be decided by the court; and a rule having been thus obtained, the question whether Russian hemp is like Bombay or Manilla hemp, would be a matter of fact to be submitted to the jury. The just interpretation of the treaty, by which a practical rule may be arrived at, applicable to this particular case, and capable of guiding a jury in its decision, is attended with no small difficulty. The respective counsel for the parties have widely different views concerning it. The one contends that "like" denotes substantial identity; or, at least, sameness in all respects. That the origin, the mode of production and preparation, the uses to which each is adapted and applied, and the pecuniary value of each in the market, are all to be considered; and that an article made from a different plant, by different methods of manufacture, having substantially different qualities, not capable of being usefully employed for the same purposes, and bearing a much lower price in the market, is not "like," within the meaning of the treaty. The other maintains that these diversities are unimportant. Undoubtedly it is the duty of the court to encounter these difficulties, and ascertain the true rule, and it is the duty of the jury to apply this rule, and find their verdict accordingly, if this be a judicial inquiry. But it is quite plain, it cannot be competent for the court to go any further than a determination that the case is within the treaty. If congress legislates in subordination to the treaty, viewed as municipal law, it is not material what its reasons were for legislating in contravention of the treaty. If the other party to it, had by similar legislation, in admitted or plain disregard of the treaty, afforded the amplest reasons for counter legislation, how could

this court take notice of or weigh those reasons?

Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows, that if they are denied to congress and the executive, in the exercise of their legislative power, they can be found nowhere, in our system of government. On the other hand, if it be admitted that congress has these powers, it is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the act in question they have not departed from the treaty, the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the constitution, to judge of its grounds, and act as may be suitable and just.

There is another view of this case, which has been presented by the plaintiff's counsel, and requires examination. It is urged that, as Russian hemp is not specifically named, the court may conclude, it was not the intention of congress to include it under the words "all unmanufactured hemp"; that though these words are broad enough to include it, the obligation, arising from the treaty, not to include it, is such as to raise an exception of this article; and that the true construction of the act is, "upon all unmanufactured hemp, not hereinafter excepted, either expressly, or by force of the treaty with Russia, the duty is to be $40 a ton, and upon those so excepted $25 a ton." To this construction of the act, I think there are insuperable objections. It must be admitted at the outset, that it would do violence to the language of the act, and would force into it an exception which it does not contain. Why should this be done? It is said because it is offered to be proved to the satisfaction of a jury, by the evidence in this case, that Russian hemp is like Bombay hemp, and so there should be no discriminating duty levied. But, in the first place, this argument makes the jury the judges whether the case is, in point of fact, within the treaty, and then makes the court declare that, if within the treaty, there should be no discriminating duty. As already stated, I do not consider these to be judicial questions. It must be observed also, that there are two ways of avoiding discrimination. One is to reduce the duty on the article which is provided for in the treaty; the other, to increase the duty on the "like" article. The treaty is as well satisfied by one mode as by the other. If I were to assume that this case is within the treaty, and that it was the intention of congress not to depart from it, how shall I say that they intended to have the duty on Russian hemp $25 a ton, rather than the duty on Bombay hemp $40 a ton? One is as consistent with their language as the other; or rather neither can be reconciled with what they have said.

The truth is, that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties, and those which operate as laws in courts of justice, is settled in our jurisprudence. It was clearly pointed out in Foster v. Neilson, 2 Pet. [27 U. S.] 314. By the treaty between the United States and Spain, of the 22d of February, 1819 (8 Stat. 252), it was stipulated by the former, "that all grants of land made, &c., by his Catholic majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, &c." The question arose, whether this clause operated on the titles to the lands. Mr. Chief Justice Marshall, delivering the opinion of the court said: "Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not to the judicial department, and the legislature must execute the contract before it can become a rule for the court." After commenting on the language of the article, he proceeds. "This seems to be the language of contracts; and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject." This is the established doctrine under this treaty, as well as under that by which Louisiana was acquired. 8 Stat. 200. See Garcia v. Lee, 12 Pet. [37 U. S.] 519. Its applicability to a stipulation, like that now in question, is clear. The contract is to legislate in conformity with a rule therein given. This necessarily addresses itself, exclusively, to the legislative power. It is a rule of their action, and not of the action of courts of justice. They alone must determine which con-

struction it shall receive, and what cases are or are not within it, in point of fact, unless by law they refer these matters to the judicial department of the government. To some extent, congress has done so, both under the Florida and Louisiana treaties. But they have not done so under this treaty with Russia. And, in the language already quoted, "until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject."

For these reasons, I am of opinion that, inasmuch as the duty paid in this case was duly assessed and levied pursuant to the act of congress, there is no further or other question to be tried, and the plaintiffs cannot recover. I desire to add, what perhaps is not necessary, that the various suppositions of violation or departure from treaties by foreign sovereigns, or by our country, which are put by way of argument in the course of this opinion, have no reference whatever to the treaty now in question, or to any actual case; that I have not formed, or intended to intimate, any opinion, upon the question whether the duty levied upon hemp, the product of Russia, is, or is not higher, than a just interpretation and application of the treaty with the sovereign of that country would allow; as, in my judgment, it belongs to the political department of the government of the United States to determine this question.

[On error, the above judgment was affirmed by the supreme court. 2 Black (67 U. S.) 481.]

TAYLOR (PENNY v.). See Case No. 10,957.

Case No. 13,800.

TAYLOR v. RASCH et al.

[1 Flip. 385;[1] 11 N. B. R. 91; 1 Cent. Law J. 555; 31 Leg. Int. 365.]

Circuit Court, E. D. Michigan. Oct. 19, 1874.

PARTNERSHIP—CONTRACT BEYOND SCOPE OF BUSINESS—LIMITED PARTNERSHIP—HOW AND WHEN PARTNERS ARE PROTECTED.

1. Every one trading with a limited partnership is chargeable with notice as to the scope and range of the business of the partnership, and as set forth in the articles, when the same have been filed and made known according to law.

2. The capital of special partners in a limited partnership against liability upon contracts made by general partners, is protected by the same general principle that obtains in favor of general partners against liability on contracts made by individual partners; and no departure by general partners, no matter how common or long continued, if not consented to or known and acquiesced in by the special partners, will have the effect of enlarging or changing the scope of the business as specified in the copartnership articles.

[This was a bill in equity by Elisha Taylor, assignee, against August Rasch and William Bernart.]

[When this case was before the court on a former occasion on demurrer to the bill, it was held that a proper case for relief was made out by the bill. The demurrer was overruled, and the defendants were granted leave to answer. [Case No. 13,801.] Thereupon the defendants answered, and proofs have been taken. The issues of law arising in the case as made by the bill, were disposed of by the decision of the court upon the demurrer. All that remains to be done, therefore, is to dispose of the issues made by the answer. They are as follows: (1) That the arrangement or agreement under which the furniture in question was purchased by defendants was not as set up in the bill, but was made with "the firm of Tillman, Sillsbee & Co. by and through said William Tillman," and was of the tenor and effect, "that if the said defendants or either of them would purchase furniture of the said firm of Tillman, Sillsbee & Co., that then the said firm of Tillman, Sillsbee & Co., or any of the members thereof, should purchase clothing of these defendants in payment of the same." (2) That the arrangement and agreement was within the scope and ordinary course of business of the firm.] [2]

Ashley Pond, for complainant.

O. Kirchner and G. V. N. Lothrop, for defendants.

LONGYEAR, District Judge. The firm of Tillman, Sillsbee & Co. was a limited partnership, and was composed of William Tillman and Charles E. Sillsbee as general partners, and John S. Newberry as special partner. Whatever the proofs show as to the general partners being parties to the arrangement for exchange of patronage between them and the defendants, or as to what the particular character of that transaction was, one thing is certain, and that is, there is no proof or pretense that the special partner was in any way privy to the arrangement, or knew of it, or in any way assented to it. It is contended, however, that by the statutes of Michigan the general partners had authority to bind the firm. The statute referred to is as follows: "Section 3. The general partners only shall be authorized to transact business, to sign for the partnership, and to bind the same." 1 Comp. Laws 1871, p. 520, § 1569. The effect of the statute is simply to exclude the special partner from active participation in the business of the firm; and as to the general partners, it confers no authority upon them to transact business, sign for the partnership, and to bind the same in any manner, or to any extent whatever, beyond the purposes and scope of the partnership. Therefore, conceding that the arrangement in question was made with the general partners, as claimed in the answer, if it was not within the scope and purposes of the partnership, it was wholly unauthorized, and therefore void.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [From 11 N. B. R. 91.]

This brings us to the second and only remaining issue made by the answer.

The scope and purposes of the partnership are specified in the articles, as follows: (2) "That the general nature of the business to be transacted by said partnership, is the purchase, sale, and manufacture of all kinds and descriptions of furniture, chairs, upholstering, furnishing and upholstered goods, lumber, and all kinds of articles, merchandise, tools and machinery, used in such manufactures."

Surely it does not require argument to show that a contract for the purchase of clothing for the individual general partners, or otherwise, does not come within "the general nature of the business to be transacted by said partnership," as specified in the articles.

But it was contended that such had been the usual course of business of the firm, and proofs were adduced tending to show that such was the fact; and it was argued that, therefore, the defendants had a right to assume that the transaction was within the scope of the partnership. The articles of copartnership were duly filed and published as required by the statute, and all persons dealing with the firm were bound to take notice of, and were chargeable with knowledge of their contents. No departure by the general partners, no matter how common or long continued, if not consented to or known and acquiesced in by the special partner, could have the effect to change or enlarge the scope of the business as specified in the articles. To hold the contrary would be to disregard plain provisions of law for the protection of special partners and the public, and would make a limited partnership one of extreme hazard to the special partner.

In the opinion of this court, overruling the demurrer to the bill, it was shown that a general partnership could not be made liable upon a contract by an individual partner out of the scope of the partnership business. The same principle of law that protects general partners from liability in such cases, protects the capital of special partners in a limited partnership. Troub. Lim. Partn. § 377.

It results that the complainant is entitled to a decree against the defendants for the balance of the account of Tillman, Sillsbee & Co. against them over and above the fifty dollars actually paid to the firm by one of its employees on account of defendants, together with interest on such balance from and after the date of the last item in the account, viz.: June 8, 1870, and for costs.

The balance of the account as alleged in the bill, and admitted by the answer, was	$473 25
Interest from June 8, 1870, to date, October 19, 1874, four years, four months, eleven days	144 47
Total	$617 72

Decreed accordingly.

Case No. 13,801.

TAYLOR v. RASCH et al.

[5 N. B. R. 399;[1] 4 Amer. Law T. 201.]

District Court, E. D. Michigan. Oct. 3, 1871.

BANKRUPTCY — FRAUDULENT PREFERENCE — PARTNERSHIP PROPERTY — PAYMENT OF INDIVIDUAL DEBTS — PRACTICE IN EQUITY — ADEQUATE REMEDY AT LAW.

1. An agreement to sell an individual certain specific articles expressly for his individual use and consumption, to be paid for out of the partnership goods of the firm, is void as to the other partners.

2. Such an arrangement, made without the knowledge, assent or approval of his copartners, is therefore fraudulent and void as to them.

3. A demurrer to a bill in equity brought by the assignee, on the ground that complainant has a complete remedy at law, will be overruled where the facts show that questions of fraud, trust and partnership are all involved in the case at issue.

[This was a bill in equity by Elisha Taylor, assignee, against August Rasch and William Bernart.]

On demurrer to the bill of complaint. The bill sets up that Tillman and Silsbee, as the partners composing the firm of Tillman, Silsbee & Co., were adjudged bankrupts in the district court of the United States for the eastern district of Michigan, June thirtieth, eighteen hundred and seventy, and the complainant was appointed assignee July fifteenth, eighteen hundred and seventy; that the said firm, while it existed, was engaged in business at Detroit, in said district, in the manufacture and sale of household furniture; that Tillman and Silsbee were the general partners in the firm, and that John S. Newberry, of Detroit, was a special partner therein; that the firm was a limited partnership, and was formed under the statutes of Michigan, August fifth, eighteen hundred and sixty-seven, and was to continue until March first, eighteen hundred and seventy-three, and was duly published; that the defendants were partners, doing business at Detroit under the firm name of Rasch & Bernart, in the manufacture and sale of men's clothing. The bill then charges, "that on or about the eighteenth day of September, eighteen hundred and sixty-nine, the said William Tillman individually entered into an arrangement with the said defendants to the following effect: That he, the said Tillman, would purchase clothing from them for his own private use and consumption, and that they, the said defendants, would and should, in payment therefor, purchase and receive furniture from the said firm of Tillman, Silsbee & Co. to a like value and amount." That in pursuance of said arrangement the said Tillman afterwards purchased from the defendants, for his own private use, clothing to the value of four hundred and thirty-eight dollars. That the defendants afterwards obtained

[1] [Reprinted from 5 N. B. R. 399, by permission.]

furniture from the store and stock of Tillman, Silsbee & Co. to the amount and value in all of five hundred and twenty-three dollars and twenty-five cents, as follows: April twenty-third, eighteen hundred and seventy, three hundred and sixty-nine dollars and twenty-five cents, and May twenty-first, eighteen hundred and seventy, one hundred and fifty-four dollars. The bill further alleges, "that of the amount so received by the defendants (five hundred and twenty-three dollars and twenty-five cents) the sum of fifty dollars was paid in clothing sold and delivered by Rasch & Bernart to an employee of the said firm, and duly accounted for by him, leaving a balance of four hundred and seventy-three dollars and twenty-five cents." The bill charges that the said arrangement was so made and the furniture was so delivered without the knowledge, consent or approval of either Silsbee or Newberry. That at the time the furniture was delivered the firm of Tillman, Silsbee & Co. was insolvent, and at the time the arrangement was made the firm had met with losses, its capital was impaired and it was indebted in large amounts. That Tillman had no right or authority to withdraw funds or property for his own private use, or to appropriate the same to the payment of his private debts, but on the contrary had largely overdrawn his account and was largely indebted to the firm. That the said arrangement and delivery of furniture in pursuance of it were not within the scope or course of business of the firm of Tillman, Silsbee & Co., which fact the defendants well knew. The bill sets up that the defendants have offered to pay to the complainant the balance of furniture obtained by them over and above the clothing and the credit of fifty dollars, but that complainant has declined to receive the same, and has required defendant to pay the full value of the furniture, less the said credit of fifty dollars. That the assets of the bankrupts are not sufficient to pay the firm debts, and the full amount and value of the said furniture will be needed for that purpose. The bill claims that the arrangement between Tillman and defendants was wholly unwarranted and illegal as against Silsbee and Newberry, and as against complainant as assignee. That the delivery and receipt of the furniture under the arrangement was and is to be deemed a fraud upon Silsbee and Newberry, and passed no title in the same to the defendants, and that the same should be deemed assets of the said firm. Prayer, that the arrangement be set aside; that the defendants be decreed to hold the furniture in trust for Silsbee and Newberry and complainant, and to produce and surrender the same to complainant, and to pay for the use and enjoyment of the same, or that they pay the full value thereof, less the said credit of fifty dollars, with interest, and for general relief.

The demurrer is general to the equity of the bill. On the argument the following grounds of demurrer were insisted on: (1) As appears by the bill the arrangement made by Tillman with the defendants was according to the ordinary course of the partnership business. (2) The partner Tillman, as the general agent of the firm, had authority to make the arrangement. (3) If the arrangement was not valid, complainant has a complete remedy at law, and quity has no jurisdiction.

Mr. Towle, for complainant.
Mr. Kirchner, for defendants.

LONGYEAR, District Judge. The first ground of demurrer is based upon the well settled rule of law that if any one holds another out to the world as having authority to do certain things in his behalf, and such other person obtains credit in consequence thereof, he will not be permitted to deny that such person had the requisite authority; and it is predicated on the allegation in the bill of credit of fifty dollars given to the defendants by the bankrupts in consequence of a payment made by them in clothing to an employee of the firm and duly accounted for by him. It is argued, the firm having thus recognized the authority of an employee to receive pay from the defendants in clothing on account, a fortiori, the defendants had a right to assume that a similar arrangement made by one of the partners would be recognized, or at least that it is evidence that such was the ordinary course of the business of the firm.

This argument is based upon the following assumptions: First. That the transaction with the employee was before the transaction with Tillman. This assumption is not supported by the bill, but by necessary inference is rebutted. The statement in the bill is, that the fifty dollars paid by the defendants to the employee was "of the amount so received by the defendants," but none of this amount was received by the defendants until several months after the original transaction between them and Tillman. Second. That the credit of fifty dollars was given to defendants solely on account of the payment made by them to the employee. Neither is this assumption supported by the bill. The statement in the bill is that the fifty dollars was paid "to an employee of the firm and duly accounted for by him." The necessary inference is, that the credit was given because the amount paid to the employee was accounted for by him. It is but another form of stating that fifty dollars had been paid to the credit of defendants by an employee of the firm. The balance of the statement is mere matter of detail, entirely unnecessary to the understanding of that portion of the case made by the bill. In the case of Hazard v. Treadwell, 1 Strange, 506, relied on by defendants' counsel, the servant had been sent

by his employer with authority to obtain the goods on the employer's credit. It was held that on a second application by the same servant the party applied to had the right to assume that he came with the same authority, although, in fact, he did not, and the employer was held liable for goods delivered to the servant on such second application. That is very different from a case like the present, where the transaction in question was long anterior to the transaction on account of which it is sought to be justified; where, in fact, no credit was given, but simply a payment made on a prior indebtedness; where no previous authority to the employee to receive pay for his employer in that manner appears, and where the credit given the defendants for the amount so paid to the employee appears to have been given only when accounted for by him. The first ground of demurrer is not sustained.

The second ground of demurrer is, that the partner Tillman, as the general agent of the firm had authority to make the arrangement with the defendants. The commendable energy of counsel on both sides, manifested in their research for, and citation of, decisions relating to this proposition, as well as in their able arguments, has been of much aid to the court in arriving at a conclusion. It is conceded that an individual partner cannot bind the concern by a note or contract given or made for his individual debt, or use and benefit, without the consent of his copartners, express or implied; nor can he, without such consent, use partnership funds or property to pay a prior individual debt; nor can he, without such consent, cancel an indebtedness to the firm by crediting upon its books an individual indebtedness of himself. But it is contended that a sale of goods in the ordinary course of the partnership business, under a contemporaneous or prior arrangement with the purchaser to pay for them in specific articles, is within the general powers of each individual partner, and that the fact that such specific articles were taken and used by such individual partner will not affect the validity of the sale; that in such case the firm must look to such individual partner for reimbursement. This, as an abstract proposition, is no doubt correct. In such case, the purchaser of the partnership goods sells his specific articles to the firm, and it is no concern of his what disposition is afterwards made of them. He does the business, it is true, with an individual member of the firm, and perhaps delivers the articles to him individually and upon his separate premises. But even this does not alter the case. See McKee v. Stroup, Rice, 291. If this were all there is of the present case, there would be no difficulty in holding the transaction between Tillman and the defendants valid. The difficulty in the case lies in the fact that the agreement was to sell to the individual partner Tillman, not to the firm, certain specific articles, expressly for his individual use and consumption, to be paid for out of partnership goods of the firm of Tillman, Silsbee & Co. I can see no difference in principle between this case and that of an agreement to pay an individual prior indebtedness out of partnership funds. In the one case the indebtedness exists when the agreement is made. In the other the indebtedness is to follow the agreement. It is just as much an individual transaction in the one case as in the other, and each must be held invalid in the same circumstances, equally with the other. The bill expressly negatives the knowledge, assent or approval of the other partners, and alleges knowledge in the defendants that the arrangement made by Tillman with them was not in accordance with the usual scope or course of dealing of the partnership. The current of authority and of decisions in this country, almost without exception, unites in denouncing such a transaction as fraudulent and void, as to the other partners. Mr. Parsons, in his treatise on Partnerships, makes use of the following language: "Instances of partners using the name or credit of the firm for their personal advantage and without authority, are constantly occurring; and as we have seen, when this is known to persons dealing with them, the firm are not held. Some difficulty often arises as to the proof of such knowledge on the part of the creditor. There is a rule, however, which rests on much authority, and is in itself reasonable, just and convenient, which would settle the most of these cases, or at least reduce them to mere questions of fact. It is, that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time" (thus including the very case here under consideration) "or before existing, or by way of settlement of, or security for, a debt or indebtedness, or obligation of the firm in any form" (thus putting this case and the others all in the same category), "the presumption of the law is that the partner gives this and the creditor receives it in fraud of the partnership, and has consequently no demand upon them." See, also, the numerous authorities cited by the author in the note; also Story, Partn. § 132; Homer v. Wood, 11 Cush. 62, 64. It is competent, of course, for the defendants to rebut this presumption by showing the express or implied assent of the other partners to the arrangement. But without such showing the arrangement clearly cannot be upheld. In each of the numerous adjudicated cases cited by counsel, with but two exceptions, such assent, or its absence, constituted the basis of, or at least an essential element in the decision. The exceptional cases are Strong v. Fish, 13 Vt. 277, and Eaton v. Whitcomb, 17 Vt. 641. In these cases the subject of assent was not discussed or noticed, and the arrangement was upheld. The reasoning and conclusion, however, are entirely unsatisfactory, and I cannot regard them as sound. In the latter case, Chief Justice Williams deliv-

ered a dissenting opinion, which I regard as laying down the law much more in accordance with the current of decisions. As at present appears the arrangement between Tillman and the defendants was not within the scope and course of the partnership business, which was known to the defendants, and was made without the knowledge, assent or approval of his copartners, and the same is therefore fraudulent and void as to them. The second ground of demurrer is therefore not sustained.

The third ground of demurrer is, that if the arrangement was not valid, complainant has a complete remedy at law, and equity has no jurisdiction. Cases were cited upon the argument in which actions at law had been brought and sustained in such cases, but in none of them was the question raised. In no case, however, where there was a separate equity jurisdiction, in which the question was raised, has the action at law been maintained; and in nearly every case in which the question has been so raised, equity jurisdiction has been directly asserted or strongly intimated. In an action at law the defrauding partner must be made a party plaintiff, together with his copartners, and the action is denied on the familiar rule of law that a party to a fraudulent transaction cannot himself seek to set it aside. The remedy in such cases is to the innocent defrauded partners, which cannot be sought at law and can be sought only in equity. As we have seen, the arrangement between Tillman and the defendants was presumptively fraudulent. A fraudulent purchaser may be held a mere trustee for the innocent owners or part owners. 2 Story, Eq. Jur. § 265. The case here involves to some extent the litigation of partnership relations among the partners themselves. We have, therefore, these three grounds of equity jurisdiction, viz. fraud, trust and partnership. 1 Story, Eq. Jur. § 681; Colly. Partn. § 643; Story, Partn. § 238, and note 4; Jones v. Yates, 9 Barn. & C. 532; Greeley v. Wyeth, 10 N. H. 15, 19; Pennock v. Yeager, 5 Phila. 171; Homer v. Wood, 11 Cush. 62; Estabrook v. Messersmith, 18 Wis. 545, 550; Fellows v. Wyman, 33 N. H. 351, 358. So much as to the rights and remedies of the partners in such cases. Here the remedy is sought by the assignee in bankruptcy of the firm for the benefit of creditors. Partnership creditors must be first paid out of the partnership property. Such preference, while it creates no lien, strictly speaking, on such property, may be worked out through the partners. In the ordinary creditors' bill the suit for that purpose is brought by the creditors themselves. The assignee in bankruptcy represents the creditors, and hence the suit is brought in his name. In fact, bankruptcy proceedings are in the nature of a general execution for all the creditors; and an effectual lien is created thereby for their benefit, to be enforced by and through the assignee. The creditors may pursue partnership property which has not been legally parted with into whosesoever hands it may be. Under the present bankrupt law this must be done through the assignee. And where, as in this case, property has been placed beyond his reach by action at law, and the right thereto being, as we have seen, a right in equity merely, the same must be reached through the courts of equity, as is sought to be done in this case. "All rights in equity" of the bankrupts pass to the assignee by express provision of the bankrupt act, section fourteen. See 1 Story, Eq. Jur. § 675; 2 Story, Eq. Jur. § 1253; Story, Partn. §§ 97, 326, 360; Sands v. Codwise, 4 Johns. 536, 556; Ex parte Stokes, 7 Ves. 408; Clements v. Moore, 6 Wall. [73 U. S.] 299, 312; Halbert v. Grant, 4 T. B. Mon. 581; Matlack v. James, 2 Beasley [13 N. J. Eq.] 126; Hoxie v. Carr [Case No. 6,802]; Miner v. Pierce, 38 Vt. 610; Hawkeye Woolen Mills v. Conklin, 26 Iowa, 422; Flack v. Charron, 29 Md. 318; Crooker v. Crooker, 46 Me. 250, 259; Ferson v. Monroe, 21 N. H. 462; Benson v. Ela, 35 N. H. 403, 410; Tenney v. Johnson, 43 N. H. 144, 147. The third ground of demurrer is therefore not sustained.

The demurrer is overruled with costs, and the defendants have leave to answer within thirty days.

[For hearing on the issues made by the answer, see Case No. 13,800.]

TALYOR (READY ROOFING CO. v.). See Case No. 11,613.

TAYLOR (RICE v.). See Case No. 11,755.

TAYLOR (ROBACK v.). See Case No. 11,877.

Case No. 13,802.

TAYLOR et al. v. ROCKEFELLER et al.

[35 Leg. Int. 284; 18 Am. Law Reg. (N. S.) 298; 7 Cent. Law J. 349; 7 N. Y. Wkly. Dig. 3; 6 Reporter, 226; 6 Wkly. Notes Cas. 283; 25 Pittsb. Leg. J. 182; 24 Int. Rev. Rec. 245.] [1]

Circuit Court, W. D. Pennsylvania. June 17, 1878.

REMOVAL OF CAUSES—FILING PETITION AND BOND—POWER TO DETERMINE WHETHER A CAUSE IS REMOVABLE — CITIZENSHIP.

1. In an application for removal of a cause from a state to a federal court the petition and bond must be filed "before or at the term at which the cause could be first tried and before the trial thereof."

2. It is the federal court and not the state court that has the power to adjudge whether the case is a proper one for removal under the act of congress.

[Cited in Dennis v. Alachua County, Case No. 3,791; Cruikshank v. Fourth Nat. Bank, 16 Fed. 889.]

3. Under the act of 1875 [18 Stat. 470], although some of the formal or nominal plaintiffs and defendants may be citizens of the same

[1] [Reprinted from 35 Leg. Int. 284, by permission. 7 N. Y. Wkly. Dig. 3, and 6 Reporter, 226, contain only partial reports.]

state, still if it is shown that it is a controversy wholly between citizens of different states, and can be fully determined as between them, then it is a cause that can be removed to the federal court.

[Followed in Arthur v. New England Mut. Life Ins. Co., Case No. 565. Cited in Chester v. Wellford, Id. 2,662. Approved in Sheldon v. Keokuk N. L. P. Co., 1 Fed. 797. Cited in Buckman v. Palisade Land Co., Id. 369; Ruckman v. Ruckman, Id. 590. Approved in Bybee v. Hawkett, 5 Fed. 8.]

[Cited in brief in Amy v. Manning, 144 Mass. 153, 10 N. E. 738. Cited in Dunn v. Burlington, C. R. & N. R. Co., 35 Minn. 83, 27 N. W. 453. Cited in brief in Sharp v. Gutcher, 74 Ind. 364.]

[Motion to remand suit to state court.

[The bill in this case was originally filed in the common pleas of Butler county, to March term, 1878, on February 8, 1878. It charged that the plaintiffs, together with one Vandegrift and one Foreman, sold to the defendants an undivided one half interest in certain oil property, and entered into partnership with them for the purchase and operation of oil territory and the produce and sale of petroleum; that at the time of the partnership a written instrument, an exhibit made part of the bill, was entered into by certain trustees, parties of the first part, the plaintiffs and others of the second, and Rockefeller and Flagler of the third; the action of Rockefeller and Flagler being afterwards confirmed by the other defendants. This agreement provided for the manner of holding the land, and for dissolution of partnership; by it the trustees were created managers at a compensation, the profits and proceeds of sales to be divided and given, one half to Flagler for the parties of the second part, one half to Flagler for the parties of the third part. A motion for a receiver was immediately made, and a time fixed for hearing the motion. On the 18th the defendants entered an appearance, and on the 21st filed a joint answer under oath. On the 25th the court appointed a receiver. On the 5th of March Rockefeller and Flagler filed a petition for removal to the United States circuit court, setting forth that they were citizens of Ohio; that some of their co-defendants were citizens of New York and some of Pennsylvania; that the plaintiffs were citizens of Pennsylvania and New York; that the controversy was wholly between citizens of different states, and could be determined between the plaintiffs and the petitioners without the presence of the other defendants; that they believed from prejudice and local influence they would not obtain justice, etc. The petition was accompanied by the bond required by the act. After argument the court denied the prayer of the petition. The defence nevertheless removed the case.] [2]

George Shiras, Jr., M. W. Acheson and John M. Miller, for the motion.

Rufus P. Ranney, McJunkin & Campbell, Robert Woods, D. T. Watson and Hampton & Dalzell, contra.

STRONG, Circuit Justice. Three reasons are assigned in support of the motion to remand this case to the state court. They are as follows: First, that the application to remove the case into this court was not made in time. Secondly, that if the application was in time the record discloses that the state court, in the due and orderly exercise of its own jurisdiction, has adjudged that the record and petition did not exhibit a case proper for removal under the acts of congress; and has refused to part with its jurisdiction. And thirdly, that the record clearly shows this court can have no jurisdiction of the case.

Of the first reason little need be said. The act of congress of March 3, 1875, has greatly enlarged the jurisdiction of the circuit courts of the United States, and enlarged correspondingly the right of removal of civil suits from the state courts. The second section of the act enacts as follows: "That any suit of a civil nature, at law, or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined, as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district."

The third section prescribes the time when such removal may be made, and the manner in which it may be effected. It enacts that either party, or any one or more of the plaintiffs or defendants entitled to remove the suit, may make and file in the suit in the state court a petition for the removal before or at the term at which the cause could be first tried, and before the trial thereof, together with a bond with surety, etc. It is then made the duty of the state court to accept the petition and bond, and proceed no further in the suit. The petition and bond must be filed "before or at the term at which the cause could be first tried, and

[2] [From 6 Reporter, 226.]

before the trial thereof." In this case the bill was brought to March term, 1878, of the state court. It was filed on the 8th of February, 1878; a motion was instantly made for a receiver, and the 20th of February was assigned for hearing the motion. On the 18th of February the defendants entered their appearance, and moved to postpone hearing of the motion for a receiver until the 27th. This motion the court denied, but postponed the hearing one day. On the 21st of February the defendants filed a joint answer under oath, denying most of the material averments of the bill, together with affidavits. On February 25th the court appointed a receiver, and on the 5th of March, 1878, the petition for removal of the suit into this court was filed together with the required bond. They were filed before the first term of the common pleas, subsequent to filing the bill, commenced. This recital of the facts, as they appear by the record, without more, is sufficient to show that the application for removal was made in due time.

The second reason advanced for remanding the case is equally without merit. If a proper petition and bond were filed in due season, as we have seen they were, and if the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The act of congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed in the suit. It thus is made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It may be admitted that when the petition, read in connection with the other parts of the record, does not show a case of which the circuit court has jurisdiction, the jurisdiction of the state court is not ousted. In such a case that court may proceed. It may therefore examine the petition and record, but its judgment upon the question whether a proper case appears for removal is not conclusive upon the circuit court. It is to be observed that no order of the state court for a removal is necessary; certainly none since the act of 1875. Nor is any allowance required. The allowance is made by the statute. Hence when the petition and record exhibit a case for removal, coming within the statute, all jurisdiction of the state court terminates. It has even been said every subsequent exercise of jurisdiction by that court is "coram non judice," null and void. Such was the language of the supreme court in Gordon v. Longert, 16 Pet. [41 U. S.] 97, and the declaration has been repeated in other courts. This would seem to follow from the fact that subsequent action by the state court is expressly prohibited by the act of congress. But whether the declaration was strictly accurate when it was made, or not; whether subsequent exercise of jurisdiction by the state court was not void, but merely erroneous, it is unimportant now to consider; for plainly by the act of 1875, the power of removal and the jurisdiction of the federal court is made independent of any action or non-action of the state court upon the application. The 5th section of the act requires the circuit court to dismiss a suit which has been removed, or remand it whenever it shall appear to its satisfaction that it does not involve a dispute or controversy properly within the jurisdiction of the circuit court. A decision of the state court, therefore, that the cause sought to be removed is one of which the circuit court has jurisdiction, can have no effect. It can not force jurisdiction upon the circuit court, nor can it deny jurisdiction to it. And further, the 7th section empowers the circuit court, to which any cause shall be removable under the act, to issue a writ of certiorari to the state court commanding said court to make return of the record in any such cause, removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce said writ according to law. Surely it would be no sufficient return to such a writ that the state court had decided the case was not one which could be removed, or had decided that the circuit court had no jurisdiction. So also it may be inferred from another provision of the act that no action of the state court can prevent or hinder the removal. A severe penalty is imposed upon the clerk of the state court who shall refuse to any one or more of the parties applying to remove a cause, a copy of the record therein, after tender of the legal fees for such copy. The copy must be furnished for filing in the circuit court to any party applying for removal, without reference to any action the state court may have taken. For these reasons we think the refusal of the court of common pleas to allow the removal of the case into this court is immaterial.

The third reason urged in support of the motion to remand is the most important one. If it be true indeed that the case is one of which this court has no jurisdiction, it is our duty to remand it to the court from which it has been removed. Whether we have jurisdiction or not depends both upon the citizenship of the parties and the controversy involved. What the citizenship is must be determined from the bill filed by the plaintiffs; and to the bill with its exhibit, the answer and the petition for removal, alone, can we look, for the controversy between the parties, so far as it bears upon our jurisdiction. Taylor, one of the plaintiffs, is a citizen of New York, and his co-plaintiffs citizens of Pennsylvania. Rockefeller and Flagler, the petitioners for removal, are two of the defendants, and they are both citizens of Ohio. The other defendants sued with Rock

efeller and Flagler, are citizens either of Pennsylvania or of New York. The petitioners are therefore citizens of a different state from those of which the plaintiffs are citizens, though some of the plaintiffs and some of the defendants are citizens of the same state, viz., Pennsylvania. Such being the citizenship, it may be admitted that, as the law was before the enactment of the act of 1875, the petitioners would have had no right to remove the case into the circuit court, and that court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a federal court. So it was ruled in Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, when the 12th section of the judiciary act of 1789 [1 Stat. 79] was under consideration, and this has been the constant construction of that act. Similar rulings have been made with reference to the acts of 1866 [14 Stat. 306] and 1867 [Id. 558]. Case of Sewing Mach. Cos., 18 Wall. [85 U. S.] 553; Knapp v. Railroad Co., 20 Wall. [87 U. S.] 122. Such was the general rule. It was not, however, of universal application. Even in Strawbridge v. Curtis the court declined giving an opinion of a case where several parties represent several distinct interests, and some of the parties are, and others are not competent to sue, or liable to be sued in the courts of the United States. And the rule has often been held not to apply to merely formal parties. Thus in Wood v. Davis, 18 How. [59 U. S.] 468, it was said by the supreme court: "It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction if the citizenship or character of the real parties be such as to confer it." The court has gone much further. In Shields v. Barrow, 17 How. [58 U. S.] 139, speaking of parties to a bill in equity, they were described as, first, formal parties; second, necessary parties; and third, "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Such are indispensable parties. And subsequent decisions held that it is only when an indispensable party defendant was a citizen of the same state with the plaintiff that the jurisdiction of the federal courts was defeated. Ober v. Gallagher, 93 U. S. 204.

But whatever may have been the doctrine held prior to the act of congress of 1875, that act has introduced great changes of the law. The first section extends the jurisdiction of the circuit courts nearly, if not quite as far as the second section of the third article of the constitution authorizes, alike in regard to the subject matter of suits, and to the citizenship of the parties. It adopts the words of the constitution. The second section relates to the removal of suits from state courts into United States circuit courts, and if follows the language of the first section. Hence, any cause which might have been commenced in the circuit court, either because of its subject matter or the citizenship of the parties, may be removed from a state court into the federal one. The question always is, whether, on account (of) the citizenship of the parties or the subject of the controversy, the federal court has jurisdiction.

Whether since the act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs, or some of them, is no doubt a very important question not yet decided. It does not, if the rule of construction applied to the judiciary act of 1789, and the acts of 1866 and 1867, is applicable to the later act. But the later act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the circuit courts, all the jurisdiction, which, under the constitution, it was in the power of congress to bestow. Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the constitution to give jurisdiction to the federal courts of controversies between citizens of different states, apply as strongly to it as they do to a case in which all the defendants are citizens of a state, other than that in which the plaintiffs are citizens, and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative. However that may be, it is certain the act of 1875 confers a right to remove cases which could not have been removed under any former act. It expressly declares that when in any suit mentioned in the second section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court. It is not where the controversy, or even the main controversy, is between such citizens. The meaning of the clause is not obscure. In many suits there are numerous subjects of controversy, in some of which one or more of the defendants is actually interested, and other defendants are not. The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause, "a controversy, which can fully be determined as between them," read in connection with the other words, "actually interested in such controversy," implies that there may be other

parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy which is wholly between the citizens of different states, or their being parties to the action is no obstacle to a removal of the case into the circuit court.

If this is a correct construction of the act of congress, the case in hand is free from difficulty. The petition of Rockefeller and Flagler for removal, asserts that the controversy is wholly between them and the plaintiffs, and that as between them it can be fully determined. The motion to remand traverses no fact set out in the petition. It simply presents the question whether the facts asserted in the record show that under the act of congress the case was improperly removed, and that this court has no jurisdiction of it. The fifth section of the act provides that, if at any time it shall appear that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, that court shall proceed no further therein, but shall remand it to the court from which it was removed. Looking then to the bill and answer, do they involve such a controversy? We cannot doubt that they do.

The bill, with its exhibit, made a part of the bill, charges that the plaintiffs, together with one Vandegrift, and one Foreman, sold an undivided half interest in their oil producing properties to the defendants (not naming them,) and entered into a partnership with the defendants, (not naming them,) having for its object the purchase and operation of oil producing territory, and the production and sale of crude petroleum. It further charges that, at the time of entering into the contract of partnership, a written contract was executed between certain trustees of the first part, the plaintiffs, and Vandegrift and Foreman, of the second part, and Rockefeller and Flager of the third part, confirmed by the other parties defendant, providing for the manner in which the title to the lands and property of the partnership should be acquired, held and disposed of, and fixing a limitation and method of dissolution of the partnership. A copy of this agreement is annexed to the bill, and made a part of it. From the whole tenor of the bill it is evident that agreement is what is called the contract of partnership. But on reference to it its purpose was not to create or evidence a partnership. It is a mere declaration of trust. The parties to it are Taylor and Bushnell, two trustees, of the first part, whose duty is to hold the lands conveyed to them, and to manage them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Foreman, Pitcairn and Sutterfield, of the second part, and Rockefeller and Flagler, of the third part. There are no other parties to the agreement. The parties mentioned as of the third part are petitioners for the removal of the case. They are the only defendants named in the contract. The other defendants, it is true, appear to have joined in one of the conveyances of land conveyed to the trustees, and by a separate instrument they expressed assent to the agreement, and declared that their conveyance was made for the purpose set forth in it. But they entered into no covenants, and assumed no obligation to the plaintiffs. Looking more minutely to the contract, it appears that Taylor and Bushnell, the trustees, and parties of the first part, were constituted managers of the property and the interests of the trust, for a compensation to be fixed. All the other parties were at best mere cestuis que trust, and it was stipulated that in case profits were divided they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor for the second party, and the other half to Henry M. Flagler for the third party. Beyond doubt, therefore, Rockefeller and Flagler are the main defendants in this suit. There are no other indispensable defendants. If those who have not petitioned for a removal of the suit into this court have any interest at all in it, it is because Rockefeller and Flagler, the petitioners, are their trustees, a matter in which the plaintiffs have no interest. Conceding that those other defendants are cestuis que trust of Rockefeller and Flagler, which does not clearly appear, they are not necessary parties to the bill. They are represented by their trustees. Kerrison v. Stewart, 93 U. S. 159. And the fact that they have been made parties by the plaintiffs is, under the act of 1875, no obstacle to the removal of the case into the federal court. Ellerman v. New Orleans, etc., R. Co. [Case No. 4,382]; Osgood v. Railroad Co. [Id. 10,604]; Turner v. Railroad Co. [Id. 14,259]; Dill. Rem. Causes, 34, note. The case, therefore, plainly involves a controversy which is wholly between the plaintiffs and Rockefeller and Flagler, and which can be fully determined as between them. If there are other controversies, in which the other defendants are interested, they are merely incidental; they are not the main controversy. The real controversy, as appears on the face of the bill, independent of the answer and the petition for removal, is between the plaintiffs and Rockefeller and Flagler, the second and third parties to the trust agreement. This is true whether the third parties are solely interested in one-half of the trust property, or whether they are trustees of the other defendants.

Indeed, according to the literal reading of the statute, (a reading quite in harmony with the constitution,) the right of removal, and the jurisdiction of this court exists, though the controversy between the plaintiff and the defendants, who are petitioners for the removal, be not the main controversy in the case. It is enough if there be a controversy

wholly between citizens of different states, which can be fully determined as between them, though it may not be fully determined as between the plaintiffs and the other defendants. The phrase, "as between them," is significant. And there is no necessary embarrassment attending such a removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the circuit court, having thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental. This is in accordance with the acknowledged practice, and with the adjudications. It has even been ruled that supplementary, auxiliary or dependent proceedings, though commenced by original bill, and involving only controversies between citizens of the same state, will be entertained in the federal courts when necessary to a complete determination of all the matters growing out of a controversy in those courts between citizens of different states. Jones v. Andrews, 10 Wall. [77 U. S.] 833, and cases in note.

But in this case it is unnecessary to invoke such decisions. The case, as exhibited by the bill of the plaintiffs, is one of property equitably held in common, to be managed and divided as stipulated in an agreement, and the object of the suit is to terminate the trust declared, and to have the property sold and divided according to the equities of the parties interested. The agreement itself provides how the division shall be made. Any rights to the profits, or proceeds of sale, not belonging to the second or third parties, that is, not belonging to the plaintiffs, or Rockefeller and Flagler, are only incidental. The entire property described in the agreement, together with all rights to it, and all duties in relation to its management belong to the plaintiffs and Rockefeller and Flagler. If the other defendants have claims against the latter, they are outside of the real controversy, and claims in which the plaintiffs have no interest.

We think, therefore, the case was properly removed into this court, and the motion to remand it to the state court is denied.

Case No. 13,803.

TAYLOR v. The ROYAL SAXON.

[1 Wall. Jr. 311.] [1]

Circuit Court, E. D. Pennsylvania. July 11, 1849.

ADMIRALTY — JURISDICTION — TITLE TO VESSEL — SALE UNDER DECREE—EFFECT ON PRIOR LIEN—LIS PENDENS — CONFLICT OF JURISDICTION.

1. The admiralty jurisdiction of the courts of the United States extends to petitory suits as well as to those merely possessory; that is to say, it may pass upon the disputed title of ships as well as upon the simple right of possession to them.

[Cited in Grigg v. The Clarissa Ann, Case No. 5,826.]

2. A sale of a vessel by order of a court of Pennsylvania under the foreign attachment law of that state, does not divest a lien in the admiralty for seamen's wages, which may accordingly be enforced in the latter court. (The libel in the admiralty was here filed prior to the order of sale in the state court.)

[Cited in brief in Taylor v. Carryl, 24 Pa. St. 261.]

3. The pendency of a replevin in a state court to settle the right of property in a vessel, is a bar to a libel in the admiralty to settle the same right between the same persons; not technically a bar as a plea of lis pendens, but effectively so, to prevent a conflict of jurisdiction.

[Cited in The Oliver Jordan, Case No. 10,503; The Tubal Cain, 9 Fed. 837; The City of Lincoln, 25 Fed. 843.]

[Cited in Fisher v. Whoollery, 25 Pa. St. 199. Cited in brief in Howe v. Freeman, 14 Gray, 568; Leighton v. Harwood, 111 Mass. 69; Smith v. Ford, 48 Wis. 155, 2 N. W. 159.]

"The Royal Saxon," a British barque, arrived at Philadelphia in October, 1847, and on the 17th of November following, Magee issued a foreign attachment from the supreme court of Pennsylvania and attached her as the property of one McIntyre, the defendant in the attachment suit. The sheriff of Philadelphia county executed this writ; placing his officer on board, who retained her in his custody until she was sold as hereinafter mentioned. On the 15th of January, 1848, this same Magee presented his petition to the court from which his attachment had issued, praying a sale of the barque as chargeable, and obtained a rule for her sale, which, after argument in behalf of the captain and owners, was made absolute on the 29th. The barque was accordingly sold by the sheriff on the 9th of February, 1848, when Ward, the real defendant in this suit, bought her for $2,800, and the sheriff delivered her to him.[2] On the 21st January, 1848, Wall et al., mariners, libelled the barque in the admiralty for wages. Process was issued on the same day,—that is to say, eight days before the order of sale from the supreme court,—the marshal returning specially, "Attached the barque Royal Saxon, and found a sheriff's officer on board, claiming to have her in

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

[2] The process of foreign attachment in Pennsylvania, is a writ by which the sheriff attaches a non-resident debtor by all and singular his goods and chattels * * * in whose possession soever the same may be * * * so that he appear in the court from which the writ issues. "The goods and effects of the defendant in the attachment shall after such service be bound in the hands of the garnishee—(the person in whose possession they are) by such writ," and if susceptible of it shall be taken into possession by the sheriff. After judgment against the defendant, the plaintiff may have execution "of the estate and effects of the said defendant attached as aforesaid." If the goods attached are of a perishable or chargeable nature, the court will order them to be sold. Act June 13, 1836; Serg. For. Attachm. 23.

custody." [Case No. 17,093.] Other libels followed in quick succession: among them one of the 22d January, by the master, for wages: and one on the 25th, by a mariner, for wages. To these libels the marshal made a like return. On the 25th January, 1848, the master of the barque presented to the district judge in admiralty, a petition, reciting the foreign attachment of Magee, declaring his inability to procure bail to relieve the barque; that he had not funds to pay the wages of the mariners; (the mariners having remained with the barque in expectation of continuing the voyage;) that the barque was at a daily expense, and concluding with a prayer that the court would interfere "by ordering a sale of her." To this prayer was appended the approval of the British consul for this port. An order of sale was accordingly issued by the district judge, and on the 15th of February, 1848, she was sold a second time, by the marshal, for $1,600, to Mr. Taylor. At this sale, Ward publickly notified to all persons his title under the sheriff's sale, and that any claim derived from the marshal's sale would be contested by him. The marshal executed a bill of sale and delivered the barque to Mr. Taylor. Mr. Taylor being thus in possession, under the marshal's sale, of the barque which Mr. Ward had bought under the sheriff's sale, the latter gentleman, on the 24th February, 1848, issued a replevin out of the supreme court of Pennsylvania, and having given the sheriff the bond required by law, in double the value of the barque, "conditioned to prosecute the suit with effect and without delay, and for duly returning the barque in case a return should be awarded," the sheriff replevied the barque from the possession of Mr. Taylor, delivered it again to Ward and summoned Mr. Taylor as defendant; who responded by causing an appearance to the suit to be entered by counsel. While the replevin suit was thus pending, Mr. Taylor, in his turn, now filed this libel in admiralty (the present suit) for the re-possession of the barque alleging in his libel "that the said barque was wrongfully withheld from him."

On this state of facts, which were all disclosed by the pleadings—the pendency of the replevin being pleaded in abatement, and also generally by way of bar—three questions arose: (1) Has the district court, sitting as a court of admiralty, jurisdiction of this case, or power to entertain a petitory as distinguished from a possessory suit, and so determine the question of title to a ship? (2) Did Taylor obtain a good title to the barque as against the other claimants, through the proceedings and sale made to him under the authority of the court of admiralty? (3) If so, can he sustain this suit, notwithstanding the pendency of the replevin suit in the supreme court of Pennsylvania for the same property?

The district judge, was of the affirmative opinion on all three points.

Mr. Waln and G. W. Biddle, for Ward.

This is a petitory suit as distinguished from a possessory one, that is to say, it is a suit whose object is to determine the title of the ship; not the mere possession of it. The English admiralty, at no time since our Revolution, would have entertained such a suit. Sir W. Scott tells us—The Aurora (1800) 3 C. Rob. Adm. 133–136—"that it was formerly held, for a very long time, and down to no very distant period, to be within the jurisdiction of this court to examine and pronounce for the title of ships on questions of ownership. It was not till some time after the Restoration," he says, "that it was informed by other courts that it belonged exclusively to them. Since that time," he adds, "this court has been very cautious not to interfere at all in questions of this nature." In a prior case (3 C. Rob. Adm. 93) he refused to entertain a suit for possession; the property being litigated and doubtful: and many years afterwards—The Warrior (1818) 2 Dod. 288—he speaks of the admiralty as being "very abstemious in the interposition of its authority on questions of title." In a third case—The Pitt (1824) 1 Hagg. Adm. 242—still later, he says: "It considers itself and is bound to consider itself as moving within very narrow limits, if it proceeds at all, originally, upon a question of title." In Re Blanshard, 2 Barn. & C. 248, the king's bench refused to grant a prohibition to the admiralty "to take a vessel from a wrong doer and to deliver it to the rightful owner;" it being assumed by the king's bench that the admiralty would not have proceeded, if the defendants had "pleaded their title." The case of The Tilton [Case No. 14,054], which will be cited on the other side, is in point against us; but it is not binding as authority on this circuit: and the opinions, as to admiralty jurisdiction of the eminent judge (Story) who decided De Lovio v. Boit [Id. 3,776], have never yet received higher approbation than that which he gave to them, at different times, himself. Clerke, whose Praxis Supremæ Curiæ Admiralitatis will be also cited, though a good author, is a very old one; having lived in the time of Elizabeth. He is therefore no authority in a case where a change is asserted to have been made about the time of Charles II.

(2) Suppose this court may pass upon the title, who has the title? The sale under the foreign attachment was a judicial sale; of which the effect is "a transfer of all the rights of property to the highest bidder, so that he cannot be disturbed by lien creditors or mortgagees, who have not made resistance to the decree; nor after sale and confirmation by any claimants of title to any part of the estate levied; because the decree extinguishes (purges) all rights of prop-

erty, mortgages, incumbrances and quitrents in default of opposition." Corporation v. Wallace, 3 Rawle, 109-126; quoting Ferriere, Dict. de Droit, Verbo "Saisie Reellee." This principle which has been adopted from its convenience and justice, by the common law, comes to it in truth from that very system administered here, that is to say, the civil and maritime law. The Madonna Del Burso, 4 C. Rob. Adm. 169. The sale transferred all liens from the barque to the fund produced by the sale of it. This undoubtedly is true in the case of judgments on real estate, or of executions on personalty, where the supreme court constantly refer it to their auditor to settle the right of claimants to the fund. In a leading case (Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, 710) in the supreme court of the United States, the practice was applied in admiralty, and the wages of sailors sustained against the proceeds of the ship which had been forfeited for the acts of the owner. "The lien," says Judge Story, "re-attaches to the thing, and to whatever is substituted for it."

It is vain to say that the interest of the owners in the barque—which was all that the foreign attachment sold—was the barque incumbered by legal liens. It is just as true that an execution creditor who, last of all creditors, levies on personalty, can sell nothing but the defendant's interest, that is to say, can sell only the property subject to the lien of former executions. Yet all prior executions are divested. Indeed foreign attachment is a proceeding in rem. The debtor is attached by "his goods and chattels." The execution is to be out "of the estate and effects of the said defendant attached as aforesaid." It is the thing which is taken possession of and sold; not the defendant's reversionary or resulting interest in the thing.

(3) Admit the general jurisdiction of this court to pass on questions of title, and that Mr. Taylor is the owner. Can this court decide that he is owner? Decide so now, while that very question will be passed upon by the supreme court of the state on a writ of replevin which issued and was completely served prior to the time when the libel here was filed? Technically speaking, perhaps the plea of lis pendens may not apply: for that is pleaded only where the suit is brought by the same plaintiff against the party filing the plea. But the pendency of the suit of replevin is pleaded generally in bar; and the question is not one of lis pendens technically applied, but a question of comity arising under our complicated system of state and federal jurisprudence. Look at the effects in this very case. The marshal of this court is expected to deliver to Taylor the barque which only an hour, perhaps, before, the sheriff of another court had taken from him and delivered to Ward. That the supreme court of Pennsylvania is competent to decide this question of property must be conceded. A replevin is the precise form of action in which to raise the question, and Mr. Taylor has actually appeared to the summons in such a suit. Here then that court had got clear and competent possession of the matter before this court heard of the difficulty at all. Will this court take the matter out of its hands? even if it could do so. But suppose that that court or its suitors should interpose; that Ward again replevies, and that Taylor again files a libel. What is to be the effect? Either an unending and senseless counter-impetration of writs, or else a conflict between this court and the supreme court of the state. To state this case is to decide it; and hence it has passed into a maxim, that in all cases of concurrent jurisdiction, the court that first gets possession of the subject must determine it eventually. Smith v. McIvor, 9 Wheat. [22 U. S.] 532.

The Robert Fulton [Case No. 11,890] is in point. The syllabus is, "The sheriff having attached the vessel under the process of the state court, it was held that the marshal could have no authority to take it out of his possession, but should have so returned to prevent a conflict of jurisdiction." Hagan v. Lucas, 10 Pet. [35 U. S.] 400, applies the same principles to final process, so as to prevent "a most injurious conflict of jurisdiction."

F. W. Hubbell and Mr. Hood, for Taylor.

The English admiralty always has maintained (Clerke, Praxis Supremæ Curiæ Admiralitatis, §§ 41, 42), and still does maintain jurisdiction in petitory suits. It is true that in cases involving long and intricate inquiries of fact, which cannot be well decided without the aid of a jury, it has sent the questions of fact elsewhere for trial. But in simple questions of law, whether involving title or possession, it still entertains the jurisdiction. At furthest, it is said to have been "very abstemious in the interposition of its authority," or "bound to consider itself as moving within very narrow limits."

In The Aurora, 3 C. Rob. Adm. 133, and The Warrior, 2 Dod. 288, cited on the other side, Sir W. Scott did consider the question of title; in the former case deciding on its insufficiency: in the other, taking no action upon it. So he did in The Pitt, 1 Hagg. Adm. 240, declining to pass on it from the difficulty of getting at the truth of the facts. The Lagan, 3 Hagg. Adm. 418, though called a cause of possession, was in truth a question of title: the right to possession, indeed, often settles title. The Experimento, 2 Dod. 38, 42, was clearly one of title, though disputed between British and foreign subjects, and Sir W. Scott there denies that the court of admiralty cannot look "a little" into title. In Re Blanshard, 2 Barn. & C. 244, 249 (reported somewhat differently on this point, as Bax-

ter v. Blanshard, 3 Dowl. & R. 177–184), the court of king's bench refused a prohibition to prevent the admiralty taking a vessel from a mere wrong doer and delivering it to the owner: and argue from the higher power of the admiralty "in disputes between owners as to the employment of the ship," that "as part owners of a vessel have a distinct though undivided interest in the whole vessel, they cannot be considered as absolute wrong doers by the act of using a vessel of which they are the proprietors." With regard to the power to settle the title generally, the chief justice, according to the least favourable report (3 Dowl. & R. 177–184), says, "I do not say whether they may or may not try the question of right." The case in the admiralty sought to be prohibited was, as appears by the report of it (The Partridge, 1 Hagg. Adm. 81), a dispute between the original owner of a ship and the purchaser upon a sale by the master abroad. It did therefore involve title. The grounds of the refusal of admiralty to act, are stated by Lord Stowell in The Pitt, already cited. "Where the possession is gained by force and violence, or by a fraud manifest upon the very face of the transaction; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests, there the court feels no hesitation, but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves it to be determined by the inquiry of courts which have ampler means of arriving at the real truth, and the real justice of the case; for there may be some incidental matters—such as repairs and other expenses, requiring the application of equitable principles which this court may not feel itself competent to administer. I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety."

The question here is one of mere law; whether a sale under the process of admiralty, of a vessel previously sold because of her chargeable nature, while in the hands of the sheriff under an attachment for debt gives the preferable title? It is a question perfectly within the faculties of this court. It has none of the difficulties which made Sir W. Scott "hold his hand and desist from ulterior measures" in The Pitt, where there was "a series of transactions charged on the one side to be fraudulent, and on the other, deemed not to have the slightest mixture of fraud in them:" and where "many documents" were not "forthcoming, which upon such a question ought to be produced." But whatever may be the law in England, the matter must be considered as settled by the investigation and judgment in The Tilton [supra], where the exact point was decided by Judge Story. This case, if not binding as a technical "authority," will yet receive the highest respect.

What then, next, has Mr. Ward got under his attachment? Nothing more than an execution in it could give him, i. e. the "estate and effects" of the defendant subject to all its infirmities. The defendant had neither "estate nor effects" here, but such as were bound by the lien for wages. The sale has not divested them any more—much less indeed—than it would divest an admitted mortgage on the barque. Reed v. Fawkes, 9 Port. (Ala.) 623, syllabus, is in point. It decides that "a fi. fa. levied on a vessel will not divest a previous lien acquired by the libellant in admiralty."

Indeed, the attachment from the admiralty having been served before the order of sale by the supreme court was made, the possession of the ship was in the admiralty, to which the foreign attachment creditors should have transferred their claim: and the possession of the sheriff as against the admiralty ceased or was suspended, and with it the jurisdiction of the supreme court to order a sale as chargeable. Both officers could not hold, and the title of the admiralty was paramount. The order of sale, therefore, by the supreme court was invalid, and the sale so likewise.

The remarks on the other side about executions and reference to an auditor don't apply. Walters v. Pratt, 2 Rawle, 265–268. When was a lien for mariner's wages ever enforced by a common law court, or any where but through the organs of the admiralty? The idea of sailors being bound by a state court auditor's notice of distribution and so "for ever debarred," is a novelty. Neither is the foreign attachment a proceeding in rem in the sense of the civil or admiralty law, or in any sense other than a fi. fa. is so. It is a mere mode of compelling the appearance of a non resident debtor, by attaching his property and rights of property.

The third point, the lis pendens, is disposed of by Judge Story (Certain Logs of Mahogany [Case No. 2,559]) in a case very similar to this; the libel having been brought to enforce the lien for freight under a charter party. The parties to the replevin, he says, are not the same. The suits are not of the same nature, the replevin being founded on tort; the libel on contract. Then the replevin acts in personam as to the judgment: the libel exclusively in rem. "The admiralty," he adds, "does not attempt to enter into any conflict with the state court as to the just operation of its own process, but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process." Then, again, the plea of lis pendens applies only where the plaintiff in both suits is the same, and both are commenced by himself. The ground of the plea is given by Bac. Abr. tit. "Abatement," M, as being be-

cause "the law abhors multiplicity of actions." It is the duplex vexatio.

As to comity, the case of Certain Logs of Mahogany [supra] is conclusive. The marshal there took the mahogany logs out of the hands of the sheriff: and a process of courtesy is destroyed by a single infraction.

GRIER, Circuit Justice. "It is certainly true," says Lord Stowell, in 2 Dod. 289, in speaking of the high court of admiralty of England, "that this court did formerly entertain questions of title to a greater extent than it has lately been in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the Restoration, however, it was informed by other courts, that such matters were not properly cognizable here, and since that time it has been very abstemious in the interposition of its authority." As few cases could arise (unless between part owners,) in which the question of possession when entertained would not necessarily introduce as an incident, the question of title, the courts of admiralty in England have been for a time almost wholly deprived, by the unreasonable jealousy of the common law courts, of a jurisdiction which they were peculiarly suited to exercise, and which has been at last restored to them by statute.[3] Recent cases in the supreme court of the United States,—Waring v. Clarke, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344,—although not directly in point on the present question, show that the courts of admiralty of the United States, have not considered their jurisdiction restrained to the narrow, and sometimes absurd limits lately imposed by the courts of common law in England. Although I am not disposed to go the length of De Lovio v. Boit [supra], I feel no difficulty in giving my assent to The Tilton [supra], which is to the point on the question now under consideration.

2. That the title acquired by Mr. Taylor to the barque Royal Saxon, was good against all the world, will hardly admit of an argument.

The attachment issued out of the supreme court of Pennsylvania, reached only the title of the defendants in the action. The sale by the order of the court, gave no higher title than if sold on an execution of the same court. The purchaser took the title of the defendants whatever it was, subject to the liens or rights attached to the vessel.

The lien for mariners' wages attaches to the vessel, in whosesoever hands it may come, with notice of the claim. It is said to be "nailed to the last plank." If she has been wrongfully seized by belligerents, and restitution of the value is afterwards made, the mariners' lien will cleave to the proceeds. Brown v. Lull [Case No. 2,018]. The proceedings in the state court were not in rem. The rights of the mariner against the vessel can only be prosecuted in a court of admiralty which proceeds in rem, and has exclusive jurisdiction of the subject matter. The vessel is not attached as the debtor, but the property or right of the defendant in the suit is distrained to compel his appearance. The purchaser in the state court might have intervened in the district court, and released the vessel by entering stipulation with sufficient sureties to satisfy the liens. He bought with full notice; for the proceedings in the district court were pending at the time of his purchase. If he has suffered a sale in the admiralty for liens which adhered to the vessel when he bought her, his title is divested as completely as if he had bought lands on execution which were afterwards sold on a mortgage which was the oldest lien upon the property.

The case of Certain Logs of Mahogany [supra] is directly in point as to this question. There, it was decided that the pendency of a replevin, in which the title and possession of the property was litigated, was no bar to the prosecution in admiralty of a claim which was a lien on the thing, and sought a remedy against it, irrespective of possession, ownership or title. To this extent we concur fully with the learned judge who decided that case, but it has been cited to support doctrines in which we do not concur, and which were not intended to be advanced by the court in that case, and which we shall notice more fully hereafter.

For these reasons, I feel no doubt of the correctness of the decision of these two questions by the learned judge of the district court.

On the third point stated, I am sorry after much reflection and examination, to be compelled to differ from that court.

The plea of lis pendens, in courts of common law, will be allowed to abate the writ only where the first suit is brought by the same plaintiff against the same defendant for the same cause of action. It is founded on the principle that the law abhors a multiplicity of actions, and that to allow a man to be twice arrested or twice attached by his goods for the same thing would be oppressive. It is plain that the plea in this case could not be sustained on these technical grounds, as plaintiff or libellant in this suit was defendant in the replevin suit instituted by the claimants in the supreme court of Pennsylvania.

But, I apprehend, the question before us depends on broader and different principles, and such as will support this plea either in abatement or in bar.

It will not be denied that the courts of Pennsylvania have full power and jurisdiction to seize a ship lying in the port of Philadelphia with a writ of replevin, and to de-

[3] St. 3 & 4 Vict. c. 65, § 4, expressly authorizing the admiralty "to decide all questions as to the title to, or ownership of any ship or vessel, arising in any cause of possession or otherwise."

cide the question of possession and property between the parties claimant. And although it has been denied, and probably will be hereafter, that the district court as a court of admiralty, has the same jurisdiction, to decide the question of title, we will assume that question as settled, at least for the purposes of the present case.

We have then, two equal and independent tribunals with concurrent jurisdiction of the parties, and the subject matter in contest.

The state court has first taken cognizance of the question of possession and property between these parties. And if it were an action of trespass where the same question might be collaterally decided in a suit by A. against B. in one court, that might arise in a suit by B. against A. in the other, it may be admitted that the pendency of such a suit in one court, would be no bar to a proceeding in the other, merely because the same question was involved and might be decided.

But we have something more. The state court has taken possession by her officer of the thing, or subject matter in controversy, and disposed of it according to law. It is true the court have not decided the question of property between the parties; that is still pending; but until that question is decided the possession of the matter in dispute is disposed of according to the law of the land.

Originally the action of replevin was a remedy for an illegal distress; and when the property distrained was delivered to the plaintiff on a writ of replevin, it became as much under his control, and as liable to be taken in execution for his debts, as his other property. The bond is substituted in court in place of the thing distrained, and the lien of the distress is gone. Woglam v. Cowperthwaite, 2 Dall. [2 U. S.] 68. In Pennsylvania a writ of replevin lies in all cases where one man claims personal property in possession of another. But the same consequences must result when the distress or taking is only fictitious, and the title and right of possession are the real matters in dispute. By virtue of the writ of replevin, the sheriff seizes the property; it is taken into the custody of the law. But as it would be injurious to both parties that the property should be so retained, the sheriff is ordered by the writ to deliver it into the custody and possession of the plaintiff, on his giving sufficient pledges. If the defendant or party in possession claims title, the sheriff does not hold an inquisition to try the question nor does any writ de proprietate probandâ issue; but the defendant is allowed to retain the possession by giving what is called "a claim property bond." When this is done, the suit proceeds as a common action of trespass de bonis asportatis. The plaintiff recovers in damages the value of the property, and the only advantage which he gains by his action of replevin, is the security which he has obtained for the damages he may recover. The delivery to the defendant is final; no retorno habendo ever issues for delivery of the specific thing to the plaintiff, or withernam to compel it. In fact, whatever the defendant's title may previously have been, it becomes indefeasible by his "claim property bond," which is substituted for the property, and has the effect, like a recovery of damages in trespass, to confer a good title on the trespasser. If the sheriff were to deliver possession to the plaintiff according to the letter of the writ, without any judgment of the court on the question of title, or any inquisition by the sheriff, or writ de proprietate probandâ without regard to the defendant's claim of title, it is plain that very great abuses might be committed.

But practice has shown that these abuses are sufficiently restrained by giving the person who has the actual possession, which is prima facie evidence of title, the first right or refusal, of taking the property into his possession during the contest about its title, and in fact of perfecting his title as against the plaintiff in the writ, by substitution of his bond.

But if the person in possession and claiming title, does not desire to retain it on these conditions, the sheriff in obedience to the command of his writ, delivers the thing seized to the plaintiff, taking sureties or pledges for the ultimate sufficiency of which the officer and his sureties are liable.

The plaintiff having thus obtained the possession by process of law, has the legal possession. The title of his antagonist is transferred to him in consideration of his bond, liable only to recaption if found in his possession by a writ of retorno habendo. In practice, this writ is seldom or never resorted to, unless to have the formal return of "elongatur."

If the plaintiff has sold and delivered the property to another, the sheriff cannot seize it on a writ of de retorno habendo; but if not found in possession of the plaintiff, he must necessarily return his writ "elongatur."

If ever a case should arise, in which the restoration of the identical property for some peculiar reason, should be preferred to a recovery of its value, a writ of withernam would lie to compel the plaintiff to restore it, and if he had sold it, to purchase it again. But whether the replevin be to restore a real or fictitious distress, the title and possession of the plaintiff to the things are considered as good and defeasible only in case of recovery by defendant, and a reseizure on writ of retorno habendo.

The plaintiff's replevin bond has been substituted in the court by consent of the defendant, and by process of the law, for the property in dispute: if the plaintiff prosecute the suit with effect, or if the defendant recover his damages, the title of plain-

tiff is absolute and indefeasible, and his possession continues to be legal till taken from him by process of the same court which gave it to him.

But on this subject we are not without cases directly in point, which confirm the views here taken. In the case of Morris v. De Witt, 5 Wend. 71, it has been decided that a writ of replevin by defendant to obtain a re-deliverance of the property taken from him by virtue of a writ of replevin issued against him, is irregular and will be quashed. The court say: "The law has provided guards against abuses in practice under the writ of replevin. It would be a very useless proceeding, if the defendant in replevin has a right to turn round and bring his action of replevin, and thus regain possession of the property which has been legally taken from him. If such a proceeding were permitted, there would be no end to suits, and the benefits of this action would never be realized. The title to the property in question must be tried upon issue regularly joined, and until such trial, the party from whom the property has been taken by due process of law, must remain out of possession, unless it is restored to him on his claim of property."

Lowry v. Hall, 2 Watts & S. 129, also asserts and confirms the views which we have taken. A raft of lumber had there been delivered to Lowry on a writ of replevin, in which Hall and others were defendants, in the state of New York. When the raft was brought into Pennsylvania, Hall took out a replevin here, Lowry pleaded the delivery to him on a replevin in New York, as conclusive evidence of his title, and a bar to a second replevin between the same parties in this state. The court below decided that an adjudication of the question of property in New York would have been conclusive, but the mere pendency of an earlier replevin there was not. The supreme court reversed the judgment, on the ground that whatever may have been the previous rights of the parties, after the delivery in replevin to one of the parties, he had not only the right of possession but of property also, till actual re-deliverance by process from the same court. "After the execution of the first replevin, then" asks Chief Justice Gibson "who had a right to the possession of this lumber by the law of New York? Unquestionably not he from whose possession it had been taken by the authority of that law and committed to the custody of an antagonist claimant, to abide the event of the suit." Again, he remarks, "it is unnecessary to contend that his title becomes absolute in form by the eloignment, for it is enough that the ownership is taken to be in him, till his title is disproved by the trial of the issue. But the property has been delivered to him as his own, on the basis, real or supposed, of having been wrongfully taken from him, and as possession is prima facie evidence of title, delivery to him, after a claim of property which admits the taking, is so too; at least it settles the right to treat it as his own, till it be adjudged to belong to another.

It is clear, therefore, that the supreme court of Pennsylvania would not have entertained a second replevin, if Mr. Taylor had brought his suit in that court; not only because it would be oppressive to compel the opposite claimants a second time (and if a second, then any other number of times,) to give sureties for prosecuting their claim to the barque, but because, by operation of law, the proceedings in the first replevin, have vested the right of possession in the party to whom it was delivered in the first writ. The pendency of the first replevin, would therefore be a valid plea, not only in abatement but in bar. And if the second replevin had been issued in the district court of the city and county of Philadelphia, which has concurrent jurisdiction with the supreme court, it is plain that they must sustain the plea, not only on the well established principle "that in cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively" (Smith v. McIvor, 9 Wheat. [22 U. S.] 532), but because the pendency of the first writ shows conclusively that the party in possession has a legal possession, which the plaintiff in the second replevin is estopped to deny; the disposition of the property by the law during the pendency of the litigation, being as conclusive on the parties as the final decision of the court on the question of title. These points being (as we think) conclusively established, it remains only to inquire whether a court of admiralty, a court of concurrent jurisdiction receiving her authority from the United States, is bound by the same rules of comity and of law, or may disregard the disposition made of the property now in dispute by the law and courts of Pennsylvania, and anticipate the decision of a controversy already submitted by the parties to the state tribunal.

The court of king's bench in England, treating the court of admiralty as an inferior tribunal, have refused to sustain a plea in abatement, that the plaintiff had libelled the defendant in admiralty, for the same cause of action. Bac. Abr. tit. "Abatement," M. But while the supreme court (the king's bench) of Pennsylvania, could not treat the court of admiralty deriving her power from the United States, as an inferior court, so neither can the latter disregard the pendency of process in the state courts, where they have concurrent jurisdiction. The principle that the first tribunal which has possession of the subject matter should be left to determine it conclusively, is not founded on mere comity, but on necessity and to avoid the unpleasant collision of jurisdictions which would otherwise ensue. Where, as in the present case, the courts, derive their power from different sovereigns, there is the great-

er reason and necessity, why "uberrima comitas" (if I may be allowed the phrase,) should be observed to avoid a conflict. It would exhibit a humiliating spectacle, to have a ship delivered by the state officer to Ward yesterday, restored to Taylor by the court of admiralty to-day—to be re-taken by process from the state court to-morrow, and so on alternately.

The fact that the title of one party was acquired under the judgment and process of the court of admiralty, and that of the other under the state court, furnishes no reason why either court should consider itself bound to warrant or sustain the title emanating from it. It is to be presumed that justice will be administered according to law, in either court, and Mr. Taylor's title, and the well known principles of maritime law on which it is founded, will be sustained in the state court, as well as here.

But it is denied that this is a case of concurrent jurisdiction, because of the different form and course of proceeding in a court of admiralty. This proceeding it is said is in rem, that all the world is a party, while the action of replevin is a mere personal action of trespass; that in the one case, the thing passes into possession of the court, in the other, the delivery is made by the officer without any order or judgment of the court.

These distinctions, though ingenious, do not constitute a difference or furnish an argument to justify the court of admiralty in disregarding the disposition made of this property by the law of Pennsylvania, whether it be temporary or final. By that law Ward has a good title to the possession of this property as against Taylor, till the court by whose process it was delivered to him, shall award a return of it.

And why is not the process of replevin as much a proceeding in rem as the petitory or possessory action in the admiralty? The forms of process and course of proceeding will differ of course, one being modeled on the common law and the other on the civil law. The caption of the suit in one case is against the thing, with a citation to the parties claiming and in possession, whoever they may be found to be. In the other, the claimants are first ascertained and made the parties at once. In either case, the officer of the court takes the subject matter in contest, into his possession. In admiralty, the court order it to be delivered to one of the parties during the contest, on his stipulating with sureties; in the state court, the officer delivers it to one of the parties according to fixed rules of law. In either case, the thing itself is disposed of by the legal process of the court, and the question of title is afterwards contested. In admiralty, where cases are more speedily decided, the property is often detained till a decision of the question of title, and is then delivered to the successful party.

It is true, that the court of admiralty, from the peculiarity of her process and modes of proceeding, is more competent to render speedy and exact justice to the parties, than the courts of common law, (more especially in disputes between part owners,) but it cannot, on that assump'n, disregard their acts and process, or anticipate their decisions. The proceeding in the one court, is in fact just as much in rem as in the other. The barque has been seized by the officer in each court, and has been delivered to one of the claimants, during the pendency of the litigation. And neither court has a right to disregard the process or judgment of the other.

The delivery by the sheriff in one case, is as conclusive between the parties, as the interlocutory order or judgment of the admiralty in the other.

The case of Certain Logs of Mahogany, already noticed, has been relied on as authority for supporting the judgment of the district court on this point, and if this were a proceeding against the vessel to enforce a bottomry bond or mariner's wages, which follow the vessel, whether the party in possession has taken it by writ of replevin or in any other way, that case would be an authority to which we would willingly assent. But the point now before us did not arise in that case, nor can we receive the arguments used by the learned judge, which were conclusive in the case before him, as having any bearing whatever on the point now under consideration.

Judgment with costs accordingly.

[See Taylor v. Caryl, 20 How. (61 U. S.) 583; Id., 24 Pa. St. 261.]

TAYLOR (SARAH v.). See Case No. 12,339.

Case No. 13,804.

TAYLOR v. SCHOLFIELD.

[2 Cranch, C. C. 315.] [1]

Circuit Court, District of Columbia. May Term, 1822.

NOTES — ENDORSEMENT AFTER DISHONOR — PAROL AGREEMENT.

If a promissory note be indorsed in blank after it has been dishonored, with a parol agreement between the indorser and the indorsee that the indorser should not be liable except in the case of the maker's insolvency, it is competent for the defendant to prove such agreement by parol evidence.

Assumpsit [by Elijah Taylor] against [Andrew Scholfield] the indorser of Peter Sanders' note, indorsed by the defendant in blank after it had been protested.

Mr. Taylor, for the defendant, offered parol evidence to show that at the time of indorsement it was agreed that the defendant should not be liable unless the maker

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

should prove to be insolvent. Between immediate parties the defendant may give evidence to contradict the words, "for value received;" a fortiori to explain an equivocal indorsement.

Mr. Hewitt, contra. The plaintiff may now fill up the blank indorsement by an absolute assignment, and the court will consider it as done; then this parol evidence is to contradict the written contract.

THE COURT (THRUSTON, Circuit Judge, absent) admitted the parol evidence. For if the plaintiff had filled the indorsement made after the dishonor of the note, by an absolute assignment, the defendant would have been permitted to show that such an absolute assignment was contrary to the agreement of the parties; and that it was agreed to be an assignment without recourse.

TAYLOR (SECURITY INS. CO. v.). See Case No. 12,607.

TAYLOR (SEDAM v.). See Case No. 12,608.

TAYLOR (SHAKELEY v.). See Case No. 12,608.

Case No. 13,805.

TAYLOR v. SHERBURNE.

[1 Hayw. & H. 106.] [1]

Circuit Court, District of Columbia. August 22, 1842.

ADMINISTRATOR—ADDITIONAL BOND.

After an administrator has been appointed, and the court subsequently is informed that a large sum of money is likely to come into his possession, it will order the administrator's removal, unless he gives further bonds, the amount of the bonds to be discretionary and decided by the orphans' court.

At law. Appeal from the orphans' court.

Coxe & Carlisle, for petitioner.

F. S. Key, for defendant.

The petitioner, Jannette Taylor, prays the court to revoke the letters of administration granted to John H. Sherburne in the estate of John Paul Jones. The petitioner states that, by the will of John Paul Jones, it appears that the said Jones left the whole of his estate, real as well as personal, to his two sisters, to be divided into as many portions as his two sisters and their children would make up individuals at the time of his death, the mothers being guardians of their respective children during their minority, but as soon as any of his nieces or nephews had reached the age of twenty-one they were to enjoy their respective shares. The petitioner is one of the original heirs of said Jones, and also the representative and sole survivor of the family of one of the sisters, Mrs. Jannette Taylor, the other sister, Mary Ann, married Mark Lowden; that said administrator never received any power of attorney or any authority from any of the said petitioner's family; that he took out letters of administration without the knowledge of George L. Lowden, one of Mary Ann's children; that said Lowden had given a power of attorney to another to act for him; that the only power of attorney he has is from one John Lowden, dated 1826, and that said power of attorney is null and void, the said John Lowden having died nearly two years ago; that the heirs have a claim against the United States for at least twenty or thirty thousand dollars.

John H. Sherburne appeared and answered the above petition, and said he was duly appointed attorney in fact of seven-tenths of the heirs of said John Paul Jones, not including the petitioner, in the year 1826; that he took upon himself the trust confirmed upon him in good faith, and it was necessary to possess legal powers for that purpose. That the claim against the United States is a balance left over after paying to the officers and crews of the Jones squadron certain prize money collected by the said Jones in 1787, the said balance being deposited in the treasury by the disbursing agent for the benefit and use of the said officers and crews; and that the heirs of Jones have no interest in said claim.

THE COURT ordered the administrator to give additional security in the penalty of $30,000.

On the appearance of Sherburne, agreeable to the order of THE COURT, the following order was passed:

Whereas, on the production of a general power of attorney from John Lowden, representing seven-tenths of the heirs of John Paul Jones, and at the same time several letters from George L. Lowden, dated late in 1838, recognizing Mr. John H. Sherburne as his agent, urging him to bring the business to a close as soon as possible, the court did (supposing the said letters and power of attorney were both from the same person) order that letters of administration be granted to said Sherburne, and on his representation that no money was to be received the court ordered that letters be granted as prayed for, provided he gave a bond in the penalty of $500. Jannette Taylor subsequently entered a caveat setting forth that Sherburne had no claim to the administration, and that at least twenty or thirty thousand dollars would be received, and Sherburne now admits that there will be $12,000 or $15,000 received from a Danish claim, and therefore prayed a revocation of said letters.

THE COURT then ordered said Sherburne by a certain day, viz., on the 2d of July, 1839, to give a new bond. Having failed to do so, it was further ordered that the letters of administration to the said Sherburne be revoked.

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

An appeal was granted to the circuit court.

The papers in the case were submitted without argument August 17, 1842.

The circuit court affirmed the order of the orphans' court.

NOTE. The claim against Denmark was for the value of the prizes, three English ships of war sent into Bergen, Norway, where they were forcibly taken possession of by the Danish government, and given up to England, on the ground that Denmark did not recognize the independence of the United States. In negotiations with Denmark the latter offered to pay ten thousand dollars to liquidate the claim. Dr. Franklin declined the offer on the ground that the value of the prizes should form the just measure of compensation.

Case No. 13,806.

TAYLOR v. SMITH et al.

[3 Cranch, C. C. 241.] [1]

Circuit Court, District of Columbia. Dec. 1827.

SHIPPING—MASTER—COPARTNER—ACTION AGAINST COPARTNERS.

One partner in a steamboat company, who acted as master and engineer, cannot maintain an action at law against his copartners, for compensation as engineer.

Indebitatus assumpsit, for compensation as engineer of the steamboat Surprize, the plaintiff [Robert Taylor] having been employed and paid as master.

It appeared in evidence, that he himself was one of the owners of the boat, and a member of the company; so that he was defendant as well as plaintiff.

Mr. Jones, for the defendants, contended that it was a partnership, and that the plaintiff could not sue his copartners at law.

Mr. J. Dunlop, contrâ, contended that part-owners are not copartners, and cited the case of Magruder v. Bowie [Case No. 8,964], in this court, at May term, 1825, which was an action at law, by an owner of one fourth of the ship Alleghany, for his share of the freight, against the ship's husbands, who had received the whole, and who were also part-owners, in which the court said that the interests of part-owners were separate and not joint, and that one might maintain an action, for his share of the freight, against others who had received the whole.

THE COURT, however, in the present case, inclined to think that the plaintiff must be considered as a partner; and that as his claim was for services on board the boat, he, being himself a copartner, would have to bear his proportion of the value of those services, and the defendants had a right to have the whole partnership concerns settled, and the plaintiff's share ascertained before they could be compelled to pay him any thing.

The plaintiff became nonsuit, with leave to move to reinstate the cause. A motion was made accordingly, which was overruled, June 5th, 1838.

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

TAYLOR (SNOW v.). See Case No. 13,148.

TAYLOR (SPERRING v.). See Case No. 13,235.

TAYLOR (STARR v.). See Case No. 13,319.

TAYLOR (STEELMAN v.). See Case No. 13,349.

TAYLOR (STOUGHTON v.). See Case No. 13,502.

Case No. 13,807.

TAYLOR et al. v. TWENTY-FIVE THOUSAND DOLLARS.

[Bee, 175.] [1]

District Court, D. South Carolina. Nov., 1801.

SALVAGE—COMPENSATION—HOW DETERMINED.

Salvage must be proportioned to the risque run, the service rendered, and the amount of property saved. And encouragement must be given to assist in cases of this sort.

[Cited in Baker v. The Slobodna, 35 Fed. 541.]

In admiralty.

BEE, District Judge. It appears in this cause that the schooner Friendship, from Nassau, bound to this port, was wrecked on the 7th instant, upon the Rattlesnake shoal, off Dewees' Island, two miles distant from any shore. The vessel beat a great way over the breakers, and the sea ran very high. They got the boat over the side, with a view to procure assistance from shore; but she broke away with one man in her, and could not return. One attempt to save themselves on a raft failed; they had determined to make a second, considering it as the last resource. Two pilot boats appeared off, but found it impossible to give them assistance. From five o'clock in the morning, when the vessel struck, to four in the afternoon, the crew were in great danger, and much alarmed for their final safety. At that hour, they were overjoyed at the sight of a canoe and four hands, with which Taylor and Deliessline had come to their assistance. As soon as they got on board, the captain said he had money, and was very desirous to save it. It was immediately put into the boat, and carried on shore, with the passengers and crew, except the captain, and one of two others. The salvors went off a second time, with two boats, one of which could not venture to go alongside. The other effected it, at great risque; but saved nothing from the vessel, except some trunks and baggage. It appeared that the seaman, who had drifted away in the schooner's boat, returned on the morning of the 9th, not having been able sooner to procure assistance. At this time it was high water, and

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

the sea rough; the vessel had bilged, and the waves were breaking over her. It was fully proved that these unfortunate persons were treated by Mr. Deliessline and Capt. Taylor with the greatest kindness. It appeared that Mr. Deliessline has a large family, and is in narrow circumstances; and that the loss of him and of his negroes in this attempt would have been attended with very serious consequences. The counsel for the actors insisted that under the circumstances of this case, the risque of the salvors, and the danger of the persons and property thus meritoriously saved would justify, and even called for a proportion not less than one third for salvage. On the other side, the services were readily admitted, but it was contended that the danger to the salvors had been too strongly set forth.

In determining cases of salvage, I have uniformly proceeded on the following considerations: (1) The service rendered. (2) The risque of the party rendering this service. (3) The value of the property saved by their means. In the present case the service was great. The parties saved were in imminent danger, and had little chance of being otherwise relieved. Two pilot boats saw their distress, but would not venture to come near them; and the persons on Long Island, to which the schooner's boat had drifted, thought the danger so great, that they would not risque themselves, their negroes, or their boats. One raft had failed; their remaining hope, from a second, was very precarious; and all the people saved are ready to acknowledge that they must have perished without the assistance given by the actors.

As to the second point, it appears that the sea ran high, and that the persons in the boat did not board the schooner without danger. It was not indeed, so imminent, as one of the counsel endeavoured to make it appear. I shall not, however, detract from the merit of the parties. Their motives were generous and disinterested, and their assistance no less prompt than voluntary. Many others, in their situation, would have remained snugly on shore. It is true, that they consulted their feelings, and did not calculate their interests. This is their highest praise; and though it has been said, that their reward is laid up in heaven, I see no reason why they should not receive such as may be decreed to them on earth. Deliessline's risque was unquestionably great; for, if he had perished with his boat and negroes, his numerous family would have been exposed to severe distress.

As to the third point: the property saved consisted of no less a sum than 25,000 dollars. If these had not been received into the boat at the time they were, it is doubtful whether they could have been saved at all. Molloy (L. 2. c. 5. s. 4.) quotes the Rhodian law as fixing a fifth, or tenth, in cases like this, according to the case, or difficulty of effecting the salvage. He adds: "Rich goods, as gold and silver, pay less than goods of greater bulk, because they are in less danger." The observations on the Laws of Oleron, quoted in page 125 of a treatise on the Dominion of the Sea, say that, according to those laws, divers and salvors should take one half, a third, or a tenth of the things saved, according to the depth of water, out of which they were recovered. In 1 Rob. Adm. 313, Sir William Scott, in a case of salvage by a boat going to the relief of a distressed vessel, expresses his opinion, as to the rate of reward, in terms to which I entirely accede. See the case.

Upon a full review of the circumstances before me, and upon mature consideration of their applicability to the principles I have laid down, and after inquiry as to what would have been the amount of premium upon the insurance of this property, I decree, that one fifth thereof be paid to these salvors; not only for compensation of their risque, their services, and their humanity, but also as an inducement to others to "go and do likewise." Let the costs of this suit be paid by the claimants out of the residue, after deducting this proportion for salvage.

TAYLOR (UNITED STATES v.). See Cases Nos. 16,436–16,442.

TAYLOR (WALLACE v.). See Case No. 17,103.

TAYLOR (WILDMAN v.). See Case No. 17,654.

Case No. 13,808.

TAYLOR v. WOOD.

[12 Blatchf. 110; 1 Ban. & A. 270; 8 O. G. 90.] [1]

Circuit Court, S. D. New York. May 30, 1874.

PATENTS — EQUIVALENTS — ANTICIPATION — ABANDONED EXPERIMENT—RUBBING MACHINE.

1. The apparatus described in letters patent granted to Allen L. Wood, December 7, 1869, for an "improved apparatus for treating diseases by mechanical movement," is an infringement of the first, second and fifth claims of letters patent No. 75,218, granted to George H. Taylor, March 3, 1868, for an "apparatus for exercise," and of the first and fourth claims of letters patent No. 77,933, granted to said Taylor, May 12, 1868, for an "oscillating rubbing machine for medical uses," and of the first claim of letters patent No. 75,217, granted to said Taylor, March 3, 1868, for an "apparatus for exercise."

2. Although, in patent No. 75,218, the handle and the foot holder are described as having oscillating or vibrating motions communicated to them, while the handle and foot holder of Wood have a rotary motion, yet the latter motion, although circular, is not a continuous motion in one direction, but is an oscillating or vibrating motion to and fro, in view of the action on the limb.

3. Although, in patent No. 77,933, the rubber is described as having india rubber on its external surface, and the rubber of Wood has a surface of cloth or leather, and is stuffed with some material, and is very slightly elastic, and is corrugated, yet the inferior adhesion of the cloth

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 1 Ban. & A. 270, and here republished by permission.]

or leather to the skin, in rubbing, requires the corrugations, and there is more or less adhesion in each of the surfaces. The change does not avoid the infringement.

4. The inventions claimed in patent No. 75,218, are not anticipated by a prior machine the motion of which was so slow as not to produce a rapid vibratory or oscillating motion, in the sense of such patent.

5. As only one of such prior machines was built, and that more than 35 years before, and the recollection of the mechanism which constituted it had passed away from the mind of the witness who deposed to its existence, if he ever knew what it was, and it could not, from such recollection, be reconstructed, and there was no other record of it, and it was only an abandoned experiment, it did not anticipate such patent.

6. The burden of proof is on the defendant to show a prior invention, and, if the evidence is too vague and unsatisfactory to establish affirmatively, as against the patent, that the patentee was later in time of invention, the patent must stand.

[This was a bill in equity by George H. Taylor against Allen L. Wood, for the infringement of certain letters patent.]

Frederic H. Betts, for plaintiff.
Charles N. Judson, for defendant.

BLATCHFORD, District Judge. This suit is brought on three several letters patent, granted to the plaintiff, namely, No. 75,218, granted March 3, 1868, for an "apparatus for exercise," No. 77,933, granted May 12, 1868, for an "oscillating rubbing machine for medical uses," and No. 75,217, granted March 3, 1868, for an "apparatus for exercise."

The specification of No. 75,218 states, that the plaintiff has invented an "oscillating vibrating machine for medical purposes." It refers to three figures of drawings—Fig. 1, a front view; Fig. 2, a top view; and Fig. 3, an end view.

It says: "This invention relates to the application of oscillatory or vibrating motion to various parts of the human body, under the direction of a competent physician, to aid in the recovery of health, by inducing the following effects—to increase the production of heat in such parts as are subjected to the action; to cause blood to flow in larger amount into such parts; to attract blood from other portions, where it may be retained in too large measure; to excite capillary activity; to counteract the tendency to local congestion; to restore nervous action and power; to perfect and equalize the nutritive operation of the body;, and to render healthful the tissues of the body. My invention consists of, first, a handle, of convenient shape and size to be grasped by the hand, to which an oscillating or vibrating motion is communicated by any suitable mechanism; second, a shoe or foot holder, of convenient size and shape, and adjusted in a suitable position to receive and retain the foot of the person to be operated upon, the said foot-holder having an oscillating or vibrating motion communicated to it by proper mechanism; * * * fifth, the combination and arrangement of the several parts or devices forming the machine, hereinafter fully described, for producing the effects stated." The handle B is hung on a shaft, and vibrates or rocks with it, and to such shaft is hung a crank, to which is connected, by a rod, a shorter crank, on the driving shaft, F. When the shaft F revolves, the shorter crank revolves with it, and gives a reciprocating or rocking motion to the shaft on which the handle B is hung, and to such handle. The foot-holder, B', is hung on another shaft, which is, in like manner, driven by two cranks and a rod, which obtain their motion from the driving shaft, F. The working parts are hung or attached to a frame. There is a pulley, H, on the driving shaft, F, and a driving pulley, G. The machine may be driven by the hand, through a crank, or by the foot, through a treadle, or by power. The extent of the vibrating motion given to the hand or foot may be increased or diminished by shortening or lengthening the cranks by which the handle or foot-holder is driven; and, by running the machine faster or slower, the rapidity of the vibrations may be increased or diminished, to suit different cases. The first, second and fifth claims of this patent are those which are claimed to be infringed, and are as follows: "(1) The handle, B, driven by any suitable mechanism, by which a vibratory or oscillating motion is imparted to it, substantially as and for the purpose set forth; (2) the shoe or foot-holder, B', driven by any suitable mechanism, by which a vibratory or oscillating motion is imparted to it, substantially as and for the purpose set forth; * * * (5) the combination, with the handle B and foot holder, B', and their immediate connections, of the driving shaft, F, pulleys, G and H, and a suitable means for applying power, as described, the whole constituting a machine constructed and operating substantially as, and to the effect, set forth."

The specification of No. 77,933 says: "The object of my invention is to produce effects on different parts of the human body similar to those produced by a rubbing with the hands, and to produce these effects in an increased degree, but without the fatigue to the operator occasioned by that operation. For this purpose, my invention consists, first, in a new and improved rubber, hereinafter fully described, which, when operated by any suitable mechanism, rubs the surface to which it is applied in such a manner as to produce effects similar to those produced by the human hand; * * * fourth, in the combination, with the said rubber, and the mechanical devices for imparting motion thereto, of a suitable couch, bed, or table, on which the person to be operated upon may sit or recline, the said couch, bed, or table having a suitable opening in it, through which the said rubber may be made to protrude, in order that it may be brought in

[Drawings of patent No. 75,218, granted March 3, 1868, to G. H. Taylor; published from the records of the United States patent office.]

Fig. 1

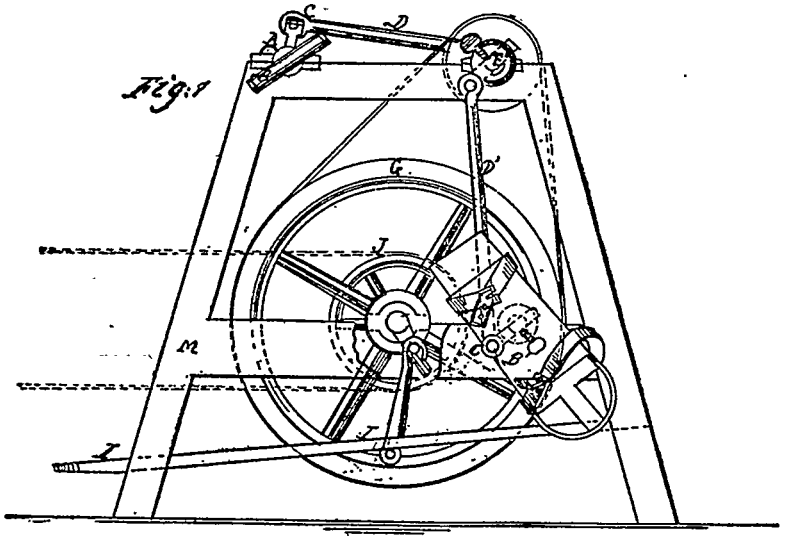


Fig. 2

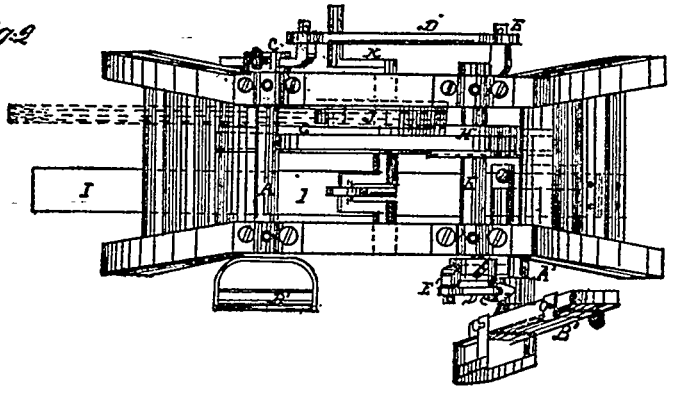
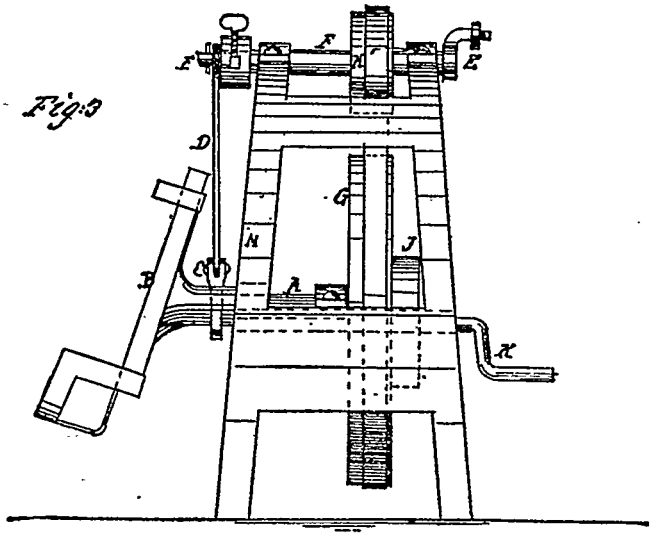


Fig. 3



contact with, and caused to operate on, that portion of the body of the patient which rests on or across said opening. * * * A is the rubber. It consists of a core of wood, or other similar material, of the form of the middle frustum of a prolate spheroid, somewhat resembling a very long cask or barrel. On this core, a triangular band of india rubber is wound spirally from end to end, covering its entire surface, except the ends, and securely fastened to the said core. A strip or band of india rubber, of a square section, may be used, by previously cutting out of the wooden core a triangular spiral groove, to receive one-half of it. India rubber bands of other shapes may also be used in a similar manner, or the india rubber surface, containing the requisite corrugations or projecting points, cones or ridges, to make it adhere to the surface to be operated upon, may be prepared in a sheet of proper size, and fastened on the core, or a hollow cylinder of india rubber, having the requisite outer surface, may be stretched over or secured to the core, or upon the rod or pivot on which the rubber turns. In this last case, no core would be used, but circular end plates, of metal or other stout material, ought to be put on at the ends of the rubber, to keep it in place." The rubber is hung in the fork of a rod, by means of a shaft, so as to turn freely. Such rod is hung on a pivot in a cross piece, at any convenient height, being capable of being raised or lowered by means of a series of holes, in any one of which such pivot may be placed. By shortening the upper end of such rod, the lateral motion of the rubber is shortened, and the convexity of its motion is increased. The middle part of such cross piece is made double, and such rod passes down between the two parts, such pivot passing through both, so as to have a firm and even bearing. The lower end of such rod is connected to a double crank, by means of an arm, and thus has a reciprocating or vibrating motion imparted to it by a shaft on which such double crank is hung. Such shaft is turned by a crank, and is hung in bearings in two hangers secured to the frame of the machine.

The lower part of the machine consists of a strong, rectangular frame of wood, O, with legs similar to a common lounge frame. To this frame, at one end, is secured, by hinges, a bed or couch, having a hole or opening, R, through it, to permit the rubber, A, to work against that portion of the body of the patient which is placed over the opening. There is an arrangement for fixing and holding the couch at any desired elevation or inclination. In using the machine, the patient sits or reclines on the couch, and brings a portion of the body directly over, and partially resting on, the rubber, A. The attendant turns the crank, or connects the power by which the shaft is revolved, and sets the rubber, A, in motion. The claims which are alleged to be infringed are the

[Drawings of patent No. 77,933, granted May 12, 1868, to G. H. Taylor; published from the records of the United States patent office.]

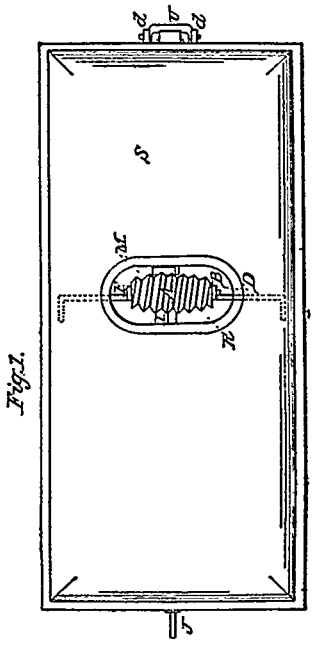


Fig. 1.

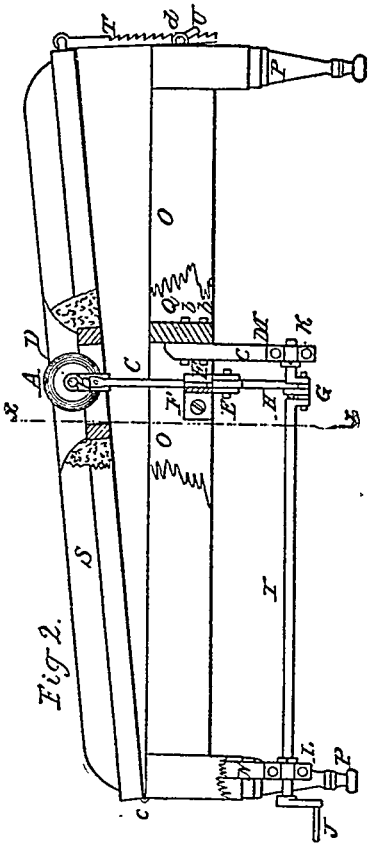


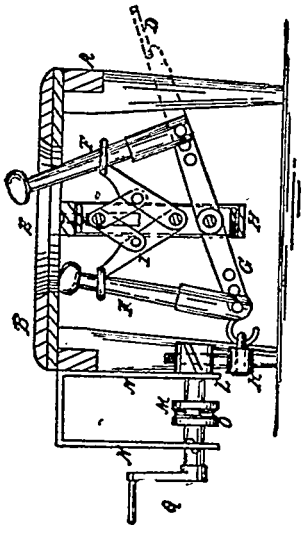
Fig. 2.

first and fourth. They are as follows: "(1) The rubber, A, composed of india rubber, and having its outer surface coated or covered with india rubber, the said outer surface being furnished with projecting ribs, points or corrugations. and the said rubber, A, being constructed substantially as and for the purpose specified; * * * (4) the combination with the rubber, A, driven by suitable mechanism, substantially as set forth, of the couch, S, properly connected to the frame, O, and having an opening, R, through it, for the said rubber, A, to work through, substantially as and for the purpose set forth."

The specification of No. 75,217 says, that the invention is a "medical kneading and vibrating machine, the purpose of which is to apply kneading and vibrating motions to the body or any of its parts, under the direction of a competent physician, to aid in securing the following therapeutic effects—reinforcing the circulation of the blood in weak parts and obstructed capillaries, removing congestion, promoting intestinal and digestive absorption, increasing the attraction of the products of waste for oxygen, and their consequent removal from the body, solidifying the tissues, equalizing and invigorating the nutritive operations of the body." The arrangement described, so far as it is involved in this suit, is to construct a couch so arranged as to be capable of elevation and depression, so as thereby to adjust the position of the body lying thereon to the desired action and effect of the machine. The top of the couch has an opening of size and shape suitable to admit one or more headed rods, F, which, in size, shape and position, are adapted to impinge against that portion of the body resting on the couch immediately over the before described opening.

The lower ends of the headed rods are attached to a lever at equal distances from its fulcrum, which distances may be varied to produce more or less motion, as may be desired. The fulcrum of the lever is on a vertical bar, which turns freely on pivots or centres at each end, and the lever is driven by a crank on a shaft, which gives to its ends a circular motion. The upper ends of the headed rods pass through rings, which guide them, and, in conjunction with the lever, give to the upper ends of said rods a compound motion, which is, at the same time, lateral, vertical and circular. The distance of the rings from the axis of the swinging or pivoted bar is fixed and kept equal by a parallelogram of levers, to the outer corners of which, respectively, the rings are attached. The lower corner of the parallelogram of levers is attached to the vertical bar before mentioned by a pivot or pin, on which the two levers composing the lower corner freely swing, while the upper corner is held in position, and adjusted to any desired height, by a bolt and nut. The shaft may be driven by any suitable means, as by a crank, by a belt acting on a pulley, or by a suitable treadle. By a modification, the lever to which the lower ends of the headed rods are attached is hung on a rock-shaft, which is driven by a crank or arm, and the upper ends of the rods pass through holes in the frame of the couch; and the motion thereby imparted to the upper ends of the headed rods is thus confined to one vertical plane, being a circular reciprocating motion. Such lever may be driven, if desired, by the hand or foot, applied to an extension of one of its arms. For the purpose of producing a kneading motion, the machine is driven at such a speed as will produce from 50 or less to 200 or 300 upward motions per minute, while, for producing a vibrating motion, consisting of, or caused by, a rapid succession of slight shocks or blows, the form of the machine which produces a circular reciprocating motion is used, and it is driven at a speed of from about 200 to 1,200 or more upward motions per minute. The effects of these two degrees of motion are different, becoming more similar as they approach the common speed of about 200 per minute. The slow or kneading motion is, in its effects, laxative, soothing and calculated to increase muscular action and development, while the rapid or vibrating motion stimulates absorption of the fluids, equalizes their distribution throughout the body, and promotes the excretion of all those products which, in health, are thrown off from the system. When it is desired to give to the machine the rapid motion above stated, it is most convenient to drive it by steam or other power, or, if driven by hand, additional gearing facilities obtaining the desired speed. Only the first claim of this patent is alleged to be infringed. It is in these words: "(1) The headed rods F, driven by any suitable mechanism for producing a reciprocating or circular mo-

[Drawing of patent No. 75,217, granted March 3, 1868, to G. H. Taylor; published from the records of the United States patent office.]



tion of the headed ends of said rods, substantially as and for the purpose set forth."

The apparatus employed by the defendant, and alleged to infringe the claims above referred to, is substantially such an one as is described in a patent granted to him December 7, 1869, for an "improved apparatus for treating diseases by mechanical movement." The specification of this patent says: "The object of my invention is to devise a machine in which mechanical action is adapted to produce motion of various kinds, in a manner applicable to the treatment of various diseases with salutary effect; and it consists essentially in the employment of certain mechanism, whereby circular or rotary motion, properly converted and applied, is made to perform the several operations of rubbing, kneading and giving vibratory and other action to the muscles and various parts of the system." The defendant's machine has a vibratory bar, lying horizontally, which has a rotary motion at the end actuated, and the opposite extremity of it is connected with a vertical vibratory support, and it produces the operations of kneading and vibrating, through the medium of fixed or removable attachments. It is capable of imparting vertical, horizontal or circular vibrations. Tables or platforms are placed on either side of such bar, on which the patient is supported, with the part to be operated upon lying upon and across the bar, the upper surface of which is provided with a friction or rubbing device, or with cushions adapted to the particular mode of operation required. In the application of kneading, an attachment which has undulations on its upper surface is applied to the top of the vibrating bar, and the opposite end of the bar is so connected, by a bolt, with a disk which rotates freely, that a circular vibration of such attachment is produced, and, as the patient lies on the tables in such position that the part to be operated upon is in contact with such attachment, the operation of kneading is closely simulated, the effect being heightened by the undulations on the surface of the attachment. The motion thus obtained is an elliptical vibration and not a regular vibration on the same plane. Special arrangements convert the motion of the vibrating bar from a circular vibration to one which is vertical or to one which is horizontal. The latter consists of rapid vibrations on a horizontal plane, and is adapted to friction or simple rubbing, and the attachment then employed consists of a series of transverse ribs alternated with grooves or spaces between. Provision is made for increasing or diminishing the rapidity of the vibrations. The specification states, that "the attachments for friction, kneading, &c., are preferably covered on the surface with leather, and may be stuffed with any suitable material, possessing but a slight amount, if any, of elasticity." To give motion to the feet of the patient, a disk is employed, to the face of which is affixed, by means of a bolt or pivot at the centre of its length, a bar, having at each side of said pivot, which forms its axis, a foot piece. To these foot-pieces the feet of the patient are secured. The rotation of the disk imparts like motion to the axis, which carries the centre of the bar around in a true circle, while the extremities on which the feet rest are free to follow the uniform rotation, or to oscillate. For motion to the hands and arms, a bar is affixed in the same manner to another disk. This bar is grasped by the hands of the patient on either side of its axis, the motion being the same as that of the feet. The axes of these bars and of the vibrating bar may be adjusted at a greater or a less distance from the centre of the disk, to increase or diminish the motion.

"Oscillate" is defined, "to vibrate as a pendulum; to move backward and forward; to swing." "Oscillatory" is defined, "moving alternately one way and another, as a pendulum; swinging; vibrating." "Vibrate" is defined, "to move or play to and fro, as a pendulum; to oscillate; to swing." "Vibratory" is defined, "vibrating; moving up and down, or to and fro; oscillating." It is contended, by the defendant, that his apparatus does not infringe patent No. 75,218, for the reason that the plaintiff's handle and foot-holder are required to have a vibratory or oscillating motion, as contradistinguished from a rotary motion, while the defendant's handle and foot-holder have a rotary motion. In seeking to maintain this distinction, it is urged, that the defendant's handle and foot-holder, because they move each in a circle, have a continuous motion in one direction. This is a fallacy. The matter must be looked at in view of the action on the arms and legs of the patient. In each machine, the hand or the foot is moved from a given position with relation to the parts of the body with which, through the joints, it is connected, and returns again to that position, to start anew. The motion to and fro is equally oscillating or vibrating, in view of the action on the limb, whether such motion takes place in both directions in the same line, or whether an ellipse or a circle be described in passing away and returning. The muscles and joints may be brought into different play by the difference of motion, but that is aside from the mechanical operation of giving play to the muscles and joints and particles of the legs and arms by the movement to and fro, in passing rapidly from a given position and returning to the same position. In the sense of the plaintiff's patent and invention, the defendant's handle and foot-holder have a vibratory motion to and fro, although the return is made in a different path from the outward path. But, in each machine, there is the same point of departure; an extreme point is reached by an outward movement; there is a return, by an inward movement, to the

point of departure; between every two arrivals at the point of departure, the path of the outward movement is gone over once and but once, and the path of the inward movement is gone over once and but once; and there is no departure from the prescribed path. There is, therefore, mechanical uniformity and precision; the movements are two in number, outward to an extreme point and inward from it, and are alternating, vibrating and oscillating, although the plaintiff uses one and the same path for each movement, and the defendant uses two different paths, one for each movement.

It is contended, for the defendant, that he does not infringe patent No. 77,933. He uses a rubber with a surface of cloth or leather, stuffed with some material, and very slightly elastic, and corrugated. It projects, and is applied, through an opening between two couches, the patient reclining on the two couches and across the opening, and it is driven by suitable mechanism. All these features are those of the patent. But, it is contended that the plaintiff's rubber is required to be made of india rubber on its external surface. It is said, that the india rubber surface is adhesive, and the leather or cloth surface is not, and that the corrugated india rubber surface yields horizontally in rubbing, while there is no such horizontal yielding in the corrugated leather or cloth surface. But, there is more or less adhesion in either surface. Where the adhesion is less, so that the rubber passes more readily over the surface that is being rubbed, the greater must be the corrugations, to produce a given effect. The object stated in the patent is to produce, by rubbing, effects on the body similar to those produced by a rubbing with the human hand. The hand, when applied to rub, controlled by the will, is adhesive and needs not to be corrugated, because its contact and pressure, as it rubs, can be always maintained, to make the rubbing continuous and effective. Where a very adhesive substance, like india rubber, is used as the surface to rub with, impelled by machinery, the corrugations necessary to maintain continuous contact in rubbing are less than when a less adhesive surface is used; and, when a less adhesive surface is used, the corrugations must be greater, in order to compensate for the want of surface adhesiveness, by causing the surface of flesh to enter between the walls of the corrugations, and thus be rubbed in the movement of the rubber. The patent states that the object of the corrugations or ridges is to make the surface of the rubber adhere to the surface to be operated upon.

The invention set forth in the patent granted to Charles F. Taylor, December 8, 1863 for an "improvement in machines for exercising the human body," is adduced as anticipating what is claimed in patent No. 77,933. But, it is sufficient to say, that the Charles F. Taylor implements are not corrugated, and do not work from below through an opening in a couch or between couches, as the patient reclines thereon and over such opening. The patient lies on a lounge, and two pads are applied to opposite sides of the person, which pads are hinged to arms capable of being adjusted higher or lower, or more or less obliquely, or in a vertical position. The pads have a reciprocating or vibratory movement imparted to them by machinery, and act upon the parts of the body to which they are applied. The pads are not represented as being at any time out of contact with the body of the patient, and the operation is strictly one of rubbing.

The defendant uses substantially the headed rod of patent No. 75,217, driven by suitable mechanism for producing a circular motion of the headed end of the rod. The heads of the plaintiff's rods are described as being, in size, shape and position, adapted to impinge against the portion of the body presented to it. In the kneading motion, the rod is driven more slowly, and its upper end has a compound motion, which is described as being lateral, vertical and circular at the same time, and which produces, through the motion of the end of the rod, an operation like that of kneading. The defendant performs the operation of kneading, by giving a circular vibration to his kneading attachment, which has on it protuberances, the equivalents of the heads of the plaintiff's rods.

As to Williamson's evidence in regard to the horse machine, it shows nothing which can avail to defeat any of the plaintiff's claims. The motion of the horse machine was so slow as not to produce any motion which can be properly called vibratory or oscillating, in the sense of the plaintiff's patents—a motion sufficiently rapid to accomplish the results accomplished by the plaintiff. Whatever there was of the horse machine, it rose only to the dignity of an experiment and was abandoned. But one was built, and that more than 35 years ago, and the recollection of the mechanism which constituted it has passed away from the mind of the witness, if he ever knew what it was, so that it cannot, from such recollection, be reconstructed, and there is no other record of it.

The defendant claims to have himself constructed and used, prior to the plaintiff, the inventions covered by the plaintiff's claims. As to patent No. 75,218, the evidence is entirely clear, that the plaintiff was prior in time. As to the other two patents, the burden of proof is on the defendant, to show his priority. His evidence is too vague and unsatisfactory to establish affirmatively, as against the plaintiff's patents, that the plaintiff was later in time of invention.

There must be a decree for the plaintiff on all the claims in question.

[2] [This cause having come on to be heard at this term, upon the pleadings and proofs, after hearing counsel for the respective parties, and due proceedings had, it is, upon consideration, ordered, adjudged, and decreed: That the several letters patent granted to the complainant for apparatus for exercise, dated March 3, 1868, No. 75,217, March 3, 1868, No. 75,218, and May 12, 1868, No. 77,933, are good and valid in law. That the said George H. Taylor was the first and original inventor and discoverer of the inventions described and claimed in said letters patent, and in the specifications annexed thereto, and is the exclusive owner of said letters patent. That the defendant Allen L. Wood has infringed upon said letters patent, and upon the exclusive rights of the complainant under the same; that is to say, by making, using, and selling, without right or license from the complainant, certain machines, substantially described in letters patent granted to him, dated December 7, 1869, and machines similar thereto in certain particulars, which said machines contain and embody the inventions described and claimed in the first, second, and fifth claims of said letters patent No. 75,218, and in the first and fourth claims of said letters patent No. 75,217, and in the first claim of the said letters patent No. 77,933. And it is further ordered, adjudged, and decreed that the complainant do recover of the defendant the profits, gains, and advantages which the said defendant has received or made by reason of the infringement of the complainant's patents, set forth in the bill, or either of them, by any manufacture, use, or sale, and that said complainant do also recover any and all damages he has sustained by reason of any infringement of said letters patent by the defendant. And it is hereby referred to Joseph Guiman, Jr., one of the masters of this court, to take and state the account of said gains, profits, and advantages, and to assess such damages, and to report thereon with all convenient speed; and the defendant is hereby directed and required to attend before said master from time to time as required, and to produce before him such books, papers, and documents as relate to the matters in issue, and submit to such oral examination as the master may require. And it is further ordered, adjudged, and decreed that a perpetual injunction issue out of and under the seal of this court, restraining the defendant, his clerks, agents, and workmen from making, using, or selling any machine or machines containing or embodying any one or more of the following features described and claimed in said letters patent, viz.: The handle B, driven by any suitable mechanism by which a vibratory or oscillating motion is imparted to it, substantially as and for the purposes set forth. The shoe or foot-holder, driven by any suitable mechanism by which a vibratory or oscillating motion is imparted to it, substantially as and for the purposes set forth. The combination of the handle and foot-holder and their immediate connections, of the driving-shaft, pulleys, and a suitable means for applying power, as described, the whole constituting a machine constructed and operated substantially as, and to the effect, set forth. The rubber, composed of india rubber, and having its outer surface coated or covered with india rubber, the said outer surface being furnished with projecting ribs, points, or corrugations, and the said rubber being constructed substantially as and for the purposes specified. The combination, with the rubber driven by suitable mechanism, substantially as set forth, of the couch properly connected with the frame, and having one opening through it for the said rubber to work through, substantially as and for the purpose set forth. The headed rods, driven by any suitable mechanism for producing a reciprocating or circular motion of the headed ends of said rods, substantially as and for the purpose set forth. Or from infringing upon any of the claims of said letters patent, or either of them, in any way whatsoever. And it is further ordered, adjudged, and decreed that the complainant do recover of the defendant the costs of this suit, and that the question of increase of damages, and all further questions, be reserved until the coming in of the master's report.] [3]

[2] [From 8 O. G. 90.]

[3] [From 8 O. G. 90.]

Case No. 13,809.

TAYLOR v. WOODS et al.

[3 Woods, 146.] [1]

Circuit Court, D. Louisiana. April Term, 1878.

APPEAL—ADMIRALTY—COSTS.

The allowance or non-allowance of costs in an admiralty cause being a matter within the discretion of the court, is not a subject of appeal.

[Appeal from the district court of the United States for the district of Louisiana.

[This was a libel by Jordan Taylor against B. D. Woods and others.] Heard on motion to dismiss the appeal.

R. De Gray, for libelant.

Charles S. Rice, for claimant.

BRADLEY, Circuit Justice. As no decree could have been rendered for the libelant by the court below, except for costs; and as the allowance or non-allowance of costs is

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

in the discretion of the court, and not a subject of appeal, the appeal must be dismissed, but without costs to either party.

TAYLOR (WOOSTER v.). See Cases Nos. 18,040 and 18,041.

TAYLOR (WRIGHT v.). See Case No. 18,096.

TAYLOR, The ABNER. See Case No. 5,705.

TAYLOR, The JOHN. See Cases Nos. 7,428 and 7,429.

TAYLOR COUNTY (POST v.). See Case No. 11,302.

Case No. 13,810.

TAZAYMON v. TWOMBLEY.

[5 Sawy. 79.] [1]

Circuit Court, D. California. Feb. 25, 1878.

APPEAL—FROM CONSULAR COURT—TRANSCRIPT—RECORD—LOOSE PAPERS—ALLOWANCE OF APPEAL—CITATION.

1. The record on appeal from the consular court of Japan to the circuit court for the district of California, consists of a transcript of the libel, bill, answer, depositions and all other proceedings in the case.

2. The transcript should be a single document certified at the end as being a full and correct copy of the proceedings in the case, and authenticated by the official signature and seal of the consul.

3. Where on appeal from a consular court of Japan the record sent up consisted of a mass of loose, separate papers, some having the appearance of being originals and others of being copies not certified, or in any matter authenticated, the appellate court declined to take jurisdiction, and dismissed the appeal.

4. In cases of appeal from the consular and ministerial courts of China and Japan to the circuit court of the United States for the district of California, the record on appeal must show an allowance of the appeal.

5. A citation is necessary, unless the appeal is allowed in open court. Query, whether a citation is not always necessary, if the consular court has once adjourned after rendering a decree, there being no terms of such courts.

Appeal from the consular court at Hiogo, in the empire of Japan [in an action by Hashimoto Tazaymon, against John Fogg Twombley].

O. P. Evans, for appellant.

C. McAllister, for appellee.

SAWYER, Circuit Judge. This case purports to be an appeal from the United States consular court at Hiogo, in the empire of Japan. The papers having been filed in this court, counsel appears on behalf of the appellee, and moves to dismiss the appeal on the grounds: (1) That no authenticated transcript of the libel, bill, answer, depositions, and other proceedings has been transmitted to, or filed in, this court, as required by section 4093 of the Revised Statutes; and, consequently, that there is no authentic record upon which the court can act; (2) that the papers filed show no allowance of an appeal; (3) that the papers do not show any citation to, or any service of citation upon the appellee.

The record filed consists of a mass of separate, loose papers, no one of which is certified to be a copy of any document on file in the court below; nor is it certified to be the original. Some would seem to be original documents, but they bear no marks or indorsements showing that they were ever filed in the consular court; others may be copies, but they are not certified to be copies of any part of the papers, records, or proceedings of the consular court. The papers, so far as authentication is concerned, might just as well have been brought here, and filed by any resident of Japan without ever having been in any court whatever. There is a personal letter, separate from the other papers, from the consul addressed to the judge of this court, stating that he has transmitted a matter of appeal to this court. It would certainly be very unsafe, even if there was no statute upon the subject, for the court to assume jurisdiction, and act upon such papers, or such a record. But the statute prescribes what the record transmitted shall be; and that is, "a transcript of the libel, bill, answer, depositions, and all other proceedings in the case."

This transcript should be a copy in chronological order of all the proceedings in the case from the beginning to the end, as a single document, and this should be certified at the end as being a full, true, and correct copy of the pleadings, depositions, and all other proceedings in the case; and that the same constitute the transcript on appeal to the circuit court; and it should be authenticated by the official signature and seal of the consul. The papers used in the court below should remain there as parts of the record of that court. The record should also show an allowance of the appeal; and where the appeal is not taken in open court, at the time of the rendition of the judgment or decree, and before adjournment of the court, the record should show a citation to the appellee, and due service thereof to appear in this court. See The Spark v. Lee Choi Chum [Case No. 13,206].

In that case, upon this point it is said: "It is objected that the record shows no order allowing the appeal, and no citation to the appellees. The section cited, it will be seen, provides that 'appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States.' The twenty-second section of the judiciary act of 1789 (1 Stat. 84), provides, that final decrees and judgments of the district courts in civil actions, 'may be re-examined and reversed or affirmed in a circuit court * * * upon a writ of error, whereto shall be annexed and returned therewith, at the day and place

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

therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the supreme court, the adverse party having at least twenty days notice.' The same section has a similar provision for writs of error from the supreme to the circuit court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the highest state courts in certain cases by the supreme court of the United States. The construction of these latter provisions, and consequently the construction of the similar provisions relative to writs of error from the circuit to the district courts, has been settled by the supreme court of the United States. Thus in the very late case of Gleason v. Florida, 9 Wall. [76 U. S.] 783, the supreme court say: 'But on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of reviewing jurisdiction over final judgments or decrees by the courts of the states.' So, in Hartford Fire Ins. Co. v. Van Duzer, the writ was dismissed because no allowance of the writ appeared in the record, the chief justice delivering the opinion of the court, said: 'That such allowance was indispensable to the jurisdiction of the court in error to review the judgment of the highest court of the state.' Id. 784, note. So, an appeal from the supreme court of the District of Columbia was dismissed by the supreme court of the United States, because there was 'no evidence in the record of any allowance of appeal, and without an allowance this court cannot acquire jurisdiction.' Pierce v. Cox, Id. 787. See, also, Edmondson v. Bloomshire, 7 Wall. [74 U. S.] 312. This settles the construction of the act of congress relating to writs of error, and appeals from the United States district courts, and as the same rules and regulations are made applicable to appeals from the consular courts of China and Japan, it settles the point in this case. The record shows no allowance of an appeal, and no citation, the latter being necessary, also, if the order allowing an appeal is not made in open court. This is implied, at least, from the case of Pierce v. Cox, supra, if a citation is not waived by appearance of the appellee. And it is expressly required by the provisions of the statute quoted. It is claimed, also, that this appeal, if taken at all, must have been taken out of court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed that there are no terms in the consular court, under the statute, and that as soon as judgment is entered, and the court for that occasion has adjourned, it is no longer an open court with reference to that case, and all subsequent allowances of appeals, must, necessarily be made out of court, with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it, upon the view taken, upon other objections. It will be the safer practice to issue and serve a citation."

I regret the necessity of dismissing the appeal in a case brought so far, but there is no record here upon which the court can take jurisdiction. Appeal dismissed, with costs.

T. B. ABEEL. The (DUBOIS v.). See Case No. 4,109a.

Case No. 13,811.

TEAKLE et al. v. BAILEY.

[2 Brock. 43.] [1]

Circuit Court, D. Virginia. May Term, 1822.

EQUITY—BILL TO SET ASIDE CONTRACT AND DEED—FRAUD—MISTAKE—AGENCY—PARTIES TO CONTRACT—INFANT ADMINISTRATOR.

1. In 1807 a contract was entered into between L. T., widow and administratrix of S. T.; and R. T., a daughter of S. T., of Maryland, and T. M. B., of Virginia, whereby L. T., as administratrix of her deceased husband, and as guardian of her infant children, and R. T. in her own right, constituted T. M. B. their agent, and stipulated to convey to him a moiety of certain military lands in the state of Ohio, on certain conditions expressed in the contract. This contract, after reciting the title of S. T., deceased, to these lands, which had not been patented, and the descent of them to his widow and children, proceeds thus: "And whereas a considerable portion of the said land has been sold for the payment of taxes:" "Now, therefore, in consideration of the said T. M. B. undertaking to redeem the portion of land so sold for the payment of taxes, or as much thereof as he can redeem, at his own proper expense and trouble; and also obtaining all the necessary title papers to the said 4,000 acres, or so much thereof as he can obtain at his own proper cost and trouble, which he doth hereby undertake to do, then, in that case, we, the said L. T. in her own right, and also as guardian of the said E. T. and S. T., Jr., and also the said R. T., do agree to convey to the said T. M. B. one half of the said 4,000 acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." The contract contained a covenant, on the part of L. T. and R. T., that E. T. and S. T. Jr., should, when they respectively attained their majority, ratify the agreement and make the necessary conveyances.

2. In 1812, L. T., R. T., and E. T., the two last being then of full age, conveyed to the agent one moiety of these 4,000 acres of land which belonged to the heirs of S. T., deceased. The effect of this conveyance was, to execute the contract of 1807, not only as to themselves, but as far as respected the interest of S. T., then a minor.

3. The parties filed their bill to set aside the contract of 1807, and also the deeds of 1812, in execution thereof, on the ground that the contract was entered into, and the deeds were executed, through mistake and ignorance on the part of the plaintiffs, and misrepresentation and concealment on the part of T. M. B. On the trial it was fully proved that R. T. was a minor when the contract of 1807 was entered into. The court *held* that, with respect to the contract of 1807, that being the commencement of the de-

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

fendant's agency, the onus probandi was upon the plaintiffs to show the alleged misrepresentation and concealment, and without such proof adduced by them, the court could not interpose its authority to set aside the contract.

[Cited in Brooks v. Martin, 2 Wall. (69 U. S.) 85.]

[Cited in Clute v. Barron, 2 Mich. 198. Cited in brief in Segar v. Edwards, 11 Leigh, 225.]

4. The effect of that contract was to bind the widow according to its terms, i. e., to the extent of her dower-right, and the infants to the extent of the equity it gave for a liberal remuneration for services performed.

5. But the question arising under the deeds of 1812, was a different one. So far as they could be considered a mere confirmation of the contract of 1807, which had been made for them by their mother, to the extent above expressed, they are binding upon R. T. and E. T., though not upon their infant brother. But so much of the contract of 1812 as bound them farther than that of 1807, was not the confirmation of an old, but the execution of an original contract. The principles of equity do not absolutely annul such a contract (entered into between an agent and his principals), but they subject it to a searching and rigorous examination. They require the agent to show that he withheld no information which his agency enabled him to acquire, that his communications to his principals were full, as well as fair. If he cannot do this, the contract must be set aside.

In equity.

MARSHALL, Circuit Justice. This bill is brought by Lucretia Teakle, widow and administratrix of Severn Teakle, deceased, and by her children, to set aside a contract made on the 2d of August, 1807, by the said Lucretia, as the administratrix of her deceased husband, and as guardian of her infant children, and by her eldest daughter, Rachael Teakle, with the defendant, stipulating to convey to him a moiety of certain lands in the state of Ohio; and also to set aside certain deeds dated 16th of April, 1812, executed by the said Lucretia and Rachael, and also by Elizabeth Teakle, purporting to convey a moiety of those lands. Thomas M. Bailey, the defendant, being in the state of Ohio in the summer of 1807, for the purpose of locating military land-warrants which he had previously acquired, was informed by the auditor of the state that four thousand acres of military lands belonging to Severn Teakle, a captain in the army of the United States, had been located in Ohio, and that a considerable portion of them had been sold for non-payment of taxes, and that parts of them would continue to be annually sold, unless measures should be taken for the payment of future taxes as they should accrue. By the laws of Ohio, the lands of minors sold for non-payment of taxes, were redeemable within twelve months after such minor should have attained his age of twenty-one years, by payment of the purchase-money, with interest, and by paying also for any improvement which the purchaser might have made on the premises. Redemption was so much a thing of course, that the purchasers usually gave up the land on being satisfied of the fact of minority; and if the establishment of that fact in court were required, this was done without formal proceedings, and at a very inconsiderable expense. The only real difficulty lay in the adjustment of the claim for improvements, where such claim was made. On his return from the state of Ohio, Mr. Bailey called on Mrs. Teakle, then residing at Easton, a small village on the eastern shore of Maryland, and communicated to her the situation of the lands of the family, on which the contract of the 2d of August, 1807, was entered into. Mr. Bailey proceeded to effect the redemption of the lands which had been sold for non-payment of taxes. Not long after this contract, the defendant, by looking into the acts of the Virginia assembly concerning land-bounties to the officers of the Virginia line, discovered that Capt. Teakle, having served until the end of the war, was entitled to the additional quantity of twelve hundred and twenty-one acres. He communicated this fact to Mrs. Teakle, and drew the warrant, under a power of attorney made by her. Under a contract with Mrs. Teakle, this warrant was located by Bailey's agent, and the title obtained, for which service Bailey receives a moiety of this tract also. In April, 1812, Rachael and Elizabeth having then attained their age of twenty-one years, deeds were executed by Lucretia, Rachael, and Elizabeth, purporting to convey a moiety of the four thousand acres of land to the defendant. Elizabeth afterwards intermarried with ——— Swann, and Severn Teakle, Jr., has attained his age of twenty-one years. He refuses to assent to these contracts, and this bill is brought to set them aside, as having been obtained by misrepresentation and concealment, from persons entirely ignorant of the property they sold, and of the situation in which it was placed.

The contract of the 2d of August, 1807, will be first considered. This paper, after reciting the title of Severn Teakle to four thousand acres of military land which had not been patented, and the descent of said land to his widow and children, proceeds thus: "And whereas a considerable portion of the said land has been sold for the payment of taxes:" "Now therefore, in consideration of the said Thomas M. Bailey undertaking to redeem the portion of land so sold for the payment of taxes, or as much thereof as he can redeem, at his own proper expense and trouble; and also obtaining all the necessary title papers to the said four thousand acres, or so much thereof as he can obtain, at his own proper cost and trouble, which he doth hereby undertake to do, then, in that case, we, the said Lucretia Teakle in her own right, and also as guardian of the said Elizabeth and Severn Teakle, and also the said Rachael Teakle, do agree to convey to the said Thomas M.

Bailey one half of the said four thousand acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." The agreement then contains a covenant on the part of Lucretia and Rachael Teakle, that Elizabeth and Severn Teakle shall, when they respectively attain their ages of twenty-one years, ratify this agreement, and make the necessary conveyances. The bill charges that the contract, and the deeds which grew out of it, originated in mistake and ignorance on the part of the complainants, and in fraud, imposition, and misrepresentation and concealment on the part of the said Bailey. They were ignorant, the bill states, of the value of the land, and of the means to be employed for its redemption, and were unable, from their narrow circumstances and situation, to make the inquiry. The said Bailey represented the land as poor, and the difficulties of redemption as considerable, and believing him to be their friend, they trusted to his representation. He knew the value of the land, and knew that the law of Ohio rendered redemption easy. The communications made by Mr. Bailey were entirely verbal, and no person, not of the family, appears to have been present at the time. The proof of his misrepresentation or concealment can come only from the parties themselves. In his answer, Mr. Bailey states the communication to him by the auditor of the state of Ohio, relative to Capt. Teakle's lands, and adds, that he communicated all the information he possessed to Mrs. Teakle.

The counsel for the plaintiffs rely upon the representation made in his answer of the auditor's communications, as being a representation of his own communications to Mrs. Teakle, and contend that they amount to a misrepresentation. The fact supposed to be misrepresented, is the quantity of land sold for nonpayment of taxes. Mr. Bailey, in his answer, represents the auditor to have said, that more than half had been sold; whereas, in truth, not quite half had been sold. Of the four thousand acres, between nineteen hundred and two thousand acres had been actually sold. The answer does not aver in terms, that he gave to Mrs. Teakle the precise detail of circumstances which he says was made to him by the auditor; and if he had, we do not think that a mistake less than one hundred acres in the quantity of land actually sold, would have made any difference in the course which Mrs. Teakle would have pursued, and ought in prudence to have pursued, under the circumstances in which she found herself and her family placed. Great part of the land was certainly sold, and the rest would certainly share the same fate, unless some persons were employed for its preservation. And the precise quantity actually sold had no influence on her conduct, as is shown by the fact that she gave as much for saving the unsold land, as she gave for the redemption of that which had been sold. It is also a circumstance of some weight, that the bill does not suggest any misrepresentation in this particular, and that the language of the contract is, that "a considerable portion," not that more than one-half "of the said land had been sold." The bill also charges a great misrepresentation in the value of the land; but of this there is no proof. Indeed it does not appear, nor is there any reason to believe, that Bailey had, in August, 1807, acquired any accurate knowledge of its value, nor is it alleged, nor is there reason to believe, that, at that time, he made any representation respecting it. A point of more consequence is the representation he made respecting the facility of redemption. When we compare the description of the difficulties attending redemption, detailed in his answer, with the statement of those difficulties made by lawyers in Ohio, whose depositions have been taken, or with those actually encountered, we must say that it is highly coloured, that it is calculated to magnify those difficulties; but we cannot say that they are positively untrue. The account of the value of improvements was certainly exposed to the hazard which he stated.

The most important inquiry in this part of the case is, did Mr. Bailey communicate to Mrs. Teakle the legal right of the children to redeem within a limited time, after attaining their ages of twenty-one years, the lands which might before that time be sold for non-payment of taxes: or did he leave her to suppose that it was an affair to be arranged with the purchasers? Mr. Bailey's answer must be understood as averring that he did give her this information, because he admits that he possessed it, and avers that he gave all the information he possessed. On this point, too, the answer is to be considered as responsive to the bill and as testimony in the cause. There are certainly some expressions in the contract which are calculated to attract notice, though they may not be sufficient to countervail the answer. The language of that instrument is, that Lucretia and Rachael Teakle undertake to convey a moiety of the land, "in consideration of the said Thomas M. Bailey undertaking to redeem the portion of land sold for the payment of taxes, or as much thereof as he can redeem." These expressions certainly do not imply an absolute legal right to redeem the whole, and were not to be looked for in an instrument prepared with a knowledge of such absolute legal right. The same language is observable in that part of the instrument which stipulates for the conveyance from Lucretia and Rachael Teakle; they "agree to convey to the said Thomas M. Bailey, one half of the said four thousand acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." These latter words would be unnecessary, if no

doubt existed respecting the redemption of the whole land; for all the land sold, and all the land unsold, must, certainly, be equal to all the land. This last member of the sentence, then, would seem to indicate some apprehension in the minds of the contracting parties, that some part of the land sold might not be redeemed—an apprehension not very consistent with a legal right to redeem the whole; yet these expressions may originate in the superabundant caution of the writer of the contract, and are not thought sufficient to outweigh the answer.

The counsel for the plaintiffs contend, that Bailey is to be considered as the agent of Mrs. Teakle and the family, before this agreement was made; and that, instead of requiring proof of misrepresentation or concealment from her, he must show that his own conduct was perfectly fair. This fact, it is contended, shifts the onus probandi from her to him, and in proof of the fact, they rely on a letter from Bailey to his agent, of the 28th of April, 1807. The court cannot understand the letter otherwise than as asserting this agency; but, notwithstanding the declaration it contains, we must consider the agency as commencing with the contract of August, 1807; there is no allegation in the bill which asserts a prior agency; consequently, that part is not put in issue. This is not all; such prior agency would be inconsistent with the whole case, as made out by the plaintiffs, and with all the other testimony in the cause. John Edmondson speaks, in his deposition, of a letter from John Teakle to the plaintiff Lucretia, recommending the defendant to her as a person capable of giving her information, and of transacting her business. The date of this letter, as well as its contents, might throw some light on a part of this case; but it is not produced, and, consequently, can have no influence on it. The defendant being entirely free to contract with Lucretia, one of the plaintiffs, on the 2d of August, 1807, the misrepresentation and concealment alleged, in order to set aside that contract, must be proved by the plaintiffs, or the court cannot interpose its authority for that purpose. We do not think either has been proved. The contract of August, 1807, then, is to be considered as remaining in force until cancelled by the parties, and the court will proceed to examine the extent of its obligation. The contract was made with this defendant by Lucretia Teakle, the widow and administratrix of Severn Teakle, deceased, and guardian of his children, and by Rachael Teakle, one of his daughters. The contract of Lucretia could not bind the land beyond her dower right; the contract of Rachael might bind her third part, if she was of age when it was executed, not otherwise. That she was an infant at that time, is proved satisfactorily, not only by the affidavit of the mother, to which no objection has been made, but by the deposition of her brother, John Edmondson; he produces a book, proved to be in the handwriting of Severn Teakle, in which he has, in his own handwriting, inserted the age of his wife, the time of their intermarriage, and of the birth of each of their children. The deponent further swears, that to his own knowledge, the age of Severn, the youngest, is truly stated in the book. It is then sufficiently proved that Rachael was an infant when she executed the contract of August, 1807, and her lands could not be bound by it. That contract, then, unaided by subsequent transactions, would give the defendant recourse against Mrs. Teakle in the event of its nonperformance, but would give him no interest in the lands themselves. Those subsequent transactions, therefore, must be considered.

The court will pass over the purchase made by the defendant in 1809, because the deeds were cancelled at the request of the plaintiffs, and proceed to the contract or deeds of April, 1812. By deeds of that date, Rachael and Elizabeth Teakle, who were then of full age, convey to the defendant one moiety of the four thousand acres of land in the state of Ohio, to which the heirs of Severn Teakle were entitled. The effect of this conveyance is, to execute the contract of 1807, not only so far as respected themselves, but so far as respected the interest of their brother, then a minor. The plaintiffs make the same objection to this instrument, as being obtained by misrepresentation and concealment from persons ignorant of their rights, as were made to the agreement of 1807, and contend that the objection derives additional strength from the fact, that the contract was made with an agent. That an agent to sell cannot be himself the purchaser, under the power to sell, is well settled. Such a purchase is absolutely void.[2] The

[2] Sugd. Vend. 391–405. In Yancey v. Hopkins, 1 Munf. 419, Judge Roane, in commenting on this rule, said, that the inhibition seemed to arise from the confidence placed in, and the intimate knowledge acquired by, trustees, auctioneers, &c., which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge in their several characters, and by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument. But it had not been shown by any adjudged case, that the inhibition had been extended in England to sheriffs or collectors, and he thought that the reason of the rule did not extend to a purchase by a sheriff at his own sale, if it was bona fide. He was for sustaining such a sale. The majority of the court, however, affirmed the decree setting aside the sale, but on the ground that the authority given to the sheriff had not been strictly pursued. In Carter v. Harris, 4 Rand. [Va.] 199, Judge Carr stated it as his impression, that a sheriff selling property under an execution could not legally buy of himself. The characters of buyer and seller were incompatible, and could not safely be exercised by the same person. But in that case, also, the sale was set aside on other grounds. Whether a purchase by a trustee, at his own sale, is void per se, has never been directly decided in Virginia. In Quarles v. Lacy, 4 Munf. 251, where one trustee pur-

principle, however, of those decisions does not apply to a contract between an agent and his employer. Such contracts are not void per se, but are watched with no inconsiderable jealousy by courts of equity. In general, the information of the principal may be supposed to be derived through the agent, who must also be supposed to possess his confidence. In such a case it is certainly desirable that the circumstances attending the transaction should be so clearly stated, as to leave no doubt that the principal entered into the agreement with full knowledge of them, or at least of such of them as were essential to the contract into which he had entered. Whether the whole burden of proof be shifted to the agent or not, it may be stated with some confidence, that circumstances which are merely suspicious, and which would be insufficient to affect a contract between persons unconnected with each other, would be allowed great weight in a case between a principal and agent. The case under consideration is one in which proof that the communications to the principal had been full, is peculiarly desirable. The principals resided in the state of Maryland, and were young ladies who had not very long attained the age of twenty-one. The business to which the agency related was transacted in the state of Ohio, and the record furnishes no evidence of their possessing any other knowledge respecting it than was derived from their agent. Were the deeds of April, 1812, then, an original contract, there would be much weight on the argument, which insists on proof from the defendant that his communications to the plaintiffs were full, as well as fair.

But those deeds do not constitute an original contract. They amount, in part, at least, to a confirmation of a contract made for them in their infancy by their guardian. So far as Rachael and Elizabeth convey a moiety of their several interests in the lands, they only confirm the contract made for them by their mother, to which Rachael, while an infant, was a party. That contract, as has been already observed, must be allowed to stand, and is obligatory on the mother, according to its terms, and on the infants, to the extent of the equity it gives for a liberal remuneration for services performed. Being thus far obligatory, the subsequent contract, and so far as it is a mere confirmation of a contract unexceptionable in its origin, made by one of the infants in conjunction with her guardian, cannot, we think, be set aside. But so much of the contract of April, 1812, as binds Rachael and Elizabeth farther than that of August, 1807, was intended to bind them, is not a confirmation of the former contract, but is an original contract, and is unquestionably, in all its parts, made with a person who was at the time an agent, and is subject to all the rules which a court of equity applies to purchases made by the agent with his principal. It has been already said, that these rules do not positively annul such a contract, but do subject it to a rigorous and suspicious examination. This principle is, we think, to be collected from all the cases which have been cited, or which are to be found in the books.

In Ex parte Lacey, 6 Ves. 626, the court said, that a trustee may purchase from cestui que trust. The cestui que trust may, by a new contract, dismiss him from that character: but the act must be watched with infinite and most guarded jealousy. In Ex parte James, 8 Ves. 337, the court said that an assignee under a commission of bankruptcy cannot purchase, unless he shakes himself altogether out of the trust, and not

---

chased the trust property for the benefit of both, the sale was set aside; but in that case the price was grossly inadequate, and the court, in setting forth the grounds of their opinion, rely strongly upon circumstances (which are detailed), tending to produce a great sacrifice of the property: besides that in that case, the trustees did not proceed in strict conformity with the decree under which they acted. As to executors, a purchase by them at their own sale, it seems, is valid, if the exigencies of the estate shall render the sale necessary, and it be fairly conducted. Anderson v. Fox, 2 Hen. & M. 245; McKey v. Young, 4 Hen. & M. 430. In the latter case, Chancellor Taylor said, that in Virginia it was universally understood that such sales were valid, and that there was "nothing more common than for an executor to be a purchaser at his own sale of his testator's estate, and most commonly for the advantage of the legatees."

This subject is examined by Judge H. St. G. Tucker (now president of the Court of Appeals of Virginia), in a recent and valuable work. 2 Tuck. Comm. 450–453, tit. "Trusts." He lays down the general proposition, that trustees executors, agents, commissioners of sales, sheriffs, and auctioneers, are incapable of purchasing at sales made by themselves, or under their authority or direction; and does not deem the dicta found in the Virginia Reports, which seem to incline against the universal denial of the validity of purchases by persons in fiduciary characters, of the trust subject, sufficient to shake the well-settled principles quoted from the decisions of the English courts, and of Chancellor Kent, in Davoue v. Fanning, 2 Johns. Ch. 252. But quære, if the case of executors (or administrators) may not be considered an exception to the universality of this rule in Virginia, if it be shown that the sale was necessary for the payment of debts, and was perfectly fair? In such a case it would be a grave question, how far the general understanding of the people of this state, that such purchases are valid, and the very general practice, too, under it, would be entitled to consideration, as controlling the general rule. In Anderson v. Fox, cited above, Judge Tucker (the elder) said, that this practice had been too general, and had prevailed too long in this country to be now drawn in question by analogy to the doctrines in England, concerning trustees of lands or commissioners of bankrupt: that though executors and administrators were, to many purposes, considered as trustees in a court of equity, they were not so in all cases. And although Judge Roane, in the same case, said, that the decision of the question was not necessary, yet the decree directed an account and if on such account it appeared that the sale of the slave was necessary for the payment of debts, the purchase by the administrator should be confirmed.

then, without a little more than parting with the character. It is the duty of a trustee to acquire all the knowledge he can obtain for the benefit of cestui que trust; and no court can discuss what knowledge he has acquired, and whether he has fairly given the benefit of that knowledge to the cestui que trust. In this case, the court refused to let James, who had been the solicitor to the commission of bankruptcy, lay down his solicitorship, and become a purchaser. Although a distinction may be taken between the character of the agency in the case Ex parte James, and that of Mr. Bailey, yet, the principles laid down in that case apply, to a considerable extent, to all agencies in which the agent may be supposed to acquire information in consequence of his agency, which is not in possession of his principal. In Coles v. Trecothick, 9 Ves. 235, an agreement was entered into to convey lands to trustees to be sold for the payment of debts, but the deed was not executed, and the cestui que trust acted for himself. The trustee purchased a part of the trust property, for his father, from the cestui que trust, who, being offered some time afterwards, a much more considerable price for the land, refused to convey, and this suit was brought by the purchaser for a specific performance. There were many circumstances in favour of the purchaser, and a specific performance was decreed; but, in speaking of purchases made by a trustee from cestui que trust, the chancellor said: "But, though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence, so much, that it is very hazardous for a trustee to engage in such a transaction." In Morse v. Royal, 12 Ves. 355, the counsel for the trustee purchaser admitted the law to be, "that it is incumbent on the trustee, if the suit be instituted during his life, to prove that the cestui que trust knew, not only that he was selling to his trustee, but also what he was selling, and that he had all the information the trustee could give him." The same doctrine was laid down with great strength by the opposite counsel, and although the court does not in terms assent to it, there is no reason to believe that the doctrine was not entirely familiar. In Lowther v. Lord Lowther, 13 Ves. 95, the lord chancellor states the principle to have been laid down to this effect by Lord Eldon, in Coles v. Trecothick: That an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnishes his employer with all the information that he himself possessed. There is much good sense and moral justice in this rule, and it imposes no hardship on the agent. He may make his contracts in the presence of witnesses, who may depose to the extent of his verbal communications: or their extent may be shown by written testimony, either in his correspondence, or the contract itself: or it may be inferred from the relative situation of the parties, and of the subject of the contract, that every material fact was known to the principal. The case under consideration, furnishes no circumstance to enable the court to infer, that the principal possessed all the knowledge which had probably been acquired by the agent. The facts of the case justify the belief, that he had received accurate information of the value of the property for which the contract was made. They do not authorize the opinion that Lucretia Teakle, or her children, possessed any other information than was derived from him, nor that he had communicated to them all that he had acquired which was material to the contract. Our knowledge of Mr. Bailey might satisfy us, as individuals, that he had done all which the strictest morality would require, but courts of equity must be guided by the testimony in the record, not by the good or bad opinion of individuals.

In this case, then, we see a contract made for an infant brother, by young ladies who had recently attained their ages of twenty-one years, with an agent, who had been employed for them during their infancy, in such transactions as gave him full knowledge of the value of the property which constituted the subject of the contract, and which had also constituted the subject of his agency. We perceive no evidence, that he communicated this information to them, or that they had derived it from any other source; nor was their situation in relation to the property such as to justify the inference that they could be possessed of it. Under these circumstances, we cannot think that the contract, so far as it was original, ought to stand against Rachael and Elizabeth, since their brother Severn, who has now attained his full age, refuses to affirm it. But, although the contract of 1812 must be set aside, as to the moiety of Severn Teakle's third part of the land, the defendant Bailey is unquestionably entitled to claim from him his third of the expenses incurred, and of the pecuniary compensation to which he would have been entitled for the services rendered. The advances of money constitute a proper subject for an account. The compensation which Mr. Bailey may claim, may be referred to a jury, unless the parties can adjust it themselves, or prefer a reference to a commissioner.[3]

[3] In addition to the cases cited by the chief justice, from Vesey, see the following cases, on the question of the extent of the validity of contracts between principal and agent: Butler v. Haskell, 4 Desaus. Eq. 651, and the cases cited by Desausure, J., in his opinion; Davoue v. Fanning, 2 Johns. Ch. 252. This question was examined very elaborately, in both of those cases, and in each of them the contract was annulled. See, also, Wormley v. Wormley, 8 Wheat. [21 U. S.] 421; 5 Pet. Cond. R. 473, cited in a note to the same case.

TEAL (COLLINSON v.). See Case No. 3,020.
TEAL (ELLIOT v.). See Case No. 4,389.
TEAL (ELLIOTT v.). See Case No. 4,396.
TEAL (PRICE v.). See Case No. 11,417.

Case No. 13,812.

TEAL v. WALKER et al.

[5 Reporter, 202:[1] 10 Chi. Leg. News, 131.]

Circuit Court, D. Oregon. Dec. 24, 1877.

PARTIES—SURETY—TRUSTEE—FEDERAL JURISDICTION—CITIZENSHIP.

1. In a suit by surety to cancel a conveyance of land in trust to secure a note of the principal, the trustee is a necessary, not a nominal, party to the suit.

2. The word "citizen" in the judiciary act of 1789, and word "citizens" in the act of March 3, 1875 [18 Stat. 470], construed.

[Cited in Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. 531.]

3. A controversy is not "between citizens of different states," unless all the persons on one side of it are citizens of different states from all the persons on the other side. If any of the plaintiffs and defendants are citizens of the same state, the controversy does not come within the operation of the judicial power of the United States.

In equity. Suit for an injunction and to cancel conveyance. The bill alleges that plaintiff is a citizen of Oregon; Walker a citizen of California, and Hewett, defendant, a subject of Great Britain. It also alleges that one Goldsmith, in August, 1874, borrowed $100,000 of Walker, giving his note payable in two years, with interest, and on the same day Goldsmith and Teal, being equal part owners of 10,600 acres of land in Wallamet Valley, conveyed the same to Hewett in trust to secure the note, and Goldsmith also, for the same purpose, at the same time, conveyed to Hewett as trustee 6,340 other acres of which he was sole owner; that in October, 1876, the sum of $96,750 being due on the note, Goldsmith and Teal conveyed 800 additional acres to Hewett to secure its payment, and payment was extended one year; that no part of the interest on the note has been paid since December 21, 1876; that in March, 1877, Goldsmith became insolvent; that in the same month Hewett and Walker, without the knowledge or consent of plaintiff, and for a valuable consideration, extended the time for payment of said note to May, 1877. The plaintiff claims that the effect of this extension was to discharge his property from the trust or suretyship; and he brings this suit to enjoin the trustee from enforcing the trust against his interest in the property, and to have the conveyances, so far as such interest is concerned, cancelled.

The defendants pleaded that defendant Hewett is not an alien, but a citizen of Oregon, and, therefore, this court has not jurisdiction of the controversy.

[1] [Reprinted from 5 Reporter, 202, by permission.]

Upon the argument of the pleas, counsel for plaintiff maintained Hewett was only a nominal party without interest in the subject of the controversy, and, therefore, his citizenship was immaterial, citing Brown v. Strode, 5 Cranch [9 U. S.] 303; Irvine v. Lowry, 14 Pet. [39 U. S.] 293; also, that the plea is bad, even admitting Hewett to be a citizen of Oregon, and a party in interest, because there is still a controversy in a suit "between citizens of different states," namely, the plaintiff and Walker.

W. F. Effinger, W. L. Hill, and H. T. Thompson, for plaintiff.

John Catlin, for defendants.

DEADY, District Judge. The defendant Hewett is more than a nominal party. He is an interested party. The legal title to the premises is in him and he is vested with the power and charged with the duties of a trustee of the property for the benefit of the parties actually interested therein. In Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 174, the supreme court held that executors and trustees who sue for the benefit of others are necessary parties and not merely formal ones; and that if they are qualified by their citizenship to be parties to litigation in the national courts, the citizenship of the parties whom they represent is immaterial. The legal controversy in this case lies between the plaintiff and Hewett—the former seeking by means of this suit to divest the latter of his title to and control of the premises as trustee, on the ground that Walker, the cestui que trust, is no longer entitled to the benefit of the security. The argument in support of the second proposition rests upon the difference in the language of section 1 of the act of March 3, 1875 (18 Stat. 470), and that of section 11 of the old judiciary act (1 Stat. 78), conferring jurisdiction upon the circuit courts on account of the citizenship of the parties. The latter provided that the court should have jurisdiction when "the suit is between a citizen of the state where the suit is brought and a citizen of another state," while the former extends the jurisdiction to all suits "in which there shall be a controversy between citizens of different states."

It is contended that the use of the word "citizens" in the late act as a substitute for the singular number of that term in the old act indicates a purpose to confer jurisdiction in any suit wherein there is a controversy between two or more citizens of different states, although other adverse parties to the suit and controversy therein may be citizens of the same state. The word "citizen" in act of 1789 was always construed to include all the parties to a suit, so that if any one of the plaintiffs and defendants were citizens of the same state the jurisdiction did not attach. In Coal Co. v. Blatchford, supra, Mr. Justice Field states the rule as follows: "The designation of the party, plaintiff or defendant, is in the singular number, but the designation is

intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons all of whom are entitled to sue, or are liable to be sued in the federal courts. In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

The act of 1875 follows the language of the constitution (article 2, § 2) in this particular, which extends the judicial power of the United States "to controversies between citizens of different states." Congress cannot extend the jurisdiction of the circuit courts beyond the grant of judicial power in the constitution, and, therefore, the question turns upon the proper construction of the phrase, "between citizens of different states" as used in the constitution and copied into the act of 1875. The word "citizen" in the act of 1789 having been held to be equivalent of "citizens," the construction given to the act in this respect must apply to this. All the parties plaintiff must be citizens of different states from all the parties defendant. A controversy is not between citizens of different states unless all the persons on one side of it are citizens of different states from all the persons on the other side. So long as any of the plaintiffs and defendants are citizens of the same state, the controversy is only partially between citizens of different states, and does not come within the operation of the judicial power of the United States, and, therefore, not within the jurisdiction of this court. The pleas are sufficient.

[NOTE. An action at law was subsequently brought by Walker against Teal to recover damages to the amount of $16,000, which he claimed he had sustained by the refusal of Teal to surrender possession of the property to Hewett. A demurrer was filed to the complaint, which was overruled, with leave to Teal to answer. 5 Fed. 317. Teal answered, and the case, having been put at issue by the filing of a replication, was tried by a jury, which returned a verdict for the plaintiff for $5,345.88, on which the court rendered judgment. On error to the supreme court, the judgment of the circuit court was reversed, and the cause remanded for further proceedings. 111 U. S. 242, 4 Sup. Ct. 420.]

TEARRIN v. CRAWFORD. See Case No. 4,686.

Case No. 13,813.

TEASDALE v. BRANTON.

[Brunner, Col. Cas. 28;[1] 2 Hayw. (N. C.) 377.]

Circuit Court, D. North Carolina. Dec., 1805.

JUDGMENT—VERDICT—PRESUMPTION—PLEADING—REPLICATION—ADMINISTRATOR—PERSONAL LIABILITY.

1. If upon the plea of nul tiel record the record produced shows a verdict, but no judgment entered thereon, the court will presume, according to the loose practice in this state, that there was a judgment entered pursuant to the verdict, and pronounce that there is such a record.

2. After a confession of assets a judgment to be levied de bonis testatoris, and a return of nulla bona, a scire facias to the executor or administrator to subject him de bonis propriis is the proper course, and will issue on suggestion of a devastavit.

3. If an administrator plead judgment and no assets ultra, replication thereto may be either nul tiel record, or assets ultra, or per fraudem, or any other fact properly triable by jury.

There was a verdict against the administrator upon the plea of fully administered—judgments, etc. Execution issued, and was returned nulla bona. This scire facias issued to show cause why the plaintiff should not have judgment to be levied de bonis propriis. The defendant pleaded nul tiel record, no devastavit returned or found—judgments. Replication to the plea of nul tiel record, and demurrer to the other pleas. The record produced showed the verdict; no judgment had been regularly entered. The scire facias after stating the verdict went on and stated that judgment was rendered accordingly.

[See Case No. 13,814.]

PER CURIAM. We must presume according to the loose practice of this state that there was a judgment entered pursuant to the verdict, and therefore we must say there is such a record. As to the demurrer, for that no devastavit is returned or found: to be sure by the English practice no scire facias lies against the executor to subject him de bonis propriis, till a devastavit is found upon a scire fieri inquiry, and returned. An action of debt, however, will lie upon suggestion of a devastavit, and the practice in this state has been to issue a scire facias upon such suggestion. And as every defense can be made to the scire facias which could be made to the action, there can be no good reason for adjudging the scire facias improper. If the scire facias here be considered in lieu of scire fieri inquiry in England, it possesses advantages far above the English mode; for here it is to be executed in court, and under the direction of the court; whereas the other is in the county before a jury. With respect to the demurrer to the plea of judgments and no assets ultra, that was pleaded in the original suit; but the defendant's counsel say a replication thereto, denying the judgments, in nul tiel record; and the record shows that the jury said there were no such judgments; therefore the plea has not been tried, and if so, no judgment can be presumed; for the court ought not to enter judgment when any one plea remains untried. The answer is, the replication may be either nul tiel record, or assets ultra, or per fraudem, or other matter of fact; and such replication was properly triable by jury; and an irregularity committed by the

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

clerk in entering the verdict will not raise a presumption that the judgment was not given upon the verdict. If there was such a judgment, that estops the defendant from using any plea which he did or might have pleaded prior to that judgment. The demurrer therefore must be allowed.

Case No. 13,814.

TEASDALE v. JORDAN.

[Brunner, Col. Cas. 19; [1] 2 Hayw. N. C. 281.]

Circuit Court, D. North Carolina. June Term, 1803.

PLEADING AT LAW—ADMINISTRATOR—FAILURE OF ASSETS.

An administrator may be permitted to amend by adding a plea where judgments have been obtained to the amount of the assets in his hands since he first pleaded.

This case being called for trial Woods moved to aid a plea and stated that since the defendant [Jordan, administrator in right of the wife of Brandon] pleaded, judgments had been obtained against him to the amount of the assets in his hands.

And by MARSHALL, Circuit Justice (to which POTTER, District Judge, assented): It is in the discretion of the court to permit the addition of a plea at any time before the trial; and the court will admit the plea where the justice of the case requires it. And the plea now offered is such an one as justice requires the admission of. It would be a monstrous position that when judgments, after plea, had taken away all the assets, the executor or administrator should, notwithstanding, be compelled to answer the debts first pleaded to.

The plea was added.

[See Case No. 13,813.]

Case No. 13,815.

TEASDALE v. The RAMBLER.

[1 Bee, 9.] [2]

District Court, D. South Carolina. 1794.

PLEADING IN ADMIRALTY—PLEA TO JURISDICTION—HOW INTERPOSED.

A plea to the jurisdiction can only be interposed by the defendant himself in propriâ personâ, and on oath. No third person can be admitted to file such plea.

[Cited in Hutson v. Jordan, Case No. 6,959; Van Antwerp v. Hulburd, Id. 16,826.]

[Cited in brief in Fuller v. Bartlett, 41 Me. 263.]

In admiralty.

BEE, District Judge. The matter to be determined is, whether a plea to the jurisdiction of this court can, consistently with its rules of practice, be filed by a third person, who calls himself an agent of the French republic. All the cases quoted, and some others that I have looked into, maintain that such a plea cannot be exhibited by an attorney, proctor, or solicitor; and the reason is assigned, viz. that as the party must ratify the act of the agent, he thereby admits the jurisdiction of the court in the first instance, and must exhibit his plea to the jurisdiction in propriâ personâ, and on oath.

In the present case, a libel has been filed against Edward Ballard, and a sloop and cargo, taken by him on the high seas, belonging to subjects of Great Britain, in amity with us. The libel charges that Ballard is a citizen of the United States; that his vessel was fitted out and is owned there, and that his crew are citizens of the United States: that the capture is therefore illegal, being contrary to the laws of neutrality and of nations. Ballard does not appear, and answer on oath to the charges in the libel, which, by the rules of the civil law, he is required to do; these charges, therefore, must be considered as true. But a third person, Sasportas, comes forward in behalf of the French republic, and of Capt. Ballard, and pleads to the jurisdiction, insisting that neither he nor Ballard is bound to appear, or answer the libel: First, because the vessel commanded by Ballard belongs to the French republic, and was fitted, armed, and commissioned by their authority. Secondly, that Ballard is a French citizen; but that, even if he were a citizen of the United States, he had a right to command this vessel for the benefit of France, and to capture prizes from her enemies.

Cases were produced to shew that any person may, in a court of civil law, interpose pleas and claims for others who are absent. This is true to a certain extent; and there would be a failure of justice if it were otherwise. But there is not a single instance of a plea to the jurisdiction interposed in this manner. The reason has been already assigned; the jurisdiction is admitted as soon as the act of the agent is ratified by the principal. At common law, this same consequence follows from filing the power of attorney. The actor in civil law courts, and the complainant in chancery is entitled to call for the oath of defendants, because it is otherwise difficult to get at a knowledge of the facts. To controvert this oath, there must be the evidence of two witnesses.

It is admitted that if the suit be in personam, the defendant alone can either plead, answer, or claim. But it is said that if the suit be in rem, all persons may interpose a plea or claim, though they are not expressly named in the libel. Nobody, however, can answer, unless named in the libel. Sasportas, to justify his interposition in this case, exhibits a certificate from the French consul, authorizing him to comply with certain cus-

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

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

tomhouse requisites as to Ballard's prizes, of which the Rambler is one. He is further authorized by this paper to hold the proceeds at the disposal of the French republic, whose agent he is said therein to be. The certificate is dated eleven days after this suit was instituted, and when the property was in the hands of the marshal of this court. Letters of agency, or powers of attorney, are to be pursued strictly; and the one in question, authorizing only customhouse entries, can never be a warrant for defending this suit.

In the case of Jansen and Talbot, Ballard suffered his third default to be recorded, and relinquished thereby, all claim. Talbot, indeed, stated that he found the prize in Ballard's possession, and took it from him because he had no commission. Here, Ballard does not relinquish, but procures a third person to interpose a plea in his behalf, though he is, himself, on the spot, and has been duly served with process of the court.

Let Sasportas' plea be repelled with costs, as being brought forward by a person incompetent thereto.

Case No. 13,816.

Ex parte TEBBETS.

[5 Law Rep. 503.]

District Court, D. New Hampshire. 1842.

BANKRUPTCY—PROPERTY OF MINOR CHILDREN.

Held, that the property of minor children, which had been accumulated by their sole exertions, with their father's consent, and had always stood in their name, did not vest in the assignee of the father.

In this case, the assignee [Torr] made his return, that the bankrupt had delivered to him all his property, of every description, unless two hundred and seventy-eight dollars deposited in the Strafford Savings' Bank, and two shares in the Rochester Bank, of the value of one hundred dollars each, which stand in the name of his two minor sons, one twenty, the other seventeen years of age, should be deemed and taken as the property of the bankrupt. It appeared, that Torr, the bankrupt, had been a retailer of merchandise, in the town of Rochester, where he now resides, for the last twenty-four years. About ten years since, being without a clerk, and to induce his sons to remain in the store, he stipulated with them, that if they would remain in the store, and be faithful to his interest, they should have the privilege of selling confectionery, and the profits arising from such sale should belong to them. Accordingly, preparations were made for keeping their stock and their money, entirely separate from the business of the store. They purchased their first stock, not exceeding two dollars in value, with money which they had obtained, as children obtain small sums of money, and enlarged their business as their capital increased. When the Rochester Bank was established in 1835, they took one share of its capital stock, paid one half the amount, and gave their note, secured by a pledge of the stock, for the other half. The note was afterwards paid by them in small sums, as they had means. Afterwards, they bought another share in the same bank, and secured the payment for it, by pledging the certificate, and for which payment has since been made by them, in small sums, realized from the profits of their business, as satisfactorily appears. These shares have always been taxed to these boys, and they have ever paid the taxes from their own money, and received the dividends made thereon. The two hundred and seventy-eight dollars, deposited in the Strafford Savings' Bank, in the belief of the father, was obtained from their aforesaid business, and in no other way, as he never contributed, either directly or indirectly, towards this deposit, or the payment of the bank shares.

C. H. Woodman, for minors.

HARVEY, District Judge, was of opinion, that this case furnished sufficient reasons for an exception to the general rule, which gives to the parent the proceeds of the labor and industry of minor children. And, in adopting this conclusion, he was not aware that the creditors of the bankrupt had any just grounds for complaint. For, from the facts disclosed, it might safely be presumed, that the effects of the bankrupt were none the less, in consequence of this agreement of the father with these boys; but, on the other hand, the strong presumption was, that they were increased by reason of the greater diligence and constant attendance on the business of the father, by his sons, considering it for their own interest to be trustworthy and faithful. He considered it no forced construction, to view this transaction in the character of a daily task, required to be performed by these minors, and after the performance of which, the residue of the time, with all its advantages and all that might be realized from it, to be at their disposal. This, he presumed, was a practice of no unfrequent occurrence; but the gross injustice of a father, in taking away a small pittance, earned under such circumstances, must be obvious to every one, however strongly it may be urged and supported by strict legal construction. Moreover, he thought the creditors had no equitable claim to this property, for the reason, that it never was considered the property of the bankrupt, and of course he never could have received any further indulgence, or additional credit from them on this account. The books of the savings bank, and the collector's tax book, have always shown this deposit and these bank shares, to be the property of these boys. His opinion, therefore, was, that this property could not be claimed by the assignee.

Case No. 13,817.

In re TEBBETTS.

[5 Law Rep. 259.]

Circuit Court, D. Massachusetts. Sept. 7, 1842.

BANKRUPTCY—WHO MAY OPPOSE DISCHARGE—FIDUCIARY DEBTS—EFFECT OF PROVING—FORM OF DISCHARGE — CONCEALING DEBTS.

1. A person having an equitable claim against the estate of a bankrupt, has such an "interest" as entitles him to appear and to oppose the petition of the bankrupt for his discharge.

[Cited in Re Sheppard, Case No. 12,753.]

2. The existence of fiduciary debts, contracted before the passage of the bankrupt act, owing by the petitioner, constitutes no positive incapacity, disqualification, or valid objection to his being declared a bankrupt, and obtaining the benefit of the bankrupt act, if he owes other debts, not of a fiduciary character.

3. Misapplication of fiduciary funds before the passing of the bankrupt act [of 1841 (5 Stat. 440)] deprives the party of all right to a discharge from them only; misapplication after the passing of the act, deprives him of all right to a discharge from any debts whatsoever.

[Cited in Day v. Bardwell, 97 Mass. 255.]

4. Fiduciary debts are provable under the proceedings in bankruptcy, equally with other debts, at the creditor's election.

5. If the fiduciary creditor elects to come and prove his debt and to take a dividend, he is barred of all other remedy therefor, except out of the assets.

[Cited in Re Clews, Case No. 2,891.]

[Cited in Burpee v. Sparhawk, 108 Mass. 115; Morse v. Lowell, 7 Metc. (Mass.) 153.]

6. Fiduciary debts, not proved under the proceedings in bankruptcy, are not extinguished by a discharge and certificate under the act.

[Cited in Rowan v. Holcomb, 16 Ohio, 465.]

7. The discharge and certificate of a bankrupt, when granted, should be in a general form; but the terms of them, however general, cannot affect the rights of those to whom the bankrupt is owing debts in a fiduciary capacity, which have not been proved under the proceedings in bankruptcy.

[Cited in Wilmarth v. Burt, 7 Metc. (Mass.) 261.]

8. The date of the passage of the bankrupt act, as referred to in the fourth section thereof, means after the date of the approval thereof, namely, the 19th of August, 1841, and not after the day when it was to go fully into operation.

9. A concealment or suppression by the bankrupt, of a particular debt in the schedule annexed to his original petition, does not constitute a valid objection to his discharge, unless such concealment or suppression was intentional and fraudulent.

This case was adjourned from the district court under the following circumstances. The bankrupt, John C. Tebbetts, having filed his petition for a discharge, at the return day of the notice, the following objections were filed: "Charles F. Adams, Peter T. Homer, and Sidney Homer, all of Boston, in the county of Suffolk in said district, merchants and partners in trade, jointly negociating under the firm of Adams, Homer & Co., appear and pray the court here, that the said Tebbetts may not be discharged on his said proceedings in bankruptcy, and they now file their objections thereto in writing, as follows: that is to say, that the said Tebbetts, heretofore, to wit, in the year eighteen hundred and thirty-six, was appointed administrator of the goods and estate of Henry H. Willard, late of said Boston, trader, deceased, intestate, and accepted said trust; and in the execution of said trust, the said Tebbetts received a large sum of money, belonging to said estate, to wit, twelve thousand four hundred and four dollars and forty-four cents, ($12,404.44), which he has never paid over or accounted for. That the said Adams, Homer & Co. were creditors of said Willard; that upon a settlement of his estate in the probate court of said county, it was decreed to be insolvent; that their debt against said Willard was proved before the commissioners of insolvency appointed by the judge of probate of said county, and the sum of two thousand one hundred and eighty-four dollars and sixteen cents ($2,184.16) was allowed them by said commissioners in their return made to the said judge; which said return was duly accepted by the said judge, and a decree thereon made by him, upon the second day of March, in the year one thousand eight hundred and forty, ordering a distribution among the creditors, of all the assets remaining in the hands of said administrator; which said assets, according to his administration account, rendered on said second day of March, 1840, amounted to the sum of twelve thousand two hundred and twenty dollars and fifty-four cents, ($12,220,-54), and by the said decree of distribution, the said administrator was ordered to pay to the several creditors their several debts, each at the rate of sixty-four cents and four hundred and fourteen thousandths on the dollar, at which said rate the proportion due to the said Adams, Homer & Co., for their debt aforesaid, amounted to the sum of fourteen hundred and six dollars, ($1406.00) which said sum has been demanded by them of the said administrator; but he has neglected and refused to pay the same. That the said Tebbetts, in his petition to this court for his discharge as a bankrupt, has, among the alleged debts from which he prays to be discharged, set forth the aforesaid sum of twelve thousand four hundred and four dollars and forty-four cents, ($12,-404.44) being the assets aforesaid heretofore in his hands, in which the said Adams, Homer & Co. have an interest as aforesaid, and being the same sum of money which said administrator has not paid over or accounted for, as before alleged. That the assets belonging as aforesaid to the estate of Henry H. Willard, upon which the said Tebbetts administered as aforesaid, have, by his acts and doings in the premises, been unlawfully intermixed with the property of said Tebbetts and of his late copartners in trade, the remains of which are set forth in the inventory of property, rights, and credits annexed to his said petition; and in con-

sequence of such unlawful intermixture by the said Tebbetts it cannot now be ascertained what part of said inventoried property, if any, belongs to said Tebbetts or his co-partners, so that a just dividend and distribution thereof cannot be made according to the statute of the United States in this behalf provided. That the said Tebbetts, in the list of debts annexed to his said petition, has colorably set forth the aforesaid balance of twelve thousand four hundred and four dollars and forty-four cents, due from him in his capacity of administrator of said Willard, as among the ordinary individual debts due from him or his co-partners; whereas, in truth and in fact, the same was a debt owing by him, and created in consequence of a defalcation by him while acting in his fiduciary capacity of administrator as aforesaid. All which is in violation of his duty in his said fiduciary capacity, in fraud of the bankrupt law of the United States, in this behalf made and provided, and to the great injury of your petitioners."

To these objections, the following answer was put in by the bankrupt: "And now the said Tebbetts comes into court and prays judgment, whether, by reason of any thing in the objections filed by the said Charles F. Adams, Peter T. Homer, and Sidney Homer, contained, he, the said Tebbetts ought to be precluded from having and receiving a full discharge from all his debts, as by him prayed, in his proceedings, under the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' And he also prays judgment of the court here, whether the above-named objectors are entitled to or in law have any good right to propound and maintain the said objections."

At the hearing in the district court, the following question was ordered to be adjourned into the circuit court, to be there heard and determined, namely: "Whether, upon the facts set forth in the written objections of Charles F. Adams, Peter T. Homer, and Sidney Homer, said Tebbetts can and ought to receive any discharge; and if any, what discharge and certificate."

John Pickering, for parties objecting, contended, that the bankrupt was not entitled to a discharge from all his debts; if from any, then only from those in his own right: (1) Because he had not complied with the requisitions of the law, in pursuing his remedy, if entitled to relief under the law. (2) Because he was a defaulter in his fiduciary character. (3) Because he had brought forward debts which were false and fictitious as respects the general creditors. (4) Because he had included in his list of debts, a demand which was due from himself as administrator of an intestate, and represented it as an ordinary debt like others due to the general creditors. (5) Because he had used the property of the intestate and intermixed it with his individual property, so that it could not be now ascertained what part belonged to the intestate, and what part, if any, to himself.

Henry H. Fuller, for petitioner, Tebbetts, took the following points:

First. That Tebbetts, although owing debts in a fiduciary capacity, yet, as he owed other debts, those of both descriptions having been contracted before the passage of the bankrupt act, was a subject of that law; that is, he could petition to be declared a bankrupt, and had a right to a decree to that effect. To this point he cited the first section of the act, "all persons, whatsoever, residing, &c., owing debts, not created in consequence of a defalcation, &c., who shall by petition, &c., shall be deemed bankrupts, &c., and may be so declared."

Second. That as he comes within the purview of the statute, and has, in fact, been declared a bankrupt, by a decree of the court in due form, he is now entitled to his discharge, if he has obeyed the orders of the court, and conformed to the provisions of the act; there being only one case, in which, by the statute, a person thus situated, shall not be discharged, and that is, where the debtor has applied "trust funds to his own use," since the passage of the act. To this point he cited the fourth section, and particularly the latter part, which states the only points, which, being found against the debtor by a court or jury, shall deprive him of a discharge. It runs thus: "If, upon a full hearing, &c., it shall appear, &c., that the bankrupt has made a full disclosure, &c., and has in all things conformed to the directions, &c., the court shall make a decree of discharge," &c.

Third. Being entitled to a discharge, it must be a discharge in general form, from all his debts, there being nowhere in the act any provision for a partial or qualified discharge, nor any intimation, that such an one might or could be granted in any case whatsoever, arising under the act.

Fourth. The persons now appearing and opposing a discharge, have no right to be heard, inasmuch as they are not creditors of Tebbetts, but of H. H. Willard, the deceased,—and the statute has allowed to creditors, only, the right to oppose a discharge. It is true, the act has directed notice, in certain cases, to be given to "creditors, and others interested,"—but in the clause in the fourth section, giving a right to oppose a discharge, the word "creditors," only, is used.

Fifth. To the objection, that the schedule of debts was irregular and informal, because it set down the debt from Tebbetts, as owing "To the estate of H. H. Willard," it was answered, that this is well enough, because the creditors of Willard, were not, directly and in a legal sense, creditors of his administrator; but more especially, that

this objection to the form of the schedule, unless it was coupled with a charge, that it was so made with some fraudulent design and purpose in the bankrupt, was of no validity at any time, because mere honest mistakes and errors in schedules are amendable at any time; and in this instance the objection comes too late, it being in the nature of matter in abatement, and should have been urged, if ever, before the decree of bankruptcy passed; that decree being final and conclusive upon all such matters, by the express provisions of the act.

STORY, Circuit Justice. Three questions have been ably and fully argued at the bar: (1) Whether the objectors have, by law, any right to appear and intervene to oppose the petition of the bankrupt for his discharge and certificate, under the circumstances stated in their written allegation. (2) If they have, whether the circumstances, so stated, constitute any valid objection to the right of the bankrupt to a discharge and certificate. (3) If the bankrupt is entitled to any discharge, whether it should be a general discharge and certificate, or ought to be limited in its terms and extent, to such debts as are not fiduciary.

The first question is preliminary in its nature, and necessarily involves, what is called in the admiralty the jus personæ standi in judicio, the right of the objectors to stand in judgment before the court, as parties entitled to contest the petition. The argument, on behalf of the bankrupt, resolves itself into this, that the objectors are not creditors, and that creditors alone have a right to appear and contest his discharge. The argument on the other side is, that although they are not creditors, they are "parties in interest," and, therefore, under the bankrupt act of 1841, c. 9, entitled to appear and contest the discharge. And in support of this argument, the language of the fourth section of the act, respecting the application for a discharge, is relied on; where it is expressly provided, that "notice shall be given for a prescribed period, by a publication in some newspaper, to all creditors, who have proved their debts, and other persons in interest, at a particular time and place, to show cause, why such discharge and certificate shall not be granted; at which time and place any such creditors or other persons in interest, may appear and contest the right of the bankrupt thereto." Now, it seems to me, that these words, "other persons in interest," are sufficiently broad and appropriate to cover the case of the objectors. If they are not strictly, in the sense of the law, creditors of the bankrupt, they are, at least, equitable creditors, and, under the circumstances stated in their allegation, they have an interest in the funds and property to be administered in bankruptcy. In short, in the view of a court of equity, they have a direct claim upon the bankrupt for the amount of the dividend, decreed in their favor, by the court of probate; and no court of equity would hesitate to decree it to be paid by him out of the assets of the estate of Willard, in his hands, and if he has wasted them out of his own assets. Upon this point, therefore, I feel no doubt whatsoever.

Upon the second point, there is, I am sorry to say, some room for doubt; and that doubt is greatly enhanced, by the apparent conflict of the decisions, upon the subject, made in other circuits, with which I have been favored. In Virginia, it has been held by one of my learned brothers (Mr. Justice Daniel) that a person, who owes fiduciary debts, is not entitled to the benefit of the bankrupt act, and is not within the scope of its provisions, and cannot be declared a bankrupt, so long as he remains in that predicament. On the other hand, in Ohio and in New York, two others of my learned brothers hold the contrary doctrine, that such a person is within the scope of the bankrupt act, and may be declared a bankrupt, notwithstanding he owes fiduciary debts. The learned judge in Ohio (Mr. Justice McLean) holds: (1) That no relief can, under the bankrupt act, be given against a fiduciary debt. (2) That the debt, in that case, having been contracted before the passage of the bankrupt act, that the applicant is not thereby deprived of the benefit of the act as to other debts. The learned judge in New York (Mr. Justice Thompson) holds: (1) That the existence of a fiduciary debt does not preclude the party from taking the benefit of the bankrupt act, as to all other debts. (2) That the bankrupt act, being intended for the benefit of creditors, a fiduciary creditor is not bound to come in and take his dividend under the act; but he has an election to do so, if he chooses. (3) That unless the fiduciary creditor does elect to come in under the bankruptcy, his debt is not discharged thereby; but that the bankrupt is or may be entitled to a discharge from all other debts.

In this state of the authorities, I am reluctantly compelled to examine the question de novo, and to decide it according to my own judgment of the true intendment, language, and objects of the act. And, upon the best consideration, which I have been able to bestow upon the subject, my own opinion on this point is, that the existence of fiduciary debts, owing by the petitioner, constitutes no positive incapacity, disqualification, or valid objection to his being declared a bankrupt and obtaining the benefit of the act, if he owes other debts not of a fiduciary character. It seems to me, that this is the natural, if it be not the necessary interpretation of the language of the first section of the act, descriptive of the persons, who are within its purview. The language is: "All persons whatsoever, resid-

ing in any state, district, or territory of the United States, owing debts, which shall not have been created in consequence of a defalcation, as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall by petition, &c. shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court." Now, it seems to me, that the just interpretation of these words is, that they include all persons, who are owing other debts, as well as fiduciary debts; and that they exclude persons, who are owing no other than fiduciary debts. The act has nowhere said that a person, who owes a fiduciary debt, shall not be entitled to the benefit of its provisions. All, that is said, is, that he must owe other debts, besides a fiduciary debt. If he is owing debts, which shall not have been created by public defalcation, or while acting in any fiduciary capacity, he falls within the very category of the language of the act. The descriptio personæ is directly applicable to him. If the act intended to exclude all persons from its benefits, who owed fiduciary debts, the appropriate manner of expressing that intention would have been, to have said: All persons, who do not owe fiduciary debts, shall be entitled to the benefit of the act. What appears to me to fortify this construction of the act is, that the fourth section provides, not, that a fiduciary debtor may not become a bankrupt under the act, but that, if he is a bankrupt, he shall not be entitled to a discharge or certificate under the act, if, after the passing of the act, he "shall apply trust funds to his own use." Now, this language necessarily supposes, that if he has misapplied trust funds before the passage of the act, he is or may be still entitled to the benefit of the act. And yet he may, up to that very moment, be a fiduciary debtor by reason of such misapplication. Indeed, in this very case, the objections, in the mode and under the circumstances, in which they are presented, are objections to the discharge of the bankrupt, and not to his being declared a bankrupt. For the latter purpose the objections come too late; for the decree of the district court has already proclaimed him a bankrupt; and the objections should have been interposed before that decree, in order to be of any validity; and the case, as to the right of the petitioner to be declared a bankrupt, has passed in rem judicatam. The application is not now to supersede the decree of bankruptcy, even if it could be lawfully done; but to deny any discharge and certificate to the bankrupt. The closing passage of the first section of the act, by providing that "all such decrees (declaring the party a bankrupt) passed by such court, and not so reëxamined (that is, by a jury), shall be decreed final and conclusive as to the subject-matter thereof," seems to preclude all further inquiry as to the point, whether he was a debtor entitled to the benefit of the act, or not.

The third question involves still more difficulty, and from which it is not very easy to free one's mind from all doubt. The question is susceptible of being considered under various aspects. In the first place, are fiduciary debts provable under the bankruptcy, so as to entitle the creditor, at his option, to come in and take a dividend? In the next place, if he does come in, will the discharge and certificate amount to an extinguishment or waiver of all right to his debt, beyond what the assets of the bankrupt will satisfy? In the next place, if the fiduciary creditor does not come in and prove his debt under the bankruptcy, will the discharge and certificate, if obtained by the bankrupt, operate as an extinguishment thereof, or leave the fiduciary creditor with a full title to all his rights and remedies in the same way, as if no decree of bankruptcy had occurred and no discharge and certificate had been given? And in the next place, if the fiduciary debts are not extinguished by the discharge and certificate in bankruptcy, should the discharge and certificate be in a general form, or contain an exception of such fiduciary debts? There is no direct and positive provision in the act, which resolves either of these questions; and, therefore, the answers must be wrought out by a close survey of the true objects and intents of the act deducible from its various enactments.

After bestowing considerable reflection upon the subject, under these various aspects, I have at length come to the conclusion (1) that fiduciary debts are provable under the proceedings in bankruptcy equally with other debts, at the creditor's election; (2) that if the fiduciary creditor elects to come and prove his debt, and to take a dividend, he is barred of all other remedy therefor, except out of the assets. I deduce this latter conclusion from the language of the fifth section, which declares, that "no creditor or other person coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt." The other conclusion I deduce from the general language of the act, which enables "all creditors to come in and prove their debts and claims;" and a fiduciary creditor is as much within this language, as any other creditor. It is a benefit, to which he is entitled, in common with all other creditors. The act manifestly intended to favor fiduciary creditors, and not to place them in a worse situation than others; and yet, upon any other interpretation, they would be in a worse situation, and be excluded from sharing in the assets, and be compellable to rely upon the personal responsibility, (if any exists,) of the bankrupt.

himself,—that is, upon the ability of a person utterly insolvent and without property. And I have no doubt, that fiduciary creditors, whether the debts due to them are to be treated as legal or as equitable debts, are equally within the protective power of the act, and in an especial manner of the fifth section thereof. I have as little doubt, that the present objectors are fiduciary creditors, having an equitable debt and claim against the bankrupt, and entitled to come in and prove it against his estate under the proceedings in bankruptcy. The debt is, indeed, due to them primarily by the bankrupt in autre droit, and in his fiduciary character; but if he has wasted the assets of the intestate, he is personally liable to the objectors for the full amount in his personal capacity. In truth, the very enumeration of the debt of $12,404.44 cents in his schedule, as due to the estate of his intestate, admits, that he has wasted all the assets thereof to that amount.

The next point (3) is, that upon which I have felt most difficulty, namely, whether fiduciary debts, not proved under the proceedings in bankruptcy, are extinguished by a discharge and certificate under the act. After some hesitation, I have come to the conclusion, that they are not. There is not, I admit, any positive clause to this effect; but it seems to me, to be a just result, from the general provisions and objects of the act, and especially of the first and fourth sections thereof. If fiduciary debts, as well as other debts, were intended to be barred or extinguished by a discharge and certificate obtained, by the bankrupt, under the act, it seems difficult to perceive, why the first section has so studiously excluded persons, owing fiduciary debts, alone, from the benefit of the act. Yet they certainly are so excluded. If, on the other hand, we construe the act, as saving the rights of the fiduciary creditors, and exempting them, at their option, from the operation of the act —from motives of public policy—and the design of putting strong marks of distinction and reprobation upon official and fiduciary defalcations, we readily see, why the party may still be permitted to obtain the benefit of the act, as to other debts, without, in any manner, impairing this policy, or breaking in upon this design. It leaves the party, as to his fiduciary debts, where it finds him, to the justice, and it may be to the mercy of the creditors. In this manner, the whole section is in entire harmony with itself, as well as with other parts of the act, and has an appropriate meaning and use. The fourth section illustrates this interpretation. By that, the bankrupt is denied any discharge or certificate, if, after the passing of the act, (which in my judgment means after the date of the approval of the act, viz., the 19th of August, 1841, and not after the day when it was to go fully into operation, viz., from and after the first day of February, 1842,) he "shall apply trust funds to his own use." Now, it is plain, that such a misapplication, after the passing of the act, is treated as a gross fraud, which ought to deprive the party of any discharge or certificate under the act, as to all his debts whatsoever, not only such as are fiduciary, but all others. But if the misapplication was before the passing of the act, the party is not deprived of his right to a discharge or certificate; so that there is no difficulty in saying, that the discharge may well operate as a bar or extinguishment of all other debts, leaving still fiduciary debts a privileged class, untouched by the act upon the grounds of the public policy above suggested. In this mode of construing the act, the distinction between fiduciary debts and others is constantly preserved; and the public policy is throughout maintained and promoted. Misapplication of fiduciary funds before the passing of the act deprives the party of all right to a discharge from them only; misapplication after the passing of the act deprives him of all right to a discharge from any debts whatsoever.

The remaining point (4) is, what ought to be the form of the discharge and certificate? Ought it to be in a general form, or with a special exception of fiduciary debts? I think, that it should be in a general form for two reasons. In the first place, no other form is contemplated by the provisions of the act, and especially by the fourth section, which is pointed to this very matter. The language of the section is, that the bankrupt shall "be entitled to a full discharge, from all his debts, to be decreed and allowed by the court, which has declared him a bankrupt, and a certificate granted to him by such court accordingly upon his petition filed for such purpose;" and again, "and such discharge and certificate, when only granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act." Now, it seems to me difficult to perceive, that any other form than that of a general discharge and certificate, is required, or justified, or allowed by this language. In the next place, there is no necessity to except fiduciary debts from the general terms of the discharge and certificate; for if they are by implication excepted from the operation of the act, where the fiduciary creditor does not elect to come in and prove his debt, and take a dividend under the proceedings, it is plain, that the terms of the discharge and certificate, however general, cannot vary or control his rights; and that his debt will not be barred or extinguished thereby; but he may, if the discharge and certificate are pleaded to any suit for his debt, reply the fact, that it is a fiduciary debt. There is no necessity, therefore, and no utility in excepting such debts from the general terms of the certificate,

even if it were otherwise authorized by the act.

Another objection, to the right of the bankrupt to a discharge or certificate, has been taken at the bar; and that is, that the bankrupt has not enumerated the objectors among the creditors in the schedule of the debts due by him; but has simply declared himself to be a debtor to "H. H. Willard's estate $12,404.44, whereas he ought to have stated the names of all the creditors, as his creditors, to and among whom the court of probate had ordered a dividend to be apportioned and paid under the proceedings in that court, and among others the objectors, as creditors for the sum of $2,184.16." I doubt, if the objection has any just foundation in law. Strictly speaking, the bankrupt is a debtor to the estate of H. H. Willard for the whole amount of $12,404.44; and if he were to die, or to be discharged from his administration at any time, the administrator de bonis non would have a right of action against him or his executor or administrator for the full amount of that debt, as assets of and a debt due to the estate of H. H. Willard; and the judge of probate would have a right to direct a suit therefor against him and his personal representative upon his official bond, and the sureties thereto. Indeed, the debts due to the objectors and the other creditors of H. H. Willard's estate are not at law and ex directo the personal debts of the bankrupt; but are due by him in autre droit. They are strictly debts due from the estate of H. H. Willard to them; and they are by no means limited in their remedy to a personal suit against the bankrupt, if other assets should appear, or if they can obtain payment upon the official bond of the bankrupt from his sureties in the probate court. The debts are, therefore, only secondarily, and in equity, debts due by the bankrupt, upon the election of the creditors of H. H. Willard so to consider them.

But if the case were otherwise; and the schedule ought to have contained the names of all the creditors of H. H. Willard, entitled to dividends under the probate decree, still, unless the concealment or suppression was intentional and fraudulent, and not by mere mistake or accident, it does not appear to me to constitute any valid objection to the grant of a discharge and certificate under the act. This appears to me to be a plain result of the provisions and exceptions of the fourth section of the act. Nor is the mischief of the omission irremediable. On the contrary, it is in the power of the district court to give the omitted creditors the same benefit, as if their debts had been formally stated in the schedule. The omission to include the debts should have been "wilful," that is, knowingly wrongful or fraudulent, to produce a forfeiture of his right to a discharge and certificate; for the language of the fourth section is, that if any bankrupt "shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, &c. &c., he shall not be entitled to any such discharge or certificate."

Upon the whole, I shall direct a certificate to be sent to the district court in conformity to the opinions above expressed.

TEEL (HULSECAMP v.). See Case No. 6,862.

Case No. 13,818.

TEESE et al. v. PHELPS et al.

[McAll. 17.] [1]

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

PLEADING—AVERMENT OF RESIDENCE IN DISTRICT — FOLLOWING STATE FORMS — PATENTS — WHETHER PATENTABLE—HOW DETERMINED.

1. An allegation, in the complaint, of residence of the parties is not necessary to impart jurisdiction.

2. If a defendant is sued out of his district, he must plead his personal privilege.

3. The objections to the form of a complaint must be availed of by special demurrer.

4. This court has by rule adopted the forms of pleadings and practice in the courts of this state, as ascertained by its practice act, unless they contravene the acts of congress or the rules of this court.

5. Whether an invention is patentable is a mixed question of law and fact, and should not, in ordinary cases, be disposed of without the intervention of a jury, where the title has not been fixed at law.

[Cited in Blessing v. John Trageser Steam Copper Works, 34 Fed. 754.]

This action is brought to recover damages for the alleged infringement of a patent. To the complaint a general demurrer has been filed.

Charles H. S. Williams, for plaintiffs.

B. S. Brooks, for defendants.

McALLISTER, Circuit Judge. The grounds assigned in argument are, first, that there is no allegation in the complaint that either plaintiffs or defendants are residents of any particular district. It is not indispensable to make such averment. If a party be sued out of his district, he can plead his personal privilege. In this case it is not alleged that the defendants are sued out of the district of which they are residents. The objection is, that there is no allegation in the complaint that the defendants are residents of the district in which they are sued. Such allegation is not necessary to give jurisdiction to the court, and it certainly constitutes no part of the plaintiffs' cause of action. In Gracie v. Palmer, 8 Wheat. [21 U. S.] 699, Chief Justice Marshall says: "That the uniform construction under said clause (Judiciary Act 1789, c. 20, § 11; 1 Stat. 78) had been, that it

[1] [Reported by Cutler McAllister, Esq.]

was not necessary to aver on the record that the defendant was an inhabitant of the district, or found therein. That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties."

The second ground of demurrer goes to the form of complaint. It is admitted that this complaint is substantially an action on the case; but it is urged that it is not clothed in the technical form as known at common law. The defects alleged, being matters of form, cannot suspend the action of the court, inasmuch as they have not been made the ground of a special demurrer, as required by the judiciary act of 1789. But if a special demurrer had been filed, and the defect alleged, that the action was brought in a form different from that which accords with the common law, the objection would not have been available. The act of congress known as the "Process Act," passed May 19, 1828 [4 Stat. 278], adopted the forms and modes of proceedings in the state courts in common-law cases, as controlling the practice of the courts of the United States, subject to such alterations and additions as the said courts of the United States shall in their discretion deem expedient, or to such regulations as the supreme court shall from time to time prescribe. In all the states except Louisiana, while actions at law are tried upon their merits by the application of common-law principles, the forms of pleading as they obtain in the state courts have been adopted in most of the courts of the United States. This court has, by a rule, adopted the forms of pleading and practice which obtain in the courts of this state, in all cases not provided for by the rules of this court or the acts of congress. Now, the complaint in this case cannot be deemed defective: though not technically correct, it is a substantial compliance with the mode of pleading prescribed by the practice act of this state, in conformity to which, as far as practicable, it is the duty of this court to act. It is urged in support of the demurrer, that, as the act of congress of August 23, 1842 (5 Stat. 517), gives full power to the supreme court of the United States to regulate from time to time the forms of writs and other process in the circuit courts, the preceding acts of congress are repealed. There is no repealing clause in the statute. Its only object is to give a supervisory power to the supreme court over the rules of subordinate courts. Under this act that tribunal has prescribed rules in admiralty and in equity; but has not thought expedient to prescribe rules in common-law cases; thus leaving the circuit courts to govern themselves by the modes of proceeding which obtain in the state courts, modified by their own rules. A practical illustration of this will be found in the case of Christy v. Scott, 14 How. [55 U. S.] 282.

The third ground of demurrer is, that the improvement for which the plaintiffs claim a patent, is neither an art, a manufacture, nor composition, and is therefore not patentable. Whether a given improvement is a patentable invention, is a mixed question of law and fact, and should not, in ordinary cases, be disposed of on demurrer and without the intervention of a jury. The last objection is, that the specification is too indefinite. The court does not so consider it, and if the jury should find it novel, cannot regard it of such indefinite character as to defeat the patent on that ground.

An order must be entered in this case that the demurrer be overruled, defendant paying costs.

Case No. 13,819.

TEESE et al. v. PHELPS et al.

[McAll. 48.] [1]

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

PATENTS — CONSTRUCTION OF SPECIFICATIONS — NOVELTY—EQUIVALENTS—INVENTION—MECHANICAL SKILL.

1. The construction of the specification in an application for a patent, so far as the language is concerned, is a question for the court.

[Cited in Van Antwerp v. Hulburd, Case No. 16,827.]

2. The application of the facts to the law is for the jury.

3. The clearness the law requires in a specification is such as will distinguish the thing patented from all others previously known, and which will enable a person skilled in the art of which it is a branch, to construct the thing specified.

4. The production of the patent is prima facie evidence of novelty.

[Cited in Whitcomb v. Spring Val. Coal Co., 47 Fed. 655.]

5. If the idea involved in the patented article has occurred to others, if that idea has not been embodied in a practical form, it will not disprove novelty.

6. If the article produced be substantially the same with the one patented, with variations in form only, or where a new and substantial result is not produced, such cannot affect the right of plaintiff.

7. If there be invention, to whatever extent, it is sufficient.

8. If the process required no more skill than that possessed by an ordinary mechanic skilled in the business, there is an absence of inventive faculty, and only the exercise of mechanical skill.

This was an action at law brought to recover damages for the infringement of a patent; and the following instructions were given to the jury:

McALLISTER, Circuit Judge. To sustain this action, the plaintiff must establish: (1) That the improvement he claims was properly explained in the specification which accompanied his application to the patent-office. (2) That such improvement is useful and novel, and that he was the first and original inventor. (3) He must establish by proof the infringement of his patent, and the

[1] [Reported by Cutler McAllister, Esq.]

actual damages incurred by reason thereof.

As to the specification,—so far as the construction of the written words of that document is concerned, it is a question for the court. The application of the facts to the specification as construed by the court, is an inquiry you are to make. On this point I instruct you that the clearness the law requires in a specification must be, such as will distinguish the thing patented from all others previously known, and which will enable a person skilled in the art or science of which it is a branch, or with which it is nearly connected, to construct the thing specified. The testimony is before you on this point, especially that of John Kittedge, which you will apply to it. The utility of the improvement claimed has been admitted; but its novelty is disputed. The rules that are to control you in deciding on this fact are these: The production of the patent is prima facie evidence of the novelty of the thing patented; and the production of it imposes upon the defendant the duty of proving that the patentee was not the first inventor. In the investigation of the testimony invoked by defendant to negative this prima facie evidence, you will carry with you for your instruction the following rules: (1) Should you conclude that the idea of the improvement claimed in this case had occurred to others, few or many, still, if that idea has not been embodied in some practical form, the existence of that idea will not disprove the novelty of the improvement. (2) If you should conclude that the idea of this improvement, and hints concerning it, had come to the patentee from others, still, if the patentee was the first who gave to that idea a useful and practical form, his rights are not to be defeated.

The next point is the infringement. This is where the article constructed and produced in evidence is substantially the same with the one patented, the variations being in form and not in substance; or where a new and substantial result is not produced by such variation. Such will not affect the right of plaintiffs. Gray v. James [Case No. 5,718]. Before directing your attention to the damages, I desire you to look to the evidence in this case tending to show an abandonment by plaintiffs, and whether the improvement patented is patentable. Prior to the act of congress of March 3, 1839 (5 Stat. 353), if the patentee had allowed the public use of his invention, or the free use of it to individuals, before he applied for his patent, it would invalidate the patent. Such is no longer the law; and the use of his invention by individuals, unless it had continued more than two years prior to the obtainment of his patent, will not invalidate it. Curt. Pat. §§ 58, 307. This, although the use of it was with permission of the patentee. If, on the contrary, the use is without his consent, it is a trespass upon his rights, unless such use was so frequent, public, and notorious, and was continued so long a time and attended by such circumstances as raised a conclusion that the party had abandoned his right. Curt. Pat. § 308; Pierson v. Eagle Screw Co. [Case No. 11,156]; Wyeth v. Stone [Id. 18,107].

Is the improvement claimed patentable? On this point, you will observe that the claim is for a new combination of the flat-bottomed tines of the fork with the sharp, angular formation of the upper sides of the tines. It is claimed that, by this combination, a novel and useful result has been obtained. If such result has been obtained, neither the simplicity of the structure nor the greater or less amount of invention or intellect employed as an element, are of importance in determining the validity of the patent. The distinction is, that where there is a mere application of an old thing to a new use, it is not patentable; but where there is exhibited an inventive faculty in the process, it is. Curt. Pat. §§ 11, 12. To illustrate: In one case, a claim was made for an improvement in making a mold-board to a plow, by which the molding part, or face of the mold-board, was made to work in circular lines instead of straight lines; by which it was claimed that every part of the furrow-sluice was embraced far more than by any other shaped plow, &c. The court say, "that if by changing the form and proportion a new effect is produced, there is not simply a change of form and proportion, but a change of principle also. In every case, therefore, the question must be submitted to the jury whether change of form and proportion has produced a different effect." Davis v. Palmer [Case No. 3,645]. In another case, a claim was made for an improvement in making friction-matches, by means of a new compound; and it was in proof that all the ingredients had been in use before. The court say, "The question is, had the materials been in the same combination? if not, it was patentable, however simple it might be." Ryan v. Goodwin [Id. 12,186]. In another case, the arrangement of bowed flyers in a fly-frame in two rows, was held to be patentable, although open-bottomed flyers had been previously arranged in the same way in one row. Davoll v. Brown [Id. 3,662].

Thus much as to the amount of invention required. I will now direct your attention to one or two cases where the patents were decided to be invalid on the ground that the improvement claimed was an application and not an invention. A claim was made for an improvement, being a new mode by which the back of a rocking-chair could be reclined and fixed at any angle required, by means of an apparatus; and the patent was declared void because the same apparatus had been long in use, and applied to other machines, if not to chairs. Bean v. Smallwood [Case No. 1,173]; Hovey v. Stevens [Id. 6,745]. In Hotchkiss v. Greenwood, 11 How.

[52 U. S.] 248, 265, the claim was for an improvement in making door and all other knobs of all kinds of clay used in pottery, and of porcelain, in having "the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in the form of a dovetail, and a screw formed therein by pouring in metal in a fused state." The patent was deemed invalid for want of invention.

Upon this question of invention, it is proper you should have some general rule, to control you while acting upon the evidence in the case which refers to it; and I instruct you that, if the flattening of the bottom of the tines of the fork is a process which, in your opinion, required no more skill or ingenuity than that possessed by an ordinary mechanic skilled in the business, the patent is invalid. If, on the other hand, there was an exhibition of inventive faculty beyond the skill of a capable mechanic, the patent is good.

As to the damages. The statute gives actual damages sustained by the plaintiffs; the power to inflict a greater amount is committed to the discretion of the court, within the limit of trebling the actual damages found by the jury. If the plaintiff has given you sufficient testimony to enable you to find the damages incurred by him, by sales made of the article constructed by defendant, that will constitute a correct basis on which you can act. If none such has been given to you, your attention must be directed to such other items which he has proved. The damages in actions similar to the present, must not be conjectural, but actual.

With foregoing views of the legal principles which should control you in your deliberations, I leave with you the facts for your adjudication.

Verdict for plaintiffs for the sum of $800.

TEFFRY (UNITED STATES v.). See Case No. 16,443.

TEFT (HURST v.). See Case No. 6,939.

Case No. 13,820.

The TELAMON.

[4 Adm. Rec. 570.]

District Court, S. D. Florida. March 14, 1852.

SALVAGE — COMPENSATION — SEPARATE CONSORTSHIPS.

[Twenty per cent. allowed on goods saved from a wreck, with comparatively little labor and expense, by a first expedition, 50 per cent. on goods saved partly by diving, by a second expedition, and 60 per cent. on goods saved entirely by diving, by subsequent expeditions.]

[Cited in The Isaac Allerton, Case No. 7,088; Baker v. The Slobodna, 35 Fed. 541.]

[Libel in rem by William Lowe and others against the cargo and materials of the ship Telamon for salvage.]

Thomas F. King, for libelants.

Wm. R. Hackley, for respondent.

MARVIN, District Judge. The ship Telamon while on a voyage from New York to New Orleans ran ashore on the Delta Shoals, near Key Vacas, and was totally lost. The value of the materials and cargo saved by libellants amounted to $37,248.91. Every possible effort was made to save the ship, but without success. The goods saved by the seven vessels composing the first consortship amounted to $23,904.88, and this property was saved in good condition, or nearly so, and with but little labor and difficulty as compared with that subsequently saved. The goods saved by the nine vessels composing the second consortship amounted to $7,967.26. This property was saved in a damaged condition, and in part by diving. The goods saved by the third consortship, composed of seven vesels, amounted to $1,283.76, and were all saved by diving. The goods saved by the fourth consortship, composed of five vessels, amounted to $496.17, and were saved by diving. This consortship also saved the materials amounting to $2,417.74, and expended $900 for hire of windmills and pumps employed in their unsuccessful efforts to float the ship. Certain other vessels saved property worth $1,179.10 by diving. The court awarded 20 per cent. to the first consortship, 50 per cent. to the second consortship, and 60 per cent. to the others on the amount saved by each, respectively, and also awarded to the fourth consortship the amount expended for hire of windmill and pumps.

Case No. 13,821.

The TELEGRAPH.

[Cited in Wallis v. Chesney, Case No. 17,110. Nowhere reported; opinions of district and circuit courts not now accessible.]

TELEGRAPH, The. See Case No. 9,217.

TELEGRAPH CO. (DORGAN v.). See Case No. 4,004.

Case No. 13,822.

The TELLER.

District Court, 1839.

MARITIME LIENS—REPAIRS AND SUPPLIES—HOME PORT.

[Cited in Thomas v. The Kosciusko, Case No. 13,901, and Ben. Adm. 162, to the point that the general maritime law does not provide a lien for supplies and labor furnished a vessel at her home port, since, in the absence of state regulation, such supplies and labor are presumed to have been furnished upon the personal credit of the owner of the vessel.]

[Nowhere reported; opinion not now accessible. Affirmed by circuit court; opinion not reported.]

Case No. 13,823.

The TELLUMAH.

[3 Adm. Rec. 293.]

Superior Court, S. D. Florida. Jan. Term, 1846.

SALVAGE — SERVICE — AMOUNT OF COMPENSATION.

[For saving the cargo of crockery and hardware and materials of a ship lost upon the Florida reef, by 150 or 200 salvors, by great labor and exposure, the court awarded $11,931 as salvage, the cargo, etc., being appraised at $35,821, with duties thereon of $8,980.]

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[This was a libel in rem by Joseph Stickney and others against the materials and cargo of the ship Tellumah for salvage.]

S. R. Mallory, for libellants.

W. R. Hackley, for respondent.

MARVIN, District Judge. The American ship Tellumah, Borland, master, bound from Liverpool to Havana, laden with a cargo of crockery, iron, hardware, etc., on the 18th day of November last struck on the Florida Reef, where she bilged, filled with water, and was totally lost, with a considerable part of her cargo. The libellants, Stickney and his associates, some one hundred and fifty or two hundred in all, by great labor and exposure succeeded in saving a considerable portion of the cargo and the materials of the ship. The materials and all the cargo saved, excepting a lot of gas works, six sugar rollers, and a box of thread, have been sold under the previous order of the court, and the articles excepted from sale have been appraised. The proceeds of the sales and the appraisement together amount to $35,821.39, and the duties thereon amount to $8,980.08, leaving as a net amount upon which salvage may be decreed $26,841.31.

Under the circumstances of the case, I shall allow as the full salvage upon the entire cargo and materials saved, the sum of $11,931.66, which is to be distributed among the salvors according to the decree.

It is therefore ordered, adjudged, and decreed that the sum of $11,931.66 be allowed to the salvors of the cargo and materials of the ship Tellumah for their services in saving the same, and that it be distributed among them, and paid to the masters of the respective vessels, for themselves, owners, and crews. And application having been made by O. O'Hara, on behalf of the consignees, for the restoration of certain gas pipes and other gas works, and he having presented a bill of lading regularly indorsed therefor, and consenting to pay the salvage and other charges thereon, and the articles having been appraised at the sum of $2,003.66, including the duties, and the duties appearing to be $312.14, it is ordered that the said articles be delivered to the said O'Hara upon his paying to the marshal the sum of $1,350, which sum includes the salvage duties and certain expenses thereon, and is supposed to be sufficient to include any other charges and expenses said articles may be justly liable for on making up a final average account. In like manner, Mr. F. A. Browne having presented bills of lading regularly indorsed for six sugar rollers, appraised at $225.90, including the duties, and the duties being $90.48, it is ordered that the same be delivered to him upon the payment of $155, which sum includes salvage, duties, and charges as above. In like manner, a bill of lading having been duly presented by Mr. F. A. Browne for one box spool thread, appraised at $240, including $87 duties, it is ordered that the same be delivered to him upon the payment of $157, which sum includes salvage, duties, and charges, as above specified.

It is further ordered and decreed that, after paying the salvage decreed as aforesaid, the clerk tax and pay the bills for wharfage, storage, and labor, and the costs and expenses of this suit, out of the residue of the proceeds of said cargo and materials, and that he pay the remainder of said proceeds to the master of said ship, for and on account of whom it may concern, and that all other questions be reserved.

TELOS, The (REED v.). See Case No. 11,653.

Case No. 13,824.

The TEMPEST.

[Cited in The Angelina Corning, Case No. 384. Nowhere reported; opinion not now accessible.]

Case No. 13,825.

In re TEMPLE.

[4 Sawy. 92;[1] 17 N. B. R. 345.]

District Court, D. California. Sept. 25, 1876.

BANKRUPTCY — PARTNERSHIP — NOTICE — VOID ADJUDICATION — ASSIGNMENT UNDER STATE LAW.

1. Where one partner, on his voluntary petition, obtained from the register an adjudication against the firm, without giving the notice required by rule 18, *held*, that the adjudication is void.

2. Where the same person, on the same petition, obtained an adjudication against a firm of which he had been a member, but which had been dissolved by the death of his copartner, *held*, that the adjudication is void.

3. The assignee in bankruptcy is entitled to recover property assigned in fraud of the bankrupt act [of 1867; 14 Stat. 517], although such an assignment was made in strict compliance with the insolvent law of the state, and was for the equal benefit of all the creditors.

In equity.

Volney E. Howard, James D. Thornton, and Joseph Naphtaly, for complainants.

G. H. Smith, A. Bronson, John M. Coghlan, and Wm. S. Wells, for defendants.

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

HOFFMAN, District Judge. On the tenth day of July, 1876, the above-named bankrupt filed his petition for adjudication individually, and as a member of the firms of Temple & Workman and Temple & Ledyard.

He averred that both of those firms were insolvent, and he annexed schedules showing his separate assets and liabilities, and the assets and liabilities of the two firms of which he was a member. The petition was referred to J. J. Werner, Esq., one of the registers of this court, who, on the twentieth July, 1876, adjudged the said F. P. F. Temple, individually, and as surviving "partner of the firm of Temple & Workman, and the said firms of Temple & Workman and Temple & Ledyard, bankrupts, accordingly." It is admitted that Workman was dead at the date of the filing of the petition, and it does not appear that Ledyard assented to the petition or had any notice whatever of the proceeding.

On the twenty-first August, 1876, Volney E. Howard filed his bill in equity against D. Freeman and E. F. Spence, setting forth that he is a creditor of the said F. P. F. Temple, and that he brings suit for himself and all other creditors of said bankrupt, and all creditors of said firms of Temple & Workman and Temple & Ledyard, and also for William Temple, administrator, with the will annexed of William Workman, deceased.

The bill in substance avers: That on the thirteenth day of January, the said firms of Temple & Workman and Temple & Ledyard were insolvent and unable to pay their debts, and that being so insolvent, and with a view to prevent the assets of said firm of Temple & Workman, and of the said firm of Temple & Ledyard, and the individual assets of said bankrupt and of said Workman, from coming to their assignees in bankruptcy, and with a view to prevent them from being distributed under the bankrupts laws of the Revised Statutes, and to defeat the operation of and impair, hinder, impede and delay the operation and effect of, and to evade the provisions of said laws, the said bankrupt and the said William Workman, and the firm of Temple & Workman, made an assignment of all their individual and partnership assets, and said bankrupt made an assignment of all the assets of the said firm of Temple & Ledyard to D. Freeman and E. F. Spence, in trust, for the satisfaction of the creditors of said firm of Temple & Workman, and of the individual members of said firm, and of the creditors of said firm of Temple & Ledyard, and to distribute the same amongst the said creditors in manner and proportion as provided in title 3, pt. 2, of the Civil Code of California. That said D. Freeman and E. F. Spence accepted the said assignment, and took possession of said assets and still retain them. That at the time the assignment was executed and accepted, the said assignees had reasonable cause to believe and know, and did know that said firm of Temple & Workman, and the individuals composing said firm, and said firm of Temple & Ledyard, were insolvent, and that said assignment was made with a view and with the intent by such disposition of the assets and property aforesaid to prevent the same from coming to their assignee or assignees in bankruptcy, and to prevent said assets and property from being distributed under the acts of congress aforementioned, and to defeat the object of, and to impair, hinder and delay the operation of, and evade the provisions of said laws.

The bill contains averments with regard to the debts of the firms and the members thereof, and the value of the property assigned, and charges upon the assignee mismanagement and waste of the estate, and that a suit to set aside the assignment aforesaid has been commenced and is still pending in the courts of this state.

The complainant therefore prays, inasmuch as no assignee has yet been appointed, that the said Freeman and Spence may be enjoined from making any disposition or transfer of any of the said assets conveyed to them under the assignment aforesaid, that they be so decreed to have and to hold the same in trust for the assignee or trustee hereafter to be elected, and that they may be required to deliver to such assignee or trustee, when elected, all of said property and assets. To this bill the defendants have filed a general demurrer.

It is clear that the act of the register adjudicating the firms of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard, as expressly required by rule 18 of the supreme court, and Workman was dead at the time the court would commence proceedings. The act speaks of persons who are partners in trade, and although partners are deemed to continue to be such quoad creditors, notwithstanding a formal dissolution, inter sese where there are joint assets and joint creditors, it has never been held that a partnership dissolved by the death of one of the members can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws.

The effect of an adjudication that the firm is bankrupt is to declare each of its members bankrupt, and the act requires the assignee to take possession, not only of the firm assets, but also of the individual property of each of the partners. The status of a deceased person cannot be passed upon by a bankruptcy court, nor has he any property, the title to which can vest in an assignee appointed in a proceeding by or against the surviving partner. In Durgin v. Coolidge, 3 Allen, 555, two partners had signed a petition in insolvency and sent it for presentation to the court. Before it was presented one of them was killed, but the judge, in ignorance of that fact, issued the warrant in the usual form. It was held that the court of insolvency never acquired jurisdiction of the separate estate of the deceased partner,

and that the warrant to the messenger to take possession of his separate estate was inoperative and void. But it was also held that the petition might be treated as that of a surviving partner, and that in that relation he was entitled to have possession of all the partnership property. The court say: "It is, therefore, quite clear that, upon the death of one of two partners, the survivor may rightfully apply to the court of insolvency by petition, and that thereupon due proceedings may be had for the sequestration of the partnership property and the disposal of it for the payment of the debts due to the partnership creditors." 3 Allen, 555. See, too, in re Daggett [Case No. 3,535].

It is, therefore, plain that so far as the bill seeks to compel the delivery to the assignee of Temple, of the joint assets of Temple & Ledyard, the relief must be denied, for Ledyard has not been brought before the court, and the adjudication that the firm of Temple & Ledyard is bankrupt is void. The prayer of the bill that the separate estate of Workman shall be held in trust for the assignee to be elected, and delivered to him when elected, must also be denied, for the adjudication that the firm of Temple & Workman is bankrupt is void. This court has no power to reach his estate, in the course of administration by the probate court, or in the hands of his assignee; and the assignee in bankruptcy of Temple, adjudged a bankrupt individually, and as surviving partner of the late firm, would have no title or right of possession to what was formerly the separate estate of his deceased partner. It is suggested that Workman, by his assignments, converted his separate estate into joint assets, and therefore his surviving partner, or his assignee in bankruptcy, may take possession of it for distribution. But these views seem quite inadmissible. The principal object of the bill is to obtain a decree declaring the assignment to be void under the bankruptcy laws. It cannot be pronounced void and inoperative to convey title to the assignee, and at the same time be valid as operating a conversion of his separate estate into joint assets. Moreover, such was not the effect or intention of the instrument. It was merely an assignment of all Workman's estate, joint and separate, in trust, to be distributed amongst his creditors according to law. His separate debts might have been sufficient to absorb the entire separate estate. The fact that these debts are small in comparison with the joint debts can have no effect to make the assignment a conversion of separate assets into joint assets. It is unnecessary, however, further to consider the matter, for since writing the above the counsel for the complainant has apprised me that he abandons the point.

From the foregoing it results that the bankrupt, as surviving partner of the firm of Temple & Workman, was entitled, on the death of the latter, to the possession of the firm assets for the purposes of administering upon them, and that upon his being adjudged bankrupt individually and as such surviving partner, his assignee in bankruptcy may recover them from the assignee to whom he has transferred them by a conveyance which the bankrupt act avoids. It is contended that the assignment to the defendants is void, under those laws. The bill avers that the assignment was made with a view to prevent the assets of the bankrupt from coming to his assignees in bankruptcy, and to prevent said assets and property from being distributed under the provisions of the bankrupt laws, and to defeat the object of, and to evade the provisions of, and to impair, hinder, impede, and delay the operation and effect of said laws. It further avers that the defendants knew that the firm of Temple & Workman, and the individuals composing said firm, were insolvent, and that the assignment was made with the view and intent above set forth.

In passing upon this demurrer, these allegations must be taken to be true. The case is thus brought within the very terms of section 5129, and it is also taken out of the operation of the cases decided by Mr. Justice Nelson and Mr. Justice Swayne,—Sedgwick v. Place [Case No. 12,622], Langley v. Perry [Id. 8,067]. In the first of these cases Mr. Justice Nelson places his decision on the ground that "all intention to defraud creditors or to prevent the property of the debtor coming to an assignee in bankruptcy was denied and that there is no proof to the contrary." The learned judge therefore assumes the assignment in "question to be untainted with fraud, either against creditors or against the bankrupt act."

In Langley v. Perry [supra], Mr. Justice Swayne held that a voluntary assignment of his property by a debtor, for equal distribution among his creditors, is not necessarily a conveyance of property with intent to defeat or delay the operation of the bankrupt act. "That the existence of such intent is a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the bankrupt law unless it was so intended." The bill in this case alleges this intent, and the allegation is not denied.

It is contended by the learned counsel for the defendants that this case falls under the first clause of section 5129, and that the assignment can only be avoided because of a preference given to some creditor, and this only within four months from its date. In support of this view, he cites a passage from the opinion of the supreme court in Gibson v. Warden, 14 Wall. [81 U. S.] 249. The language of the court is "upon comparing the two clauses together we are satisfied that the first clause was intended to refer to the past, and the second to the present. The language employed in the first clause imports clearly that the consideration must

be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party.

"It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it."

If this language be taken literally, the assignment in question evidently falls within the second clause of the section. It was "original and complete within itself, and had no reference for its consideration to anything between the parties which had gone before it."

The learned counsel, however, argues that inasmuch as the assignment was in trust for the benefit of the creditors, they must be regarded as the real parties, and the assignment as founded on the consideration of the assignors' indebtedness to them. But this construction of the language of the supreme court seems quite inadmissible. The parties to the instrument are evidently the assignors and the assignees. It may have been made without the knowledge or consent of all the creditors. The argument of counsel is not founded on the particular circumstances of this case. It would equally apply to an assignment made without the knowledge, or contrary to the wishes of all the creditors. In such a case, they surely could not be called parties to it.

But the construction of the two clauses in the section does not turn upon a close and literal examination of the expressions used in an opinion of the supreme court. The construction of the section substantially given by the court is, that the first clause refers to cases of preference given to creditors; the second, to transfers in fraud of the bankrupt act. These will ordinarily be to persons other than creditors. But the language of the clause and its evident object and intent forbid the idea that congress designed to permit an insolvent to make any or all of the fraudulent sales, transfers or assignments of his property denounced in the section, provided he selects for his accomplices a creditor, and avoids giving him a preference. Such a construction would practically deprive the clause of all effect.

All the cases cited on behalf of the defendants impliedly recognize the invalidity of assignments like the one under consideration, if made in fraud of the act, to a person having knowledge of the fraudulent intent. Some difference of opinion has arisen on the point where the existence of such intent should be conclusively presumed, on the ground that every one is presumed to contemplate and intend the natural and inevitable consequence of his acts. But it is nowhere intimated that, if this intent be established, the case does not fall within the second clause of section 5129.

In Mayer v. Hellman, 91 U. S. 496, the supreme court applied the six months' limitation in the second clause to an assignment, in all respects similar to the assignment in this case. I think it clear, therefore, that if the allegations of the bill as to the intent of the assignors, and the knowledge of that intent on the part of the assignees be true (and they are admitted by the demurrer), the assignment, so far as it relates to the separate estate of the bankrupt Temple, and the firm assets of Temple & Workman, must be set aside. An interlocutory decree will therefore be entered, setting aside the adjudication, in so far as it adjudges the late firm of Temple & Workman and the firm of Temple & Ledyard to be bankrupts, and directing it to be modified by adjudging Temple a bankrupt individually, and as surviving partner of the late firm of Temple & Workman. The demurrer filed to the bill will be overruled, and leave given to answer within thirty days, and further proceedings will thereupon be stayed until an assignee or trustee be chosen, and is made a party complainant to the bill.

The injunction heretofore issued will be dissolved, so far as it relates to the separate property of Workman, deceased, and to the firm property of Temple & Ledyard, but will be retained in respect of the separate property of Temple and the firm assets of Temple & Workman. The order postponing the election of assignee will also be vacated, and the register ordered to proceed to hold such election, the votes to be cast by all the creditors of Temple, whether as an individual or as surviving partner as aforesaid.

NOTE [from 17 N. B. R. 345]. The "first clause" mentioned in the opinion refers to section 5128, and the "second clause" to section 5129 itself; section 35 of the bankrupt act having been divided by the revision of the statutes.

Case No. 13,826.

In re TEMPLE.

[6 Sawy. 77].[1]

District Court, D. California. Oct. 30, 1879.

BANKRUPTCY—VACATING ASSIGNMENTS FOR BENEFIT OF CREDITORS — INTERMEDIATE JUDGMENTS—VALIDITY OF ASSIGNMENTS.

1. Where an assignment for the benefit of creditors, valid by the state laws or at common law, is set aside at the instance of an assignee in bankruptcy, the latter will take the property free of the liens of any judgments obtained after the execution of the assignment, and which would not have attached had the assignment been allowed to stand. McIntyre v. Reed, 98 U. S. 507, followed.

2. An assignment made in conformity to the provisions of Civ. Code Cal. tit. 3, pt. 2, is valid, notwithstanding that the insolvent law of 1852 [St. 1850-53, 314], which is expressly continued in force by Pol. Code, § 19, declares invalid any assignment not made in accordance with its own provisions.

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

In bankruptcy.

Craig & Meredith, for petitioner.
L. D. Latimer, for assignee.

HOFFMAN, District Judge. The point which the learned counsel for the petitioner discusses with much ingenuity and subtlety of argument has been authoritatively settled by the supreme court in McIntyre v. Reed, 98 U. S. 507. That case decides that where an assignment for the benefit of creditors, valid by the state laws or at common law, is set aside at the instance of an assignee in bankruptcy, the latter will take the property free of the liens of any judgments obtained after the execution of the assignment, and which would not have attached had the assignment been allowed to stand.

It is contended, on the part of the petitioner, that the assignment was invalid under the laws of this state. It appears to have been executed in entire conformity to the provisions of part 2, tit. 3, of the Civil Code of California. The heading of this title is "Assignments for the benefit of creditors."

It appears, however, that by section 19 of the Political Code it is provided that "nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws." Among the statutes enumerated is "An act for the relief of insolvent debtors and the protection of creditors, approved May 4, 1852, and the acts amending and supplementing such act." The thirty-ninth section of this act provides that "no assignment of any insolvent debtor otherwise than is provided in this act shall be legal or binding on creditors."

It is urged that under these provisions the validity of an assignment for the benefit of creditors must depend upon its conformity to the provisions of the insolvent law of 1852, and not to those of title 3, pt. 2, of the Civil Code, which expressly and exclusively treats of assignments of that description. But this construction of these conflicting provisions is, I think, quite inadmissible. The provision of the Political Code which has been cited was evidently intended merely to continue and keep alive the insolvent law of this state, which, though then in abeyance, and superseded by the bankruptcy act of the United States, it was desired should revive and become operative upon the repeal of the bankruptcy act, which was then anticipated, and which soon afterwards took place.

The framers of the Code overlooked the fact that among the forty sections of the insolvent law, one section (the thirty-ninth) declared "No assignment otherwise than as provided in this act shall be legal." That there could have been no intention to continue this section in force is evident from the fact that in the same body of laws which contains the provision supposed to have that effect a title is devoted exclusively to the regulation of assignments for the benefit of the creditors, which, on the construction contended for, would be wholly inoperative.

I cannot suppose that any member of the bar, consulted as to which statute should be followed by an insolvent desirous of making an assignment for the benefit of creditors, would hesitate to advise obedience to the provisions of the Code on that very subject, rather than to those of the insolvent act of 1852, and especially if, when consulted, the United States bankruptcy act were in force, and the operation of the insolvent act, so far as it conflicted with the bankruptcy act, suspended and superseded.

My opinion, therefore, is that the assignment in this case, if made in conformity to the provisions of title 3, pt. 2, of the Civil Code, was valid under the laws of this state, and falls within the operation of the rule laid down by the supreme court in the case above cited.

TEMPLEMAN (SIMMS v.). See Case No. 12,872.

TEN BALES OF GUNNY BAGS (PACIFIC MAIL S. S. CO. v.). See Case No. 10,648.

TEN BARRELS AND THREE KEGS (UNITED STATES v.). See Case No. 16,444.

TEN BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,445.

Case No. 13,827.

TEN BROECK v. PENDLETON.

[5 Cranch, C. C. 464.] [1]

Circuit Court, District of Columbia. March Term, 1838.

PLEADING AT LAW—SEALED INSTRUMENT—IMPROPER ACTION—ATTACHMENT FOUNDED THEREON—AMENDMENT.

An attachment to answer in a plea of trespass on the case, founded upon a promissory note having a scrawl for a seal, will be quashed, and the plaintiff will not have leave to amend, nor to declare in debt.

This was an attachment under the Maryland act of 1795 (chapter 56), to compel the defendant [E. H. Pendleton, garnishee of E. C. Moore] to answer to the plaintiff [Richard Ten Broeck] "in a plea of trespass on the case." The capias was also to answer in a plea of trespass on the case. The short note was in these words: "The cause of action in this case is a promissory note drawn by the said Edmund C. Moore, in favor of the said plaintiff, dated Baltimore, 24th October, 1835, at one day after date, for $450, now due and unpaid."

The promissory note, produced in evidence, and which was annexed to the order of the

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

justice, for the attachment, was as follows: "$450. Baltimore, October the 24th, 1835. One day after date, I promise to pay R. Ten Broeck, or order, the sum of $450. Edmund C. Moore. (L. S.)"

Mr. Brent appeared for the garnishee, and moved the court to quash the attachment, because it is to answer in a plea of trespass on the case, when the cause of action is in debt; the note being under seal. The case of Trasher v. Everhart, 3 Gill & J. 235, is decisive.

Mr. Bradley, for plaintiff. The practice here is different from that in Maryland. There, the short note is considered as a declaration, but here, if the defendant appears to the capias, the plaintiff may file a declaration in any form of action in case or debt. The only object of the attachment is to compel an appearance. Barry v. Foyles, 1 Pet. [26 U. S.] 311, 314.

But THE COURT will give leave to amend, if the justice of the case requires it, as in the cases of McCloud v. Coltman [Case No. 8,703] and Cooper v. Hardy [Id. 3,196]. The decisions of the Maryland courts since the separation are not binding upon this court. Wallingford v. Allen, 10 Pet. [35 U. S.] 583.

THE COURT (CRANCH, Chief Judge, contra) was of opinion that the attachment should be quashed.

Mr. Bradley then moved to amend the short note by stating the instrument to be under seal, and to declare in debt. There is no bail to be injured by the amendment. The property of the debtor, himself, is attached. The motion to quash is made really by the defendant, through the garnishee.

THE COURT refused leave to amend by changing the action from case to debt, because the short note of the cause of action would not have given the defendant the notice which the act contemplates. The attachment was quashed, because it was to compel the defendant to answer in an action of trespass on the case, when the cause of action was in debt upon a sealed instrument.

TENBROEK (UNITED STATES v.). See Case No. 16,446.

TEN CASES OF MERCHANDISE (UNITED STATES v.). See Case No. 16,447.

Case No. 13,828.

TEN CASES OF OPIUM.

[1 Deady, 62.] [1]

District Court, D. Oregon. March 11, 1864.

FORFEITURE—LANDING GOODS WITHOUT PERMIT—REIMPORTATION.

1. Goods of whatever growth or manufacture brought from a foreign port or place, and landed at a port or place within the United States without a permit, are forfeited to the United States under section 50 of the collection act (1 Stat. 665).

[Followed in The Coquitlam, 57 Fed. 706.]

2. Foreign goods once lawfully admitted into the United States, if re-exported or voluntarily placed within the limits of a foreign jurisdiction, lose the character imparted to them by such admission, and if re-imported into the United States, it must be done in conformity with the law governing the importation goods of a foreign growth or manufacture from a foreign country.

3. If opium was shipped from San Francisco via the foreign port of Victoria to Portland, and while the ship was lying at Victoria the shipper of the opium should cause it to be taken ashore and placed in a house in Victoria, for even a few hours, or less time, and then cause it to be re-laden upon the ship and brought thence to Portland, such opium would be brought from a foreign port and liable to become forfeited by being landed without a permit.

At law.

Edward W. McGraw, for plaintiff.

W. Lair Hill, for claimant.

DEADY, District Judge. The information in this case was filed November 4, 1863. In the first count it is alleged that the opium was brought in the steamship Sierra Nevada, from the foreign port of Victoria to the port of Portland, and here unladen without a permit, and was seized as forfeited for this cause by the collector on October 22, 1863. In the second count it is alleged that the opium was brought from and to the ports aforesaid, but not entered upon the vessel's manifest, and therefore became and was forfeited to the United States. The claimant, Wha Kee, a Chinese merchant of Portland, on November 7, 1863, demurred to the second count because the facts stated were not sufficient to cause a forfeiture, which demurrer was confessed by the district attorney. On December 9, 1863, the claimant answered the first count of the information, denying that the opium became forfeited by reason of being unladen without a permit as alleged, or that the same was brought from any foreign port, and alleging that said ten cases of opium was purchased by the claimant in San Francisco, about October 16, 1863, of one Pon Jib, who shipped the same to claimant at Portland, via Victoria, on the Sierra Nevada. By the stipulation of the parties the cause was tried without the intervention of a jury, on March 7, 1864, and was continued for decision until March 11. This seizure is made under section 50 of the collection act of 1799, which declares: "That no goods, wares, or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States * * * without a permit from the collector * * * for such unloading or delivery, * * * and all goods, wares, or merchandise, so unladen or delivered shall become forfeited, and may be seized by any of the officers of the cus-

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

toms." 1 Stat. 665. The answer must be taken to admit that the opium was landed without a permit. The allegation that it did not "become forfeited to the United States by reason of being unladen without a permit," is a conclusion of law, and not a denial of the averment that it was so unladen.

The only issue then arising upon the pleadings, is, whether the opium was brought from a foreign port or not.

From the admissions in the pleadings and the evidence the following facts are satisfactorily proven: That between October 17 and 22, 1863, while the Sierra Nevada was lying at the harbor of Esquimalt, at Vancouver's Island, on a voyage from San Francisco to Portland, a Chinaman called Ching Sung, a partner of the claimant, brought two common-sized trunks in a spring wagon from Victoria, containing ten cases of opium, and caused them to be delivered on board the vessel; and that Dyer, the freight clerk, on account of certain suspicions which he then entertained and which will be hereafter noticed, did not allow Ching Sung to take these trunks to his state-room, as he desired, but directed the porter to put a mark upon them and stow them in the ship's hold. That these trunks, containing the ten cases of opium mentioned in the information, were then brought on the Sierra Nevada to this port and here unladen, without a permit, and seized by the collector; and that Ching Sung came over from Victoria on the Sierra Nevada as a passenger, and in conjunction with the claimant made a claim to the trunks when they were seized as aforesaid. These facts show that the opium was brought here from a foreign port and unladen without a permit. This makes a prima facie case for the government, and the burden of proof is thrown upon the claimant "to establish the innocence of the importation, and to repel the supposed forfeiture." 1 Stat. 678; Taylor v. U. S., 3 How. [44 U. S.] 211. To overcome this case and establish his right to the goods, the claimant introduced evidence tending to prove that Ching Sung purchased this opium, on the claimant's account, of Pon Jib, a Chinese merchant in San Francisco, on October 17, 1863; that it was then packed in the two trunks in question and sent to the Chinese house of Lum Wa, where Ching Sung was then buying a general assortment of Chinese goods for the claimant's house in Portland; and that from the house of Lum Wa these trunks were carted with the other goods there purchased to the Sierra Nevada, and shipped for Portland, all the goods being shipped as freight and entered on the ship's manifest, except the two trunks, which were taken by Ching Sung into his state-room as baggage. That Ching Sung sailed on the ship as a passenger, and upon her arrival at Esquimalt in the forenoon hired a wagon and went up to Victoria and visited the house of a Chinaman called Lum Wa, taking with him the two trunks with the opium purchased in San Francisco; that while at Lum Wa's, and at his request, Ching Sung opened the trunks and exhibited the opium to the former, when it appeared that the tin boxes or cans in which it was packed were rubbing or breaking one another, to prevent which they took them out of the trunks and repacked them, first wrapping them in newspapers, which proved to be Victoria dailies; that in the afternoon of the same day Ching Sung returned to the vessel in the wagon, bringing with him the trunks and opium, which he attempted to take to his state-room, but was prevented by the freight clerk, who directed them to be stowed in the hold as above stated; and that Ching Sung was a stranger to Lum Wa, but had a letter to him.

This, I believe, is a fair statement of the claimant's case as he claims it to appear from the evidence. How far is it to be believed, considered with reference to its intrinsic probability, or want of it and the known facts and circumstances of the case? The witnesses in support of it, with one immaterial exception, are Chinese. The principal one—Ching Sung—is a partner of the claimants, and pecuniarily interested in the result; besides, being the principal actor in the transaction, he naturally would feel some solicitude for its success. The witness Joe was Ching Sung's companion on the voyage, including the visit to Lum Wa's, at Victoria, and is most probably under the control and influence of the claimant at this time. Lum Wa testifies that the opium was in the trunks when they were brought to his place, but he is contradicted in some important particulars by Dyer, the freight clerk. On the day the Sierra Nevada touched at Esquimalt, Dyer visited Lum Wa's place in search of two packages of opium that were brought up on the vessel on that trip from San Francisco. He found the packages there, and he says they belonged there. In fact, Lum Wa was engaged in importing opium from San Francisco. Dyer also testifies that Lum Wa kept a store, and that he saw Ching Sung and Joe there, in the back room, with these trunks opened, containing these packages of opium, wrapped in Victoria daily newspapers. These are the circumstances that excited Dyer's suspicions, on account of which he directed the trunks to be stowed in the hold. Now, Lum Wa testifies that he kept a wash-house, and did not keep a store. Again, if Lum Wa really did furnish the opium in the trunks to Ching Sung to be smuggled in here, as appears probable, he would naturally feel some interest in the result of the venture, in addition to the sympathy which he may be safely presumed to have for a countryman in trouble. The effect of these circumstances is to place these witnesses before the court somewhat in the light of accomplices. In addition, there is the direct pecuniary interest of Ching Sung in the result, and that the nat-

ural sympathy of all of them for the claimant as against the government.

The only other material witness for the claimant is Pon Jib. He deposes unqualifiedly to the sale of opium to Ching Sung, as alleged in the answer. That it was packed in trunks similar to these, but what became of it he does not know, further than it was sent to the house of Lum Wa, where Ching Sung was making his principal purchases, such as sugar, silks, teas, etc. A drayman of San Francisco also testifies that he hauled goods from Lum Wa's to the Sierra Nevada for Ching Sung, and among the rest these or similar trunks, but what was in them then, if anything, he does not know. The rest of the goods—many of them being valuable in proportion to bulk—were shipped as freight and put upon the manifest, but the trunks were treated as baggage and taken into Ching Sung's state-room. Wilson, the servant who had charge of the state-room during the voyage, testifies that he handled the trunks and set them up on end before reaching Victoria, and that they were a "little heavy, not much"—in effect that they were light. If these trunks, as claimed by the claimant, then contained opium of the value of $1,575, they should have been entered on the manifest and shipped as freight. This circumstance itself is a badge of fraud, unless explained. The omission to do so, tends to show that the opium was not then in the trunks. The freight would have been but a trifle, and the goods would have been equally as safe as in the state-room, and more so. The taking the trunks ashore at Esquimalt is not explained or accounted for on the supposition that they contained this opium at the time. No adequate cause or motive is shown for such an apparently useless act. Nor is there any sufficient reason shown for Ching Sung's visit to Victoria under the circumstances. Lum Wa and he both admit that they had never seen one another before, and were utter strangers to one another. To my mind it is very unreasonable that Ching Sung would hire a wagon and go three miles to Victoria, simply to get his dinner with a stranger, who kept, as he says, a wash-house, while he was a merchant, and had his meals furnished him in his room on shipboard. Yet this is the only reason assigned for the visit. The vessel was only to remain at Esquimalt a few hours, and there would be hardly time to exchange greetings with Lum Wa and eat a dinner of ceremony. But why drag the trunks of opium along? Ching Sung's only reason is, that he was afraid they would be stolen if left in his room. The reason is not satisfactory. It is destitute of probability, and is evidently an afterthought.

This is the evidence of the claimant and upon its face it is improbable if not untrue.

But the testimony of Parker, the officer of the customs who made the seizure, tends strongly to show that the answer to this alleged forfeiture is substantially false. The testimony of Mr. Parker is direct and positive, and notwithstanding the criticisms of counsel, I think entitled to full credit. The suggestion as to his interest in the forfeiture is answered by the fact that he is not entitled to any share of a forfeiture in a case where he is a witness. He states, that on the way up the Columbia river, Dyer communicated to him what he saw at Lum Wa's, and his subsequent suspicions, and said he would point out the trunks to witness when they reached Portland. When the trunks were put upon the wharf, Parker asked to whom they belonged. Ching Sung, who was present, claimed them. Wha Kee was also present. Parker asked them what the trunks contained. Both answered positively and unqualifiedly: "Bedding and clothing from San Francisco." The two Chinamen being then about to take the trunks away, Parker bade them desist and questioned them further. They repeated the statement that the trunks contained the bedding and clothing of Ching Sung. Parker then lifted one of the trunks, and finding it quite heavy for its size, ordered them to be opened. Wha Kee went up town for his keys, and on his return opened one of the trunks, which, in the language of the witness, "presented to view a soft, light, elastic bed-cover or comforter." Upon this, Wha Kee threw up his hands and exclaimed: "There, see!"—evidently intending, as Mr. Parker says, to convey the impression, that the fact was just as they had said, that the trunk contained "bedding and clothing." But Parker's faith was weak, and lifting up the bed cover he exposed the cases of opium to view. Wha Kee then admitted that the cases in the trunks contained opium, and when asked how they came to be wrapped in Victoria newspapers, he replied that "they—the papers—had been sent to San Francisco." Thereupon Parker took the trunks into his possession, and Wha Kee went away. About half an hour afterward he returned with an attorney, and upon some one suggesting that the trunks had been taken ashore at Victoria, unpacked, and the cases there wrapped in Victoria papers, Wha Kee at once caught at the suggestion, and said that was the fact, repeating the statement at length.

It is not necessary to comment upon the further portion of Parker's testimony, wherein he details a conversation between himself and Wha Kee, in September of 1863, in which Wha Kee, as Parker understood, sought to convince the witness that he could make money by letting opium pass the Astoria custom house as soy, or "by shutting his eyes." Parker might have misunderstood his drift. Besides, I am afraid that the experience of the Chinese on this coast would naturally lead them to the conclusion that in their business relations or intercourse with American officials, the use of money was a lawful means on any and

every occasion, and that what was so often exacted from them upon one false pretense and another, might without any impropriety be offered when a favor was asked.

The facts stated are sufficient for the decision of the case. The government has made out a plain prima facie case. The claimant has failed to overcome it; and not only that, but upon his own showing it is highly probable that the whole arrangement, from its inception, was a scheme to purchase opium of Lum Wa and ship it to Portland as a purchase made in the United States—at San Francisco—and upon which the duties were therefore supposed to be paid. The letter to Lum Wa is accounted for upon this supposition, and the whole transaction at Victoria admits of no other reasonable explanation, particularly when it is remembered that Victoria is a free port, to which opium is shipped out of bond from San Francisco in large quantities, and there sold without the payment of duties.

I am loth to conclude that Pon Jib has intentionally sworn falsely in this matter. His character for truth and veracity is testified to by three white men of San Francisco. He may have sold opium to Ching Sung, as he states; but if so, it must have been a part of the preparation of appearances by Ching Sung. The opium purchased of Pon Jib, if any, might have been left at Lum Wa's, and then Ching Sung having thus made it appear that there was opium in his trunks, might start with them in fact empty for Victoria and free opium.

I have been thus particular in examining this case upon the facts, more for the purpose of showing that this forfeiture is morally just, than otherwise. But, as a matter of law, the government is entitled to a judgment of condemnation, even if the facts were exactly as claimed by the claimant. Supposing that the opium was purchased in San Francisco, having afterwards been voluntarily landed at a foreign port, it then lost its former character or status. When the opium was brought back from Victoria, and placed on board the Sierra Nevada, and thence transported to this port, it was a technical importation of goods from a foreign port or place, and therefore such goods could not be unladen without a permit. The words of the statute are plain and comprehensive: "No goods, wares or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen," etc. It is said that this permit is a mere technical regulation. So it is, in itself; but in effect it is a means to enable the officers of the customs to have inspection of all goods brought from foreign ports, and collect the revenue, if any, due thereon. If goods once admitted into the United States from a foreign port are re-exported, the effect of such admission ceases, and if such goods are attempted to be reimported into the United States, they must be taken to be what they are in fact—goods then brought into the United States from a foreign port or place, and not to be landed, on pain of forfeiture, without a permit. The time which the opium remained in Victoria, after being landed from the vessel, is not material. If one year would be sufficient to separate the goods from the vessel and place them within the foreign jurisdiction, so may one day or one hour be. It is not a question of time, but of what was done with the goods. If they were practically separated from the ship and the control of its officers as a part of her cargo, and voluntarily placed within the limits and jurisdiction of the government of the foreign port of Victoria, as I think they were, they could not be afterwards brought to Portland and landed without a permit. They would come within the category of the act—"goods brought from a foreign port." Acts declaring forfeitures and imposing penalties for violations of the revenue laws must be construed so as to accomplish the object for which they were intended. In the technical sense, they are not penal, but rather remedial—intending to effect a public good and prevent frauds. Taylor v. U. S., 3 How. [44 U. S.] 210.

Counsel for the claimant, assuming that this opium paid duty in San Francisco, sought to have it considered upon the footing of goods, the growth or manufacture of the United States, coming from a foreign port. But if the analogy would hold good, it would not help the claimant's case. Goods, the growth or manufacture of the United States, cannot be brought from a foreign port into the United States, and unladen without a permit, nor without evidence of their exportation and that they are in the same condition as when exported. In Knight v. Schell, 24 How. [65 U. S.] 526, the plaintiffs manufactured at Newberg, N. Y., a number of barrels, and shipped them in three vessels to Cuba, where they were unladen and filled with molasses, when they were re-laden upon the same vessels and brought to New York. The defendant being collector at the time, charged the barrels with the regular duty—24 per centum—upon their value at Cuba. The plaintiffs paid the duties under protest and then brought an action against Schell to recover them back. The court decided against the plaintiffs—holding that the barrels were not returned in the same condition as when exported. Mr. Justice Clifford, in delivering the opinion of the court, says; "When filled in the foreign port, the barrels have been applied to the commercial use for which they were manufactured; and when shipped with their contents, brought back to the United States, and are offered with their contents by the importer for entry at the custom house, they have then, in respect to the revenue laws of the United States, acquired a new character." So with foreign goods once lawfully introduced into the United States,

if taken out of the country and landed at some foreign port or place, "in respect to the revenue laws of the United States, they have acquired a new character." They must pay duties as upon an original importation, and to this end it is forbidden to land them without a permit. That is this case, even upon the ground which counsel for the claimant seeks to put it.

But this is a more favorable view of the transaction than the facts warrant. I do not think Ching Sung purchased this opium in San Francisco, but in Victoria, and that it never paid duties to the United States. If the fact were otherwise, and it had been innocently landed at Victoria and then brought to Porland in ignorance of the law, Wha Kee and Ching Sung would naturally have answered Parker according to the fact, when asked by him what the trunk contained. Instead of this they prevaricated and sought to make the impression that the trunks contained nothing but "bedding and clothing,"—thus betraying a consciousness of something wrong in the matter and a purpose to conceal it from the officer.

In accordance with these views the court finds as a conclusion of fact that the opium in the information mentioned was, on October 22, 1863, brought to Portland, in the district of Oregon, from the foreign port of Victoria, and here unladen contrary to the statute without a permit, and as a conclusion of law that the said opium thereby became and is forfeited to the United States.

Judgment, condemning the goods as forfeited to the United States.

TEN CASES OF SHAWLS (UNITED STATES v.). See Case No. 16,448.

TENCH (HUMPHRIES v.). See Case No. 6,873.

Case No. 13,829.

In re TEN EYCK et al.

[7 N. B. R. 26.] [1]

District Court, N. D. New York. March 11, 1872.

BANKRUPTCY — LEASED PREMISES — ELECTION OF ASSIGNEE.

It is well settled that until an assignee in bankruptcy elects to accept a lease as assignee, he does not become liable for rent accruing after the adjudication, hence, when an assignee occupies the leased premises independently of the lease and pays for such occupation, this occupation is not evidence of such an election.

[Cited in Lee v. Hollister, 5 Fed. 760.]

This case came before the court upon the certificate of the register in charge, upon a statement of facts and of controverted questions assumed to have arisen between the assignee in bankruptcy and the lessors in a lease made to the bankrupts, as follows, viz.: "The said lessors, to wit: the executors and executrix of Nathan Burr, deceased, by said written lease demised for the term of three years from May first, eighteen hundred and seventy, to said bankrupts [Ten Eyck & Choate] the three upper stories or lofts of the 'Suydam' store, number 86 Genesee street, and the said bankrupts occupied and used the said 'lofts' in accordance with the terms of the lease, inter alia, for the purposes of their business up to their being adjudicated bankrupts, viz., August fourteenth, eighteen hundred and seventy-one, having 'covenanted' to pay for said premises two hundred and fifty dollars per year, in quarterly payments." That on or about the twenty-sixth day of September, eighteen hundred and seventy-one, Amasa B. Hamlin was appointed assignee herein, and has ever since been and is now acting as such. That on said twenty-sixth day of September, eighteen hundred and seventy-one, and at the first meeting of creditors, said lessors put in evidence their lease and proved seventy-two dollars and fifty-eight cents of rent to have accrued up to the adjudication herein. And at the second meeting of creditors, said assignee paid and said lessors accepted a fifty per cent. dividend upon said accrued rent, it being mutually agreed by and between said parties and before said register that said payment and receipt should not prejudice the rights of said parties herein; and on the twenty-sixth day of February, eighteen hundred and seventy-two, the assignee paid for the use and occupation of said premises (he having used the same for said estate independently of the lease), up to the twentieth day of February, eighteen hundred and seventy-two, one hundred and twenty-nine dollars and seventeen cents, and the assignee also gave notice of the surrender of said premises. The said money and notice of surrender were each both given and received in like manner, without prejudice as to the unexpired balance of the lease. The assignee has at no time accepted said lease, nor have said lessors in any way consented to its transfer into the fund. Reference is made to said Exhibit A, for a more full and particular statement of its terms and conditions. (Such lease contained an express covenant for the payment of the rent, and the following provision: "Provided said party of the second part shall fail to pay said rent or any part thereof, when it becomes due, it is agreed that said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.")

Upon the above statement of facts, the respective parties, by their said counsel, beg to submit: First. Did the adjudication of bankruptcy herein release said bankrupts from further liability on said lease, and relieve them from the payment of all rent which would accrue thereon by its terms from the date of said adjudication? Second. Is the estate of said bankrupts holden

[1] [Reprinted by permission.]

for the rent of said premises from the adjudication to the full end and term of said lease? Third. Was the rent unaccrued at the adjudication provable as a debt; and can bankrupts be discharged from the express and implied covenants to pay the rent then unaccrued? Fourth. What disposition shall be made of the balance of the term unexpired at the adjudication?

The register gave no opinion upon the questions presented, and the counsel for the assignee cited no authorities. The counsel for the lessors cited the following, viz.: Mills v. Auriol, 1 Smith, Lead. Cas. pt. 3, p. 933; Hare & W. Am. Notes, 1140; Stinemetz v. Ainslie, 4 Denio, 573; Bosler v. Kuhn, 8 Watts & S. 183; Prentiss v. Kingsley, 10 Barr [10 Pa. St.] 120; Savory v. Stocking, 4 Cush. 607; 6 Johns. 52.

Charles F. Durston, for assignee.

Edward C. Marvine, for executors and executrix.

HALL, District Judge. In my judgment it is not proper for me now to decide either of the questions presented by the annexed submission, to which the lessors therein referred to and the assignee in bankruptcy are the only parties, unless the second presents the question of the liability of the assignee in bankruptcy in the character of an assignee of the lease.

The first question is one in which the assignee has no interest, as it can only be properly adjudicated in a suit brought to enforce such liability, and a decision of the question in this proceeding would not bind the parties to such suit. Besides it is upon the effect of the discharge and not of the adjudication, that the question of such liability must depend.

The second question, as I understand it, can only be properly adjudicated after the lessors have presented and made formal proof of their claim, as required by the bankruptcy act [of 1867; 14 Stat. 517]. Then if the claim is resisted by the assignee and disallowed by the district court, the claimants would have a right of appeal to the circuit court, and of a trial in that court, as provided in the bankruptcy act. Besides, by the brief presented on behalf of the lessor, it is contended that they cannot legally prove a claim for such rent, and until they propose to prove such claim, no question in regard to its validity has arisen between them and the assignee.

The third question is regarded as the same in substance as the first, for the reason that if the claim for rent is provable, it can be discharged.

The fourth question is too general, and no answer to it can be given under the facts stated. If the lessors had not already, in legal effect, re-entered upon the demised premises, by accepting the tenancy of the assignee in bankruptcy independently of the lease, the disposition of the unexpired term must depend upon the future action of the lessors and assignee.

It may possibly have been intended by the second question to submit whether the assignee, under the facts and circumstances stated, had assumed the position and liability of an assignee of the lease, and had therefore become liable in that character for subsequently accruing rent; and if so, it is proper to decide that question. The question, so understood, must be decided in the negative. There is nothing evidencing an election by the assignee to accept that position, except his occupation of the premises; and it is expressly stated that such occupation was independently of the lease, and that the assignee had paid for such occupation. This occupation therefore is not evidence of such an election. It is well settled that until an assignee in bankruptcy elects to accept a lease as assignee, he does not become liable for rent accruing after the adjudication and assignment in bankruptcy. Turner v. Richardson, 7 East, 335; Copeland v. Stephens, 1 Barn. & Ald. 593; Martin v. Black, 9 Paige, 641; Lewis v. Burr, 8 Bosw. 140; Carter v. Hammett, 12 Barb. 253; Smith v. Gordon [Case No. 13,052]. And see as bearing upon the question presented, Bourdillon v. Dalton, 1 Peake, 238, and 1 Esp. 234; Wheeler v. Bramah, 3 Camp. 340; Hanson v. Stevenson, 1 Barn. & Ald. 303; Carter v. Warne, 4 Car. & P. 191; Journeay v. Brackley, 1 Hilt. 447; Jermain v. Pattison, 46 Barb. 9; In re Wynne [Case No. 18,117]; In re Merrifield [Id. 9,465]; Murray v. De Rottenham, 6 Johns. Ch. 52; Funtur v. Graham, note to 8 East, 317; Mayor v. Steward, 4 Burrows, 2439; Boot v. Wilson, 8 East, 311; Wadham v. Marlowe, note, 8 East, 314; Stinemetz v. Ainslie, 4 Denio, 573; Lansing v. Prendergast, 9 Johns. 137; Bosler v. Kuhn, 8 Watts & S. 183; Prentiss v. Kingsley, 10 Barr [10 Pa. St.] 120; and the cases referred to in the reports of the cases above mentioned. Under these cases, and the fourteenth, nineteenth, twentieth and thirty-fourth sections of the bankrupt act, the questions submitted in respect to the effect of a bankrupt's discharge, and the right of the landlord to prove for rent accruing after the adjudication in bankruptcy, and, if so, whether it must be considered a debt secured by a pledge of or a lien on the property of the bankrupt, and conditionally provable under section twenty, are questions by no means free from doubt, and upon which I do not propose to deliver an opinion until the questions are presented under such circumstances as require me to make a judicial decision.

TEN EYK (UNITED STATES v.). See Case No. 16,449.

Case No. 13,830.

TEN HOGSHEADS OF RUM.

[1 Gall. 187.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

NON INTERCOURSE — PROHIBITED GOODS BROUGHT FROM NEUTRAL COUNTRY—ORIGIN OF GOODS—BURDEN OF PROOF.

The act of 1st March, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], applies to all goods of British manufacture, &c. although imported into a neutral country before the passing of that act. In what cases the onus probandi lies on the claimant. Condemnation on the facts.

[Cited in The Harriet, Case No. 6,100; The Short Staple, Id. 12,813.]

This was an information founded on the 5th section of the act of the 1st March, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], for an alleged importation into the United States of ten hogsheads of rum of the growth, produce, and manufacture of some colony or dependency of Great Britain. On the trial, the importation was admitted to have been at Boston, about the 1st of January, 1812, and the single question was, whether the rum was of British origin. The testimony on the part of the United States given by experienced and skilful witnesses proved, that this rum had the qualities and flavor of the rum manufactured in the British West-India Islands, and not the flavor or qualities of rum manufactured in the island of Cuba, from whence the importation was made; and the witnesses unhesitatingly pronounced their opinion, that it was of British origin. The testimony produced on the other side did not contradict that of the United States, and the principal witness who had been long engaged in the Havanna trade, and who had tasted the rum, admitted, that it has the flavor and taste of the rum of the British West-India Islands, and that he could not undertake to say, that it had the flavor or quality of the rum of the Spanish colonies. There was, indeed, other evidence, to show that the rum manufactured of late years in Cuba was of an improved quality; and that some portions were equal to that of the manufacture of British colonies. But in general it was admitted to be inferior, and scarcely ever used or brought into our market, and until within the last year, British rum was admitted into the ports of Cuba.

Mr. Crane, for claimant, contended that it was incumbent on the government to prove by clear and incontestible evidence, that the rum was of British origin, and imported into the island of Cuba after the passage of the law; that on the first point, there was no evidence but such as, being founded on opinions formed from the taste, was necessarily very doubtful and uncertain; and on the second point, no evidence whatever; that the rum must, therefore, be taken to be of the manufacture of the island of Cuba, from which, by the documents, it appeared to have been shipped.

Mr. Blake, Dist. Atty., for the United States, by direction of the court, confined his reply to the nature and sufficiency of the evidence to prove the origin. It was a fact, of which direct evidence was obviously impossible. It was necessary, therefore, to resort to the judgment of those, whose sense of taste was so improved by exercise and cultivation, as to enable them to decide with confidence and accuracy. It was well known that this sense is capable of such improvement, as to distinguish between the different objects presented to it, with as much certainty, as the eye. In the present case, the government relied on the evidence of a Mr. Hunt, who was once a grocer, and had been for years employed in the custom-house, in settling the proof of rum. The government having thus supported their case, it became the duty of the claimant to rebut this evidence, by tracing the history of the rum.

Mr. Crane observed that if any doubt existed, he should wish for time to procure a deposition from Havanna, but he was answered by the court, that no continuance could be allowed after argument, unless by consent.

STORY, Circuit Justice (after reciting the facts). It has been contended in behalf of the claimant ([John Winslow, Jr.] who acts merely as agent of one Henry Relando, a Spanish merchant, resident at Havanna, and the assumed owner), that the act of 1st of March, 1809, does not apply to British goods, which were imported into Cuba previous to the passage of that act, although brought subsequently into the United States. But this is directly against the words of the statute, and the prohibition extends to all goods of the growth, produce, and manufacture, of any British colony from whatever port they may be imported. If the argument contended for should prevail, there would be an end to the practical operation of the act, for the United States could scarcely ever obtain proof of the time, when the goods were imported into a Spanish or other foreign colony.

It has been further argued, that the United States are bound to prove the British origin of the rum beyond all possible controversy, and that nothing can be more uncertain, than the decisions of taste. I admit that it is an ancient proverb "de gustibus non est disputandum," but there can be no doubt, that in many instances the taste acquires as great accuracy and precision, as the eye. It is stated by the witnesses, that the flavor of British rum is very clearly dis-

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

tinguishable from all other colonial rum; and in the absence of all contrary evidence, I can perceive no reasonable ground to doubt the fact. How in general can it be ascertained, that any article is of the manufacture of a particular country, unless by the testimony of persons, who have, from long experience, acquired peculiar skill in the article? It is by no means uncommon for artisans to be able to pronounce with confidence, as to the origin of the goods connected with their trades; and their opinions come within the rule, which admits the opinions of gentlemen of the liberal professions—"cuique credendum est in sua arte." It has been supposed, that the onus probandi is not thrown upon the claimant in proceedings in rem, except in cases within the purview of the 71st section of the collection act of 2d March, 1799, c. 128 [1 Story's Laws, 633; 1 Stat. 678, c. 22]; The Luminary, 8 Wheat. [21 U. S.] 407; The Short Staple [Case No. 12,813]; The Matchless, 1 Hagg. Adm. 105; The Union, Id. 36. And I incline to the opinion that the provision alluded to is but an extension of the rules of the common law. Be this as it may, wherever the United States make out a case prima facie, or by probable evidence, the presumption arising from it will prevail, unless the claimant completely relieve the case from difficulty. In the present case, I think the United States have prima facie maintained the allegations of the information. The burthen of proof of the contrary, therefore, rests on the claimant. He, and he only, knows the origin of the goods. He can trace his title backwards, and give the history of the manufacture, or at least of his own purchase. If he does not attempt it, but relies on the mere absence of conclusive, irrefragable proof, admitting of no possible doubt, he claims a shelter for defence, which the laws of the country have not heretofore been supposed to acknowledge. I observe that the owner, in this case, professes to be a Spanish subject at Havanna. He is of course, in a situation, peculiarly fitted to enable him to show, that the rum was of domestic and not of foreign origin. The neglect so to do affords a presumption, that the case does not admit of a satisfactory explanation.

On the whole, I am satisfied that the rum was of British manufacture, and I accordingly reverse the decree of the district court, and condemn the property as forfeited to the United States, with costs. Condemned.

Case No. 13,831.

The TENNESSEE.

[Cited in The Selma, Case No. 12,647. Nowhere reported; opinion not now accessible.]

TENNEY (MAYNADIER v.). See Case No. 9,350.

Case No. 13,832.

TENNEY v. TOWNSEND.

[9 Blatchf. 274.] [1]

Circuit Court, S. D. New York. Dec. 30, 1871.

JUDGMENT—ACTION ON—AVERMENT OF JURISDICTION—PLEADING.

In an action on a judgment of the superior court of Chicago, Illinois, the declaration averred that that court was a court of general jurisdiction, duly created by the laws of Illinois, but did not aver that that court had jurisdiction of the person of the defendant, either by service of process, appearance, or otherwise: *Held*, on demurrer, that the declaration was sufficient.

[Cited in Wakelee v. Davis, 50 Fed. 523.]

[This was an action by Daniel K. Tenney against Thomas S. Townsend.]

J. H. & B. F. Watson, for plaintiff.

Charles Donohue, for defendant.

WOODRUFF, Circuit Judge. The action herein is debt on judgment, demanding $539. The declaration avers, that the plaintiff is a citizen of the state of Wisconsin; that the defendant Townsend is a citizen of the state of New York; that the superior court of Chicago, within and for the county of Cook and state of Illinois, was, at the time in the said declaration afterward mentioned, a court of general jurisdiction, duly created by the laws of the said state of Illinois; that, on the 23d of February, 1870, in the said superior court of Chicago, at * * * before the justices thereof, by the consideration and judgment of said court, the said plaintiff recovered against the said defendants the said sum of money above demanded, which, in and by the said court, was then and there adjudged to the said plaintiff for his damages which he had sustained, as well by reason of the non-performance, by the said defendants, of certain promises and undertakings theretofore made by the said defendants to the said plaintiff, as for his costs and charges, &c., whereof the said defendants were convicted, &c.; with the usual averments, that the judgment still remains in full force and effect, not reversed, &c., and that the plaintiff hath not obtained execution or satisfaction thereof, &c., whereby, &c.; with the usual formal conclusion. To this declaration the defendant Townsend has pleaded three several pleas, to which the plaintiff has demurred, assigning special causes of demurrer. It is not necessary to state the pleas. They are each of them defective, either in form or substance, and that they are so was very properly conceded by the counsel for the defendant, on the argument of the demurrer. But, as, on demurrer, judgment must be rendered against the party who commits the first fault in substance, the defendant's counsel insists that judgment should be for the defendant, because the declaration is insufficient.

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

The sole objection made to the declaration is, that it does not aver, or in any manner show, that the superior court of Chicago had jurisdiction of the person of the defendant Townsend, either by service of process, appearance, or otherwise. The declaration is in conformity with the established precedents used in England, in declaring upon judgments of the court of king's bench and the court of common pleas, and would have been approved in the state of New York, under the system of pleading in use before the adoption of the Code of Procedure, in declaring on a judgment of the supreme court of that state. The principle governing the subject is, that, when the judgment of a court of general jurisdiction is declared upon, jurisdiction of the person is presumed, from the averment of the recovery. This presumption is, however, not conclusive. Want of jurisdiction of the person may be set up as a defence, and may prevail. The presumption, however, suffices to sustain the declaration as a pleading, and puts the defendant to plead his defence.

By the constitution of the United States (article 4, § 1), full faith and credit are to be given, in each state, to the judicial proceedings of every other state; and this imports, that a judgment shall have, in each state, the same credit, validity and effect as it has in the state in which it was rendered. But, on the other hand, this is qualified, in respect to its operation against a defendant in another state, by the condition, that the court in which it was rendered had jurisdiction of such defendant. In this view, it was suggested, on the argument, that, inasmuch as the defendant was here sued as a citizen of New York, it ought affirmatively to appear, when a judgment of another state was declared upon, that jurisdiction of the person was in fact acquired; and that no presumption arose, in the tribunals of this state or district, that the court of the state of Illinois, however general its jurisdiction, had any jurisdiction of such a defendant. That the want of such jurisdiction is available as a defence is unquestionable; and it would be no unreasonable rule which required a plaintiff who wished to rely on such a judgment, and assert its conclusiveness under the constitution, to take the affirmative, in the very form of his declaration, and aver all the facts essential to make the judgment not only valid, but conclusive. Under the peculiar relations existing between the states, and this stipulation in the constitution, which forbids us to treat the judgment of a sister state as a foreign judgment, such a rule of pleading would harmonize with the construction which is given to the clause in the constitution, referred to. But no case is cited to me which shows that the general rule of pleading has been modified, to change the burthen of averment from the defendant to the plaintiff, or which indicates that, upon averring that the court in which the judgment is rendered is a court of general jurisdiction, the plaintiff may not, for the purposes of his pleading, rely upon the same presumption which would avail him if he were declaring thereon in the same state in which it was rendered, and leave the defendant to plead and prove want of jurisdiction, if he can. The cases to which I have referred lead to the contrary conclusion; and it may well be suggested, that, if, in the state in which a judgment is rendered by a court of general jurisdiction, the fact of recovery imports, prima facie, that such court did acquire jurisdiction of the person, and, in the absence of counter averment, that prima facie import would prevail, then, like faith and credit, which should be here given to such judgment, includes the same prima facie import, and requires that courts, here, should accord to the mere averment of recovery in such a court the like presumption of jurisdiction. In support of the declaration in question, and as bearing on the question discussed, see 2 Chit. Pl. 225 et seq.; 3 Chit. Pl. 228; Wheeler v. Raymond, 8 Cow. 311; Griswold v. Sedgwick, 1 Wend. 126; Starbuck v. Murray, 5 Wend. 148; Mills v. Duryee, 7 Cranch [11 U. S.] 481. And that, when congress gave the effect of a record to the judgment, it gave all the collateral consequences. See Hampton v. McConnel, 3 Wheat. [16 U. S.] 234; Biddle v. Wilkins, 1 Pet. [26 U. S.] 686; D'Arcy v. Ketchum, 11 How. [52 U. S.] 165; Westerwelt v. Lewis [Case No. 17,446]; Lincoln v. Tower [Id. 8,355]; Wilson v. Graham [Id. 17,804]; Sumner v. Marcy [Id. 13,609]. Some conflict of opinion appears to exist on the question whether, if the record of the judgment shows service of process on the defendant, or appearance in the action, the fact can be controverted by the defendant. On that question this demurrer calls for no opinion.

Judgment must be given for the plaintiff on the demurrer, but leave is first given to the defendant to amend his pleas, on the usual terms.

TENNISON (GARDNER v.). See Case No. 5,238.

Case No. 13,833.

TENNY et al. v. COLLINS.

[4 N. B. R. 477 (Quarto, 156).] [1]

District Court, E. D. Missouri. 1871.

BANKRUPTCY — MOTION TO SET ASIDE DISCHARGE —SPECIFICATIONS—TESTIMONY OF WIFE.

1. Upon a motion to set aside the discharge granted to a bankrupt, the wife of the bankrupt cannot be required to testify as a witness against her husband.

2. Creditors moving to set aside the discharge, may not prove, at the trial, acts of the bankrupt not set forth in the specifications.

---

[1] [Reprinted by permission.]

[This was a proceeding by Tenny & Gregory against Collins.]

Whittelsey & Mauro, for bankrupt.
Stewart & Torry, for petitioners.

TREAT, District Judge. The bankrupt had been granted a discharge, no debts having been proved against his estate, and no assets coming to the hands of his assignee. A year after the discharge, a petition was filed by two of the creditors to set it aside, alleging that the bankrupt had willfully sworn falsely in his schedules, and in his examination by the assignee, in stating that he had no property, whereas the creditors alleged that he had an equitable estate in some oil lands in Pennsylvania, and owned lands in Texas; and was also interested as a partner in a firm in which his name appeared. At the trial the plaintiffs proved that in 1866 the bankrupt had an interest in some oil lands, with other parties, upon which payments had been made, and that he made the final payment and had the deed executed to his father-in-law; that in 1868, after the discharge, purporting to act as agent, he sold the land and expended part of the money in payment of one of his scheduled debts. The testimony showed that the bankrupt, in 1866, was indebted to his father-in-law, to an amount exceeding the supposed value of the oil lands, and that he caused the lands to be conveyed in payment of this debt, the value being about two thousand dollars, as the bottom had fallen out of the speculation in oil lands in the vicinity of those thus conveyed; and that when the sale was made in 1868, the price obtained was more than double the sum at which they were taken, and that, for this reason, the father gave the son-in-law one thousand dollars of the proceeds of the sale. The Texas lands were purchased for one hundred dollars, and were sold for one hundred and twenty-five dollars, more than six months before the application in bankruptcy, and the money was expended in the support of the bankrupt's family. The plaintiffs also summoned the wife of the bankrupt, who was sworn as a witness, and were proceeding to examine her in relation to the conveyance, in 1866, of land held in her name by herself and husband to her father, in payment of other debts, and as a security for debts upon which he was jointly liable with the bankrupt. Objections were interposed, that while the bankrupt act [of 1867; 14 Stat. 517] provided for the examination of the wife of the bankrupt before the register, for the purpose of ascertaining the condition of his estate, it did not alter the common rule that the wife could not be a witness for or against the husband in a motion to set aside the discharge. The objection was sustained by the court. The court also held that conveyances made by the bankrupt and alleged to be fraudulent, could not be shown in evidence unless charged in the specifications, except so far as that might be used to show the intent of certain acts specified in the petition. The court, upon the evidence, decided that the specifications were not sustained, and dismissed the motion.

Case No. 13,834.

TENNY v. DENSLEY et al.

[1 Cranch, C. C. 314.] [1]

Circuit Court, District of Columbia. June Term, 1806.

INSOLVENCY—ARREST—COSTS—DISCHARGE.

An insolvent debtor will be discharged from arrest for costs accrued partly before and partly after his discharge under the act.

Ca. sa. [by Tenny against Densley & Burford] for costs on verdict at December term, 1805, for defendant, Tenny. On the 30th of September, 1805, Densley had been discharged under the insolvent law of 1803 (2 Stat. 237), by the 10th section of which, he is to be discharged if taken on any process or any judgment for any debt, damages, or costs contracted, owing or growing due before his discharge. Part of these costs were growing due or were contracted before his discharge. The defendant, Densley, was discharged by the court on that ground. (DUCKETT, Circuit Judge, absent.)

TENTH NAT. BANK (WARREN v.). See Cases Nos. 17,200–17,202.

TEN THOUSAND CIGARS (UNITED STATES v.). See Cases Nos. 16,450 and 16,451.

TERESA, The MARY. See Case No. 9,228.

TERRE HAUTE DRAW-BRIDGE CO. (JOLLY v.). See Case No. 7,441.

TERREL (UNITED STATES v.). See Cases Nos. 16,452 and 16,453.

TERRELL (BROCK v.). See Case No. 1,914.

Case No. 13,835.

In re TERRY.

[2 Biss. 356; [2] 4 N. B. R. 126 (Quarto, 33); 3 Chi. Leg. News, 106.]

District Court, E. D. Wisconsin. Aug. Term, 1870.

BANKRUPTCY — JUDGMENT BY CONFESSION — TIME OF ENTRY.

1. Where a creditor has reasonable cause to believe his debtor insolvent, he acquires no preference in bankruptcy over other creditors by taking from his debtor a promissory note with warrant of attorney to confess judgment, and levying an execution issued on said judgment note, on the debtor's stock of goods.

[Cited in Re Dunkle, Case No. 4,160.]

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

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

2. Although the warrant of attorney may have been given more than four or six months before the institution of proceedings in bankruptcy, yet if the lien of the execution only became operative within the six months, the creditor is entitled to no preference, and the limitations on the 35th and 39th sections [of the act of 1867 (14 Stat. 534, 536)] do not apply.

This was a petition by John J. Fairbanks, judgment creditor of Terry & Cleaver, bankrupts, for an order requiring the assignee to pay their execution in full from the proceeds of sales of property coming to his hands, on the ground that his execution was a lien upon the property.

A. R. R. Butler, for creditor.
Palmer, Hooker & Pitkin, for assignee.

MILLER, District Judge. John J. Fairbanks, a resident and business man in Milwaukee, at different times between the months of February and September, 1867, loaned to Terry & Cleaver, a firm in the same city, about $5,000. There were some propositions for a future business connection between these parties, which were not consummated. Under these propositions the money was loaned to the firm. In January or February, 1869, Fairbanks notified Terry & Cleaver that he wanted his money. He was then given to understand that Cleaver would take up the loan by the first of July of that year, or make him outside security that would be negotiable. Terry at that time stated to Fairbanks that he was not able to raise the money. The indebtedness was in book account, and continued in that form until February 23, 1869. Not being satisfied that the loan should continue in that form, Fairbanks insisted on security. Terry & Cleaver informed him that their business would not justify their drawing that amount out, but expressed a wish to give him any security they could. A note with warrant of attorney was given by Terry & Cleaver to Fairbanks for the money on the 23d of February, 1869, payable four months after date. The debtors were frequently urged for payment of the money or part of it, without effect; but until judgment was entered on the note, no part of the money could be collected of the firm in cash. Before the judgment was entered, Fairbanks demanded of Terry & Cleaver a statement of their business, which they refused. Fairbanks testified that he made every effort to induce an arrangement for the payment of the debt before entering up the judgment. May 9, 1870, judgment was entered on the note and warrant of attorney in the circuit court of Milwaukee county, for $5,584.49, and execution was issued thereon the same day, and Terry & Cleaver's stock of goods levied on. They had no intimation or knowledge in advance of these proceedings. Fairbanks gave no publicity to the fact of having the note, except to friends, in a business way, not creditors of Terry & Cleaver. The note was made payable to Fairbanks alone, and not to his order or to bearer, at the request of Terry & Cleaver, as they did not wish it to be made public or negotiated. Fairbanks told them they need have no fear of anything of the kind, that he should probably take the note home, and put it in his cash drawer, and leave it there until it matured, and of course it would be left there longer unless it was taken up. Terry testified that when giving the note he told Fairbanks it was preferring a creditor, and would not give him any security over other creditors. And before the note was given, they told Fairbanks if he pushed them it would break them up. Terry did not mention to any one their having given the note. Terry did not believe the note with warrant of attorney better security than a common note, and they did not intend thereby to give Fairbanks a preference over other creditors. And they told him if the note was a good security they would not give it to him. The money was used by the firm to replenish and increase their stock. The understanding was that Fairbanks should take the note out of the store and keep it. The interest for the year 1869 was not paid.

Proceedings in bankruptcy against Terry & Cleaver were commenced by creditors, June 6, 1870. These debtors were adjudicated bankrupts, and an assignee was duly appointed. The marshal having by virtue of a warrant taken possession of the stock of goods levied on by the sheriff under the execution in favor of Fairbanks, and sold them pursuant to an agreement between the parties, Fairbanks presented his petition, praying an order of court for the payment of the amount of his execution out of the proceeds of sale. To this petition the assignee and petitioning creditors in bankruptcy interpose an answer. "They object to the order for payment; that said bankrupts, within four months prior to the commencement of bankruptcy proceedings, to wit: on the 9th day of May, 1870, they being bankrupt and insolvent at that time, did suffer their property (their entire stock of goods) to be taken on legal process, to-wit, the execution issued on the judgment mentioned in the petition of said Fairbanks, with intent thereby to give a preference to said John J. Fairbanks, a creditor of said bankrupts, and with intent thereby to defeat and delay the operation of the bankrupt act, and that at the time said property was so taken, said Fairbanks had reasonable cause to believe that said Edward Terry and Albert B. Cleaver were insolvent, and that a fraud on the bankrupt act was intended. That Fairbanks' judgment was rendered on a note dated February 23, 1869, payable four months after date, with a warrant of attorney to confess judgment thereon, of same date, by said Terry & Cleaver to said Fairbanks; the said Terry & Cleaver being bankrupt and insolvent on said 23d of February, 1869, and so continued until the commencement of proceedings in bankruptcy against them, all of which said Fairbanks well knew; the pre-

tended lien of said Fairbanks referred to in his petition being of no validity or effect, the same being void under the bankrupt act." Fairbanks supplied Terry & Cleaver with money to the amount of $5,000 through the summer of 1867, under some understanding between the parties that upon certain conditions a co-partnership might be entered into between them. The only written evidences of debt consisted of entries in a book in the nature of charges against Terry & Cleaver as debtors for money loaned, until February 23d, 1869, the day on which the judgment note was given. The parties, Fairbanks, Terry and Cleaver, resided in Milwaukee, and had very frequent interviews respecting this loan and securing it. There is no doubt, I think, but that Terry & Cleaver were in an insolvent condition in their business at the date of the note. The note was not given for a present consideration, but to secure a pre-existing debt. Fairbanks had notice from Terry & Cleaver when the note was received by him, that if he pushed them their business would be broken up, and that they could not take the amount of that debt out of their business. He also had notice that a judgment note, taken under these circumstances, was not valid as against other creditors. The condition of these debtors did not improve, but grew worse, so that they were not able to pay the interest on the note for the year 1869. There can be no doubt but that Terry & Cleaver were insolvent, and that Fairbanks had reasonable cause to believe them so at the date of the levy of his execution on the stock of goods.

[2] [Terry & Cleaver did not consider that, by the judgment note, they were giving a preference to Fairbanks, as they believed a judgment and execution would not be available, and as a preference over their other creditors. This does not help the case, for the legal consequence of the note, with warrant to confess judgment, was to be followed by an execution, levy, and sale of their property to the exclusion of the other creditors. These debtors committed an act of bankruptcy by giving the note with warrant of attorney to confess judgment, and also by suffering their property to be taken in execution to satisfy said judgment. By section 39 of the bankrupt act, it is an act of bankruptcy in an insolvent debtor to give a warrant to confess judgment, or to suffer his property to be taken on legal process. Either of these acts is sufficient to enable his creditors to proceed against him in bankruptcy by petition, provided such petition is brought within six months after the act of bankruptcy shall have been committed. One act of bankruptcy charged in the petition of creditors against Terry & Cleaver is the suffering their stock of goods to be taken.] [2]

On the execution of Fairbanks, on the 9th of May, 1870, which was about a month before the petition in bankruptcy was brought, the limitation of six months did not apply. But if the giving the note with warrant of attorney to confess judgment had been the only act of bankruptcy alleged in the petition against Terry & Cleaver, the limitation of six months would have barred the proceedings in bankruptcy.

It is contended that the limitation should also be applied to the claim of Fairbanks, as the note with warrant of attorney was given more than six months prior to the petition in bankruptcy. The cause of bankruptcy alleged in the petition against Terry & Cleaver, is that they suffered their stock of goods to be taken on execution in favor of Fairbanks. His claim of preference must rest on his execution and levy. The note with warrant of attorney was merely an evidence of a debt; and first became an available security by virtue of the levy under the execution. The note with warrant of attorney to confess judgment was given to Fairbanks in February, 1869, pursuant to his frequent importunities for security. Instead of having judgment entered and execution issued and levied on the goods of his debtors, who were not even paying the interest for the year 1869, he locked up the papers in his money drawer, where he retained them until the 9th of May, 1870. In all that time he had frequent opportunities of inquiring into the financial condition of his debtors. And in the course of that time the firm of Terry & Cleaver contracted debts to a large amount for borrowed money and for goods purchased on credit. It does not appear that these creditors had any knowledge of the existence of the judgment note before the service of the execution. If Fairbanks were permitted, after concealing the evidence of his intended preference over other creditors, to their prejudice for that length of time, to obtain by means of the execution payment of his debt in full, the great object of the bankrupt act, equality among creditors, would be frustrated. There can be no doubt but he had reasonable cause to believe Terry & Cleaver to be insolvent before and at the time he entered up judgment and issued execution.

For these reasons I am constrained to deny the prayer of the petition.

NOTE. The preference on a judgment note is obtained when the judgment is entered. Golson v. Nieboff [Case No. 5,524], Jan., 1871. It is not a sufficient answer to say that the warrant of attorney was given to secure a bona fide debt, and that at the time the creditor had no knowledge of the debtor's insolvency. The question depends upon his knowledge or information at the time he made his warrant operative. Id. That the giving a note with warrant of attorney is a preference, &c., see Campbell v. Traders' Nat. Bank [Id. 2,370], Jan., 1871; In re Dibblee [Id. 3,884]; Fitch v. McGie [Id. 4,835]. And a judgment may be a preference, and be set aside, even though obtained in due course of law, if suffered by debtor. Beattie v. Gardner [Id. 1,195]; Smith v. Buchanan [Id. 13,016].

It has been held by Blodgett, J., that under

[2] [From 4 N. B. R. 126 (Quarto, 33).]

certain circumstances the lien of an execution is transferred to assets in the hands of the assignee. In re Weeks [Case No. 17,350]. And the supreme court has lately decided that a creditor who, having reasonable cause to believe his debtor insolvent, commences suit in a state court, and obtains judgment, execution and levy, does not obtain a valid lien as against an assignee in bankruptcy proceedings commenced within four months subsequent to such judgment. Buchanan v. Smith [16 Wall. (83 U. S.) 277].

Case No. 13,836.

In re TERRY.

[5 Biss. 110.] [1]

District Court, N. D. Illinois. Feb., 1870.

BANKRUPTCY — ACT OF — LIMITED PARTNERSHIP — HOW DISSOLVED.

1. It is not an act of bankruptcy on the part of one partner to influence or procure the departure of another from the state.

2. In Illinois, if the certificate of dissolution of a limited partnership does not fulfill the requirements of the statute, the partnership still continues, and such informal dissolution does not affect the rights of creditors.

In bankruptcy. This is a proceeding on the part of the creditors of the firm of Arbogast & Terry, to declare Lyman Terry, who was a special and limited member of said firm, a bankrupt, and subject his private property to the debts of said firm. The original petition was against Arbogast and F. P. Terry, and the petitioners then filed an amendment asking adjudication against Lyman Terry. To this amended petition Lyman Terry answered. It appeared that this special partnership was formed on the first of March, 1869, Arbogast contributing no money to the assets of the firm, but only undertaking to put in his skill in the art and business of manufacturing glass. The two Terrys put in $1,250 each, and Arbogast and F. P. Terry were the general partners. The proceedings to perfect this association as a limited partnership within the statutes of this state were admitted to be all regular, and under this law the special partner only became liable for the money put into the firm. It was admitted that Lyman Terry duly paid in his $1,250, and there was no evidence or pretence that he ever withdrew this capital. On the 20th of March the firm were greatly in need of money to pay their laborers, and Lyman Terry procured $1,500 by his own note to Page & Sprague, and advanced it to the firm, with an express understanding that he should be refunded out of the proceeds of the first glass got to market. There seems to be no dispute but that this money was paid and went into the affairs of the firm. On the 24th of March, steps were taken for the dissolution of this partnership. Arbogast took $125, and assigned his interest to F. P. Terry, and a stipulation for dissolution was entered into, but no certificate was filed in the recorder's office, nor was the notice required by statute (1 Gross' St. p. 433, § 16) duly published. On the 30th of March, F. P. Terry, who had continued the control of the business of the firm after the attempted dissolution, was in want of more money, and applied to Lyman Terry for it. The application resulted in his obtaining from Lyman Terry the $2,000 he needed, he giving as security a bill of sale for 1,000 boxes of glass—465 of which were delivered on the 3d of April, and 60 boxes on the 6th of April, making 525 boxes in all —with an agreement that whatever the glass came to over the $2,000, should apply on the $1,500 advanced to the firm.

Hervey, Anthony & Galt, for petitioning creditors.

H. B. Hurd and John A. Hunter, for Lyman Terry.

BLODGETT, District Judge, charged the jury as follows:

It is insisted that the successive transactions between these partners make Lyman Terry guilty of the acts of bankruptcy provided for in the statute, which brings him within the clauses of the bankrupt act [of 1867; 14 Stat. 517]. The acts insisted upon as bringing him within the operation of these clauses, are: (1) Procuring the departure of Arbogast from the state. (2) Giving the judgment note with others to Booth. (3) The buying of the 1,000 boxes of glass on the 30th of March, and taking possession of the 525 boxes on the 3d and 6th of April.

As to the first of these grounds,—that of procuring the departure of Arbogast from the state,—I do not see how this can be held to be an act of bankruptcy on the part of Lyman Terry. It was such an act on the part of Arbogast. But that this act of Arbogast is to make Lyman Terry a bankrupt, I do not see, any more than it would any stranger, who had used his influence or advice to procure Arbogast's withdrawal from the firm.

The note given Booth, and used as a means, may have been a fraud on Arbogast, —may have deceived him,—but how are the creditors left any worse off? Arbogast put no money into the concern, and under the evidence it seems doubtful whether his services were of any value to them. At all events, the evidence shows that they lost money all the time he stayed, and only made money, if at all, after he left. But it is contended that the buying out of Arbogast was dictated by an honest regard for the interests of the firm.

We now come to the transaction of the 30th of March, when Lyman Terry let F. P. Terry have the $2,000 on the bill of sale of 1,000 boxes of glass. It is contended that at this time Lyman Terry was still a member of this firm, and that, owing to informalities in the proceeding in not filing the certificate of dissolution, the dissolution had not taken

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

effect as to creditors. I agree with the counsel for the creditors on this point, that the partnership still continued. But in my opinion this is no reason why Lyman Terry could not, if the transaction was fair, buy this glass. The business of the firm was to manufacture glass and sell it. This was their only resource from which to raise money to meet their daily expenditures. Lyman Terry had no interest in the firm save to the extent of the $1,250 capital he had put in. As to all other transactions, he could deal, buy and sell, like any third party.

Verdict against creditors, as to Lyman Terry.

TERRY (BABCOCK v.). See Case No. 702.

Case No. 13,837.

TERRY v. BAMBERGER.

[14 Blatchf. 234; [1] 44 Conn. 558.]

Circuit Court, D. Connecticut. May 24, 1877. [2]

TROVER AND CONVERSION — BAILMENT — LIEN — PLEADING—AMENDMENT—COSTS—COURTS —TERRITORIAL JURISDICTION.

1. The B. Co., of Connecticut, had in the hands of C., in New York, goods for sale on commission, on which C. had a lien as security for his liability on accommodation acceptances which he had given to the B. Co. A voluntary assignment in insolvency was made by C. to B., under the laws of New York. B. took possession of such goods, with notice that they belonged to the B. Co. Afterward the B. Co. tendered the acceptances to B., and demanded the goods, but B. refused to deliver them, and sold them. Their market value was $7,500. Subsequently T. was appointed receiver of the B. Co., under the laws of Connecticut, and tendered the acceptances to B., and demanded the goods, but B. refused to deliver them. T. then sued B. in this court, and, at the trial, was allowed to amend his declaration by adding counts for a conversion prior to T.'s appointment: *Held,*

(1) B. rightfully took possession of the goods of the B. Co., but tortiously converted them thereafter.

(2) T., as receiver, had a right to sue B. in Connecticut for a conversion happening prior to T.'s appointment.

(3) T. was entitled to a judgment for $7,500, and interest at 6 per cent. from the date of the demand by the B. Co., and the costs after the amendment, but should pay to B. his costs until the amendment.

[This was an action by George E. Terry, receiver, etc., against Leopold Bamberger.]

George E. Terry and Stephen W. Kellogg, for plaintiff.

Charles W. Gillette and Harris B. Munson, for defendant.

SHIPMAN, District Judge. This case was tried by the court, the parties having, by written stipulation duly signed, waived a jury. Upon said trial by the court, both parties appeared by their counsel and with their witnesses, and were fully heard respecting the controverted questions of law and of fact. The facts which are found to have been proved are as follows: On or about August 12th, 1875, the firm of S. A. Castle & Co., of the city of New York, consisting of Samuel A. Castle, Rufus E. Hitchcock, and Henry S. McGrane, being insolvent, made an assignment in insolvency of all their goods and effects, for the joint and equal benefit of their creditors, under the statute of New York, of April 13th, 1860, to Leopold Bamberger, of said city, who accepted said trust, gave bonds according to law, and entered upon his duties on August 12th, 1875. Previous to this time, said firm had been the selling agents, in said city, of the United States Button Company, a joint stock corporation, duly incorporated in pursuance of the laws of this state, and established at Waterbury. Said firm had in their store, on said August 12th, 1875, the manufactured goods of said company, which had been theretofore sent to them for sale upon commission, to a large amount, which goods were the property of said button company. The market value of said goods was $7,500. The company had not been in the habit of drawing against their consignments, but, prior to this date, had obtained from S. A. Castle & Co. their accommodation acceptances, to the amount of $22,500, and it was agreed between said parties, at the time when said acceptances were given, that said firm should have a lien on the goods which were from time to time unsold, as security against their liability upon said acceptances. These acceptances had been discounted for the benefit of said button company, and were then held and owned by the Waterbury National Bank. The goods of said company in the possession of S. A. Castle & Co. were specified in their inventory, which was duly made and filed in pursuance of the laws of the state of New York, under the head of "goods on hand on which allowances have been made and merchandize in stock, &c.," as "consigned by the United States Button Co.," and were appraised at $6,054. The assignee thus had notice of the ownership of the goods. Said Bamberger immediately took possession of said goods as his own, and as equitably belonging to the creditors of S. A. Castle & Co., and proceeded forthwith to sell them as rapidly as he was able, for the benefit of said estate. On September 24th, 1875, said button company took up and received said acceptances from the Waterbury National Bank, by the substitution of the button company's notes therefor, and thereupon the president of said company carried said acceptances to New York, tendered them to said Bamberger, and demanded of him the goods belonging to said company, but said Bamberger refused to deliver the same and continued the sale thereof. On or about November 1st, 1875, the plaintiff was duly appointed receiver of the estate of said button company, by the superior court

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

[2] [Affirmed in 103 U. S. 40.]

of New Haven, Connecticut, under and by virtue of the 23d section of chapter 1, tit. 17, of the General Statutes of Connecticut (Revision 1875, p. 281), and said receiver was authorized by the decree of said court to execute the powers specified in section 1, pt. 14, c. 17, tit. 19, of said General Statutes (Revision 1875, p. 482). The plaintiff accepted said trust, gave bonds pursuant to law, which were accepted by said court, and entered upon his duties. On November 24th, 1875, the plaintiff, accompanied by the secretary of said company as a witness, again tendered to said Bamberger, in the city of New York, said acceptances, and again demanded said goods, as the property of said button company, but said Bamberger refused to deliver them. The plaintiff then asked Bamberger if there were any other acceptances outstanding against said goods, or if there were any other claims or charges against the goods, for interest, commissions, &c., except the tendered drafts, to which inquiry Bamberger replied in the negative. Upon the payment of said accommodation acceptances, S. A. Castle & Co. were indebted to said button company in a large amount, as appeared by said inventory. The present action was brought in a state court of this state, and was removed to this court by the defendant. At the close of the testimony the plaintiff asked and obtained leave, against the objection of the defendant, to amend the declaration by the addition of the second and third counts, for a conversion prior to the plaintiff's appointment. Opportunity was given to the defendant, after the allowance of said amendment, to introduce additional testimony, if he desired.

Upon the foregoing facts, the conclusions of law are as follows:

1. The defendant rightfully took possession of the goods of the button company, but tortiously converted them thereafter. S. A. Castle & Co. were the factors of the button company, and, as such, were personally intrusted with the sale of its goods. This trust was a personal one, and could not be delegated to another, beyond the usual course of business, without the consent of the consignors. Neither had Castle & Co. any right to sell or transfer the goods in payment or in pledge for their own indebtedness. Having a lien upon the goods as security for their liability upon the accommodation acceptances which they had given to the consignors, Castle & Co. had a right to transfer said lien to their creditors, and to deliver the goods to their assignee for the benefit of their creditors, solely as a security to the extent of said lien. The button company could not regain possession until they had tendered to the assignee the amount of the lien of Castle & Co., or otherwise discharged said lien, and, upon such tender or discharge, had the right to regain possession of their property, if it could be traced, or distinguished from the mass of the other property of the factor in the possession of the assignee. Warner v. Martin, 11 How. [52 U. S.] 209; Veil v. Mitchel [Case No. 16,908]; Thompson v. Perkins [Id. 13,972]; Cook v. Kelly, 9 Bosw. 358; Chesterfield Manuf'g Co. v. Dehon, 5 Pick. 7; Denston v. Perkins, 2 Pick. 86; Scott v. Surman, Willes, 400. But, the rightful possession of the assignee gave him no authority to assume to himself the entire property or right of disposing of the goods, until duly authorized by law, and when, having taken possession, with notice that the goods were the property of the button company, he proceeded to sell and convert them into money as rapidly as he could, there was a conversion. The action of trover "always supposes the defendant to have come legally into possession of the goods. It is the breach of the trust, or the abuse of such lawful possession, which constitutes the conversion." Murray v. Burling, 10 Johns. 172; Connah v. Hale, 23 Wend. 462; Fisk v. Ewen, 46 N. H. 173; Baldwin v. Cole, 6 Mod. 212; M'Combie v. Davies, 6 East, 538.

2. The plaintiff, as receiver, had a right to institute a suit in this state against the defendant, for a conversion happening prior to the plaintiff's appointment. It is contended, that the decree of the state court had no extra-territorial jurisdiction, and gave the plaintiff no title to property beyond the limits of this state, and that, therefore, he had no right to institute a suit for the recovery of the value of property which had been since his appontment beyond the jurisdiction of this state. But the statutes of this state in regard to the appointment and duties of receivers of the property of corporations do not undertake to change the title of the property or to vest it in the receiver. Receivers are declared by the statute to have the right to the possession of the property of the corporation, and power in their own names, or in its name, to commence and prosecute suits for and on behalf of the corporation, to demand and receive all evidences of debt and property belonging to it, and to do and execute, in its name or their own names, as such receivers, all the acts and things which shall be necessary or proper in the execution of their trust, and to have all the powers, for any of said purposes, possessed by such corporation. The receiver is the agent of the law to collect the property of the corporation and to wind up its affairs, and for that purpose to do all acts which may be necessary in the execution of the trust. By authority of law he acts in the place of the directors, but no title to property is changed. Such has been the construction of similar statutes elsewhere. Willink v. Morris Canal & Banking Co., 3 Green, Ch. [4 N. J. Eq.] 377.

It is unnecessary to determine whether the receiver was empowered to commence a suit in his own name, in the state of New York, for the recovery of the property of the corporation. As the title to the property which is now in question was confessedly always in the button company, a suit could have been instituted in New York against the defendant, in the name of the corporation, certainly with

the assent of its officers. It is apparent, that, both before and after the appointment of the plaintiff, the officers of the corporation were seeking to obtain this property, and they have not been prevented from aiding the receiver in the collection of the debts of the company in any court here or elsewhere. They are still the officers of the company. In this state, the plaintiff can commence a suit either in the name of the corporation, or in his own name, in its behalf. Whether the receiver or the corporation is plaintiff, the action is for the recovery of the value of property the title of which is in this company. Being thus the agent of the law to wind up the affairs of the corporation, and to do whatever it could do in this behalf, the receiver is authorized to collect, within this state, its debts and choses in action, of whatever nature the same may be, and to commence any proper suits, whether sounding in tort or in contract. "There is no greater reason for allowing the receiver to recover damages in his own name for the breach of a contract made with the bank, than there is for allowing him to recover damages in his own name for the wrongful withholding of the property of the bank, in another form." Gillet v. Fairchild, 4 Denio, 80.

The fact that the United States Button Company had not discharged the lien, and so were not entitled to the possession of the goods, at the time of the conversion by the defendant, on August 12th, 1875, does not defeat the action of trover, the lien having been discharged before suit was brought. If the plaintiff had a right of action when the suit commenced, it is competent for him to show a prior conversion. Delano v. Curtis, 7 Allen, 470; Carpenter v. Hale, 8 Gray, 157. Judgment should be rendered in favor of the plaintiff, for $7,500 and interest at six per cent, from September 24th, 1875, and his costs accruing after May 15th, 1877. Upon the amendment, the plaintiff should pay the defendant his taxable costs until May 15th, 1877, in accordance with the state practice. Richardson v. Hine, 43 Conn. 201.

[On error to the supreme court, the above judgment was affirmed. 103 U. S. 40.]

Case No. 13,838.

TERRY v. IMPERIAL FIRE INS. CO.

[3 Dill. 408;[1] 4 Ins. Law J. 824; 9 West. Jur. 551; 2 Cent. Law J. 459; 21 Int. Rev. Rec. 236; 22 Pittsb. Leg. J. 194.]

Circuit Court, D. Kansas. 1874.

REMOVAL OF CAUSES—ALIEN—FOREIGN CORPORATION.

A corporation created by the laws of Great Britain is an "alien" within the meaning of section 12 of the judiciary act of 1789 (1 Stat. 79), and when sued by a citizen of the United States in the state court, may, on complying with the requirements of that section, have the suit removed to the proper circuit court of the United States.

[Cited in Purcell v. British Land & Mortg. Co., 42 Fed. 466.]

The plaintiff, Jas. E. Terry, a citizen of the state of Connecticut, commenced his suit in the district court of Douglass county against said defendant, the Imperial Fire Insurance Company, to recover for a loss by fire, upon a policy of insurance issued by that company. The defendant, on entering its appearance, filed a petition for a removal of the case to this court, under the provisions of the 12th section of the judiciary act of 1789, claiming that it is within the meaning of that section an "alien." On that petition the case was sent to this court. Now the plaintiff files his motion to remand the cause to the state court. The Imperial Fire Insurance Company of London is a corporate body, organized under and by virtue of the laws of Great Britain.

Thatcher & Stephens, for plaintiff.

Nevison, Simpson & Alford and S. A. Riggs, for defendant.

FOSTER, District Judge. The only question presented to this court for determination is, whether or not the defendant is an alien within the meaning of the constitution, and the judiciary act. It is a question of no little moment, and one upon which there appear to be no reported cases, directly in point; its solution however, is not difficult, in the light of the several decisions of the supreme court, establishing the right of corporate bodies of other states to litigate in the federal courts, as if citizens of such other states.

Perhaps there is no one subject in the litigation in the highest court of the land, which has given rise to so much controversy, and which has brought out more able expressions of opinion from the bench and the profession, than the question whether or not corporations come within the jurisdictional rights given to citizens of different states, to sue and be sued in the United States courts. But however interesting that discussion may be to the legal student, or however weighty may be the arguments and reasons urged against the conclusion to which the federal courts have finally arrived, it may now be regarded no longer an open question, and we are bound by the maxim, "Stare decisis et non quieta movere."

The reasoning upon which those decisions rest, applies with equal force to the question involved in this case, and is decisive of it. It has been repeatedly decided that a body corporate, organized under the laws of a state, is to be treated as a citizen of that state, so far as the question of jurisdiction of this court is concerned. In other words, when a corporation is created by the laws of a state, the legal presumption is that its members are citizens of that state, and that a

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

suit by or against a corporation in its corporate name, must be conclusively presumed to be a suit by or against citizens of the state which created the corporate body. Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 232; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286; Railway Co. v. Whitton's Adm'r, 13 Wall. [80 U. S.] 270.

If, then, it is conclusively presumed that the members of a corporation created by the laws of a state of this Union are citizens of that state, it follows that the members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, are presumed to be citizens or subjects of that kingdom.

In the case of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 585, it was decided that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only by force of the law. It must dwell in the place of its creation, and cannot migrate to another sovereignty; yet, it does not follow that its existence will not be recognized in other places, or that it may not have the power of contracting in other states, under the comity between states and nations. On the contrary, that power is therein distinctly affirmed.

In the case of Bank of U. S. v. Devaux, 5 Cranch [9 U. S.] 61, Mr. Chief Justice Marshall, speaking of the apprehensions of suitors as to the local influence of the state courts, classes aliens and citizens together as coming within the rule, and says: "Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name indeed cannot be an alien or a citizen, but the persons that it represents may be the one or the other. * * * Substantially and essentially the parties in such a case, when the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." Although that case has been modified by later decisions on other points, the rule therein established, classing aliens of foreign corporations with citizens of domestic corporations, has not been questioned.

In Louisville, C. & C. R. Co. v. Letson [supra], the court, after speaking of the case in 5 Cranch [supra], say: "Let it then be admitted for the purpose of this branch of the argument, that jurisdiction attaches in cases of corporations in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens, does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another state, that all of the corporators must be citizens of the state in which the suit is brought?" And the court then holds that the members of the corporation must be presumed to be citizens of the state in which the corporation was created and domiciled. The court rest their decision on this broad ground, and say: "A corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person."

Resting upon the analogy of these decisions, we hold in this case that the members of this insurance company defendant must be presumed to be subjects of Great Britain, and as such entitled to bring their case to this court.

Motion to remand overruled. Ordered accordingly.

NOTE. "Where the members of a corporation are aliens * * * they come within the meaning and terms of the jurisdiction of the federal courts." "Incorporated aliens * * * may sue a citizen in the federal courts by their corporate name, and the controversy is substantially between aliens and a citizen." 1 Kent, Comm. 348. See, also, Ang. & A. Corp. §§ 377, 378; 1 Abb. U. S. Prac. 216; Fisk v. Chicago, R. I. & P. R. Co., 53 Barb. 472; 3 Abb. Pr. (N. S.) 453; King of Spain v. Oliver [Case No. 7,814].

Case No. 13,839.

TERRY v. LIFE INS. CO.

[1 Dill. 403; 2 Leg. Op. 27; 6 Am. Law Rev. 369; 5 West. Jur. 496; 1 Ins. Law J. 132; 2 Bigelow, Ins. Cas. 31.] [1]

Circuit Court, D. Kansas. May 26, 1871.[2]

LIFE INSURANCE — SELF-DESTRUCTION — INSANITY.

1. Insanity on the part of the assured which irresistibly impelled him to take his own life, or existing to such an extent as to render him incapable of forming a rational judgment with respect to the act of self-destruction, will so far excuse him as to render the company liable, notwithstanding the policy contains a condition avoiding liability thereon, in case the assured shall "die by his own hand."

[Cited in Manhattan Life Ins. Co. v. Broughton, 109 U. S. 128, 3 Sup. Ct. 99.]

[Cited in Supreme Commandery Knights Golden Rule v. Ainsworth, 71 Ala. 436. Cited in brief in Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 172. Followed in Phadenhauer v. Germania Life Ins. Co., 7 Heisk. 568.]

2. The burden of proof to establish the insanity is, in such cases, upon the plaintiff, by whom it is alleged.

[Quoted in Manhattan Life Ins. Co. v. Broughton, 109 U. S. 128, 3 Sup. Ct. 99.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Am. Law Rev. 369, contains only a partial report.]

[2] [Affirmed in 15 Wall. (82 U. S.) 580.]

3. There is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity.

[Cited in Wolff v. Connecticut Mut. Life Ins. Co., Case No. 17,929.]

[Cited in Williams v. State, 50 Ark. 511, 9 S. W. 9.]

This is an action on a life insurance policy issued by the defendant to the husband of the plaintiff [Mary Terry]. The policy contained a condition avoiding liability thereon in case the assured shall "die by his own hand." Answer: that the assured died from poison, which he took for the purpose of destroying his life. Replication: that he was insane at the time and with respect to the act in question. Trial to jury, before Mr. Justice MILLER, and DILLON, Circuit Judge.

The fact that the deceased died from poison, self-administered, was admitted on the trial, and the only question was in respect to the alleged insanity. The testimony showed that the deceased had been in great trouble in consequence of rumors respecting his wife's fidelity; that he was in a highly excited and distressed state of mind; that in communicating his suspicions to friends he would at times break out in explosions of laughter without apparent cause; that he purchased arsenic, stating that he wished it to kill mice, but inquired whether there was enough to kill a man. Some medical gentlemen gave their opinion to the jury that he was insane. There was no evidence offered by either party touching the conduct of the wife, or the ground or reasonableness of the suspicions of the deceased as to her character.

Mr. Nevison, for plaintiff, contended for the doctrine laid down in Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224; Breasted v. Farmers' Loan & Trust Co., 4 Seld. [8 N. Y.] 299, 4 Hill, 73; 1 Phil. Ins. 503; State v. Felter, 25 Iowa, 67.

Mr. Shannon, for defendant, referred to Dean v. American Mut. Life Ins. Co., 4 Allen, 96, and asked the court to instruct accordingly.

After consideration, the court, by the presiding justice, charged the jury as follows:

MILLER, Circuit Justice. It being agreed that deceased destroyed his life by taking poison, it is claimed by defendants that he "died by his own hand," within the meaning of the policy, and that they are therefore not liable. This is so far true, that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the poison, as will relieve the act of taking his own life from the effect, which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, prima facie, or otherwise, that self-destruction arises from insanity; and if you believe, from the evidence, that the deceased, although excited, or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.

The jury found for the plaintiff, and there was judgment accordingly.

[On error, the above judgment was affirmed by the supreme court. 15 Wall. (82 U. S.) 580.]

NOTE. Under a policy with a condition making it void in case the assured shall die by his own hands, the company is liable if the self-destruction shall happen as a direct consequence of the insanity of the person insured. Breasted v. Farmers' Loan & Trust Co. (1843) 4 Hill, 73; same case (1853) 8 N. Y. 299; Eastabrook v. Union Mut. Life Ins. Co. (1866) 54 Me. 224; Hartman v. Keystone Ins. Co. (1853) 21 Pa. St. 466, 468 (poisoning by taking arsenic). As to the degree and nature of the insanity necessary to make the company liable, when the policy contains such a condition, the cases are conflicting. See, in addition to the above, Dean v. American Mut. Life Ins. Co. (1862) 4 Allen, 96; same case, with note, 1 Bigelow, Ins. 195; followed Cooper v. Massachusetts, etc., Ins. Co. (1869) 102 Mass. 227; Nimick v. Insurance Co. [Case No. 10,266], U. S. Cir. Ct. W. D. Pa., McKennan, J., 1871; St. Louis Mut. Life Ins. Co. v. Graves (Ct. App. Ky. 1843) [6 Bush, 268],—as to effect of moral insanity. The leading British decisions on the subject are Borradaile v. Hunter (1843) 5 Man. & G. 639; Clift v. Schwabe (1846) 3 C. B. 437, 2 Car. & K. 134; Dufaur v. Professional Life Assur. Co. (1858) 25 Beav. 602; Horn v. Anglo-Australian & U. F. Life Ins. Co., 7 Jur. (N. S.) 673; White v. British, etc., Assur. Co., L. R. 7 Eq. 394. Sanity of a person who commits suicide presumed. Arguendo, per Williams, C. J., in St. Louis Mut. Life Ins. Co. v. Graves, supra; contra, Robertson, J., Id. The court examined the foregoing authorities before adopting the charge to the jury in the foregoing case.—Reporter.

TERRY (MAYSHEW v.). See Case No. 9,361.

TERRY (PARSONS v.). See Case No. 10,782.

TERRY (UNITED STATES v.). See Case No. 16,454.

TERRY, The ELLEN S. See Case No. 4,378.

Case No. 13,840.

TERRY CLOCK CO. v. NEW HAVEN CLOCK CO.

[4 Ban. & A. 121;[1] 17 O. G. 909.]

Circuit Court, D. Connecticut. Feb. 12, 1879.

PATENTS—INVENTION—MECHANICAL SKILL.

The desirability of an improvement, the difficulties to be encountered, and the unsuccessful experiments of others in the same direction, tend strongly to show that he who achieves the desired result was not merely a better mechanic than his predecessors, but that he had a problem, which required the skill of the inventor, to solve.

[Cited in Electrical Accumulator Co. v. Julien Elec. Co., 38 Fed. 136.]

In equity.

Charles E. Mitchell and Charles W. Gillette, for complainant.

John S. Beach, for defendant.

SHIPMAN, District Judge. Since the decision of the court in this case upon the facts as presented on the trial, the plaintiff has filed in the patent office a disclaimer, whereby it disclaims "combining a dead-beat and recoil escapement, except when the same is produced from flattened metal by bending into the shape and for the purpose, substantially as described in the specification of said patent." The plaintiff now asks for a decree against the defendant upon the ground that it is confessedly using a combined dead-beat and recoil escapement made by bending from flattened steel, and that such an escapement so made is the invention of the plaintiff, and is a material and substantial part of the thing patented, and is definitely distinguishable from the part inadvertently claimed without right.

The defendant replies that, in view of the state of the art existing at the time of the alleged invention, there was no invention in the mode of construction by bending, but that the choice of methods was a matter simply of mechanical skill and judgment.

Prior to the date of manufacture of the Botsford clock in 1853, clocks were constructed either with the recoil escapements, or with the dead-beat escapements. It is stated in the former opinion that dead-beat verges were generally made by pressing from solid steel. It can truly be said that they were always made in this way, while recoil verges were made by bending from flattened steel. Botsford invented in 1853, but did not patent, a combined dead-beat and recoil escapement, which he made by pressing from solid steel. In 1868, Terry invented a combined escapement not differing, in shape of the working surfaces, or in operation, or in construction, from the Botsford escapement, in any manner, except that it was made by bending. Dead-beat verges were made of solid metal, because it is necessary to have the pallet a perfect dead-beat, or poor time-keeping is the result, and it was supposed that metal could not be bent with such exactitude as to make the pallet a perfect dead-deat. The steel was liable to spring out of shape when hardened. On the other hand, solid verges were more expensive, because, if the pallet was not accurately adjusted to the teeth of the crown-wheel when the pallet was first made, the process of correcting the defect was difficult and expensive, whereas bent verges were adjusted with ease, so that dead-beat verges were made of solid metal to insure accuracy at the time of construction, while recoil verges were made by bending, from motives of economy.

It was, therefore, desirable that the combined dead-beat and recoil escapement should be made by bending, in order to produce a cheap clock, if by such a mode of manufacture accuracy could be obtained. The advantages of this method seem to have been appreciated, and attempts to accomplish the result were made by others than Terry. Botsford unsuccessfully made the experiment before he attempted the solid verge. Geo. W. Brown, an experienced manufacturer, made similar experiments upon fine movements, and says that he found "on so fine a sized verge it was almost impossible to form steel into the required shape—certainly impracticable." The patentee experimented with solid verges, and found them to be too expensive for ordinary clocks. He succeeded in making a bent combined verge, which proved a success. The solid combined verge has not been used in this country since 1859, until April, 1877. Since the last named date the defendant has made between one thousand and two thousand such verges. These were made by the milling process.

The desirableness of a bent combined verge, the difficulties to be encountered in its successful manufacture, and the unsuccessful experiments of other manufacturers satisfy me that the patentee was not simply a better mechanic than his predecessors. Botsford and Brown had both, after their experiments, fallen back upon the solid verge; but their style of manufacture in the then state of mechanism seems to have been too expensive for common clocks. At any rate, it went out of use about 1859, after Botsford ceased to be a clock-manufacturer and his clocks had all been sold. In this state of the art, combined escapements being disused, Terry first told the public that an accurate and cheap combined escapement could be made by bending. He made a step forward, substituted the bending process for the process by pressure, and effected a new and useful result by effecting a material saving in the operation. The economy is not by any means so marked now as it was in 1868, in consequence of other improvements in manufactures; but when Terry made his invention he gained a material advantage in

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

point of cheapness of production. The successful result, and the fact that previous experimenters wanted to obtain the result, but failed, lead to the conclusion that the patentee was not merely contending with mechanical difficulties, but that he had a problem, which required the skill of the inventor, to solve. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486.

Let there be a decree for an injunction and an accounting, with costs.

[For another case involving this patent, see Terry Clock Co. v. New Haven Clock Co., Case No. 13,841.]

Case No. 13,841.

TERRY CLOCK CO. v. NEW HAVEN CLOCK CO.

[3 Ban. & A. 332;[1] 17 O. G. 908.]

Circuit Court, D. Connecticut. June 27, 1878.

PATENTS—CLAIM—INVENTION—ANTICIPATION—CLOCK ESCAPEMENT.

The patent granted to Silas B. Terry, assignor of the complainant, dated December 1st, 1868, for a new manner of constructing the pallets of clock escapements, construed by the court, and upon the construction given, *held*, that the patent is broader than the invention, and that the invention as claimed has been anticipated.

In equity.

Charles W. Gillette and Charles E. Mitchell, for complainant.

John S. Beach, for defendant.

SHIPMAN, District Judge. This is a bill in equity to restrain an alleged infringement of letters patent [No. 84,517] which were granted to Silas B. Terry, the assignor of the plaintiff, on December 1st, 1868, for a new manner of constructing the pallets of clock escapements. The answer denies that the patentee was the original inventor of the improvement which is described and claimed in the letters patent. An amendment of the answer sets up another defence, which it is not important now to consider.

Prior to the date of the Terry invention, escapements constructed with pallets to regulate clock-work movements were well known. One well-known class was called a "recoil escapement" and another class was called a "dead-beat escapement." Dead-beat verges were generally made by pressing from solid steel. Recoil verges were made by bending from flattened steel. The patentee constructed a combined recoil and dead-beat escapement, and in the specification of his patent described this part of his invention as follows: "This invention relates to a new manner of constructing the pallets of a clock escapement, * * * and consists in a novel construction of the pallets of a combined recoil and dead-beat anchor escapement, of which one is turned outward and the other inward, with a view of allowing the motive power of the wheel to aid the weight of the pendulum to overcome its momentum. * * * I prefer to have the whole escapement made of one piece of flattened steel, as shown."

The pallet D is bent almost radially to the centre E of the escapement-wheel F, and has a bent-in flange, d, which has a rounded outer face, as shown, so as to allow the teeth of the wheel to easily act upon the pallet.

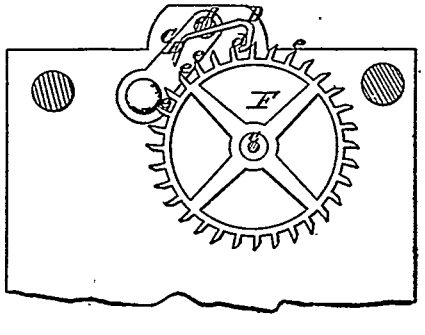
The other pallet, E, is bent outward, as shown, and the teeth of the wheel should be somewhat rounded or bevelled to act easy on the pallet E.

The operation of the escapement will easily be understood. During the oscillation of the verge-shaft, the pallets will alternately arrest the teeth of the wheel, so as to bring the same to a dead stop, the pallet E causing a recoil of the wheel. But at the moment when the momentum of the pendulum is being overcome by the weight of the same, the motive power, acting upon the same, will materially aid the weight of the pendulum, as the teeth of the wheel can then easily act upon the inclined respective outer and inner faces of both pallets D and E. It will be noticed that this is a combined recoil and dead-beat escapement, the pallet D arresting the motion of the wheel while the pallet E produces a recoil of the wheel by the vibration of the escapement. In this manner I have succeeded in obtaining a perfect regularity of motion and a full control over an unevenly-operating spring.

The claim was as follows: "The anchor escapement, constructed as described, with one pallet, D, having a flange, d, and the other pallet, E, bent out, whereby one pallet is made dead-beat and the other recoil, for the purpose of equalizing the vibrations of larger or smaller pendulums produced by unequal motive power, as herein shown and described."

The plaintiff makes its patented escapement entirely by bending from flattened steel. The defendant largely uses the pat-

[Drawings of patent No. 84,517, granted Dec. 1, 1868, to S. B. Terry. Published from the records of the United States patent office.]



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

ented invention, and manufactures by bending. A combined dead beat and recoil verge is a decided improvement in the manufacture of cheap clocks.

It was clearly proved that S. N. Botsford, of Whitneyville, Connecticut, made and sold between 1853 and 1858 many thousands of clocks which had combined dead-beat and recoil-anchor escapements, made by pressing from solid steel. These escapements did not differ in the shape of the working-surfaces, or in operation, or in construction from the Terry escapements in any manner, except that the former were shaped by pressing out of solid steel instead of being formed and shaped by bending out of a piece of flattened steel. The defendant offered evidence to show that Botsford, during the first part of the time between 1853 and 1858, was in the habit of making for use and sale the same combined bent escapement. The plaintiff offered evidence to show that such manufacture, if it existed, was merely experimental. In the view which I take of the case it is not necessary to find whether or not the defendant affirmatively established the fact of such manufacture for sale.

It was established to my satisfaction that the bent verges were cheaper, and that they were more easily made perfect, than solid verges. Under this state of facts the question of novelty becomes one of construction of the patent. If the patent is limited to a bent verge, the invention has not been proved to have been anticipated, and the patent has been infringed. If the patent is for the peculiarly-shaped and described combined dead-beat and recoil escapement, it is devoid of novelty. In the latter case the patent is broader than the invention.

Upon the construction of the patent:

First. The claim does not, upon its face, show that the claimed invention was a peculiarity in the mechanical means by which the escapement was formed or shaped. The claim is for "the anchor escapement, constructed as described, with one pallet, D, having a flange, d, and the other pallet, E, bent out, whereby one pallet is made dead-beat and the other recoil." The apparent invention which is included in the claim is the combined dead-beat and recoil escapement, in which the different parts of the escapement are shaped as described; and unless the specification shows that the construction is necessarily to be by bending, and that the term "bent out" is used in its mechanical signification, and is not equivalent to curved or crooked, the claim would naturally be construed to be a claim for the peculiarly-shaped combined recoil and dead-beat escapement.

Second. In the descriptive part of the specification the phrases "turned outward," "bent almost radially," and "bent-in flange" are used; but there is nothing in the specification which shows that the hinge of the invention is a bent verge, as distinguished from a solid verge of precisely the same shape. If such a distinction had been in the mind of the patentee, it would naturally be found in the patent, and it would not only be found but it would have been made prominent. It now appears that the invention consisted in the construction of an old verge by bending the pallets instead of by pressing them into shape by dies. If the patentee was of that opinion when the specification was drawn, it is unaccountable that the precise character of his invention should have been so dimly shadowed forth. If he knew that the secret which he had found out was not the combination made with a flange, as described, but a peculiarity in the method of producing an old combination, it was his duty to have distinctly announced to the public the true nature and extent of the invention which he had made. He was required by the statute to "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." If the patentee knew of what he was the actual first inventor, he did not comply with the statute. If he supposed that he was the first inventor of a peculiarly-shaped combined recoil and dead-beat verge, the language which he used was in accordance with such supposition, and is the language which would naturally have been used. There is no evidence of any fraudulent or deceptive intent on the part of the patentee.

Third. A broad construction of the patent is supported by its history, which shows that the patentee in fact claimed to be the inventor of the peculiarly-shaped combination. The application was rejected, the examiner saying that the combination was "no more patentable than the combination of a gilt and steel hand to indicate the time." In reply, the patentee—after stating that in common anchor escapements both the dead-beat and recoil verges are deficient; that the action of the dead-beat verge upon the pendulum in large and small arcs of vibration causes large vibrations to be slower and small vibrations to be faster than the mean between the two, and that the action of the recoil escapement upon the pendulum has an opposite effect to that produced by the dead-beat, says:

"I have invented or discovered, after more than forty years' experience in these matters, that a verge can be made with one pallet dead-beat and the other to recoil to such a degree that the vibrations of the pendulum shall be equalized, whether large or small, when produced by an unequal motive power. Such is the verge for which I ask a patent in claim first. It is entirely unlike any other verge in its essential features, as any one can see by comparing it with the remarks above made. To the common eye it might not be noticed; but to a man versed in these matters I think it will

be seen at once, and seen as a matter of the utmost consequence. Verges that are bent for common clocks are never bent like the model, but always as seen in the common. [Sample given]. This is entirely new in its form of being bent or shaped to produce a dead-beat pallet. I do not believe anything has ever been made to accomplish the same purpose. New results are produced by making the vibrations equal. It is a matter that can be seen, and is of great consequence, and is, therefore, in my opinion, patentable."

This quotation shows that the patentee placed the stress of his invention upon the combination as constructed, and not upon any peculiarity in the method by which the peculiar combination was formed and shaped from metal. He declares that he has discovered a way of equalizing the vibrations of the pendulum, which method is by making one pallet of the verge dead-beat and of a specified form, and the other recoil to a certain degree. This peculiar construction, it is now conceded, was old. But the manufacture of this peculiarly-constructed combination from sheet metal was novel. The peculiarity in which it is conceded that this invention consisted was not particularly pointed out or specified. The argument convinced the patent office, and the patent was issued.

It follows that the patent is broader than the invention, and that the invention as claimed had been anticipated by Mr. Botsford

Let there be a decree dismissing the bill, with costs.

[Patent No. 84,517 was granted to S. B. Terry, Dec. 1, 1868. For another case involving this patent, see Terry Clock Co. v. New Haven Clock Co., Case No. 13,840.]

Case No. 13,842.

In re TERTELLING.

[2 Dill. 339.] [1]

Circuit Court, D. Kansas. 1872.

BANKRUPTCY — HOMESTEAD EXEMPTION — CONSTITUTION OF KANSAS CONSTRUED—CHOICE OF ASSIGNEE—WHO MAY VOTE.

1. The constitution of Kansas provides that "a homestead to the extent of one acre in an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt from forced sale under any process of law." [Article 15, § 9.] *Held*, that the whole house occupied as a home by the bankrupt debtor was exempt, though a portion of it may be used, and may have been constructed with a view to be used for a brewery.

[Cited in Re McKenna, 9 Fed. 35.]

[Cited in Hogan v. Manners, 23 Kan. 551; Bebb v. Crowe, 39 Kan. 342, 18 Pac. 225; Hoffman v. Hill, 47 Kan. 611, 28 Pac. 624.]

2. Whether a block of stores or a brewery building upon the land, not part of the residence and not occupied by the family as a home, would be exempt, quære?

3. Mortgagee of a homestead may vote in the choice of an assignee in bankruptcy. (Per Delahay, J., note.)

[In review of the action of the district court of the United States for the district of Kansas.]

Petition by the bankrupt, Tertelling, for a review of an order of the district court in relation to property claimed by him as a homestead under the constitution of Kansas. The register reported to the court the following facts: "At the time of the commencement of proceedings in bankruptcy against said Tertelling, he was engaged in the business of manufacturing beer in Wyandotte, Kansas. He was the owner of a brewery, in which he carried on the business. He was also the owner of real estate there, described as lots one, two, three, four, five, six, and thirteen, in block seventy-one, in Wyandotte, an incorporated place, on which his brewery was situated—all of the lots being in the same enclosure, and constituting less than an acre of ground. He had been engaged in this business about three years. During all that time, previous to November or December, 1870, he, with his family, consisting of a wife and several children, had occupied a portion of the brewery building as their home. The portions so occupied by the family were the two north rooms in the first story and the second story. The remainder of the brewery building, to-wit, the south rooms in the first and second stories, the basement, sheds, vaults, and ice house, were used for the purpose of carrying on the brewery business, some portions of them occasionally for the storing of vegetables, but mainly in the business of brewing. There was also a stable on the premises used by him for keeping his horses, cows, &c. There was a small house on lot thirteen, which had been rented to other parties by him. In November or December, 1870, Tertelling, with his family, moved into the small house on lot thirteen. His object in moving was to enable him to put a new roof upon the brewery building, and he moved with the intention of returning after he should put on the new roof. Having done so, he returned, and was living in the brewery when these proceedings were commenced."

The register found, as conclusions of law from the facts aforesaid, that "Tertelling is entitled to a homestead in the premises known as the brewery building—that is to say, in the two north rooms in both the first and second stories, and in the other portions of said lots one, two, three, four, five, and six, in block seventy-one, not covered and occupied with the other portion of said brewery building and the sheds, cellars, arched vaults, and ice house, connected

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

therewith, but that the south rooms in both the first and second stories, the basement of the building, the cellars, arched vaults, and ice house, and said lot thirteen and the house thereon, are not a part of such homestead, and are not exempt from seizure on execution."

The report of the register was confirmed by the district court and an order entered accordingly, to which the bankrupt excepted, and to reverse which the present petition is brought.

Cobb & Bartlett, for bankrupt.
Cook, Sharp & Britton, for assignee.

DILLON, Circuit Judge. The bankrupt act exempts property to an amount not exceeding that allowed by state exemption laws in force in the year 1864 (section 14). The constitution of the state of Kansas in force in 1864, as well as at the present time, provides: "That a homestead to the extent of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law." Article 15, § 9. The correctness of the facts found by the register is not disputed, and that the bankrupt is entitled to a homestead exemption in the brewery building, so called, is admitted. The question is whether the court below was right in dividing the same building into two portions, the one portion being considered a homestead, and exempt, and the remainder not a homestead, and thererore subject to execution and forced sale. The constitutional provision respecting the homestead exemption is exceedingly liberal to the debtor; but it may admit of some doubt whether it is just towards the creditor. The quantity of land exempted is limited, but there is no limitation on the value of the land exempted, or the value of the (homestead) improvements thereon. If the building is occupied as a residence by the family of the owner it is exempt, whatever its value. The building now in question was thus occupied, and it is all exempt, though a portion of it may have been devoted to other uses. We do not decide that in addition to the house occupied as a homestead and separate from it, the owner could erect upon the acre upon which his residence is situated a block of stores, or a brewery building (not occupied by the family as a home), and hold it as exempt. No such case is before us. We only hold that the whole house occupied as a home is exempt, though a portion of it may be used, and may have been constructed with a view to be used for other purposes. We have examined the cases referred to by counsel, arising under the homestead legislation of other states. These turn upon special statute provisions, and afford little aid in construing the constitutional exemption in this state. We are of opinion, upon the facts reported by the register, that the entire building is exempt from forced sale.

The order of the district court is reversed. Reversed.

NOTE. Homestead exemption laws as impairing the obligation of contracts: Gunn v. Barry, 15 Wall. [82 U. S.] 610; Martin v. Hughes, 67 N. C. 293; Poe v. Hardie, 65 N. C. 447. May be exempt, though a portion of the building is occupied for business purposes: Orr v. Shraft, 22 Mich. 260. What use essential to constitute homestead: Coolidge v. Wells, 20 Mich. 79; Gary v. Eastabrook, 6 Cal. 457; Rhodes v. McCormick, 4 Iowa, 368; Philleo v. Smalley, 23 Tex. 498; 1 Am. Law Reg. (N. S.) 641 et seq. Mortgagee of homestead may vote in the choice of an assignee in bankruptcy. In Re Stillwell [Case No. 13,448], District Judge Delahay decided, after an examination of sections 13, 20, and 22 of the bankrupt act [of 1867 (14 Stat. 522, 526, 527)], that "a creditor having a mortgage upon the homestead of the bankrupt has the right to prove his demand and vote on the choice of an assignee in bankruptcy." He denied the correctness of the broad statement of the rule in Bump, Bankr. (4th Ed.) 123, "that a secured creditor cannot vote;" and he added that he was "unable to see how the fact that the mortgage was upon the homestead instead of other property could change the construction to be given to the act."

Case No. 13,843.

TESCHEMACHER et al. v. UNITED STATES.

[Hoff. Land Cas. 28.] [1]

District Court, N. D. California. June Term, 1855.[2]

MEXICAN LAND GRANTS—PRINCIPLES GOVERNING—GRANT FOR MERITORIOUS SERVICE.

Ordinary grants and those for meritorious services are governed by the same principles and regulations.

Appellants [H. F. Teschemacher and others] claim the tract of land known as Lup Yomi, in Napa county, alleged to contain fourteen leagues, granted by Governor Manuel Micheltorena, on the fifth of September, 1844, to Salvador Vallejo and Juan A. Vallejo. The claim was rejected by the board of land commissioners.

Thornton & Williams, for appellants.
S. W. Inge, U. S. Dist. Atty., and A. Glassell, for appellees.

HOFFMAN, District Judge. At the commencement of the session of this court for the hearing of appeals from the board of land commissioners, it was stated by the district attorney that a question of great importance would arise, the determination of which would materially affect, if not control, the decision of a large majority of the land cases now pending in this court. The district attorney having stated his point, the court intimated its willingness to hear

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 22 How. (63 U. S.) 392.]

the subject fully discussed by any members of the bar whose cases might be affected by the determination of the question. Pursuant to this invitation, the court has been favored with elaborate and learned discussions, which have occupied its attention during several days, and in the course of which not only the points raised by the district attorney, but other questions, arising out of the system of granting land formerly prevailing in this country, have been fully examined. As to many of these, it would be inexpedient for the court now to express its opinion. Its more immediate duty is confined to the determination of the points raised by the district attorney.

When the opinion of the supreme court in the case of Fremont v. U. S. [17 How. (58 U. S.) 542] was first promulgated in this state, it was generally supposed that by it principles were determined and rules of decision established applicable to all the ordinary colonization grants in California. It is urged by the district attorney that the grant to Alvarado was not an ordinary colonization grant, or at least that his title, or that of his assignee, was upheld by the court, not on considerations applicable to colonization grants generally, but on the ground that the land was originally granted to him for meritorious services; that the principles laid down by the court must be considered as applicable to such cases alone; and that those principles are still open for discussion in all cases which in this particular can be distinguished from that of Fremont. It becomes then the duty of this court, not to seek to limit the operation of the decision of the supreme court by subtle and unsubstantial distinctions between the case decided and other cases to which the same reasoning may apply, but to inquire whether the decision in question was in any respect founded upon the distinction suggested, and whether the principles laid down are not, by the reasoning by which they are supported and the facts to which they are applied, necessarily applicable to all similar cases. But one passage in the opinion of the court in the Case of Fremont has been cited as indicating that the principles determined by the court were to be limited in their application to cases where the grantee had rendered meritorious services: "The grant was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers; and although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and, when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions."

In determining whether the considerations suggested in the foregoing extract were the true grounds of the decision of the court, it will be necessary to consider what were the questions presented for determination in that case, and what were the facts of the case before the court. The objections to the confirmation of the claim of Fremont, which chiefly received the attention of the court, were two: 1. That there was no segregation of the granted land from the public domain, no survey having been made or juridical possession given; and that the description of the grant was so vague and uncertain that nothing passed by it. 2. That the conditions of the grant had not been complied with. With respect to the first objection, it is apparent that the motives of the grantor, or the consideration on which the grant was founded, in no respect affect it. It recognizes, or does not deny, the right of the claimant to ten leagues of land somewhere; but it is based on the ground that the courts have no power to grant land, or decree an equivalent for land, that cannot be identified, and that, until its identity is established so as to enable the court to ascertain with reasonable certainty where it lies, the land remains unsevered from the public domain, and the grant cannot be confirmed. It is evident that this objection would apply with equal force to all grants with similar descriptions, and would be equally tenable, whatever the authority by which the grant was executed, or the considerations on which it was founded. The circumstance, then, that Alvarado was deemed worthy to be preferred for his patriotic services, cannot be deemed to have influenced the court in determining the question whether anything passed by the grant; and the decision of the supreme court must be received as settling the law, not only in the case of Fremont v. U. S. [supra], but in all cases of grants in California with similar descriptions. With regard to the second objection, viz. that the conditions of the grant had not been complied with, the distinction taken by the district attorney possesses greater plausibility. For if the inquiry be, what excuses for the nonperformance of the conditions shall be received, it might be contended that, in case of a grant founded in part on the consideration of previous services, the court would be less rigorous in exacting a full performance than in cases where the performance of the conditions formed the sole consideration of the grant, and that the rules laid down in one class of cases could not be applied to the other. But the reasoning of the court in the Case of Fremont in no respect proceeds upon this distinction. The court, in the previous part of its opinion, decides that the grant to Alvarado vested in him a present and immediate interest, and that the conditions attached to it were conditions subsequent. It then proceeds to inquire "whether anything done, or omitted

to be done, by him during the existence of the Mexican government in California forfeited the interest he had acquired and revested it in the government." In determining this question, the court observes "that the omission to perform the conditions did not forfeit the grantee's right. It subjects the land to be denounced by another, but the conditions do not declare the land to be forfeited to the state upon the failure of the grantee to perform them. The chief object of these grants was to colonize and settle the vacant lands. The grants were usually made for that purpose, without any claim of the grantee on the bounty or justice of the government. But the public had no interest in forfeiting them in these cases, unless some other person was ready to occupy them, and thus carry out the policy of extending its settlements. As between the grantee and the government, there is nothing in the language of the conditions, taking them altogether, which would justify the court in declaring the land forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed; nor do we find anything in the practice or usages of the Mexican tribunals, so far as we can ascertain them, that would lead to a contrary conclusion." The court then proceeds to inquire whether there had been any such unreasonable delay, or want of effort, on the part of Alvarado, to fulfill the conditions, as would authorize the presumption that he had abandoned his claim before the Mexican power ceased, and that he was now endeavoring to resume it from its enhanced value.

It is apparent from the foregoing extracts that the learned chief justice is considering the effect of a nonfulfillment of the conditions, not merely in cases of grants made on consideration of previous services, but also in those made "without any claim of the grantee on the bounty or justice of the government." The conclusion arrived at is founded "on the language of the conditions, and their evident object and policy," and is declared to be in accordance with the practice and usages of the Mexican tribunals. That "the court is not justified in declaring the lands forfeited, where no other person has sought to appropriate them and the performance of the conditions has not been unreasonably delayed," must be deemed to be a decision applicable to all cases of grants in California, and the idea that it relates exclusively to grants founded in part on the meritorious services of the grantee must be rejected as inadmissible. But, even if the language and reasoning of the court were less clear, the facts in the Case of Fremont show that the grant to Alvarado can in no respect be distinguished from the ordinary colonization grants made in California. By reference to the petition of Alvarado to the political chief, it will be seen that he solicits the land "according to the colonization laws." The governor, in conformity with those laws, directs the secretary to report, and all the intermediate steps are taken precisely in the manner required by the laws of 1824 and the regulations of 1828. By those laws the governor was authorized to concede lands to those who petitioned for them with the object of "cultivating them or living on them." Regulations of 1828, § 1. Nor does he seem to have been empowered to grant on any other conditions or considerations; for the regulations of 1828, under which he acted, give to the political chief no authority to make grants in reward for military services. The grant when issued is made subject to the approval of the departmental assembly, as required by the fifth section of the regulations, and it contains all the conditions, and only those, required by the policy of the colonization laws, and invariably inserted in the colonization grants. That both the governor and the grantee intended this grant to be made under the colonization law is too clear for argument; and it is abundantly evident, from the opinion of the chief justice, that the grant was considered by the supreme court as made under those laws, and by their requirements its validity was tested.

With regard to the reference made in the grant to the meritorious services of the petitioner, it is to be observed that under the colonization laws of 1824, and the regulations of 1828, they could not have formed the consideration of the grant. By the ninth section of the law of 1824, it was enacted that in the distribution of lands preference shall be given to Mexican citizens, but "between them there shall be no distinction, except that to which their particular merits or services entitle them." The meritorious services of the applicant are therefore, under the law, regarded, not as the consideration of the grant, but merely as a reason why his application should be preferred to that of others. But in his case, as in that of an ordinary colonist, the motive and consideration of the grant, as well as the object and policy of the law, were the cultivacation and inhabitation of the land. In strict conformity with this provision of the law, the governor, in his grant, recites that Alvarado, "for his patriotic services, is worthy to be preferred in his pretension to the land," etc., and he then proceeds to make the grant on the usual conditions. But he does not pretend to grant the land as a recompense for meritorious services, nor from any other motive than to carry out the policy and effect the object of the colonization laws, under which he was acting; and for this purpose he adds to his grant the usual conditions, the fulfillment of which is the only consideration for the grant contemplated by the law. If any further argument were necessary to show that, in deciding the Case of Fremont, the supreme court has

laid down, and intended so to do, principles applicable to colonization grants in California generally, and not merely to the particular case under consideration, it would be found in the first sentence of the opinion of the court. "The case," says the court, "is not only important to the claimant and the public, but it is understood that many claims in California depend upon the same principles, and will in effect be decided by the judgment of the court in this case." In the face of such a declaration, it can, we think, hardly be contended that the case was determined upon peculiar and exceptional grounds.

The case at bar remains to be more particularly considered. No oral argument upon the merits of the case was had at the hearing, but it was stated by the district attorney that the only objections to the validity of the claim on which he relied were those contained in the opinion of the board of land commissioners rejecting the claim. By reference to that opinion, it appears that the grounds upon which the board rejected the claim were two: 1. That the conditions had not been performed. 2. That the locality and boundaries are not given with sufficient definiteness to identify the premises. Without stopping to consider how far the force of the first objection is affected by the principles decided in the Case of Fremont, it is sufficient to say that it is not sustained by the proofs. Since the decision of the board was rendered, and during the pendency of the case in this court, additional testimony has been taken, which establishes beyond question the fact that the conditions of cultivating and inhabiting their rancho have been fully complied with by the grantees. The grant was issued on the fifth of September, 1844. The land had, however, previously been occupied by the grantees under a permission to occupy issued by the director general of colonization, and dated March 15, 1839. It appears that the rancho was occupied as early as 1842 or 1843 by Juan Antonio Vallejo and Salvador Vallejo, the grantees, who put upon it large numbers of horses and cattle and hogs; that they built several houses, of which the last, built either in 1844 or 1845, was an adobe consisting of two rooms, one large and the other small, and that corn, beans and watermelons were cultivated on the rancho. Had this evidence been submitted to the board, I cannot doubt but that they would have regarded the facts of cultivation and habitation as satisfactorily established.

The second objection urged by the board is, that the boundaries and locality of the granted land are not given with sufficient definiteness. The recital in the grant states that the petitioner has solicited the land known by the name of "La Laguna de Lup Yomi." The grant is made with the specification "that the land of which donation is made is sixteen leagues, more or less, as shown by the respective maps." A map of the land described in the grant was offered in evidence before the board. This map was proved by the testimony of Salvador Vallejo to be a faithful representation of the land; but he was unable to state whether or not it was the same that was presented to the governor. He believed, on the contrary, that the map produced was one made by himself, while that presented to the governor was made from it by Jasper O'Farrell. The witness, however, did not explicitly state that O'Farrell's map was a copy of the one produced, or that he saw O'Farrell make his map, or that he has compared the two. Under this evidence, it was decided by the board that it did not appear that the map offered in evidence was either the identical map presented to the governor or a copy of it, and that the description in the grant was not sufficient, in the absence of either a map or a juridical measurement and delivery of possession, to describe and locate the land granted, or to segregate it from the national domain. To remedy this defect in the proofs, additional testimony has been taken in this court.

By the testimony of Bedney F. MacDonald, it appears that the rancho pointed out to him as that of Lup Yomi can be readily distinguished by great natural boundaries; "that there are only two places by which you can get out of it;" and "that the boundaries all around are high mountains, except where it is bounded by the creek and the lake. The boundaries are natural boundaries and cannot well be mistaken." The witness further states that he made a map of the tract according to the boundaries as pointed out to him by Salvador Vallejo and Ramon Carrillo. Salvador Vallejo, in an additional deposition taken in this court, states, after describing the land, that he has known the tract since 1840 or 1841, and that it has been called by the name of "Lup Yomi" ever since he has known it; that it has natural boundaries, the mountains on one side, and the lake on the other; and that the boundaries of the tract are the same as those pointed out by him and Carrillo to MacDonald, the surveyor. He further states that, after the grant of the tract to him, he pointed out its boundaries to seven rancheros, his nearest neighbors, that they might know it and recognize it as his property; that he knew what those boundaries were, because the mountains were on one side, and the lake was on the other; that these boundaries were the same as those originally designated to him by an Indian chief named Minac; that "Lup Yomi," in the Indian language, means "town of stones," and this tract was so named by the Indians. José Ramon Carrillo testifies to substantially the same facts. After stating the boundaries of the tract, he adds that its boundaries are natural, consisting of the lake, the mountains and the river; and that the line runs

at the base of the mountains; and that he has known it by the name of "Lup Yomi" since 1840. He further states that Minac, the Indian chief, pointed out the land described by him, the witness, as his land, called "Lup Yomi;" that he knows of no other land called by that name; and that the adjoining valleys have different Indian names, some of which the witness mentions.

From the foregoing testimony, we think it clearly appears that the description in the grant of the land as that known by the name of "La Laguna de Lup Lomi" is sufficient to designate its locality; that the premises are identified, and the land severed from the public domain by its designation under a name which is shown to be that under which it was well known, and which was applied to a distinct and unmistakable tract of land, enclosed within great natural boundaries limiting and defining its extent. That such a mode of designating the locality of the granted land is at least as satisfactory as that furnished by the designation of a point of commencement for a survey, we think obvious. For in this case, not only the beginning point for a survey, but all the exterior boundaries are distinctly indicated, and circumscribe the tract and limit the quantity of the land with such precision, that it has been ascertained on a survey to contain only twelve leagues instead of sixteen, the quantity mentioned in the grant. No other reasons for rejecting the claim than those we have been considering are contained in the opinion of the board, nor has any other been suggested in this court by the district attorney. Neither the genuineness of the grant nor the authority of the governor is disputed. A decree confirming the claim of the petition must therefore be entered. It will be perceived from the foregoing that the decree in this case proceeds on the ground that the grantee has fully complied with the conditions of this grant, and that the description of the land in the grant is abundantly sufficient to ascertain its locality, and to effect its severance from the public domain.

The question discussed in the first part of this opinion might therefore, with more propriety have been considered in some other case necessarily requiring its determination. But the importance of the question, and the fact that it was elaborately argued at the bar, as applicable to this case, have induced us to take this occasion fully to express our views upon it.

[NOTE. On appeal to the supreme court, the above decree was reversed, and the cause remanded for further evidence and examination. 22 How. (63 U. S.) 392. The new evidence introduced proved to be unsatisfactory, and the claim was rejected. Case No. 16,455.]

TESCHEMACHER (UNITED STATES v.). See Case No. 16,455.

Case No. 13,844.

In re TESSON et al.

[9 N. B. R. 378.] [1]

District Court, E. D. Missouri. 1874.

TRUSTS—RIGHT TO FOLLOW FUNDS—BANKRUPTCY—PROVING CLAIMS.

1. The beneficiaries may follow a trust fund into the hands of anyone receiving it with notice of the trust.

2. Where an executor had invested funds of the estate in his partnership business with the knowledge and assent of his co-partner, the parties entitled to the fund may prove their debts against the partnership, although they have proved against the estate of the executor.

[Cited in Re Jordan, 2 Fed. 321.]

In bankruptcy.

TREAT, District Judge. J. C. Cabanne and S. C. Cabanne have filed their proof of claim against the partnership estate of the bankrupts, to the allowance of which the assignee objects. Edward P. Tesson was executor of the estate of John P. Cabanne (the brother of the petitioner) and placed the fund of that estate now in question in the business of the partnership with the knowledge of the other partner that it was a trust fund. Under the established rule in equity, Edward P. being express trustee, Edward M. would have become implied trustee if he had individually received and used the fund with notice of its true character. As both partners knew and consented to the partnership use of the trust fund, the partnership as such is liable therefor. Downes v. Power, 2 Ball & B. 491; Morgan v. Stephens, 3 Giff. 226; Hubbell v. Currier, 10 Allen, 333; Belknap v. Belknap, 5 Allen, 468; Wilson v. Moore, 1 Mylne & K. 337; Trull v. Trull, 13 Mylne & K. 407; ex parte Watson, 2 Ves. & B. 414; Ex parte Warne, 2 Rose, 413; Smith v. Jameson, 5 Term R. 601. If the partnership were not in bankruptcy, the cases hold that assumpsit could be maintained. But does the fact of its bankruptcy prevent the beneficiaries from pursuing the partnership estate? There is no question here that all beneficial interest in the fund is vested in the petitioners. If they could maintain their action against the partnership when solvent, why not pursue the assets in bankruptcy? But they have already proved their demand separately against Edward P., who was the executor misappropriating the fund, and he has no separate assets. Indeed, he was the sole capitalist of the partnership, into which he placed all of his property. If he had a separate estate applicable to the payment of this demand, more doubt might arise. The cases referred to wherein it is held that a creditor may prove a joint and several demand against both the joint and several estate, and not be compelled, as ruled in the English cases, to elect to which fund he will pursue, are not so full and clear as to be

[1] [Reprinted by permission.]

conclusive upon the points now submitted. Farnum's Case [Case No. 4,674]; Mead v. Bank [Id. 9,366]; In re Bigelow [Id. 1,397]; In re Howard [Id. 6,750]; In re Beers [Id. 1,229]; Borden v. Cuyler, 10 Cush. 476; Ex parte Clowes, 2 Brown, Ch. 595. Still the general principle is broad enough to cover this case. Edward P., the executor, was unquestionably liable for the trust fund in his hands. When the co-partnership, as such, received and used the fund with full knowledge of its character, the co-partnership became liable therefor. The creditors or beneficiaries could, therefore, pursue one or the other. The only doubtful proposition is whether they can pursue both; but as the whole separate estate of Edward P. was merged in and constituted the entire estate of the co-partnership, and as no question as to adjudgment between the two estates for dividends paid by each, can arise, the doubt, if any, should be solved in favor of the creditor. Forsyth v. Woods [11 Wall. (78 U. S.) 484], and In re Downing [Case No. 4,044], are not adverse to the conclusion reached. The first of these two cases does not reach the point here decided, and the Downing Case rather favors this equitable result. Those who received and enjoyed the fund should be liable for it. The petitioners can prove their demand against the co-partnership estate.

Case No. 13,845.

Ex parte TETLOW.

[The case reported under above title in 14 Int. Rev. Rec. 205, and 6 Am. Law Rev. 575, is the same as Case No. 16,456.]

TETLOW (UNITED STATES v.). See Case No. 16,456.

Case No. 13,846.

In re TEUSCHER.

[23 Int. Rev. Rec. 202.]

Circuit Court, D. Missouri. 1877.

FINES AND PENALTIES—METHODS OF COLLECTION—EXECUTION AND IMPRISONMENT.

[Since the passage of the act of June 1, 1872, authorizing the collection of fines and penalties in criminal cases by execution against defendant's property, such fines and penalties may be enforced, either by such an execution or by capias; but if the court in its sentence directs collection by execution, a subsequent imprisonment under a capias is illegal.]

[This was an application by Louis Teuscher for a writ of habeas corpus.]

Louis Teuscher, it appears, was one of the defendants in the late whiskey prosecutions. He was under several indictments in the district court, one being for felony, which was nolle prosequied, and the two others for misdemeanors, which were consolidated. Having pleaded guilty, he was sentenced, on June 2, 1876, under section 5440 of the General Statutes of the United States, better known as the "conspiracy section," which provides that "if two or more persons conspire for the purpose of committing any offence against the United States * * * all of the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to be imprisoned for not more than two years." The sentence, as it appears on the records of the court was "that the said Louis Teuscher make his fine to the United States by the payment of $1,000, and also the costs of the prosecution of said cause to be taxed, and that executions for said fine and costs be issued against the said defendant herein; and further, that the said defendant be confined and imprisoned by the marshal for and during the term of one day from this date."

That part of the sentence relating to imprisonment seems to have been satisfied, but the fine of $1,000 was never paid. Promises of payment were made, but never attended to, and the matter was still hanging fire when Mr. Bliss, the United States district attorney, went to Washington. While there he received instructions to issue capias pro fine, and on his return such capias was duly served. Teuscher sued out a writ of habeas corpus, and the hearing on the writ was set for yesterday before Judge TREAT. Judge Chester H. Krum appeared for Teuscher.

Teuscher's answer to the return of the marshal sets out his sentence by the court on June 2, 1876, and that the imprisonment has been served out, and avers that the petitioner, Teuscher, can not be now lawfully held in the marshal's custody under that sentence. To which avower the district attorney duly filed a demurrer on behalf of the marshal, that the facts stated therein do not constitute a barrier to the present execution by capias, and praying that the petitioner be remanded to the marshal's custody.

The question at issue was essentially this: Was the $1,000 fine imposed on Teuscher a fine in the proper sense of that word, or a penalty? The sentence speaks of a "fine" and "costs," and "execution" therefor. There is no specific mention of imprisonment until the fine is paid. The section under which sentence was imposed speaks of a "penalty of not less than $1,000, and by imprisonment for not more than two years."

Judge Krum, for Teuscher, argued that the $1,000 was a penalty. Teuscher had been imprisoned his one day under his sentence; the penalty was to be collected by execution against his estate. The petitioner could not be twice imprisoned for the same offence. Under no circumstances could the district court sentence Teuscher to a second punishment for the same crime. His sentence was to pay a fine and costs and suffer one day's imprisonment. It was not to pay a fine and costs, and stand committed till the same were paid or the defendant discharged under the insolvent convicts' clause. Judge Krum

referred to Greenville's Case, 1 Reyn. 213, and to the Lange Case in 18 Wall. [85 U. S. 163]. If the court had meant to imprison Teuscher till the fine was paid it would have said so in the sentence. Furthermore, the petitioner was one of a class of men whose heavy punishment had not been intended by the government, on account of meritorious services rendered in the prosecution of other cases.

Mr. Bliss said the question turned entirely on the meaning of the word "fine" and the meaning of the word "execution." The word "fine" was defined by Lord Bacon, quoted in Bouvier's Legal Dictionary, to be a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." "Execution" is defined to be "the act of carrying into effect the judgment or decree of a court. Execution against the person is effected by the writ of capias ad satisfaciendum, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by proceeding of law."

Mr. Bliss quoted from Chit. Cr. Law, p. 111, and Bish. Cr. Proc., and cited Kane v. People, 8 Wend. 215; Ex parte Watkins, 7 Pet. [32 U. S.] 574; and State v. Dodge, 24 N. J. Law [671], to show that wherever a fine was imposed, it was with the understanding that the defendant stand committed until it be paid, or until his release under the insolvent convicts' section. That section provides that a convict sentenced to fine, who shall make oath of insolvency, shall be released from payment of such fine at the expiration of thirty days' imprisonment in lieu thereof.

In conclusion, Mr. Bliss remarked that the offence of Teuscher was too grave a one to be passed over with merely a nominal imprisonment, and that, according to the practice and the common law rule, the government was entitled in this and all similar cases to a capias pro fine, as it had always had since he had been connected with the court.

In answer to a question by the court, it was stated that the cases of Bensberg, Bernecke and Wadsworth were similar so far as the form of sentence was concerned to the Teuscher case. In the Kellerman case a fine of $1,000 and costs was imposed, the defendant "to stand committed till such fine and costs be paid." The clerk who entered the sentences was unable to explain the difference.

TREAT, District Judge, said there was a question of how far the act of June 1, 1872 [17 Stat. 196], affected the act of 1792. Under the act of 1792 [1 Stat. 275], a capias ad satisfaciendum might go in the first instance, while the later act allowed the collection of the fine or penalty by execution against defendant's property.

THE COURT then took the papers and put the matter over until to-day.

TREAT, District Judge. On examination of the record entry of judgment, by which the court has to be controlled, this proposition necessarily arises, viz.: Whether, when the court enters as a part of its judgment the process for the enforcement of same, that is to be considered as the sole process? Prior to the act of 1872, in all criminal proceedings, fines and penalties that became part of the sentence were enforced, either by the judgment of the court that the party should stand imprisoned until the fine or penalty was paid, or omitting that clause, leaving the district attorney to issue his capias pro fine. In 1872 congress passed a very important act, regulating the practice and proceedings of the United States courts. It took occasion in that act, by what is now known as section 1041 of the Revised Statutes, for the first time to adopt an alternative mode of making good to the government the amount of penalty or fine. By the terms of that provision the fine or penalty might be collected by an execution for the first time in the history of the government. It, of course, was not designed by this act that that should be the exclusive mode, but either one mode or the other might be adopted, to wit: either what is generally known now by the term "execution" or a capias.

Now, "execution," as used in this act, is what is known by the profession generally, the country over, as fi. fa. If nothing had been said in this judgment concerning the mode of enforcing it, then the district attorney, at his election, might have adopted one or the other process; but the court, for reasons satisfactory to itself at the time, imposed what was the minimum punishment under the statute in these particular cases. (I am speaking of cases other than Kellerman's.) It did so at the representation of the prosecuting officers of the government, but for which representations very different judgments might possibly have been rendered. Now, in making that sentence and in passing that judgment, the court seems to have acted distinctly on the idea of the minimum punishment. What is the minimum punishment? It was one day's imprisonment and $1,000 penalty. What is mentioned in the judgment as "fine" would more properly have been "penalty." Then following that judgment, what was to occur? If it was left to be collected by capias, thirty days at least of additional imprisonment would follow under the poor convict act; but if the court, in its judgment, said that the penalty was to be collected by execution, then one day was the limit of the punishment by imprisonment, leaving execution as the sole process allowable in the case. I think no other conclusion could be reached from the act of 1872. It reads:

"In all criminal or penal causes, in which judgment or sentence has been or shall be rendered imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may

be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced; provided" (and the proviso is very important in the interpretation of this section) "that where a judgment direct that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of the execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

It is very clear from the terms of that act that congress contemplated that the harsher modes of collecting these penalties and fines should not be in all cases adopted, but left it, as most criminal acts leave the punishment, to be determined by the court most familiar with all the facts and circumstances pertaining thereto. The court might have ordered these parties to stand committed until their fines were paid. Had it done so they would have been so committed, and then at the expiration of thirty days, under the provisions of section 1042 of the Revised Statutes, they could have been discharged on showing their pauperism. Hence these judgments, as they stand in these cases, are judgments rendered by the court at the time named, and whether erroneous or not they must stand as final judgments.

I notice that the form of writ which went into the hands of the marshal is not precisely what it should have been, but that is a matter of minor moment to this since the court has reached this definite conclusion. The inadvertence perhaps lay in the draftsman not having the record of judgment before him at the time. I have before me the writ in Bernecke's case. After stating "whereas, etc.," and citing the penalty imposed, it states, "and capias pro fine was ordered to be issued for said fine and costs." That was not the judgment of the court. If the court had not, acting in accordance with the provisions of this act of congress, thus determined the manner in which this penalty should have been collected, then the district attorney could have issued a capias pro fine.

It so happened that these cases were determined upon the last day I sat upon the bench, so that the then condition of my health and the immense amount of business thrust upon me at the time, did not enable me to carefully supervise these judgments as entered. I left immediately afterwards, and my attention has never been called to the form of them until this case arose. Had my attention been called as these things arose, I should probably have drafted the judgment myself. They must, however, stand as absolute verities. Therefore, all the prisoners of this class will be discharged.

Now, as to Kellerman's case. That stands on quite a different footing. In the petition it is stated that "this capias issues under a judgment rendered May 6," an inadvertence on the part of the draftsman, for the judgment was modified June 1, and I looked to the judgment of June 1, and find it reads thus: "And it is thereupon further considered by the court as the judgment and sentence of this court, upon the plea of guilty, entered by said defendant in this case, that the said defendant, Louis Kellerman, make his fine to the United States of America by the payment of the sum of $1,000, and also the costs of the prosecution of this cause to be taxed, and that he stand committed until said fine and costs be paid, and that the said defendant, Louis Kellerman, be confined and imprisoned in the county jail of St. Louis county, at the city of St. Louis, state of Missouri, for and during the term of one month from this date, and the marshal of the said United States is hereby directed to deliver said prisoner, Louis Kellerman, for keeping, under this judgment and sentence, to the keeper of the said St. Louis county jail." A difficulty might have arisen if the commitment had not specified any place of imprisonment, but an examination of the judgment shows that it did specify as the place of imprisonment the county jail of St. Louis county.

Now, whether that commitment ever was executed or a mittimus was ever issued by the clerk of the court to the marshal, is unknown to the court. There is, however, resting on my memory that the district attorney at that time, for purposes satisfactory to himself, in connection with this case, withheld the mittimus. But that does not change the aspect of the case, so far as Mr. Kellerman is concerned. The writ is rightfully issued, and he is rightfully in custody, as the judgment of the court was that he be committed until he pay the penalty. He will have to pay the penalty or go through the poor-convict process. Hence the writ of habeas corpus in this case must be dismissed, and he is left in the custody of the marshal.

TEUTONIA INS. CO. (SMITH v.). See Case No. 13,115.

TEVEN (UNITED STATES v.). See Case No. 16,457.

Case No. 13,847.

TEXAS v. GAINES.

[2 Woods, 342.] [1]

Circuit Court, W. D. Texas. June Term, 1874.

NEGROES—LOCAL PREJUDICE—CRIMINAL PROSECUTION—RIGHT TO REMOVE.

The fact, that by reason of local prejudice against his race and color, a person of African descent cannot have a fair trial in the state courts, is not a ground under the civil rights

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

act for removing a criminal prosecution against such person, from the state to the federal court.
[Cited in Louisiana v. Dubuclet, Case No. 8,538; Virginia v. Rives, 100 U. S. 332.]

This was an indictment for bigamy in the district court of La Fayette county. The defendant, a colored person of African descent, applied for a removal of the case into the district court of the United States, under the civil rights act of April 9, 1866 (14 Stat. 27; Rev. St. § 641), on the ground, that by reason of his race and color, and his Republican politics, he could not have as full and equal protection and benefit of the laws of Texas in any of the courts thereof, nor of proceedings thereunder, for the security of person, as is enjoyed by white citizens; and that the public prejudice against him, for the causes aforesaid, was so great, that it would be impossible for him to obtain a fair and impartial trial in any of said courts. The state district court refused the application, and proceeded with the case. The defendant, being found guilty, appealed to the supreme court, which reversed the judgment, and directed the inferior court to remove the case as prayed. It was removed accordingly, and being by the United States district court remitted to this court, the defendant moved to quash the indictment, and the district attorney of the United States, at the same time, moved to dismiss the case from this court for want of jurisdiction.

J. R. Burns, for Gaines.

A. J. Evans, U. S. Atty., for the motion to dismiss.

Before BRADLEY, Circuit Justice, and DUVAL, District Judge.

BRADLEY, Circuit Justice. I will consider the last motion first. The first section of the civil rights act (14 Stat. 27) declares, that citizens of every race and color shall have the same right, in every state, to make contracts, sue, give evidence, inherit, purchase and hold property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments and none other, any law, statute or custom to the contrary notwithstanding. The second section makes criminal and imposes penalties on any attempt to deprive any citizen of these rights, or to different punishments on account of his having at any time been held in a condition of slavery. The third section gives to the district courts of the United States cognizance of all crimes and offenses under the act; and also, concurrently with the circuit courts of the United States, cognizance of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section; and if any suit or prosecution, civil or criminal, has been commenced in any state court against any such person for any cause whatsoever, such defendant shall have the right to remove such cause for trial to the proper district or circuit court, in the manner prescribed by the "Act relating to habeas corpus," etc., approved March 3, 1863, and its amendments.

The act of March 3, 1863 (12 Stat. 755), to which reference is made, authorizes the removal to the courts of the United States of suits and prosecutions commenced in a state court, against officers or others acting under authority of the United States, and, to effect such a removal, authorizes the party sued "to file a petition, stating the facts, and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending," etc. Thus, the statement on oath by the party himself is all the verification of the facts which the law required for effecting the removal. The question is, whether local prejudice against a colored person, by reason of his race and color, alleged to be so great that he cannot have a fair trial in the state courts, is good ground, under the civil rights act, for removing a criminal action against him from the state court into the district court of the United States. Is it a cause for removal within the act?

It is clear that in order to entitle to a removal of the cause the case must show the deprivation of a right guarantied by the first section of the act. The defendant says that he is deprived of such a right, and that the right of which he is thus deprived is, "full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens." But how does he say he is deprived of that right? Not by the laws themselves, but by the prejudice and enmity of the people. Is that sufficient? What says the third section? How does it describe and define those who are within the meaning of the act? It defines them as "persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of this act." Here are two classes: (1) Persons who are denied any of the rights secured to them by the first section of the act. (2) Persons who cannot enforce in the courts any of said rights.

Does the denial of rights or the inability to enforce them in the courts refer to a denial by the laws, usages and customs of the state, and to an inability to enforce rights in the courts in consequence of inadequate remedies to that end; or does it refer as well to other obstructions of right, such as personal or class prejudice, or political feeling and the like? It must be remembered that the privilege of removal is thus guarantied to every citizen of the United States, as well white as black. And if every citizen who is prosecuted in a state court can, on his own allegation, remove his case to the United States courts, it will present a powerful temptation to litigants, especially of the criminal class,

and the United States courts will be flooded with cases, in which one of the parties imagines, or says, that he cannot have a fair trial in the state courts. We cannot think that this is the true construction of the statute. Besides, if it were, it might be open to very grave question whether it would be constitutional. The civil rights act has been reënacted since the adoption of the fourteenth amendment. An examination of that amendment might be necessary in order to ascertain whether any interference with the equal rights of the citizen is guarantied, otherwise than as against state interference, and the operation of partial and unjust state laws. This, however, is rendered unnecessary from the view we have taken of the true construction of the civil rights act. We think it is intended to protect against legal disabilities and legal impediments to the free exercise of the rights secured, and not to private infringements of those rights by prejudice or otherwise, when the laws themselves are impartial and sufficient.

The case must be remanded to the state court.

DUVAL, District Judge (concurring). The purpose and object of the civil rights bill was a most laudable one. It was to secure to the newly enfranchised black race the same rights and privileges, civil and political, as were enjoyed by the whites. The first section of that act enumerates those rights. It provides that the colored race shall have the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey, real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding."

From a careful consideration of the act in question, my opinion is that no cause, civil or criminal, to which a black man is a party pending in a state court, can be properly removed into a court of the United States unless it affects the exercise and enjoyment of some one of the rights specified in the above section. I cannot think it was the intention of congress, by any provision in said act contained, to discriminate in favor of the black race as against the white, but simply to secure them in the same rights, civil and political, that the white race enjoyed. Both were to be left subject "to like punishment, pains and penalties, and to none other," for violation of the criminal laws of the state. In other words, their rights and responsibilities, civil and criminal, were to be identically the same.

In this case, the defendant has been indicted under the laws of the state of Texas, for the crime of bigamy and convicted thereof. The case has been transferred to this court by order of the supreme court of the state, simply upon the sworn statement of the defendant that, owing to a hostile public sentiment and prejudice against him, he cannot obtain justice. In my judgment, the civil rights bill does not authorize the transfer. It is not such a case as the act contemplates and is not embraced in its provisions.

TEXAS, The (GIBBS v.). See Case No. 5,385.

Case No. 13,848.

TEXAS v. TEXAS & P. R. CO.

[3 Woods, 308.] [1]

Circuit Court, E. D. Texas. June Term, 1879.

REMOVAL OF CAUSES—DEFENSE UNDER CONSTITUTION OR LAWS OF UNITED STATES—STATES — PARTY TO CAUSE.

1. Under section 640, Rev. Stat., the right of one of the class of corporations therein mentioned, when sued in a state court, to remove the cause to the federal court does not depend on the citizenship of the parties.

[Cited in Curnow v. Phœnix Ins. Co., 44 Fed. 305.]

2. The truth of averments made by such defendant corporation in its petition for removal, to the effect that it has a defense arising under or by virtue of the constitution or laws of the United States, cannot be inquired into or controverted on a motion to remand the cause to the state court.

3. Under said section the defendant corporation may remove a cause otherwise proper to be removed, from the state to the federal court notwithstanding the fact that a state is plaintiff in the action.

Heard upon motion to remand to the state court.

This case was removed from the district court of Harrison county, Texas, to the United States circuit court at Tyler, then in the Western district of Texas. A motion to remand the cause was argued at the November term, 1878, before Judge T. H. DUVAL, district judge of the Western district, and he held the matter under advisement. In the meanwhile (before Judge DUVAL had decided the motion), by act of congress, the court at Tyler was placed in the Eastern district, and Hon. AMOS MORRILL, the district judge of the Eastern district, became its presiding officer. At the May term, 1879, Judge MORRILL disposed of the pending motion to remand, and in doing so read the following opinion, which had been previously prepared by Judge DUVAL, as expressing also his views of the law.

H. H. Boone, Atty. Gen., and Geo. McCormick, Asst. Atty. Gen., for the State.

F. B. Sexton and W. Stedman, for defendant.

DUVAL, District Judge. This is a suit brought in the district court of Harrison

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

county, state of Texas, on the 26th day of September, 1877. Its object is to recover of the defendant as forfeited certain land grants and reservations made and granted to it by the state of Texas, etc. On the 5th of November, 1877, the defendant filed in said court its petition, verified by oath, alleging that it was a corporation, other than a banking corporation, created, existing, and organized under and by virtue of certain acts of the congress of the United States, and that it had a defense to the said action arising under and by virtue of a law of the United States, to wit, its acts of incorporation and the constitution of the United States, and that the matter in dispute, exclusive of costs, exceeded five hundred dollars. It further offered a bond with good and sufficient security, conditioned according to law, and prayed that the cause might be removed for trial to the circuit court of the United States for the Western district of Texas, at Tyler. To this petition the plaintiff at once filed a general demurrer, and certain special exceptions. On the 12th of November the cause was continued by consent, without prejudice to the motion to remove, and on the 1st of June, 1878, the court rendered judgment, overruling the motion for removal. The defendant thereupon obtained a transcript of the proceedings and filed the same in this court, on the 7th day of October, 1878.

The right of removal in this case is based upon the act of congress of 27th of July, 1868 [15 Stat. 227], section 640 of the Revised Statutes of the United States. It provides as follows: "Any suit commenced in any court other than a circuit or district court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation or of such member as a member thereof, may be removed for trial in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section." The different statutes in regard to the removal of causes from a state to a circuit court of the United States, commencing with the judiciary act of 1789 [1 Stat. 73], and coming down to and including the act of March 3, 1875 [18 Stat. 470], make the right of removal dependent either upon the subject matter involved, or the citizenship of the parties.

In my opinion, the right of removal, under section 640 of the Revised Statutes, is not affected at all by the citizenship of the parties, but depends wholly on the subject matter of the controversy, and the character of the defendant. In other words, if the defendant is a corporation, other than a banking corporation, organized under a law of the United States, it has the right, under section 640, to remove a suit brought against it in a state court to the circuit court of the United States, upon its petition, verified by oath, stating that it has a defense arising under and by virtue of the constitution, or of any treaty or law of the United States, and in such case this right exists independent of the citizenship of the parties, plaintiff or defendant. The defendant herein avers that he has a defense against the action by virtue of a right arising under the laws of congress incorporating it, and the constitution of the United States. The truth of this averment cannot be controverted or inquired into upon a motion to remand. It is a matter for determination on the pleadings and proof at the trial. Mayor v. Cooper, 6 Wall. [73 U. S.] 247. There can be no doubt that congress in giving a corporation other than a banking one, setting up a right or defense under the constitution, or a law of the United States, the right to remove the same from a state court to a United States circuit court, intended to secure the interpretation of such constitution and laws, at the original hearing to its own judiciary, and this, it seems to me, is but just and reasonable, and can work no injury to the plaintiff.

In this case, the defendant has, in my opinion, complied with all the requirements of the different removal acts of congress applicable to his case, entitling him to its removal here. Upon one point alone, arising upon the exceptions of the plaintiff, have I found any difficulty. This is, that the suit being one instituted by the state of Texas, in one of her own courts, and the state, as such, being sovereign and incapable of being sued, is not embraced within the meaning of section 640, allowing the removal of causes by a corporation from the state courts. I am aware that, by the eleventh amendment to the constitution of the United States, no suit can be brought against a state of the Union. But in this case it is the state which brings a suit against a corporation, created by the United States. If the former cannot be sued, it does not follow that, if she brings a suit in a court of her own creation against the latter, congress may not authorize a removal of it to a court of the United States. The United States cannot be sued, and yet under the act of March 3, 1875, it is provided that, in a case wherein the United States is plaintiff in any state court, either party may remove the same into a circuit court. It would seem strange indeed that in cases where the United States was plaintiff in a state court, and the defendant could remove them into a circuit court of the United States, that the same right should not exist where a state was plaintiff in its own court, especially when the construction and interpretation of the constitution or an act of congress was concerned. The language of section 640 is very

broad. It provides for the removal of "any suit" falling within its provisions to the United States circuit court, and I believe it is comprehensive enough to embrace suits brought by a sovereign state as well as by one of its citizens.

From the most careful study and reference to authorities as bearing on this question, I am of the opinion that the motion to remand should be refused, and it is so ordered. If this cause was improperly removed into this court, or if jurisdiction is here entertained of it in which, by law, it can have none, I am glad that it will furnish a ground of appeal to the supreme court of the United States. This, I believe, has been determined in the case of Knapp v. Railroad Co., 20 Wall. [87 U. S.] 117. Motion refused.

TEXAS & N. O. R. CO. (CAMPBELL v.). See Case No. 2,369.

TEXAS & P. R. CO. (HARKEY v.). See Case No. 6,065.

TEXAS & P. R. CO. (HAUGH v.). See Case No. 6,221.

TEXAS & P. R. CO. (TEXAS v.). See Case No. 13,848.

TEXAS PAC. R. CO. (GOHEN v.). See Case Nos. 5,506 and 5,507.

TEXAS PAC. R. CO. (KAIN v.). See Case No. 7,596.

TEXAS RY. CO. (GOHEEN v.). See Case No. 5,507.

Case No. 13,849.

The T. F. WHITON.

[10 Ben. 369.] [1]

District Court, S. D. New York. March, 1879.

SEAMEN—WAGES—SETTING OFF DAMAGES—STATEMENT MADE BEFORE SHIPPING COMMISSIONER—EVIDENCE.

1. A second mate of a vessel filed a libel against her, to recover $91.75, for wages. The amount of his wages was admitted, but the owners of the ship set up as an offset, that he had wrongfully assaulted one of the sailors on the voyage, to the damage of the ship of $120. The assault and the damage were proved. But the libellant urged that as the deduction was not claimed in the statement of wages made by the master to the shipping commissioner, nor entered in the log, the defence could not be made. *Held*, that as the log was not produced, the presumption was that the entry was not made in the log.

2. Under sections 4550, 4596, and 4597, the court has a discretion to reject the evidence offered, but this does not prevent proof being given of the facts, and as the facts were proved beyond dispute, the owners were entitled to the set-off, and the libel must be dismissed.

In admiralty.

Louis F. Post, for libellant.

Benedict, Taft & Benedict, for claimants.

CHOATE, District Judge. This is a suit in rem for wages of the libellant, as second mate, on a voyage from Philadelphia to Venice, thence to Trieste, and thence to New York. She arrived at New York December 15th, 1878, and it is admitted that there was a balance of libellant's wages to that time unpaid, amounting to $91.75. Among other defences set up in the answer, it is averred that "during the voyage and on or about the 26th day of August, 1878, when said vessel lay outside of the port of Venice, the libellant, who was the acting master of the said bark, committed a most violent and unprovoked assault and battery upon James Blake, the steward of said bark; that by reason of said assault and battery, said Blake was very severely injured, and was in danger of losing his life, and was unable to do his duty on board, whereby said bark and these claimants suffered damage in the sum of $120," which claimants ask to have deducted from any wages found due. That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has been often held. Scott v. Russell [Case No. 12,546]; Brown v. The Neptune [Id. 2,022]; The Tusker [Id. 14,274].

The fact of the assault was clearly proved, and the evidence shows that in the sums paid for medical service to the steward, and loss of his services, the ship has sustained damage exceeding the balance of libellant's wages.

It is, however, insisted that as this deduction was not claimed in the statement of the wages of the crew, made by the master to the shipping commissioner, at the end of the voyage, nor entered in the log, under Rev. St. § 4550, the claimants cannot make this defence. I think, however, that the provisions of this section were not designed to prevent and do not prevent the court in a suit for wages from adjudicating upon the amount due, according to the facts proven. Sections 4596 and 4597 show that the failure to enter facts in the log on which deduction of wages is claimed, does not absolutely prevent proof of those facts, but gives the court a discretion to reject the evidence. No doubt the general purpose of these provisions of law is such as libellant's counsel suggests, to prevent the oppression of seamen by trumping up unfounded claims of misconduct, and ordinarily, and if the facts are left in doubt, the failure to enter the facts in the log should defeat the attempted defence. But in this case, the proof of misconduct is the positive and repeated admissions of the libellant himself, and the proof of damage is clear and not contradicted. The log was not produced. The vessel was at sea with the log at the time of trial. I think the libellant's counsel is correct; that the presumption is as against the claimants; that the prescribed entry was not made in the log.

As there is nothing due the libellant, it is

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

unnecessary to consider the other defences set up by the claimants. Libel dismissed, with costs.

THACHER (AYER v.). See Case No. 684.

Case No. 13,850.

THACHER v. BOSTON GAS LIGHT CO.

[2 Lowell, 361.] [1]

District Court, D. Massachusetts. Dec., 1874.

DEMURRAGE—QUICK DESPATCH—CUSTOM.

1. An agreement for quick despatch supersedes any custom of discharging vessels by which they are to take their turn at the wharf.

[Cited in Lindsay v. Cusimano, 12 Fed. 507; Mott v. Frost, 47 Fed. 84; Sixteen Hundred Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 61 Fed. 851.]

2. The naming a wharf in the charter party, containing such a stipulation, amounts to an undertaking that the wharf shall be unincumbered.

[Cited in Moody v. Five Hundred Thousand Laths, 2 Fed. 607; Lindsay v. Cusimano, 12 Fed. 505; Williams v. Theobald, 15 Fed. 470; Mott v. Frost, 47 Fed. 84.]

3. Semble, that a charterer has the right to name any suitable and convenient wharf which, when named, stands as if the name had been inserted in the charter party.

4. The proviso against liability for detention, unless "by default" of the charterer, exempts him only from delay from causes beyond his control acting directly to retard the discharging.

[Cited in Williams v. Theobald, 15 Fed. 471; McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 530.]

The libellant [L. Thacher], as master and part owner of the schooner, Charles E. Gibson, chartered her to the respondents, to bring a cargo of coal from the Albion Mine, at Pictou, Nova Scotia, to Boston. The charter party contained the following stipulations: "It is agreed that the lay days for loading and discharging shall be as follows (if not sooner despatched), commencing from the time the vessel is ready to receive or discharge cargo. *Vessel to take her turn in loading, as customary, at Albion Coal Company, and quick despatch discharging;* and that, for each and every day's detention by default of said party of the second part or agent, *fifty* dollars per day, day by day, shall be paid by said party of the second part or agent, to the said party of the first part or agent." The words in italics were written; the others were in the printed form of the charter party. The schooner arrived at the respondent's wharf, in Boston, with a full cargo of six hundred and eighty-four tons of coal, on Sunday, August 2, 1874, and was ready to discharge on the next day. No berth was ready, and the discharge of the cargo was not begun until the 13th of August, and it was finished on the 19th. The answer alleged, and there was evidence tending to show, that the respondents had suitable accommodations for receiving the different kinds of coal at their wharf, which were sufficient for ordinary occasions; that they always endeavored to charter vessels at such times that they would not interfere with each other, and had done so at this time, but other vessels happened to arrive just before the libellant's schooner. It appeared that there was room for the schooner somewhat sooner at another part of the wharf, but that it would have been inconvenient to the company to take this sort of coal there; that the libellant had brought a cargo to that wharf a short time before this charter party was made; and that the schooner was very long in proportion to her carrying capacity, which caused a part of the delay. The suit was for nine days' detention, at the agreed rate.

J. C. Dodge, for libellant, cited Davis v. Wallace [Case No. 3,657].

C. P. Greenough, for respondents.

LOWELL, District Judge. The case of Davis v. Wallace [Case No. 3,657], decided by Clifford, J., in the circuit court for this district, in 1868, holds that an agreement for quick despatch overrides any customary mode of discharging vessels, by which they are to take their turn at the wharf. A similar decision has, since that time, been made in the Southern district of New York. Keen v. Audenried [Id. 7,639]. The only distinction taken at the argument between the former case and this is, that the charter party in Davis v. Wallace [supra], did not designate the wharf for discharging; while here, the wharf being named, the usages of its owners may be presumed to be known, and to have been impliedly provided for. This difference will not support a distinction in the judgment on this point; because a charterer has an undoubted right to name any suitable and convenient wharf, and, when it is named, the contract stands as if the name had been inserted in the charter party. Tapscott v. Balfour, L. R. 8 C. P. 46. The learned judge in Davis v. Wallace, recognizing this right, held that an unincumbered wharf ought to be named; but the meaning was that the naming a wharf was a warranty that a berth could be had there. So here, the contract amounts to an undertaking that the respondents' wharf shall be unobstructed.

This construction is somewhat aided, as was argued for the libellant, by the written words and their collocation; by which, after providing for the schooner taking her turn at Pictou, the expression is immediately varied, and quick despatch is agreed upon for Boston.

The remaining question is, whether the proviso, that demurrage is to be paid only if the detention is "by default" of the respondents, relieves them from responsibility.

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

This proviso is usual in Boston charter parties, and perhaps not in others. It has been construed in three cases which have come to my notice. In Towle v. Kettell, 5 Cush. 18, it was held that a detention at quarantine, by order of a foreign government, was not by default of the charterer. In The Mary E. Taber [Case No. 9,209], it was proved, that, by the custom of the port of discharge, the charterer had a right to order the deck load to be delivered at one pier, and the remainder of the cargo at another; and time was lost in taking the vessel to the second pier, and the detention was alleged by the master to have been occasioned by bad weather. It was held that this delay was not by default of the charterer. The third case is Davis v. Wallace, above cited, where Clifford, J., said that the stipulation for quick despatch excluded all delay save the time employed in discharging, except what was occasioned by natural causes beyond the control of the party so contracting.

These three decisions are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which by its operation on other vessels has caused a crowded state of the docks. If the respondents do not furnish the wharf room, or any other means and appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and immediate vis major, or something like it.

Upon this point, as upon the other, I find it impossible to distinguish the case from Davis v. Wallace. As the court there said that the respondents were bound to choose a wharf where the discharge could be at once proceeded with; so here I must say that these respondents were bound to discharge the vessel at the other part of their wharf, or at some other convenient wharf. The question in both cases is one of convenience, and the contract decides that question. I have held in one case, that a master who by his bill of lading was consigned to one wharf, which happened to be full, could not recover demurrage for time lost after he had been offered another suitable and convenient wharf, a ruling which fits this case exactly to Davis v. Wallace.

The measure of damages is the difference between the time the vessel was detained and quick despatch. There was very little evidence on this point; but what there was agrees with the well-known usage, which has been so often proved in this court, that coal is to be discharged at the rate of one hundred tons a day, Sundays excepted. This would give the nine days' demurrage asked for by the libellant. I have doubted whether I ought not to throw out one day, according to the same usage. But as that applies to all voyages to the port, and the first day is given to enable the consignee to find a wharf and the master to reach it, I have concluded, upon the whole, that this part of the usage does not fairly apply to a case in which the wharf is reached before the notice is given. Decree for the libellant for $450 and costs.

THACHER (STEELE v.). See Case No. 13,348.

Case No. 13,851.

THACHER v. UNITED STATES.

[15 Blatchf. 15.] [1]

Circuit Court, S. D. New York. July 1, 1878.[2]

FORFEITURE—INTERNAL REVENUE REGULATIONS—SPIRITS—FALSE DOCUMENTS.

1. Distilled spirits, unrectified, were seized as forfeited under section 3451 of the Revised Statutes, which provides, that every person who falsely or fraudulently executes or signs any document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or rraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned, &c., and the property to which such false or fraudulent instrument relates shall be forfeited. Under sections 321 and 3249, the commisssioner of internal revenue had made a regulation that a rectifier, before emptying spirits to be rectified, should give a notice, form 122, to the collector, and that thereupon a gauger should reguage such spirits and make a report, form 59, from which the rectifier should make an entry in form 122, and the gauger should certify on the latter form as to his making the gauge and seeing the packages emptied and the stamps destroyed, and as to the correctness of such entry by the rectifier. The alleged cause of forfeiture was, that the owner of the spirits, with the purpose of obtaining stamps for rectified spirits, to be placed on other spirits on which the tax had not been paid, made false returns as to the first named spirits, on form 122, and, by bribing a gauger, induced him to make a false certificate on form 122, and a false return on form 59, so that the packages were not emptied, nor the stamps destroyed, being the packages seized. *Held*, that the regulation was a valid and reasonable one.

2. It applied to unrectified spirits.

3. The false documents related to the spirits in respect to which the certificate and report were made.

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

Thomas Harland, for plaintiff in error.

Stewart L. Woodford, Dist. Atty., for defendant in error.

WAITE, Circuit Justice. Section 3451 of the Revised Statutes is as follows: "Every person who simulates, or falsely or fraudulently executes or signs, any bond, permit,

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

[2] [Affirming Case No. 15,944. Decree of circuit court affirmed by supreme court in 103 U. S. 679.]

entry or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited." The commissioner of internal revenue is required (section 321), under the direction of the secretary of the treasury, to "prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue;" and, by section 3249, the commissioner is specially authorized to "prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking and gauging of" distilled "spirits." Pursuant to this authority, the commissioner, with the approval of the secretary, adopted as one of the rules and regulations of the department, that, whenever any rectifier proposed to empty any spirits for the purpose of rectifying, &c., he should, in a specific manner and in the proper place, enter upon a blank notice, known as form 122, the number and description of the casks or packages he would empty, and forward the notice in duplicate to the collector of the district. Upon the receipt of this notice, the collector was required to deliver it to a gauger, with instructions to make an actual regauge of the spirits specified therein, and make a report thereof on what was known and designated as form 59. From a copy of this report to be furnished by the gauger, the rectifier was required to fill up the column in form 122, headed, "Contents, as Shown by Gauger," and the gauger to certify at the foot of the form, that, on the —— day of ——, 18—, he made an actual gauge of the spirits described in the form, that he saw the packages emptied and stamps destroyed, and that the column, "Contents, as Shown by Gauger," was correctly filled up. The gauger was also specially required to witness the dumping of the entire quantity of spirits that the rectifier gave notice, in the form 122, he would empty, and any neglect in this regard was a breach of duty. This was part of the system of "inspection, weighing, marking and gauging," adopted for the security of the collection of taxes upon distilled spirits, and these certificates, returns and notices were essential to an issue of stamps for rectified spirits.

The seizure in this case was for a violation of section 3451, and the information charges that the spirits seized were, prior to their seizure, owned by one Rensberg, who was duly authorized to carry on the business of a rectifier upon premises in the first internal revenue collection district of the state of Missouri, and that, while the foregoing regulations were in force, and while his ownership of the spirits continued, he, "with the purpose and intention of obtaining the issue to him of stamps for rectified spirits, to be placed upon certain other spirits upon which the tax had not been paid, and for the purpose of evading said tax, and enabling him to dispose of the latter mentioned spirits without compliance with any requirement of law respecting them, falsely made returns to the collector of the collection district aforesaid, upon form 122 aforesaid, that the spirits first above mentioned were emptied for rectification upon his premises aforesaid, and the stamps, marks and brands thereupon effaced and obliterated; and that said Rensberg, then and there, by means of a bribe for that purpose, paid by said Rensberg to a certain United States gauger, who was then and there charged with the duty of inspecting the emptying of packages of spirits for rectification upon the premises aforesaid, and of making his certificate relating thereto, as set forth in form 122 aforesaid, and of making a report relating thereto to said collector, upon a form duly, by the commissioner aforesaid, according to law, for that purpose, prescribed, and known as form 59, * * * induced said gauger to make his certificate upon form 122 as aforesaid, and the return upon form 59 aforesaid, that the packages of spirits first above mentioned were emptied upon said premises, and the stamps, marks and brands upon them effaced and obliterated, while in truth and in fact such returns, forms 122 and 59, and said certificate, were wholly false, and said packages were not emptied, or said stamps, marks or brands effaced or obliterated, but, on the contrary thereof, said packages were subsequently shipped and delivered to the claimants in this action," &c.

Upon demurrer to this information the district court entered a decree of condemnation and forfeiture [Case No. 15,944], and it is now insisted that this decree is erroneous, because, (1) the regulation requiring the certificate and report alleged to have been falsely and fraudulently executed, was not made pursuant to law; (2) the regulation, if valid, has reference only to the stamping of rectified spirits, and does not affect those that are unrectified, and upon which the tax on distilled spirits has been paid; and (3) the false documents complained of did not "relate" to the spirits in respect to which the certificate and report were made, but only to such as should have affixed to them any stamp obtained by means of the fraudulent device complained of.

It is certainly true, that the commissioner of internal revenue cannot alone, or in connection with the secretary of the treasury, alter or amend the internal revenue law. All he can do is to carry into effect that which congress has enacted. His regulations in aid of the execution of the law must be reasonable, and made with a view to the due assessment and collection of the revenue.

There can be no doubt of the reasonableness of the particular rules now under consideration. The very means employed by Rensberg to obtain an over-issue of rectifier's stamps, shows their importance. They create no new penalties under the law, but simply furnish the way of enforcing the old ones. While the ultimate object of the regulations may be, and undoubtedly is, to ensure the proper stamping of all rectified productions, the immediate thing to be accomplished, as a means to that end, is the certainty of accurate returns from the rectifier, of the quantity of distilled spirits actually used in his business. For this purpose, a system of checks and balances has been adopted, with a view to the detection of fraud between the rectifier and the distiller. Prudence requires such precautions, and honest dealers are not unnecessarily incommoded by them. The punishment is of the offence created by the statute. The regulations provide the means of detecting the offender. These regulations require certain certificates and reports, as the business goes on. The law makes it an offence to falsely or fraudulently execute, or procure to be falsely or fraudulently executed, any such certificate or report. The allegation in this case is, that such a thing has been done in respect to the spirits now in controversy. Clearly, the case is brought within the statute.

The offending property is that about which the false and fraudulent certificate and report were made. Neither the certificate nor the report "relate" to any other property. If the fraud should be successful and an over-issue of stamps procured, other property might become liable to forfeiture by reason of the subsequent use of such stamps, but that would not relieve this from the effect of what has already been done. The forfeiture follows from the fraudulent act, whether successful or not, and the property to be forfeited is that in respect to which the false and fraudulent certificate has been made.

The decree of the district court is affirmed.

[On error, the above judgment was affirmed by the supreme court. 103 U. S. 679.]

Case No. 13,852.

THACKAREY et al. v. The FARMER OF SALEM.

[Gilp. 524.] [1]

District Court, E. D. Pennsylvania. Jan. 23, 1835.

ADMIRALTY JURISDICTION—THE SEA—TORTS—CONTRACTS—LOCALITY—SUBJECT MATTER—MARITIME SERVICE.

1. Waters within the ebb and flow of the tide, are to be considered as the sea.

2. In cases of torts, injuries and offences, locality brings them within the admiralty jurisdiction; but in cases of contract, it is also necessary that the subject matter be of a maritime nature.

[Cited in Cox v. Murray, Case No. 3,304; Leland v. The Medora, Id. 8,237; U. S. v. New Bedford Bridge, Id. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 488; Doolittle v. Knobeloch, 39 Fed. 41.]

3. A contract relative to service on board of a vessel, and on the sea or waters within the ebb and flow of the tide, cannot be enforced in the admiralty, unless the service is essentially a maritime service.

[Cited in Boon v. The Hornet, Case No. 1,640; The D. C. Salisbury, Id. 3,694; Cope v. Vallette Dry-Dock Co., 16 Fed. 925; The Alabama, 19 Fed. 545; Fox v. Patton, 22 Fed. 747.]

4. Steamboats and lighters engaged in trade or commerce on tide water, and the seamen employed on board, are within the admiralty jurisdiction; but not ferry boats or those engaged in ordinary traffic along the shores.

[Cited in Packard v. The Louisa, Case No. 10,652; Murray v. The Nimick, 2 Fed. 90; Cope v. Vallette Dry-Dock Co., 10 Fed. 145.]

[Cited in Walters v. The Mollie Dozier, 24 Iowa 198.]

5. A contract for the payment of labour, on board of a vessel employed in carrying fuel to the city of Philadelphia, from the opposite shore of the Delaware river, cannot be enforced by a suit in rem in the admiralty.

[Cited in Packard v. The Louisa, Case No. 10,652; The Mary, Id. 9,190; The Canton, Id. 2,388; The Pioneer, 21 Fed. 427. Cited in brief in The May Queen, Id. 9,360. Disapproved in The General Cass, Id. 5,307; The F. & P. M. No. 2, 33 Fed. 512.]

This was a libel, for wages alleged to be due for services performed by the libellants [Marmaduke Thackarey and Jacob Crilley], as mariners, on the high seas. The libel concluded with a prayer for process of attachment. The boat, which was of forty-two tons burthen and upwards, plied between the port of Philadelphia, and Cooper's creek, a small stream which is nearly opposite thereto, and enters the Delaware from the Jersey side of the river. The vessel was employed in bringing wood for fuel, from the creek to the city, and in no other service. On application to the judge, at his chambers, the process prayed for in the libel was refused.

HOPKINSON, District Judge. The libel in this case was presented to me, at my chambers, on the 16th December last, concluding with a prayer for process of attachment against the vessel, and that she should be condemned and sold, for the payment of the wages claimed by the libellants. The libel contained the usual allegation, supported by the affidavit of one of the libellants, "that the said boat or vessel is about to proceed to sea, before the expiration of ten days next after the delivery of her cargo." I declined to order the process asked for, and think it is incumbent upon me to give my reasons for so doing; and the more so, as the occasion is a fit one for an endeavour to bring, within some rule or principle, a class of cases, which is now growing upon the admiralty jurisdiction of this court. The libel states that the libel-

[1] [Reported by Henry D. Gilpin, Esq.]

lant, Marmaduke Thackarey, on the 13th October, 1834, at the port of Philadelphia, in the said district, at the request of Jacob Crawford, master of the American boat Farmer of Salem, of forty two tons and upwards, shipped as a mariner on board the said boat to perform voyages on the high seas, and within the jurisdiction of this court, to wit, from the said port of Philadelphia, to Cooper's creek, in the state of New Jersey, and thus alternately between the said port of Philadelphia and Cooper's creek, at the following rate of wages, to wit, two voyages at two dollars and fifty cents each; one voyage at three dollars; two voyages at one dollar and fifty cents each; and seven trips at two dollars each. The claim of the other libellant is set out, substantially, in the same manner.

There is certainly no want of formality in this libel, and if we were not permitted to look out of it, there would be no want of jurisdiction in this court, over the subject matter of it. The known truth of the case is this. Cooper's creek is a small stream issuing into the Delaware, from the Jersey side of the river, about two miles above the city or port of Philadelphia. The boat in question was employed in bringing wood for fuel from this creek to the city, and in no other service; making her voyages, as they are called in the libel, at the rate of about two in every week. It appears that she performed about twelve of these voyages in about six weeks. The libellants were hired and paid by the trip, by a verbal agreement, in the manner of hiring common labourers. Their duty was to take this boat to and fro, between the city and the creek, and to load and unload the wood brought by her to market. The time of the passage could seldom exceed an hour, and must have been frequently a shorter period. Such were the services and the voyages on the high seas, which are made the foundation for the jurisdiction of a court of admiralty, for the recovery of the wages of the libellants, as mariners.

Applications have so multiplied for admiralty process, to recover wages for services performed, on board of our river craft, that I have found it necessary to make a pause in granting it, until I could carefully examine the subject, and, if possible, ascertain the limit to which the jurisdiction of this court may rightfully be extended, in such cases. Little regard has been had, in these applications, to the character of the use or employment of the vessel; the manner in which she was navigated; or the nature of the contract and services to be performed. The common river boats, of every size, have become ships or vessels, navigating the high seas; their daily trips, from shore to shore of adjoining states, are voyages on the high seas; and the loading and unloading of wood and similar articles for the market, brought from places within a few miles of the city, for daily wages, are denominated marine services and are maritime contracts. No more has been thought necessary to be shown, than that the thing floated on the water, and that the water was within the ebb and flow of the tide. I have, in several of such instances, refused the process demanded; but it has become necessary to do it in a more formal way, and to attempt to fix some rule for the government of similar cases. I confess that I do not expect to be able to draw a clear line, which will decide the place of every case that can occur, to be within or without the admiralty jurisdiction; but I hope to fix some principle, as a guide for future proceedings in this court, unless they shall be rejected by a higher authority.

In pursuing the inquiry, into which I am entering, I am saved from the immense labour, so ably performed by a learned judge in the case of De Lovio v. Boit [Case No. 3,776], of tracing the history of the jurisdiction of the admiralty, through its struggles with the common law courts, and of noticing the faint, equivocal, and changing lines, that have been drawn, from time to time, between the powers of these courts. I shall not find it necessary to go beyond the constitution, legislative acts, and judicial decisions of our own country. These are imperative upon this court, and supersede every other opinion or authority. My examination of this interesting question will, consequently, be brought within, comparatively, a narrow space, and may be made with reasonable brevity.

By the constitution, the judicial power of the United States, is extended to "all cases of admiralty and maritime jurisdiction;" and the judicial act, establishing the courts of the United States, carrying into effect the jurisdiction granted by the constitution, has awarded to the district court, "cognisance of all civil cases of admiralty and maritime jurisdiction." The inquiry then, in every question of the power of the court, arising under this branch of its jurisdiction, is whether the cause is of admiralty and maritime jurisdiction. This inquiry also might lead us over a vast space; but, for our present purpose, that is, of determining whether the case now before the court is one of the description mentioned, it is unnecessary to go much further than to a judgment of the supreme court of the United States, rendered with great deliberation and care.

The contract I am required to enforce must be maritime, or I have no right to touch it. In order to bring it within this description, the libel alleges that it was for the performance of services on certain voyages on the high sea. Were the services of the libellants rendered on the high sea, in the legal signification of the terms? In the case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, this question seems to have been put to rest, on principles long and well established. The opinion of the court was delivered by Judge Story. It was a suit, brought in the district court of Kentucky, for subtraction of wages. The libel claimed them on a voyage

from shipping port in that state, up the river Missouri, and back again to the port of departure: and the question was, whether this case was of admiralty and maritime jurisdiction, or otherwise within the jurisdiction of the district court. I will here remark, this was the case of a steamboat, navigated, as they usually are, on a river far from the sea; but that neither the distance, nor the manner of navigating the boat, was made an objection to the jurisdiction. We may add, as a matter of notoriety, that she was employed in transporting passengers and merchandise between the places of her departure and destination. The judge, learned upon all subjects, and peculiarly so on this, states that, "in respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed upon the sea, or upon waters within the ebb and flow of the tide." Thus, as to the purposes of jurisdiction, in such a case, the court decides, in full conformity with acknowledged principles of law, that waters, which are within the ebb and flow of the tide, are to be considered as the sea; that a contract for wages, to be earned on waters so situated, is a maritime contract; that the service is a maritime service; and that the cause arising from it is of admiralty and maritime jurisdiction, as fully as if it related to a voyage to Europe. The judge presses the principle still further, and says, "there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide." In that case, the libel was dismissed, for want of jurisdiction, because "the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide."

If, then, the locality of the service were sufficient to give jurisdiction to the admiralty over a contract, it is clear that I should sustain the present claim. The whole service was performed on the waters of the Delaware, within the ebb and flow of the tide. In conformity with the doctrine of the supreme court, I have repeatedly taken cognisance of claims for wages, earned in vessels plying as traders, carrying passengers and goods on freight, between this port and places on the river, in the states of Delaware and New Jersey. In the case of Smith v. The Pekin [Case No. 13,090], the question was elaborately argued in this court, and decided as I have mentioned. But locality is not, of itself, enough to give jurisdiction to the admiralty in cases of contract. We must also look to the subject matter of the contract; to the nature of the service and employment. We shall then discover that, in some instances, the service may be done strictly and truly on the sea, and yet the cause will not be "of admiralty and maritime jurisdiction." It is true, that in cases of torts, injuries and offences, the jurisdiction is settled by the place where they are committed; but not so as to contracts. The difficulty we have to struggle with is, to establish a satisfactory rule or line by which the subject matter of the contract and service may be clearly defined. I have acknowledged my inability to give such a rule, which will be universal in its application. Each case, as it occurs, must be decided by its circumstances, under the control of some principle as nearly general as can be obtained, on a subject so uncertain in its nature. It will be easier to say that a particular service is not marine, than to give a rule which will embrace or exclude each that may occur.

By referring again to the case of The Thomas Jefferson, we shall find a principle, which will serve us for a general guide to our inquiries. It is stated that, "the material consideration is, whether the service is essentially a maritime service." It is true, that the question still remains, what is a maritime service? In that case, the only test alluded to, was the locality of the service, whether performed on tide water or not, because, in that case, no other question than that of locality arose, or was necessary to be examined or decided. The libel was dismissed, because the service was not done within the ebb and flow of the tide, and, therefore, clearly not maritime, however it might have been in other respects. But the court did not say or intimate, that every service performed on tide water is, therefore and necessarily, a maritime service. That it was done on tide water is an essential circumstance; but, non constat, that other circumstances may not also be essential to bring it under the admiralty jurisdiction. Can we say, did that opinion mean to say, that every thing done upon the sea, or upon tide water, is a maritime service? I think not. In the case of De Lovio v. Boit, above quoted, Judge Story assists us on this point. He says, "The true interpretation of the words, things done on the sea, in this connection, would seem to be all things done touching the sea, that is, maritime affairs in general; and this is the approved interpretation asserted by the admiralty." He afterwards says, the jurisdiction extends to "all cases of maritime service and labour." In both instances, he shows that something besides locality enters into the question of jurisdiction; that we must attend to the nature of the transaction, the kind of service or labour, and inquire whether they relate to maritime affairs or not, and not merely to the place where they are done. If a thing done, or a contract made, in fact, upon the land, is considered to have been done on the sea, provided it relates to maritime affairs, we but follow out the same reason, or turn it back on the subject, in saying, that if the contract or thing does not relate to maritime affairs, if the service or labour are not in themselves maritime, they will not be taken, on the question of jurisdiction, to have

been done on sea, although, in fact, they were so. The circumstance of the place, where the thing is done, follows the nature of the thing, and, as that is maritime or otherwise, the jurisdiction prevails or is denied. In the case of The Jerusalem [Case No. 7,294], the same judge gave the law as he did in the case of The Thomas Jefferson. "The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognised by Justice Buller, that the jurisdiction as to contracts, depends not upon the locality, but upon the subject matter of the contract." And he adds, that the admiralty has "perfect jurisdiction over all maritime contracts." To be a maritime contract, as I have before said, it is not enough that the subject matter of it, the consideration, the service, is to be done on the sea, it must be in its nature maritime; it must relate to maritime affairs; it must have a connection with the navigation of the ship, with her equipment or preservation, or with the maintenance and preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though not strictly mariners or seamen, may all sue for their wages in the admiralty, because they contribute, in their several ways, to the preservation and support of the vessel and her crew.

With all this aid, we meet with embarrassing difficulties in every attempt to designate a clear line, which will separate, with satisfaction and consistency in all its parts, cases of contract and service arising on rivers, into which the tide flows, proper for the admiralty jurisdiction, from those which are not so. On the sea, extra fauces terræ, the difficulty is hardly, at this time, felt, having been removed or cut down by judicial decisions, as in the case of the carpenter, surgeon, and others. But we have no such description of the vessel or her employment, or the services of those on board of her, navigating our rivers, as will at once decide the question of jurisdiction. The circumstances of any given case, the kind of vessel, the business she is engaged in, the places between which she is navigated, may make it apparent that it cannot be one for the cognisance of the admiralty, without furnishing a general rule of exclusion.

Cases will readily occur to the legal mind, in which, although the service is performed on the sea, or within the ebb and flow of the tide, no doubt can be entertained that it is, in no sense, a maritime service, and cannot be cognisable in the admiralty. Nor does it depend on the manner, in which the vessel is equipped, with or without masts and sails; nor upon the power, by which she may be propelled, by sails, by oars or by steam. Steamboats, engaged in the business of trade or commerce, are clearly subject to this jurisdiction; and a learned judge, in another district, has considered lighters employed on tide waters, in the carriage of goods to and from shipping, to be under this jurisdiction. On the other hand, boats having masts and sails may, nevertheless, be clearly without it; such as ferry-boats used on the tide waters of our rivers, and plying from shore to shore, between two states. Also numerous boats of various sizes, which are employed daily in bringing fruit and vegetables to the market. I think no one would hesitate to say, that such vessels can, with no legal propriety, be said to perform voyages on the high seas; nor that the persons employed on board of them, hired by the trip or otherwise, are mariners engaged in marine services. Indeed they are, generally, loaded and unloaded, and navigated by men, who come from the fields and orchards, which they have cultivated, and bring the produce of their labour to market. They are farmers and gardeners, either for themselves or hired by others, and not sailors. If we should take the language of the supreme court, in the case quoted, in its broadest signification, such boats so employed, and those, who navigate them, would be subject to the admiralty jurisdiction. The service is performed "upon waters within the ebb and flow of the tide." But, as I have before said, the court had in their view only the case before them, which turned entirely on the locality of the service, and, as to that, they decided that the jurisdiction depended on the fact whether it was done upon tide water or not. We have seen that they thought, as a general proposition, that "the material consideration was, whether the service was essentially a maritime service;" and they applied the principle only to the case before them, deciding that it was not then a maritime service, because it was not performed on the sea, or on tide waters, but not intimating that this circumstance alone would make a service maritime.

The character of the service, whether maritime or not, will depend, not only upon the particular business or employment of the individual on board of the vessel, but also upon the business or employment of the vessel. Thus a vessel may be navigated for foreign commerce, on the broad ocean, but persons may be hired on board of her, for services, which could not be called marine, and of which the admiralty would take no cognisance. On the other hand, the individual may be engaged in the actual navigation of the vessel, but she may be so employed that no service on board of her can be considered to be maritime. In regard to the character of the vessel or the business in which she is engaged, which is the object of our present inquiry, it is not questioned that those employed in foreign commerce are within the jurisdiction of the admiralty. As to those, which are employed on our tide waters, in going from place to place, in the United States, I hold them also to be under the same jurisdiction, provided they are occupied in the business of trade and commerce, in a liberal and fair meaning of

the terms, in which I do not include the petty traffic of market or ferry boats, nor the carriage of fuel to a city, from its neighbourhood, and other services of the same description. I am aware that there is a want of precision in this rule, and it is intended only as a general guide. In every particular case, the judge must decide, from its circumstances, whether the employment of the vessel is in the business of trade or not; for so far I think the rule may be relied upon. The uncertainty is as to what should be considered to be trade and commerce. This criterion is not without support by good authority. Judge Winchester, whose learning in the admiralty law is highly and justly extolled, adverts to it. He says, in the case of Stevens v. The Sandwich [Case No. 13,409], "within the cognisance of this jurisdiction, are all affairs relating to vessels of trade, and the owners thereof, as such; and all matters which concern owners, proprietors of ships, as such;" again "whatever is of a maritime nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of marine trade or commerce." In conformity with this rational and intelligible doctrine, Judge Story, in the case of De Lovio v. Boit [Id. 3,776], says, that the words "admiralty" and "maritime jurisdiction," include "all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea."

If we turn our attention to the act of congress [1 Stat. 131] for "the government of seamen in the merchant service," under the provisions and authority of which this libel is filed, and the process of the court demanded, many very direct arguments and inferences present themselves, to induce us to believe that a case like this never could have been in the contemplation of congress, in making the regulations, particularly as to the hiring of seamen and the recovery of their wages, found in that law. But I content myself with this general reference to it, as a particular analysis would require a longer examination and discussion than the occasion calls for or would warrant.

The general result to which my inquiry into this subject has brought me is, that as to torts, injuries and offences, locality gives jurisdiction; but as to contracts, there must be something more. It is not enough that the service performed, or to be performed, is on the high sea, or on tide water, it must in its subject matter be maritime; it must have some relation to trade and commerce; some connection with a vessel employed in trade; with her equipment, her preservation, or the preservation of her crew. Thus a carpenter, a surgeon, a steward, all contribute, in their several ways, to the preservation of the ship or her crew. But if the master should take with him a servant, whose sole business should be to shave him or comb his hair; or another to amuse him with a violin, the service would be performed on the high sea, but would it be a maritime contract or service, for which the ship could be libelled and attached in the admiralty; or her owners be personally responsible by any process?

In a late case, in this court, Trainer v. The Superior [Id. 14,136], a libel was filed for wages earned on board of a boat, employed in going from place to place, in bays and rivers, on tide water, in Pennsylvania, Delaware, Maryland, Virginia and North Carolina, carrying a museum of curiosities, which were exhibited, in the boat, at the various places at which she stopped. She had no other object. The libellants were employed as musicians for the exhibition, but occasionally assisted, at their pleasure, in rowing the boat, when the sails could not be used. She was a large canal boat. I dismissed the libel, on the ground that the contract and services of the libellants could in no sense be considered maritime, although performed on tide water. On the other hand, in Wilson v. The Ohio [Id. 17,825], I sustained the libel of the crew of the steamboat Ohio, plying between this port and Delaware City, in the state of Delaware, for she was employed not only in taking passengers, but in the transportation of merchandise between her port of departure and places in the Southern and Western states, which is strictly a trading service or employment. I do not mean to say whether a boat carrying only passengers, would or would not be within the same rule.

I have thus given, not perhaps as concisely as it might have been done, a view of the reasons which determined me to refuse the process prayed for by the libellants in this case. If they are not altogether precise and satisfactory, it may be because the subject is not susceptible of a rule which will be certain and universal in its application, or because I have not the ability to define it with accuracy and clearness. Having taken upon myself to refuse, at my chambers, to attach and detain the vessel, I was obliged to do so without argument, as that would have produced a delay injurious and expensive to a party whom I thought not amenable to this court. Occasions may occur hereafter when this subject may be more fully considered, and more satisfactorily decided.

Case No. 13,853.

THAIN v. The NORTH AMERICA.

[2 N. Y. Leg. Obs. 67.]

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

COLLISION—VESSEL AT ANCHOR—LIGHTS—WATCH.

The British barque George Canning was lying at anchor within 300 yards of the Battery, at about 4 o'clock in the morning. The steamboat North America rounded to just below the George Canning, in order to come into her berth

at the foot of Courtlandt street. The usual method was adopted of bringing her to the slip, and she followed the accustomed route, slackening her speed in making way to the landing place, in doing which she came in collision with the George Canning, thereby doing considerable injury to both vessels. It appeared that the George Canning had, at the time of the collision, no light suspended, and that no watch was on board her. In a suit by the owners of the George Canning, to recover damages for the injury sustained, *held*, that the George Canning was acting in violation of an express law, in lying at anchor without showing a light, and that, independent of the state statute, her remaining in the darkness of the night without a light, and without a watch on deck, amounted to culpable negligence, and that therefore the suit was not sustainable.

[Cited in The Indiana, Case No. 7,020; Flynn v. The Falcon, Id. 4,619; Jones v. The Hanover, Id. 7,466.]

In admiralty. The British barque George Canning was lying at anchor within 300 yards of the Battery, the night of the 30th of March, 1842. At about 4 o'clock in the morning, the steamboat North America, coming from Albany, rounded to just below the George Canning, in order to come into her berth at the foot of Courtlandt street. This was the usual method of bringing her to the slip, and on this occasion she also followed the accustomed route, going below the dock, slackening her speed, and being then brought round and worked up to her landing place. In making her way up she came upon the barque, and both vessels were considerably injured by the collision. The barque, at the time, had no light suspended, and no watch on deck. Much testimony was called on both sides to prove the state of the atmosphere at the time,—on the part of the barque, it being attempted to be proved that daylight had appeared, and was sufficiently advanced to enable persons on board the North America to see the barque a distance off amply sufficient to take measures to avoid her; and on the other side, that it was so thick and dark at the time that the barque, without the aid of a light hung out, could not be seen the length of the steamboat from her.

Charles Edwards, for libellant.

H. B. Cowles, for claimants.

The libellant cited the following cases: 5 C. Rob. Adm. 291; 4 Blackf. 224; 7 Dana, 134; Com. Dig. "Burglary"; Dwar. St. p. 628, c. 12; Abb. Shipp. 206–208; 2 Hagg. Adm. 173; 1 Bing. 213.

The claimants cited 14 Johns. 304; 2 Hall, 151, 161; 1 Cow. 78; 21 Wend. 188; 19 Wend. 399; Abb. Shipp. 354; 5 Car. & P. 375; 3 Car. & P. 554; 4 Car. & P. 106.

BETTS, District Judge. I think a decided preponderance of proof establishes these facts: That the collision was wholly accidental, free of intentional neglect or fault on either side. That the steamboat was navigated with reasonable care and precaution, and was pursuing the usual course of her voyage at the time of collision with the libellant's vessel. That it was nighttime, and thick, dark weather on the water. That the vessel of the libellant, at anchor off Castle Garden, had no watch on deck at the time, and no light exhibited in the rigging, and none within view on deck, and she was not seen on board the steamboat until the boat was too near to avoid collision. That if a light had been suspended in the rigging of the vessel, she might have been discovered from the boat in time to avoid her.

In adopting these conclusions of fact, I do not overlook the pointed contradiction of testimony exhibited against the one side by that of the other, nor the collateral evidence tending to show that the sky was clear, and that the libellant's vessel could be plainly discernible at a distance amply sufficient to enable the steamboat to go clear of her. The greater number of witnesses, and those placed in a situation best to judge, prove, in my opinion, the facts adopted as the basis of this decree. The rules of law applicable to such a state of facts are familiar, and clearly established upon authority recognized in this country and England. First, admitting the George Canning was managed with the most prudent precaution, and was therefore in no way accessory to the injury received, yet, if the steamboat was also clear of all fault or neglect, no damages would be recoverable. Each party injured would bear his own loss. Abb. Shipp. 354; 3 Kent, Comm. 251; Story, Bailm. p. 381, §§ 607, 608, 611. The proof is satisfactory that the steamboat was properly checked in her speed in coming round; that an attentive watch was kept up on board, two pilots were at her wheel, and all hands on deck, and that everything was done that is usual in bringing such vessels into their berths, to avoid coming in contact with other vessels; and that after the George Canning was discovered the headway of the boat was stopped, and the machinery worked for a backward movement as promptly as the order could be given and executed. This, then, renders the occurrence an accident on the part of the boat, if the vessel at anchor had, on her side, done all that was prudent in her position, to obviate such damages. Lack v. Seward, 4 Car. & P. 106; Handaysyde v. Wilson, 3 Car. & P. 538.

This view of the case dispenses with the necessity of discussing the question whether nighttime, in its general acceptation, is to be regarded as continuing till displaced by that degree of daylight which gives the vision command of surrounding objects; or whether it is to be understood as defined in the criminal law, when there is not light enough began or left, whereby the countenance of a person may be reasonably discerned (2 Russ. Crimes, 940); for, whatever the hour may have been, or whether the master of the George Canning was guilty of any omission of duty or proper care in not

carrying a light in his rigging, the steamboat is alike exempt from a claim of damages, no fault being proved against her, the decided weight of evidence being that, with the exercise of every reasonable diligence on board, the Canning was not seen in time to be avoided. But, the case presenting the point directly, I have no hesitation in saying that not only was the George Canning acting in violation of an express law in lying at her place of anchorage without showing a light, but that, independent of the state statute, it was culpable negligence in her to remain in the then darkness of the night without both such light and a watch on deck.

Decree dismissing the libel, with costs to be taxed.

Case No. 13,854.

The THALES.

[Nowhere reported; opinion not now accessible.]

Case No. 13,855.

The THALES.

[3 Ben. 327.] [1]

District Court, S. D. New York. June, 1869.[2]

MARITIME LIEN—SUPPLIES—BONDING VESSEL—REARREST.

Where a libel was filed against a vessel, to recover for supplies furnished to her, and the vessel, having been seized under process issued on the libel, was on the 10th of July, 1857, discharged on a bond given without notice to the libellants, the practice of the court at that time not requiring such notice, and, on the 4th of March, 1858, the libellants, on consent of the claimants, discontinued the cause, paying the costs of the action, and, on the same day, filed another libel against the vessel for the same cause of action: *Held*, that the vessel was discharged of the lien for the supplies by the giving of the bond in the first suit, and was not liable to the second action.

[Cited in Bolten v. The James L. Pendergast, 30 Fed. 720; Morrison v. District Court of United States, 13 Sup. Ct. 253; U. S. v. The Haytian Republic, 14 Sup. Ct. 994.]

In admiralty.

Horace Andrews, for libellant.

Robert D. Benedict, for claimants.

BLATCHFORD, District Judge. This libel was filed March 4th, 1858, by the firm of B. M. & E. A. Whitlock & Co., against the bark Thales, to recover a sum of money, as the balance remaining due for certain repairs, supplies, and advances claimed to have been furnished at Pensacola, Florida, in the fall of 1856, by the firm of Keyser, Judah & Co., commission merchants there, for the use of the bark, and on her credit. When the suit was brought, the claim belonged to B. M. & E. A. Whitlock & Co., and it has since been assigned to William H. Judah, who has been substituted as libellant.

One of the defences set up in the answer is, that, on the 9th of July, 1857, a libel was filed in this court by B. M. & E. A. Whitlock & Co., against the same vessel, for the same cause of action; that the vessel was arrested in that suit, and was duly discharged, on a bond being given in due form; and that thereby the vessel was discharged from the claim, so that this suit cannot be maintained against her. It appears, that the libel in the former suit was for the same cause of action, and that, on the filing of a claim, and of a stipulation for the claimants' costs, together with a bond, under the act of congress, in double the amount claimed, approved by the judge of the court, the vessel was discharged from custody by the marshal. There can be no doubt that the vessel is not liable to arrest in this action for the same cause of action for which she was arrested in the former action, she having been duly discharged on bond in that action. In The Union [Case No. 14,346], Mr. Justice Nelson says: "The vessel, after being discharged from the arrest, upon the giving of the bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made." If the court has no power to order a vessel which has been fairly discharged, on a bond or stipulation, from an arrest, back into the custody of the marshal, in the same suit, as was held in the case of The Union [supra], and also in the case of The White Squall [Case No. 17,570], a fortiori, it has no power to order her to be arrested a second time, in another suit, for the same cause of action. To order her back into the custody of the marshal, in the same suit, when she has been fairly, and not improvidently, or by fraud, or mistake, discharged by bonding, is simply to arrest her a second time for the same cause of action, after she has been discharged by bonding, from the lien or charge in respect of which she was arrested. To arrest her, under the same circumstances, in a new suit, for the same cause of action, is to do nothing more or less. In The Kalamazoo, 9 Eng. Law & Eq. 557, 560, Dr. Lushington says: "It is perfectly competent to take bail to the full value; but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and, when a ship is once released upon bail, she is altogether released from that action."

The libellant urges, that the fact that the former suit was discontinued, and that the costs therein were paid, before the present suit was brought, remits the libellant to all the rights which he had at the time he insti-

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

[2] [Affirmed in Case No. 13,856.]

tuted the former suit, and that such discontinuance operates to make the arrest of the vessel, in the present suit, an original arrest, and not a second arrest. This view overlooks the fact that the vessel was discharged on bond, on the 10th of July, 1857, and that the former suit was not discontinued until the 4th of March, 1858. The rights of the parties interested in the vessel were fixed by the bonding and discharge, and she then returned into their hands freed from the lien or charge for which she had been arrested, and from liability to be again arrested therefor. See Coote, Adm. Prac. p. 23. Such liability could not be renewed or recreated, against their consent, by the action of the libellants in discontinuing the suit. The fact that the suit was discontinued with the consent of the claimants therein, and that they received and accepted the costs of the suit, indicates no intention, actual or in law, to thereby subject the vessel to a second arrest, or to waive the rights in that respect which then belonged to them.

The fact that the vessel was bonded and discharged in the former suit without notice to the libellants makes no difference. It was not irregular, according to the established practice of the court at that time, to discharge the vessel on bond, without such notice being given. Besides, relief in that respect cannot be given in a collateral action. Any irregularity, if it existed, should have been corrected by a direct application to the court, in the former suit.

The libel must be dismissed, with costs.

[On appeal to the circuit court, the above decree was affirmed. Case No. 13,856.]

Case No. 13,856.

The THALES.

[10 Blatchf. 203.] [1]

Circuit Court, S. D. New York. Oct. 2, 1872.[2]

PRACTICE IN ADMIRALTY — DISCHARGE ON STIPULATION—REARREST.

A vessel, which has once been arrested, in the admiralty, and discharged on stipulation for her value, cannot be arrested again, in the admiralty, for the same cause of action.

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

In admiralty.

Dennis McMahon, for libellant.

Robert D. Benedict, for claimant.

WOODRUFF, Circuit Judge. Upon the proofs, I am of opinion that the advances made in this case, for reimbursement whereof this cause is promoted, were made upon the credit of the owners, on their request, and were not made upon the credit of the vessel. If so, then no lien upon the vessel ever existed.

But, the authorities, cited to the effect that the vessel, having once been arrested and discharged upon stipulation for her value, cannot be proceeded against a second time and arrested again for the same cause of action, seem to me to settle the question, at least in this court. The Union [Case No. 14,346]; The Kalamazoo, 15 Jur. 885, and 9 Eng. Law & Eq. 557, 560; Williams & B. Adm. Prac. 211, and cases cited. I must, therefore, direct a dismissal of the libel, in affirmance of the decree below. [Case No. 13,855.]

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

[2] [Affirming Case No. 13,855.]

THALES, The (SEAVER v.). See Case No. 12,594.

THALES, The (WHITLOCK v.). See Case No. 17,578.

Case No. 13,857.

The THALIA.

[Cited in Bowers v. The European, 44 Fed. 491. Nowhere reported; opinion not now accessible.]

Case No. 13,858.

The THAMES.

[3 Ben. 279.] [1]

District Court, S. D. New York. June, 1869.[2]

BILL OF LADING—DELIVERY OF CARGO TO WRONG PERSON—PARTIES—CASHIER.

1. Where a shipper of cotton in Savannah, on a vessel bound to New York, received for it a bill of lading, specifying that it was to be delivered to order, and drew a draft on B., V. P. & Co., a firm in New York, which he sold to a bank in Savannah, on the faith of the bill of lading as security for its payment, and endorsed the bill of lading to S., the cashier of a bank in New York, to which the draft was sent for collection, and the agent of the vessel in Savannah made a memorandum on the ship's copy of the bill of lading, that the cotton was to be delivered to B., V. P. & Co., and, on the arrival of the ship in New York, the bill for the freight on the cotton was sent to B., V. P. & Co., and the cotton was delivered to them on their request and on their endorsement of the ship's copy of the bill of lading, without any inquiry after the other copies of it, and no notice was ever given to S. of the readiness of the ship to deliver the cotton, and, the draft not being paid, he libelled her upon the bill of lading: *Held*, that the agents of the ship in Savannah were guilty of negligence in putting such a memorandum on the bill of lading, and the agents in New York were negligent in delivering the cotton without the production of the other copies of the bill of lading.

2. The libel was properly filed in the name of S.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 141.]

3. As the value of the cotton was more than the draft, the libellant was entitled to a decree

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

[2] [Affirmed in Case No. 13,859. Decree of circuit court affirmed by supreme court in 14 Wall. (81 U. S.) 98.]

against the ship for the amount of the draft and interest from its maturity.

This was a libel, filed by B. Seaman against the steamship Thames, to recover damages for the nondelivery of one hundred and eleven bales of cotton. The libel alleged that the cotton was shipped on board the Thames, at Savannah, by one Gilbert S. Van Pelt, to be carried to New York; that three bills of lading were signed, two of which were delivered to Van Pelt, and were afterwards assigned by him to the libellant; and that the ship had failed to perform them, and had refused to deliver the cotton to the libellant. A copy of the bill of lading was attached, which acknowledged the receipt of the cotton from Van Pelt, and agreed to deliver it "unto order, or to his or their assigns." The bill of lading was endorsed: "Deliver B. Seaman, cashier, or order. G. S. Van Pelt." The answer alleged, that Van Pelt was a member of the firm of Bennett, Van Pelt & Co., of New York; that he had made frequent shipments of cotton to that firm, by the line of steamers of which the Thames was one; that this cotton was shipped for that firm, and was agreed to be delivered to them, and was so delivered without notice of any other claim; and that the libellant only held the bill of lading under some arrangement for advances made on the obligation of the firm, which became insolvent after the cotton had been delivered to them, and before any demand for it had been made on the ship by the libellant. It appeared, that the libellant was cashier of the Fourth National Bank of New York, to which a draft of G. S. Van Pelt on Bennett, Van Pelt & Co., for $8,300, had been sent by the Atlanta National Bank, with this bill of lading as security. The circumstances of the transfer of the bill of lading by Van Pelt were in dispute on the evidence.

John E. Parsons, for libellant.
William Allen Butler, for claimants.

BLATCHFORD, District Judge. In this case, I think that the plaintiff became the bona fide holder, in trust for the Atlanta National Bank, for a valuable consideration, without notice, of the bill of lading of the cotton, and that he held it as collateral security for the payment of the draft on Bennett, Van Pelt & Co., and not as collateral security merely for the acceptance of that draft. The two bills of lading delivered to Gilbert S. Van Pelt, the shipper of the cotton, engaged to deliver the cotton to "order," and were duly endorsed by him, as the shipper therein named, to the libellant. The draft drawn by Gilbert S. Van Pelt on Bennett, Van Pelt & Co., was made payable to the order of the libellant, at the request of the agents in Savannah of the Atlanta Bank, who purchased it for that bank with the money of that bank, on the faith of the bill of lading as security for its payment. The agents of the vessel in Savannah were guilty of great negligence in putting upon the copy of the bill of lading which they retained and furnished to the purser of the ship, words to the effect that the cotton was to be delivered to Bennett, Van Pelt & Co. On the strength of this the purser made out the bill for the freight to that firm, and sent notice of the arrival of the cotton to that firm, and caused the vessel to wrongfully deliver the cotton to that firm. And the agents of the ship in New York were guilty of even grosser negligence in delivering the cotton to Bennett, Van Pelt & Co. on their request, and on their endorsement of the ship's copy of the bill of lading, without inquiring after, or demanding the production of, the other two copies of the bill. The whole transaction appears, on the evidence, to have been a well contrived and successful scheme of fraud on the part of the two Van Pelts, one in Savannah and the other in New York, to obtain possession of the cotton without paying anything for it, and they were aided in this by a negligence on the part of the agents of the ship in both places, for which the ship is responsible, and without which the fraud could not have been consummated. The title to the cotton passed to the libellant by the endorsement to him of the bill of lading, to an amount, as between him and the vessel, sufficient to pay the draft, and a delivery of such cotton to any other person than the libellant was a wrongful delivery, and makes the vessel liable therefor to the libellant. The ship ought to have stored the cotton, at the risk of the libellant, until the bills of lading held by him were produced.

The testimony of Gilbert S. Van Pelt as to the transferring of the bill of lading merely as security for the acceptance of the draft, and that of James C. Van Pelt as to what transpired between him and the libellant in regard to the cotton, are entirely unworthy of credit, and I reject wholly the testimony of both of them. They are manifestly swearing to carry through the fraud they devised.

There was no laches on the part of the libellant. The ship arrived on Sunday, and, on the next day, the agents of the ship gave to Bennett, Van Pelt & Co. an order to receive the cotton from the ship, and on the latter day and the day following they received it. The ship never gave any notice to the libellant to receive the cotton, or that it was ready for delivery. This was a delivery to the wrong party, without affording to the proper party any opportunity to take his property.

Although the cestui que trust is the Atlanta National Bank, the suit is properly brought in the name of the libellant, who holds the legal title, as trustee, to the cotton and the draft. The fact that the draft and the endorsement of the bill of lading run to him by the name of "B. Seaman, cashier," do not make it necessary that, because he is, in fact, the cashier of the Fourth Nation-

al Bank of New York, the suit should be brought in the name of that bank.

As the value of the cotton, less the freight on it, is admitted to have been more than the amount of the draft, there must be a decree for the libellant for the amount of the draft, $8,300, with interest from its maturity, February 19th, 1868, with costs.

This decision was affirmed by the circuit court, on appeal. [Case No. 13,859. On appeal to the supreme court, the decree of the circuit court was affirmed. 14 Wall. (81 U. S.) 98.]

Case No. 13,859.

The THAMES.

[7 Blatchf. 226.] [1]

Circuit Court, S. D. New York. April 23, 1870.[2]

BILL OF LADING—DELIVERY TO WRONG PERSON—PARTIES.

1. A vessel gave bills of lading for cotton in Savannah, making it deliverable to order in New York. G., the shipper of the cotton, drew his draft at Savannah, on P., in New York, to the order of B., "Cashier," and endorsed the bills of lading to B., "Cashier." The draft was discounted for G. by M., with moneys of A., and the proceeds were applied by G. to pay for the cotton, on its purchase from M. The draft and the bills of lading, so endorsed, were delivered by G. to M. They were sent by M. to B., "Cashier," to collect the draft, for the credit of the account of A. with the bank of which B. was cashier. The bills of lading were intended as a transfer of the cotton to B., as security for the payment of the draft. On the bill of lading retained by the vessel was a memorandum that the cotton was for P. The vessel, on the next day after her arrival at New York, delivered the cotton to P., without the presentation of any of the outstanding bills of lading. The draft not being paid, B. brought this suit, in admiralty, against the vessel, in his own name, for the value of the cotton. *Held*, that the vessel was liable therefor to B., in this suit.

2. If the vessel might have been justified in leaving the cotton on the wharf, under certain special provisions in the bill of lading, actual delivery to persons having no authority to receive it was not justified by delay in the presentation of the bill of lading by the holder thereof.

3. Although the draft was made payable to B., "Cashier," in order that he might receive payment thereof and pay over the proceeds, he could proceed in admiralty against the vessel in his own name.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 141.]

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

In admiralty.

Benjamin F. Lee, Jr., for libellant.

William Allen Butler, for claimants.

WOODRUFF, Circuit Judge. This case has been ably and ingeniously argued on the appeal, but a careful examination of the proofs leaves no doubt upon my mind, in respect to the material facts. Gilbert S. Van Pelt purchased, on the 28th of January, 1868, in Savannah, Georgia, one hundred and eleven bales of cotton, from the firm of Brady & Moses, for the firm of Bennett, Van Pelt & Co., of New York, (in which firm Gilbert S. Van Pelt was a partner,) and, on the same day, shipped the cotton to New York, by the steamship Thames, receiving bills of lading therefor, in which the cotton was expressly made deliverable to order. On the same day, in order to procure money wherewith to pay for the cotton, and in compliance with the terms and conditions of the purchase, he drew his draft on his firm in New York, for eight thousand three hundred dollars, payable fifteen days after sight, to the order of "Billop Seaman, Cashier," and also endorsed upon the bills of lading of the cotton, an order, directing the delivery of the cotton to Billop Seaman, Cashier, and delivered the draft, and the bills of lading, to the said Brady & Moses, who held moneys of the Atlanta National Bank, of Atlanta, Georgia, for the purpose of investment in bills drawn on New York, and the draft was discounted for the account of that bank, and the proceeds were applied toward the payment for the cotton. The evidence establishes, that the bills of lading were delivered, and were intended, as a transfer of the cotton to the libellant, Billop Seaman, as security for the payment of the draft, at its maturity. The draft and the bills of lading were forwarded to the libellant, to hold and collect, for the credit of the account of the said Atlanta National Bank with the Fourth National Bank of the City of New York, of which last-named bank the said Seaman was the cashier. The Thames arrived, with the cotton on board, at the port of New York, on Sunday, the 2d day of February, and, on the next day, the cotton was delivered to Bennett, Van Pelt & Co., by whom it was removed and sold the same day. On the ship's bill of lading appears a memorandum, which does not appear at all on the other bills of lading, indicating that the cotton was "for Bennett, Van Pelt & Co.," although the body of that bill declared, as did the other bills, that the steamship undertook the carriage, and to deliver in New York, to order. By whomsoever that memorandum was made, it was not by Brady & Moses, or with their knowledge. The draft became due on the 19th of February, and was not paid. The libellant then sought the cotton, and learned that it had been delivered to Bennett, Van Pelt & Co. on the morning after its arrival.

These facts are, I think, established by a clear preponderance of evidence, and, upon them, the liability of the ship for the cotton is quite clear. The delay of the libellant in presenting the bills of lading to the ship, or its owners, (whatever else, in respect to the care, keeping, or custody of the cot-

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

[2] [Affirming Case No. 13,858. Decree of circuit court affirmed by supreme court in 14 Wall. (81 U. S.) 98.]

ton, certain special conditions annexed to the usual terms of the bill of lading would have permitted,) did not justify a delivery of the cotton to Bennett, Van Pelt & Co., who had, in fact, no bill of lading, nor any authority to receive the cotton. Nor was such delivery caused or promoted, in any degree, by such delay, for it was made the next morning after the ship's arrival. If, by the special terms of the bill of lading, the ship would have been justified in storing the cotton, or even in placing it upon the wharf, at the risk of the consignee, when no person appeared to claim it having the order of the shipper, even then there was no justification for a wrong delivery, to one who held no bill of lading. By issuing bills of lading for the cotton, as deliverable to order, the ship became bound not to deliver it without the production of such order; and laches of the holder, in not presenting the order, however it might warrant the ship in divesting itself of the special risks assumed as carrier, formed no warrant for a delivery of the cotton to a person who had no authority to receive it. Nor did the memorandum on the ship's bill of lading, "for Bennett, Van Pelt & Co.," constitute any warrant for such delivery. The ship's bill of lading is not the operative instrument between the ship and the consignee. The bills of lading signed and delivered as the undertaking of the ship, on which parties dealing therewith had a right to rely, contained no such words. Besides, the words themselves are not inconsistent with the actual undertaking embodied in the instrument, namely, to deliver to order, and they did not at all justify a delivery without order, while the order was outstanding in favor of another. For whosesoever ultimate benefit the shipment was made, the ship had agreed to deliver to order, and this agreement was broken instantly on arrival, without enquiry, and in such wise that it would have required extraordinary diligence, on the part of the libellant, to intercept it.

The objection that the libel was improperly filed in the name of Billop Seaman must, also, be overruled. The draft was made payable to him, and the bills of lading were endorsed to him. Notwithstanding the word "Cashier" was annexed to his name, he could, even at law, I think, have sued upon and collected the draft, unless something more appeared than that the moneys were to be paid over to the Fourth National Bank to the credit of the Atlanta National Bank. There is, no doubt, some confusion, in the cases at law, upon the question whether the Fourth National Bank could have maintained an action at law upon the draft. But here it is plain, that the libellant, described as cashier, was selected by the parties, and was clothed by Gilbert S. Van Pelt with the legal title to both the bill and the cotton. Be this as it may, the case of Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40, 49, and McKinlay v. Morrish, 21 How. [62 U. S.] 343, 355, leave no doubt that, in admiralty, Seaman can sustain the suit in his own name.

The decree must be affirmed, with costs.

[Affirmed in 14 Wall. (81 U. S.) 98.]

Case No. 13,860.

THAMES v. MILLER.

[2 Woods, 564.] [1]

Circuit Court, M. D. Alabama. Jan., 1873.

BANKRUPTCY—SALE BY SHERIFF AFTER ADJUDICATION—EFFECT OF ADJUDICATION—SETTING SHERIFF'S SALE ASIDE.

1. Where a judgment was a lien on the real estate of the judgment debtor, and an execution had been levied thereon, and the property advertised for sale, but before sale the judgment debtor was adjudicated a bankrupt, the sheriff, unless restrained by the bankrupt court, might well proceed to sell, and his sale would be valid.

2. The naked fact, that the judgment debtor had been adjudicated a bankrupt before the sale, did not of itself operate as an injunction to restrain the sale.

3. When, however, real estate was first seized in execution by the sheriff, long after the bankruptcy, and sold for little more than one-tenth its value, the sale was set aside, and the property turned over to the assignee.

4. When several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property, and under this agreement it is bid off for its full value, the sale will not be set aside on account of such agreement.

[5. Cited in Re Beck, 31 Fed. 555, to the point that application for review must be made within a reasonable time.]

[In review of the action of the district court of the United States for the Middle district of Alabama.]

In bankruptcy.

E. W. Pettus, for petitioners.

John T. Morgan and W. L. Bragg, for defendants.

WOODS, Circuit Judge. This is a petition filed under the second section of the bankrupt act, seeking a review and reversal of an order of the district court for the Middle district of Alabama, sitting in bankruptcy. From the pleadings and evidence I find the following facts: On the 12th of November, 1866, one Samuel McKirral recovered a judgment against Edward A. Blunt, in Perry county circuit court, for $2,227 and costs. On the same day, in the same court, M. Morgan & Sons recovered a judgment against the same Edward A. Blunt for $3,201.23 and costs. Soon after the rendition of these judgments, executions were issued upon them, and thereafter, from time to time, executions were issued on the judgments according to law, so as to preserve

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

their lien on the property of the defendant in execution within the county of Perry. On the 28th of November, 1868, pluries executions were issued on these judgments, and on that day placed in the hands of the sheriff of Perry county, who, on the same day, levied the same upon certain real estate, the property of the judgment debtor, situate in and near the town of Marion, in the county of Perry. On the 8th of November, 1867, C. E. Thames & Co., who are among the petitioners in this case, also recovered a judgment in Perry circuit court against Blunt for $7,651.66, on which judgment an execution was issued on the 16th day of December, 1867, and levied on certain real estate of the defendant in execution, situate in Perry county, and returned by the sheriff without further proceedings; and afterwards other executions were, from time to time, issued and returned by the sheriff, so that at the time of the sale, hereinafter mentioned, the said execution was a lien on said real estate. On the 7th and 8th of November, 1867, other parties, some of whom are petitioners in this case, and others defendants, also recovered judgments in the same court against Blunt, on which executions were, from time to time, so issued and returned, that at and before the date of sale, hereafter mentioned, the judgments were a lien upon the lands and personal property of Blunt within the county of Perry. Immediately after the 28th of November, 1868, the date when the sheriff of Perry county levied the executions of McKirral and Morgan & Sons, and before the 9th day of December, 1868, the sheriff advertised for sale the property so levied on to satisfy said executions, the sale to take place on the 4th of January, 1869. Before the day of sale, to wit, on the 2d of January, 1869, certain judgment creditors of Blunt, to wit, Francis A. Bates, who had become the assignee and owner of the judgments of McKirral and Morgan & Sons, C. E. Thames & Co., Mary J. Williams, Martha Benson, Duryee & Jaquess, John Barron, Cyrus Billingsly, Thomas S. Wallace and Oscar Cheeseman, all of whose judgments were claimed to be liens on the real estate of Blunt, in Perry county, entered into a contract in writing, which recited that the real estate of Blunt had been levied on to satisfy sundry executions in favor of said creditors, and that without concert of action the property might be sacrificed, and the creditors realize but little on their debts. In order, therefore, to prevent a sacrifice, and to collect as much as possible on their debts, they mutually agreed to buy the real estate so levied on, on the 4th of January, 1869, and to hold the same until such time as they, or a majority of them, might think best to sell the same, and carry the proceeds into the circuit court of the county of Perry, there to be distributed under the order and direction of the court, according to the respective priorities of the parties, and without prejudice to the rights of any one. On the 4th of January, 1869, the sheriff struck off the real estate advertised to be sold under the executions of McKirral and Morgan & Sons, in parcels, to several of the parties who signed this agreement, and among the purchasers were the petitioners in this proceeding. The aggregate amount for which the several parcels were sold was $19,685 in cash, which sum was paid by the purchasers to the sheriff, who, after deducting the costs, applied the net proceeds of the sale to the judgment liens in the order of their priority, crediting the same upon the executions, whereby the money so paid, less the costs, immediately found its way back to the hands of the parties from whom it had been received. The sum for which the property sold was, according to the weight of the testimony, as much as it would at that time reasonably bring in cash, and more than it would sell for now. The judgments to which the proceeds were applied were, with the exception of a mortgage lien, the first and best liens upon the property sold, and it was sold subject to the mortgage. The liens upon the property far exceeded what the property was worth. In the meantime, after the levy by the sheriff and his advertisement of sale, and before the sale, to wit, on the 9th of December, 1868, Blunt, the defendant in execution, filed his petition in the district court for the Middle district of Alabama, to be adjudged a bankrupt. He was adjudicated a bankrupt on the 14th of December, 1868, and on March 27, 1869, William Miller was appointed his assignee in bankruptcy, and the 16th of March, 1871, said Bailey was appointed associate assignee of said Miller. On the 18th of March, 1871, the assignees filed their petition in the bankrupt court, praying that said sheriff's sale be set aside; that the purchasers be required to account for the rents of the property; and for an order of the bankrupt court authorizing them to sell the property free of incumbrance. A full answer to this petition was filed by the defendants on May 23, 1871, and the bankrupt court referred the case to the register in bankruptcy, to take testimony and report his opinion upon the facts. Upon the coming in of the register's report, the court made an order in conformity with the prayer of the petition. To review and reverse this order is the object of this petition of review.

In passing upon the case, I shall only notice two of the questions presented, namely: 1. Had the sheriff of Perry county a right, under the facts as above detailed, to sell the property in question, and would his sale and deed, in the absence of fraud, make a good title? And, 2. Was the arrangement between the creditors to buy at the sheriff's sale a fraudulent one? Other questions have been argued by counsel, but they have been so often passed upon by the court, as stated

during the argument, that I shall not consume time by noticing them further.

The first question to be passed upon must, in my opinion, be answered in the affirmative. The judgments upon which the property was sold had for years been liens upon the property, the sheriff had levied his executions upon it, and had advertised it for sale before the filing of the petition in bankruptcy. Now, unless the naked fact of the filing of the petition by Blunt, to be adjudicated a bankrupt, operates as an injunction on the sheriff, restraining him from further proceedings under the execution, and rendering such proceedings void, then the sale by the sheriff is a good one. I do not think such is the effect of the filing of the bankrupt's petition. Goddard v. Weaver [Case No. 5,495].

It has been held that the bankrupt court has the right by injunction to restrain a sale by a sheriff or other officer of the law, of property surrendered by the bankrupt. Irving v. Hughes [Case No. 7,076]; Jones v. Leach [Id. 7,475]; Pennington v. Sale [Id. 10,939]; Pennington v. Lowenstein [Id. 10,938]; In re Bowie [Id. 1,728]; In re Schnepf [Id. 12,471]. But it by no means follows from this proposition that if the bankrupt court does not intervene, and the sheriff proceeds without the interference of that court, his proceedings are void, and the purchaser takes no title. The contrary has been expressly held. Thus, in Re Fuller [Id. 5,148], the court says: "The judgment against the bankrupt having by lapse of time become valid, so far as the bankrupt act [of 1867 (14 Stat. 517)] is concerned, Smith has acquired a lien thereby upon the real estate in question. Upon the application of parties interested, this court has jurisdiction to ascertain and liquidate this lien (Bank Act, § 1), and while doing so, to enjoin Smith from enforcing the same by execution out of the state court. But after the process of the state court has been executed and the property sold thereon, it is too late for this court to interfere. The purchaser at such sale acquires a good title; and this is so even if the judgment was fraudulent, provided the purchaser was an innocent one. For this reason, as well as upon general principles, this court could not set aside the sale upon the process of the state court, and order the property resold, however apparent it may be that it was sold much below its real value."

So in Re Bernstein [Case No. 1,350], which in its facts very much resembled the case on trial, it was held, that where the property of the bankrupt has been sold by the sheriff under an execution issued on a valid judgment in a state court, an injunction will not be granted. The court says: "In this case the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantage can result from requiring the money to be paid into this court with a view to its application by this court in satisfaction of the lien on the property. An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the discharge of the amount which he is required by the execution to make, including his charges and fees therein, and directing him to pay the overplus, if any, to the assignee, if there be one; and if there be none, then to the clerk of this court."

In this case I decide this, that where an execution is issued on a valid judgment of a state court, and levied by the sheriff upon the property of the judgment debtor, who, intermediate the levy and sale, is adjudged a bankrupt, and the sheriff proceeds to sell the property without restraint from the bankrupt court, and the sale is made for a fair price without fraud, and the proceeds applied to the payment of liens thereon, in the order of their priority, the sale is not void, but valid, and the bankrupt court ought not to set aside the sale and direct the property to be re-sold. In my opinion, therefore, the sale made by the sheriff of Perry county, on the 4th of January, 1869, ought to stand, unless the agreement between themselves, under which the purchasers bought, was fraudulent.

The purpose expressed in this agreement was a proper one, namely, to prevent a sacrifice of the property, and to make it pay as much as possible on the liens. Its object and effect were not to suppress bidding; but, on the contrary, by the union of the means of several persons, bidding was promoted. There was nothing illegal in this arrangement. Phippen v. Stickney, 3 Metc. [Mass.] 387, 388; Kearney v. Taylor, 15 How. [56 U. S.] 494; Smull v. Jones, 1 Watts & S. 128; 1 Sugd. Vend. 17, and notes; Chitty, Cont. 407, note m. I have been unable to find anything in the said agreement of the purchasers, or in their conduct in reference to the sale, that is fraudulent. The sale appears to have been fairly conducted and the property to have brought all that it was reasonably worth.

It seems, from an amendment to the petition of the assignees in the bankrupt court, that after the sale made by the sheriff, on the 4th of January, 1869, to wit: on the 1st day of August, 1870, two parcels of land, containing together twenty-five acres, were sold by the sheriff in Perry county, on an execution on a judgment of Mary Jane Williams against Blunt, issued and levied upon the 17th day of June, 1870. As this property was seized in execution long after the bankruptcy, and appears to have been sold for little more than one-tenth of its value, I think the sale should be set aside.

A period of six months elapsed between the rendition of the decree in the bankrupt court and the filing of the petition in this court to reverse the same. This delay, unless accounted for, I should consider unreasonable, and should have dismissed the petition as coming too late, had there not been

peculiar circumstances in the case, as stated by counsel, which satisfactorily account for the delay. In the meantime, however, the assignees, proceeding to carry out the decree of the bankrupt court, have incurred costs in advertising the sale ordered by that decree. As these costs are the result of the delay of the petitioners, I think the petitioners should pay them, and not the assignees.

A decree will be entered reversing so much of the decree made by the district court sitting in bankruptcy on June 14, 1872, as sets aside the sale made by the sheriff of Perry county on the 4th day of January, 1869, and as directs the said assignees in bankruptcy to resell said real estate, and as directs the defendants in the petition in the bankrupt court to pay to the said assignees the rents since January 4, 1869, for the real estate purchased by them on that day, and as directs the delivery up of possession to said assignees of the real estate so sold on January 4, 1869, and directing all tenants in possession thereof to attorn to said assignees, and as decrees the costs made in said proceedings against the defendants.

The decree will also be against the said assignees for the costs of this case in the district court and in this court, but the petitioners in review will be required to pay the costs incurred by said assignees in advertising the sale of said property, to take place on January 4, 1869.

So much of the decree of the district court as sets aside the sheriff's sale of the property, made on August 1, 1870, and directs said assignees to resell the same, is affirmed.

The injunction heretofore allowed, restraining said assignees from making sale of said real estate sold by the said sheriff on January 4, 1869, and August 1, 1870, or from making any report of sale, or in any manner executing said decree rendered on June 14, 1872, will be continued and made perpetual, except so far as the same relates to and embraces the property sold by said sheriff on August 1, 1870, and, as to that, said injunction is dissolved.

Case No. 13,861.

THAMES LOAN & TRUST CO. v. JULIAN et ux.

[7 Biss. 446; [1] 4 Cent. Law J. 534.]

Circuit Court, D. Indiana. May, 1877.

HUSBAND AND WIFE — CONTINGENT RIGHT OF DOWER—MORTGAGE—SALE UNDER FORECLOSURE.

1. In Indiana a wife who has mortgaged her individual interest in her husband's lands to secure his individual debt, has an equitable right to require that her interest shall not be sold, if her husband's interest will sell for enough to satisfy the debt.

2. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be properly guarded by the courts.

3. Indiana act of March 11, 1875 (1 Davis' St. 1875, 554), construed.

In equity. The Thames Loan and Trust Company filed its bill against Jacob B. Julian and Martha, his wife, and Arthur L. Wright, assignee of said Jacob B. Julian, to foreclose a mortgage given by the Julians on certain real estate to secure a loan of $10,000. Martha Julian filed her cross-bill against the plaintiff and her co-defendants, averring that the debt secured by the said mortgage was not hers, but her said husband's; that she signed said mortgage simply for his accommodation; and that, as between herself and him or his assigns, her part of the mortgaged premises ought to be last sold, or not sold at all, unless necessary to make the full amount of plaintiff's debt; that said mortgaged property was worth less than twenty thousand dollars, and her interest therein was one-fourth as fee simple, which she had a right to have set off to her under the statutes of this state, on the sale of her husband's part, under such decree as may be rendered to pay said mortgage, provided it should sell for enough to pay the same, and prayed that in the final decree the court direct that the mortgaged premises be first offered for sale subject to her inchoate right of inheritance, and if at such sale enough be bid for said property subject to her inchoate title to satisfy the decree, then her title and interest to remain to her unaffected by such decree and sale, and for all other equitable relief. To this cross-bill the assignee demurred.

Baker, Hord & Hendricks, for cross-complainants.

Claypool, Newcomb & Ketcham, for assignee.

GRESHAM, District Judge. The only controversy is between Mrs. Julian, and the assignee of her husband's estate, who seeks to make the mortgaged premises available for the general creditors. Under the statutes of this state Mrs. Julian has an inchoate right of inheritance to one-fourth of the incumbered premises. May v. Fletcher, 40 Ind. 576; Brannon v. May, 42 Ind. 93. This interest she pledged for her husband's debt, and in doing so established between him and herself the relation of principal and surety. As between herself and her husband she has certain equitable rights. Having mortgaged her individual interest in her husband's lands for his individual debt, she has a right to say that her interest shall not be offered if her husband's interest will sell for enough to satisfy the debt. If her husband were dead, and his estate in administration, Mrs. Julian would have a right as against her husband's creditors to have the entire mortgage paid out of the personal assets. Perry

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

v. Borton, 25 Ind. 274. Her inchoate right to one-fourth of the mortgaged premises is absolute against everybody but the holder of the mortgage. She might redeem from the mortgage, and be subrogated to all the rights of the mortgagees and their foreclosure, and sell her husband's title, leaving her own unextinguished. If she should now exercise this right of redemption and subrogation, the assignee might sell, subject to both the mortgage debt and her marital rights, or he might pay the mortgage debt and sell subject to her marital interest only. The wife's inchoate right in her husband's lands, contingent upon his death, or the extinguishment of his title by judicial sale, will be guarded and protected by the courts in a proper case. The case of McCormick v. Hunter, 50 Ind. 186, which was cited by counsel for the assignee as authority against the right asserted by Mrs. Julian, merely holds that "during coverture the wife has no interest in the husband's real estate which, while his interest remains in the same, can be separately conveyed."

Thus far I have considered the marital rights of Mrs. Julian without reference to the act approved March 11, 1875 (1 Davis' St. 554). The act declares that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, and such inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become vested in the wife to the same extent and as absolutely as the inchoate interest of a married woman now becomes vested upon the death of her husband. Before the passage of this act the wife's inchoate right ripened into a perfect title on the death of her husband. Now her title is perfect upon the death of her husband or the extinguishment of his title by judicial sale. It is clear that the title of Jacob B. Julian to the real estate described in the mortgage is now in his assignee, Wright. If this case proceeds to a decree of foreclosure and sale, the purchaser will acquire the title of the assignee. Jacob B. Julian has no title to sell. It is only when the husband's title is extinguished by "judicial sale," that the wife's inchoate title becomes perfect under the act of 1875.

Whether an adjudication of bankruptcy on a voluntary petition is a judicial sale within the meaning of that act, is not a question necessarily involved in this case. Mrs. Julian joined in the mortgage, and thereby as between herself and the mortgagee bound her interest in the premises for the debt.

If the land is first offered for sale subject to her marital rights (as I think it should be, for she certainly has some interest in it), the act of 1875 has no bearing upon the case otherwise than as affording additional evidence of the settled purpose of the legislature of this state to secure to married women an interest in all the real estate owned by their husbands at the time of their marriage, or that may be acquired during coverture. Demurrer overruled.

See Pawtucket Institution for Savings v. Bowen [Case No. 10,852].

THARP (TILLEY v.). See Case No. 14,047.

THARP (UNITED STATES v.). See Case No. 16,458.

THATCHER (EVERETT v.). See Case No. 4,578.

Case No. 13,862.

THATCHER v. McCULLOH.

[Olc. 365.] [1]

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

AFFREIGHTMENT—ACTION—DEVIATION—USAGE—DAMAGES AS SET-OFF.

1. An action for the recovery of freight lies in admiralty in favor of the master of a ship against the consignee of cargo, equally in personam and in rem.

2. An intention of the master of a ship to depart from her direct voyage and stop at an intermediate port for the purpose of taking in additional cargo, if assented to or made known to a shipper when bills of lading are executed to him, is not a deviation which annuls the contract of affreightment on his part.

3. If it might amount to a violation of the contract per se, the acceptance of the cargo by the shipper, with knowledge of the fact of deviation, restores to the ship-owner his right to freight.

4. The known usage of trade and navigation from New Orleans to Northern ports, in the summer season, to touch at Havana for further cargo, prevents such act being a deviation, although the freighter had no notice of the intention of the master to make that port on the particular voyage.

[Cited in Hostetter v. Gray, 11 Fed. 181; Hostetter v. Parks, 137 U. S. 40, 11 Sup. Ct. 4.]

5. Although the further stopping at Key West on the voyage, without the assent or knowledge of the freighter, is an unwarranted deviation which may avoid the contract of affreightment at the option of the freighter, his acceptance of the cargo, with full knowledge of the deviation, reinstates in the master the right to recover the freight; but receiving the cargo in that manner does not deprive the consignee of a right of action for any special damages he may have sustained because of the deviation.

6. The court is not under the necessity of driving the consignee to a cross-action in such case, nor for recovery of other damages or claims arising out of the contract, but may adjust and recompense his damages by way of recoupment in the action prosecuted for freight.

[Cited in Kennedy v. Dodge, Case No. 7,701; Holyoke v. Depew, Id. 6,652; Ebert v. The Reuben Doud, 3 Fed. 522.]

[See Bearse v. Ropes, Case No. 1,192.]

7. Those damages may embrace whatever could be demanded by a cross-action for the nonfulfilment of the contract of affreightment, including extra premiums of insurance paid because of the deviations on the voyage.

This was an action by [Charles Thatcher] the master of the ship Celia against [James

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

McCulloh] the consignee of part of her cargo to recover freight on a shipment of lead from New Orleans to New York. The bills of lading were dated at New Orleans the 27th and 29th of August, 1844. The ship sailed about the time of their date, partly laden, and ran to Havana, to take in the complement of her cargo. She arrived there the 1st of October, just previous to a hurricane, which set in at that period in that latitude. The Celia was a general ship; her main loading was cotton; the lead on board composed her ballast. Not succeeding in filling up her cargo readily at Havana, she went over to Key West, and took in her lading of cotton from a French vessel, wrecked in that vicinity. Key West lies 60 to 70 miles north of Havana, and 30 to 40 off the usual track or route of vessels from Havana to New York. The ship was detained about two days at Key West, in taking in her cargo. She arrived in New York in November. The consignee was advised, before the arrival of the ship, of the deviation to Havana and to Key West, and effected extra insurances for those runs on account of the deviations. It is the notorious usage at New Orleans for general ships bound to Northern ports in the summer season, because of the difficulty of obtaining full cargoes at that period in New Orleans, to touch at Havana on their home voyage to make up their lading. There was evidence, also, in the case, that it was understood between the agent of the consignee and the agent of the ship when the affreightment of the lead was made, that the ship would probably follow that custom; and that in case she touched at Havana, the extra insurance therefor was to be at the charge of the ship. The shipment of lead was accepted by the consignee at New York, less fifty pigs short of the amount stated in the bills of lading. Testimony was taken on the trial, to a great extent, in relation to the state of the lead market in this port when the ship would be properly due here, according to usual voyages at that season direct from Havana, and at the time of her actual arrival. The main bearing of it showed a declining market, as is usual through the fall months and December; but the rate of depreciation appeared very unsettled, and no precise certainty of the value of lead at the two points indicated was established, and the evidence failed to show there was any appreciable change of prices for ten or twenty days directly preceding the arrival of the ship here. Demurrage was claimed for the delay of the voyage by taking the circuitous route and stopping at Havana and Key West. But the evidence did not go beyond loose conjectures and estimates as to the loss of time, and was not in harmony as to any loss at all having been so occasioned. Objections were taken to the competency of a court of admiralty to entertain an action by the master of the ship against the consignee in personam for freight; and the defence further insisted that the deviations on the voyage annulled the contract of affreightment in favor of the ship, and that no action was maintainable thereon by master or owner.

A. W. Bradford, for libellant.
Jesse C. Smith, for respondent.

BETTS, District Judge. A leading point made by the respondents is, that the court cannot take jurisdiction of an action in personam, for freight brought by a master of a vessel against a consignee of her cargo. It is not controverted that the vessel is bound to the shipper for the delivery of the cargo, nor but that the cargo is bound in rem for the payment of freight; but it is urged upon the notion of the English common-law courts, that the action against the consignee upon the implied contract to pay freight, must be sued in a court of law in the name of the ship-owner. No additional light can be thrown upon the question of the jurisdiction over the subject in this court by restating the decisions already before the public, or the principles upon which they rest. I consider the rightful jurisdiction of the admiralty in such cases fully sustained by the authority of the eminent jurists who have discussed and sanctioned it. The Volunteer [Case No. 16,991]; Certain Logs of Mahogany [Id. 2,559]; Drinkwater v. The Spartan [Id. 4,085]; 3 Kent, Comm. (3d Ed.) 218, 223; Cleirac, 722; Boul.-P. Dr. Com. 297. I hold, in concurrence with the doctrines of those authorities, that this court has jurisdiction over the subject matter. The method of exercising the jurisdiction is merely matter of practice; and the remedy is no more restricted in principle to actions in rem than in personam. Indeed, in the original constitution of the court, suits in their personal form were those in which the jurisdiction was most distinctly exercised (2 Browne, Civ. & Adm. Prac. 432; Clarke, Praxis Adm. tit. 1, Marr. Form. 30); and there is no principle involved in the functions of the court which imparts to it cognizance in rem over a broader field of cases than falls within its powers in actions in personam. [Astor v. Wells] 4 Wheat. [17 U. S.] 479. Its special and vital properties are the brevity, simplicity and celerity of its proceedings, adapting it to the emergencies of commerce and navigation. 1 Kent, Comm. 380. If the respondent intended to set up the alleged deviation of the ship on her voyage as a rescission of his liability for freight, he should have refused to receive the cargo. By accepting that, he waived the right to annul the whole contract, and must rely upon his right to indemnification under it because of its imperfect fulfilment. Abb. Shipp. 192; 3 Kent, Comm. 221.

Although the evidence falls short of proving a direct consent on the part of the respondent to the libellant, in respect to this particular shipment, that the voyage might be made by way of Havana, yet the assent of his agent to the agent of the ship in regard to other shipments on board her at the same

time, of like goods, to the same destination, that the circuitous route might be run, affords a reasonable implication that the arrangement with all the freighters was substantially of a common import, and with the understanding that the ship was to touch at Havana for the purpose of making up a full cargo. I think, independently of any binding assent to the circuitous voyage, that the evidence establishes sufficiently the usage of the trade in respect to voyages from New Orleans to New York in general ships, at that season when freights are short, to have been to touch at Havana to complete their cargoes. The evidence satisfactorily shows that the entire voyage in that way is usually essentially expedited. The shipper must be supposed cognizant of this course of trade, and to have had it in view when the contract was entered into, and cannot, therefore, take exception to it because the deviation may affect his insurance. Abb. Shipp. 192; 1 Phil. Ins. 182–184; 1 Cond. Marsh. c. 6, § 2, pp. 185, 186. Nor probably would such departure from a direct voyage be a deviation which would affect the policy. 2 Phil. Ins. c. 12, § 1. In a case before Lord Eldon, on a vessel bound from Newfoundland to Portugal, where the vessel went to Sidney, in Nova Scotia, for a cargo of coals, he rules that such subordinate voyage, being in conformity to usage, was not a deviation. Ougier v. Jennings, 1 Camp. 505, note; Lockett v. Merchants' Ins. Co., 10 Rob. (La.) 339. By a bill of lading, expressing that goods are to be carried from one port to another, a direct voyage is prima facie intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper that such a course is to be pursued. Lowry v. Russell, 8 Pick. 360. A ship, under these circumstances, would ordinarily be detained at New Orleans a period greatly longer to fill up her freight than is required to run the additional distance by way of Havana.

Under the proofs, the voyage in question, by way of Havana, did not amount to a deviation which affected the rights of the shipowner, as against the shippers, [Oliver v. Maryland Ins. Co.] 7 Cranch, [11 U. S.] 487, —and but from her afterwards putting into Key West, without necessity, there would be nothing in this branch of the case demanding special consideration. After stopping at Havana and finding her cargo could at once be made up at Key West, she run over and filled up at that port. There is no evidence that it was a customary course for vessels from New Orleans, or even from Havana, to touch at Key West. 1 Phil. Ins. 154. This was accordingly a deviation which impaired the policies of the respondent, though it might conduce to expedite the voyage. 13 Mass. 68; Roc. Ins. note, 52; 3 Johns. Cas. 10; 2 Johns. 138; Collings v. Hope [Case No. 3,003]; [Mason v. The Blaireau] 2 Cranch, [6 U. S.] 257, note.

In a special action for the loss sustained because of the circuity and delay of the voyage, the freighter might undoubtedly recover damages commensurate to any injury he could prove accrued from that cause; such cross-action might probably be sustained by the merchant, notwithstanding his acceptance of the cargo. Bornmann v. Tooke, 1 Camp. 377. I perceive no objection to adjusting the equitable rights of the parties, without double action, by allowing, by way of recoupment of freight, the amount of damages sustained by the respondent by means of the breach of contract of affreightment in the deviation to Key West. No specific objection has been raised by the libellant to that course, and it may avoid a cross-action, with accumulated expenses. I think it is clear the libellant is entitled to his full freight according to the bills of lading. On the other hand, he should be charged with the invoice value of forty pigs of lead lost on the voyage, with ten per cent. added thereto, and he should also repay the extra insurance because of the circuitous voyage, with interest thereon from the time of its payment to the arrival of the vessel at this port. The consent to vary the route was upon condition that her owner should pay the extra premiums of insurance disbursed by the consignees, to whom the assent was given. The testimony is not very explicit as to the time of such payments, nor indeed to the amount; and the subject must go before a commissioner for adjustment, unless the parties, by stipulation, settle the facts between themselves.

There is no reliable evidence how much, if any, the voyage was prolonged by the ship's touching at Key West. It is reasonably to be inferred that she was delayed all the time of her detention at that port. Still that fact would not afford a satisfactory measure of the time she should have arrived in this port, so as to afford a basis for allowing a quasi demurrage for such period. There is testimony tending to show that entering that port withdrew her from the range of hurricanes prevailing at that season in that region, which might have occasioned a much more serious delay. These contingencies of navigation are not of that definiteness to afford a guide for the computation of detentions and damages therefor. The court cannot speculate upon that point now. The proper time for the respondent to have availed himself of the deviation, it being known to him, was on the arrival of the vessel; and on the circumstances of this case, he should be deemed, by accepting the cargo without objection then, to have waived alike all damages for delays and deviations on the voyage. These particulars will, therefore, be disallowed in the present case, although under a different state of facts they might properly go before a commissioner for investigation and allowance, with other claims for losses or prejudices sustained by the

freighter on the voyage. Nor is the proof on his part satisfactory to show any deterioration in the price of lead within ten or fifteen days antecedent to the arrival of the Celia. The evidence to that point was exceedingly indefinite and discordant, and, I think, in its general result, conduces to establish the contrary.

I accordingly decree for freight according to the terms of the bills of lading, deducting from it the forty pigs of lead not delivered, and allowing the respondent the value of that lead at New Orleans, with ten per cent. added thereto, and also allowing the respondent extra premiums of insurance actually paid by him on account of the change of route, and interest on such extra insurance from the time of payment to the time of the arrival of the ship in this port. If the parties do not, by mutual arrangement, fix the time of the arrival of the Celia in this port, and the time and amount of extra insurance, and the value of the forty pigs of lead in New Orleans, let the case be referred to a commissioner to ascertain and report those particulars. The question of costs will be reserved until it is ascertained whether a balance be due the libellants.

Case No. 13,863.

THATCHER v. WINSLOW.

[5 Mason, 58.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.

PARTIES—NEGOTIABLE PAPER—AGENT.

1. An agent, to whom a negotiable note has been indorsed by his principal for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note.

[Cited in Welles v. Newberry, Case No. 17,378; Bank of Newbury v. Baldwin, Id. 892.]

[Disapproved in Colburn v. Phillips, 79 Mass. (13 Gray) 68. Cited in French v. Price, 24 Pick. 24.]

2. No person can sue as indorsee, unless he be the owner of the note or has some legal or equitable interest therein.

[Cited in Mattocks v. Baker, 2 Fed. 459.]

Assumpsit on certain notes made by Lewis Rousmaniere, payable to the defendant [Andrew Winslow], or his order, at the Merchants Bank in Newport. The declaration contained various counts against the defendant, as indorsee, in favour of the plaintiff [David Thatcher] as indorser. Plea, the general issue.

At the trial, the defence turned principally upon the point of forgery of the defendant's name, as indorser, by Rousmaniere. Another point was made, viz. that the plaintiff was not the owner of the notes in question, but that they belonged to the Merchants Bank at Newport, by which bank they were originally discounted; and that the notes, since the death of Rousmaniere (who committed suicide), had been delivered to the plaintiff by the Merchants Bank for the purpose of suing the same in his own name in the circuit court; and that plaintiff had no interest whatsoever therein. A witness, called for the plaintiff, upon his cross examination, fully established the latter point.

STORY, Circuit Justice. If the facts stated by the witness on this last point are not denied, I think the cause is at an end. Unless the plaintiff is a real holder of the note, and has some interest in it, he cannot maintain an action as indorsee against the defendant. Here the proof is, that the Merchants Bank is the real holder, and the plaintiff is merely an agent for the bank. I take it not to be competent for a mere agent to maintain an action on a negotiable note in his hands, although it be with the consent of his principal. He must be the owner of the note, or have some substantial interest therein. Prima facie indeed the possession of such a note is evidence of the party's being a holder for a valuable consideration, and unless the note has been previously stolen, or received by him under suspicious circumstances, he is not bound to prove by other evidence, that he is such a bona fide holder. But if it is admitted or proved aliunde, that he is but a mere agent, and holds the note as such, he is not competent to recover a judgment upon it in his own name. See Gunn v. Cantine, 10 Johns. 387; Gilmore v. Pope, 5 Mass. 491.

The plaintiff discontinued his suit.

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

Case No. 13,864.

THATCHER HEATING CO. v. CARBON STOVE CO.

[4 Ban. & A. 68; 15 O. G. 1,051; 2 N. J. Law J. 25; 7 Reporter, 199; Merw. Pat. Inv. 201.] [1]

Circuit Court, D. New Jersey. Dec. 7, 1878.

PATENTS—PLEADING—INFRINGEMENT—AIR HEATING FURNACE.

1. It is not necessary to state, in a bill of complaint for the infringement of a patent, the particular claims infringed by the defendant.

2. A statement of the complainant's patent, and a general allegation that the defendant has infringed, is sufficient to put the defendant upon his answer, and at the final hearing the complainant may specify the claims of the patent, on which he will ask for a decree.

3. The second and third claims of letters patent No. 71,244, granted to John M. Thatcher, November 19th, 1867, for an "Air-Heating Furnace," namely: "(2) The clinker-cleaning passage from and through the furnace front to and into the fire-pot, enclosed by the plate connected with the fire-pot, furnace front, and ash-pit, so as to prevent communication with the hot air chamber surrounding the fire-pot, substantially as described," and "(3) in combination with the clinker-cleaning passage, the downward pas-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 7 Reporter, 199, and Merw. Pat. Inv. 201, contain only a partial report.]

sage leading therefrom to the ash-pit, substantially as described": *Held*, valid.

In equity.

B. F. Lee and F. C. Bowman, for complainant.

Charles B. Collier and F. Kingman, for defendant.

NIXON, District Judge. This is a suit in equity, brought by the complainant against the defendant, for the infringement of letters patent No. 71,244, dated November 19, 1867, for improvement in air-heating furnaces, and assigned to the complainant corporation. The complainant's patent contains nine claims, and it was conceded by counsel at the opening of his case that the only subjects of controversy were the infringement of the second and third claims.

The counsel for the defendant called the attention of the court to the fact, (1) that the only allegation of the bill of complaint was that the defendant company, having full knowledge of the premises, and in violation of the exclusive right and privilege of the complainant, had, since the assignment of the said letters patent, and without its license, "erected, used and sold, and still continued to erect, use and sell many air-heating apparatus embracing the invention described in said letters patent, and so secured" to the complainant corporation; and (2), that the defendant, in the answer, prayed the same benefit of the facts and things thereinbefore set forth, as if, for the reason thereof, the said bill had been demurred to, and submitted, as a matter of equity practice, that a suit could not be maintained when the bill alleged a violation of the invention generally, and the proofs were that only two claims thereof had been infringed.

It was insisted that, unless the whole invention, as claimed, had been infringed, it was necessary for the complainant to specify in the bill the particular claims, of the violation of which he complained.

Perhaps that would have been the correct practice to have been established in suits for the infringement of patent rights in analogy of what is required in courts of equity in actions for relief against fraud. In such cases it is not permitted to allege fraud generally. The party alleging it must state the facts which constitute the fraud. Small v. Boudinot, 9 N. J. Eq. 391; Rorback v. Dorsheimer, 25 N. J. Eq. 516. But such is not the recognized practice in patent cases. A statement of the complainant's patent, and a general allegation that the defendant has infringed, is deemed sufficient to put the defendant upon his answer. Turrell v. Cammerrer [Case No. 14,266].

The question there arose upon a demurrer to a bill of complaint drawn substantially like the bill in the present case. In concluding his opinion overruling the demurrer, the learned judge says: "I am clearly of opinion that the general charge of infringement is all that is necessary to require the defendant to answer the bill, and that particulars of infringement need not be specified."

When the proofs are closed, and at the final hearing, the complainant is permitted to specify the claims of the patent on which he will ask for a decree.

The only other questions raised by the pleadings, which were discussed at the hearing, were: (1) Whether the complainant has proved the infringement. (2) Whether the complainant's patent was not void for want of novelty.

1. With regard to the infringement, no serious attempt appears to have been made to deny it. A pamphlet was produced, marked "Complt's. Ex. D.," and was identified by the president of the defendant company as a publication issued by them, in which several kinds of heaters are described; and the president testified that they had sold one or more of such heaters since the 4th of May, 1868, and before the 26th of November, 1875.

From the certificates and testimonials printed from the fourteenth page to the end of said pamphlet, it would seem that the "carbon reverberatory heater" was the one most earnestly pushed by the defendant, and the one most generally in favor with the public, and the testimony is quite clear that said heater embraced some of the devices claimed in the Thatcher patent. Besides this, the evidence of Mr. Roberts, the president, substantially admits the infringement. He says that, at his request, the secretary of the company furnished one or more statements of the number and description of furnaces manufactured by the Carbon Stove Company, which embraced the devices defined in claim 3 of the complainant's patent. He further states that he attempted to justify the use of these devices by purchasing the right to a patent, including those which had been granted to a Mr. Hillson in 1870, and that he afterward ascertained that the Hillson patent was younger than the complainant's; and that his subsequent negotiations for the payment of a royalty, for his infringement of the third claim, came to an end because the complainant insisted that the "covered clinker-way," as used by the defendant, was equally an infringement of claim No. 2. No inquiry was made as to the extent of the infringement, because that fact was of no importance until an accounting was ordered.

2. The principal controversy is in regard to the novelty of the second and third claims of the complainant's patent. The patentee's description of the invention, so far as it relates to these claims, is as follows: "My invention also consists in the combination and arrangement of a passage-way, from and through the furnace front, to and into the fire-pot, at the bottom thereof, the passage-way being of sufficient width and height to admit of the introduction of a slicer or poker, for the purpose of slicing the fire and remov-

ing the clinker from the grate bars forward, the bottom of the passage-way being on a line with the top surface of the grate bars, and the top and sides of the passage-way formed by an inclosing plate extending from the fire-pot to the furnace-front, and joining at the sides the ash-pit box, so as to prevent any communication between said passage-way leading from the said furnace-front into the fire-pot, and the hot-air chamber surrounding the fire-pot; and this part of my invention further consists in combining, with said inclosed passage from the furnace-front to the fire-pot, a downward opening between the furnace-front and fire-pot, leading from said inclosed passage to the ash-pit, whereby clinkers and other matter removed from the fire-pot may fall into the ash-pit."

The claims are as follows: "(2) The clinker-cleaning passage from and through the furnace-front to and into the fire-pot, inclosed by the plate connected with the fire-pot, furnace-front, and ash-pit, so as to prevent communication with the hot-air chamber surrounding the fire-pot, substantially as described." "(3) In combination with the clinker-cleaning passage, the downward passage leading therefrom to the ash-pit, substantially as described." These claims are prima facie good. The legal presumption is in favor of the novelty of the devices patented, and the burden of rebutting the presumption is upon the defendant.

What has been shown to establish the fact, with any reasonable degree of certainty, that the apparatus or combinations claimed by the complainant are not new? The testimony is within a narrow compass. No actual structures have been produced which were made before the date of the Thatcher patent; but certain representations of things are exhibited which the witnesses say are the same in appearance or in principle as what they saw or knew or heard of years ago. Such evidence, however honest, is of little practical weight. It requires something more accurate than the average human memory, to carry in the recollection, through a long series of years, those little resemblances or differences in construction or arrangement which distinguish things, and which are necessary to be recalled, in order to make the testimony of any value.

The "McIlvaine heater" is set up as an anticipation of the second claim. The defendant offers much testimony to prove that twenty years ago the country generally, and the city of Philadelphia in particular, were full of such air-heaters, but fails to produce an actual structure embodying the devices, of older date than the patent. The president of the defendant company, on his examination, stated that he had one in his house at Burlington, New Jersey, and kindly consented that the complainant or its experts should be allowed to inspect it; but when he went for that purpose it had disappeared, and the witness was told that it had been broken up and melted. Reference was also made to an old heater in the possession of Cox, Wightman & Cox, of Philadelphia; but when it was examined, and the proportions accurately taken, it was found that the passage-way into the fire-pot and grate was too small for a clinker-cleaning passage-way. The counsel for the defendant insists that mere form or proportion is not material, and that there is no invention in simply enlarging the covered aperture. That would be true if no new and useful result was accomplished by the enlargement; but when a change of form produces a new and beneficial result, such change may be patentable. Curt. Pat. § 44.

The letters patent to J. P. Hayes, No. 20,640, and dated June 22d, 1858 (Deft.'s Exhibit No. 4), were also offered in connection with defendant's Exhibit No. 3, as anticipating the second and third claims of the complainant's patent.

There is nothing in the claims of the Hayes patent which indicates that the inventor had in his mind the clinker-cleaning passage-way, or the combination of such passage-way with a downwardly-leading passage toward and into the ash-pit. But the patentee, in his testimony, states that, in his application for the patent, he made claim for "four or five new principles, and one of these principles was precisely or substantially as that in the complainant's heater; that the patent office decided that this principle was the subject of a patent in itself, and that he would be required to make a new application for this or the other principles; that he decided to receive the patent for the other principles, designing to make another application for this principle." No such application, however, was made; but he got up a heater, and put it in practical use in 1858, with this principle attached, and he shows the model (Exhibit No. 3) to illustrate it. Comparing this exhibit with the two claims of the Thatcher patent under consideration, its distinguishing feature, as the specifications inform us, is the grates in two parts, made to slide back and forth on a plate which supports them, so that a space or opening can be formed both behind and between the grates by drawing them partially forward, as occasion may require, for removing large stones, slate, or cinders without letting fall the whole mass of burning fuel. He further says that, when the fire needs raking, a poker is introduced through the grate-opening I "for the purpose, and also in like manner for the purpose of separating or otherwise producing a sufficient opening between and at the rear of the grates, to let down the cinders, slate or stones that may at any time be found in the fire." These methods differ from the complainant's claims. There is no suggestion of a covered passage-way of sufficient dimensions to allow of clinker-cleaning by slicing the fire with a poker, nor, in combination with this, a downward passage in front of the grate to the ash-pit below; and defendant's Exhibit 3 is so constructed as to negative the idea

that the inventor had in his mind the Thatcher devices. The hole designed for raking the fire with a poker is so arranged, in reference to other and contiguous parts of the heater, that it cannot be used as a clinker-cleaning passage. The bars of the grate turned up at the ends prevent such use.

There must be a decree in favor of the complainant for profits and damages and costs, according to the prayer of the bill.

[For another case involving this patent, see Thatcher Heating Co. v. Spear, 1 Fed. 411.]

Case No. 13,865.

THATCHER HEATING CO. v. DRUMMOND et al.

[3 Ban. & A. 138.] [1]

Circuit Court, D. New Jersey. Oct., 1877.

PATENTS—INFRINGEMENTS—ADMISSIONS.

Where complainants proved admissions of the defendants, (1) that they had sold a number of a certain article, and (2) that said article was substantially the same as the article described in the three claims of the complainant's patent, and no testimony was offered by the defendants, *held*, that the infringement was sufficiently proved.

[This was a bill in equity by the Thatcher Heating Company against William H. Drummond and others.]

F. C. Bowman, for complainant

A. J. Todd, for defendants.

NIXON, District Judge. This suit is brought for the alleged infringement of letters patent No. 104,376, dated June 14, 1870, granted to John M. Thatcher for "improvement in fire-place heaters." The answer of the defendants denies that the said Thatcher was the original and first inventor of the improvement described in said letters patent; and claims that the substantial matters and things set forth therein, were described in various patents and printed publications, specifically enumerated in said answer, and were in public use long anterior to the date of the said letters patent.

The complainant proved its incorporation; the issuing of letters patent to John M. Thatcher; various mesne assignments to the corporation; and the admissions of the defendants, that they had sold a number of the Burtis heaters, and that the Burtis heater was substantially the same as the heater described in the three claims of the complainant's patent, and then rested its case. No testimony has been offered by the defendants.

The letters patent owned by the complainant are prima facie good, and the infringement is proved. There must be a decree for the complainant, an injunction, and a reference for an account.

[For another case involving this patent, see Thatcher Heating Co. v. Burtis, 12 Fed. 569.]

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

Case No. 13,866.

THAXTER v. HATCH et al.

[6 McLean, 68.] [1]

Circuit Court, D. Illinois. Oct. Term, 1853.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP.

1. Where a mortgage was executed in Massachusetts to secure the payment of promissory notes also made there, for land in Illinois, and the payer of the note, then a citizen of Massachusetts, assigned them to the plaintiff, and continued to reside in that state till after cause of action had accrued on the notes, but before suit brought, the payer moved to Illinois, and at the time of the commencement of the suit was a citizen of Illinois, *held* that the case was within the eleventh section of the judiciary act of 1789 [1 Stat. 78], and that the court had no jurisdiction.

2. When the courts of the United States once acquire jurisdiction, by virtue of the citizenship of the parties, it cannot be ousted by a change of residence; but this applies only where jurisdiction has vested by a suit.

[Cited in Chamberlain v. Eckert, Case No. 2,577.]

3. The limitation in the eleventh section of the judiciary act is confined to the time when the suit is commenced.

[Cited in Jones v. Shapera, 6 C. C. A. 423, 57 Fed. 461.]

[This was a bill in equity to foreclose a mortgage by Adam W. Thaxter against Reuben Hatch and others.

[A bill had previously been filed by Hatch against Preston, praying for an injunction, etc. A motion to dismiss the cause for want of jurisdiction, and to remand it to the court from whence it came, was overruled. Case No. 6,208.]

Grimshaw & Williams, for plaintiff.

Hay & Browning, for defendants.

DRUMMOND, District Judge. This is a bill to foreclose a mortgage given by Reuben Hatch and James Wilson on some land in Pike county, to John Preston. The mortgage was executed to secure some promissory notes, part of the purchase money of the land. They were made payable to Preston, who assigned them to the plaintiff. At the time of the assignment, both Preston and the plaintiff were citizens of Massachusetts. When the suit was brought, Preston had ceased to reside in Massachusetts, and had become a citizen of Illinois. The mortgage itself had never in form been assigned by Preston to the plaintiff, and the only right of the plaintiff was founded on the fact that the note had been duly endorsed to him. It is objected, that under this state of facts the court has no jurisdiction of the case.

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

In the eleventh section of the judicial act of 1789, there is the following clause: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other clause in action in favor of an assignee, unless a suit might have been presented in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Whatever doubts may have heretofore existed on the subject, the case of Sheldon v. Sill, 8 How. [49 U. S.] 441, decides that the kind of contract upon which this action is brought, is a chose in action or promissory note, within the meaning of this act of congress. But was a case of bond, secured by mortgage. This is a case of promissory notes secured by mortgage. The plaintiff is therefore an assignee of a chose in action, and the only question is whether within the meaning of the act a suit might have been prosecuted if no assignment had been made. In the case referred to, the citizenship of the parties remained the same; the contract was made in the state where the suit was brought, and between citizens of that state. Here, the contract was made in Massachusetts, and Preston, when he assigned the notes, was a citizen of that state; and it is insisted that inasmuch as a suit could at one time have been brought by Preston, he could not by his own act deprive the plaintiff of the right to sue in the courts of the United States, that right existing at the time of the assignment. The question is, what is the limitation of the restriction? Is it general, or is it confined to the time of the commencement of the suit? It is true that at one time a suit might have been prosecuted if no assignment had been made; but before any suit was brought, the assignor became a citizen of Illinois, and consequently he could not have brought suit there if no assignment had been made, because the controversy would not have been between citizens of different states.

It has been uniformly held, that when the courts of the United States have once acquired jurisdiction, by virtue of the citizenship of the parties, it cannot be ousted by a change of residence; but as I understand this rule, it only applies when jurisdiction has actually vested by the commencement of a suit. There can be no doubt, that as a general rule, the jurisdiction depends upon the character of the parties at the time the suit is brought; and this is the only inquiry for the court in these cases. And I think the same rule must be adopted in this case. The limitation is confined to the time when the suit is commenced. Morgan v. Morgan, 2 Wheat. [15 U. S.] 290; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Dunn v. Clarke, 8 Pet. [33 U. S.] 1; Clarke v. Matthewson, 12 Pet. [37 U. S.] 171.

The bill must accordingly be dismissed for want of jurisdiction.

Case No. 13,867.

In re THAYER et al.

[7 Am. Law Rev. 177.]

District Court, D. Massachusetts. 1872.

LIMITED PARTNERSHIPS—VALIDITY OF ORGANIZATION—CASH CONTRIBUTIONS.

[The contribution of a special partner must, under the Massachusetts statute, be in actual cash, and all the partners are held as general partners, if the transaction, while showing an apparent contribution in cash, resulted in fact in putting in goods and debts equivalent to cash.]

Certain creditors of the firm of Thayer & Bro. petitioned against Edward F. Thayer, Theodore A. Thayer, and Isaac D. Farnsworth, all of Boston, as copartners of that firm. It was alleged that an act of bankruptcy had been committed by the suspension of their commercial paper for a period of 14 days. The suspension was admitted, and there was no controversy excepting whether Mr. Farnsworth was a general partner. The facts were found by the court to be in substance as follows: The three defendants, in January, 1869, formed a limited partnership, in which Mr. Farnsworth was the special partner, contributing $15,000 to the capital stock. This contract expired January 1, 1871, and about that time a balance sheet was made up, by which it appeared that the firm had, in assets considered to be good, about $9,000 above the liabilities, not counting the capital as liability. Nearly or quite all this $9,000 was due to Mr. Farnsworth for his capital. On the 14th day of January, 1871, the active partners transferred to him boots and shoes estimated to be worth $9,000, and took from him that sum in bank bills. On the 16th they received $8,000 more. Both these payments were made by Mr. Farnsworth's attorney on his behalf, but out of the attorney's own money. They also received, on the 16th, Mr. Farnsworth's check for $8,000, which was paid by the bank on the 17th. The attorney took from Mr. Farnsworth, as security for the advances made on his account, two checks of Mr. Farnsworth for $8,000 and $9,000, respectively. On the 16th of January, a certificate was made, and acknowledged in due form, stating that Mr. Farnsworth had contributed $25,000 to the common stock, and was a special partner in the new firm of Thayer & Bro., which was certified as being from the 2d of January. Notice was duly published in Boston, and the certificate was recorded in the county of Suffolk. The certificate represented that the business of the firm was that of manufacturers of and dealers in boots, shoes, and leather. The firm had a factory at Westborough, where boots and shoes were made on a large scale, and where the workmen, averaging about a hundred, were hired and discharged by an agent of the firm, who superintended the manufacture. The stock was bought and

the manufactured goods were sold in Boston. The money to pay the workmen was sent from Boston to the superintendent. Most of the books were kept here, excepting such as related to the manufacturing and the pay rolls. On the 17th of January, after the certificate had been recorded and the first publication had been made in the newspapers, the Thayer brothers repaid to Mr. Farnsworth's attorney the $9,000 which he had paid them on the 14th, and the attorney reconveyed to them the boots and shoes which he had then received. On the same day, being the 17th, they paid him $8,000, to be paid to Mr. Farnsworth on account of a debt of $10,000 which the old firm owed him, being money lent them besides the capital, and independently thereof. The attorney was thus repaid the $17,000 he had advanced, and he returned to Mr. Farnsworth the two checks which he had before received as security, and Mr. Farnsworth indorsed $8,000 on his debt of $10,000. At the time the two checks were given to the attorney there was not money in the bank to meet them. There was evidence, however, tending to show that the bank would have honored them if they had been presented. They appear to have been intended rather as memoranda between Mr. Farnsworth and his attorney than any thing else.

THE COURT held, first, that there was a payment into the capital stock of $25,000, but not in actual cash, as required by the statute of the state. The whole transaction, from the 14th to the 17th, inclusive, was but one transaction, and the real contribution of Mr. Farnsworth was $9,000 in boots and shoes, $8,000 in a credit on an old debt, and $8,000 in actual cash. Under the decisions in this state and in others having similar statutes, money's worth could not be accepted as money in such case.

THE COURT held, secondly, that a copy of the certificate should have been recorded in the county of Worcester, because Westborough was a place of business of the firm as manufacturers, within the meaning of the fourth section of the statute.

It was held, thirdly, that the failure to follow the statute in both or either of these particulars made all the defendants general partners. The judge said, however, that he rested his decision mainly on the want of an actual cash contribution. He said that he had no idea that any wrong was intended, but the business appeared to have been done under the impression that, if the money was actually passed, and its value fairly contributed, the statutes had been complied with, but the decisions show this to be a mistake. The judge referred to Pierce v. Bryant, 5 Allen, 91; Haggerty v. Foster, 103 Mass. 17; Richardson v. Hogg, 38 Pa. St. 153; Haviland v. Chace, 39 Barb. 283.

It is singular that, though the statute concerning limited partnerships has been in force since the year 1836, and though it would seem to offer peculiarly strong temptations to litigation, yet the reports of the state courts show only two causes arising under it. In both of these the special partner has, as in the preceding decision, been held liable on the ground of an imperfect compliance with the strict letter of the statute. The truth is that the law is so plain and so imperative in its phraseology that the judges cannot easily, if they would, evade it. But it must be confessed that the two decisions of the state court seem, if it be allowable to form an opinion of this sort from the language of the judges, to have been delivered ab invitis.

THAYER, In re. See Case No. 5,305.

THAYER (BANCROFT v.). See Case No. 835.

THAYER (BARCLAY v.). See Case No. 978.

Case No. 13,868.

THAYER v. HERRICK.[1]

Circuit Court, D. Minnesota. Aug., 1876.

RECORDING LAWS—UNORGANIZED COUNTIES—CORPORATIONS—BY-LAWS—VALIDITY.

[1. The land in an unorganized county in Minnesota is regarded, for all purposes, including registry, as being within the territorial limits of the county to which it is attached for judicial purposes.]

[2. A by-law of a corporation, adopted by the directors, and not by the incorporators when two-thirds were present, as required by the charter, is a nullity.]

[This was a bill in equity by George Thayer against Nathan Herrick to quiet title.]

NELSON, District Judge. The Little Falls Manufacturing Company, a duly-authorized corporation, became the owner of the town site of Little Falls West, situated in Todd county, Minnesota, and also the owner of the town of Little Falls, located east of the Mississippi river, in Morrison county. At the time Little Falls West was platted, Todd county, although declared to be organized by act of the legislature of the territory of Minnesota, passed in 1856, was not so in fact. The governor was authorized by chapter 35, § 3, Sp. Laws 1860, to appoint a board of county commissioners and these commissioners were to have full power to appoint all other county officers to complete the organization of the county, yet no county officers were appointed or elected until 1868. The town plat of Little Falls West, located in Todd county, was recorded, according to the statute, in the office of the register of deeds of Morrison county, to which it was attached for judicial purposes (see Sp. Laws 1860, p. 91, and Rev. St. Minn. 1851, p. 150, § 6), and all the muniments of title, including the original patent

[1] [Not previously reported.]

from the government of the United States, were also there recorded.

The general policy of the state, as indicated by legislation, recognized the platting of towns and villages in a county unorganized for county purposes, and provided for the record of the same in the county to which it might be attached for judicial purposes. Such laws were early passed by the legislature of Wisconsin territory, and were retained in the Revised Statutes of Minnesota territory, and are now in force in the state. The land in an unorganized county is regarded, for all purposes, including registry, as being within the territorial limits of the county to which it is attached for judicial purposes. The whole course of legislation contemplates the validity and legality of such record in relation to all deeds, mortgages and liens. Under these circumstances the plaintiff loaned his money to the Little Falls Manufacturing Company, and two mortgages were executed by the officers of the company to secure the same, —one upon the property it owned in Morrison county, and the other in 1861, upon property located in Todd county. On default of payment the mortgages were foreclosed,—the latter by advertisement under the statute; the former by a bill in equity. The plaintiff became the purchaser of all the property at the sales. The defendant subsequently obtained a judgment against the company, and a sheriff's deed under execution sale of the same property. He now urges that his title thus acquired is superior: (1) As against the foreclosure in equity, because by-law No. 12 of the company forbids the execution of a mortgage upon the property embraced therein. This by-law is as follows: "The officers of the company are hereby prohibited from selling any of the water power of Little Falls, or" (here follows a description of property, including the property covered by the mortgage). (2) As against the title obtained under the foreclosure by advertisement, because the proceedings, including certificates, etc., were not filed in the office of a register of deeds in Todd county, where the property is situated, and the sale was not made in that county, but in the county to which it was attached for judicial purposes.

I think the first objection not tenable, for the reason that by-law No. 12, above referred to, was not adopted as the charter required. It was adopted by the directors, and not by the incorporators when two-thirds of their members were present, as section 4 of the charter required. This view is conclusive, although it may be doubtful whether the sale mentioned in the by-law had reference to the execution of a mortgage for the loan of money which is provided for in section 6 of the charter. See Sess. Laws 1856, p. 221.

The second objection from the views expressed in the outset of this opinion, in reference to the policy of the state as evidenced by continuous legislation cannot be sustained. The plaintiff is therefore entitled to judgment, and the relief prayed for. See statutes for transcribing records (Laws 1858; Gen. St. 1870, p. 117; Sp. Laws 1871, p. 297).

Case No. 13,869.

THAYER v. JOHNSON COUNTY.

[3 Dill. 392, note.][1]

Circuit Court, D. Kansas. 1874.

ELECTION—CONDITION PRECEDENT—CURATIVE ACT.

The bonds in question were issued to the Kansas & Neosho Valley Railroad Company, or bearer, part dated in September, 1867, and the rest in June, 1868. There is no recital in the bond, except that it purports to be a "stock bond," and states that it is issued "by order of the board of commissioners of the county of Johnson." They are signed by the chairman of the board, attested by the clerk, and are under the seal of the county. The present questions arose on demurrer to several special pleas in the answer. The general nature of these pleas appears in the opinion.

Pratt & Ferry and C. W. Blair, for plaintiff.
Cobb & Cook, for defendant.

DILLON, Circuit Judge. I am of the opinion that the second count of the answer is insufficient. It does not deny that the plaintiff is a holder of the bonds in suit for value without notice. Part of the bonds were issued after the curative act of February 25, 1868 (Gen. St. Kan. 1868, p. 892). This act, it seems to me, validates the bonds thereafter issued as against the two objections urged against them, one of which is that the particular railroad company to which the subscription was to be made was not named in the order of submission, and the other, that the line of the road was not located through the county prior to the election. If the bonds issued in June, 1868, under the order and vote of 1865, are valid by reason of the curative act of February 25, 1868, I am inclined to think the bonds issued in 1867, under the same order and vote, are also made valid. But, however this may be, the plaintiff, as a presumed bona fide holder, may, under the doctrine of the supreme court of the United States, recover, as against the matters pleaded in the second count of the answer, no notice thereof to plaintiff being charged in this count.

The third count is like the second except that it charges notice to the plaintiff of the order of submission, and denies that the plaintiff is a holder for value. Under the statute under which the vote in question was taken the supreme court of the state has decided "that some corporation must be named (in the order for the vote) as the recipient of the subscription and bonds, or the proceeding will be without warrant of law and void." Lewis v. Commissioners of Bourbon Co. [12

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

Kan. 186]. As the plea in question alleges notice to the plaintiff of this order, it would, if this view be correct, and if the doctrine of the state supreme court were followed by this court, be a good defence. But as to the bonds issued since the curative act, and, as it seems to me, as to those issued before the same, they are validated by that act.

As the fourth plea does not charge notice to the plaintiff that the bonds were issued without any subscription having been made or stock received, it sets up no defence available against an innocent holder of the bonds for value.

The sixth and seventh pleas set up, the one the failure of consideration, and the other, the want of consideration, for the bonds in question, with notice to the plaintiff. These constitute good defences.

The result is that the demurrer to the second, third and fourth counts of the answer is sustained; as to the sixth and seventh counts, overruled.

Case No. 13,870.

THAYER v. MONTGOMERY COUNTY.

[3 Dill. 389;[1] 1 Cent. Law J. 365.]

Circuit Court, D. Kansas. June Term, 1874.[2]

RAILROAD COMPANIES — COUNTY AID — BONDS — POWER TO ISSUE COUPONS—MODE OF SIGNING—SUFFICIENCY OF DECLARATION.

1. If the bonds to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defence to an action on the coupons that they are signed by only one of the county officers.

[Cited in Donaldson v. Butler Co. (Mo. Sup.) 11 S. W. 572.]

2. A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. This principle applied, and the declaration *held* sufficient.

3. Bridge bonds—construction of local statute respecting; Kansas municipal bond registration act construed; Kansas municipal bond curative act construed; election and conditions precedent to issue of bonds—see cases in note.

Action [by Nathaniel Thayer against Montgomery county] on coupons on county bonds. The bonds in suit are in the usual form, signed by the chairman of the board of county commissioners, attested by the clerk, and are under the seal of the county. They are payable to the "Leavenworth, Lawrence & Galveston Railroad Company, or bearer," and contain the following recital: "This bond is executed and issued under the provisions of and in conformity to the laws of the state of Kansas, and in pursuance of the vote of a majority of the electors of Montgomery county, of June 21, 1870." The petition set out the bonds and coupons in suit in full, but did not contain any express averment of the purpose for which the county issued the bonds, and such purpose did not appear otherwise than on the face of the bonds. The coupons were signed only by the county clerk. Demurrer to petition on three grounds: (1) That the county clerk had no authority to sign coupons. (2) That it does not appear that the vote was by the qualified electors of the county. (3) That the authority or power of the county to issue the bonds in suit is not averred, and does not appear on the face of the bonds.

N. T. Stevens, for plaintiff.

Clark, Gamble & Shannon, for the county.

MILLER, Circuit Justice (orally), overruling the demurrer, said, in substance:

1. As to the first ground of demurrer. The bond itself being duly signed and sealed by the proper officers of the county, and the coupons being part of the bond, it is no defence to the coupons that they are not signed by the chairman of the board as well as by the clerk.

2. The omission in the recital of the bond of the word "qualified," in describing the electors is immaterial. The electors are the qualified electors.

3. The third ground of demurrer presents to my mind a more serious question. It is that an authorized, lawful purpose for which the bonds were issued should be alleged in the declaration or be recited in the bonds, which are made part thereof. This, I think, is a sound proposition. The power of counties to issue bonds is not inherent or general. They are authorized to issue bonds or negotiable paper, only for limited or specific objects or purposes, and hence it should appear by averment in the petition or by recital in the bonds that they were issued for one of these specified purposes.

I should have preferred that the petition here should have alleged that the bonds in suit were issued by the county in payment for stock subscribed by it in the railroad company, but I must pass upon the sufficiency of the petition as it stands. The petition sets out the bonds in full, and although my conviction is not strong and clear, yet, taking a somewhat liberal view of the bonds, I think it can be gathered from them that they were issued under the statute of the state, by the county, to aid the corporation payee in the construction of its road. In this view, I incline to hold, though with some hesitation, that the petition is good.

Judgment accordingly.

[On error, a judgment for plaintiff was affirmed by the supreme court. 94 U. S. 631.]

NOTE. The opinion of Mr. Justice Miller in the above case, asserts a doctrine of general interest, and holds that there is no presumption in favor of the power to issue such securities, and that to constitute a good declaration it must appear on the face thereof, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. The importance of this principle is manifest, for

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

[2] [Affirmed in 94 U. S. 631.]

if bonds issued by counties contain no recital, it would seem to follow that there would be no presumption in favor of their validity, and it would devolve on the holder, though he were such bona fide, and for value, to aver and show by evidence aliunde, that the bonds were issued for some purpose authorized by statute. This view has much to support it in one of the latest cases on the subject in the supreme court of the United States. Nashville v. Ray, 19 Wall. [86 U. S.] 468. See Kennard v. Cass Co. [Case No. 7,697].

[Appended to the above case, in the original report, were the following cases: Coler v. Wyandot Co., Case No. 2,987; January v. Johnson Co., Id. 7,218; Thayer v. Johnson Co., Id. 13,869.]

THAYER (POTTER v.). See Case No. 11,340.

Case No. 13,871.

THAYER et al. v. WALES et al.

[9 Blatchf. 170; 5 Fish. Pat. Cas. 130.] [1]

Circuit Court, E. D. New York. Oct. 9, 1871.

PATENTS—EQUIVALENTS—PRELIMINARY INJUNCTION—SERVICE—IRREGULARITY—MACHINE FOR MAKING CANDLES.

1. The first claim of the letters patent granted to John Stainthorp, March 6, 1855, for an "improvement in machines for making candles," namely, "the employment of the pistons, D, D, formed at their upper ends into moulds for the tips of the candles, in combination with stationary candle-moulds, to throw out the candles in a vertical direction, substantially as herein set forth," is infringed by a machine in which the piston has a flat end, and moulds a candle with a flat end, instead of a convex tip, provided the piston is used in combination with the stationary mould, to throw out the candle in a vertical direction, as described in the specification.

2. The said letters patent are valid.

3. A preliminary injunction granted against a clear infringement, there having been repeated adjudications sustaining the patent.

4. An irregularity in the service on a defendant of the subpœna in a suit in equity, affords no reason for withholding an injunction against him, if he has had notice of the motion for the injunction, and appears to oppose it.

[This was a bill in equity by Edward S. Thayer and others against Joseph Wales and James M. Dietz.]

[Motion for preliminary injunction. Suit brought upon letters patent [No. 12,492] for an "improvement in machines for making candles," granted to John Stainthorp, March 6, 1855, extended for seven years from March 6, 1869, and assigned to complainants. The first claim of the patent, which was the only one in controversy, will be found in the opinion of the court.

[In the Stainthorp machine, as represented below, the hollow rods or pistons marked D, D, D, are formed at their upper ends into molds (shown in dotted lines at E, E, E) for the tips of the candles, the bodies of which are cast in the molds, C, C, C. The rods or pistons are raised by suitable mechanism, so as to force the candles from the molds when the casting is completed.] [2]

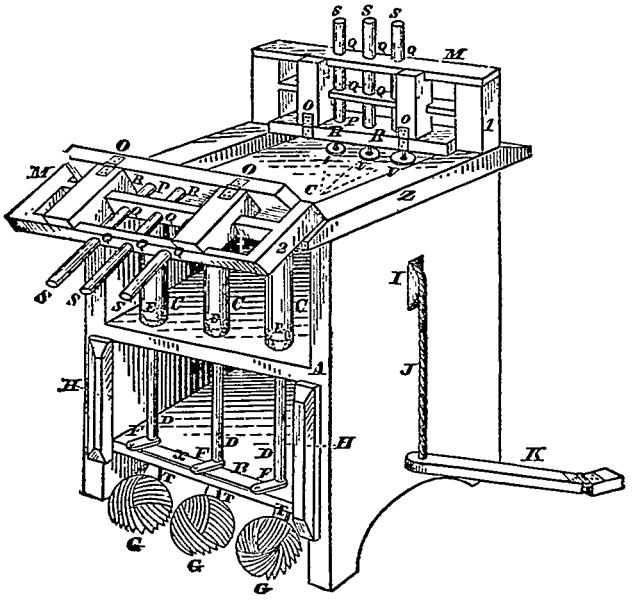
Miles B. Andrus and Causten Browne, for complainants.

Abbett & Fuller, for defendants.

BENEDICT, District Judge. This case comes before me upon a motion, on the part of the complainants, for a preliminary injunction, to restrain the defendants from

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 170. and the statement is from 5 Fish. Pat. Cas. 130.]

[2] [From 5 Fish. Pat. Cas. 130.]



using a machine, in the making of candles, within this district, upon the ground that it is an infringement upon a patent granted to John Stainthorp, March 6, 1855, for an "improvement in machines for making candles," and owned by the complainants. The motion is founded upon the bill and affidavits, and is opposed by affidavits on the part of the defendants.

The first issue raised is as to the infringement charged. There appears to be no dispute in regard to the description of machine which the defendants are using, but it is contended that such a machine is not covered by the claim in the Stainthorp patent.

The Stainthorp patent contains two claims, of which the first is the only one in controversy here. That claim is as follows: "What I claim as new, and desire to secure by letters patent, is: (1) The employment of the pistons, D, D, formed at their upper ends into moulds for the tips of the candles, in combination with stationary candle-moulds, to throw out the candles in a vertical direction, substantially as herein set forth." This claim, the defendants insist, does not cover the defendants' machine, because, in the defendants' machine, the piston is flat, and moulds a candle with a flat end, instead of a convex tip, whereas, as they claim, a tip-mould is a substantial feature in the Stainthorp patent, and a necessary element of the combination secured by that patent. I am unable to sustain this construction of the Stainthorp patent. The object sought to be attained by the Stainthorp invention was the safe removal of the candle from the mould in which it is formed, and, by the same operation, a proper adjustment of the wick for a new candle. This is accomplished by constructing a stationary upright mould, which, instead of having a fixed bottom, has a movable bottom, arranged to work, by means of a piston-rod, as a piston in the mould, and having a centre aperture in the piston, through which the wick can pass, enabling the candle to be forced up by the movable bottom, and safely delivered from the upper end of the mould, while the wick is, at the same time, drawn through the mould ready for the next candle.

The first claim set forth in the patent is for the employment of the piston in combination with the stationary mould, to throw out the candle in a vertical direction, as described. I find nothing in the specification or claim to warrant the opinion, that the shape of the piston was therein mentioned for the purpose of claiming any particular shape of piston, as part of the invention. The form of piston mentioned is not necessary to accomplish the result sought to be attained; and the mode of operation of the machine remains unchanged, whether the candle be moulded with a concave, or a convex, or a flat end. Candles are made with ends of various forms, and every form of end may be moulded by a piston shaped to such form. The form of the candle was not what the Stainthorp invention looked to. It sought to deliver in a safe and cheap way candles of every form; and, the method having been described in the patent, it required no invention to alter the form of the piston to a plane surface, nor did any change in the principle of the machine follow such alteration. No advantage is shown to have been gained by such alteration, and no reason for it has been suggested. It appears to me to have been made with the expectation of raising a distinction between the machines, which should, in effect, enable the defendants to use the Stainthorp invention without compensation, and for that purpose alone. But the alteration is merely colorable, and creates no substantial change. The defendants' machine must, therefore, be held to be, in substance, similar to the Stainthorp machine, in the features now in question, and its use an infringement of that patent.

It is further contended, that the invention claimed by the Stainthorp patent was previously known and described; and what is known as the Morgan machine is referred to as showing this. But the Stainthorp patent is not recent, and has been repeatedly adjudicated upon and sustained; and, in more than one instance, the Morgan machine was proved and held not sufficient to invalidate the patent. Stainthorp v. Elkinton [Case No. 13,278]; Stainthorp v. Hamiston [Id. 13,279]. Repeated adjudications in favor of this patent entitle the complainants to the relief of a preliminary injunction against what seems to me to be a clear infringement.

Some preliminary objections to this motion were taken on behalf of the defendants, only one of which I think it necessary to mention here. An objection is taken by the defendant Dietz, to the granting of any injunction against him, upon the ground of a supposed irregularity in the service of the subpœna, as to which it appears sufficient to say, that such irregularity, if it exist, affords no reason for withholding an injunction against a defendant who has notice of the motion and appears to oppose it.

Let a preliminary injunction be issued, according to the prayer of the bill, against both of the defendants.

[For other cases involving this patent, see Cases No. 13,281 and 13,872.]

Case No. 13,872.

THAYER et al. v. WALES et al.

[5 Fish. Pat. Cas. 448.] [1]

Circuit Court, E. D. New York. April, 1872.

COURTS—FEDERAL JURISDICTION — CITIZENSHIP — MARSHAL'S RETURN—ADMISSION OF JURISDICTION—PATENTS—ASSIGNMENT.

1. The bill having alleged that the defendant was a resident of New Jersey, in order to con-

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

fer jurisdiction, it should appear affirmatively in the marshal's return that the subpena was served on the defendant within the district in which the suit was brought.

2. The defendant having appeared by attorney, and having filed his plea to the jurisdiction by attorney, and not in person, this fact must be deemed an admission that the court has jurisdiction and a submission thereto.

3. A special appearance having been entered by the clerk upon the order-book, at the request of the defendants' attorney, without leave of the court, *held*, that such an appearance was an admission of jurisdiction.

4. A patentee having conveyed an undivided interest in the "invention as secured" by letters patent, the same to be held and enjoyed "to the full end of the term for which said letters patent are or may be granted," *held*, that this conveyed to the assignee an interest in the extended term.

In equity. Pleas to the jurisdiction and in abatement.

Suit brought on letters patent [No. 12,492] for an "improvement in machines for making candles," granted to John Stainthorp, March 6, 1855, extended for seven years from March 6, 1869, and assigned to complainants [Edwin S. Thayer and others], more particularly referred to in the report of the case of Thayer v. Wales [Case No. 13,871]. The bill averred that one James M. Dietz, one of the defendants, resided in the state of New Jersey. He was served in the city of New York, but was returned "served personally," and it did not appear where service was in fact made. The attorneys of Dietz addressed the following paper to the clerk: "Please enter our appearance for the defendant Joseph Wales in the above case; also, enter a special appearance for us for the defendant James M. Dietz in order to save a default, that he may plead specially to the jurisdiction of this court, said Dietz not having been served with process in the Eastern district of New York." The clerk entered in the order-book an appearance in the words of this request, and the defendant subsequently filed, by the same attorneys, a plea to the jurisdiction. A motion was made at the same time to correct the return, to show where the service was made, that it might appear upon the face of the return that the defendant was not served within the Eastern district of New York. The plea in abatement was filed by defendant Wales. The facts upon which it was based are fully set forth in the opinion.

M. B. Andrus, for complainants.
Abbett & Fuller, for defendants.

BENEDICT, District Judge. In regard to the motion made in this cause to correct the marshal's return of service of the subpena upon the defendant Dietz by adding to the return that the service was made in the city of New York, it is sufficient to say that it is needless, in view of the decision in Allen v. Blunt [Case No. 215]. That return, as it stands, does not show where the subpena was served, and is not of itself sufficient to confer jurisdiction. The bill avers that the defendant Dietz resides in New Jersey, and it should appear affirmatively in the return that the subpena was served on him within this district, to render such return a foundation for the exercise of jurisdiction over him. The motion may, therefore, be denied as useless.

The main question before me is presented by the plea to the jurisdiction which Dietz has interposed, upon which plea issue has been joined and testimony taken, upon which a decision is now to be rendered. The plea avers that the defendant Dietz was never served with process in this district, but was served in the city of New York, and that he has never voluntarily appeared in the case. The proofs are sufficient to show that the service of the subpena was made in the city of New York; and, if that were all, the plea to the jurisdiction must prevail, as the bill avers the defendant Dietz to be an inhabitant of the state of New Jersey. But the difficulty is that the defendant Dietz has appeared in the cause by attorney, and his plea is filed by attorney, and not in person.

The appointment of an attorney, solicitor, or agent, by whom the plea is put in, is, per se, an appearance—an admission that the court has jurisdiction and a submission thereto. Van Antwerp v. Hurlburd [Case No. 16,826]. This rule, although technical, appears to be followed; and, if applicable in any case, there is no reason for omitting to apply it here, where the subject matter of the controversy arose in this district, and where the defendant transacted a part of his business in this district, and could easily be found therein, and when his co-defendant and partner engaged jointly with him in the infringement complained of, is found within the district. The fact that what is called a special appearance was entered by the attorney for Dietz, without leave of the court, does not relieve the case from the application of the rule. There must, therefore, be a decree for the plaintiffs upon the plea to the jurisdiction, with liberty to the defendant Dietz to answer, if so advised.

The remaining question arises upon a plea in abatement, interposed by the defendant Wales, because of the non-joinder of Stephen Seguine as a party plaintiff. The interest of Seguine in the patent sued on depends upon an indenture, in the following words: "Whereas, I, John Stainthorp, of the city of Buffalo and state of New York, did obtain letters patent of the United States for an improvement in machines for making candles, which letters patent bear date March 6, 1855. And whereas, Stephen Seguine, of Staten Island, county of Richmond, state of New York, is desirous of acquiring an undivided fourth part of all my interest therein: now, this indenture witnesseth that, for and in consideration of the sum of one dollar and other good and valuable considerations to me in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold, and set over, and do hereby assign, sell, and set over

unto the said Stephen Seguine, an undivided fourth part of all the right, title, and interest which I have in the said invention, as secured to me by the said letters patent, except for all that part of the United States lying east of Hudson river and Lake Champlain, and north of Long Island Sound; Long Island, in the state of New York, being included in this assignment. The same to be held and enjoyed by the said Stephen Seguine for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made. In testimony whereof, I have hereunto set my hand and seal, this 29th day of May, A. D. 1857. John Stainthorp. [L. S.] Signed, sealed, and delivered in presence of J. E. Shaw, J. H. B. Jenkins." Subsequently to the execution of this instrument, an extension of the patent was granted, and the question here is, whether, by this instrument, Seguine acquired a right in the extension. If so, then it appears by the bill that he should be made a party plaintiff. This instrument appears to be the same in legal effect as the instrument which came under the consideration of the supreme court of the United States in the case of Railroad Co. v. Trimble, 10 Wall. [77 U. S.] 378. These words, almost identical, were held to convey an interest in all reissues, renewals, and extensions of the patent referred to; and, in obedience to that decision, I must give the present instrument a similar effect.

Upon the plea interposed by the defendant Wales there must, therefore, be judgment for the defendant, with liberty to the plaintiffs to amend. No costs given to either party on either plea.

[For other cases involving this patent, see Cases Nos. 13,281 and 13,871.]

Case No. 13,873.

THAYER v. WENDELL.

[1 Gall. 37.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

EXECUTOR—VENDOR—COVENANTS—TITLE—INDIVIDUAL LIABILITY.

A covenant by an executor, on a conveyance of land of his testator, in his capacity as executor, and "not otherwise," is not binding on him in his individual capacity, although it may not be binding on the estate of the testator. A covenant that the premises sold were "in due form of law" extended upon and taken in execution to satisfy a debt due to the testator, and that all the forms of law relating to the setting off, &c. have been complied with, is a covenant for the regularity of the proceedings on the levy, and not for the validity of the title to the land.

[Cited in Duvall v. Craig, 2 Wheat. (15 U. S.) 57.]

[Cited in Mitchell v. Hazen, 4 Conn. 514; Underhill v. Gibson, 2 N. H. 352.]

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

This was an action of covenant, brought by the plaintiff [Levi Thayer] against the defendant [Oliver Wendell], for a breach of the covenants contained in a deed of conveyance of land, dated the 2d day of August, 1792, and given by the defendant, as sole surviving executor of the last will and testament of John Erving, deceased. By the case, as presented in the pleadings, it appeared that one James Gordon was indebted to said Erving in a considerable sum of money; that James Gordon died intestate, and after his decease, and while there was a rightful administrator on his estate, the defendant and the other executors of Erving brought an action against one Cosmo Gordon, as executor de son tort of James, at the court of common pleas in Suffolk, and at the January term thereof, 1790, recovered judgment against the said Cosmo in said suit, and the land in the deed mentioned was duly set off, as the estate of said James Gordon, to satisfy the execution which is sued on said judgment. It was admitted, that in point of form the levy by the execution was well made; and the controversy turned on the nature and extent of the covenants in Wendell's deed. The deed purported on the face of it, to be given as surviving executor of Erving, and for the land set off to the executors on their execution against the estate of James Gordon. The covenants relied on were in the following words: "And in my capacity aforesaid, but not otherwise, I do covenant with the said Levi Thayer, his heirs and assigns, that the said premises were in due form of law extended upon and taken by execution, as aforesaid, to satisfy a debt actually due to the estate of the said John Erving from the said James Gordon; and that all the forms of law relating to the setting off of real estates for the payment of debts due therefrom, have been duly complied with." The breach assigned in the declaration negatived these covenants, and alleged a legal eviction by one James Martin.

Thomas Williams, Jr., and Rufus Amory, for plaintiff.

Charles Jackson, for defendant.

Mr. Amory cited 1 Term R. 489; 4 Term R. 343; 5 Term R. 6.

STORY, Circuit Justice. Since the decision of the supreme court of this commonwealth in Mitchel v. Lunt, 4 Mass. 654, it is admitted, as settled law, that on a judgment against an executor de son tort, the real estate of the intestate cannot be set off to satisfy the execution. It is contended in behalf of the plaintiff: 1. That the covenants of Wendell, although in his capacity as executor, and not otherwise, bind him personally. That the true meaning of the words "not otherwise" is, that the funds out of which payment is to come in case of a breach, are to be the assets of the estate

of Erving; and further, that thereby a rule may be furnished to regulate the damages in case of a recovery against the defendant. 2. That if the first position be correct, then the covenants extend not only to matters of form, but to the right and title acquired by the levy on the execution.

As to the first point, it is undoubtedly true, that the best construction is to be made in order to support a deed. Shep. Touch. p. 84, c. 5; Id. p. 654. But the first rule of construction is, that every deed is to be construed according to the intent of the parties. Now what was the apparent intent of the parties? Certainly, the argument itself admits, that the defendant should not be personally bound. Yet this action is brought against him personally; and the execution, if at all, must be satisfied out of his own estate; and for aught that appears in the case, there are not any assets of John Erving, out of which any indemnification could be had, even if the right to apply them were incontestible. If, therefore, we support this action, we plainly set aside the intent of the parties. But it is said, that if this construction be not adopted, the covenant is void, and has no legal operation; for an executor cannot bind the estate of his testator by his own covenant. Be it so; but is not the conclusion then irresistible, that the defendant, if liable at all, must pay out of his own funds? Whether such a covenant be void or not, I do not decide, for the question does not arise in this case, and it will be time enough to decide, when we are compelled by law so to do. I take it however to be true, that where a party contracts in a particular, and not a personal capacity, it is of no consequence, as to the legal result, whether, supposing no remedy can be had against him personally, none will lie against another. It is the party's own folly to take such a contract; and unless there be fraud, deceit, misrepresentation, or warranty, there can be no reason in nature, why a recovery should be had. The cases which have been cited, seem to me to proceed on this general ground, that no man, acting fairly and openly, in alieno jure, and not otherwise, can be made answerable in his private capacity upon the contract. See cases cited 1 Com. Cont. 247, 272; Macbeath v. Haldimand, 1 Term R. 172; Hodgdon v. Dexter, 1 Cranch [5 U. S.] 345.

Now the clear exposition of the contract of the defendant is: "I covenant in my capacity as executor, and as far as I can legally bind the estate of Erving, but I hereby expressly exclude myself from all personal responsibility, in any event." Now it is quite too plain for argument, that if the words had been, as I have stated, there would have been no personal remedy. Can there be, when the words used require precisely the same exposition? We are not at liberty to reject any words, which are used in a contract, when they are sensible in the place where they occur; much less have we any authority to change the entire nature of a contract from a particular to a general responsibility.

But even if this point were more doubtful than I think it to be, I am clear in opinion, that the second point is with the defendant. The language of a covenant, to bind an executor to warrant the right and title to the land, ought to be clear and explicit, before any court should venture to charge him. Now the language of these covenants is, that the premises (i. e. the land—not the title to the land), had been extended in due form of law on the execution, to satisfy a debt due to Erving; and that all the forms of law, necessary thereto, had been fully complied with. To my understanding, nothing can be more plain than that the defendant covenanted only for the regularity of the proceedings under the execution, and not for the title of the property, or the absolute legal right, which resulted from the levy. The first covenant warrants, that there was a debt due to Erving, that there was a regular execution, and a regular extent in point of form; all of which was literally true; and the second covenant is little more than a repetition of the former.

My judgment accordingly is, that the plaintiff take nothing by his writ. And as the district judge concurs in this opinion, let the judgment be so entered. Vide Spittle v. Lavender, 2 Brod. & B. 452. Vide, also, Childs v. Monins, Id. 460. Judgment for defendant.

THE.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Mary Washington. See Mary Washington."]

Case No. 13,874.

The THEBES.

[See Case No. 10,022.]

THEBES, The (NASH v.). See Case No. 10,022.

Case No. 13,875.

THEBO v. CAIN.

[1 Tex. Law J. 92.]

District Court. W. D. Texas. 1877.

HOMESTEAD EXEMPTIONS—CITY LOTS.

[Under the constitution of Texas in force in 1871, a homestead might embrace any number of city or town lots, whether remote from or contiguous to each other, provided they were designated and used as a homestead, and did not, in the aggregate, exceed in value $5,000, irrespective of any improvements thereon.]

The subject of controversy in this suit was certain lots embraced in blocks No. 3 and 14 in

the city of Paris, Texas, claimed as a homestead by the bankrupt. C. T. Thebo was adjudicated an involuntary bankrupt on the 26th day of May, 1874. The assignee [W. G. Cain] set apart to the bankrupt all the lots claimed by him as a homestead, in his schedule, except a brick store-house and lot on the northwest corner of block 3, and three lots, with tenement houses thereon, in block 14. The bankrupt excepted to this action of the assignee, and the issue was formed as to the extent, use and value of the homestead claimed. The evidence showed that the homestead claimed embraced a number of lots in blocks 3 and 14, near the public square of Paris, of great value; that a street separated the two blocks; that most of block 3 and part of No. 14 were bought January 30, 1862, and two lots in No. 14 were bought subsequently; that all the lots except one, when bought, cost over $9,000. Confederate money; the other, about $350, gold; and that all the lots, with improvements, when designated as a homestead, were worth about $3,500, gold, and, without improvements, were worth about $1,500, gold; that all the lots had been used, more or less, for the convenience and purposes of a homestead since 1862; that the brick store-house and the three tenement houses had been rented for residences and business, from time to time, sometimes vacant, but mostly rented; and that the lots had greatly appreciated in value since designated as a homestead.

W. B. Wright, Sawnie Robertson, and W. S. Herndon, for plaintiff.

Lightfoot, Jones & Henry, for defendant.

DUVAL, District Judge. The plaintiff in this case, at the suit of certain of his creditors, was adjudicated a bankrupt by this court in the year 1874, and the defendant, W. G. Cain, appointed the assignee. The bankrupt law of the United States provides that the bankrupt shall be entitled to retain, as exempt from sale for debt, all such property as was so exempted by the constitution and laws of the state in which he resided in the year 1871. By the constitution of the state of Texas, in force in the year 1871, the homestead of a family not to exceed two hundred acres of land in the country, or any city or town lots not to exceed $5,000 in value at the time of their designation as a homestead, and without reference to the value of any improvements thereon, is declared to be exempt from any forced sale for debt.

It appears from the evidence that, under the bankrupt law [of 1867 (14 Stat. 517)], and the provisions of the constitution of Texas, above referred to, the bankrupt claimed as his homestead certain lots or parcels of ground in the city of Paris, state of Texas, containing about one acre in all, and represented by the plat attached to the bankrupt's schedules, as well by the plat attached to the depositions of witnesses read before the jury, and to which they can refer. The assignee, whose duty it was to set apart to the bankrupt all such property as was exempted from forced sale, under the constitution and laws of Texas then in force, believing that the bankrupt claimed more, as his homestead exemption, than he was entitled to, refused to allow the same, but did allow and set apart to him all that he claimed as such homestead exemption except the brick store-house and the ground upon which it is situated, on the northwest corner of block 3, on Lamar avenue, and the three store-houses in said block, and lots containing the same, fronting Clarksville street, 54 feet long by 30 deep. To this action of the assignee the bankrupt filed his exceptions, and thus the matter at issue between them has been brought to this court for adjudication. The bankrupt in this case was a married man, and the head of a family, though without children. The property which he claims as constituting part of his homestead exemption, and which is the subject of controversy between him and the assignee, is embraced in the land which he purchased on the 30th day of January, 1862, from one A. S. Kottwitz.

Under the homestead exemption, as provided for in the constitution of Texas, in force in the year 1871, I have to instruct the jury that it might embrace any number of lots in a city or town, and it does not matter whether they be remote from or contiguous to each other; provided, that they were designed and used for the purpose of a homestead, and that they did not, in the aggregate, exceed the value of $5,000 (irrespective of any improvements thereon) at the time of their designation as such homestead. The limitation is not to the number of lots, but to their value, as being naked and unimproved. Furthermore, that the head of a family had the right, after the homestead had been designated, to increase its value by improvements, and to this end might erect buildings thereon for leasing or renting, without it necessarily having the effect of segregating or separating such portion, so improved, from the homestead, so long as it is actually used and occupied as a part of the homestead, and for the necessary support and comfort of the family. A homestead, once acquired and occupied in a town, may subsequently be added to or increased by the acquisition of other lots until the same reaches the full limit allowed by the law, or, in other words, until all the lots, taken together, without reference to the improvements thereon, do not exceed $5,000 in value. While the constitutional exemption of a city or town homestead may, as I have said, embrace many lots, they must be limited and confined to the homestead in point of fact, and to its uses and purposes as such. They should form and constitute in fact a part of the homestead; otherwise, they are not included in the exemption.

Under these general instructions, it will be for the jury to determine whether or not the lots or parcels of ground claimed by the bankrupt as a portion of his homestead exemption, and not allowed as such by the assignee, form in fact a part of such exemption. Were they designated and actually used by the bankrupt as a homestead, and did they truly form a part of the same? To determine this the jury will consider the uses to which they were applied, and all other facts pertinent to the inquiry, and which may be in evidence before them. If you believe from the testimony that the bankrupt, Thebo, designated the lots in controversy as his homestead in the year 1862 or 1866; and that said lots in fact formed a part of such homestead, and were used by him and his family in carrying on his and their necessary business, and for their support, comfort and maintenance, and that all of said lots, in the aggregate, at the time they were designated, did not exceed in value $5,000, to be estimated and valued by you, from the evidence, without reference to the value of the improvements then or thereafter made thereon, then your verdict must be: "We, the jury, find for the plaintiff." Otherwise, your verdict will be for the defendant.

Case No. 13,876.

THECKER et al. v. MILBURN.

[Hayw. & H. 271.] [1]

Circuit Court, District of Columbia. Oct. 17, 1847.

ACTIONS—CUMULATION—JUSTICE OF PEACE—JURISDICTION.

The holder of several notes, made by the same party, may elect to bring separate action in a justice's court on each note, and the fact that the amount of all the notes combined exceeds the jurisdiction of the justice will not oust the justice of jurisdiction.

Appeal from Henry Reaves, justice of the peace.

[This was an action on promissory notes by Thomas Milburn against James Thecker and James A. Thecker.]

Robert Ould, for appellants.

Mr. Laurence, for appellee.

The Theckers had given two joint promissory notes, bearing the same date, to T. M. Milburn, each note for $36 with interest, one payable in four and the other in six months. After both of the notes had fallen due, a warrant was issued on each, and Milburn obtained judgment on each. The Theckers appealed, on the ground that both notes ought to have been embraced in one suit, and that then the amount would have exceeded the magistrate's jurisdiction.

For the appellee, it was contended that each note constituted a separate cause of action, and that the magistrate was right in giving a separate judgment on each.

THE COURT sustained the appellee's point, and affirmed the magistrate's judgment, with costs.

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

Case No. 13,877.

THELASSON v. CRAMMOND.

[1 Wash. C. C. 319.] [3]

Circuit Court, D. Pennsylvania. (Adjourned) Oct. Term, 1806.

AWARD — REPORT OF REFEREES — EXCEPTIONS — ADDITIONAL FACTS.

When facts to sustain an additional exception to the report of referees, have been discovered, since the period for filing exceptions has passed; the court will allow the additional exception to be filed: although, if no exceptions had been filed in time, the discovery of such circumstances would not induce the court to allow them to be filed.

[Cited in Messenger v. Broom, 1 Pin. 640.]

Upon an affidavit that the defendant had not, until last night, discovered ground for an additional exception to the award; THE COURT permitted him to file it, saying; though the same reason might not have been a sufficient one to sanction the filing of exceptions originally, after the four days, because then the cause might be out of the reach of THE COURT; yet, as the cause is depending, an amendment may be made, where the proper foundation is laid for asking the indulgence.

[See Case No. 13,878.]

Case No. 13,878.

THELLUSON v. SMITH.

[Pet. C. C. 195.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.[2]

UNITED STATES — INSOLVENCY — PREFERENCE — PRIOR JUDGMENTS.

1. Insolvency or inability to pay his debts, by any one who is a debtor to the United States, does not give to the United States a preference, unless the same be accompanied with a voluntary assignment of all the property of the debtor for the benefit of his creditors. Aliter if there be a legal insolvency.

2. The preference given to the United States, in the cases mentioned in the law, supersedes prior judgments upon the estate of the debtor to the United States.

In equity.

WASHINGTON, Circuit Justice. The facts of the case, which the court are now to decide, are as follows: The plaintiffs in this cause, instituted a suit in this court against William

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

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

[2] [Affirmed in 2 Wheat. (15 U. S.) 396.]

Crammond, which, by the agreement of the parties and the order of the court, was referred to arbitrators. An award in favour of the plaintiffs was filed, and a judgment, nisi, entered thereon, on the 20th day of May, 1805. Exceptions to the award were filed within the four days, and were, upon argument, overruled on the 15th of May, 1806. On the 22d of May, 1805, Crammond executed a conveyance of all his estate to trustees, for the benefit of his creditors, at which time he was indebted to the United States, on several duty bonds, which became due at different periods subsequent to the 22d May, 1805. On those bonds, as they became due, suits were instituted, judgments obtained, and executions issued; under which, a landed estate, belonging to Crammond, called "Sedgely," was levied upon and sold. The plaintiffs considering this estate bound by their judgments of the 20th of May, 1805; and themselves entitled to be first satisfied out of the same, brought this suit against the marshal, to compel him to pay over to them the proceeds of said sale, or so much thereof, as might be sufficient to satisfy their judgment. The action being considered by all the parties, as an amicable one, in order to try the question of preference claimed by the plaintiffs and by the United States, a certain agreement was made between the parties in order to facilitate the trial of this question. Upon the trial of the cause, the jury found by their verdict, that William Crammond was insolvent on the 20th of May, 1805, but that it was not notoriously known; subject to the opinion of the court, upon the foregoing statement of facts, agreed to by the parties, whether the plaintiff was entitled to recover. The parties have further agreed in writing, that on the 22d of May, 1805, William Crammond was unable to satisfy all his debts, which fact is to be considered, as part of the special verdict.

Two questions have been made and argued by the counsel. 1st. At what time the judgment nisi, on a report of arbitrators, under an order of court, binds the real estate of the defendant? Whether on the day it is rendered, on the quarto die post, if no exceptions be filed, or on the day when the exceptions were overruled, should that be their fate? If the land is bound, from the time the judgment nisi is entered. The 2d question is, whether the United States, notwithstanding, are not entitled to be paid in preference to the judgment creditor? As the opinion of the court is in favour of the defendant upon the second point, it will not be necessary to give any upon the first; and the court is willing to avoid it, since a contrariety of opinions, seems to prevail upon that subject, and it is agreed that the point has never received a judicial decision. The question, whether the preference given to the United States, shall cut out a judgment creditor, prior to the act on which the right of preference can be claimed, appears to be quite new. It did not occur in either of the cases referred to in the argument. [U. S. v. Fisher] 2 Cranch [6 U. S.] 358; [U. S. v. Hooe] 3 Cranch [7 U. S.] 73. The point decided in those cases was, that a mere state of insolvency, or inability in a public debtor, to pay all his debts, gives no right of preference to the United States; unless it is accompanied by a voluntary assignment of all his property, for the benefit of his creditors. There can be little doubt, but that the word "insolvency," mentioned in the act of 1790 (1 Laws [Folwell's Ed.] 221 [1 Stat. 145]), and repeated in the acts of 1797 (3 Laws [Folwell's Ed.] 423 [1 Stat. 512]) and of 1799 (4 Laws [Folwell's Ed.] 386 [1 Stat. 627]), means a legal insolvency, which, wherever it occurs, will give to the United States this right of preference, as well as in the other specified cases, to which these subsequent laws have extended the cases of insolvency.

In this case, the conveyance by Crammond, on the 22d of May, was of all his property, at which time he was unable to pay all his debts. It is, therefore, a case precisely within the law, and within the principle decided by the above case. But the question still remains to be decided, whether this right of preference, which accrued on the 22d of May, can cut out a prior judgment creditor? To resolve this, the law itself must be referred to. It declares, that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied, and if the assignees of an insolvent debtor shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debts due to the United States, from such person or estate, being first duly satisfied, they shall become answerable for the same, in their own persons and estates. These expressions are as general, as any that could have been used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States, if, in a case of insolvency, they pay any debts previous to those due to the United States. The law makes no exception in favour of prior judgment creditors, and no reason has been, or we think can be shown to justify this court in making one. Exceptions there must necessarily be, as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from a debtor of the United States, to other persons. The United States are to be first satisfied: but then it must be out of the debtor's estate; if, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his property to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a fieri facias, the property is divested out of the debtor, and cannot be made liable to the preference claimed by the United States. The effect of a judgment, is merely to give to the judgment creditor a lien on the debtor's land, and a preference over all subsequent judgment creditors. But the act of congress de-

feats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799.

The court is of opinion, that the law is in favour of the defendant.

The plaintiffs excepted to this charge.

A writ of error was prosecuted to the supreme court, where the decision of the circuit court was affirmed; the opinion here stated having been delivered by Mr. Justice Washington, as the opinion of that court. 2 Wheat. [15 U. S.] 396. See the following cases, on the points decided in this case: U. S. v. Hooe, 3 Cranch [7 U. S.] 73; Harrison v. Sterry, 5 Cranch [9 U. S.] 289; Prince v. Bartlett, 8 Cranch [12 U. S.] 431; M'Clean v. Rankin, 3 Johns. 369; Smith v. Tinker, 2 Day, 236.

THEODORE KORNER, The (KENDEPT v.). See Case No. 7,693.

Case No. 13,879.

The THEODORE PERRY.

[8 Cent. Law J. 191.] [1]

District Court, E. D. Michigan. Feb. 1878.

MARITIME LIENS—STATUTE—REPAIRS—WAIVER—LACHES.

1. Under a state statute declaring that certain vessels "shall be subject to a lien" for repairs, materials, etc., such lien dates from the time the repairs are furnished, and not from the time the vessel is seized.

2. Though a lien for repairs is presumed to be waived by taking a mortgage upon real estate, parol evidence is admissible to show that the mortgage was received as collateral security, and with no intention of waiving the lien.

3. Where a mortgage is received simply as collateral security and not as conditional payment, it does not operate to extend the time for payment of the original debt, notwithstanding the mortgage itself is made payable at a distant day.

4. A lien for repairs furnished in the home port is entitled to be paid in preference to a subsequent mortgage.

[Cited in The Illinois, Case No. 7,005.]

5. A lien for repairs may be enforced, notwithstanding the bond and mortgage given to secure it are not tendered back to the mortgagor, or surrendered in court at the trial.

[Cited in The Allianca, 64 Fed. 873.]

6. The lien of a material man must be promptly enforced as against a subsequent mortgagee, though the claim had not become stale at the time the mortgage was given. Maritime liens are not pronounced stale solely upon the principle of estoppel. The lien holder is bound to diligence in the enforcement of his right, notwithstanding the mortgagee may not have suffered directly by the delay.

[Cited in The General Burnside, 3 Fed. 230; The Robert Gaskin, 9 Fed. 64; The C. N. Johnson, 19 Fed. 785.]

On motion for distribution of proceeds.

The schooner Theodore Perry, having been libeled by a large number of parties, was sold pendente lite, on the 16th day of September, 1875, and the proceeds paid into court. Among these libels were: First, by the Detroit Dry Dock Company, for repairs furnished at Detroit, the home-port of the vessel, in July, 1874, to the amount of $2,738 26. It appears that to secure this claim William Stewart, owner of the schooner, and Hannah Stewart his wife, on the 7th of June, 1875, nearly a year after the claim accrued, executed to the dry dock company a mortgage payable in installments of one, two and three years upon certain real estate in Detroit, belonging to Hannah Stewart, the wife. Accompanying this mortgage was the individual bond of William Stewart for the amount of the bill. Second, a libel of Edward Mayes, for supplies furnished the schooner at her home-port in June, July, August and September, 1874, in the amount of $265 21, for which decree has been entered up. Third, a libel of William Smith, for supplies furnished at the home-port, for which a decree has also been rendered. Fourth, a libel of the Orient Mutual Insurance Company, for premiums upon policies of insurance issued on the first day of August, 1875, the amount due being $351. Fifth, on the 12th of October, 1875, Hugh Coyne filed his petition, praying payment from the proceeds of the sale of the vessel of a certain mortgage of indemnity executed to him on the 4th day of October, 1875, upon which there is due about $3,455, amounts which Coyne had been compelled to pay by reason of indorsements for Stewart.

J. J. Speed and D. B. Duffield, for Dry Dock Company.

L. S. Trowbridge, for Mayes.

Mr. Atkinson, for Orient Mutual Insurance Company.

F. H. Canfield, for mortgagee.

BROWN, District Judge. Most of the questions relative to admiralty jurisdiction and the marshaling of liens, have been so frequently discussed, and the conclusions reached so diametrically opposed to each other, that I feel reluctant to add another to the mass of adjudications which have served hitherto less to settle the law than to impair, in the minds of the profession, the value of all judicial precedents. As two lawyers can rarely be found to agree upon questions touching at all upon admiralty jurisdiction, it is hopeless for an inferior court to attempt to establish a precedent; it can only follow, as nearly as possible, the latest adjudications of the supreme court, decreeing whatever seems just in the particular case.

The first and most important question at issue relates to the relative priority of the claim of the Detroit Dry Dock Company and the mortgage of Hugh Coyne. A lien enforceable in this court is claimed to exist in favor of the dry dock company, by virtue of section 6648 of the compiled laws of this state, which enacts that "every water craft

[1] [Reprinted by permission.]

above five tons burthen, used or intended to be used in navigating the waters of this state, shall be subject to a lien thereon; first, for all debts contracted by the owner or part owner, master, clerk, agent, or steward on such craft, on account of supplies and provisions furnished for the use of said water craft * * * on account of work done or materials furnished by mechanics, tradesmen or others, in or about the building, repairing, fitting, furnishing or equipping such craft. It seems now to be settled by the supreme court, in the late case of The Lotawana, 21 Wall. [88 U. S.] 579, that liens created by state laws for necessaries, which by the law maritime are cognizable in personam, may be enforced in the admiralty courts. As observed by the supreme court in that case, "it seems to be settled in our jurisprudence, that so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port, may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract; and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. * * * But the district courts of the United States, having jurisdiction of the contract as a maritime one, only enforce liens given for its security even when created by the state laws."

Although the point was not made upon the argument, I see no reason to doubt that the lien created by this act attaches when the supplies are furnished. In the case of Germain v. The Indiana, 11 Ill. 535, it was held that, under the water craft law of Illinois, which provided that the vessel "should be liable for all debts," &c., "and that no creditor should be allowed to enforce the lien created under provisions of this chapter, unless," &c., that the act created a lien which attached the moment the liability was incurred. A different construction was given to the act of 1857 [Laws (Ill.) 1857, p. 52], in the case of Williamson v. Hogan, 46 Ill. 518, and The Montauk v. Walker, 47 Ill. 335. But these cases were expressly overruled by that of The Great West, No. 2, 57 Ill. 168, in which the court held, under a similar statute, that the lien was created by force of the statute, and not by virtue of the levy and seizure upon the attachment. Under the former water craft law of this state which provided that the vessel "should be liable," &c., it was held in the case of Robinson v. The Red Jacket, 1 Mich. 171, that no lien was created until attachment. Following the case of The Huron v. Simmons, 11 Ohio, 458, and Jones v. The Commerce, 14 Ohio, 408, that a lien was created by the Wisconsin statute was decided in the case of McRoberts v. The Henry Clay, 17 Wis. 101, and by the New York statute in the case of Veltman v. Thompson, 3 N. Y. 438. This latter statute provided that whenever a debt amounting to fifty dollars or upwards should be contracted in the manner therein specified, such debt should be a lien. I think a distinction may be taken between cases where the statute declares the vessel "shall be liable" and those which declare they "shall be subject to a lien." In the one class the lien may be properly said to arise from the seizure, in the other from the contract itself. I see no reason in this case why a lien did not arise in favor of the dry dock company from the time the repairs were put upon the schooner, which it was at liberty to enforce, at any time, by proper proceedings in this court.

It is not disputed that the mortgage to Coyne, recorded under the act of congress, also created a lien, notwithstanding it was a mortgage of indemnity. But it is insisted that Coyne had notice of the claim of the dry dock company, and that its lien as against him was not waived, and did not become stale by its failure to institute proceedings within the year provided by section 6690. The testimony on this point is somewhat conflicting, but I think there is sufficient to show that Coyne is chargeable with notice of the claim of the dry dock company. He admits himself, that he was informed by Stewart sometime during the summer preceding his mortgage, that the dry dock company had repaired his vessel, and that its claim was unpaid. Stewart himself swears specifically that Coyne knew of the claim; that he told him of it as soon as the repairs had been put upon the vessel; that he thought the bill was high, and had frequently talked it over with him; that he told him the amount was thirty-three hundred dollars, and that he mentioned the matter to him two or three times, once in Mr. Parson's office. I see no reason to discredit this testimony. Indeed, I can hardly believe that Coyne, occupying the somewhat confidential relation of endorser to Stewart, and depending upon this vessel for his security, should not have had knowledge of this incumbrance, and taken his mortgage in contemplation of it. I must hold, therefore, that he is chargeable with notice, and does not stand in the position of a bona fide purchaser.

Was the lien of the dry dock company waived by taking the mortgage of June 7th, 1875, from William and Hannah Stewart, upon the real estate of the latter, together with the bond of William Stewart for the payment of his claim? While, without explanation, a waiver might be presumed from taking a distinct collateral security, it was held by the circuit judge in the Case of Hurst [Case No. 6,925], that the

question of payment (and consequently of waiver) was always one of intent; and in a case where a resolution of composition had been adopted by which the creditors agreed to accept the sum of twenty cents on the dollar, "in full satisfaction and discharge," it might be explained by showing that the notes provided for were not intended to be received in payment or satisfaction of the original claim. A large number of authorities are cited in the opinion, not necessary here to be repeated. The testimony upon this point shows clearly that as between the dry dock company and Stewart, no waiver of its claim against the vessel was intended by taking the mortgage upon the real estate. Not only does Mr. Stewart admit it, but Mr. Toms, the attorney for the dry dock company, who drew the mortgage, and Mr. McVittie, the secretary of the company, swear unequivocally that it was taken as collateral. Being taken then simply as collateral security, and not as conditional payment, it does not even extend the time for payment of the original debt for the one, two, and three years provided by the mortgage. U. S. v. Hodge, 5 How. [46 U. S.] 282; The Maggie Jones [Case No. 8,947]; Austin v. Curtis, 31 Vt. 64.

Under the facts exhibited in this case, which is entitled to priority of payment, the material man for the repairs furnished in the home-port, or the mortgagee? As a general rule, I should say without hesitation, the material man should rank a subsequent mortgagee. He has put repairs upon the ship which have largely added to its value in the hands of the mortgagee, and it is no more than just that the latter should take it with the burden thus imposed upon it. Indeed, if the material man has any lien at all, it would be grossly unjust to permit it to be defeated by a mortgage placed upon the ship the next day, possibly for the very purpose of preferring some other creditor and defrauding him. Again, the work done by him either adds to the value of the vessel, or puts her in a condition for the work she is about to engage in, while the mortgage may be given for a consideration wholly unconnected with the vessel. In this light I regard the lien as, prima facie, much more meritorious than the mortgage. I lay no stress whatever upon the fact that the lien is created by the state law, while the mortgage is recorded under the act of congress. Mortgages upon vessels were valid long before the recording act was passed, although filed under state laws. The act was not designed to add a particle to their value as security, except so far as it might incidentally do so in providing a convenient place for recording them, and making the record notice to subsequent purchasers and incumbrancers. The case of White's Bank v. Smith, 7 Wall. [74 U. S.] 646, merely held that a mortgage recorded under the act of congress was notice to subsequent purchasers, though not filed or recorded under the state law, making all mortgages of chattels constructive notice only when recorded in the town in which the mortgagor resided. This view of the relative priority of the material man and mortgagee was apparently taken by the learned judge of the Western district, in the case of The St. Joseph [Case No. 12,229], and again in The Alice Getty [Id. 193], in which he held that material men, having liens by local laws, have priority even over prior mortgagees. Although a different view was taken by Judges Drummond and Blodgett in the cases of The Grace Greenwood [Id. 5,652], The Skylark [Id. 12,928], and The Kate Hinchman [Cases Nos. 7,620, 7,621], there is nothing in these opinions which necessarily conflicts with the position here assumed, as the mortgages in all these cases were prior in date to the lien of the material men. In Scott's Cases [Case No. 12,522], the mortgages also ranked the lien of the material man in point of time, and were accorded priority solely upon that ground. But whatever be the rule in the Seventh circuit, I think a decided preponderance of authority accords a preference to a domestic material man, at least as against a subsequent mortgagee. See The Wm. T. Graves [Id. 17,758], decided by Wallace, J.; The Bradich Johnson [Id. 1,770]; The Alice Getty [supra]; Francis v. The Harrison [Case No. 5,038]; The Granite State [Id. 5,687]; Donnell v. The Starlight, 103 Mass. 227; The Norfolk, Case No. 10,297. The law of this state, under which the material man is entitled to a lien, in express terms accords him priority over mortgages both prior and subsequent. Com. Laws, §§ 6678, 6679. I hold, therefore, the lien of the dry dock company is entitled to rank that of the mortgagee.

Further objection is made by the counsel for the mortgagee, that the lien in this case cannot be enforced because the bond and mortgage have not been surrendered or delivered up by the libelants or tendered in court. Relying upon the cases of The St. Lawrence, 1 Black [66 U. S.] 532; Andrews v. Wall, 3 How. [44 U. S.] 573; Ramsey v. Allegre, 12 Wheat. [25 U. S.] 611; and The Eclipse [Case No. 4,268],—where a promissory note has been given for a claim, which is also a lien, and the maker of the note insists upon the objection, undoubtedly the court should require the note to be surrendered before the lien is enforced, for otherwise the maker might be compelled to pay it again to the innocent holder. But I apprehend this rule does not apply where the security given is collateral and the objection is not taken by the owner or the person who gives the security. It is entirely immaterial, so far as this mortgagee is concerned, whether this security be surrendered or not; he cannot be prejudiced by its remaining outstanding, and I think he has no right to insist upon its cancellation.

The claim of Edward Mayes accrued shortly before the mortgage was given. The answer of the mortgagee denies notice of it, and this is conceded by libelant. It is insisted, however, that the claim has not become stale as against the mortgagee, inasmuch as it had not become stale when the mortgage was given, and there having been no change in the relative situation of the parties up to the time of filing the libel, the mortgagee has not been injured by the delay. The argument proceeds upon the very ingenious theory that courts pronounce claims stale solely upon the principle of estoppel. If A. unreasonably sleeps upon his rights; if he is silent when he ought to speak; if he is inactive when he ought to do something to assert his rights, and thereby B. is induced to act as if no such right existed, and in ignorance of it, A. is estopped to assert his rights to the prejudice or injury of B. If that position is correct, then it follows irresistibly that the laches or neglect of the lien-holder must have occurred before the rights of the party claiming the estoppel have become fixed; in other words, if the claim is not stale by reason of the lien-holder's delay, at the time the mortgagee acquires his rights, no subsequent delay can make it stale. There is certainly much to be said in support of this theory. I had occasion myself to urge the same argument in the case of The Detroit [Case No. 3,832]. In this case a claim for towage accrued in May and June, 1865, while the vessel was in the hands of a person who had contracted to purchase her. Having failed to fulfill his contract, she was returned to the owner, who took her to Canada within a month or two after the services were rendered, where she remained until June 27th of the following year. She was then resold to a bona fide purchaser, without notice, who at once brought her within the jurisdiction of the court and kept her during the remainder of the summer. On October 6th a libel was filed and the vessel attached. It was strongly insisted upon the argument, page 142,[1] that so far as that question was concerned, the case stood precisely as if the libel had been filed on the day she was brought over from Canada, as no change of circumstances took place from that time to the day of filing the libel. Without passing directly upon the question, the court observed that "the libelant was bound to know when she was brought over, as he could have learned it by observation or inquiry; yet he allowed the months of July, August and September to elapse without taking a step to enforce his claim. I think it was incumbent upon libelant to keep a careful watch upon her movements, to notify the purchaser of his claim as soon as she was sold, and to proceed to enforce his lien as soon as she was brought within the jurisdiction of the court. He was bound to know that this vessel was as likely to change hands as any other, and should have used due diligence to ascertain when she was transferred to Alger, and to have given him speedy notice of his claim, in order that he might lose no opportunity of protecting himself against it. Instead of this, he allowed the three busiest months of the season to elapse without making known its existence. I think these facts warrant the presumption that the lien was waived." These remarks furnish a very strong inference that the learned justice did not consider the position a sound one, as he seems to have taken it for granted the claim would not have been stale if libelant had attached the vessel the moment she was brought over from Canada, but that his lien was waived by the subsequent delay of three months.

It is apparently conceded in the argument in this case that if, in the meantime, the mortgagee had given up any securities, or had been in any way placed in a worse position, this might be a complete answer, but that the burden of proving this was upon him. It might not always be easy to prove this; for example, suppose a vessel worth twenty thousand dollars incumbered, first by the claim of a material man to the extent of ten thousand dollars, and secondly, by a mortgage of the same amount put upon her a month afterwards. By arrangement between the material man and the owner the credit is extended, and the lien kept alive for five years; and although no positive change of circumstances may have taken place, except such as are inherent in the property, and which might be difficult to prove, the vessel has graudually depreciated to one-half its former value, perhaps the mortgagee may have postponed a foreclosure upon the very theory that, although the property was greatly depreciated, older claims had been paid off, and thus his security kept up to its full value; yet it might be very difficult to prove that such depreciation had taken place. In the case under consideration, in all probability the schooner has depreciated more than the amount of Mayes' bill, so that the mortgagee is in fact a loser by his failure to enforce it at the opening of navigation, and yet it would be utterly impossible to show such depreciation in dollars and cents. In the case of The Hercules [Case No. 6,400] it was held by this court that where a claim accrued in the summer, and the vessel changed hands the following January, the claim should be enforced as soon as possible after the opening of navigation, and the libel, being filed in September, the claim was held to be stale, although it did not appear distinctly or clearly that the purchaser had been injured by any delay occurring after the first of June. I think he may rest upon the assurance that tacit liens must be enforced during the current season, or as soon as possible after the commencement of the next season, and is not bound

to show that he has actually suffered injury by a delay after that time. His position seems analogous to that of an indorser. The question of injury might be a very delicate one, and might impose upon him a burden which he ought not to be obliged to assume. For these reasons, I deem it safer to adhere to the generally received doctrine upon the subject of stale claims—that as against innocent parties they must be promptly enforced. Within this ruling the libel of Mayes has become stale as against the mortgagee.

For the same reason the claim of Smith has also become stale. So far as the case of the insurance company is concerned, it is practically determined by the ruling in the case of The Dolphin [Cases Nos. 3,973, 3,974].

Case No. 13,880.

The THEODORE PERRY.

[24 Int. Rev. Rec. 54.]

District Court, E. D. Michigan. 1878.

SEAMEN—WAGES—SHIPPING ARTICLES—DESERTION.

Shipping articles signed after the vessel has left her port of departure are not binding upon the seaman, and he may leave the vessel at any time without incurring the penalties of desertion.

Libellant shipped on board the Theodore Perry for a voyage from Detroit to Ossineke, Mich., thence to Tonawanda, N. Y., and back to Detroit. Shipping articles were signed in St. Clair river, the day after the departure of the schooner on her trip to Ossineke. On her way from Ossineke to Tonawanda she stopped at Detroit for repairs, when libellant left the vessel and commenced this suit for wages. It seems that libellant contracted a cold and rheumatism while on board the vessel, but he did not allege this as an excuse for leaving.

J. W. Finney, for libellant.
F. H. Canfield, for claimant.

BROWN, District Judge. This case turns upon the validity of the shipping articles signed by libellant the day after the vessel left Detroit. Rev. St. § 4520, requires "every master of any vessel of the burthen of 50 tons or upward, bound from a port in one state to a port in any other than an adjoining state, * * * before he proceeds on such voyage to make an agreement in writing or in print with every seaman," etc. Section 4521 provides that "if any master * * * shall carry out any seaman or mariner * * * without such contract or agreement being first made and signed by the seaman, such master shall pay to every such seaman the highest price or wages which shall have been given at the port or place where such seaman was shipped, for a similar voyage, within three months next before the time of such shipping," and shall also incur a penalty. Section 4523 pronounces all shipments of seamen made contrary to the provisions of any act of congress void. "And any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages at the port from which the seaman was shipped, or the sum agreed to be given him at his shipment." That the provisions of the law requiring shipping articles applies to lake navigation, was held, doubtless correctly, in Wolverton v. Lacey [Case No. 17,932]. Such, too, has been the practical construction of the law by the shipmasters themselves. It is insisted, however, by the claimant, that conceding the shipping articles should be signed before leaving port, the parties waive this requirement by afterward signing them; and that they become obligatory upon the seamen from this time. There is no room for such construction. The statute is explicit. The articles must be signed before leaving the port of departure, and if not so signed the shipment is void by the express language of section 4523. The object of requiring shipping articles is, primarily, to prevent imposition upon seamen, and disputes between them and the master. Indeed, title 53 of the Revised Statutes is filled with provisions designed to protect the seaman against the master, and even against himself; and courts in the construction of shipping articles lean constantly in favor of the seaman. "The courts interfere to protect seamen against loose and indefinite language or unfair or new and unusual stipulations; and wherever there is a doubt as to their meaning or obligation, the seaman has the benefit of the doubt." 2 Pars. Shipp. 35. Courts of admiralty do not allow force to any clauses lessening the right of seamen to their wages; "nor do they give any effect to the receipt of a sailor for his wages, whether sealed or parol, unless there was an actual payment of them." 2 Pars. Shipp. 40, 41. The well established rule of common law, viz.: That a written instrument cannot be varied by parol has been abrogated with regard to seamen (The Cypress [Case No. 3,530]), though remaining in full force as against the ship owner (The Triton [Id. 14,181]; The Exchange [Id. 4,594]). Under the English statutes the seaman may prove the contents of the shipping articles without producing, or giving notice to produce them, and any erasure or alteration therein not proved to have been made with the consent of all parties and before a public officer, is wholly inoperative. Macl. Shipp. 202. If the articles are signed under duress they are invalid. Mayshew v. Terry [Case No. 9,361]; Stratton v. Babbage [Id. 13,527]; 2 Pars. Shipp. 36. The tenor of these provisions and rulings exhibits the extreme jealousy with which the rights of seamen are guarded by the legisla-

tures and the courts. Congress has recently added other restrictions upon the shipment of seamen upon sea-going vessels, by providing that the articles shall be signed in every case before a shipping commissioner. To authorize a master to withhold the signing of the articles until the vessel has put to sea would enable him to impose upon the seaman as great a duress as if his signature were coerced by actual physical violence. From the time the vessel breaks ground the seaman is absolutely at the disposal of the master, and no redress can be had against him until the arrival of the vessel at the next port. If, for instance, the master of a transatlantic vessel may postpone signing the articles until after the vessel has passed Sandy Hook, he may, with equal reason, defer it until she has reached the English channel, and thus defeat the whole purpose of the statute. To permit the master, under these circumstances, to show that the articles were signed voluntarily and understandingly, and without undue influence, would be putting in his hands a weapon against which the sailor would be powerless to defend himself. Whenever a seaman is shipped, he is entitled to know at once the terms of his engagement, that he may exercise his option of leaving the vessel before she weighs anchor. While there is not the slightest imputation upon the master in this case, and while it frequently happens upon the lakes that the articles are not signed until after the vessel has left the port of departure, I feel compelled to hold that articles so signed have no binding effect upon the seaman. Whether they are not obligatory upon the master it is unnecessary here to determine.. See Macl. Shipp. 203. The fact that at the time the articles were signed the vessel was bound, primarily, to a port in the same state, is of no consequence; the voyage was entire—to Ossineke, Tonawanda, and back, and that voyage had been commenced.

There must be a decree for libellant for the rate of wages agreed to be given him at the time of the shipment; but as he recovers upon a mere technicality, and his conduct in leaving was such as to amount to desertion if the articles had been duly executed; and as the master seems to have acted fairly, I think costs should not be given with the decree. It is true that libellant was sick with a cold and with rheumatism at the time he abandoned the vessel, but, conceding that sickness was a sufficient excuse for leaving, of which there may be some doubt, he did not claim the right to leave on that account, but abandoned the vessel suddenly and without assigning a reason, or even demanding his wages.

THEODOR HEINRICH, The (JANSEN v.). See Case No. 7,215.

THEUS, Ex parte. See Case No. 5,420.

Case No. 13,881.

THIBAULT et al. v. DE BASAVILBASO.

[Baldw. 9.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1828.

ACTIONS — ELECTION — CONTRACT — TORT — INSOLVENCY—DISCHARGE—ESTOPPEL.

The plaintiff sold to the defendant certain goods in Philadelphia, and at the same time delivered to him other goods to be disposed of at Havanna, on account of the plaintiff. The defendant took all the goods to Havanna and there pledged them as a security for money advanced to him; on his return to Philadelphia, this suit was commenced against him. This action was on the case, but no declaration was filed. So it stood when a judgment was entered generally; afterwards, by an agreement between the parties, the judgment was confessed on the record to be for a certain sum, and notes were taken for the amount, payable at distant periods, and execution stayed accordingly. After these arrangements were made, the defendant was duly discharged by the insolvent laws of Pennsylvania, and after his discharge, the plaintiff filed his declaration in the above suit in trover, and charged the defendant with a tortious conversion to his own use, of the goods in both invoices; the alleged tort was the pledging of the goods at Havanna. If on these facts the plaintiff had originally an election to bring his suit on the contracts or for a tort, yet as it clearly appears by the whole course of proceeding that he had proceeded upon the contracts, he cannot, by filing under these circumstances a declaration in trover, turn his suit into one for a tort. The contract and promises having been made in Philadelphia, by persons resident here, and to be executed here, the rule for the exoneretur was made absolute.

Sur rule to show cause why an exoneretur should not be entered on the bail piece; the defendant [P. De Basavilbaso] having been discharged by the insolvent laws of Pennsylvania.

BY THE COURT. On the 29th of March, 1828, the plaintiffs [Thibault & Bros.] sold to the defendant a quantity of jewellery amounting to 3,172 dollars, and on the same day delivered to him other jewellery to the amount of 2,160 dollars, which by an entry on the plaintiffs' books are declared to be "goods sent by Mr. Basavilbaso to be sold for Thibault & Bros., or to be returned, if they are not sold for the invoice prices; Mr. Basavilbaso to pay all expenses, and run all risks, for the profits arising from the same, over and above the invoice price."

On the 1st of April following, the plaintiffs received from the defendant a draft and note amounting together to 3,172 dollars, and in the receipt given for them they agree, that should any part of the jewellery, per invoice of the same date, be returned to them within six months, in like good order, to receive the same on account of the above mentioned draft and note; all the goods thus obtained from the plaintiff, that is the invoice of 2,160 dollars as well as that of 3,172 dollars were shipped to Havanna by Vezin & Von Lon-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

gerke, merchants of this city, consigned to the defendant, by whom the insurance and all other expenses were paid; he probably went in the same vessel with the goods to Havanna, where he received the jewellery, and deposited both invoices into the hands of Messrs. A. Morales & Co., merchants of Havanna, as security for 2,000 dollars advanced to him on account of the said jewellery. On the 7th of October, 1828, the defendant having retu ned, this suit was brought against him, generally, in case, and bail demanded in the sum of 5,000 dollars, but no declaration was filed. On the 22d of December, 1828, an agreement was signed by the plaintiffs' attorney, and by the defendant confessing judgment for the sum of 1,700 dollars to be paid by equal instalments, in one, two and three years, execution to be stayed accordingly, and the judgment was entered on the same day conformably to the agreement, no declaration being yet filed. This sum of 1,700 dollars is the balance stated to be due from defendant to plaintiffs on an account which is dated on the same 22d of December: and on the same day the plaintiffs gave a receipt to the defendant, for three notes bearing date at Philadelphia, on the 20th day of December, 1828, and payable severally in one, two and three years, and declared to be "for balance of 1,700 dollars due them on account." As these notes bear a date two days antecedent to that of the account on which this balance is struck, they must either have been antedated, or the amount must have been settled by the parties before the account was actually stated in form. They are, however, expressly declared to be for the "balance due them on account," and however we may connect them with the judgment, whether the judgment was given to secure them, as the defendant asserts, or they were a means of obtaining satisfaction of the judgment, as the plaintiffs contend, still we cannot doubt that the sum or debt for which both the judgment and the notes were given, was the balance of 1,700 dollars, settled by the parties in the account of 22d December, 1828; the dates are the same; and where was this sum of 1,700 dollars, mentioned in the judgment, in the notes and in the receipt given for the notes, found and ascertained to be the amount of the debt due to the plaintiffs, unless in the account settled on the 22d of December, 1828?

On 31st March, 1829, three months after these arrangements were completed, the plaintiffs paid to Morales & Co. the money, with additional charges, amounting together to 2,400 dollars, for which the jewellery had been pledged by defendant; and by referring to the account of 22d of December, it will be seen that a credit is allowed to the defendant, of 4,200 dollars, amount of jewellery at Havanna, and a charge is made against him for the money which had been advanced to him on the jewellery by Morales & Co., with the expenses; by which it is evident that on the settlement made on the 22d December, the plaintiffs assumed the debt due from defendant to Morales & Co., and that the whole goods deposited by defendant, as well those which were absolutely purchased of the plaintiffs as those which were sent to be sold under the agreement mentioned, were passed to the plaintiffs.

All matters having been thus arranged between the parties, the balance due to the plaintiffs ascertained, notes given for the payment of it, and a judgment entered on the suit according to their agreement and in conformity with the notes; the formality of filing a declaration, which surely was incumbent upon the plaintiffs, and of course the neglect was theirs, had never been attended to. On 29th October, the defendant having complied with the requisitions of the law, was duly discharged as an insolvent debtor, by the court of common pleas of Philadelphia county. On November 13, 1829, the plaintiffs' attorney filed his declaration, in which he charges the defendant, as his cause of action in this suit, with having converted and disposed of the jewellery contained in both invoices, to his own use; and the action which until this time, nearly eleven months after the judgment, had stood on the docket with the equivocal description of an action on the case, now assumes the character of an action of trover, for a tortious use or conversion of the property of the plaintiffs at Havanna, in the island of Cuba.

All the contracts between these parties, in relation of these goods, were made at Philadelphia, some before the goods were shipped and some after return of defendant to this country; and, of course, if the judgment, which is now the debt of the defendant to the plaintiffs, is to be considered as a judgment rendered in an action of assumpsit, or on the contract and promises between the parties, the discharge by the insolvent laws of the state will operate upon it; but if the transactions at Havanna must be taken as the ground of the suit and its judgment, a different result would follow; and the discharge of the defendant will not avail him against it. Whether by the peculiar agreement under which the jewellery contained in the invoice of 2,160 dollars was delivered to the defendant, to be taken to Havanna entirely at his expense, and at his risk—to be indeed at his risk after their arrival at Havanna, whether sold or not sold, with a full right to all the profits that might be made on them above the invoice price, whether such an agreement did not place these goods entirely at the disposal of the defendant, he being always accountable for the invoice price—or, at least, whether they were not placed so indefinitely in his power, that the use he made of them in common with his own, could not be considered to be a wrongful disposal of them, a tortious unauthorized conversion of them to his own use, and make him responsible in an action

of trover, I do not find it necessary to decide. If on the whole transaction the plaintiffs had an election to proceed against the defendant on their contract, or on the tort, by assumpsit or in trover, and I am well satisfied, that, in point of fact, it clearly appears they made their election, that they did bring their suit and enter their judgment on the promises and not on the wrong; it cannot be permitted to them to undo what they have so solemnly done, on an unexpected turn of events, to give a new character to all their proceedings; to throw up as nugatory, the settlement deliberately made with the defendant—the notes received from him in payment of the amount agreed to be due, which have no possible reference to or connection with any wrong, but a clear and direct connection with the settled account, and to set up a claim for damages arising from a tort committed at Havanna—to allege that the judgment rendered, in an evident connection with the above mentioned account and notes, was in truth a judgment confessed for damages for the alleged wrong at Havanna.

The whole proceeding and documents show, beyond the reach of doubt, that the judgment was given for an amount found due on the whole dealings between the parties, comprehending not only the goods said to have been converted, but those also which were absolutely sold to the defendant and subject wholly to his disposition, and even other articles not found in either of the invoices now in controversy. I cannot raise a question that this judgment was taken on this settlement of all matters between the parties, and cannot be applied to the wrong said to have been committed by defendant with the goods which form but a part of the account settled; and if as to those goods the plaintiffs can have a right of action in trover, it was merged or surrendered on their subsequent dealings and agreements with the defendant. By those they consented to take back to themselves the property they allege had been illegally converted by defendant to his own use: and further, to charge themselves with the payment of the money he had taken up on them; they have assumed the debt due by the defendant to Morales & Co., and they have in consideration of this obtained a right to receive from Morales & Co., not only the goods which they say belong to them, but a larger amount of other goods to which they had no claim. They have adopted the whole transaction between the defendant and Morales & Co., and this arrangement was afterwards fully completed and carried into effect, by their paying the amount due to Morales & Co., and receiving from them all the goods deposited by the defendant Their right of recovery in an action of trover was limited to the amount of the invoice of 2,160 dollars; but they have received in consequence of their agreement or compromise with the defendant the sum of 4,200 dollars, and still retain it; can they be permitted to have the whole benefit of this arrangement and afterwards to repudiate a part of it? May they now affirm the part which has been so beneficial to them, and reject the rest? Their debt or claim upon the defendant, under both invoices, was 5,332 dollars. This they have fortunately reduced to 1,700 dollars by the voluntary delivery to them by the defendant of goods to which they do not and cannot pretend a claim, and shall they now keep these goods and reject the agreement on the faith of which they obtained them? Was this the understanding of the parties, or any of them, when the arrangement was made and the judgment confessed? If this were intended to be a judgment in an action of trover, for the wrongful conversion of goods of the value of 2,160 dollars, how were the damages put at 1,700 dollars, and who can say that this amount is due on the invoice of the goods actually sold, or on that of the goods sent to be sold for the plaintiffs? It is undoubted that the goods said to have been converted have actually been returned to the plaintiffs; and although they did pay upwards of 2,000 dollars to obtain them, yet they also obtained other goods of a greater value than all they paid.

Being entirely satisfied that the judgment entered in this case, and against which the bail in the action seeks to be relieved by reason of the discharge of the defendant under the insolvent laws of this state, is a judgment confessed and rendered on assumpsit, or contracts and promises made at Philadelphia, and not in a foreign state, I direct that the rule for an exoneretur be made absolute.

Case No. 13,882.

In re THIELL.

[4 Biss. 241.] [1]

District Court, D. Indiana. July, 1868.

BANKRUPTCY—EXEMPTIONS—DISCRETIONARY POWER—EXCEPTIONS.

1. When a bankrupt applies to his assignee for the exemption of property under the fourteenth section of the act [of 1867 (14 Stat. 522)] and the application is refused, the proper way of bringing the matter before the district judge for his decision, is to except to the decision of the assignee.

2. The exemption clause in the fourteenth section of the act, authorizing the assignee to set apart "other articles and necessaries," vests a discretionary power in the assignee, and his action thereon ought not to be reversed unless it plainly appears that he has abused his authority.

[Cited in Re Steele, Case No. 13,346.]

[Cited in McClung v. Stewart, 12 Or. 431, 8 Pac. 448.]

3. Such exemptions, however, cannot include manufactured articles kept for sale.

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

[In the matter of W. H. Thiell, a bankrupt.]

McDONALD, District Judge. This matter comes before me on a certificate of a register in bankruptcy under the sixth section of the bankrupt law. The certificate states that "the assignee, Samuel C. Davis, having, under the five-hundred-dollar exemption clause, set off to the bankrupt the sum of three hundred and sixty-three dollars and fifty-three cents, which includes household and kitchen furniture, and tools of trade, with some other items, the counsel for the petitioner claims that the assignee should make up the sum of five hundred dollars out of the stock on hand of the petitioner, he being a tinner, and having been engaged in the tin and stove business, and the stock consisting of such articles as are used and sold in that business. This the assignee would be willing to do, but that he conceives the language of section fourteen leaves him no discretion. The words, 'other articles and necessaries,' he holds cannot extend to articles held on sale. To this action of the assignee counsel for the petitioner objects." It is presumed that by the term "petitioner," in this certificate, the register means the bankrupt, though, so far as concerns the papers before me, no petition appears to have been filed.

In cases like the present the fourteenth section of the bankrupt act provides, that "the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court." There is here no formal exception taken to the ruling of the assignee; and the case can hardly be said to be regularly before me. Nevertheless, it may be as well perhaps that I should express an opinion on the disputed point in the form in which it is presented.

So far as the question presented is concerned, the fourteenth section of the act provides that "there shall be excepted from the operation of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart, having reference, in the amount, to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars."

I construe this provision of the act, so far as it relates to "necessary household and kitchen furniture," as being imperative on the assignee, though he must judge and determine what furniture of the kind described is, under the circumstances, necessary.

So far as concerns the phrase "other articles and necessaries," in the act, I think that congress meant to leave it to the sound discretion of every assignee in bankruptcy to determine what and how much property of this kind, over and above necessary household and kitchen furniture, and not to exceed in all five hundred dollars, ought, under the circumstances of each particular case, to be exempted from the operation of the bankrupt law. The term "necessaries" used in the phrase last cited, may include things other than household and kitchen furniture. It may, for example, include provisions for a family, and the tools of a tradesman, and the books of a professional man.

The phrase "other articles" occurring in the fourteenth section of the act is a very indefinite expression. It might include family pictures, "keep-sakes," a cheap watch or clock, and many other things of small value; but it certainly should not be construed as including things of considerable value, used only as things of ornament or pleasure, as gold watches, pianos, and the like. Whether it may fairly be construed as including material for carrying on a trade, may be doubtful; though I think cases might exist in which a moderate quantity of such material would be fairly comprehended under the term "other articles." I am of opinion that it would not include manufactured articles kept for sale. I think, therefore, that in this case, the assignee acted properly in refusing to set off to the bankrupt the tin ware which he had on hand for sale. Whether, in refusing to allow him to retain any of the material out of which he manufactured tin ware for sale, the assignee acted with sound discretion, is not quite so clear. But he had a better opportunity, from a reference "to the family, condition, and circumstances of the bankrupt," to judge what was proper in the case, than I, who am altogether uninformed touching these matters, could have. Therefore, I cannot undertake to say that he did not exercise a sound discretion in refusing to allow the exemption prayed by the bankrupt.

According to what has been said, this authority on the part of the assignee in bankruptcy to exempt in favor of a bankrupt "other articles and necessaries," is a discretionary power. Now, it is a rule that when a discretionary power is confided to an inferior officer or court, the action on such a power will not be reversed, unless it plainly appear that the discretionary power has been abused. Gordon v. Spencer, 2 Blackf. 286; Heberd v. Myers, 5 Blackf. 94; Tinkler v. Palin, 19 Blackf. 240; Hunter v. Elliott, 27 Blackf. 93. Indeed, the supreme court of the United States has gone further and held that the execution of a discretionary power cannot be reviewed in a court of errors. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. The bankrupt act does, however, authorize this court to review, and, in proper cases, to revise, the action of an assignee in the exercise of the discretionary power under consideration. But in determining what this court shall do in such a case, I think the question should always be, has the assignee plainly abused the discretionary power confided to him?

And if it does not appear that he has, his action should be affirmed.

In this view of the matter, I sustain the action of the assignee.

NOTE. Where the assignee wrongfully exempts in his list, household furniture, necessary articles, etc., exceptions must be taken to his report. In re Gainey [Case No. 5,181].

But in cases of exempting real estate unlawfully, no exceptions need be taken to the assignee's report, as no title passes thereby, but the creditors may except to the assignee's account, and hold him responsible for the value of the exempted property. Id.; In re Farish [Case No. 4,647]; and In re Jackson [Id. 7,127].

Case No. 13,883.

THIELMAN v. REYNOLDS.

[Syllabi, 4.]

Circuit Court, D. Minnesota. 1876.

ESTOPPEL—ELECTION OF REMEDIES—ACTION FOR CONVERSION—RESCISSION OF CONTRACT.

[1. Plaintiff held the warehouse certificate of H. & Co. for a special deposit of spring wheat, but, on demanding the same, was informed that they had sold it to defendant. H. & Co. then agreed to pay plaintiff $1.10 per bushel for the wheat, made a part payment in cash, and for the remainder gave him a bill of sale of a bin of winter wheat then in their warehouse. Shortly afterwards they informed him that the winter wheat did not belong to them, but was purchased with defendant's money, and they were merely his agents. Thereupon plaintiff brought replevin against H. & Co. for the winter wheat, but defendant was admitted as a party, and found to be the owner thereof. Plaintiff then sued defendant for conversion of his spring wheat. *Held*, that the doctrine of estoppel by election of remedies did not apply, for plaintiff's agreement with H. & Co. to take the winter wheat in part payment implied a warranty of title thereto, and as H. & Co. were shown to have had no title, he was remitted to his original remedies for the conversion of his spring wheat, of which conversion defendant was equally guilty with H. & Co.]

[2. The rule that he who rescinds a contract must return all that he received under it did not apply, so as to require plaintiff to restore to H. & Co. the cash payment, as a prerequisite to maintaining the suit; for, as they were unable to restore his spring wheat, it was sufficient that the amount of his recovery should be reduced by the amount of the cash payment.]

[This was an action by Christian Thielman against Joseph Reynolds to recover damages for the conversion of certain wheat. There was a verdict for plaintiff, and defendant moved for a new trial.]

The plaintiff brought suit to recover damages for a conversion of his spring wheat in the year 1874. It appeared at the trial, that on April 20, 1874, the plaintiff held the warehouse certificate of Hoag & Co., of Wabasha, Minnesota, for a special deposit of 1,196½ bushels of spring wheat. He made a demand for the same, and one of the firm informed him the wheat had been sold by them and shipped to Joseph Reynolds, the defendant. Hoag & Co. finally agreed to pay for the wheat at the rate of $1.10 per bushel. It is undisputed that plaintiff, when he discovered Hoag & Co. had sold the wheat, consented to take $1.10 per bushel, and did receive in cash $300, and for the balance a bill of sale of a bin of winter wheat in their warehouse, which they affirmed belonged to them. On the next or second day after this arrangement, Hoag & Co. told plaintiff they were the agents of the defendant, and the winter wheat was purchased with his money, and did not belong to them. It is also undisputed that Hoag & Co. were storing wheat on their own account. When a demand was made for the winter wheat, plaintiff was informed it had been purchased with defendant's money, and he then brought an action of replevin against Hoag & Co. in the state court, and on a trial defendant, being admitted as a party, he (the present defendant) was decided to be the owner. It is also undisputed that defendant received from Hoag & Co. the spring wheat, and plaintiff has never realized any more than $300 for it. There was evidence to show the market value of spring wheat at the time of the conversion.

Upon these facts disclosed, the court instructed the jury that the plaintiff was entitled to recover, and the measure of damages would be the actual value of the wheat taken at the time of conversion, and that a deduction from the amount found should be made of $300. The jury rendered a verdict for the plaintiff. Defendant now moves for a new trial, and urges that, on the undisputed facts, the court erred in giving this instruction, and the defendant was entitled to a verdict; that the plaintiff occupies in this suit a position inconsistent with his previous conduct.

Bigelow, Flandrau & Clark and S. L. Campbell, for plaintiff.

Wilson & Taylor, for defendant.

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

NELSON, District Judge. It is claimed the plaintiff cannot maintain this suit; that by the attempt to enforce, under the warehouse receipt, his right to the winter wheat, he elected to ratify the transaction with Hoag & Co., and thereby affirmed the title to the spring wheat in Reynolds, the defendant. The general doctrine of estoppel by election of remedies is agreed to, as claimed; but this case does not fall within the rule. At the time plaintiff presented his certificate of special deposit, and demanded his spring wheat, April 20, 1874, Hoag & Co. had wrongfully parted with it. His legal remedies then were either to sue for the value, or to follow his wheat. He did neither. But Hoag & Co. agreed to allow him $1.10 per bushel, and paid $300 in cash, and "turned out" for the balance a bin of winter wheat in their warehouse, affirming that it belonged to them. In this transaction, the title to the winter wheat was warranted

when Hoag & Co. gave the warehouse receipt. Subsequently, when informed they were not the owners, plaintiff commenced suit to settle the question. In his effort to obtain possession he failed, and the defendant in this suit was declared to be the owner. This result determined that Hoag & Co. had not fulfilled the conditions of the sale, and had not satisfied the demand of the plaintiff. The sale was not to be concluded until the winter wheat came into his actual possession. If a conditional sale and delivery of chattels is made, and the vendee fails to perform, the vendor can recover his property, or its value; and if the sale and delivery is induced by fraud, the property or its value can be recovered from the vendee, notwithstanding its manual tradition, or from any person claiming title through him. The failure of ownership in Hoag & Co., determined by the result of the replevin suit, remitted plaintiff to all the remedies he possessed when he demanded his special deposit, and this defendant, being equally guilty of a conversion, is liable. It makes no difference, as I can perceive, that legal proceedings were taken to settle the title to the winter wheat. The demand of the plaintiff was not satisfied, as that suit determined, and the title to the spring wheat did not pass from the plaintiff by this transaction with Hoag & Co. It is urged that the acceptance of $300 in part payment, and failure to return it, is inconsistent with the effort to recover in this action. Ordinarily, the party who rescinds a contract should return all he has received upon it. This is only necessary to place himself in his original position. But here, it is manifest, Hoag & Co. could not restore the spring wheat, and plaintiff was not obliged to tender or return the $300. The plaintiff should be indemnified to the extent of his loss only, and, as Hoag & Co. were the agents of Reynolds, it was proper that judgment should be reduced pro tanto. I find no error upon a full review of the case. New trial denied.

THIRD NAT. BANK (FIRST NAT. BANK v.). See Case No. 4,801.

THIRD NAT. BANK (GERMAN AMERICAN BANK v.). See Case No. 5,359.

THIRD NAT. BANK v. PAPIN. See Case No. 12,239.

THIRD NAT. BANK (RANKIN v.). See Case No. 11,568.

THIRTEEN BALES, ETC. (JOHNSON v.). See Case No. 7,415.

THIRTY-FIVE BARRELS OF HIGH WINES (UNITED STATES v.). See Case No. 16,460.

THIRTY-FOUR BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,461.

THIRTY-FOUR BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 16,462.

THIRTY-NINE BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 16,463.

THIRTY-NINE THOUSAND ONE HUNDRED AND FIFTY CIGARS (UNITED STATES v.). See Case No. 16,464.

THIRTY-NINE TRUNKS (UNITED STATES v.). See Case No. 16,465.

THIRTY-SEVEN BARRELS OF APPLE BRANDY (UNITED STATES v.). See Case No. 16,466.

THIRTY-SEVEN BARRELS OF RUM (UNITED STATES v.). See Case No. 16,467.

THIRTY-SIX BARRELS OF HIGH WINES (UNITED STATES v.). See Cases Nos. 16,468 and 16,469.

THIRTY-THREE BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 16,470.

Case No. 13,884.

THISTLE v. HAMILTON.

[4 Dill. 162.] [1]

Circuit Court, W. D. Missouri. 1877.

BANKRUPTCY — APPEAL — REV. ST. §§ 4980, 4984— RIGHT TO JURY TRIAL—WAIVER OF RIGHT.

1. A creditor, whose claim is rejected by the bankruptcy court, and who duly takes an appeal to the circuit court, and there files a declaration to which the assignee has pleaded, has the right to have the issues of fact thus presented tried by a jury. Rev. St. §§ 4980, 4984.

2. The right to a jury trial may be waived in such a case, and such waiver need not necessarily be by written stipulation.

3. Under the circumstances, the right to a jury trial was held not to have been waived by the creditor, where the appeal was inadvertently submitted and decided as if the cause had been brought to the circuit court by a writ of error.

The plaintiff [Mary H. Thistle, administratrix] presented in the district court a claim for a large number of ties sold and delivered to the bankrupt. The claim was opposed by the assignee, and a jury trial was had in the district court, and a verdict returned for the defendant [H. B. Hamilton, assignee in bankruptcy of the Lexington & St. Louis Railroad Company], on which judgment was rendered. [Case unreported.] The plaintiff perfected an appeal to the circuit court, as required by the bankrupt act (section 8 of original act; Rev. St. §§ 4980, 4984; rule 26 of general orders in bankruptcy). In the circuit court the claimant filed her statement or declaration, as required by section 4984 of the Revised Statutes, and the assignee filed an answer in denial. The case was entered on the appeal docket, and was submitted to the court, nothing being said about a jury by either party. The record sent up from the district court contained a bill of exceptions, embodying all the evidence and exceptions to portions of the charge of the district court to the jury, and to certain rulings in respect of testimony.

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

In the arguments before the circuit court, the appellant relied chiefly upon the alleged erroneous rulings of the district court in matters of law, and these rulings not being considered by the circuit court to be erroneous, that court, at the November term, 1876, ordered the judgment below to be affirmed. [Case unreported.] A motion was made, during the same term, by the appellant, to set aside this order of affirmance, and to proceed with the trial of the case in accordance with section 4984 of the Revised Statutes. It is this motion which is now before the court for decision.

N. C. Kouns, for the motion.
H. B. Hamilton, contra.

DILLON, Circuit Judge. The claimant presented her claim in the district court, and made proof thereof, as required by section 5076 of the Revised Statutes. The assignee filed objections, and the claim was certified by the register to the district court, which granted the demand of the claimant for a trial by jury This trial resulted in a verdict for the assignee, on which judgment was rendered, and the claimant appealed to this court in due time and form, and filed the statement or declaration required by section 4984, to which the assignee pleaded, denying the claim. Notwithstanding the district court granted a jury trial, the appeal was really from the decision of that court rejecting the claim; and, on the appeal being taken and perfected, the claimant was entitled to have the cause determined. as provided in section 4984. This section enacts that, upon entering the appeal in the circuit court, the creditor shall file "a statement in writing of his claim, setting forth the same, substantially, as in a declaration for. the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law, commenced and prosecuted in the usual manner, in the courts of the United States," etc. The appellant having filed her declaration, and the assignee having answered, issues of fact were thus presented which either party had the right to have determined by a jury. The proceedings in the district court may be summary, without a jury, and the claim rejected as not being duly proved or as being founded in fraud, illegality, or mistake. Rev. St. § 5081; Catlin v. Foster [Case No. 2,519]. An appeal is allowed, which, in such cases, is really converted into an action at law in the circuit court, and is to be tried like actions at law commenced originally in that court. Rev. St. §§ 4980, 4984; Rule 26, General Orders in Bankruptcy. I agree with the late Judge Woodruff, that "these sections contemplate not a mere review of the adjudication in the district court, but the trial of the questions of fact by a jury upon pleadings and an issue, or an issue of law, if there shall be a demurrer." In re Place [Case No. 11,200]; In re Jaycox [Id. 7,237]; Catlin v. Foster [supra]. Undoubtedly the parties can waive the right of a trial by jury in such a case, the same as in cases at law commenced in the circuit court by original process; and such waiver need not necessarily be by written stipulation. Kearney v Case, 12 Wall. [79 U. S.] 275. If the parties in the present appeal had said, "We submit the case to the court upon the testimony which is embodied in the bill of exceptions," and the circuit court had examined this testimony and found that the claim was not sustained, we should have refused a motion afterwards for a trial by jury. But no such agreement was made, and no such course taken. It was inadvertently submitted and decided as if the case had been brought into the circuit court by a writ of error. The evidence is conflicting; there was no intention on the part of the appellant's counsel to waive a jury trial; and, under the circumstances, it would be applying too strict a rule to hold that what was done precludes the creditor from having the issues of fact tried in the usual manner. The order of affirmance will be set aside, and the cause will stand for trial by a jury. Motion granted.

NOTE. The point stated in the first headnote, in relation to the right of a trial by jury, was ruled the same way by Mr. Justice Miller, in Manning v. Simpson, in the circuit court for the Eastern district of Missouri, September term, 1877. [Case unreported.]

THOMA (UNITED STATES v.). See Case No. 16,471.

Case No. 13,885.

Ex parte THOMAS.

[3 App. Com'r Pat. 346.]

Circuit Court, District of Columbia. 1860.

PATENTS—LIMITED SPECIFICATIONS—FAILURE TO AMEND—NOVELTY—ANTICIPATION.

[1. Where the applicant, represented by competent counsel, is put upon inquiry by the ruling of the board of appeal that his claim in the specifications is not limited to the only patentable device in his machine, the court upon appeal will not relieve him from the effect of the failure to amend his specifications.]

[2. Thomas' application for a patent for an improvement in devices for driving machinery, consisting of a portable hand power operated on the pendulum plan, *held* properly rejected for want of novelty in his claim and as anticipated by others.]

[Appeal by G. D. Thomas from the decision of the commissioner of patents rejecting his application for an improvement in devices for driving machinery.]

MERRICK, Circuit Judge. The object proposed to be accomplished by the applicant is a convenient portable hand power to be applied by farmers and others to drive

light machinery, such as threshers, fodder cutters, corn shellers, etc. The contrivance he has hit upon consists of a pendulum supported between two upright beams, and confined to a crossbar running through its axis of oscillation, from the ends of which bar movable rods depend, to be attached to the gearing of the machine to be operated. The pendulum is put into action by a lever handle like a pump handle, and oscillates between guides of wood or metal in the shape of arcs and is limited in its stroke by stops or bumpers fastened between the arcs at either end. The claim has been rejected upon references to rejected claims of Hackley Burton, June, 1852, Francis Johnston, October, 1855, and Kibbe and Burt, December, 1857, and the patents of McIntosh and Barnhart, April 13, 1839, and of C. or J. Stever, July 22, 1856.

The case of Kibbe and Burt presents the application of the motive power of the pendulum in its simplest form, to wit, the returning force of the pendulum operating one pump, when by external power it has been forced from its perpendicular to move another pump; and the saving of power effected in that case is the equivalent, or nearly so, of that necessary to work either of two equal pumps. In the case of Stever's ship pump, the external force of the waves is availed of, so that the pendulum may be said to work automatically; and inasmuch as the force of the waves is inconstant and unequal, it was essential to the successful operation of the pump that the pendulum should be limited in its stroke or arc of oscillation, and preserved from sudden lateral strain, for which purpose the guiding arcs and crossbars or bumpers were introduced. In the patent of McIntosh and Barnhart the pendulum is confined between upright beams, is connected at the axis of oscillation with a crossbar, e, for which a movable rod, f, transfers the motion to the driving crank, g, and fly wheel, i, of the machine to be operated.

The two former cases are examples of the motive power confined in its application to the production of an alternating or reciprocating movement in working pumps or anything requiring only a backward and forward movement. For the purposes of such movements the guide bars and bumpers found in Stever's pump are a complete answer to patentability for those features in the claim of the appellant. If, however, we consider the application of the pendulum to the production of rotary or continuous movements, we do not find, in the machine of McIntosh and Barnhart, or any other to which reference is given, the guide bars or bumpers. Now, if they perform any distinctive valuable function in such movements, and are not found in any existing machinery of that class, the applicant ought to have a patent for their introduction and combination. Has he shown any such function, or does any such exist? For, of course, if they are useless, he can claim nothing for them; and if illusory additions they might render vicious otherwise good claims, if calculated and intended to deceive the public.

Now, so far as the guide bars are concerned, the office has correctly argued that, as the vibrations of the pendulum are in a vertical plane, and the arm of the pendulum a rigid bar or beam, the guides are obviously of no avail. With regard to the stops or bumpers it may be observed that, as the pitman, D, of the model and specifications is fastened to the driving crank and fly wheel of the threshing machine (and the same must be true in all similar applications of the power), the stroke of the pendulum must of necessity be exactly measured by and limited to the revolution of the crank, for if the stop be placed at a point in the arc of oscillation short of that limit, the crank can never go on to a revolution. If it be placed exactly and mathematically at that limit, of course the whole force of the pendulum will be exhausted upon the stop and the crank must rest upon its dead center; and if the stop is placed beyond that limit, it is manifest that, as the pendulum never can reach it, the whole shock and excess of force must be expended upon the crank, and, so far as it can become valuable in saving labor, that excess must pass into the machine and be there garnered up in its general momentum or in that of its fly wheel, if it be operated with such an appendage, as all light machinery should be. Indeed, it may be doubted, as the board of appeal has intimated in their report in this case, whether the fly wheel is not to be considered the only practically useful manifestation or treasury of the advantages derived from the saving of the momentum in the propulsion of machinery. The foregoing remarks are mainly applicable to rigid stops or bumpers, as distinguished from spring bumpers.

The claim in the specification not being limited to spring bumpers, the case was treated by the office in all the breadth in which it was presented, and without an amendment could not have been otherwise considered. Nor upon the appeal before me is the case open upon the question of patentability of a claim to spring bumpers. I shall therefore go into no speculations as to the possible advantages or disadvantages of the combination of spring bumpers in the applicant's invention. It is true that spring bumpers are represented in the model, but not at such relative distance to the other parts as to show, by experimentally working the model, their value, and being so shown, if the applicant meant to limit his claim to them, and was understood by the office so to do, and if, thus limited, it seemed to be patentable it certainly would have been the appropriate duty of the office to have suggested to him an amendment of his

defective specification. Now, although the distinction between spring and solid bumpers is adverted to by the board, at page 5 of its manuscript opinion, in terms sufficiently distinct to have put the applicant upon inquiry, if such had been the real claim, no movement towards an amendment was made by him, notwithstanding the fact, as shown by the indorsement of the file, that the office still considered the case as within the equity of the 105th rule, allowing a withdrawal, and, of course, under the same rule, open to amendment. Represented as he was by counsel acquainted with the rules and practice of the office, there was enough in what fell from the board to call his attention to the necessity for amendment, if it could have availed him; and therefore I feel no hesitation in confining myself to the case in the aspect under which, alone, I have considered it.

The remaining feature of the combination is the adaptation of the hand lever to the machine for the purpose of imparting motion to the pendulum, and through it to all the parts. This is a contrivance of such obvious character that its introduction furnishes no aid to the combination. Finding no novelty in any of the several parts, nor in the result attained, nor any utility in those features of the combination which, upon first presentation, might seem new in their special application, I have arrived at the conclusion that the claim as presented is not patentable. Now, for the reasons assigned, I hereby certify to Hon. Philip F. Thomas, commissioner of patents, that, having fixed the 7th of June last for hearing this appeal, and having, at the request of counsel for applicant, adjourned it from time to time, I have now read and considered his arguments and the reasons of appeal, the official response to those reasons, together with the references, and I am of opinion that there is no error in the decision, which is hereby affirmed, and the application is finally rejected.

Case No. 13,886.

In re THOMAS et al.

[8 Biss. 139;[1] 17 N. B. R. 54; 6 Cent. Law J. 151.]

District Court, E. D Wisconsin. Jan. 28, 1878.

BANKRUPTCY—FIRM LIABILITY—INDIVIDUAL SECURITY—PROOF OF DEBT.

1. Though a note is signed by the members of a firm, with their individual names, yet, if the consideration when received is treated as copartnership funds, the note is a firm liability.

[Cited in Ex parte First Nat. Bank, 70 Me. 380; Colwell v. Weybosset Nat. Bank, 16 R. I. 290, 15 Atl. 80, and 17 Atl. 913.]

2. In a proceeding in bankruptcy, a creditor of the firm, holding security upon the separate property of one of the partners, may prove his entire claim against the joint estate without releasing his security, though the member whose individual estate constitutes the security, owes no individual debts.

3. Discussion of cases.

In bankruptcy. In April, 1875, George L. Thomas and Byron G. Sivyer, the bankrupts, formed a copartnership for the purpose of carrying on a livery and boarding stable business, under the name and style of Thomas & Sivyer. The copartnership relation began about the 8th or 9th of April, 1875, although the active conduct of the business did not commence until some days later. Previously Sivyer and one White had, as copartners, carried on the same business, and by arrangement, the bankrupts purchased White's interest, agreeing to pay him therefor a certain sum of money in cash, and to assume and pay his share of the liabilities of the original firm. To enable them to carry out this arrangement, the bankrupts negotiated a loan of five thousand five hundred dollars from a corporation known as "The Trustees of Nashotah House." This loan was consummated on the 15th day of April, 1875, and on that day the bankrupts executed to Nashotah House, their joint note for the sum borrowed, signing the note in their individual names. On the same day they received from the agent of Nashotah House a check for the money, running to them in their firm name, and at the same time the bankrupts, in their firm name, gave to White a check upon their bankers for one thousand nine hundred and sixty dollars, the amount agreed to be paid to him in cash upon their purchase of his interest. The remainder of the money so borrowed appears to have been treated and used by them as copartnership funds. The active prosecution of the copartnership business began on the day these transactions took place. Concurrently with the making of the loan of five thousand five hundred dollars, and as security for the repayment thereof, the bankrupts procured to be executed to Nashotah House a mortgage upon real estate, which mortgage was executed by Dorothy Sivyer, wife of Joseph Sivyer, deceased, E. H. Sivyer and wife, Annie J. Sivyer, Byron G. Sivyer, one of the bankrupts, and Julia N. Sivyer Thomas, wife of Geo. L. Thomas, the other of said bankrupts, and by said Thomas. The lands so mortgaged were the property of the heirs of Joseph Sivyer, deceased, each owning an undivided quarter interest, subject to a life interest held by the widow Dorothy Sivyer, the widow and heirs thus joining in the mortgage, and Byron G. Sivyer, one of the bankrupts, and Mrs. Thomas, wife of the other bankrupt, being two of the heirs. This mortgage has been ever since held by the Nashotah House. Sivyer and Thomas carried on their copartnership business until October 8, 1877, when they filed a voluntary petition in bankruptcy, and were adjudicated bankrupts as copartners and as individuals. Their schedules disclosed part

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

nership liabilities and assets, and also individual liabilities of Thomas, but did not show any individual liabilities of Sivyer. The interest of Sivyer in the real estate mortgaged to Nashotah House was scheduled as individual assets At a meeting of creditors for the choice of an assignee, the Nashotah House was permitted by the register to prove its claim as a demand against the partnership or joint estate of Thomas & Sivyer, without surrender of the mortgage security, and to participate as could an unsecured creditor of the firm, in the election of the assignee. Objection being made by other creditors to this ruling of the register, the case was certified for the opinion of the court.

Orton & Frankenburger and D. S. Ordway, in support of proof of debt.

Howard & Wall and F. C. Winkler, for opposing creditors.

DYER, District Judge. Two questions are presented: First, Is the debt owing to Nashotah House a partnership liability, for the payment of which, the creditors may look to the joint estate of the bankrupts? Second, If it is a partnership debt, can it be proved against the joint fund without surrender of the mortgage security? The first question must, in my opinion, be answered in the affirmative. It is true that the note held by the Nashotah House was signed by the bankrupts in their individual names. But this circumstance is not controlling upon the real character of the liability. "The form of negotiable paper is at most the slightest prima facie evidence of the true character and relations of the parties whose names appear upon it. The members of a firm may appear either upon the face or back of the paper, in their individual names or in the name of the firm. If the paper is made or signed in any manner in the course of the business of the firm, it is partnership paper." Richardson v. Huggins, 23 N. H. 122. The evidence shows that at the time of the five thousand five hundred dollar loan, the copartnership relation existed between Thomas and Sivyer. The money when received was regarded and treated as a copartnership fund. It was dealt with by the parties as a fund employed in their joint enterprise. In the proof of debt made by the Nashotah House, it is stated that it was represented by the parties, when they made the loan, that the money was to be expended in purchasing partnership stock, and other joint uses; that they desired and offered to sign the note in their firm name, but at the request of the creditor they subscribed it with their individual names. "A note signed by each of the members of a firm individually, the consideration of which went into their company business, and given instead of one signed with the partnership name, because the payee so preferred, held to be a partnership note." Kendrick v. Tarbell, 27 Vt. 512. The true test is, was this money borrowed by these parties as copartners, and for the benefit of the firm, and was it so used. Of course, this question is not to be decided upon statements contained in the proof of debt which is tendered; and looking into the evidence and into the circumstances of the transaction, I am satisfied that the demand in question is the firm debt of Thomas & Sivyer. Entries on their books have been pointed out as tending to a different conclusion, but I do not see that they bear as materially upon this question, as they may upon other questions touched upon in the argument, but not now directly presented for adjudication.

Mr. T. Parsons in his work on Partnership (page 215) says: "If a partnership be contemplated and agreed upon, and a purchase is made, or a debt otherwise incurred by one of the partners for the partnership, but before the actual formation of the partnership, it is only the debt of that partner." This proposition was cited by counsel, in combating the claim that the demand held by the Nashotah House is a firm liability. But upon the facts of this case, that proposition is inapplicable, because it has reference only to the case of a debt incurred by one of the partners before the existence of the copartnership.

Conceding that the demand held by Nashotah House is the firm liability of Thomas & Sivyer, the more serious question remains, can the creditor be permitted to prove against the joint estate, without giving up its mortgage security to the extent that it covers the interest of Byron G. Sivyer, one of the bankrupts, in the lands mortgaged? The question is an interesting one, and was very forcibly discussed by counsel, both in oral argument and in written briefs since submitted.

Counsel for creditors who oppose the proof of debt, contend that the case is not like that of the creditor of a firm who holds as security the collateral liability of a third party, which he may hold and still prove his debt, as if unsecured, against the joint estate, but that here the security, to the extent of the bankrupt Sivyer's interest in the land mortgaged, belongs in fact to the estate against which the debt is proven; that the interest of Sivyer in the mortgaged land is part of the estate for the payment of the partnership debts, especially as his individual schedules do not show that he owes individual debts; hence, that the creditor cannot prove against the joint estate without surrendering his security. Counsel were also understood to deny the general proposition that a joint creditor having security upon the individual estate of one of the members of a firm, is entitled to prove against the joint estate without giving up his security.

The bankrupt law provides (Rev. St. § 5075) that when a creditor has a mortgage upon the property of the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement or sale; that the creditor may release his claim upon such property and be admitted to prove his whole debt;

and if the property is not so sold or released, the creditor shall not be allowed to prove any part of his debt. It is to be observed that the security here spoken of is such as is upon the property of the bankrupt, and as it is the firm that is the bankrupt where the proceedings are against a copartnership, there is certainly some reason for construing this statute upon its bare language and independently of other considerations, as meaning that the creditor who must give up his security in order to prove his debt, must be one who has a lien upon the property of the firm; i. e., the bankrupt. And this, too, notwithstanding the fact that, as an incident to the adjudication of the firm, the individual members are also adjudicated bankrupts.

Giving due consideration, as we should, to the object of this statute, it is plain that its purpose was to place the creditors of a bankrupt upon an equal footing in the proof of claims against the fund or estate chargeable in equity with the payment of such claims. So manifestly unjust would it be to unsecured creditors to allow a creditor holding a lien upon property, to which, in the absence of such lien, all creditors might, according to established principles of equity, equally resort, to prove his entire debt, and at the same time hold his security, that the law was so framed as to forbid it.

The distinction, however, between joint and individual estates is in no manner affected. That distinction is inherent, must be always maintained, and is fully recognized in its application to partnerships, by the bankrupt law itself. Rev. St. § 5121.

It is settled, that where the property of a third person is pledged to secure the bankrupt's debt, the creditor holding such security may, without relinquishing it, prove his whole debt. In such case the security does not diminish the estate to which creditors must look, and, moreover, the court would have no authority over property constituting the security and held by a stranger to the bankruptcy proceedings. The case, in event of such security, would not be within the statutory provision.

The question then recurs, in view of the statute, its terms and object, and the established, inherent distinction between joint and separate estates, may the creditor of a firm, holding security upon the separate property of one of the partners, prove against the joint estate without releasing his security? The strength of the argument against it in the case at bar seems to lie in the claim that the bankrupt, Sivyer, whose individual estate constitutes the security, owes no individual debts, and that, therefore, that estate is chargeable with the partnership debts equally with the joint estate—a claim which will be considered after first noticing such authorities as can be found bearing upon the general proposition.

The Case of Plummer, 1 Phil. Ch. 56, was referred to, on the argument. In that case the creditor of a firm took from the firm, security for the payment of certain indebtedness. He also received from the debtors joint and several covenants in writing to pay his demands. The question was whether he was entitled to prove his whole debt against their separate estates and hold his security upon their joint estate. The lord chancellor held that he could. Here was one case of a separate creditor having a security upon the joint estate, seeking to prove against the separate estate without surrendering his security. The lord chancellor, in his opinion, says that: "In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate." And he holds one case the converse of the other, and that the same principle applies to both.

In Ex parte Peacock, 2 Glyn & J. 27, which was a case decided first by Sir J. Leach, and afterwards by Lord Eldon, a joint creditor who held security from one of the joint debtors was allowed to prove his debt against the joint estate without a sale or surrender of his security, and this case is cited as authority in Re Plummer

In Ex parte Parr, 18 Ves. 65, the facts were that a house in Demerara drew upon another house in Liverpool, and the draft was accepted by the latter house. The Demerara house, at the time of drawing the draft, gave to the creditor other security. The house at Liverpool was partner with the Demerara firm. The acceptors became bankrupt, and it was held that the creditor could prove his debt against them, without deducting the value of his security, on the ground that, although the two houses were partners, the drawers and acceptors still constituted different firms.

In the Case of Howard [Case No. 6,750], the court, in speaking of the thirty-sixth section of the bankrupt act [of 1867 (14 Stat. 534)], and upon the distinction between joint and separate estates, makes this statement: "It has, therefore, been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security." Counsel in argument claim that this language, in the opinion of the court, is altogether obiter, and perhaps it was an observation not essential to a decision of the question under consideration in that case. But it is stated as a proposition from which is deduced a principle influencing the conclusion of the court on the question before it, which was one relating to the proof of a claim against both joint and separate estates.

In Ex parte Whiting [Case No. 17,573], Judge Lowell observes that: "When one

partner has pledged his shares for the debt of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished a security, that a sale and application of the security is required by the bankrupt law."

In Re Holbrook [Case No. 6,588], the bankrupts were the firm of F. F. Holbrook & Co., and the property assigned as security was owned by Holbrook alone. Judge Lowell says: "The statute only requires the property to be renounced, sold or valued when it is the property of the bankrupt. If the goods or estate of any third person have been pledged for the bankrupt's debt, equity does not require that the general creditors of the bankrupt should have the advantage of this security; on the contrary, the equity is, that the estate of the volunteer should be exonerated, * * * whether the creditor had security by indorsements, or in any other way that has not diminished the general assets, he has a right to prove it. * * * This rule applies to partnerships when the estate of one partner has been pledged or mortgaged for a debt of the firm, and for the same reason, that the full proof should be made against that estate which is the principal debtor" (citing Story, Partn. § 389; Ex parte Parr, 1 Rose, 76; Ex parte Plummer, 1 Phil. Ch. 56; Wilder v. Keeler, 3 Paige, 167; Besley v. Lawrence, 11 Paige, 581; Ex parte Peacock, 2 Glyn & J. 27.) In the case of Wilder v. Keeler, supra, the chancellor says: "A creditor of the joint estate is always entitled to whatever he can obtain out of that fund in the hands of a surviving partner without relinquishing his security against the separate estate of the deceased partner."

These are the cases bearing upon this question which have come to the attention of the court, and it is claimed that so far as they touch the precise point under consideration they are little more than dicta. It is true that they do not discuss the question, but rather assume the proposition to be settled. Nevertheless, I think they are not to be disregarded as wanting in application to the present case or in authoritative character, as insisted by counsel.

Looking at the question in the light of principle, we encounter at once the distinction between joint and separate estates, which the law recognizes, and which, as has been remarked, is inherent. The primary fund for the payment of partnership debts is the joint estate. It is true, that after exhausting that estate, ultimate recourse may be had upon the separate estate for the payment of partnership debts if such separate estate is not absorbed by individual debts. But this possible result does not rub out the line of separation between joint and separate estates, which the law has established and which makes them, in fact, different estates.

It is contended that as the schedules of the bankrupt Sivyer do not show individual debts, his individual interest in the lands mortgaged must of necessity fall into the joint estate as part of the fund for the payment of joint liabilities. Undoubtedly, these schedules may be resorted to as evidence that Sivyer does not owe individual debts; but they are not to be regarded as conclusive evidence. And the question is, even if it be true that he has no individual liabilities, so that as an ultimate result, partnership creditors may, if need be, have recourse to his separate estate, can or ought that circumstance to affect the application of the recognized distinction between joint and separate estates? In other words, does the enforcement of that distinction depend only upon a state of case involving a marshaling of assets because of the existence of joint and individual liabilities, or is it a distinction which must have recognition ex necessitate, even though, ultimately, the joint creditor may have a right to pursue the separate estate? As I have said, the primary estate for the payment of the joint liabilities of Thomas & Sivyer is the partnership fund. That is the estate against which partnership debts are proven. Even in the absence of individual debts, each of the partners has an equitable right to insist that the primary fund be exhausted before coming upon their separate estates for the payment of firm debts. In view of the consideration thus suggested, I think it is not accurate to say that the interest of the bankrupt Sivyer in the land mortgaged, belongs to, or is part of, the estate against which partnership debts are proven, though it should be that ultimately partnership creditors might reach it.

The ground upon which the lord chancellor, in the Case of Plummer, supra, rests the proposition that a joint creditor may prove against the joint estate without relinquishing his security upon the separate estates is, that the two estates are different. And in Re Holbrook, supra, Judge Lowell, speaking of partnership and partnership liabilities, refers to the joint estate as the principal debtor, and as, therefore, the estate against which the debt is proven.

Then, if the joint estate is the primary fund for the payment of the partnership debts, can it be said that any other than that estate is the one against which the claim in question is proved, and can it be said that this creditor has security upon that joint estate? I think not.

There is a class of cases in which it has been held that where a creditor holds notes signed by a firm, and signed or indorsed also by an individual member of the firm, he may prove against both estates, and receive dividends from both. In re Farnum [Case No. 4,674]; Mead v. National Bank of Fayetteville [Id. 9,366]; Emery v. Canal Nat. Bank [Id. 4,446]. These cases establish a

rule opposed to the old rule on the subject in England, and the principle thus settled seems to reach out to the question involved in the case at bar. The scope of these decisions is, that when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and by reason of the individual liability, superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate.

Thus it results, that without the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors had been first satisfied. But holding the individual indorsement or signature, the firm creditor may, in the first instance, prove against the separate as well as the joint estate.

Now, such separate liability would seem to be, at least, in the nature of security, though differing radically, it is true, in character and form from that of a mortgage, and yet double proof by the firm creditor in such case may be made without any abatement of advantage which his diligence has secured. The principle which sanctions such a rule seems to lend support to the view taken of the question involved in the case at bar, and on the whole, my opinion is that the Nashotah House has a right, as a creditor of the firm of Thomas & Sivyer, to prove its debt against the joint estate without valuation or surrender of its security upon the separate property of Sivyer, and may, therefore, participate in the election of an assignee with other firm creditors.

Case No. 13,887.

In re THOMAS.

[12 Blatchf. 370.] [1]

Circuit Court, S. D. New York. Nov. 5, 1874.

EXTRADITION — TREATY — EXECUTIVE MANDATE — PROCEEDINGS IN FOREIGN JURISDICTION — BAVARIA — GERMAN EMPIRE.

1. In cases where a treaty of extradition with a foreign country for the surrender of fugitives from justice does not require the issuing of an executive mandate, as a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest, by a magistrate, such a prerequisite is not necessary.

[Cited in Castro v. De Uriarte, 12 Fed. 251, 16 Fed. 96.]

[Cited in People v. Board of Sup'rs of Columbia Co., 134 N. Y. 6, 31 N. E. 324.]

2. The convention for extradition between the United States and Bavaria, of September 12, 1853 (10 Stat. 1022), was not abrogated by the operation of the constitution of the German empire, adopted in 1871, as affecting the further independent existence of Bavaria.

[Cited in Wunderle v. Wunderle, 144 Ill. 56, 33 N. E. 195.]

3. The sufficiency of the complaint before the commissioner, upheld.

4. It is not a necessary preliminary to an investigation here, under an extradition treaty, that a warrant of arrest should have been issued, or proceedings had, against the accused, in the foreign jurisdiction.

[Cited in Re Roth, 15 Fed. 508.]

[Cited in People v. Board of Sup'rs of Columbia Co., 134 N. Y. 6, 31 N. E. 324.]

At law.

Edward Salomon, for the German government.

Charles W. Brooke, for relator.

BLATCHFORD, District Judge. On the 2d of September, 1874, a warrant was issued by a United States commissioner, on the complaint of the vice consul of the German empire at the city of New York, for the arrest of Hermann Thomas, charged with having committed the crimes of forgery and the utterance of forged papers, within the jurisdiction of the kingdom of Bavaria and of the empire of Germany. The proceeding was one taken with a view to the extradition of Thomas, under the provisions of the convention of September 12, 1853, between the United States and the kingdom of Bavaria. 10 Stat. 1022. Thomas was arrested and brought before the commissioner on the 3d of September, the charge was explained to him, and he demanded an examination, and the proceedings were adjourned by consent to the 17th of September, and he was committed in the meantime to the custody of the marshal.

The complaint on which the warrant was issued is made, subscribed and sworn to by August Feigel. It sets forth, that Mr. Feigel "is vice consul of the German empire at the city and port of New York, duly recognized as such by the president of the United States; that, as such, he is, also, ex officio, consul of each of the states composing said empire; that the kingdom of Bavaria is one of the states composing said empire;" and "that, as such vice consul, he is at present in charge of the office of the consul general of the German empire at the city of New York, and authorized to discharge the functions of such consul general." The complaint alleges, that, as the complainant, "from official evidence in his possession is informed and believes," Thomas, on or about the 22d of June, 1874, at Nürnberg, in the kingdom of Bavaria, and within the jurisdiction of said kingdom, committed the crimes of forgery and of utterance of forged papers, in this, that he did then and there, feloniously and falsely, and with intent to defraud the Royal Bank at Nürnberg, make, forge and counterfeit a certain receipt or acquittance of Carl Conrad Cnopf & Sohn, bearing date at Nürnberg, whereby it was stated that the said Carl Conrad Cnopf & Sohn had received of the Royal Bank at Nürnberg the sum of 15,000 guilders, Bavarian money, while, in truth

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

and in fact, the said Carl Conrad Cnopf & Sohn had not executed, or authorized to be executed, the said paper writing, purporting to be a receipt or acquittance, as aforesaid, but the same was forged by the said Thomas, and that he did afterwards, within the jurisdiction of the kingdom of Bavaria, feloniously, falsely and fraudulently utter the said forged instrument in writing, knowing it to be forged, with intent to defraud the said Royal Bank at Nürnberg. The complaint then sets forth the information of the complainant concerning the commission of said crimes by Thomas. He received, August 29, 1874, a cable telegram, of which a translation is given, signed "Ilgen, examining judge, Nürnberg," and reading thus: "The arrest of the clerk H. Thomas of this place is requested on account of forgery of documents and defrauding to the amount of 15,000 guilders. He travelled as Wolfing. Photograph in the possession of Schulz & Ruckgaber, Exchange Place, New York, where also dwelling ascertainable. Particulars follow upon answer." On the 31st of August the complainant sent a telegram to the said examining judge in these words: "Telegraph particulars of Thomas forgery; full names of injured parties; also, whether extradition demanded." On the 1st of September he received from said examining judge a telegram in these words: "Thomas obtained from the Royal Bank here 15,000 guilders on forged receipt of Cnopf & Sohn. Extradition." The complaint further sets forth, that the complainant knows said Ilgen, whose name is subscribed to said telegrams, to be royal examining judge at Nürnberg, and has seen in a newspaper printed at Berlin, in Germany, a copy of an order of arrest issued by the royal examining judge at Nürnberg, on the 2d of July, 1874, for the arrest of said Thomas on account of forgery of documents and frauds committed by him on the 22d of June, 1874; that Thomas, after the commission of said crimes, "fled from the jurisdiction of said kingdom of Bavaria and of the empire of Germany;" that, through the minister of the German empire at Washington, the complainant caused to be made an application for the issuing of the usual executive mandate in such cases; and that, upon the receipt of such mandate, the same will be forthwith presented to the officer to whom the complaint is to be presented.

On the 8th of September, 1874, the usual mandate was issued from the department of state. It states, that, pursuant to the said convention of September 12, 1853, the envoy and minister plenipotentiary of the German empire, accredited to this government, has applied to the government of the United States for the arrest of Thomas, "charged with the crimes of forgery and the utterance of forged papers, and alleged to be a fugitive from the justice of Bavaria (German empire)."

On the 17th of September, 1874, no proceedings having taken place before the commissioner other than those before mentioned, the counsel for Thomas applied to the commissioner for the discharge of Thomas on these grounds: (1) No demand has been made by the foreign government for the surrender of the accused, so as to give the commissioner jurisdiction of the proceeding. (2) There is no existing convention for extradition between the kingdom of Bavaria and the United States. (3) The convention with Bavaria, of September, 1853, is annulled by the constitution of the German empire, adopted in 1871. (4) In accordance with such constitution, the kingdom of Bavaria, as an independent government, ceased to exist, and became a component part of the German empire. (5) The government of the United States has no power or authority to treat with the component part of any other independent government, but can only treat with such government as an entirety. (6) The complaint, upon its face, indicates the want of power of the kingdom of Bavaria, as an independent government, to demand the enforcement of any right under the convention of 1853, and shows the merging of the kingdom of Bavaria in the German empire. At that stage of the proceedings the counsel for the foreign government presented the said mandate to the commissioner. The application for the discharge of Thomas was then denied by the commissioner, and the proceedings were adjourned to the 1st of October, 1874.

On the 18th of September a writ of habeas corpus and a writ of certiorari were issued, both of them returnable before this court. The relator is now before this court under the former writ, and the proceedings and papers are before it under the latter writ. The discharge of the relator is asked on various grounds.

The first ground urged is, that, prior to the issuing of the warrant by the commissioner, no mandate had been issued, or authority given, by the government of the United States, on the application of the foreign government, for the entertaining of the complaint by the commissioner, or for the issuing of the warrant by him. Prior to the time when the case of In re Kaine, 14 How. [55 U. S.] 103, arose in the supreme court, in 1852, it had been the practice, in this district, for the federal magistrates who entertained complaints in cases of extradition, to do so without the prior presentation to them of any such mandate or instrument of authority, and such practice had been sanctioned by judicial decision. In the case of In re Kaine [Case No. 7,598], before this court, held by Judge Betts, the point was taken, on habeas corpus, that no warrant of arrest could issue, in an extradition case, unless it appeared that a requisition for such arrest had first been made on the government of the United States by the foreign government. In that case, the British consul had applied, in the first in-

stance, to the commissioner, for the warrant of arrest, and the government of the United States had given no instruction or request that the subject should be acted on by a judicial officer. The court held, that the treaty with Great Britain, for extradition, admitted of the interpretation, that the first application might be made, by complaint on oath, to a magistrate, without the intervention of either nation, and that it did not provide that a requisition for the arrest of a fugitive should be made by one government on the other. The language of the convention with Bavaria is the same as that of the treaty with Great Britain, of 1842 8 Stat. 576. Each contains a provision, that "the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered," and each contains a provision, that the respective countries shall, "upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made," "deliver up to justice all persons who, being charged with" the enumerated crimes, committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other. When the Case of Kaine was under consideration by the supreme court, that court consisted of eight judges. Four of them (Justices McLean, Wayne, Catron, and Grier) concurred in holding that, under the terms of the treaty with Great Britain and the act of congress of August 12, 1848 (9 Stat. 302), the judicial magistrates named in that act are required to issue warrants, and cause arrests to be made, at the instance of the foreign government, on proof of criminality, as in ordinary cases where crimes are committed within our own jurisdiction, and punishable by the laws of the United States, and without a previous mandate from the executive department. Mr. Justice Curtis expressed no opinion on the question. Chief Justice Taney and Justices Daniel and Nelson concurred in holding, that the judiciary possessed no jurisdiction to entertain proceedings under the treaty, for the apprehension and committal of the alleged fugitive, without a previous requisition, made under the authority of Great Britain, upon the president of the United States, and his authority obtained for that purpose. A majority of the court not concurring as to the interpretation to be given to the treaty and the act of 1848, the case came before Mr. Justice Nelson, at chambers,—Ex parte Kaine [Case No. 7,597],—who held, that the previous decision of this court, refusing to discharge the accused, did not relieve him from inquiring, on habeas corpus, into the legality of the imprisonment; that, as a majority of the supreme court had not concurred in deciding the case on the merits, and it had been dismissed without any decision on the merits, he was left to follow out his own convictions and conclusions, in finally disposing of it; that a requisition ought to have been made, in the first instance, upon the executive, and his authority obtained, in order to warrant the interposition of the judiciary; and that the accused must be discharged.

While Mr. Justice Nelson was still upon the bench of the supreme court, and was the presiding judge in the Second circuit, and in this court, the case of In re Henrich [Case No. 6,369], arose. In that case there was a previous mandate. But Judge Shipman, by whom, holding this court, the case was heard, made, with the concurrence of Mr. Justice Nelson and myself, suggestions concerning the proper practice to be pursued in extradition cases, one of which was as follows: "It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the president be obtained, before the judiciary is called upon to act. See Mr. Justice Nelson's opinion, in Re Kaine [supra]. At all events, this would be the better practice, and one in keeping with the dignity to be observed between nations, in such delicate and important transactions."

In November, 1869, the case of In re Farez [Case No. 4,644] arose before this court. One of the warrants on which the accused was arrested and in custody had been issued without any previous mandate from the government. Mr. Justice Nelson was still the presiding judge of this circuit, and this court, held by myself, without discussing or deciding the point on its merits, remarked, citing the cases of Ex parte Kaine and In re Henrich: "It is the law of this circuit, that the judiciary possess no jurisdiction to entertain proceedings, under any treaty or convention between the United States and a foreign government, for the apprehension and committal of any alleged fugitive from justice, whose extradition is demanded by such foreign government, without a previous requisition having been made, under the authority of the foreign government, upon the government of the United States, and the authority of the latter government obtained, to apprehend such fugitive."

When the case of In re Macdonnell [Case No. 8,771], came before this court, held by Judge Woodruff, in April, 1873, Mr. Justice Nelson had ceased to be the presiding judge of this circuit, having resigned his office as an associate justice of the supreme court. In the Case of Macdonnell, there was a previous mandate, but it was objected that the complaint on which the warrant was issued did not show that a mandate had been issued, although the warrant showed that fact, and it was further objected that the mandate was not in proper form The question of the necessity of such mandate, to confer jurisdiction on the magistrate to entertain proceed-

ings for the apprehension of the alleged fugitive, was argued by counsel. Judge Woodruff, in his decision, narrates the proceedings in the Case of Kaine, both before the supreme court and before Mr. Justice Nelson, and states, that the practice before commissioners, in regard to the necessity of a prior mandate, had, down to the decision of Mr. Justice Nelson in the Case of Kaine, conformed to the views of the four judges of the supreme court in which Mr. Justice Nelson did not concur, and that what is said on the point in the decisions in the Cases of Henrich and of Farez is placed distinctly on the authority of Judge Nelson's decision in the Case of Kaine. But, although the language of the discussion indicates that Judge Woodruff doubted the correctness of that decision, he says that it is not necessary for him to decide to what extent he is bound by the decision made, or the opinion declared, in Kaine's Case, nor that he should express an opinion upon the question itself, for the reason, not only that the mandate of the president was procured, and delivered to the commissioner, before he acted in the matter at all, but, also, because, in his judgment, the objections made to the actual proceedings had by or before the commissioner might be considered and decided upon a concession, for all the purposes of the case, that such mandate, or other authorization by the president, was necessary.

In the case of Ex parte Ross [Case No. 12,069], before the district judge for Ohio, in 1869, an objection that the warrant of arrest could not be issued until after the action of the government, authorizing the magistrate to act and cause the accused to be brought before him, was overruled. The point has recently been under consideration by Judge Lowell, of the Massachusetts district, in the case of In re Kelley [Id. 7,655], who declined to adopt the practice of requiring a previous executive mandate. In his decision he says: "Considering the strong reasons, as well as the great preponderance of authority, against the practice—a preponderance which I find in the treaty itself, in the statute, and in the opinions of the greater number of the judges who have considered the question—and further, that the reasons in its favor have lost their force in the present state of practice in the state department, I feel constrained to refuse to establish it in this district." The practice in the state department, thus referred to, is the practice of exercising the judgment of the executive upon the case, after the examining magistrate has certified the evidence and proceedings to the secretary of state, as illustrated in the refusal of the executive to issue a warrant for the surrender of one Stupp or Vogt,—In re Stupp [Id. 13,562],—after he had been committed for extradition by a magistrate, and his release had been refused, on habeas corpus, by a judicial tribunal.

I have thus adverted to all the reported decisions on the point in issue, for the purpose of showing to what extent they uphold the necessity of a prior mandate, and what is the extent of the authority for the practice which has been held to be the law of this circuit, and which had been followed therein, since the decision of Mr. Justice Nelson in the Case of Kaine. Without recapitulating the grounds taken in the various opinions referred to, as reasons for holding that a prior mandate is not made a prerequisite, by any act of congress, to the issuing, by a magistrate, of a warrant for the arrest of a fugitive whose extradition is sought, and is not such a prerequisite, except where made so by the treaty, I am prepared to say, that, so far as my own action is concerned, it is not, for the purposes of the present case, or of future like cases, (that is, cases where the treaty does not require a previous mandate,) to be regarded as the law, that the issuing of an executive mandate, in a case of extradition, is a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest, by a magistrate. I am further authorized to say, that I have consulted with the circuit judge, (Judge Woodruff,) on the subject, and submitted these views to him, and he concurs in them, as an expression, also, of his own views.

It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German empire. An examination of the provisions of the constitution of the German empire does not disclose anything which indicates that then existing treaties between the several states composing the confederation called the German empire and foreign countries were annulled, or to be considered as abrogated. Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent, Comm. 174. In the present case, the mandate issued by the government of the United States shows that the convention in question is regarded as in force both by the United States and by the German empire, represented by its envoy, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German empire and also representing Bavaria. It is also objected, that the complaint is insufficient. This objection is not tenable.

It is not a necessary preliminary step to an investigation here, under an extradition treaty, that a warrant of arrest should have been issued, or proceedings had, against the accused, in the foreign jurisdiction. The point taken to that purport is, therefore, overruled. The writs are discharged, and the relator is remanded to the custody of the marshal.

Case No. 13,888.

In re THOMAS.

[10 Int. Rev. Rec. 53; 1 Chi. Leg. News, 245; 3 Am. Law Rev. 779.] [1]

District Court, N. D. Mississippi. 1869.

ARMY AND NAVY—MILITARY LAW—PAYMASTER'S CLERK—LIABILITY TO MILITARY TRIAL — HABEAS CORPUS.

A clerk while in the employ of a paymaster of the United States army, forged and altered certain vouchers in the disbursement of the reconstruction fund at Vicksburg, Mississippi, and was arrested and confined by the military authorities. On habeas corpus, *held*, such clerk was a person in the military service of the United States, and amenable to the law, rules and regulations thereof, and subject to trial before military tribunal. Prisoner remanded.

[Cited in U. S. v. Bogart, Case No. 14,616.]

[John Thomas, paymaster's clerk in Vicksburg, alleged to have altered certain vouchers, thereby defrauding the government, was arrested by order of General Gillem, and brought before the court on writ of habeas corpus. The relator's counsel claimed that the prisoner was wrongfully in custody, inasmuch as he was not in the military service. The return to the writ set forth that the relator was held to trial by a military tribunal for forgery; and the judge advocate maintained that under the act of March 2, 1863, the relator was amenable to trial by court martial exclusively, as a paymaster's clerk is a person in the military service.][2]

HILL, District Judge. The relator in his application for release from confinement alleges that he is a citizen of the state of Ohio, and not in the military or naval service of the United States, and that he is illegally confined in the military prison of the United States by order of Major General A. Ames, commanding the Fourth military district of the United States, with other allegations not necessary to be stated for the decision of the question now presented. The return states that the relator, at the time of his arrest, was a clerk in the paymaster's office of the army of the U. S., stationed at Vicksburg, and that while acting in that capacity, he did on the 8th day of September, 1868, at Vicksburg, Warren county, Mississippi, knowingly, willfully and feloniously, alter and change a voucher for three dollars and seventy-five cents, to a voucher or claim for twenty-three dollars and seventy-five cents, in favor of one A. Warren, and that the true amount was paid to said Warren, and that the balance, being twenty dollars, was realized and received by the relator, and that said relator had committed other acts of the same nature, and for which he was arrested and held for trial before such military tribunal as the commanding general may appoint.

It is insisted by relator's counsel that a paymaster's clerk in the army of the United States is not subject to trial before a military tribunal unless he is an officer or enlisted soldier of the army of the United States. It is further insisted, that the relator, at the time the alleged offence was committed, was employed by the paymaster, who was then engaged in disbursing the re construction fund, and that the voucher charged to have been altered, was issued in the disbursement of that fund, which facts are admitted as true. It is further admitted, that the relator received his compensation out of the reconstruction fund.

The main question presented is, was the relator at the time of the alleged offence, and at the time of the arrest, liable to arrest and trial before a court martial, or other military tribunal of the army of the United States, for the alleged offence? The act charged, is made an offence by the 1st section of the act approved March 2d, 1863 [12 Stat. 696], for the punishment of frauds committed by persons in the military or naval service of the United States, and for the punishment of civilians who commit like offences. This section provides that any person in the military service of the United States, who shall commit any of the acts therein mentioned, of which the one charged is one, shall be deemed subject to the rules and regulations made for the military and naval forces of the United States, and any person so offending may be arrested and held for trial by a court martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court martial may adjudge, save the punishment of death.

The paymaster's clerk is an officer or person engaged in a particular department of the military service, and is so recognized; he is charged by the paymaster with the performance of important duties, in an important branch of the service; is required to take an oath as such, and receives a stipulated salary for his services, from the government, paid out of the military fund. He is not compelled to engage in this service, but when he does voluntarily so engage, he renders himself liable to the laws, rules and regulations connected therewith, and amenable to the military tribunals for any violations thereof, as therein prescribed. The reconstruction fund is placed in the hands of the paymaster general, and disbursed by the

[1] [3 Am. Law Rev. 779, contains only a partial report.]

[2] [From 1 Chi. Leg. News, 245.]

paymasters according to his orders. The relator was as much in the military service, in the performance of this duty as in that of any other connected with that office.

The 3d section of the act prescribes the punishment to be inflicted upon civilians who may commit like acts, that they shall be prosecuted in the civil courts of the United States. In such cases, or in cases in which the accused has been discharged from the service, before the arrest, the military tribunals have no jurisdiction, but the prosecution must be in the proper civil courts of the United States.

The relator being alone subject to trial before the military tribunal, must be remanded to the officer from whose custody he has been taken and to be subject to such proceedings as may be instituted against him for the alleged offences.

Case No. 13,889.

In re THOMAS.

[1 Dill. 420.] [1]

Circuit Court, D. Kansas. 1871.

WITNESS FEES—ATTACHMENT—MILEAGE.

1. A witness in a civil cause in the United States courts, who, at the time of the service of the subpœna, demands his traveling fees and his fee for one day's attendance, cannot be attached for contempt, if he fails to obey the writ.

2. Mileage of witness. See note, infra.

Mr. Fenlon, for the witness.

Mr. Lecomte, contra.

DILLON, Circuit Judge. Thomas was subpœnaed as a witness in a civil cause pending in this court, and demanded of the marshal at the time of the service of the writ upon him, his traveling fee and his fee for one day's attendance as a witness, which the marshal did not pay. A motion is made to attach the witness. By the statute of the state, a witness who makes such a demand, is not obliged, if his fees are not paid, to obey the subpœna Gen. St. 1868, p. 693. So far as applicable, and when not inconsistent with the constitution and laws of the United States, these statutes have been adopted to regulate the practice in this court.

Under these circumstances, as well as upon general principles, the attachment must be refused. Attachment refused.

NOTE. In Holmes v. Sheridan [Case No. 6,644], at the same term, the court ruled that witnesses living within the district, but more than one hundred miles from the place of trial, who attended in obedience to a subpœna, and gave testimony, were entitled to mileage for the whole distance actually traveled. See Prouty v. Draper [Id. 11,447]; Anderson v. Moe [Id. 359]; Greenl. Ev. 309, 310, note; Dreskill v. Parish [Case No. 4,076]; Whipple v. Cumberland Cotton Co. [Id. 17,515]; Hathaway v. Roach [Id. 6,213]; Conk. Prac. 404, 406.

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

Case No. 13,890.

In re THOMAS.

[3 N. B. R. 38 (Quarto, 7).] [1]

District Court, D. New Jersey. June 22, 1869.

BANKRUPTCY—PROCEEDINGS IN STATE COURT—INJUNCTION—MOTION TO DISSOLVE.

Where an injunction had been issued under the act of the district court, staying proceedings against bankrupt in the state courts until the question of final discharge should be determined, and final discharge was granted and motion made to dissolve said injunction, *held*, that the motion was unnecessary, as the order for the final discharge terminated the injunction.

[In the matter of Veeder G. Thomas, a bankrupt.] Motion by creditor to dissolve an injunction after final discharge. On the 25th day of March, A. D. 1869, an injunction was granted by FIELD, District Judge, upon the petition of said bankrupt, restraining a creditor from prosecuting his suit against said Thomas in the state court of New York, until the question of the debtor's discharge should have been determined. On the 25th day of May, 1869, the said bankrupt received his final discharge in bankruptcy. Upon motion, this day made, to have the said injunction dissolved, it was held that the effect of the final discharge was to terminate the injunction; that no order to show this termination would be necessary. The language of the injunction was in accordance with the statute, and continued in force only until the question of the final discharge could be determined. The bankrupt must hereafter use his discharge as his protection, in cases thereby affected.

William L. Dayton, attorney for creditor.

Before FIELD, District Judge.

Case No. 13,891.

In re THOMAS.

[11 N. B. R. 330; [2] 7 Chi. Leg. News, 187.]

District Court, E. D. Missouri. Feb. 18, 1875.

BANKRUPTCY — ADJUDICATION — MOTION TO SET ASIDE—ACTS OF BANKRUPTCY—CREDITORS —NOTICE.

1. Where a petition by a creditor for an adjudication is filed, and the debtor appears and confesses the acts of bankruptcy charged, and under section 43 of the bankrupt act [14 Stat. 538], a trustee is appointed, a creditor who appears and proves his debt, cannot after the death of the bankrupt, and the rights of other creditors have intervened, be allowed to appear and set aside the adjudication.

[Cited in Re Herman, Case No. 6,405; Re Meade, Id. 9,370; Allen v. Thompson, 10 Fed. 124.]

2. Under the act of March 2, 1867, a creditor not appearing to the petition of adjudication, is not estopped from denying the acts of bankruptcy charged, so far as they affect him with notice.

On petition of Broadway Savings Bank to vacate adjudication of bankruptcy.

[1] [Reprinted by permission.]

[2] [Reprinted from 11 N. B. R. 330, by permission.]

H. A. Clover, for Broadway Savings Bank.
J. G. Chandler, for judgment creditors.
C. C. Whittelsey and R. H. Spencer, for John G. Priest, trustee.
Hill & Bowman, for Thomas' estate.

TREAT, District Judge. On the 25th day of April, 1874, the Mercantile Bank of St. Louis filed a petition in bankruptcy against James S. Thomas, averring that he was a trader, and that he had suspended and not resumed payment of his commercial paper, etc. About a half hour subsequently said Thomas voluntarily appeared in court and confessed in writing the allegations of the petition. He was thereupon adjudged a bankrupt. At the first meeting of creditors they elected to proceed to wind up the estate under the provisions of the 43d section of the bankrupt act. On May 30, 1874, the Broadway Savings Bank proved its claim against the estate, but not as secured. It is said to have received within four months of the adjudication, as collateral to an existing debt, an assignment by the bankrupt of a policy on his own life for his own benefit.

The bankrupt died September 26, 1874. A suit was brought October 24, 1874, by the trustee in bankruptcy against said bank to have said assignment of the policy set aside, and the proceeds of the same applied to the general estate. Answer and replication were duly filed in that case, and the taking of testimony commenced. On the 28th day of January, 1875, said bank filed a petition to vacate said adjudication of bankruptcy and all proceedings thereunder, on the ground that said adjudication was fraudulently procured through collusion between the petitioning creditor and the debtor; said Thomas not being a "trader," and not having suspended payment of any of his "commercial" paper, within the meaning of the law, as was well known to both of the parties.

For the purposes of the question under review, it may be further stated that several judgment creditors who have not yet made formal proofs of their demands, and some who have, and who have liens under their judgments rendered before proceedings in bankruptcy, are prepared to join the Broadway Savings Bank in this proceeding. Thus the question involved should be considered free from the objection that the Broadway Savings Bank had waived its supposed security by proving its demand as unsecured, probably not attaching much value to the policy in May, and not being willing to keep the same alive at its own expense. Yet it claims the benefit thereof on the death of Thomas in September following. Other suggestions as to the estoppel of the Broadway Savings Bank by its participation in proceedings under the adjudication in bankruptcy may also be omitted so far as they are special to that bank.

On filing the petition to vacate, the Mercantile Bank and the trustee under the 43d section were cited in to show cause. It was suggested that the issues of fact made by the pending petition and answers thereto should be referred for the purpose of taking testimony; but at the instance of the court the respective counsel were heard at length on the main question, viz.: Whether at this stage of the case, after adjudication had, any of the creditors can cause the judgment to be vacated and all proceedings under it set aside and annulled on the grounds alleged. It must be observed that if the debtor had not confessed his bankruptcy it would have been in the power of any other creditor to come in and join, alleging other acts of bankruptcy, which the answers to the pending petition now aver had been committed and would have been thus presented. But for the death of Thomas before this petition in January, 1875, it might be in the power of the court, if the adjudication were set aside, to let the original petition by the Mercantile Bank stand and other creditors join, averring other acts of bankruptcy. Through the delay in moving to vacate, the rights of all designed to be protected by the act may be seriously affected. Those who have secured preferences in violation of the bankrupt law, are the only persons to gain by annulling all proceedings in bankruptcy; although the judgment creditors insist that they, by the course taken under the 43d section, are debarred from enforcing their demands at once.

Various authorities are cited under the English bankrupt act to establish the doctrine that the judge, at the instance of any creditor, may at any time supersede the commission in bankruptcy when improperly issued. The case of In re Morris' Estate [Case No. 9,825], under the act of 1800 [2 Stat. 19], is also referred to. The English cases, and those which might have arisen under the act of 1800, can hardly have much application to proceedings either under the act of 1841 [5 Stat. 440], or of 1867; for both the English system and that prescribed by the act of 1800 were, so far as the question now to be considered is involved, wholly dissimilar to the later acts. The case before Judge Hopkinson concerning the Morris estate, as he rightly remarked, was wholly unlike any one previously known, and was not likely ever to occur again. In his exhaustive opinion he reached the important conclusion, that neither the chancellor in England nor a United States judge had, in bankruptcy matters, any powers other than those arising from the bankruptcy statutes; but he held that in the case before him, where creditors, and all other persons concerned, had slept on their rights for about twenty-five or thirty years, and then, after legal notice, never appeared when cited in to show cause why the abandoned estate, which had been nearly destroyed by the gross laches, should not be saved for the benefit of the Morris family, it was not only within his authority, under

the act of 1800, but his duty, to set aside the abandoned proceedings. That decision does not fairly involve the question now before this court; for not only the peculiarities of the case itself, but the provisions of the act of 1800, are entirely different from what is now under consideration. The act of 1841 is in some respects like that of 1867, but not in all. The provisions of the 7th section of the act of 1841, as to proceedings to force debtors into bankruptcy, are very dissimilar to compulsory proceedings under the act of 1867. Hence the rulings in Shawhan v. Wherritt, 7 How. [48 U. S.] 627, are not, in all their details, applicable to like cases arising under the existing statute. The act of 1841 caused notice to creditors to be given before adjudication; and hence, as they were cited in, they were held concluded as to the acts of bankruptcy alleged. The act of 1867 requires no such notice; hence other creditors than the one petitioning are not estopped from disputing that the special act of bankruptcy on which the adjudication was had, does not so far as their claims are concerned, conclude their rights.

Under the act of 1841, two decided cases are referred to,—one by Justice Story (Dutton v. Freeman [Case No. 4,210]), wherein he held that the only person who could contest the allegations for compulsory bankruptcy was the alleged bankrupt. The other case is that decided by Judson, U. S. district judge (In re Heusted [Id. 6,440]) in which it was held that when the alleged bankrupt did not appear to contest, the creditors, who it was alleged had gained a fraudulent preference, might appear and defend. In Shawhan v. Wherritt, supra, creditors were held concluded by the adjudication; so that whether the opinion of Justice Story, or of Judge Judson, were, in the light of the views expressed by the United States supreme court, to prevail under the act of 1841, none of those decisions give material assistance to the present inquiry. Under the act of 1867, a debtor within the prescribed conditions can be forced into bankruptcy, or he may voluntarily apply for the benefit of the act. At the date of the institution of proceedings against Thomas, it was competent for him to apply in his own behalf, or if proceeded against by others, to resist or confess, the consequences being the same in each case, so far as his right of discharge was effected. All or any creditors had a right to join in the petition for compulsory bankruptcy; and an adjudication had on the alleged acts of bankruptcy, whether by confession or otherwise, does not bind, as to the facts so adjudicated, other creditors who did not, and could not, under the act of 1867, intervene between the petitioning creditors and the alleged bankrupt, to prevent the adjudication of bankruptcy. So far as their demands, or claims, are concerned, inasmuch as under the act of 1867 they are not cited in at that stage of the proceedings, the adjudication as to said alleged acts of bankruptcy, so far as their claims are to be proved against the bankrupt's estate, is inter alios acta. It follows, therefore, that whether the views expressed by Justice Story or Judge Judson were correct in the light of Shawhan v. Wherritt [supra], under the act of 1841, the points involved in this case are unaffected. Two cases are referred to, viz.: In re Walker [Case No. 17,061]; and In re Goodfellow [Id. 5,536]. In each of these cases the bankrupts had made voluntary application for supposed fraudulent purposes as against their creditors. The court permitted other creditors to intervene to vacate the adjudication. The court entertained their motion so as to prevent a contemplated fraud, as was supposed, against the provisions of the bankrupt act. Without discussing the principles on which those cases rest, it must suffice to rule that they are inapplicable to this. In them, persons who voluntarily claimed the benefit of the act were, as in all such cases, ex parte, adjudged bankrupt, whereby in the one case the settlement of the estate would have been drawn into an improper district, and in the other, the debtor would have defrauded his creditors by leaving his property conveyed, in a foreign country, in the hands of those who, if in this country, would have been compelled to surrender the same to the assignee. Those were, therefore, cases of an attempt, ex parte, by a debtor to commit a fraud or palpable wrong in violation of the bankrupt act on his creditors.

In the case now before this court, whether the debtor was forced into bankruptcy, or voluntarily applied, he was a resident of this district, and his estate, when adjudged a bankrupt, was to be administered here. It cannot be denied that he could have been adjudged a bankrupt on his own petition, and his confession, upon a petition filed against him by a creditor, is substantially a voluntary proceeding on his part. If the act of bankruptcy confessed was not true, no one, save himself, could be injuriously affected thereby, unless such other person had violated the provisions of the bankrupt act. It is difficult to understand why a person cannot confess himself a bankrupt, and thus subject his estate to the law for the benefit of his creditors, when his confession, as to said act of bankruptcy, cannot affect any of his creditors, other than those who have gained illegal preferences. A modified rule might obtain since the last amendment of the act, but, as it stood in April last, it is not seen why a court should interpose, at the instance of a creditor, to set aside an adjudication of bankruptcy made on confession in an involuntary proceeding, in order, solely, that some creditors may obtain advantage in contravention of the bankrupt law. In the case of In re Morris' Estate [supra], Judge Hopkinson laid particular stress upon the extent of the interest the moving creditor had in the proceeding, as well as upon his laches.

A court should look, also, to the character of the interest prompting the motion. If the bankrupt act is, on all matters within its purview, the supreme law, no court should lend a willing ear to one who seeks to escape the force of its provisions; nor should it, after laches, when it is impossible, as in this case, to do justice to all, entertain and uphold a motion to the injury of the body of creditors for the benefit of one or more who desire peculiar advantages which the paramount law of the land is designed to prevent. From the delays in this case, it is apparent that if the adjudication and all proceedings thereunder are vacated, gross wrong to many creditors will follow. The death of Mr. Thomas has prevented the possibility of restoring all the creditors to their original status. Hence it is held, that no creditors can now be heard to vacate the judgment on the grounds alleged. It is immaterial whether the mercantile bank and Mr. Thomas did collude to have the adjudication made, for Mr. Thomas could have been adjudicated a bankrupt on his own motion, and the same results would have followed as now exist. The confession as to the special facts alleged as an act of bankruptcy, and, indeed, the valid existence of the petitioning creditor's alleged claim, conclude none of the other creditors.

A few prominent suggestions are thus hurriedly made to indicate some of the many grounds upon which the court rests its decision. It cannot order a reference to a master to take proofs, nor entertain the petition in the state of the record in this case. It, therefore, dismisses the petition with costs, it being considered that the record of the case against Thomas, and the proceedings therein, are before the court for the purpose of this decision.

THOMAS, In re See Case No. 10,395.

Case No. 13,892.

The THOMAS.

[See Case No. 3,769.]

THOMAS (ALEXANDER v.). See Case No. 174.

THOMAS (ALLEN v.). See Case No. 239.

Case No. 13,893.

THOMAS v. BRENT.

[1 Cranch, C. C. 161.] [1]

Circuit Court, District of Columbia. March 26, 1804.

EXECUTION—FORTHCOMING BOND—MARSHAL'S COMMISSIONS.

The marshal may include his commissions in a forthcoming bond, and is also entitled to his commissions upon an execution on the bond.

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

[This was an action by John V. Thomas against D. C. Brent, marshal.]

Rule to show cause why the marshal should not return his commissions received on an execution upon a forthcoming bond, which included his commissions on a former execution levied upon goods.

Mr. Taylor, in support of the rule. The act of congress, of February 27, 1801, § 9 (2 Stat. 106), respecting the fees of the marshal, refers to a former law respecting the marshal for the district of Maryland. If the fees are for a service not known by the laws of Maryland, or by act of congress, then the marshal is either not entitled to a fee, or he is entitled under the laws of Virginia of December 10, 1793, c. 151, § 13 (New Rev. Code, p. 298); of December 24, 1794, § 11 (New Rev. Code, p. 326); and the fee-bill of December 19, 1792 (New Rev. Code, p. 218), to a fee of sixty-three cents only. The property has not been actually sold nor replevied, nor has the debt been paid; the marshal, therefore, is not entitled to a commission. Before the act of December 24, 1794, the officer could not include commissions in the forthcoming bond. Worsham v. Egleston, 1 Call, 48. By that act, the officer is allowed to include commissions in the bond, but shall not receive them unless the bond be forfeited. The act proceeded upon the principle that the officer was entitled to commissions, and only directs that they may be included. It was founded on a mistake of what was the law before, and therefore does not give the right to receive a commission. By the law of Maryland of 1779, c. 25, the officer is allowed the same fees on attachment as on execution, where the sheriff is chargeable. By the Virginia law, the sheriff is not liable to the risk after bond given, and cannot be chargeable before, because the defendant has no right to tender a bond after the officer has removed the goods, and until removal, the officer is not liable.

Mr. Mason, contra. The bond satisfies the former judgment and execution. The laws of Virginia do not apply to the case. By the act of congress, the fees of the marshal of this district, are the same as those of the marshal of the district of Maryland; which by the act of congress of May 8, 1792, § 3 (1 Stat. 276) are to be the same as are allowed in the supreme court of the state. The law of Maryland is the only law applicable to the case. By the fee-bill of Maryland, the sheriff, for levying an attachment, or where the sheriff is chargeable, is entitled to the same fees as on executions; and upon a fieri facias the same as upon attachments; and upon any execution for money, he is entitled to 7½ per cent. on the first £10, and three per cent. on the residue. The words are, "or wherewith he shall be chargeable." Was the marshal chargeable for these goods? The case stated, is, that the fieri facias was levied on the goods. Levying means taking the goods into possession. Until the goods were discharged by the bond, the marshal was chargeable. The fee is for

serving the execution, and making himself liable by the custody of the goods. The defendant may tender a forthcoming bond at any time before the sale. The time is not important; some time must intervene between the levying and the bond. Upon the second execution, the marshal has the same trouble de novo. There were two judgments, and two executions, and the marshal is entitled to his fees on both.

Mr. Youngs and Mr. C. Lee, in reply. This, by the laws of Virginia, is one continued process, and constitutes but one execution. The process of a forthcoming bond is not known in Maryland. There is not a new judgment on the bond. It is only an award of execution. The words of the act of Virginia are, that the bond shall have the force of a judgment, and therefore the court only awards execution.

Rule discharged, nem. con.

Case No. 13,894.

THOMAS v. CLARK et al.

[2 McLean, 194.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

PLEADING AT LAW—PLEA DENYING INSTRUMENT SUED ON—AFFIDAVIT—GENERAL ISSUE.

1. By the rules of the court, a plea which denies the instrument on which the action is founded, or the indorsement of it, must be sworn to.

2. If filed without affidavit, the general issue may be good for some purposes, but the note and the indorsement, under such plea, are admitted.

3. And this admission is, that the signature on the note is as averred in the declaration.

[Cited in Ames v. Quimby, 106 U. S. 346, 1 Sup. Ct. 120.]

[Cited in Pegg v. Bidleman, 5 Mich. 29.]

At law.

Lockwood & Barstow, for plaintiff.

Mr. Backus, for defendants.

OPINION OF THE COURT. This action is brought against the defendants, who are partners, as indorsers of a bill of exchange to the plaintiff. A rule of court requires a plea of the general issue, denying the execution of an instrument, or of an indorsement on which the action is brought, to be sworn to. The general issue in this case being filed, without oath, a question is made, whether the ground of the action is admitted. The defendants' counsel contends, that the signatures of Clark and Cole, as they appear to be indorsed on the note, only are admitted, and not the partnership, and that it is necessary for the defendants to prove the partnership. The rule was designed to prevent delays by filing issues, which are not true in fact. A plea of the general issue, under the rule, may be good for some purposes, but it admits the instrument on which the action is brought. In this case, the indorsement by the defendants is admitted. Smith v. McManus, 7 Yerg. 477. But to what extent does this admission go? Most clearly, the admission is, that the defendants indorsed the note, as they are alleged to have done in the declaration. In the declaration, they are stated to be partners, and, as such, indorsed the note in the partnership name. This construction of the rule imposes no hardship on the defendants. If the note were not indorsed by them, as partners, they might have sworn to the plea, which would have thrown on the plaintiff the necessity of proving their signatures, as alleged in the declaration. Judgment.

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

THOMAS (CONSOLIDATED FRUIT JAR CO. v.). See Case No. 3,131.

Case No. 13,895.

THOMAS v. CRUTTENDEN.

[4 Cranch, C. C. 71.] [1]

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

EJECTMENT—TITLE—BANKRUPTCY—COMMISSIONERS' DEED—EVIDENCE—RECORDS.

A person, claiming title under a deed from commissioners of bankrupt, under the bankrupt law of 1800 [2 Stat. 19], must show their authority, and that their proceedings were regular, &c., as they exercised only a special, limited power; but if the records are destroyed, the next best evidence will be received.

The plaintiff [James Thomas], having shown title in Washington Bowie, offered in evidence a deed from E. B. Caldwell, and purporting to be executed by them as commissioners of bankruptcy to Walter Smith and Charles Wayman, assignees of the bankrupt; and offered to prove by W. Brent, the clerk of this court, that the bankrupt papers and records, in cases where commissions were issued by a judge of this court, were destroyed by the enemy in 1814; and by W. Cranch, that he, as assistant judge of this court, issued a commission of bankruptcy against Washington Bowie. And the plaintiff further offered in evidence a deed from the assignees to Baltzer, under whom the plaintiff claims; and a decree in chancery ordering a sale of this, as part of the real estate of Baltzer, and possession of the purchase under that decree; and also produced a certificate of the clerk of this court, made in January, 1804, that this court, in December term, 1803, decreed that the deed from the commissioners to the assignees should be recorded; and further proved that all the records and papers of that term were destroyed by the enemy. Those deeds recited the proceedings under the bankrupt law of 1800.

Mr. Redin, for defendant [Joel Cruttenden], objected to the admission of the deed

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

from the commissioners to the assignees, because all the proceedings under the commission of bankruptcy must be proved; nothing can be presumed; it is a special tribunal of limited powers and jurisdiction, &c.

Mr. Marbury and Mr. Key, for plaintiff, admit that everything necessary to support the jurisdiction and authority of the commissioners must be proved; but the question is, by what sort of evidence? The records and original papers are all destroyed. The next best evidence is that which is now offered. The recitals in the old deeds, recorded in 1802, twenty-eight years ago; the destruction of the original papers and records; the certificate of the clerk, recorded in January, 1804, that a decree was passed by this court in December, 1803, authorizing the recording of the deed and the long possession under that deed,—are circumstances from which the jury may infer all the necessary proceedings under the bankrupt law.

THE COURT was of that opinion (nem. con.), and the jury rendered their verdict for the plaintiff.

THOMAS, The (DELAWARE RIVER CO. v.). See Case No. 3,769.

THOMAS. The (DELAWARE RIVER STORAGE CO. v.). See Case No. 3,769.

Case No. 13,896.

THOMAS v. ELLIOT.

[2 Cranch, C. C. 432.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

ACTIONS—ASSIGNEES OF CAUSE—SPECIAL BAIL—SURETIES.

1. Where there are contending assignees of a cause of action pending in court, the court will not, on motion, decide the merits of their respective claims, by ordering the action to be entered upon the docket as for the use of either of them.

2. If special bail be taken out of court, by two justices of the peace, by recognizance, there must be two sureties.

The scire facias, in this case against William Elliot, as bail for Peter Morte, recites a recognizance before two justices of the peace for this county on the 17th of November, 1818, by which "a certain William Elliot, of the said county of Washington, came personally in his own proper person, and became pledge and bail," &c., "for a certain Peter Morte," &c., in the usual form. The suit against Morte was originally brought by the creditor, George N. Thomas, in his own name; who, before judgment, was discharged under the insolvent law, on the 7th of August, 1820, and assigned all his effects to John L. Brightwell, his trustee under that law, who became a party plaintiff in the place of George N. Thomas, and obtained a judgment in his own name as trustee of Thomas for $311. This judgment is also recited in the scire facias.

Mr. Key, for Offa Wilson, administrator of Henry M. Wilson, obtained a rule on Brightwell to show cause why this scire facias should not be entered for the use of Offa Wilson, as administrator of Henry M. Wilson; and produced an assignment dated June 4th, 1819, more than a year before Thomas's application for the benefit of the insolvent act, from the said Thomas to the said Henry M. Wilson, of the proceeds of that suit, and an order from Thomas to the clerk of the court to enter the suit for the use of Wilson.

But THE COURT, on the 23d of January, 1824, discharged the rule and refused to order the cause to be entered for the use of Wilson, without prejudice to the rights of the parties.

Mr. Redin, for defendant, moved the court to quash the scire facias, because upon its face it appeared that only one person was taken by the justices as bail, whereas the act of 1715, c. 28, which is the only act which authorizes them to take special bail out of court, requires the defendant to go before the justices with two sufficient freeholders; and the form prescribed is, "You A. B. and C. D., and either of you do undertake," &c. Every such authority must be strictly pursued, as this court has decided in several cases upon the act of Maryland of 1791, c. 67, § 1, authorizing judgments to be superseded. Smith v. Middleton, at April term, 1821 [Case No. 13,079], and Mandeville v. Love, October term, 1821 [Id. 9,012]; Rogers v. Reeves, 1 Term R. 418; Scryven v. Dyther, Cro. Eliz. 672; Symes v. Oakes, 2 Strange, 893.

Mr. Key, for plaintiff, contra.

THE COURT (THRUSTON, Circuit Judge, absent) quashed the scire facias, giving judgment upon the issue of "no such record."

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

Case No. 13,897.

THOMAS v. GITTINGS.

[Taney, 472.] [1]

Circuit Court, D. Maryland. April 11, 1844.

BOTTOMRY—NECESSITY FOR—MASTER'S AUTHORITY—ACTS OF OWNER—SUPPLIES—CONSIGNEE.

1. T., the owner of a vessel, of which F. was master, directed her to be employed in running between Savannah and Havana, under a letter of instructions; a cargo of rice was procured, and put on board at Savannah, on the credit of S., the agent of the vessel at that place; in fitting her for the voyage, expenses were incurred to the amount of $219 52, for which a bill was drawn by the master, on the owner, living in Baltimore, and accepted by him; this bill was protested, and demand was made upon the master, at Havana, for its payment; A., the consignee at Havana, gave the master a bill on a

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

house in Boston, to reimburse S. for the rice which was procured on his credit, and two days before, advanced the master $229 and 4 reals, to take up the protested bill of exchange drawn by him on the owner. While the vessel remained at Havana, supplies were furnished her, and money advanced to the master, by A., her consignee at that place; when the vessel was about to sail again from Havana, bound to Baltimore, a bottomry-bond was executed by the master, in favor of A., the consignee, for the sums advanced by the latter. In an action on this bond: *Held*, that in relation to the bill of exchange for $600, the proceeds of the cargo, and the freight also, might lawfully have been applied by the consignee to pay what was due on the rice, provided the master acted, in regard to the cargo, within the scope of the letter of instructions; and the application of the freight to this purpose would not impair the consignee's right to the bond subsequently taken for supplies afterwards furnished.

2. But, how far the consignee could take a bottomry-bond for sums advanced on the vessel, when he ought to have in his hands freight enough to pay the expenses—quere?

3. That the money was properly advanced to take up the protested bill of exchange, as it was stated in the bill itself, that the money was due for disbursements for the vessel, and chargeable to her account, and the owner, by accepting it admitted that the disbursements were so made and to be so charged.

4. The person who furnished the supplies, for which the bill of exchange was given, waived his lien on the vessel, by taking the bill, and suffering the vessel to proceed on her voyage; but when the owner afterwards refused to pay the bill, and sent the creditor to demand payment from the master, in a foreign port, he must be regarded as authorizing the master to raise the money upon the vessel itself, if he had no other means.

5. If the supplies furnished, and the expenses paid, and money advanced at Havana, were necessary for the vessel, they were a sufficient foundation for the bottomry-bond to the extent of such supplies, expenses, and advances, provided they were furnished on the credit of the vessel; they will not be presumed to have been made and furnished upon the personal credit of the owner or master alone, unless the fact is proved by testimony. The necessity for such supplies need not have been so urgent that the vessel must have been lost to the owner without them; it is sufficient, if, as matters then stood, they may, in the exercise of a discreet and honest judgment, have appeared to be reasonable and proper for the interest of the owner.

[Cited in Nippert v. The Williams, 39 Fed. 826.]

6. The specific objects to which the money was applied, that was advanced to the master, must be shown, in order that the court may judge of the necessity, upon the proof offered.

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

The libel in this case was filed on the 29th of May, 1843, by the appellee [Lambert Gittings], as assignee of Don Jose V. Adot, against the schooner El Caballero [William Thomas, claimant], on a bottomry-bond. The libellant stated that the schooner El Caballero was lying in the port of Havana, in the island of Cuba, on the 10th of May, 1843, destined upon a voyage from said port to Baltimore; that the master of said vessel (Henry Fitzgerald) being in want of money to provide supplies for, and to meet the disbursements of said schooner, and to enable her to make her contemplated voyage to Baltimore, and having no other means of procuring the same, borrowed of Don Jose V. Adot, eight hundred and ninety-two dollars and one real, upon the bottomry of said schooner, and that the same was advanced and paid accordingly, at the rate of ten per cent. for the adventure and risk, making together the sum of nine hundred and eighty-one dollars and two and one-half reals; and that the said Fitzgerald, on the said 10th of May, 1843, executed a bottomry-bond, pledging said vessel for the payment of said sum of money, within three days after her arrival at Baltimore, or before her cargo should be discharged. That the money was advanced by said Adot to said Fitzgerald, for the purpose aforesaid, and was necessary therefor, and that the schooner could not have performed her contemplated voyage, if the same had not been advanced and paid as aforesaid; that the vessel being so supplied, proceeded from Havana to Baltimore, where she arrived on the 23d of May, 1843, and completed the discharge of her cargo on the 26th of the same month. That by assignment, duly acknowledged, the bottomry-bond was, on the day of its execution, assigned to Lambert Gittings, the libellant, who thereby became entitled to receive the amount due thereon, of which said Fitzgerald received due notice; that the amount due on said bond had not been paid, although the same had been demanded of said Fitzgerald, and that the libellant was entitled to receive the said sum of nine hundred and eighty-one dollars and two and one-half reals, with interest, at the rate of six per cent. from the time it became due. The libellant filed with his libel, the bottomry-bond and assignment.

The answer of William Thomas, owner and claimant of the vessel, admitted that she was at Havana on the 10th of May, 1843; that said Fitzgerald was her master; that she was destined upon a voyage to Baltimore, and that said bottomry-bond was executed by said Fitzgerald. But he denied that said Fitzgerald was then in want of said sum of eight hundred and ninety-two dollars and one real, to provide supplies for, or to meet the disbursements of said schooner, or to enable her to make her contemplated voyage to Baltimore; and he also utterly denied that the said Henry Fitzgerald, as such master, had no other means, than upon the bottom of said schooner, of procuring such sum, if any, as he might have so needed; and he also denied that said Adot did advance to Fitzgerald, as such master, said alleged sum. He admitted that said schooner proceeded on and accomplished her voyage, and he also admitted the assignment of the bond, and that the same had not been paid. That it was falsely alleged in the libel that the sum there mentioned was advanced by said Adot, and was necessary to enable Fitzgerald to provide supplies for

and meet the disbursements of the vessel, and to enable her to make her contemplated voyage; and it was also falsely alleged that she could not have accomplished her voyage without said alleged advance. That a part of said pretended advance was an alleged claim of Fitzgerald against respondent, for alleged disbursements on a former voyage, and was paid to and received by him for his own use, and not otherwise. That Don Jose V. Adot, on the said 10th of May, 1843, or prior thereto, had received, to the respondent's use, several large sums of money, that is to say, four hundred and forty six dollars, received by him on the 18th of March, as the net proceeds of certain tierces and barrels of rice, the property of respondent. also, two hundred and eighty-seven dollars and four cents, received as her freight on her contemplated voyage to Baltimore; and also, twenty-three dollars and four reals, received on the 18th day of March, to respondent's use; which sums had not been accounted for, to respondent, by said Adot. That there was no necessity, at the time, and under the circumstances, when said bottomry-bond was executed, for the said alleged advances by the said Don Jose V. Adot; and that in consideration of the premises said Fitzgerald had no right to execute said bond, and the same was void.

A decree for the libellant was passed by the district court, Heath, J. [case unreported]; and an appeal to this court was taken and argued. The testimony adduced is substantially stated in the opinion of the court.

William Schley, for appellant.
John Nelson, for appellee.

TANEY, Circuit Justice. The libel in this case is filed against the schooner El Caballero, upon a bottomry bond, executed by Henry Fitzgerald to Jose V. Adot, at Havana, to secure the payment of $981, 2½ reals; the said Fitzgerald, being the master of the schooner; and William Thomas, as the present claimant, the owner; the bond is dated May 10th, 1843.

It appears from the evidence, that Thomas, the owner of the vessel, on the 1st of December, 1842, at Havana, executed a bottomry-bond to the said Fitzgerald, for the sum of $609, for money at that time loaned to him, and on the same day, appointed Fitzgerald master, and gave him a power of attorney to sell her for any sum not less than $6,000; and by a letter of instructions of the 10th of the same month, he directed the schooner to be employed in running between Savannah and Havana, if freight could be procured, or to take freight from either of those ports to other places, if the master should find it for the interest of the owner to do so, until a sale could be affected.

Thomas returned to Baltimore, where he resided, and Fitzgerald took command of the vessel and made two voyages to Savannah and back again to Havana. On the last of these voyages, the vessel was laden with rice, which was procured at Savannah, upon the credit of Sorel, who was there the agent of the schooner, and she arrived at Havana early in March, 1843. In fitting her for this voyage, expenses were incurred at Savannah to the amount of $219.52, for which a bill was drawn by the master on Thomas, and accepted by him; but the bill was afterwards protested in Baltimore for non-payment, and notice of the protest reached the master at Havana, shortly after he arrived on the voyage last mentioned, with a demand upon him for the payment of the bill. Jose V. Adot was the consignee of the schooner at Havana, and it appears by the accounts, that on the 11th of March, 1843, he gave Fitzgerald a bill on a house in Boston for $600, and on the 9th of the same month, advanced him $229 and 4 reals to take up the protested bill, and pay the costs and charges upon it. The net proceeds of the cargo of rice appears to have been $446 and the freight $287 and 4 reals; there is some difficulty on the testimony as to these sums and dates, which require further explanation. The bill for $600 is stated to have been given to reimburse Sorel for the rice which was procured on his credit; but I do not understand who were the owners, nor how it happens that $600 was remitted in payment of a cargo which netted only $446. The whole cargo could not have been purchased on account of the vessel, as the letter of instruction authorized the master to take an interest of one-fourth or one-third only; nor is it said that the shipment was a losing one; and it is necessary that the character of this transaction should be more clearly shown, before I can determine what influence it ought to have, if any, on the validity of the bottomry. So too, in regard to the money advanced to pay the protested bill; it is charged in the account on the 9th of March; yet the protest was made in Baltimore, and is dated on the 10th, and consequently, there could have been no notice received at Havana at the time this advance is stated to have been made. Perhaps there is some mistake as to the date given in the account.

The vessel remained at Havana about two months, no freight offering during that time, and the master not being able to sell her for the sum limited While she was so lying at that port, supplies were furnished and money advanced to the master by Adot, the consignee, and on the 10th of May, 1843, when the schooner was about to sail for Baltimore with a cargo of molasses, the bottomry was given which is now in question.

In relation to the item of the bill of exchange for $600, undoubtedly, the proceeds of the cargo and the freight also, might lawfully have been applied by the consignee to pay what was due on account of the rice, provided the master acted within the scope of his instructions in regard to this cargo; and

the application of the freight to this purpose, would not impair his right to the bond subsequently taken, for supplies afterwards furnished. But if that bill was for a larger amount than the sum justly due on account of this cargo, or if the owner was not liable to the full amount thus paid, then the freight may have been misapplied, and the question will arise how far the consignee can take a bottomry on the vessel, when he ought to have had in his hands freight enough to pay the expenses.

The money advanced to pay the protested bill stands upon different ground. It is stated in the bill itself, that the money was due for disbursements for the schooner, and chargeable to her account, and the owner by accepting it, admits that the disbursements were so made, and to be so charged. Undoubtedly, the party who furnished the supplies waived his lien on the vessel, by taking the bill and suffering the vessel to sail on her voyage; but when the owner afterwards refused to pay the bill, and the protest and demand for payment, finds the master in a foreign port, without any funds of his own in his hands, out of which the payment may be made, what is he to do? Must he suffer himself to be thrown into prison, and separated from the property intrusted to his care and leave it to be attached and sold under legal process? I think not. It is the interest of the owner, as well as the master, that the money should rather be raised on the pledge of the vessel. And when the owner thus refuses to pay the debt due from him, and sends the creditor to demand payment from his master on board of his vessel in a foreign port, he must be regarded as authorizing the master to raise the money upon the vessel itself, if he has no other means; such at least are the dictates of equity and justice, and I am not aware of any principle of admiralty law which requires the court to give a contrary decision. This item might, therefore, have been properly included in the bond.

In relation to the other accounts, embracing that of Caberga, which was paid by Adot, I am not prepared to express an opinion upon these, without a more careful examination. If the supplies furnished, and the expenses paid, and the money advanced, were necessary for the vessel, they were certainly a sufficient foundation for the bottomry-bond, to the extent of such supplies, expenses and advances, provided they were furnished on the credit of the schooner; and they will not be presumed to have been made and furnished upon the personal credit of the owner or master alone, unless the fact is proved by testimony.

When I speak of the necessity of such supplies, I do not mean to say that they must appear to have been so urgent that the vessel must have been lost to the owner without them; it is sufficient, if, as matters then stood, they may, in the exercise of discreet and honest judgment, have appeared to be reasonable and proper for the interest of the owner. But the specific objects to which the money advanced to the master was applied, must be shown, in order that the court may judge of the necessity, upon the proofs offered.

The papers and accounts are, therefore, referred to J. Mason Campbell, Esquire, one of the commissioners of this court, with directions, after notice to the parties concerned, to take the testimony of Henry Fitzgerald, and such other witnesses as may be produced by either party, and to report to this court, on or before the third day of January next, what items of the supplies, charges, expenses and advances were necessary, and also to reduce to writing and report the testimony of the witnesses, which may be examined before him. I have pointed out some of the obscurities in the evidence already offered, in order to direct the attention of the commissioner to that portion of the controversy, and he will state the account according to the principles of law hereinbefore mentioned and decided.

On the 4th of January, 1844, the commissioner filed the following report and account:

To the Honorable Roger B. Taney, Circuit Judge of the United States in and for the Fourth Circuit and District of Maryland:

The report of the commissioner, appointed by the order of your honor, passed on or about the 20th day of November, 1843, in this cause, to take testimony, etc., humbly showeth:

That at the instance of the libellant, he proceeded, upon notice to the respondent, and in presence of the proctors of both sides, to take the testimony of Henry Fitzgerald, late master of the schooner El Caballero, upon oath, and that the said witness testified as follows: That the date of the payment made by Adot to him, to take up the protested bill, was on the 9th or 10th of April, 1843, and not on the 9th of the preceding month, as erroneously entered in Adot's account current. That the draft was sent out to Havana, by James J. Fisher, of Baltimore, and lodged by him with the house of Deconnix, Spalding & Co., which firm was, he thinks, the same as Jose V. Adot; that the money was paid to deponent by Adot, under the advice of General Campbell, the United States consul at Havana, and his friends. That no suit was brought or threatened upon the draft, and no arrest made; that it was paid at once, because they were treating for the sale of the vessel at the time, and did not wish to have any claim outstanding against her, and because Sorel would hold deponent liable on the draft.

That as to the draft of six hundred dollars on Boston, it was drawn early in March, when the vessel had a credit both for the

amount of sales of the rice and the freight, and half-commissions on the sales. It was drawn partly to reimburse Sorel, the consignee of the schooner at Savannah, for the rice bought there by him, and sent by the schooner to Havana. Sorel bought it without funds, on the vessel's account, and on deponent's promise that the proceeds of the rice, as soon as sold, should be transmitted him; there was a profit on the transaction. The net proceeds of the draft, at Savannah, were five hundred and twenty-eight dollars; and of this sum four hundred and ten dollars and fifty cents went to the reimbursement of Sorel for the rice, with interest and postages on the same account, and the balance went to pay deponent on account of wages and advances due him by the vessel. The draft was obtained before he contemplated the bottomry, which was not executed until May; at the time it was procured, she was waiting a sale, not freight. The draft was drawn in Sorel's favor, and sent to him, and was received by deponent from Adot. The account herewith exhibited will show the application of the proceeds of the draft. His owner knew neither Sorel nor Adot, and deponent's going to them was of his own motion The Deconnix, Spalding & Co., mentioned in the account filed by deponent as part of his examination, was Jose V. Adot: that firm was in liquidation at the time.

In relation to the advance of two hundred and thirty-six dollars, made in different sums, on the 13th March, 26th April, and 6th and 10th May, Caberga's account: deponent recollects that part of the money received by him, either from Adot or Caberga, was paid to the mate on account of deponent's indebtedness to him, and not as wages; the amount so paid was about fifty dollars, and at the time, the vessel was indebted to deponent, in a much larger amount. The items appearing in deponent's account current with the schooner, which is filed among the papers in the case, and amounting to ninety-four dollars and eighty-seven cents, were purchased with the advances received either from Adot or Caberga; these articles were all necessary for the schooner. The supplies appearing in Caberga's account were all for the schooner (with the exception of the two boxes cigars, there marked "Self," and bought for deponent) and were all necessary for the vessel. The schooner was always indebted to deponent while in Havana, and part of the money which he received from Adot and Caberga was drawn by him for his owner's expenses. Adot advanced the sum of two hundred and thirty-six dollars he charges, and Caberga the one hundred and two dollars charged him. The former also advanced the amount of the protested bill.

The provisions, &c., charged in Caberga's account, and those in his own list of charges already mentioned, and amounting to ninety-four dollars and eighty-seven cents, were for the general sustenance of himself and crew; they lived aboard the schooner. He brought home with him about thirty or forty dollars of the money he received. On his return to Baltimore, the day after the schooner arrived, and before her discharge of her cargo, he applied to and received from Mr. Gittings, two hundred and fifty-two dollars and twenty-five cents; the occasion of applying was for pilotage, for which he would otherwise have been sued. The schooner arrived on the 23d of May 1843.

That upon the testimony so taken he has stated an account which shows the amount properly secured by the bottomry, and that, in stating it, he has reduced the Spanish real to American money, at the rate of twelve and a half cents the real.

All which is respectfully submitted,

J. Mason Campbell.

4 January, 1844.

Cost of report and audit $10.

Schooner El Caballero in Account with Jose V. Adot.

Dr.

To amount of "disbursements" for the schooner, as set down in the particular account thereof, filed among the papers	$812 37½	
After deducting cash therein charged as paid to Capt. Fitzgerald	$236 00	
And Caberga's account charged therein	226 31¼	
	462 31¼	
		$ 340 06¼
Cash paid by Adot to Capt. Fitzgerald, for the schooner, being her share of the $94.87, referred to in the deposition		53 84
Supplies furnished by Caberga, deducting two boxes cigars		119 83
Cash paid by Caberga to Capt. Fitzgerald, for the schooner, being his share of the above $94.87		41 03
Commissions of 2½ per cent. on the above $551.76		13 86
Bill on Boston, to reimburse Sorel, $410.50, and the premium necessary to make it cash in Savannah		418 71
Money advanced to pay protested draft		229 50
Commission on outward freight		12 62½
Ten per cent. on amount of bottomry		47 21
		$1,276 69

To Jose V. Adot, on bottomry-bond $519.69.

Cr.

By net proceeds of rice		$ 446 00
½ commission on do		23 50
Amount of freight		287 50
Bottomry-bond	$472 45	
Ten per cent., maritime risk	47 24	
		519 69
		$1,276 69

To which report and account the libellant filed the following exceptions:

The libellant in this case begs leave to except to the report and account filed in this cause by J. M. Campbell, Esq., commissioner. Because the said commissioner has deducted from the account of disbursements filed in the cause by the libellant, the sum of two hundred and thirty-six dollars, charged therein as cash paid to Capt. Fitzgerald, and also the sum of two hundred and twenty-six dollars and thirty-one and a quarter cents, charged therein as Caberga's account. And also because the said commissioner has refused to allow the said libellant other char-

ges constituting part of his claim, to which he was legally entitled.

J. Nelson, Proctor for Libellant.

On the 11th of April, 1844, the above exceptions having been withdrawn, THE COURT (TANEY, Circuit Justice) passed the following decree:

By the circuit court of the United States, for the Fourth circuit, in and for the district of Maryland. The within exceptions having been submitted without argument, and on the exceptant's assent, in open court, that the same should be overruled; it is, thereupon, this 11th day of April, in the year of our Lord eighteen hundred and forty-four, adjudged and ordered that the same be and they are hereby overruled, with costs to be taxed by the clerk.

It is also hereby ordered and decreed, that the decree of the district court, dated 7th July, 1843, and from which the present appeal was prayed, be and the same is hereby reversed, with costs of the appeal to be taxed by the clerk of this court. And it is also further ordered and decreed, that out of the fund in court, deposited with the clerk of this court, the sum of five hundred and nineteen dollars and sixty-nine cents, without interest, be paid to the libellant or his proctor; and that the residue of said sum be paid to the said William Thomas, the appellant, or his proctor, after deducting thereout all the costs and expenses incurred in the proceedings in the district court, prior to the appeal to this court, and which costs and expenses incurred in the said district court are hereby ordered and directed to be paid by the said William Thomas.

Case No. 13,898.

THOMAS v. GRAY.

[1 Blatchf. & H. 493.] [1]

District Court, S. D. New York. Feb. 12, 1836.

PLEADING IN ADMIRALTY—SUPPLEMENTAL LIBEL—ANSWER—REPLICATION—WAGES—DAMAGES FOR ASSAULT—COSTS.

1. Where a supplemental libel is filed before the process is returnable, it becomes part of the pleadings, without further notice to the respondent, and he is bound to answer it.

2. When the respondent has been arrested in a suit in personam, the answer is not filed, within the meaning of the eighteenth rule, until bail is perfected.

3. Where a replication is not filed within the time required by the rules of court, the respondent will be held to have waived the benefit of the rules in that respect, unless he takes advantage of the point when evidence is offered at the hearing.

4. Courts of admiralty do not encourage suits in personam, for personal torts committed upon tide-waters within the ports and harbors of a state.

5. Aliter, when a tort committed upon tide-waters gives a right of action in rem, or when a tort is not the sole cause of action, but is connected with other matters which are within admiralty cognizance.

[Cited in The Guiding Star, 1 Fed. 349.]

6. Where a seaman, before his period of service is ended, is imprisoned by the local authorities in a home port, on a well-founded charge of mutinous conduct, the master is not liable for the seaman's wages which accrue during the time of his imprisonment.

7. Such imprisonment may, however, be deemed an adequate punishment for the offence, and prevent a subtraction of the wages earned prior to the imprisonment.

8. If several distinct causes of action are united in the same libel, the costs may be distributed, and each party may recover costs on those branches of the action in which he succeeds.

9. In a libel to recover wages and also damages for an assault, where the claim to wages was sustained, but the claim to damages for the assault was dismissed, the libellant recovered wages and costs, and the respondent also recovered costs, the two recoveries being set-off against each other, and execution being awarded to the party in whose favor the balance was found.

In admiralty. This was a libel in personam, by [William Thomas] a seaman against [Cadwallader Gray] a master for the recovery of wages, and of damages for an aggravated assault and wounding by shooting with a pistol. The libel was filed on the 5th of June, and the process sued out was returnable on the 7th of July. On the 25th of June, a supplemental libel, by way of amendment, was filed. The original libel set out a contract of hiring by the month, and claimed $32 and upwards as due for wages. The amended libel alleged, that the libellant had shipped for six months, and claimed wages for the whole period, on the ground that performance of the entire contract on the part of the libellant had been prevented by the misconduct of the respondent. The answer was filed on the 7th of July, and bail was put in on the 9th. On the 17th, a replication, in the usual form, was filed by the libellant. The evidence offered by both parties at the hearing, upon the issues raised by the pleadings, was full, and, in many respects, contradictory. It appeared that, when the vessel was in New York, the libellant had absented himself for a day or two previous to the 9th of April, and that, on the morning of that day, after the crew had breakfasted, he returned and placed himself in the way of the crew who were at work, and refused to work himself, unless breakfast was prepared for him. The respondent thereupon endeavored to put him out of the way, and was violently assaulted by the libellant. The respondent then went on shore and procured a police officer. On his return, the libellant, having armed himself with an iron marling-spike, fastened it to his arm with a lanyard, and went up the fore-rigging, threatening to take the life of any one who approached him. A number of persons having collected, the li-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

bellant finally came down, and was taken to the police office, and afterwards to the hospital, in consequence of a wound received in the knee while he was in the rigging. A pistol was fired at the libellant, by the master before he came down, but the weight of evidence proved that the wound was the consequence of the libellant's own act in aiming a blow at the respondent with the marling-spike, which was suddenly brought up against the knee of the libellant by the jerk of the lanyard. The answer set up a forfeiture of the wages due to the libellant for his services prior to his imprisonment. A deposition of Tobias Guttridge was offered as evidence on the part of the libellant, and was objected to, on the ground that the witness was a resident of the city of New York, and was not proved to be absent at the time of trial. After the evidence was put in, the case stood over, for argument, to a subsequent term.

Alanson Nash, for the libellant.

I. The tort was committed on a vessel where the tide ebbed and flowed, and within the admiralty jurisdiction. Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 343; U. S. v. Bevans, 3 Wheat. [16 U. S.] 336. The jurisdiction is, in this respect, the same in a civil suit for a tort as in a suit on a contract. McGrath v. The Candalero [Case No. 8,810].

II. Parties may file, by way of amendment, new allegations, not charging new and distinct causes of suit. Proceedings in admiralty are, in conformity with the ancient practice, supposed to be in open court, and the parties to be always present; and the amended libel was filed some days before the process was returnable or the answer was filed.

III. The answer cannot be considered as having been filed until the bail was perfected. The twentieth rule allows the libellant ten days to except to the answer, and the rule of October, 1833,[2] should be so construed as not to impair the right given by the twentieth rule. Accordingly, fourteen days must elapse after bail is perfected, before the libellant, by not filing a replication, can be held to have admitted the matters set up by the answer. Moreover, the objection that the replication is no part of the pleadings, if it ever existed, has been waived by the respondent; because, at the hearing, evidence was offered and depositions were read by both parties, for and against the allegations of the answer.

IV. The respondent is liable for wages for the full term of six months, since, by his own act, he prevented the libellant from fulfilling the contract on his part. Hoyt v. Wildfire, 3 Johns. 518; Emerson v. Howland [Case No. 4,441].

Washington Q. Morton, for respondent.

I. The offence, if any, was committed at a wharf, within the jurisdiction of the civil authorities, and whilst process from them was actually out to arrest the libellant. The case is, therefore, not within the admiralty jurisdiction, and the libel ought to be dismissed.

II. The case stands before the court upon the libel and answer alone. The amended libel is no part of the pleadings, the respondent having had no notice or knowledge of its having been filed.

III. The replication is no part of the pleadings, because the libellant did not file it within four days after the respondent's appearance was entered and his answer was put in, but suffered ten days to elapse. Therefore, under the rule of October, 1833, he should be held to have admitted the matters set up by the answer, and the testimony offered to contradict the allegations of the answer should be excluded.

IV. A master of a vessel may enforce obedience to his orders in port as well as at sea. The means used by the respondent were lawful and proper; and the same degree of misconduct which renders a seaman unfit to be taken to sea, justifies a master in putting him on shore, and forfeits all wages then due. 3 Kent, Comm. 181; Relf v. The Maria [Case No. 11,692].

BETTS, District Judge. Two objections of a preliminary character are taken on the part of the respondent—one as to the effect of the supplemental libel and the admissibility of proofs under the issue, as it is formed, and the other to the jurisdiction of the court with respect to the assault and wounding. The original libel was filed on the 5th of June. On the 25th, an amendment was filed, introducing the allegations, that the libellant was compelled, by the cruel treatment of the master, to leave the vessel, and is, therefore, entitled to wages for the full period of six months. The original libel claimed that $32 and upwards were due for wages, over and above all just allowances. The answer was filed after the filing of the supplemental libel; and it is alleged by the respondent, that the answer was put in without notice that a supplemental libel had been filed. Proceedings in admiralty are deemed to be apud acta, in open court, and by authority of the court. Clerke, Praxis, Adm. tit. 19; Clerke's Eccl. Pr. tit. 31. The intendment of law is, that both parties thus have notice, in facie curiæ, of all processes in the cause, by the act of taking a step in it. When the warrant of arrest was returned

[2] This rule was as follows: "The matter set up by a sworn answer, responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless, within four days from the time the answer is filed, a replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered on the part of the libellant, in opposition to the allegations of the answer." See The Mary Jane [Case No. 9,215].

and called in court, the supplemental libel was duly on file, and a component part of the original. The answer then interposed must, accordingly, be taken as made to the entire libel. If the supplemental libel had been filed out of court, after the return of the process, and without notice to the respondent, it would be wholly nugatory, and could not now be used as part of the pleadings, unless the answer explicitly recognized and adopted it by replying to its averments. It will be of no practical importance to pursue the inquiry, in this instance, whether this amendment became part of the pleadings by being regularly in court, or by the recognition of the respondent. An issue upon the allegation that a specific sum and more was due, would justify the full latitude of proof admissible under the more direct and explicit averment, that six months' wages were due.

It is further insisted, that by the practice and the standing rules of the court, the libellant is precluded from offering proofs against the allegations of the answer, because his replication was not put in until ten days after the answer was filed. By a rule adopted in October, 1833, a libellant is held to admit the matters set up in the answer, if he does not, within four days after the answer is put in, file a replication thereto. See The Mary Jane [Case No. 9,215]. Under a sound construction of the eighteenth rule,[3] the answer cannot be regarded as put in or filed, until bail is perfected, that act being necessary to give a respondent a complete locus standi in the cause. The respondent further insists, that the ten days allowed to a libellant, by the twentieth rule, to except to an answer, should be added to the four days, so that fourteen days must elapse after bail is perfected, before the statements of an answer can have effect as being admitted on the part of a libellant.[4] It appears to me, however, to be unnecessary to settle this point of practice in this case, for, admitting that the respondent had a right to claim the advantage given him by the rule of October, 1833, he has, by his own acts, unequivocally waived its application. On the hearing, the libellant read depositions previously taken in the cause, and gave oral proofs at large against the statements in the answer, without any objection on the part of the respondent that he was precluded, by the rule referred to, from controverting those statements. So, also, the respondent himself read a deposition filed by him on the 1st of September, and called and examined a number of witnesses to maintain his defence. The objection, that the replication was filed out of time and that the answer must be regarded as full proof, is first advanced at this term, to which time the cause stood over for argument. This is too late. Objections to the admissibility of evidence must be made when the proof is offered, or the party can never avail himself of them. 1 Starkie, Ev. pt. 2, p. 121. If the libellant has committed any irregularity in his proceedings, the objection must be brought forward in such manner as not to debar him of an opportunity of applying to the court for relief, by way of amendment or otherwise. It would be against every principle of sound practice, to allow the respondent, after he has permitted his adversary to continue proceedings and accumulate expenses in the suit, and upon an after thought, or upon a defect of form known to himself but concealed from his antagonist, to cause the testimony of the libellant to be rejected, and thus secure a decision of the cause upon his answer as the sole testimony. The testimony is, therefore, properly before the court; and it is not intended to intimate that the libellant, on the facts disclosed, would have been debarred from offering his proofs, if the objection to them had been made at the earliest opportunity after the replication was filed.

This court has heretofore, when it was practicable, avoided taking cognizance of causes of action arising within the harbors and territorial jurisdiction of the state, not strictly of a maritime character, and where the remedy would be merely coincident with that supplied at common law; although there is high authority sanctioning the jurisdiction in such cases. 2 Browne, Civ. & Adm. Law, 169; 3 Bl. Comm. 106; 2 Sir Leo. Jenkins, 774; Chamberlain v. Chandler [Case No. 2,575]; Thorne v. White [Id. 13,989]. Suits in personam, founded on torts as the sole cause of action, have, therefore, not been adjudged sustainable in this court, unless the injury was received upon the high seas. See Borden v. Hiern [Id. 1,655]. But the present case is not so circumstanced, upon the facts and pleadings, as to demand an explicit judgment on that point. Proceedings in rem are sustained, when the cause of action is maritime in its nature, without regard to the locality of its origin, whether upon the high seas, or in bays or harbors where the tide ebbs and flows, or even on land, upon the acceptation that those cases are not embraced within the reservation, in the ninth section of the act of congress of September 24, 1789 (1 Stat. 77), of cases in which the common law affords an adequate remedy. But it may be essential to the jurisdiction of the court, particularly in suits for services, that the locality of the service and the nature of it should both be maritime. When the privilege of a lien on a vessel or on goods

[3] This rule was as follows: "No claim or answer shall be filed unless it shall be sworn to; and, in case of bailable process in personam, unless the party arrested appear, or put in bail according to the rules of the court, his claim or answer shall not be received by the court, but shall be treated as a nullity, and his defaults entered."

[4] By the eighty-eighth rule, the libellant now has "four days from the time the answer is perfected, or from the expiration of the time allowed for excepting thereto," within which to file his replication.

is accorded, this court, therefore, considers itself bound to afford suitors the aid of its remedies, without regard to considerations of local jurisdiction.

A suit in admiralty, simply for an assault and battery, would take from a jury and leave to the discretion of a single judge, the determination of an allowance of damages, and would, in that respect, be a departure from a cardinal usage and principle of American jurisprudence; but I am by no means prepared to declare such a suit not to be within the lawful jurisdiction of this court. When a claim for damages for personal wrongs is connected, as an incident, with other matters properly appertaining to the cognizance of admiralty, it is the habit of the court to take jurisdiction of both causes of action; because the personal tort may well be inquired into, and damages, by way of compensation, be awarded, upon the same testimony, and thus the duplication of suits be avoided, and because the division of actions into stated formulas does not prevail in admiralty, and the rights of both the actor and the respondent are adjusted upon the whole case made, without regard to the denomination of the causes of action in pleadings at common law. But, if the tort be sued singly, as a substantive cause of action, the court, if not at liberty to reject the jurisdiction entirely, is careful to discourage appeals to its exercise, by every legitimate power. This claim for damages, in the present case, being coupled with a demand for wages, may properly be disposed of in this action, since all the proofs on both sides have been given without any exception having been taken, prior to the final hearing, to the jurisdiction of the court.

The objection to using Guttridge's deposition, because he is a permanent resident of the city, and has not been proved to be now absent, must prevail. On the examination of the deposition, however, it is not found to contain matter that would change the character of the cause in the libellant's favor, even if the court might disregard the objection to it or should open the cause for the purpose of receiving the viva voce examination of the witness.

(The opinion, after examining minutely the testimony of the various witnesses in the cause, proceeded:) Admitting that the libellant's proofs import that the libellant was wounded by the firing of the pistol into the rigging by the master, the witnesses stand so far contradicted and impeached by the general bearing of the whole evidence, that no safe reliance can be placed on their testimony, nor can any decree be properly rendered thereupon against the respondent. Even the fact of the wounding by a pistol shot is not affirmatively asserted by any witness. It is inferred, from the appearance of the injury when the libellant was under surgical treatment in the hospital, as proved by Dr. Stevens, and from the circumstances, that after the firing the libellant descended from the rigging bleeding in one of his knees and lame, and that, to an inquiry of some bystander, if he had been shot, he replied, in the presence of the respondent, that he had. Against this implication and presumption, there is the answer of the respondent, which may at least be received as evidence explanatory of the transaction, if not as substantive proof for the defence, and which positively denies the wounding; and there is also, more particularly, the testimony of several disinterested and unimpeached witnesses, who saw the libellant hit by the marling-spike when, in his attempt to strike the master with it, it was jerked back by the lanyard. Upon a careful consideration of the proofs in the case, I am of opinion that the libellant has not substantiated any cause of action against the respondent for a personal tort.

The conduct of the libellant towards the respondent on board the vessel, on the morning referred to in the pleadings and proofs, is fully proved to have been insubordinate to an extreme degree. Not only was his language insolent, and his behavior generally disorderly and disobedient, but he seized the master in a manner and with a state of temper which indicated a mutinous purpose, and might authorize his arrest for that offence. His conduct was so violent and refractory that the master was well justified in calling in the civil authority to control and punish him. The libellant was taken out of the vessel by process of law, and whether that was afterwards prosecuted or not will not vary the rights of the respondent, since he establishes an adequate cause for resorting, in the first instance, to the aid of the authorities. After the libellant obtained his release from that arrest, he was put into the hospital, being disabled by his wound from doing duty on ship-board, and never again joined the vessel or offered to do so. Therefore, he cannot charge that detention against the respondent, it being already shown that the respondent is not answerable for the wound itself. And, as the commitment of the libellant, in a home port, to the custody of the civil authority, to answer for a breach of the peace and for acts of personal violence to the master, was justifiable, there is no ground for the claim to wages during the period of that confinement or detention by law, although it was during the running of the contract of hire, no improper act of the master having prevented the libellant from performing his duties and fulfilling his agreement. The claim for wages for the time subsequent to the arrest of the libellant is accordingly dismissed. But I think the libellant is entitled to recover his wages to that period. Admitting that the maritime law applies to vessels moored at a wharf in a home port, and that seamen so situated are subject to all its penalties, I do not regard this as a case for the forfeiture of wages, under the principles of that law; and it is not attempted to bring the case within the provisions of the fifth section of the act of July 20, 1790 (1

Stat. 133). It seems to be a very rational restriction of the maritime rule of forfeiture of wages, that it shall not, unless made so by positive law, be in all cases one of total confiscation, and, particularly, that it need not be used to supply the master with a double mode of punishment. When he exercises his authority, and subjects a seaman to confinement or to corporal punishment, or delivers him over to the municipal law, for acts of disobedience or misconduct, he should not be enabled to superadd a forfeiture of wages for the same offence. Thorne v. White [supra]. The spirit of this benign principle has been practically applied in cases of mutinous conduct, for which a conviction on indictment had actually been had. The Mentor [Case No. 9,427]. The conduct of the libellant in this case was disorderly and inexcusable; but I think the course adopted by the master, of delivering him up to be dealt with by the civil authority here, and his actual confinement in prison for a fortnight on the charge, an adequate punishment, and I do not feel required to adjudge the forfeiture of the balance of his wages as an additional punishment. It may probably rest in the discretion of the court, either to mulct the libellant for the act, or to subtract his entire wages, or to discharge him from all other punishment than what he has already received therefor. The latter alternative, I think, meets the justice of the case. Accordingly, I shall decree that he recover $5.50, the sum unpaid, for his month's services. Costs will also be allowed to him, because his wages were never offered to him, and his right to recover them has been contested here. But, inasmuch as he has connected with his action for wages one for a personal tort, and that has induced the chief litigation and expense in the cause, and as the latter action was wholly groundless, it is just that he should bear the expenses thus created by himself. It is a common course of proceeding at common law, to apportion costs in this manner, and impose on a suitor successful in part, the charges induced by him in coupling other unsuccessful matters with his action or defence (Grah. Prac. 584, 585; Waddington v. United Ins. Co., 17 Johns. 23); and it is the practice of the court of chancery to do so (Vancouver v. Bliss, 11 Ves. 458). This court, in the like exercise of an eminent equity jurisdiction, feels constrained to observe those persuasive principles of common justice, upon which the practice in respect to costs is founded. The Apollo, 1 Hagg. Adm. 319.

A decree must be entered, that the libellant recover $5.50 for his wages, and his costs, and that he pay to the respondent his costs to be taxed, and that the libellant's wages and costs be set off against the respondent's costs, and that the party to whom the balance, if any, is due, have process against the other party for the recovery of such balance.

THOMAS (GREY v.). See Case No. 5,806.

Case No. 13,899.

THOMAS et al. v. HATCH.

[3 Sumn. 170.] [1]

Circuit Court, D. Maine. July Term, 1838.

COURTS — STATE ADJUDICATIONS — DEEDS — HOW CONSTRUED — BOUNDARIES — PLAT — CO-TENANTS — SEISIN — INSANITY — NEW TRIAL.

1. The courts of the United States are not bound, in the interpretation of deeds, by the local adjudications of a particular state.

[Cited in Edwards v. Davenport, 20 Fed. 763.]

2. Deeds are always construed according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom.

[Cited in Richardson v. Palmer, 38 N. H. 218.]

3. The following words followed the granting part of a deed: "A certain tract of land, of which only five eighths, common and undivided, is the property of J. D. (the grantor), and is hereby conveyed, with the exceptions of about ten acres of land conveyed by deed to W. H., &c., &c., and also one acre conveyed by deed to R., &c., and also a strip of land, &c., containing one eighth of an acre, &c., which exceptions are reserved out of the five eighths as aforesaid." *Held*, that the grantor conveyed nothing in the excepted parcels, but five undivided eighths in the remainder of the tract.

4. A boundary "on a stream," or "by a stream," or "to a stream," includes the flats, at least to low water-mark, and, in many cases, to the middle thread of the river. Quære; how it would be where the boundary was "on the bank" of a river.

[Cited in Alabama v. Georgia, 23 How. (64 U. S.) 513.]

[Cited in Buttenuth v. St. Louis Bridge Co., 123 Ill. 548, 17 N. E. 439. Cited in brief in State v. Wilson, 42 Me. 15. Cited in City of Boston v. Richardson, 13 Allen, 155, 105 Mass. 355. Cited in brief in Stover v. Jack, 60 Pa. St. 341.]

5. A boundary on the bank of a river, referring to fixed monuments on the bank, limits the grant to the bank, and excludes the flats.

6. Where a tenant in common is non compos, and under guardianship, a partition-deed executed by the co-tenants, and by the guardian, is good to pass the title of the ward, at least until it is avoided by the non compos, or by those claiming in privity of estate under him.

7. Papers from the probate records, showing that a person was treated by the probate court as the lawful guardian of a non compos, will be received as primâ facie evidence, after a long lapse of time, to supply the direct proof of a probate appointment.

8. A plan of a tract of land, which is referred to in a deed, for purposes of description, is to be treated as if it were annexed to, and made part of, the deed.

[Cited in Trustees of First Evangelical Church v. Walsh, 57 Ill. 368.]

9. In cases of co-tenants, where there is no visible adverse seizin of any part of the land, an entry by one of the co-tenants gives a seizin of the whole, according to their titles.

[Cited in brief in Ramberg v. Wahlstrom, 140 Ill. 184, 29 N. E. 727. Cited in Dubois v. Campan, 28 Mich. 316. Cited in brief in Avery v. Hall, 50 Vt. 12.]

10. Where there was a deed from the state, conveying all the right, title, and interest of the state unto a "lot of land numbered ten, as was surveyed by Park Holland, in the year 1801," which deed, in the specific boundaries, bounded

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

the lot on one side to a stake, and thence "to the bank of the river, thence by the bank of the river to the first-mentioned bounds"; and in the plan the lot was laid down bounded on the river; quære, whether taking the whole description together, it did not convey the lot to the stream, and include the flats.

[Cited in brief in Com. v. City of Roxbury, 9 Gray, 474; Smith v. City of St. Louis, 21 Mo. 38.]

11. If a plan is referred to in a deed, and the land, according to that plan, is bounded on a river, with no other specific boundaries than the river, semble, that the flats will pass, by operation of law, with the upland.

12. Persons entering upon lands, belonging to the state, are to be deemed mere intruders; yet, as against all other persons, the entry will be a sufficient seisin to support a writ of right.

13. Where demandants show a seisin, that will be presumed to continue until some adverse seisin, or disseisin, is shown.

14. Quære; what is the effect upon the rights of co-tenants, of a conveyance by one tenant in common of the entirety of one part of the lands held in common?

15. A verdict was set aside on the ground, that it could not have been found by the jury, without, either disregarding the instructions of the court in point of law, or giving an effect to evidence, which, in a just and legal sense, was not proper

Writ of right on the seisin of the demandants. Plea, the general issue, and joinder on the mise. At the trial, at May term, 1837, it appeared that the demandants [James Thomas and another] claimed title to the premises, under a deed from James Dunning to them, dated June 1, 1800; and also a deed from Isaac Hatch and others to them, dated April 2, 1803. James Dunning, by his deed, in consideration of 2300 dollars, conveyed to the demandants a certain lot or tract of land, situate in Bangor, and bounded as follows: "Beginning on the bank of Penobscot river; thence running northwesterly by the northwest line of land owned by John Dennet, about one mile; thence southwesterly by the head line of the said John Dennet's land, and on the head line of Jacob Dennet's land, and William Hammond's land; thence continuing by said head lines until it comes to the southwest corner of land formerly taken up by James Dunning, deceased; thence northwest to the lot of land improved by William Holt, ten or eleven rods; thence northerly by said Holt's land one mile, to Kenduskeag stream; thence by the said stream, as the stream runs, until it comes to the head line of the lot of land owned and improved by William Hammond; thence southwest by said Hammond's southeast line, as far as it extends; thence southeast, to carry the whole width of the lot of land, until it reaches Kenduskeag stream; thence by said stream to the first-mentioned bounds; the whole containing two hundred and twenty-five acres, more or less, of which only five eighth-parts in common and undivided is the property of the above-named James Dunning (the grantor), and is conveyed as above said, with the exceptions of about ten acres of land conveyed by deed to William Hammond, which deed bears date June 21, 1798, and entered upon the records of the said county of Hancock, &c., &c.; and also one acre conveyed by deed to Rice, which deed is also upon record, &c., and also a strip of land on which stands a store, lately improved by Benning Pickering, containing about one eighth of an acre, with the store standing thereon; which exceptions are reserved out of the five eighths conveyed as aforesaid; the whole subject to such roads as are already laid out, together with all the buildings standing on the aforesaid premises." Then follows the habendum, conveying the said five eighth-parts of the land above described, with the exceptions above stated, to the demandants and their heirs, with covenants of general warranty. The title of James Dunning (the grantor), to the premises, was as follows: It was admitted, that the said James Dunning was one of seven children of James Dunning, deceased, who was a settler in Bangor, and entitled, by certain resolves of the legislature of Massachusetts hereinafter stated, to the whole tract described in the deed from J. Dunning to the demandants, and that J. Dunning was the eldest son, and entitled to a double share of his father's estate. The other three eighth-parts of the tract of land were conveyed by the heirs to James Dunning (the grantor), by the deed of Elijah Smith and others, to James Dunning, dated the 29th of December, 1793. The resolves of the legislature of Massachusetts, above referred to, are dated the 5th of March, 1801, and the 19th of June, 1801. By the former resolve, it was provided, "that all the settlers in the town of Bangor, or their legal representatives, who actually settled before the 1st of January, 1784, be entitled to a deed of their respective lots of one hundred acres each, by paying into the treasury of this commonwealth, eight dollars and forty-five cents." And by the latter resolve, John Reed and Peleg Coffin, were authorized to make the proper conveyances. Accordingly, by their deed of the 11th of November, 1801, referring to the said resolves, and acknowledging the receipt of the consideration money of $9.30, paid them by the heirs of James Dunning deceased, "who (they state) settled in said township, and made improvements therein, before the first day of January, 1784," they conveyed and relinquished to the said heirs of James Dunning, deceased, "all the right, title and interest of the said commonwealth, in and unto a lot of land lying in said Bangor, and numbered ten, as was surveyed by Park Holland, in the year 1801, bounded as follows, viz. beginning at a stake and stones, the corner of lot number seventy, and thence north forty-five decrees, west two hundred and ninety-two rods, to

a stake marked, thence west forty-five degrees west to the bank of the river to the corner of the lot number nine, thence upon the bank of the river to the first mentioned bounds, and containing one hundred acres, agreeably to the return made by the said Holland to the aforesaid agents, and his certificate to the said heirs." On the 5th of August, 1800, Andrew Dunning, one of the heirs of James Dunning, deceased, by his deed of that date, conveyed his one-eighth part of the tract of land above described, to Moses and Amos Patten; by a deed, dated the 4th of April, 1800, John Dunning (another of the heirs) conveyed his one-eighth part to Isaac Hatch. Vincent Dunning (the remaining heir) was a non compos; and was (as is asserted) then under the legal guardianship of Nathaniel Harlow. On the 2d of April, 1803, in pursuance of a division into lots, and a partition, which had been agreed to be made by the claimants under the heirs of James Dunning, deceased, and Nathaniel Harlow, guardian of Vincent Dunning, of the whole tract of land, according to a plan drafted, and in which the lots were laid down by Moses Hodsden, Jr., Hatch, and Moses and Amos Patten, and Nathaniel Harlow as guardian, by their deed of that date, released and quitclaimed to the demandants forty-two of the lots laid down on the plan of Moses Hodsden, Jr., on the 14th of May, 1801 (enumerating them by their numbers, and among others, number seventy-three), and certain other lots, also enumerated, laid down on the plan of Hodsden, on the 10th of January, 1803. It was admitted at the trial, that, at the time when the demandants received this deed from Hatch and others, they gave mutual releases to the grantors of the other lots included in Hodsden's plan; and that these deeds made the partition of the tract of land, to which the heirs of James Dunning, deceased, were entitled as above stated, complete, as far as the parties could lawfully make it. The acre which had been conveyed by James Dunning to Rice, in 1798, and was excepted from his deed to the demandants, was afterwards, in November, 1801, conveyed by Rice to Jonathan Hyde (the brother-in-law of the demandant, Thomas), under whom, by intermediate conveyances, the tenants claim. Number seventy-three on Hodsden's plan is the same land which was so conveyed by James Dunning to Rice, and by him to Hyde, and is commonly known as the Hyde acre. The demandants, by their writ, claimed title to the whole flats in front of the Hyde acre; and to the whole upland of the Hyde acre. But at the trial, they confined their claim of title to three eighths of the upland, and to the whole of the flats.

The demandants, by Messrs. Rogers and Sprague, their counsel at the trial, insisted: (1) That the conveyance of James Dunning to Rice, in 1798, being of undivided lands, could only operate upon so much of the lands as should ultimately be assigned as his property therein. That he had at the time only five-eighths therein;[2] and that the demandants, by the partition of 1803, became entitled to the remaining three-eighths therein, having given an equivalent therefor, in their deed of release to the other lots in Hodsden's plan. (2) They insisted, that the Hyde acre was bounded by the bank of the river, and did not extend to the flats. (3) They insisted, upon the whole evidence in the case (which was very voluminous), that they had established their right to the premises, and their seisin thereof within twenty years; and at all events, their right to, and seisin of the flats.

On the other hand, the tenant [Thomas F. Hatch], by his counsel, Messrs. Godfrey and Appleton, insisted: (1) That the demandant had not had any seisin of the upland, or of the flats, within twenty years. (2) That Rice purchased the whole acre of James Dunning, in 1798, and went into seisin and possession, claiming the whole acre, and those, who claim under him, have ever since remained in sole seisin and possession of the whole acre, claiming the flats also. (3) That the demandants had made out no title to the upland, or to the flats. That, at the time of the deed of partition, in 1803, Hyde was in sole seisin, and the deed could not operate to convey the three-eighths; for the heirs were then disseised. As to the flats, the deed of the commonwealth of Massachusetts never intended to convey them. The boundaries were, "upon the bank of the river." The deed from James Dunning to the demandants, in 1800, did not convey the flats; for he was a mere intruder upon the commonwealth; and had no seisin, by which he could convey. The deed of partition of 1803, never meant to convey the flats at all. The lots are bounded on the plan by the bank of the river.

STORY, Circuit Justice, in summing up to the jury, went into a full examination of all the evidence, and of the points made by the parties. But such portions only of the summing up are thought necessary to be stated, which more immediately respect the points of law raised at the trial. After having given a general outline of the case, and stating that the district judge concurred in the views which he was about to expound, the judge proceeded as follows:

In the first place, it is proper to consider what is the true construction of the deed from Dunning to the demandants, of the 1st of June, 1800. It conveys five eighth-parts of the whole tract, with the exception of the

[2] See on this point as to the effect of a deed of an entirety of a part of the lands by one tenant in common, Bartlet v. Harlow, 12 Mass. 348; Varnum v. Abbot, Id. 474.

ten acres conveyed to Hammond, the one acre conveyed to Rice, and the strip of land then occupied by Pickering. The deed conveys nothing whatsoever in the excepted parcels. Under that deed, therefore, the demandants took nothing in the Rice lot, now more familiarly known as the Hyde lot.

I am aware that a construction somewhat different from what has been above stated, has been given to this same deed by the supreme court of this state, in the MS. case which has been cited at the bar. If this were a question of purely local law, we should not hesitate to follow the decision of that learned court, for which we entertain the greatest respect. But the interpretation of a deed of this sort is in no just sense a part of the local law. It must be interpreted everywhere in the same manner; that is to say, according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom. The construction given by the state court is, in effect, this: That the deed does not convey the whole five eighths belonging to the grantor in all the tract of land, excepting the excepted parcels; but only so much as would remain of the said five eighths, after satisfying the claims of his co-tenants for their three eighths conveyed by him in the excepted parcels. The language of the court, in their opinion, is: "The parcels sold (by the grantor), being reserved out of the five-eighths, the residue was conveyed to the petitioners, (the demandants). He (the grantor) had given deeds of warranty to his prior grantees, and in selling the residue he meant to make provisions, that they should not be disturbed. In order to carry into effect the plain intent of the parties, it must have been contemplated, that in any partition, which might be made, the parcels excepted would be assigned as part of the five-eighths; and that the petitioners (the demandants), and whoever might claim under them, would be entitled to the residue of that proportion of interest to be set off to them in severalty. The petitioners (the demandants) did not purchase five-eighths; but they purchased such fractional parts of the whole, as would remain after deducting from five-eighths the parcels before sold." Now, whatever equity there might be in such an arrangement, and however proper it might be (if it existed) to be carried into full effect by the state court, on a petition for partition, to which the prior grantees might all be parties, I do not well see, that it would be conclusive upon the merits of the present controversy. But with the greatest deference for the learned state court, I feel myself bound to say, that I cannot adopt the interpretation thus put upon the terms of the deed. I find no sufficient warrant for it in the language and purport of that instrument. The granting part of the deed, commonly called the premises, conveys "a certain lot or tract of land, situate," &c., describing it by metes and bounds; and then adds: "The whole containing two hundred and twenty-five acres, more or less, of which only five-eighths, common and undivided, is the property of the abovenamed James Dunning (the grantor), and is hereby conveyed as abovesaid, with the exceptions of about ten acres of land conveyed by deed to William Hammond, &c. &c., and also one acre conveyed by deed to Rice, &c. &c.; and also a strip of land, on which stands a store, &c., containing one-eighth of an acre, &c.; which exceptions are reserved out of the five eighths, as aforesaid." Now, however inartificially the deed may be drawn in its form and language, I cannot but think it clear, that its true meaning is, that the grantor conveyed five undivided eighth-parts of the whole tract, except the ten acres, the one acre, and the strip of land above mentioned. In the excepted parcels he conveyed nothing; in the remainder of the tract he conveyed five eighths, to which it is clear he then claimed title. The words, "which exceptions are reserved out of the five eighths conveyed as aforesaid," have a natural reference to the preceding descriptive words of the deed, giving the boundaries of the whole tract, five eighths of which would, but for the exceptions, have been conveyed; and these words show that the five eighths of the excepted parcels are not granted. Upon any other interpretation, it is difficult to perceive what portion of the whole tract is conveyed. It would clearly not be five eighths, but five eighths minus some possible, indefinite, unascertained deduction, if one may so say, for owelty of partition, in some future division of the entire tract among all the parties, who were, or might become, entitled thereto. It appears to me that there is no such qualification in the deed. Five eighths and no less of the tract are conveyed in all the land, within the scope of the conveyance.

In the next place, did this deed, in 1800, to the demandants, convey the land only to the bank of the river; or did it convey the flats also, supposing the grantor capable of conveying the same? The descriptive words, so far as respects this point of the boundary are, "to Kenduskeag stream, thence by the said stream, as the stream runs, until it comes to the head line of the lot of land owned and improved by William Hammond." I consider the law to be clearly settled, that a boundary on a stream, or by a stream, or to a stream, includes the flats, at least to low-water-mark, and in many cases to the middle thread of the river. It may be different where the boundary is, "to the bank," or "by the bank," or "on the bank" of a river, or "to or by a monument on the bank;" for in such cases the boundary is, or may be limited to the very bank, and may not extend into the stream,

or the flats thereof.[3] The case of Lapish v. Bangor Bank, 8 Greenl. 85, is entirely conclusive on the point, that a boundary on a stream includes the flats.

If this be, as I am clear it is, the true construction of the deed; then the next inquiry is, whether the deed of 1803 was good to pass the title of Vincent Dunning, the non compos. It was in fact, and so, in contemplation of law, it is to be deemed, a partition deed between tenants in common. Harlow assumed to act, and to pass the title as guardian, receiving an equivalent release for the non compos in the other lots. Now, I am prepared to say, that, where a partition deed is made by tenants in common, and one of the tenants is under guardianship, the deed of partition, when executed by the guardian, is good to pass the title of the ward, at least until it is avoided by the non compos, or those claiming in privity of estate under him. The present deed has never been avoided by any person claiming under the non compos; and, therefore, I think, that, at least as to strangers to that title, in a case of partition, it is to be taken to be good. But then it is urged, that there is no direct proof, that Harlow was at the time the lawfully appointed guardian of the non compos. It is true, that no commission is produced, or can now be found on the probate records. But other papers are produced from the probate records, which show, that he was treated by the probate court as the lawful and regular guardian. Thus, the court received an inventory of the estate of the non compos from him as guardian in 1792; and as long ago as 1808, it settled and allowed an account with him as guardian. Under such circumstances, there is certainly strong primâ facie evidence, after such a lapse of time, to supply the direct proof of a probate appointment; and we all know how loosely, in those times, the records of the court of probate were in many cases kept.

Then, what does the deed of 1803 purport to convey? Does it convey the title of the grantors to the upland only, or to the flats also? I am of opinion that it conveys the title to the latter, as well as the former, in regard to lot number seventy-three. The deed refers to the plan of Hodsden, and it conveys the lots "as laid down on (the) plan drafted by Moses Hodsden, Jr., on the 14th of May, 1801." By necessary implication the plan is made a part of the description, and must supply any defects of the other specifications, in the same way as if it were annexed to, and made part of, the deed. This is the clear doctrine in the case of Lunt v. Holland, 14 Mass. 149. Now, by reference to the plan, it is plain, that there are no descriptive lines or monuments on it in this part; but that the boundaries of the lots are on the stream of the river, and not short of it. And it must be presumed, that the parties intended a full and complete partition of the whole tract, and of all their interest therein, unless some other inference is to be deduced from the words of the conveyances. None such is pretended. But then it is suggested, that at the time of this conveyance, in 1803, the grantors were not seized of the Hyde acre, or any part thereof, and therefore were incompetent to convey it. Whether they were so seized or not is a matter of fact, upon which the jury must pass judgment. If they were not so seized, then it is clear, that so far the deed is rendered inoperative. As to the flats, I am not aware, that, at this time, there is any pretence to say, that Hyde was in seisin thereof, in virtue of his title to the acre purchased by him of Rice. The deed to him and to Rice did not extend, as I shall have occasion, presently, more fully to consider, beyond the bank of the river, so as to cover the flats. And no open visible possession of the flats, as far as I recollect, is shown, or attempted to be shown, in Hyde at this period. Then, as to the upland. It is clear, that the grantors were entitled, in 1803, to three eighth parts of the whole tract, including the Hyde acre, as tenants in common. It does not appear, that there was any open disseisin or adverse possession of any part of the tract against them; and indeed, there is strong evidence the other way. The one acre does not appear to have been enclosed by any fence from the other part of the tract, or in any other manner to have been in the visible and exclusive possession of Rice or Hyde. Now, it is clear, that under such circumstances, where there is no visible adverse seisin or possession of a part of a tract, an entry by any co-tenants on the tract gives a seisin of the whole, according to their titles; because the tract is not severed or divided by any visible bounds, or enclosure, or adverse seisin; and the entry must enure as a seisin of all the co-tenants, and for their benefit. But I shall leave it to the jury to say, whether, under the circumstances, there was any such open, visible, and exclusive possession of the one acre in Hyde, at the time of the partition deed of 1803, as amounted to, and was a disseisin of his co-tenants. If not, then this objection is overcome.

In the next place, as to the construction of the deed of the commonwealth of Massachusetts to the heirs of James Dunning, in 1802. It is said, that that deed conveys the tract of land only to the bank of the river, and thence upon the bank of the river; and that this excludes the flats from the grant. But it is to be remarked, that this is not the

[3] See Storer v. Freeman, 6 Mass. 435; Hatch v. Dwight, 17 Mass. 289; Hasty v. Johnson, 3 Greenl. 282; Dunlap v. Stetson [Case No. 4,164]; King v. King, 7 Mass. 496; Lunt v. Holland, 14 Mass. 149; Morrison v. Keen, 3 Greenl. 474; Graves v. Fisher, 5 Greenl. 69; Lapish v. Bangor Bank, 8 Greenl. 85.

whole description; for the deed conveys all the right, title, and interest of the commonwealth "unto a lot of land, numbered ten, as was surveyed by Park Holland, in the year 1801." Now, if, by that plan, the lot is bounded on the river, and has no other specific boundaries marked than the river, it might deserve consideration, whether, taking the plan and the deed together, the commonwealth did not mean to convey the flats, as passing by operation of law with the upland. Such a construction has been adopted on some occasions by the supreme court of the state of Massachusetts and of Maine, in furtherance of the apparent intent of the legislature.[4] But be this as it may, it is clear that, as to all persons but the commonwealth, the demandants were capable of a sole seisin in the flats, in virtue of the conveyances to them. For, though the commonwealth cannot be disseised, and persons entering upon lands held by the commonwealth are to be deemed mere intruders, yet, as against all other persons, the entry will give a seisin capable of sustaining a writ of right. If, therefore, the demandants did, in virtue of the deeds to them, acquire a seisin of the flats, although they might be ousted by the paramount title of the commonwealth, yet, until such ouster, they were to be deemed as having a rightful seisin against third persons.

The next question which arises is, whether the demandants have been in seisin of the premises, either of the upland or of the flats, or of both, within the prescriptive period of twenty years. If they have shown a seisin, that seisin will be presumed to continue, until some adverse seisin or disseisin is shown. In cases of co-tenants, a disseisin is not to be presumed; but it is to be established by competent proofs of an exclusive adverse seisin; for, ordinarily, the possession and seisin of one co-tenant is deemed the possession and seisin of all. I shall first consider the evidence of seisin as to the flats, and next as to the upland. But, before I proceed to the consideration of the evidence, as to the seisin, it seems necessary to examine the title of the tenants to the Hyde acre; and to ascertain, whether, upon the true construction of the deed of Dunning to Rice, in 1798, any thing more than the upland passed, or was intended to pass by that deed; for it may have a most important bearing on the case, whether that deed was limited to the bank of the river, or by construction of law, included the flats in front of the upland. The boundaries in that deed are as follows: "A certain piece of land situate in Bangor, aforesaid, being and lying on the south side of Kenduskeag stream, butted and bounded as follows, viz. beginning at a pine stump on the bank of said stream, and running northwest 2° north on the line of land belonging to William Hammond, twenty rods to a stake and stones, thence south 43° west 8 rods to a stake and stones, thence southeast 2° east to a rock on the bank of said stream, thence on the bank of said stream to where it first began, together with all the fishing privileges, contagious (contiguous), and belonging to the same, with all the privileges and appurtenances thereunto belonging, being one acre, be the same more or less." Now, it is apparent from the language of this deed, that it bounds the grant by known monuments on the bank of the stream, a pine stump at one end, and a rock at the other. And, upon the known principles of law, a boundary on the bank or by the bank, referring to fixed monuments on the bank, of a stream, limits the grant to the bank, and excludes the flats below the bank. Therefore, I am of opinion, that, upon the true interpretation of this deed, the land conveyed therein is bounded by the bank of the river, and does not extend or cover the flats. The subsequent conveyance by Rice to Hyde, in November, 1801, is a mere quitclaim of all Rice's title to the same land, as is the subsequent deed of Rice to James B. Fiske, in October, 1823, under whom the tenants claim. A constructive seizin of the flats by Rice or Hyde cannot, therefore, by the terms of the deed, be inferred in either of them; but it must be established by proofs of actual seizin. I do not enter into any examination of the general doctrine, what is the effect of a conveyance by one tenant in common of the entirety of one part of the lands held in common, upon the rights of the co-tenants. It is admitted, that it could not prejudice their rights; but could only apply, by way of estoppel, to so much of the land as might be assigned to the grantor, as his purparty in the land so conveyed upon a partition. See Varnum v. Abbot, 12 Mass. 474.

Let us then proceed to the consideration of the evidence as applicable to the point of actual seizin. (Here STORY, Circuit Justice, went into an examination of all the evidence applicable to the seizin of the flats and also of the upland. He concluded by leaving the question of seizin as to the flats, and also to the upland, to the jury upon the whole of the evidence, and stating that the district judge concurred in the views of the law and facts which he had expressed.)

The jury found a verdict for the tenants.

A motion was afterwards made for a new trial, by the demandants, upon various grounds: (1) That the verdict was against the charge of the court in matters of law. (2) That it was against evidence and the weight of evidence. (3) That certain documents had been improperly admitted by the court as evidence; viz. a deed from Jere-

[4] See Lunt v. Holland, 14 Mass. 139, and Lapish v. Bangor Bank, 8 Greenl. 85. The latter is directly in point on the very resolve of March, 1801, respecting the Bangor settlers. See, also, Knox v. Pickering, 7 Greenl. 106.

miah Dudley to the demandant Thomas, and the record of a petition for partition in the case of James Thomas and Jeremiah Dudley against persons unknown, including the premises demanded. (4) That William Emerson was improperly admitted as a witness. The motion was accordingly argued at the October term, 1837, very elaborately, by Messrs. Rogers and Sprague for demandants, and by Messrs. Godfrey and Appleton for tenants, upon most of the grounds, upon which the same points had been argued at the trial, so far as matters of law were concerned. The court held the cause under advisement nisi; and afterwards their opinion was shortly delivered, as follows, at May term, 1838:

STORY, Circuit Justice. We have considered this cause with great deliberation, and remain of the same opinion, which we entertained after the argument upon the motion for a new trial. We are of opinion, that there must be a new trial. As the facts are again to be submitted to a jury, we do not wish to prejudice the cause by an elaborate examination of the evidence applicable to the points made at the bar. Our opinion proceeds upon this short ground, that in every view of the evidence properly applicable to the flats, whatever might be the case as to the upland, the verdict of the jury could scarcely have been for the tenants, without either disregarding the instructions of the court in point of law, or giving an effect to the evidence, which, in a just and legal sense, was not justified by it. New trial awarded.

A new trial was afterwards had, and a verdict found for the demandants. A motion was then made for a new trial; but the cause was afterwards compromised between the parties, one of the demandants and one of the tenants having died pendente lite.

Case No. 13,900.

THOMAS v. JAMESSON.

[1 Cranch, C. C. 91.] [1]

Circuit Court, District of Columbia. April Term, 1802.

SLAVERY—SLAVE AS WITNESS.

A slave cannot be a witness if a free white man be a party.

Assault and battery. The plaintiff was a man of color. The defendant, a free white man, offered his slave as a witness under the act of assembly (Rev. Code, 289, § 3; Old Acts Assem. p. 284).

THE COURT refused to permit the slave to be sworn. See Act Jan. 21, 1801, § 4 [Laws Va. 1800-01, p. 38].

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

Case No. 13,901.

THOMAS v. The KOSCIUSKO.

[11 N. Y. Leg. Obs. 38.]

District Court, S. D. New York. 1853.

MARITIME LIEN—FOREIGN VESSEL—OWNER'S DOMICILE—CLAIMANT—MORTGAGEE IN POSSESSION—PRIORITIES—REGISTRY NOTICE.

1. The remedy in rem for supplies or repairs furnished here to a vessel foreign to the port is according to the law maritime, and is not governed by the local law.

2. When the vessel supplied is a domestic one, this court affords no other relief therefor than is provided by the state law.

3. In this respect a vessel owned in New Jersey and supplied in New York is a foreign vessel here.

[Cited in The Sarah J. Weed, Case No. 12,350.]

4. The registry or enrollment in this port of a vessel owned out of the state does not render her a domestic vessel.

[Cited in The Albany, Case No. 131.]

5. The law appertaining to the domicile of the owner determines the character of personal property.

6. Material men residing in this state cannot, in this court, arrest a vessel owned in another state for supplies furnished by them to her in her own port, unless by virtue of the local law of the owner's domicile.

7. Objection to the right of a claimant to intervene in an admiralty cause must be taken by preliminary exception to his competency.

8. The objection will not be listened to after the cause is put at issue and brought to hearing upon the merits.

9. A mortgagee in possession is competent to intervene and contest claims affecting his lien upon the vessel.

10. A mortgage duly registered according to the law of this state has priority of lien on a domestic vessel over debts to material men subsequently accrued, although the mortgagor retains possession of her.

[Questioned in The Hendrik Hudson, Case No. 6,358.]

11. If the owner and mortgagor removes from the state to the place of residence of the mortgagee, keeping possession of the vessel, the mortgage lien given by the local law ceases.

12. Registry notice does not affect third parties, unless the owner continue to reside in this state.

13. A renewal of notice in the state registry, subsequent to the act of congress of July 29, 1850 [9 Stat. 440], does not retain a mortgage lien on a vessel unless the mortgage be also recorded in the office of the collector of the port.

These were libels filed on the 23d day of August, 1851, by the libellant [Henry B. Thomas] against the steamboat Kosciusko, to recover the amount of bills or repairs done on and supplies furnished the steamboat Kosciusko. The first cause was tried before District Judge Betts, in October term, 1852, and the other two abided its event. On the trial of the first cause, the following facts, embodied in the form of a written statement, were read in evidence, which facts were substantially the same in the other cases. They were as follows, viz.: In June, July, and

August, 1851, the libellant, a shipwright, residing in the city of New York, at the request of Clement M. Hancox, the owner of the steamboat Kosciusko, performed the work claimed for in the libel amounting to $233.67, which is due, with the interest from 8th August, 1851, to the libellant. Such work and materials were necessary and were charged by Thomas to the steamboat and owners. The items of the account commenced in May, 1851, and ended on the 8th August, 1851 and those after 1st May, 1851, up to 20th June, amounting to $56, were done on the said steamboat Kosciusko while she was lying up in Jersey City fastened to the wharf, where she had been lying and continued to lie up from December 19, 1850, to June 20, 1851. Items done after 20th June, 1851, were done and furnished on the vessel while at the city of New York. At the time this work was done, and from May 1, 1851, until after the filing of the libel in this suit, Clement M. Hancox, the owner of the vessel, was a resident of Jersey City, in the state of New Jersey. Before 1st May, 1851, he was a resident of the city of New York. The vessel was enrolled in the collector's office, New York, on the 12th day of April, 1850, by Clement M. Hancox. The vessel was attached under this libel on 23d August, 1851. Before she was attached she had been engaged in excursion business out of harbor of New York to neighboring places, and, in the prosecution of such business, made the following voyages, viz.: On the 22d of June she commenced making trips from New York to Cedar Grove on Staten Island, stopping at Fort Hamilton, and continued to run there daily, one or two trips a day, until the 28th of July, 1851. On the 29th July, 1851, she went on an excursion to the fishing banks. On the 30th July, and 3d, 7th, 9th, and 10th, of August, to Stratton Port, Long Island. On the 12th of August she went on an excursion to Newark, New Jersey. On the 16th she again went to Newark to fulfill a charter for an excursion from Newark to Shrewsbury, and on the 17th day of August, 1851, sailed from Newark with passengers for Shrewsbury, New Jersey, broke her machinery when she arrived within Shrewsbury inlet, and within a mile or two of Shrewsbury. Clement M. Hancox, the owner, did not claim and answer herein, but the same was made by Joseph W. Hancox, who claimed under two chattel mortgages of the vessel, dated June 13, 1850,—one given to him by Clement M. Hancox to secure the payment of $2,546.59, with interest, payable on demand; the other, dated the same day, executed by Clement M. Hancox to Clement D. Hancox, to secure payment of the sum of $2,500, with interest from November 3, 1849, on demand. These mortgages, when executed, were both filed in the office of the register of deeds, in the city of New York, on same date, and copies thereof, with statements of the amount claimed, were, for the purpose of renewing them, afterwards filed in same office on the 3d June, 1851. The same were never recorded or registered in the office of the collector of the port of New York. The mortgagees, Joseph W. Hancox and Clement D. Hancox, have, for several years past, been residents of Jersey City. They commenced to foreclose the chattel mortgages, taking possession of the vessel on the 19th of August, 1851, Clement M. Hancox having become insolvent, and sold the vessel under the mortgages on the 3d September, 1851. But as soon as the vessel was attached, under the libel in this suit and before the sale, Joseph W. Hancox, one of the mortgagees, bonded her on such sale, purchased her in his own name, taking a bill of sale from Clement M. Hancox, the old owner, which was dated 3d September, 1851. On these facts the cause was argued by the counsel for the respective parties.

D. McMahon, Jr., for the libellant, contended:

I. That the claimant, Joseph W. Hancox, had no right to claim and intervene, as against creditors, because: (1) His chattel mortgages were not renewed under the local law—2 Rev. St. (3d Ed.) p. 196, § 11—by filing the copies in the office of the clerk of the county wherein the defendant resided or the property was situated; the owners residing in New Jersey and the mortgages being renewed in the city of New York. [U. S. v. 422 Casks of Wine] 1 Pet. [26 U. S.] 547, 550; Rule 26, Sup. Ct. U. S. (2) The mortgages were void as against creditors, also, because they were not registered or enrolled in the office of the collector of the port of New York, as required by the acts of congress. Stat. 1850, c. 27, § 1; [State of Rhode Island v. Commonwealth of Massachusetts] 12 Pet. [37 U. S.] 657; [U. S. v. Fisher] 2 Cranch [6 U. S.] 358; 1 Hill, 324; 6 Wend. 526.

II. Conceding he had a right to intervene, yet his mortgages could not exclude the claims of creditors furnishing materials or supplies, so that by their foreclosure all subsequent hypothecations of the vessel should be cut off, because: (1) For the reasons given in the last point. (2) Treating the vessel as a foreign vessel to the district, material men had a priority over chattel mortgages or any bottomry security. Abb. Shipp. 163; The Aline, 1 W. Rob. Adm. 111; [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328; The Chusan [Case No. 2,717]; The Nestor [Id. 10,126]; The Jerusalem [Id. 7,294].

III. For that portion of the bill done after the 20th June, 1851, the libellant had a lien ad rem under the maritime law, irrespective of any subsequent departure from the state, because: (1) The vessel was a foreign vessel to this district, being owned by owners residing in another state. The St. Jose Indiano [Id. 12,322]; Selden v. Hendrickson [Id. 12,639]; 1 Liverm. Ag. p. 171, c. 5, § 4; 1 Dod. 204; [The General Smith] 4 Wheat. [17 U. S.]

438; The Nestor [Case No. 10,126]; Davis v. New Brig [Id. 3,643]; The Robert Fulton [Id. 11,890]. (2) The enrollment of the vessel in the port of New York did not make her a domestic vessel, for the enrollment was to stamp her character as a vessel of the United States, as contradistinguished from foreign nations. Ring v. Franklin, 2 Hall, 1; 15 Johns. 298; Gordon, Dig. (4th Ed. of 1848) art. 196. (3) The nationality of the character of personal property, depends upon the domicile of the owner, not the situation of the thing. [The St. Jago de Cuba] 9 Wheat. [22 U. S.] 409; The Nestor [supra]. (4) Although Jersey City was, by act of congress, made part of the port of New York, yet it was for collection purposes, not for judicial purposes; the judicial districts of New Jersey and of the Southern district of New York being entirely separate. Act 1806, § 1 [2 Stat. 355]; Gordon, Dig. (2d Ed. of 1848) art. 2304; 10 Pet. 215; 14 Johns. 201.

IV. If the vessel be treated as a domestic vessel, then for that portion of the claim which accrued after the 1st May, 1851, and before 20th June, 1851, and which was furnished at Jersey City, was not furnished in her home port, New York, and therefore a lien accrued to the libellant.

E. C. Benedict and H. W. Robinson, for the claimant, contended:

I. The Kosciusko was a domestic vessel, and belonged to the port of New York. The port of Jersey City is the port of New York, both in maritime sense and as a matter of statutory regulation. Stat. U. S. March 2, 1811, c. 33; Gordon, Dig. § 1871. The port of New York was that to which, by statute, the Kosciusko belonged, it being the port adjacent the residence of the owner and the port of his residence. 1 Stat. 56, § 4. The harbor of Jersey City and of New York are coterminus in all respects, and are both one port. A vessel hauling from one place to the other does not leave any port, any more than a vessel would leave the port of Philadelphia by hauling up into the Northern Liberties, or London by moving from one of its many cities to another. Supplies furnished in the port of New York to a vessel owned by a resident of Jersey City cannot be said to have been furnished a foreign vessel. It would be physically impossible for a vessel lying at Jersey City wharf to be out of the port of New York. The Kosciusko was, therefore, whether lying at Jersey City or New York, in her home port and a domestic vessel, and there would be no lien for supplies, except as given by the state law, and that lien was discharged by the vessel leaving the port of New York on and previous to August 10th, in 12 days after any such departure, and immediately after she left the state on the 12th and 16th August. Hancox v. Dunning, 6 Hill, 494; opinion of Judge Betts in Haight v. The Alida [Case No. 199].

II. Should the court hold differently, and that she was a foreign vessel, then there can be no lien for that part of the claim for supplies furnished at Jersey City, where the owner resided previous to 12th June, 1851.

III. The lien of the mortgagees created June 13, 1850, was not affected by the statute of the United States relating to the recording of conveyances of vessels subsequently passed, and which went into effect October 1, 1850, as the statute did not profess to and could have no retroactive effect on prior mortgagees. 1 Kent, Comm. 455; Johnson v. Burrell, 2 Hill, 238.

IV. The lien under which the claimant holds was prior in time to that of libellant, followed the boat wherever she went, was recorded and visible, was consummated by a possession under the mortgagees prior to the filing of the libel, and that possession could not be divested by the libellant claiming under a subsequent lien and of equal grade without payment, and the equity of redemption was foreclosed by the sale under the mortgages.

BETTS, District Judge. The remedy in rem in this court for supplies and repairs furnished a vessel foreign to this state, within the port, is in conformity to the maritime law, and is no way governed by the local law; but if the vessel be a domestic one, this court affords no remedy in rem unless a lien be given by the state law. This case rests on two questions: First, whether the demand of the libellant, or any part of it, was ever a lien on the vessel; and, second, whether, if the lien ever existed, it had been discharged when this suit was instituted.

Before stating the facts from which these propositions are drawn, it is proper to dispose of an objection taken to the competency of the claimant to intervene in the case. It is placed upon the ground that when his answer was filed he was only mortgagee of the vessel, having no proprietary interest in her. It is sufficient to say the libellant does not pursue the proper course to avail himself of the objection. After an answer has been received, and a replication filed to it, and the cause been brought to hearing upon merits, a libellant cannot be allowed to interpose an exception that the claimant had no legal right to contest the case. A proper allegation should have been filed, putting that fact in issue, preliminarily, and, if that is omitted, the libellant will be regarded as having waived the irregularity. But it appears upon the stipulation of the parties, that the claimant was in possession of the vessel, claiming the right to hold her under mortgage incumbrances, and a mortgagee in possession would have a possessory interest sufficient to entitle him to intervene and contest claims upon the vessel which would supersede and oust his right. This objection cannot, in either view, avail the libellant.

The steamboat Kosciusko was owned by Clement M. Hancox, and enrolled by him in the port of New York, April 12, 1850. She

was built in this state, and her owner, at the time of her enrollment, and until May, 1851, resided in this city. He has resided in Jersey City, in the state of New Jersey, since May 1, 1851. It is agreed in the written stipulation between the parties that the libellant resided in the city of New York, and as a shipwright, in June, July, and August, 1851, furnished labor and supplies to the steamboat, at the request of her then owner, amounting to $233.57, which sum, with interest from August 8, 1851, is now due; that the steamboat was taken to Jersey City December 19, 1850, and remained there undergoing repairs to June 20, 1851, and the services, materials, and supplies charged for up to August 8th were furnished the boat at Jersey City, and during that period her owner resided at that place. The items of account sued upon and attached to the libel commence May 1, 1851, and terminate August 8, 1851. Clement M. Hancox mortgaged the steamboat June 13, 1850, to Joseph W. Hancox, then residing in New Jersey, to secure the payment of $2,546.59, with interest from the date, payable on demand. On the same day he executed another mortgage on the boat to Clement D. Hancox, of New Jersey, to secure the payment of $2,500, with interest thereon from November 3, 1849, payable on demand. These mortgages were given as security for moneys loaned by the mortgagees for the purchase of the boat, and to pay for supplies, and applied by the mortgagor to that purpose. Both mortgages were registered the same day in the office of the register in the city of New York, pursuant to the provisions of the state statute. 2 Rev. St. p. 71, §§ 9, 10. The mortgagor continued in possession of the steamboat. Copies of the mortgages were filed in the register's office June 3, 1851, to secure a renewal of the register notice. The mortgages were not recorded in the collector's office of this port, pursuant to the provisions of the act of congress of July 20, 1850. That act provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. 9 Stat. 440. August 19, 1851, the mortgagees took possession of the steamboat under those mortgages. On the 23d of August the libel in this cause was filed, and the boat was attached by the marshal. Joseph M. Hancox bonded her on that arrest, and continued in possession as mortgagee till September 3, 1851, when she was sold by virtue of the two mortgages, and was bought by Joseph M. Hancox. On the same day Clement M. Hancox executed to him a bill of sale of the vessel.

The claimant regards the proceeding as one under the lien law of New York, and, accordingly, makes the defence by his answer that the steamboat was a domestic vessel, and that the lien, if one ever existed, had been discharged by the boat having repeatedly left this port for others, and also gone out of the state before suit brought. The libellant alleges that she was a foreign vessel, and subject to his demand by the general maritime law. An intermediate point also arises in the case as to the liability of the vessel in this court, in rem, for labor and supplies furnished her in New Jersey.

A vessel is personal property, and governed by the laws regulating personal property in respect to mere questions of ownership and incumbrances, and, consequently, as a general principle, it follows, in locality, the residence of the owner. It becomes part of the wealth of the state of which he is a member, and goes, on his decease, wherever it may at the moment be situated, according to the appointment of his domiciliary law. The register and enrollment acts of the United States no further touch the question of ownership of vessels than regards the national character of the owners. Abb. Shipp. 39, 115; 3 Kent, Comm. 133. It is nowhere required that a vessel shall be registered at the place she is owned, nor does the registry express or import more than that the owner is a citizen of the United States. When Clement M. Hancox removed his domicile to New Jersey, the vessel then belonged to him, became a part of his estate there, and, in relation to the domestic laws of New York, a vessel foreign to this state. Not only was that so by legal intendment in this case, but the steamboat was actually with him in his possession, within the state of New Jersey until June 20, 1851. Her coming into this port afterwards to transact business, or as her place of entry and departure on trading voyages, did not change the ownership and constitute her a New York vessel. Up to June 20, 1851, the labor put upon the vessel and the supplies sent her were all furnished in New Jersey, on board her, at her home dock. It is not proved that the laws of New Jersey provided a lien in favor of the libellant for those charges, and none is raised by the general maritime law. The credit will be presumed to have been given the owner personally. This point has heretofore been considered and decided in this court, and ruled the same way, and that decision, on appeal, was affirmed by the circuit court. The Teller [Case No. 13,822].

The stipulation between the parties does not discriminate the portion of the account of the libellant which applies to credits given the steamboat when actually lying within the district. The defence to that branch of the demand is that, if any lien arises under the state statute, it is released and avoided by the boat being allowed to depart from the port, either out of the state for a period of more than 12 days before suit brought; or, if the lien is given by the maritime law, and

is not sought for under the local statute, that the mortgage security to the claimant is anterior to it in date, and takes precedence as a legal incumbrance. It is admitted by the stipulation that, besides various preceding departures from the city on excursions, the boat left on a charter to Newark the 16th of August, and went from that place the 17th to Shrewsbury, where she broke down; and it was conceded on the argument that she was brought back in a disabled condition, and was arrested in this action after her return, and after possession was taken of her by the mortgagees under their mortgages. It is manifest upon that statement of facts, that the lien authorized by the state law, if any accrued, had been discharged under the express condition of the act, on the steamboat leaving the state the 16th of August for Newark and Shrewsbury. 2 Rev. St. p. 493, §§ 1, 3. The maritime law, however, afforded a lien for the supplies furnished her within this district, she not then being a domestic vessel, and a reasonable time to enforce it. The creditor was not bound to pursue his lien before the vessel left the port of refitment, and proper diligence was employed by arresting her on her first return, little over a week after the debt had entirely accrued. So long as the boat continued a foreign vessel, the creditor was not bound to put each demand in suit as it arose, but could furnish repairs and supplies to her when her necessities required, and consolidate the demands in one action, there being no unreasonable delay, amounting to laches, in prosecuting the claim. The credit commenced after June 20th and terminated August 8th, and the libel was filed August 23d, a period, in the whole, of scarcely two months.

The defence to this part of the demand must accordingly depend upon the validity of the mortgage security against the libellant. The debt sued for was due the libellant by admission of the stipulation, on the 8th of August, 1851, and became then a lien or charge upon the steamboat, but did not require a priority to liens subsisting at the time.

Had the boat been then owned or situated within the state, the registry of a mortgage upon her, according to the law of the state, would have given a priority of security over a tacit lien, accruing for reparations and supplies to the vessel. But on the change of the residence of the owner, taking with him the property, to the place of the residence of the mortgagee and with his full knowledge, the local law ceased to act upon the subject, and the mortgagee took no other security from the mortgage than accrued under the laws of the state of New Jersey, the place of their mutual residence, or the general law. The statute respecting mortgages of personal property does not apply to mortgagors and mortgagees resident out of the state, or affect property in the actual possession of the mortgagor unless it be within this state when the mortgage is given. 2 Rev. St. p. 71, § 10. Otherwise, the general doctrine governs the subject, and, the property being transitory, it belongs to the place of the owner's residence. Story, Confl. Law, § 376.

The creditor is not chargeable with notice of the existence of a mortgage on a foreign vessel, because of its registration in the registry of the city of New York, unless the mortgagor and vessel be there when the mortgage takes effect. That was not so in June, 1851, when the mortgage notice was renewed, and being a nonresident, the mortgagee is not within the provisions of the renewing act. Blatch. Stat. p. 737, § 2. But, independent of that point in my opinion, the act of congress of July 29, 1850, applies to this case, and governs the rights of the mortgagee in respect to his lien on the steamboat. That act was not passed until after the mortgage was executed, and did not go into operation until October, 1850, and undoubtedly for one year, to June 13, 1851, the incumbrance could be legally secured by the state registry, provided the mortgagor continued to reside in the state for that time, as both he and his property would be subject to the state law, and his creditors would be bound to take notice of the provisions of the state law in respect to them. Statutes in relation to the registry of mortgages inure as appointments of a method of giving notice of the incumbrance (4 Kent, Comm. 170); and, in the case of mortgages of personal property, the renewed entry or registry must be made at the residence of the mortgagor to constitute a statutory notice (2 Rev. St. § 2). But had the notice in June, 1851, been sufficient under the state law, the act of congress was then in force, and would have applied to the case had the mortgagor continued to reside here, and have prevented that proceeding giving any security unless the mortgage was also recorded in the collector's office. The United States statute was then no less the law of notice than that of the state, and if it had not become the exclusive law in that respect, it must, at least, have as much effect as a state act to the same purport.

When the defence of an outstanding mortgage on a vessel is set up by a mortgagee in an United States court, even where it might retain priority by the local law, as against a tacit lien without re-registry, the mortgage becomes subject to the requirements of the United States act, and can be of no efficacy without being recorded as that act directs. If the two legislations subsist together, that of the state certainly cannot be claimed to extinguish the act of congress, and in this court the mortgagee must prove his compliance with the latter act, to be entitled to any advantage from the instrument as an encumbrance, the act declaring it shall not be valid against any person other than the grantor and his privies, and those having actual notice of it (section 1). In the absence of that record evidence, the mortgage must be held invalid as against the libellant, no actual no-

tice to him or its existence having been proved. The credit on which the action rests commenced after such re-registry, to wit, June 20th, and accordingly I must pronounce that the lien of the libellant takes priority of the mortgages (the mortgages being out of possession) set up in this case against his demand. The sale under these mortgages to the claimant is to be presumed regular and valid, but the purchaser took the vessel subject to the lien then subsisting in behalf of the libellant.

Ordered that the libellant recover the amount due him for labor and repairs furnished the steamboat within this district between June 20, and August 8, 1851, with interest from August 8 1851, and that it be referred to a commissioner to ascertain and report the amount. It is further ordered that the libel be dismissed as to the residue of the demand, and that the question of costs be reserved until the coming in of the report of the commissioner.

Case No. 13,902.

THOMAS v. LANE.

[2 Sumn. 1.] [1]

Circuit Court, D. Maine. Oct. Term, 1813.

ADMIRALTY — JOINT DECREE — APPEAL — TORTS — LOCALITY — SEAMEN — RECEIPT — MASTER.

1. In a libel for a maritime trespass, assault and battery, against two respondents, if there is joint decree for damages, either of the respondents may appeal without joining the other, where the respondents have severed in their pleadings or answers, or jointly pleaded a negative plea in the nature of the general issue. But it seems otherwise, if they had pleaded a joint justification.

[Cited in Atkinson v. The Hamilton, Case No. 611; The Brothers, 7 Fed. 880; The Galileo, 29 Fed. 539.]

2. The admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or at farthest to torts committed on waters within the ebb and flow of the tide.

[Cited in Leland v. The Medora, Case No. 8,237; Waring v. Clarke, 5 How. (46 U. S.) 486; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421; Bernhard v. Creene, Case No. 1,349; United States v. Wilson, Id. 16,731; Hough v. Western Transp. Co., 3 Wall. (70 U. S.) 33, 34; Bain v. Sandusky Transp. Co., 60 Fed. 913.]

[Cited in Adams v. Haffards, 20 Pick. 130.]

3. It seems that torts committed on tide waters within foreign ports are within the admiralty jurisdiction.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 487.]

4. The statutes of 13 & 15 Rich. II., respecting the admiralty, do not affect its jurisdiction in foreign ports.

5. Every libel for a tort must contain on its face sufficient averments as to place, to show that it is within the admiralty jurisdiction, otherwise it must be dismissed.

6. A receipt by a seaman on receiving the sum due to him for wages, stating that it is in full for all services, and demands for assault, battery, and imprisonment, &c. against the owner, and officers, is no bar to a suit for an assault, battery, and imprisonment. And if it were, it could not avail the party, unless specially relied on in the answer as matter of defence.

[Cited in The David Pratt, Case No. 3,597; Mitchell v. Pratt, Id. 9,668; Piehl v. Balchen, Id. 11,137; Savin v. The Juno, Id. 12,390.]

7. Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable.

8. A master of a ship, when present, is bound to interfere to prevent gross trespasses and misconduct of his officers towards the crew. If he is present when the officers commit an assault and battery, and he does not interfere, when he may, he is presumed to encourage and consent to it, and is jointly liable for the tort.

[Quoted in Hanson v. Fowle, Case No. 6,042.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 13, 31 N. E. 969.]

Libel for an assault and battery, and imprisonment, brought against Charles Thomas, master, and John M. Jordan, mate, of the brig Moro, by Joseph H. Lane, a seaman of the same vessel, shipped for a voyage on the high seas, to wit: from Portland to Havana, and back to Portland. The libel asserted the assault and battery, and imprisonment, to be in the harbor of Havana; and set forth the circumstances specially. The respondents put in a joint answer, admitting the libellant to have been a seaman on board the brig for the voyage; but denied that they had unnecessarily assaulted the libellant, as he alleged in his libel; and further, Thomas denied that he struck or kicked the libellant, as in his libel set forth; but alleged that he caused the libellant, and several others of his crew, to be imprisoned at Havana, for refusing to obey the orders of the master and his own orders, when directed and commanded to discharge and perform their duty on board the said brig; and Thomas further alleged, that he did not order or direct a Spanish officer or soldier to strike the libellant in the boat, or at any time,—nor did he at any time stand by and countenance the mate in striking or abusing the libellant. And Jordan further answered and denied that he struck the libellant, or knocked him down, or threw him against the windlass, &c., &c., or that he struck or kicked him upon his head or face, &c., &c.; and further, that the libellant, with others of the crew, refused to obey his and the master's lawful orders and command; and that their disobedience was the cause of the imprisonment. No replication was put in by the libellant; and the cause was heard upon the libel, answers and proofs, and a decree was pronounced against both of the respondents, by the district court, for one hundred dollars damages, and costs. The respondent Jordan acquiesced in the decree; but the respondent Thomas interposed an appeal on his own behalf, without joining Jordan.

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

STORY, Circuit Justice. The present suit is what is technically called a cause of damage, brought by the libellant, a seaman of the brig Moro, of Portland, against the respondents, the master and mate of the same brig, for an asserted assault and battery (specially set forth) of the libellant, in the harbor of Havana, and an imprisonment of four days, in continuation of the wrong, on shore, in the same port. There is an answer put in by the respondents, in its form joint, but containing several distinct allegations in defence of each of the respondents, in its nature several and not joint. Although the matters thus set forth assert, as to the imprisonment, a justification, and as to the assault and battery, a denial, there is no replication put in by the libellant, (which certainly ought to have been done as to the matters in justification); and the cause was heard (doubtless by consent) upon the libel and answer; and a decree for joint damages was pronounced by the district judge. The respondent Thomas, alone interposed an appeal from this decree, the other respondent not joining in it.

The first point, made at the bar, is, whether, upon this posture of the case, a several appeal can be maintained by the appellant. The ground of objection is, that the libel is for a joint offence, and the answer is joint; so that the parties have staked their cause upon the sufficiency of the defence as a joint defence; and if bad as to either, it is bad as to both,—and in the case of a joint answer and joint defence, there cannot be a severance of the respondents upon the appeal. There is a good deal of embarrassment thrown over the cause by the state of the pleadings; and I exceedingly regret, that neither the libel nor the answer have that regularity and certainty of averments, which in strictness they ought to possess. The libel is not drawn in the regular form of articles, articulating (if I may so say) the grievances in a distinct order, and charging each as a joint act of the master and mate. On the contrary, it seems to be a narrative of the events in the order in which the libellant asserts them to have occurred; and the acts of each of the respondents are charged severally against him, without any joint charge whatsoever attributing each act to both, and only by inference leading to the conclusion of any joint co-operation. The answer is equally embarrassing. It begins by asserting that the respondents jointly deny the assault and bruising of the libellant,—it then proceeds to deny that Thomas struck or kicked the libellant, or that he did the other acts charged against him personally, except the imprisonment, which he justifies, in a very general manner, on account of disobedience of orders. It then proceeds to deny that Jordan struck the libellant or did the other acts charged against him; and concludes with a justification of the imprisonment for the same cause as is asserted by Thomas,—so that here are joint and several defences mixed up in the same general answer, in regard to matters variously charged in the libel, some of them in form several, and some of them joint. If all the parties were before the court, I should not hesitate, under these circumstances, to direct a reform of the whole pleadings, by suitable amendments; and thus to require the charges in the libel to be jointly made (for several distinct trespasses of the parties severally cannot be properly united in one joint libel), and to allow the respondents to shape their defence accordingly, either jointly or severally, as they should be advised. But Jordan not having appealed, this course cannot be adopted; and the court is driven to the examination of the case, as it stands upon the pleadings in the record.

Upon the state of the pleadings, I know not how to treat the case as either a libel exclusively upon a joint charge, or as a joint answer to such a charge. It seems to me to be a mixture of joint and several charges, with threads of connection which I am unable to disentangle or to unite together. I agree to the doctrine of the common law, that if two or more join in a defence, which is a sufficient justification for one, but no justification for the others, it is bad as to all; for the court cannot sever it, and say, that one is guilty and the others not, when they all put themselves upon the same defence. See 1 Saund. 207, note 3 of Williams, and the authorities there cited; Moors v. Parker, 3 Mass. 310; Schermerhorn v. Tripp, 2 Caines, 108. But, whether the same doctrine applies to libels in the admiralty, may admit of some question; for the admiralty proceeds upon a more liberal and less technical system of pleading than the common law. Trespasses may in their nature be several as well as joint; and therefore one respondent may be found guilty, and the other acquitted of them. But whether a court of admiralty could sever a joint defence for the purpose of abstract justice, upon the coming in of the proofs, where the parties have put themselves upon a joint justification, good as to one, and bad as to another, is more than I feel at liberty at present to affirm. There is no room for the application of the doctrine here; for I cannot judicially say, that the justification is joint, as to all the torts charged upon the parties in the libel.

But the question here is, not so much as to the effect of a joint justification or defence, as it is as to the several right of appeal of the parties charged with a tort in a joint libel. It seems admitted by the argument, that if the parties had severed in their defence (as they clearly might have done), that either of them might have sustained a several appeal. If that be so, it must be upon the ground, that a tort charged as joint may be established by proof of

its being committed by either party; and in such case, that there may be a several decree of guilt as to one, and acquittal as to another. My opinion is, that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleadings, if the defence is several in its nature, as a general denial of the matters alleged, in the nature of the general issue; for then there may be a several decree of guilt as to one, and of acquittal as to the other. See 1 Saund. 207a, Williams' note. It may be otherwise, where there is a joint justification by the respondents; for then it is difficult to perceive, how either can separately contest its proof or sufficiency. The more pressing difficulty is, when there is a joint decree against all the defendants for damages in tort, whether one can appeal alone. There is a distinction, well known at the common law, between suits founded upon the joint contract of the parties defendant, and suits founded upon their tort. In the former, the contract must be proved to be joint, as it is charged; in the latter it need not. Upon a joint justification in tort, a writ of error lies only by all the parties to the justification; for all are aggrieved, if any are. But if they plead severally, and some are acquitted and the others are found guilty, the latter may maintain a writ of error alone; for they alone are aggrieved. See 2 Tidd, Prac. p. 1054, c. 43; 2 Saund. 101e, Williams' note. In case of an appeal from a joint decree in chancery against the defendants in the suit, all the defendants affected by the decree must join; but this is because they are united in interest. Owings v. Kincannon, 7 Pet. [32 U. S.] 399. And in suits in the admiralty, founded upon contracts, I should have no doubt, that the appeal must be by all the respondents charged, either personally or in interest, by the decree. But wherever the case, though joint in form, is in reality several in its character, as in cases of salvage, where distinct owners intervene severally, as respondents, each for his own interest, it seems to me, that the decree, though in its form joint, must be treated as several in its operation; and that each defendant must possess a several right of appeal for his own distinct interest. In short, the appeal must be joint, where the interest is joint; and several, where there are distinct and separate interests represented by independent parties in the same suit.

In cases of tort, it seems to me, that the same rule must by analogy prevail, where the defendants have not a joint interest, and do not, by their pleading, assume a joint defence. In personal trespasses, like the present, though the tort should be jointly charged, it is also several in its nature; and one defendant may be found guilty, and the other acquitted. It would seem strange, if the decree of the district court should pronounce for a joint trespass, and give damages accordingly, that one party should not be entitled to an appeal, unless the other would join in it; that one party should not be allowed to establish his innocence upon the appeal, because the other had by his submission to the decree admitted his own guilt. Each defendant in such a case has a distinct and several interest in the suit. He may answer severally, and a final decree may be entered in his favor. And if he denies the whole charge jointly with the other defendant, by a general answer in the nature of the general issue, he is not thereby deprived of this right to a separate acquittal, if the evidence warrants it. Suppose the decree in this case had pronounced Thomas guilty, and had acquitted Jordan. The former might certainly have appealed; for he alone would have been aggrieved by the decree. On the other hand, if the libellant had appealed from the same decree, under the like circumstances, it should seem, that the appeal ought to be against both defendants. For if the appeal were against Jordan alone, the libellant could not have a decree against him for several damages. See Heydon's Case, 11 Coke, 5; Halsey v. Woodruff, 9 Pick. 555; Hill v. Goodchild, 5 Burrows, 2790; 1 Saund. 207a, Williams' note; 2 Tidd, Prac. 804, 805. And if it were against Thomas alone, it would falsify his own charge of a joint trespass upon his own confession. See Heydon's Case, 11 Coke, 5; Harris v. Butterley, Cowp. 483; 2 Starkie, Ev. pt. 4, p. 1442. But, on this, I give no opinion. However, if the decree were for joint damages against both defendants, I do not well see, how the libellant could maintain a separate appeal against one; for that would be to claim several damages against each. But it would be different as to the defendants; for the charge being in its nature several, as well as joint, one might be aggrieved by the decree, when the other was not, and therefore might be entitled to a separate appeal.

I have not been able to find any authorities on this special point; and though the common law modes of proceeding are not strictly applicable to proceedings in admiralty, the doctrines of the common law, as to trespasses, may well furnish principles to guide the admiralty in the expositions of its own practice. My opinion is, that in this case a several appeal well lies by Thomas from the decree for joint damages, upon the ground, that the asserted trespass is several as well as joint, and that Thomas has a distinct and independent interest and responsibility in the suit, unaffected by the decision as to Jordan. The appeal therefore must be sustained.

The appeal, then, being properly before the court, the proceedings may be looked into for all purposes regarding the rights and merits of the parties. And, here, the objections already alluded to, are presented in their full force. The libel is in some parts intended

for a joint charge (whether it states it with all legal precision or not) and in other parts the charge, as it stands, is clearly several, though it may have been intended to be joint. The answer has the same aspects, several in some respects and joint as to others. Now, I think it to be very clear, that separate and distinct trespasses by several persons, charged not jointly but severally, cannot be put into the same libel. If the trespasses are different and distinct, several suits must be brought against the parties; and if they are joined, the libel ought to be dismissed for multifariousness, and a misjoinder of parties. And this is not a mere matter of form, for it may shut out the parties respondent, from the testimony of each other, which they would be entitled to in separate suits. The present case illustrates these remarks; for if there had been separate suits brought against Thomas and Jordan, they might have been witnesses for each other under circumstances giving their testimony a peculiar importance.

There is another consideration touching the libel, which presents a more direct admonition to the court respecting its own jurisdiction in admiralty. It is no where alleged in the libel, that the trespasses complained of were committed on the high seas, or within the ebb and flow of the tide. It is only said in general terms, that they were committed in the port of Havana; and a part of the charge, viz., the imprisonment of the libellant, is distinctly stated to have been on shore in that port. In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide. With respect to the former, viz., torts upon the high seas, the courts of common law have admitted the jurisdiction. See Lord Nottingham's remarks in 3 Swanst. 605, 606. With respect to the latter, viz., torts committed on tide waters, the courts of common law have denied the jurisdiction, where those waters are within the body of any country within the realm. But I am not aware, that it has been solemnly decided, that the like doctrine applies to tide waters in foreign countries, where the distinction of countries is unknown; for the statutes of 13 & 15 Rich. II., upon which this limitation of jurisdiction is founded, manifestly, by their very terms, apply only to the realm of England, and not to tide waters in foreign countries. My own judgment has always hitherto inclined to the opinion, that at least as to torts upon tide waters in foreign countries, the jurisdiction of the admiralty attached, seeing that it was its ancient right, and not within the prohibitions of the statutes of Rich. II. See De Lovio v. Boit [Case No. 3,776]. It is, however, a grave question, to which my mind has not been latterly drawn; and I am not aware, that it has ever come under a very solemn review in this country. But be this as it may, and assuming the jurisdiction to be rightful in cases of torts on waters within the ebb and flow of the tide in foreign ports, it is indispensable, to found the jurisdiction, that it should be so stated in the libel; for the court cannot intend, or infer, that it has jurisdiction; but it must be positively stated. The court cannot judicially know, that the tide ebbs and flows in the harbor of Havana, or that all parts of that port are within the ebb and flow of the tide, or that all vessels at all times float therein on tide waters. And the difficulty is here increased by the fact, that the gravamen is mixed up with a tort, of which the court clearly has not jurisdiction, that is to say, the imprisonment on shore; and the frame of the libel does not admit, even if the court were at liberty to unravel it, of a perfect separation of one part of the charge from another. If both of the defendants were by the appeal before the court, this matter might be helped by an amended libel; but in the actual posture of the cause, this cannot be done. So that at least as to Thomas, the libel would seem to be unmaintainable, and ought to be dismissed for want of jurisdiction.

If this objection could be surmounted, it would be proper to go somewhat at length into the other points of the cause. One of them is the supposed acquittance (for not being under seal it cannot be deemed a release) on the back of the shipping paper, by which the seamen respectively, and among others, the libellant, acknowledge themselves to have received the sums set against their names, "it being in full for our services, and of all demands for assault and battery, and imprisonment, and of whatever name or nature against the said brig, her owners and officers." To such a receipt, given upon the mere payment of wages, and without any distinct compromise, satisfaction or compensation for trespasses, it can hardly be supposed, that any court would listen as a bar to a suit of this nature. It must, under such circumstances, be treated as a paper obtained by fraud, surprise, or undue advantage taken of the party's situation, even if it could otherwise operate in point of law as an extinguishment of the right of action. In the present case, however, it is not set up as a defence in the answer, and therefore it cannot be judicially taken notice of by the court

Another point, upon which some stress is laid in the argument, is, as to the liability of the master for the trespasses of his officers. The principles of law upon this subject appear to me to be equally clear and salutary in point of policy. The master has the supreme authority on board of his ship; and has, moreover, a sort of parental responsibility and duty devolved upon him, for the

due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present, when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere, and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent to, and encourage it; for no officer in his presence has any right to inflict punishment without his assent or direction, unless upon an emergency, which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notions of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers, for the good, not of the officers alone, but of the crew also, and indeed for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady confidence, he is to take care, that the crew are not made the victims of the insolence, the passions, or the caprices of the officers under him. If he will stand by, and see the seamen cruelly, brutally and unjustifiably beaten without interference, he ought not to complain, that the law forces upon him the conclusion, that he approves what is done, and means to encourage it by his silence and his authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground, that he, who knowingly allows oppression, shares the crime. Such, in my opinion, is the dictate of the law on this subject; and it is wholesome as an admonition and a preventive against the undue resentment and oppression of officers, which so often end in the open mutiny and rebellion of the injured crew. On this head I follow out, with unhesitating confidence, the able argument of the learned counsel for the libellant.

The view, which has already been taken of the case, upon the point of jurisdiction, renders it unnecessary to consider the merits of the controversy, which have been so elaborately and analytically brought out in the argument, and to the force and acuteness of which no one is more ready to pay a voluntary homage than myself. My duty is to dismiss the libel, as to the appellant, the only party before the court, for want of jurisdiction; but there can be no costs allowed, where the court dismisses the suit, for such a cause. Libel dismissed.

Case No. 13,903.

THOMAS v. MACKALL.

[5 Cranch, C. C. 536.] [1]

Circuit Court, District of Columbia. March Term, 1839.

WITNESS—COMPETENCY—INTEREST—SLAVES.

Neither the complainant nor his wife can be examined as a witness against the defendant in a bill for injunction to restrain the defendant from removing from the District of Columbia the plaintiff's slave who had been sold by the plaintiff to the defendant for a term of years only, at the expiration of which term the slave is to be free.

Bill in equity to restrain the defendant [Brooke Mackall] from removing the plaintiff's female slave from the District of Columbia; the slave having been sold by the plaintiff [James Thomas] to the defendant for a term of years only, after which she was to be free, although not yet manumitted, and having two or three years yet to serve the defendant; the complainant having the reversionary right to the slave in himself, for the purpose of manumitting her.

Mr. Bradley, for complainant, asked leave to take the deposition of the complainant and his wife, to be read at the hearing, contending that the complainant was merely acting as the prochein ami of the slave.

R. J. Brent, contra, objected that the complainant was interested, having the reversionary right to the services of the slave, and also liable for costs and damages upon the injunction bond, in case the decree should be against him, and cited Medley v. Jones, 5 Munf. 98.

Mr. Bradley, in reply, contended that a prochein ami is a competent witness, although liable for costs, or new security for costs may be given, and he will be called to swear against his interest, for he will prove that the slave will be entitled to her freedom at the expiration of the present term of service. He cited Wheeler, Law Slav. 184; Lupton v. Lupton, 2 Johns. Ch. 626; Starkie, Ev. pt. 4, p. 785, note; Goss v. Tracy, 1 P. Wms. 287; Mulvany v. Dillon, 1 Ball & B. 413; Dixon v. Parker, 2 Ves. Sr. 222; Murray v. Shadwell, 2 Ves. & B. 401; Lee v. Atkinson, 2 Cox, 413; Rogerson v. Whittington, 1 Swanst. 39.

But THE COURT (THRUSTON, Circuit Judge, absent) refused to permit the complainant or his wife to be examined as a witness.

---

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

Case No. 13,904.

THOMAS v. MAGRUDER.

[4 Cranch, C. C. 446.] [1]

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

EVIDENCE—DEED OF EMANCIPATION—RECORD COPY.

A record copy of a deed of emancipation may be given in evidence by the petitioner, upon trial of a petition for freedom, without producing the original or accounting for its non-production.

[See Bank of U. S. v. Benning, Case No. 908.]

Petition for freedom [by Robert Thomas, a negro, against Elizabeth Magruder].

On the trial, Mr. Key, for petitioner, offered in evidence the record of the deed of manumission from Reginald Magruder, recorded in the office of the clerk of this court.

Z. C. Lee objected and called for the original, and proof by the subscribing witnesses.

THE COURT (MORSELL, Circuit Judge, absent) refused to require Mr. Key to produce the original, and permitted him to use the copy on the record; it having been acknowledged and recorded according to Act Md. 1796, c. 67, §§ 28, 29.

THOMAS (MOORE v.). See Case No. 9,776.

Case No. 13,905.

THOMAS v. NEWTON.

[Pet. C. C. 444.] [2]

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

EJECTMENT—SALE PENDENTE LITE—CONFESSION OF JUDGMENT—RIGHTS OF PURCHASER—JURISDICTION.

While the ejectment was depending, the premises were sold under a mortgage and purchased by Morris, to whom the defendant for a valuable consideration delivered possession of the same; and afterwards, in fraud of his agreement with Morris, he went to the office of the clerk of the court and confessed a judgment in favour of the plaintiff in the ejectment, upon which a habere facias possessionem issued, and the land was delivered to the plaintiff. On motion, the judgment and execution were set aside, and the cause reinstated; and the court, in order to maintain its jurisdiction, which had Morris, a citizen of Pennsylvania, the purchaser under the mortgage, been made defendant, would have been lost, ordered, that the original defendant should stand, nominally, as the defendant, and that Morris should give him security to pay the costs, &c.

[Cited in Hatfield v. Bushnell, Case No. 6,211.]

This was a rule to show cause why the judgment confessed in this suit, and the habere facias possessionem, should not be set aside, and possession be restored to the tenant of Morris, and Morris be admitted as defendant in the stead of Newton. The facts of the case were as follows: Pending this ejectment, the land in dispute was sold under a judgment rendered on a mortgage, and was purchased by Morris at the sheriff's sale, he being the highest bidder. The sale took place in December, 1816, and under the provisions of the law of this state, Morris gave notice to the defendant to quit in three months, which he promised to do. It was fully proved, that about the latter end of March, Morris paid the defendant fifty dollars to induce him to quit the premises without further trouble, which he did, and gave quiet possession to a tenant of Morris. After this, viz., on the 2d day of April, 1816, the defendant went to the clerk's office and confessed this judgment, upon which the habere facias possessionem issued. It was objected to this rule, that the lessor of the plaintiff has nothing to do with the transactions which have been spoken of, and not having practised himself, or been accessary to any fraud, the court will not take from him the legal advantage he has obtained. That Morris being, as well as the lessor of the plaintiff, a citizen of Pennsylvania, the court will not allow him to be made a defendant, instead of Newton, who is an alien, so as to take away the jurisdiction. At all events, this court can issue no process for dispossessing the lessor.

WASHINGTON, Circuit Justice. That the defendant has attempted to practise a gross fraud in this case, is incontestable, nor can it be denied but that Morris is entitled to redress. The difficulty consists in providing the proper remedy. After the defendant had delivered up possession to Morris, and that too for a valuable consideration, he had no power to confess judgment; it was a fraud which no court will suffer to prevail. The obvious remedy is to set aside the judgment and the execution, and to order possession to be re-delivered to the person, who, under the process thus improvidently issued was turned out; which if disobeyed, such disobedience will be punished as a contempt, or a writ of restitution may be awarded. But the difficulty is as to retaining the cause on the docket in the name of Newton, who is desirous to withdraw from the defence, and will be liable to the costs. For the court can by no means permit the name of Morris to be substituted for that of Newton, which would enable the new defendant to oust the jurisdiction which had once attached. But, as an ejectment is a fictitious action, and can be so moulded by the court as to further the ends of justice, and as Newton is the last person who has any right to complain of the restraint imposed upon him, not to confess judgment so as to defeat the right of Morris; the court will not permit him to do so, but they will at the same time direct Morris to give security to indemnify Newton against the future cost of the suit, and they will merely

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

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

restore the cause to the situation in which it was at the time the judgment was confessed. Rule made absolute.

Case No. 13,906.

THOMAS v. PAGE et al.

[3 McLean, 167.] [1]

Circuit Court, D. Indiana. May Term, 1843.

NOTES—CONDITIONS—ASSIGNEE WITH NOTICE—PLEADING—PLEA.

1. A note, though absolute on its face, may be made payable, on conditions, by a separate agreement, as between the original parties.

2. And in the hands of an assignee, with full knowledge of the conditions, they take effect, the same as between the original parties.

3. A plea which admits the execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue.

[This was an action on a promissory note by Thomas' assignee against W. W. Page and C. O. Page.]

Mr. Cushing, for plaintiff.
Mr. Stevens, for defendants.

OPINION OF THE COURT. This action is brought on a note for $2,316.33 from defendants to Stevens, the assignor of the plaintiff, payable in twelve months. The defendants pleaded nonassumpsit, and also a special plea, alleging that at the time the above note was executed to Stevens, it was given in part consideration of two bills of exchange accepted by Lewis Evans, of Madison, Indiana, both dated 5th October, 1838, for $2,316.33⅓ each, one payable twelve months after date; the other at twenty-four months after date, given to Samuel K. Page, and that it was fully understood that this due bill of W. W. & C. O. Page, for the two thousand three hundred sixteen dollars and thirty-three cents, payable to said Stevens, was not to be considered as an obligation binding on them to pay, if the bills of Lewis Evans were not paid at maturity, and S. K. Page was authorised to compound, if it should be requisite, with Evans, and any loss or expense was to be made and allowed by said Stevens; and that said due bill was not to be of any value, or any demand made on the defendants for it, until said acceptances of said Evans were all paid in cash, and the same produced with the due bill; and the defendants aver that before the assignment of said note to the plaintiff, he had full notice of this agreement; that the acceptor was insolvent, and that no part of the bills had been paid.

The plaintiff demurred to this plea, and assigned, as causes of demurrer (1) that the defeasance set forth in said plea as a bar, is inconsistent and void; (2) if the defeasance be valid on its face, there is no sufficient averment in the plea that due diligence has been used to collect the bills of exchange; (3) that there is no averment of an offer to return the bills of exchange, and no averment that the defendants have them ready to deliver up to the plaintiff; (4) that the plea amounts to the general issue, and is, therefore, defective.

The inconsistency of the defeasance is not perceived. The note given was to be valid only, on the collection of the drafts or bills. It was, substantially, an agreement to pay the sum named, should the bills be paid by Evans. And any loss or expense was to be allowed the defendant, Samuel K. Page, by Stevens. That is, if a part of the sums called for in the bills should not be received, or the holders of the bills should be subjected to expense, the one or the other or both, as might occur, should be deducted from the note given to him by the defendants. The effect of this arrangement would seem to be, to constitute Samuel K. Page the agent of Stevens, to collect the bills, and that the liability should depend upon the amount that should be received.

It is objected, that there is no sufficient averment in the plea, that due diligence has been used to collect the bills of exchange. There is an averment that at the time the first bill fell due, Evans, the acceptor, was insolvent, and had been so for some time before. This, we think, is sufficient. Under the agreement, the liability of the defendants depended upon the receipt of the money from Evans, and not on any other condition. An agent to whom a bill is sent for collection, may be made liable, if he shall be guilty of negligence in making a demand of the acceptor, and giving notice to the other parties to the bill, through which the holder loses his recourse. But the terms of the agreement set forth in the plea, imposes no such condition; and the demurrer admits the agreement as stated in the plea.

It is also objected, that in the plea there is no offer to return the bills of exchange, and no averment that the defendants have them ready to deliver up to the plaintiff. Until the acceptances of Evans were all paid, there was to be no liability on the note; and when the acceptances were paid, they and the due bill were to be produced. The condition was not, as is contended, that if the acceptances were not paid they were to be produced with the note; for until they were paid, the payment of the note was not to be enforced; and if the acceptances were paid, then the acceptor, of course, would be entitled to the possession of them. The intention of the parties is not clear on this point. It is enough, however, that the defence set up in the plea shows that, under the agreement, no liability has attached to the defendants; and that no right of action has accrued to the plaintiff,

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

he having full notice of the agreement, before the assignment of the note to him.

The last cause of demurrer assigned is, that the plea amounts to the general issue, and is therefore demurrable. Where the defence consists of matter of fact, merely amounting to a denial of such allegations in the declaration as the plaintiff would be bound to prove in support of his case, the plea is bad, as amounting only to the general issue. But in this case, the facts alleged do not deny the execution of the note, but expressly admit it; and matter of avoidance is alleged. This, then, is neither in substance nor in form the general issue. It gives color to the plaintiff's right, but sets up a distinct agreement, which shows that right was conditional, and that the condition on which the liability was to attach has not happened.

Upon the whole, the demurrer is overruled. On motion, leave is given to file a replication to plea, which being done, the cause was continued.

[For another hearing of this cause, see Case No. 13,907.]

Case No. 13,907.

THOMAS v. PAGE et al.

[3 McLean, 369.] [1]

Circuit Court, D. Indiana. May Term, 1844.

NOTES—ASSIGNEE WITHOUT NOTICE—INDIANA STATUTE.

1. Where a promissory note is made, the consideration of which is to be defeated if certain bills of exchange shall not be paid in the hands of the assignee without notice, the nonpayment of the bills cannot be set up as a defence.

2. And this principle is not affected by the statute of Indiana, which provides that the maker of the note may set up any defence against the assignee which he could make against the payee.

3. The agreement between the original parties would be a fraud upon an innocent assignee.

[This was an action at law by Thomas against Page & Page.]

Mr. Cushing, for plaintiff.

Mr. Stevens, for defendant.

OPINION OF THE COURT. At a former term this cause was before the court on a demurrer [Case No. 13,906]. The action was brought on a note given by the defendants, dated 19th December, 1838, in which, "twelve months after date they promised to pay John Stevens two thousand three hundred sixteen dollars and thirty-three cents, for value received." Endorsed by the payee to the plaintiff. The defendants pleaded that the above note was executed in part consideration for two bills of exchange, drawn by Stevens on Lewis Evans, of Madison, Indiana, and accepted by him. And that by an agreement signed by the said Stevens, the above note "was not to be considered as an obligation binding on them to pay, if the bills of Lewis Evans are not paid at maturity," &c. And they aver that Evans became insolvent and did not pay either of the bills of exchange, or any part of them. To this plea the plaintiff replied, that the said writing as a defeasance was made by Stevens, at the time the above note was executed, &c., to enable the said Stevens to dispose of the said promissory note to some bona fide holder, without notice, and with the intention of having the said writing set up against the note, &c. In their rejoinder the defendants deny the fraud, and aver that the transaction was bona fide, &c. On this issue was joined.

This note is made assignable by the statute, so that the assignee may bring the action in his own name, but the maker may set up in defence any matter which could be set up against the payee of the note. There was evidence conducing to show that the note sued on was created with a fraudulent intent. And the court instructed the jury, if they should find from the evidence that, at the time the note sued on was signed by the defendants, there was a fraudulent intent to enable the payee to assign the note for its value, to any one ignorant of the defeasance, they should find for the plaintiff. Or if they shall find that the plaintiff paid full value for the note without any knowledge of the consideration, and that this imposition was practised through the contrivance of the original parties to the note, that they should find for the plaintiff. That fraud is not to be presumed, but it may be proved by circumstances. And that the manner in which the obligation of the note was to be defeated was well calculated to impose upon an innocent assignee. The statute permits the defendants to make defence against the assignee, as against the original payee; but where persons mutually engage to defraud others, and if the note intended to be the instrument of the fraud comes into the hands of an innocent assignee, who pays value for it, the original fraud cannot be set up as a defence against the assignee. The jury found for the plaintiff the amount of the note and interest.

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

THOMAS (PENNSYLVANIA SALT MANUF'G CO. v.). See Case No. 10,956.

Case No. 13,908.

THOMAS v. PERRY.

[Pet. C. C. 49.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1811.

DEED—LANDS NOT IN POSSESSION—SEIZIN—COVENANT—VENDOR AND PURCHASER—"MORE OR LESS."

1. A deed for lands, out of the possession of the grantor at the time of the execution of the

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

deed, does not convey the lands; and a covenant of seizin in the deed, is not broken, as to the lands which were then out of the possession of the grantor.

2. In deeds, where the seizin forms no part of the description of the lands granted, a covenant of seizin applies to the present seizin as well as to the title.

3. Where in a deed the lands sold are said to contain "about so many acres more or less," both the grantor and the grantee consider these words as a representation of the quantity which the grantee expects to purchase, and the grantor expects to sell.

[Cited in Solinger v. Jewett, 25 Ind. 481.]

4. The words "more or less" are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, it would be the duty of a court of equity to correct the mistake.

[Cited in Stebbins v. Eddy, Case No. 13,342.]

[Cited in Belknap v. Sealey, 14 N. Y. 156; Coughenour v. Stauft, 77 Pa. St. 195; Harrell v. Hill, 19 Ark. 102; Solinger v. Jewett, 25 Ind. 481.]

5. A court of equity, in directing an issue of quantum damnificatus for a violation of a covenant of seizin, will direct that the defendant be allowed to give evidence of the value of the over quantity of lands conveyed by him.

[Cited in brief in Ellmaker v. Franklin Ins. Co., 5 Pa. St. 187.]

The plaintiff [Robinson Thomas] had obtained an injunction to a judgment obtained by the defendant [James Perry] for the last instalment due by the plaintiff, being part of the consideration money for certain lands in New Jersey, sold and conveyed by the defendant to the plaintiff. The ground of equity was, that the covenant of seizin, contained in the deeds, had been violated in consequence of the adverse possessions of sundry persons of various parts of the land sold, at the time the conveyance was made. The cause was argued in April, 1810, when the facts appeared to be as follows: On the 20th January, 1797, Miles Sherbrook, acting under a power of attorney, dated 3d November, 1788, from J. Perry and Thomas Hayes, both of Great Britain, and entitled as joint partners in trade, to certain lands in New Jersey, executed a deed to the complainant, which recited that Perry and Hayes, were in the life-time of the said Hayes, seized of an estate in fee, in sundry tracts of land in Middlesex county, state of New Jersey, part purchased of Brinkerhoof and Kittletas, part purchased in company with P. Corney, and part returned to them in the proprietor's office, containing in the whole about 2,600 acres, "be the same more or less," and that since the giving of the power of attorney by Perry and Hayes, in 1788 (which is recited), the said Hayes had died, having by his will devised his part of the aforesaid lands to the said James Perry. He conveys to the said Thomas, in fee, all the real estate of the said Perry, lying in the aforesaid county and state, whereof the said Perry and Hayes were seized on the 4th July, 1776, or at any time since, and whereof the said Perry is now seized in fee with the following covenants, viz. that Perry is lawfully seized in fee of the said premises mentioned or intended to be granted, free and clear, &c. Second, that he has good title and lawful authority to grant the same, and that it shall be lawful for said Robinson at all time, quietly, &c. to hold and possess the same, without the hindrance, &c. of any person. And, third, for further assurance at any time during ten years, so as the same do not contain any further or other covenants or warrants than are contained in this deed. The plaintiff, in consequence of the death of Hayes, previous to the execution of the above deed, having required a further assurance, Perry, on the 17th May, 1799, sent to Sherbrook another power of attorney, to enable him to confirm the aforesaid deed, and to comply with the covenants in it. On the 23d October, 1800. Perry, by his said attorney, executed a deed, granting to said Thomas all the land and premises as mentioned in the recital of the first deed, (omitting the words "whereof the said Perry and Hayes were seized on the 4th July, 1776, or since, and whereof the said Perry was then seized,") with covenants of seizin, for quiet enjoyment and warranty.

It appeared, that at the time when the first deed was made, sundry persons were in possession of parts of the land which had been purchased from Brinkerhoof and Kittletas. That some ejectments were brought soon after by Thomas, on the joint demise of himself and Perry; and, after the second deed, he brought ejectments for the residue, on his own demise, in all of which he succeeded; and, in 1807, recovered the possession from all those persons. These persons had entered under surveys made of the lands they had taken into possession, some in 1791, and others at subsequent periods, but prior to the first deed to the plaintiff.

Mr. Williamson and A. Ogden, for plaintiff, contended that although the tracts of land conveyed to the plaintiff, contained more than 2,600 acres, even after deducting the parts claimed by the adverse holders, and which were afterwards recovered, yet, in consequence of the words "more or less," the plaintiff was entitled to the whole, and that the quantity mentioned in the recital was merely descriptive. 1 Caines, 493; 2 Johns. 37; Swift's Essay, 305. Second, that being out of possession of a part of these lands, they did not pass by the deed, and of course the plaintiff's only remedy was on the covenant of seizin. 1 Johns. 159. Possession and seizin are common title terms. 2 Bl. Comm.

On the other side, it was contended by Stockton & Griffith for defendant: First, that the prior possession of these lands was no breach of the covenant of seizin, unless it appeared that the plaintiff was disseized or kept out by elder and better title, the reverse of which was proved by the plaintiff's recovery in ejectment. Covenant of seizin applies to the title only, and not to the possession. 4 Cruise, Dig. 77; Cro. Jac. 304; 4 Johns. 10; 2 Saund. 181, 18; 4 Dall. 438; 1 Vern. 188;

Second, H. Perry was disseized of the lands, for which damages are now sought; then they did not pass by the deed, and of course the covenant of seizin did not apply to them.

WASHINGTON, Circuit Justice, and MORRIS, District Judge, agreed that, as to the lands of which possession had been taken before 1776, (there were two of this kind, viz. Bennett's and Williamson's tracts,) they did not pass by the deed; and of course the covenant of seizin did not apply to them. That the whole cause turned upon the first deed to the plaintiff, the second being merely executed to confirm the first, and made in virtue of the covenant for further assurance; and that it did not operate as a new grant. If, by the death of Hayes, the first power of attorney was revoked, still Perry, who by the will of Hayes had become entitled to the whole estate, ratified the first deed, and empowered his attorney to confirm it; but, not to go further, or to make any new or different grant.

As to the tracts claimed by sundry persons under surveys, from 1791 to 1796, WASHINGTON, Circuit Justice, was of opinion, that if those possessions amounted to actual ousters, under claims of title however defective, the covenant of seizin was broken, (provided such lands passed by the deed, as to which no opinion was then given;) because, in such case it could not be true, as Perry had covenanted, that he was seized. If the eviction had taken place after the deed, the covenant could not have been broken, unless it had been under an elder and better title; but this is very different from the case of a grantor disseized, at the time he covenants that he is seized. It was therefore proper to examine witnesses as to the nature of the dispossession, in order to a final decision.

MORRIS, District Judge, was of opinion, that the possession of these persons, being without title, was merely an intrusion, and did not amount to a disseizin, even although they had built houses, enclosed and cultivated the land, under a claim of title.

The cause was continued, and now came on to be again heard at this term, when it was proved, that the persons in possession of the parcels of land claimed under surveys, in opposition to the plaintiff's title, had lived on the said parcels of land, claiming the same as their own, in virtue of such surveys, from the time they were made; had built dwelling houses, and many of them barns; had cleared the land on parts of it, enclosed them, planted orchards, cultivated the land; been assessed as the owners, and paid the taxes.

Williamson & Ogden contended: First, that the three parcels of land mentioned in the recital of the first deed, whether they contained more or less than 2,600 acres, passed by that deed; and that the words "and whereof the said James Perry is now seized," should either be construed as if a disjunctive had been used, instead of the word "and," or as an averment that he was then seized of the lands, whereof he and Hayes were seized on the 4th of July, 1776, or afterwards; for if those words be construed to restrain the former words, the former words will have no effect at all; and in fact the covenant of seizin will be rendered entirely useless. Second, that the adverse possession of these persons, amounted to a complete ouster and disseizin (Cowp. 218; 1 Johns. 34, 36; 5 Burrows, 2607; 2 Salk. 423), and this, though Perry remained in possession of the residue; possession of a part not being a possession of the whole, where the possession is adverse and amounting to an ouster (2 Caines, 183; 4 Mass. 416; 9 Vin. Abr. 71, 91). The covenant of seizin applies to the possession. Co. Litt. 153; 4 Mass. 408; 2 Mass. 436, 437; 4 Cruise, Dig. 77; [Ramsay v. Lee] 4 Cranch, [8 U. S.] 401. Third, the covenant, that he had power to convey, is also broken; for, being out of possession, the deed was void. 1 Cruise, Dig. 249; 1 Johns. 159. The following cases were also cited: 1 Cruise, Dig. 12, 13, 15; 2 Bl. Comm. 95, 199; Co. Litt. 279; 4 Cruise, Dig. p. 78, § 39; 3 Cruise, Dig. p. 41.

Stockton & Griffith for defendant argued: First. That the deed passed no land but such as the grantor was then seized of, and the covenant can apply to no other. The meaning of it is, that of the land of which he is seized, his estate is lawful and in fee. Second. The grant conveys only 2,600 acres; and the words more or less are intended to cover a small excess or deficit. If the plaintiff claims an abatement for breach of covenant, he is bound to do equity, and allow for the enormous excess, (near 1,000 acres) over and above the 2,600 acres. 2 Hen. & M. 165; 1 Ves. Jr. 221. Third. The plaintiff has sustained no injury which he might not have avoided. He might have recovered in ejectment at once, on the demise of Perry or himself, and obtained immediately, on motion, orders to stay waste. After recovery in ejectment, his right to the mesne profits, from the time of the demise laid, would have been established by the verdict in ejectment. 2 Burrows, 667. He might have recovered in that action, for all the injury he had sustained by the unlawful possession beyond the mere rents and profits. 3 Wils. 121.

As to the meaning of covenant of seizin, see 2 Sandf. 177; 3 Keb. 755; 4 Johns. 18; 3 Cruise, Dig. 78; Sugd. Powers, 473, 375; 3 Term R. 584; 2 Bos. & P. 13. A dispossession is not a disseizin, without expulsion; it is only an intrusion. 1 Burrows, 107, 108; 16 Vin. Abr. 454, pl. 3.; Salk. 246; 3 Bl. Comm. 169; 1 Cruise, Dig. p. 14, § 45; 6 Com. Dig. 277. An entry and occupation never amounts to a disseizin, unless the right of entry of the rightful owner is taken away, as by time, descent cast, or judgment. In such case, it is a disseizin only at the election of the owner; and a deed or devise by him showing his election not to be disseized. 1 Burrows, 112, 113. But, at all events, however the common

law may be, a man disseized may convey in this state; for, by an act of assembly, passed in 1713, the grantee of an use, is deemed to be in possession as fully, to all intents and purposes, as if livery of seizin had been given; and livery, it is known, clears away all disseizins, where the right of the feoffor is lawful. Shep.. Touch. 199; Co. Litt. 49. This statute goes much further than the statute of uses by making the bargainee in, as if he had come in by livery. Such, too, has been the uniform practice and understandings of courts and lawyers in this state; and the recoveries by the plaintiff is one proof amongst many others. Until now it never was questioned.[2] In short, the plaintiff having recovered in ejectment, it is not for him to say, Perry was disseized; for, if disseized, he could not have recovered.

WASHINGTON, Circuit Justice. The opinions delivered on the former hearing, were merely on the operation of the covenant of seizin, in which the judges were divided. I then thought, and still think, that at common law, the covenant of seizin applies to the possession, as well as to the title; and that, if at the time the covenant is entered into, the grantor is disseized, the covenant is broken, how good soever his title may be. The argument has now taken a wider range, and, it is contended, on the one side, and denied on the other; that a deed by the rightful owner puts an end to the disseizin, if it existed at the time; provided his entry was not taken away, and in fact restores the possession. That, in short, it is no objection to the validity of a conveyance, that the grantor is out of possession. Upon these points I do not wish, unless there were necessity, to give an opinion; and in this case there is none. But I would observe, that if the plaintiff's counsel be right, still if the plaintiff could, as soon as he obtained his deed, have brought ejectments, on the joint demise of himself and Perry, as, in one or two instances he did, and recovered; and could have effectually prevented the commission of waste; if the judgments in ejectment would have been conclusive of the right to recover mesne profits, from the time of the demise laid, as they certainly would; how has he sustained an injury, which it was not in his power to have prevented? And, if he might have prevented it, whatever might be his strict legal rights, it is fair to ask where is his equity?

But, the court is of opinion, that upon the strict law of the case, the plaintiff cannot recover; because, if Perry was disseized, or held out adversely, of any part of the land, it did not pass by the deed, and consequently the covenant could not be broken. If, by the laws and usages of this state, or otherwise, he was not disseized, then the covenant is not broken. The words which describe the land intended to be conveyed, are, "all the real estate lying in, &c., whereof Perry and Hayes were seized on the 4th July, 1776, or at any time since; and whereof the said Perry is now seized." It is contended by the counsel for the complainant, that the word "and" should be construed a disjunctive; because, if the seizin of Perry and Hayes is at last to resolve itself into the seizin of Perry at the time the deed is made, the previous description of the land is rendered useless, and made to stipulate no more than that he is seized of all that he is seized of. It is very true that the word "and," by restraining the preceding words, deprives them of their effect; but, this of itself is no reason for the alteration in the language which is contended for, if a useful meaning can be given to the words as they stand. Surplusage and tautology are usual in deeds. The preceding words were intended to describe the seizin of Hayes and Perry; the latter, the seizin of Perry. It is unreasonable to suppose, that he contemplated selling land of which he was not seized, or that the plaintiff contemplated buying it; for, upon the doctrine of the common law, contended for on his behalf, the deed would have been void, as to the land of which he was not seized. Much less likely is it, that Perry should mean to use a language that implied a possibility of passing land of which he was not seized; and would superadd a covenant which was broken as soon as entered into. His situation,—a stranger to the land, to the various accidents which might have befallen it, from 1771, when he bought it; to the title of Hayes, under whom he claimed one half, and who might in his life time have sold or been disseized of the whole or a part of it,—all these circumstances were sufficient to induce caution in a prudent man: and if his intention was to convey nothing, but what he might legally part with, he could not have used more appropriate words to express such intention; and the court would go farther than would be warranted, in changing the language which the parties have used, at the risk of defeating that intention. As to the effect of the covenant in the grant, as it is expressed; the meaning is, that the lands of which Perry was seized, and which he thereby conveyed, were held by an absolute title in fee, clear of incumbrances, &c. In deeds, where the seizin forms no part of the description of the land granted, (which it does in this case,) the covenant goes to the present seizin, as well as to the title. In such a deed as this, it goes to the title only; and in this respect the covenant is sensible and useful. Again, it is contended that the word "and" is merely an affirmation that Perry was then seized of the lands, of which Perry and Hayes had been seized on

[2] Judge Morris confirmed this declaration of the counsel.

the 4th July, 1776, or since. If so, this word is strangely misplaced. The recital contains all the averments in the deed, viz. that the lands were obtained in a particular way, contained so many acres, and that Perry and Hayes, in the life of the latter, were seized of them. Had Perry meant to aver his own seizin of the same, this would have been the place to make it. But it is found in this clause which describes the land intended to be conveyed; and it ought not, therefore, to be construed otherwise than as descriptive, unless the strongest reasons could be assigned. But, it has been shown that those reasons are all the other way.

But, if this point were in favour of the plaintiff, then it is the opinion of the court, that he would not be entitled to the aid of this court, but on the terms of accounting for the excess in the quantity of land, over 2,600 acres. The description of the land sold, is either in the recital, or is expressed by the words which have just been examined. The grant is not of the land mentioned in the recital, but of all the lands in a particular county, whereof Perry and Hayes were seized, and of which Perry was then seized. If the latter words meant only an averment, that he was seized of all the lands whereof Perry and Hayes were seized, and do not restrain the expressions as to the seizin of Perry and Hayes, then the description of the land conveyed in the granting part of the deed, and in the recital, are precisely the same; for the latter describes only lands of which Perry and Hayes were seized. But then an additional description is given, viz. that those lands contained about 2,600 acres. Now this latter description qualifies the former, and if not rendered nugatory by the words in the granting part, "and whereof Perry was then seized," they ought, in construing this deed, to be taken into consideration. It seems to the court, that when the land sold, is said to contain about so many acres, both the grantor and grantee consider these words as a representation of the quantity, which the grantor expects to sell, and the grantee to purchase. The words "more or less," are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake, which it would be the duty of a court of equity to correct; more especially against him who asks the aid of that court. The consequence of this is, that if we are to direct an issue of quantum damnificatus, for breach of the covenants in the deed, we should also direct that the defendant on that issue, should be at liberty to give in evidence, in diminution, or opposition to the damages, the value of land over and above the quantity mentioned in the deed; which would probably be destructive of the plaintiff's claim. Upon the whole, we are of opinion, that the bill ought to be dismissed with costs.

THOMAS (PRATT v.). See Case No. 11,377.

THOMAS (RUSSELL v.). See Case No. 12,162.

THOMAS (SALT MANUF'G CO. v.). See Case No. 10,956.

THOMAS v. SCHUYLER COUNTY. See Case No. 13,909.

Case No. 13,909.

THOMAS v. SCOTLAND COUNTY.

THOMAS v. SCHUYLER COUNTY.

[3 Dill. 7;[1] 1 Cent. Law J. 216.]

Circuit Court, E. D. Missouri. March Term, 1874.[2]

RAILWAY AID BONDS—CHARTER PRIVILEGE OF RECEIVING SUBSCRIPTIONS — EFFECT OF RAILWAY CONSOLIDATION AND CHANGE OF NAME — STATE DECISIONS, HOW FAR BINDING ON THE FEDERAL COURTS.

1. Although the decisions of the supreme court of a state expounding the effect of the state constitution and laws upon securities issued by a municipal corporation are not necessarily conclusive upon the federal courts, yet they will be followed, unless cogent reasons appear to the contrary.

2. The decisions of the supreme court of Missouri in State v. Sullivan County Court, 51 Mo. 522; Smith v. Clark Co., 54 Mo. 58; and State v. Green Co. (January term, 1874), Id. 540, which hold that a provision in the charter of a railway company granted by act of the legislature, authorizing and empowering counties through which the road shall pass to subscribe for its stock and issue its bonds in payment of the same, is a "privilege" of the railway company, which is not taken away by a subsequent constitutional ordinance, are approved and followed.

3. The charter of the Alexandria and Bloomfield Railroad Company gave the county courts of the counties through which the road should pass power to subscribe to its stock and issue their bonds in payment of the same, without a vote of the people. Subsequently the company was empowered to change its name and extend its line, and its name was accordingly changed. Subsequently authority was given to this company to consolidate with an Iowa company whose road intersected it on the boundary line between the two states, and the consolidation was accordingly effected, and the consolidated company took a new name. After this consolidation the defendant counties issued their bonds to the consolidated company by name, reciting on the face of the bonds the provision in the charter in the original Alexandria and Bloomfield Railroad Company as their authority to do so, and also reciting on the face of the bonds the subsequent change of name of that company, and the final consolidation and change of name. In a suit upon coupons detached from these bonds, it is *held*, on the authority of Nugent v. Supervisors, 19 Wall. [86 U. S.] 241, that the authority to issue the bonds was complete, and that the defendants are liable.

4. The case of Harshman v. Bates Co. [Case No. 6,148] (United States circuit court, Western district of Missouri, November term, 1873), distinguished from the present case.

These are suits on coupons attached to bonds issued by the respective counties to pay for subscriptions to stock in a consoli-

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

[2] [Affirmed in 94 U. S. 682, and 98 U. S. 169.]

dated railroad company, and are in all essential particulars dependent on the same legal questions. The bond in the Scotland county case reads as follows: "United States of America. $1,000. Eight per cent. Railroad Bond, County of Scotland. Twenty-five years. Know all men by these presents: That the county of Scotland, state of Missouri, acknowledges itself indebted to the Missouri, Iowa, and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the states of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company, formerly Alexandria and Bloomfield Railroad Company, of the state of Missouri, and the Iowa Southern Railway Company, of the state of Iowa, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the said Missouri, Iowa, and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, New York, on the 31st day of December, A. D. 1895, together with interest thereon from the 31st day of December, 1870, at the rate of eight per cent per annum, which interest shall be payable annually, in the city of New York, on the 31st day of December in each year as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the county court of said Scotland county for subscription to the stock of the Missouri, Iowa, and Nebraska Railway Company, as authorized by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857. In witness whereof," etc. The petitions alleged the plaintiffs to be holders for value before due. The defendant counties demurred to the petitions.

Bland & Baker, and F. T. Hughes, for plaintiff.

Sharp & Broadhead, for Scotland county.

B. G. Barrow, Edward Higbee, R. Caywood, and E. M. Bradley, for Schuyler county.

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

TREAT, District Judge. Under the decisions of the supreme court of Missouri and of the supreme court of the United States, a bona fide holder of such bonds as those here in question, or of coupons annexed, has a right to recover thereon at maturity, unless there was an absence of authority on the part of the county court to issue them; and the county is estopped by the recitals from disputing that all measures antecedent to the issue were properly and lawfully adopted and pursued when the recitals so state.

When these cases were argued at the last term of this court, several grave questions as to the authority of the respective counties to subscribe to the stock of the consolidated company, and issue bonds in payment of such subscriptions were fully discussed, leaving the court in serious doubt as to the liability of said counties. Since that term, several decisions have been made by the supreme court of Missouri and the United States supreme court upon the disputed points, and a new argument has been had in the light of those decisions.

What our views might have been on the many propositions arising under the state constitution of Missouri and the state statutes, were they before us de novo, is unimportant; for while, in cases like the present, the decisions of the state supreme court would not be conclusive in United States courts, yet they will be, and ought to be, followed, unless very cogent reasons to the contrary appear. The more especially should the United States courts so act, when, under such state decisions, negotiable instruments of the kind sued on have, on the faith thereof, been received in the money markets of the world and passed freely from hand to hand. In the several cases of Iowa municipal and county bonds, the United States supreme court has not only laid down that rule, even disregarding adverse state decisions subsequently made, but has also caused it to be rigorously enforced.

The Alexandria and Bloomfield Railroad Company was chartered in 1857, and in its charter the privilege was given to the county courts of the counties defendant to subscribe to its stock and issue bonds in payment thereof. Subsequently, that railroad company was authorized to change its corporate name and extend its line. The name was duly changed accordingly, as recited in the bonds.

The Missouri supreme court has settled the question that the power given to the county courts by the charter of 1857 for the Alexandria and Bloomfield Railroad Company remained unaffected by the new state constitution; for that power was a "privilege" of the corporation, not impaired or taken from it. Hence, under the several state decisions, especially in the cases against Sullivan, Clark, and Green counties (State v. Sullivan County Court, 51 Mo. 522; Smith v. Clark Co., 54 Mo. 58; State v. Green Co., Id. 540), it must be considered settled that the county courts of Scotland and Schuyler counties respectively had the power to subscribe, without a previous vote of the people, to the stock of the Alexandria and Bloomfield Railroad Company under its changed name of Alexandria and Nebraska City Railroad Company. Indeed, the case against Clark county was under said charter, and is express on that point.

This case is clearly distinguishable from Harshman v. Bates Co. [Case No. 6,148], in the United States circuit court for the Western district of Missouri. In that case the previous vote of the people was essential to the authority to subscribe, and that vote was for a subscription to a specified company. But in the cases now before this court no such proposition is involved, for the power was granted to these county courts

to subscribe and issue bonds of their own motion. These courts could, of their own motion, subscribe to the stock of the Alexandria and Bloomfield Railroad Company, or of the same company under its new name of the Alexandria and Nebraska City Railroad Company, without a previous vote by the people. But the subscription was not made in terms to that company.

Under the act of March 2, 1869, authority was given for the consolidation of that company with any other railroad company in Iowa whose track met at the same point on the boundary line of the respective states. Pursuant thereto the consolidation was had, and the consolidated companies were known as the Missouri, Iowa, and Nebraska Railway Company—the company named in the bonds issued. As reference was fully made to the changed name of the Alexandria and Bloomfield Railroad Company, and to said consolidation, the bondholder was bound, in the light of the law as expounded by the United States supreme court, to look only to the authority of these county courts to make subscriptions to said constituent and consolidated company. The decision in the case against Green county seems to have decided this point; but whether that be so or not, the case of Nugent v. Supervisors, 19 Wall. [86 U. S.] 241, appears conclusive. The previous cases of Clearwater v. Meredith [1 Wall. (68 U. S.) 25], and of Marsh v. Fulton Co. [10 Wall. (77 U. S.) 676], were supposed to hold the opposite doctrine. True, in the Case of Nugent the subscription was made to one of the constituent companies and accepted before consolidation, and the bonds were delivered subsequently to the consolidated company. But when a subscription is made to a specified company which has at the time power to consolidate with another company, that subscription is made in full view of the fact that the consolidation may occur without invalidating the subscription. In the Bates County Case the subscription was not made as the vote of the people required. The stockholders of a constituent company may, by vote, decide whether the consolidation shall be made, and even if a non-assenting stockholder could not be bound by the acts of the majority, he who subscribed to the stock of the consolidated company, after consolidation, could set up no such defense. In Tomlinson v. Branch, 15 Wall. [82 U. S.] 460, and other cases cited, it is clearly established that the new or consolidated company has for its constituent parts all the powers and privileges and exemptions pertaining to the constituents previously. Therefore, if Scotland and Schuyler counties had subscribed to the Alexandria and Nebraska City Railroad Company, and, as stockholders in said company, had voted for the consolidation, they would be in exactly the same position as they are now, viz.: stockholders in the consolidated company by their own consent.

It follows, therefore, that if, when the subscription was to a constituent road, and the delivery of bonds to the road consolidated afterwards, the bonds are obligatory, the subscription and delivery of bonds, therefore, to the consolidated road are equally obligatory. The main consideration is the authority to issue said bonds to the consolidated company. That authority does not depend on the fact of previous subscription to a constituent road subsequently consolidated, as authorized by law at the time the subscription was made, which subscription is, by operation of law, carried over to the consolidated road, but on the fact that the court's authority to issue the bonds was complete, as it had the authority to make the counties stockholders in the consolidated road and issue its bonds in payment of its subscriptions.

Such we understand to be the doctrine established by the United States supreme court in the recent case of Nugent v. Supervisors, in accordance with which the demurrers in these cases must be overruled.

Demurrer overruled.

[These suits were taken to the supreme court by writs of error, where the above judgment was affirmed. 94 U. S. 682; 98 U. S. 169.]

Case No. 13,910.

THOMAS v. SCOTT.

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

Circuit Court, District of Columbia. June Term, 1810.

SLAVERY—DISCLAIMER—ATTACHMENT—PLEADING.

Upon a petition for freedom, the defendant may appear and disclaim, without entering into the usual recognizance.

Petition for freedom. The defendant [Alexander] Scott, offered to appear and disclaim all right of property in the petitioner [Walter Thomas, a negro], at the time of service of the subpœna or any time since.

Mr. Law, for petitioner, objected that he must enter into a recognizance before he can appear, and prayed for an attachment for not obeying the summons. The act of assembly 1796, c. 43, § 5, authorizes the court to require such a recognizance. Mr. Law suggested that Mr. Scott, knowing that a petition was filed, sold and conveyed away the negro before service of the subpœna.

THE COURT said that a man may appear, to disclaim, without entering into the recognizance to have the negro forthcoming, and refused the attachment.

THOMAS (SCUDDER v.). See Case No. 12,567.

THOMAS (SEGEE v.). See Case No. 12,633.

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

Case No. 13,911.

THOMAS et al. v. SHOE MACHINERY MANUF'G CO. et al.

[3 Ban. & A. 557;[1] 16 O. G. 541.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—REISSUE—EFFECT OF—NEW FEATURES—MATERIAL INTERPOLATIONS—PRESUMPTIONS.

1. Reissued patents are presumed to be for the same invention as the original, and will only be adjudged void, because for a different invention, where it clearly appears that the reissue contains some new feature, of a material character, not described, suggested, or substantially indicated in the specification, drawings or patent office model of the original.

2. The granting of a reissued patent closes all inquiry into the existence of inadvertence, accident or mistake.

3. Neither reissued nor extended patents can be attacked by an infringer in a suit against him for damages or profits, on the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner.

4. Where the commissioner accepts a surrender and grants a reissue, his decision is final and decisive, in a suit for infringement, unless it appears that he has exceeded his authority, and that there is such a repugnancy between the old and the new patent, that it must be held as a matter of construction that the new patent is not for the same invention as the original.

[Cited in American Diamond Rock Boring Co. v. Sheldon, Case No. 296.]

5. A patentee is not allowed to interpolate new features into a reissue which are not described, suggested or substantially indicated in the specification, drawings or patent office model of the original patent.

[Cited in Dederick v. Cassell, 9 Fed. 307.]

6. Where material interpolations are made in a reissue, they show that the commissioner exceeded his jurisdiction, and in such case it clearly becomes the duty of the court to declare the reissued patent void.

7. Inventions secured by letters patent are presumed to be new and valid, until the contrary is shown.

[This was a bill in equity by Samuel E. Thomas and others against the Shoe Machinery Manufacturing Company and others to restrain the infringement of reissued letters patent No. 6,550, granted to A. F. Johnson July 29, 1875. The original letters patent No. 42,292 was granted to Johnson April 12, 1864.]

Edmund Burke and John S. Abbott, for complainants.

Smith & Bates and W. W. Swan, for defendants.

CLIFFORD, Circuit Justice. Reissued patents are presumed to be for the same invention as the original, and will only be adjudged to be void, because for a different invention, where it clearly appears that the reissue contains some new feature of a material character not described, suggested nor substantially indicated in the specification, drawings or patent office model.

Improvements in sewing-machines were made by Albert F. Johnson, for which letters patent were granted him in due form. Those improvements relate to an improved mechanism for the operation of the awl and needle in such a machine, and consist in the employment of a driving-shaft below the supporting-plate for the operation of the needle, and a shaft above the plate for the operation of the awl, the two shafts being connected by means of suitable intermediate mechanism. Rocking levers, it seems, were formerly used, and the patentee states that the shaft is much better than the old device, as the whole strain on the awl, when piercing the material, is conducted to the gooseneck of the machine, instead of the awl, which is sufficiently strong to prevent its breaking or bending when the awl enters the material. Experience showed that the specification was in some respects defective, in consequence of which the patent was surrendered and reissued in the form described in the bill of complaint.

Service was made, and the respondents appeared and filed an answer setting up the defences following: (1) That the original patent is still in force, and that one of the respondents is an owner of an undivided share of the original patent, and has the right and liberty of making, using and vending the invention. (2) That the reissued patent is not for the same invention as the original patent. (3) That the invention is not new or useful, nor has it been of any advantage to the complainants or the public. (4) That the machine described in the reissued patent is not new, and had been previously described in the several patents mentioned in the second amendment to the answer. (5) That they have not made, used or vended the invention described and secured in the reissued patent, nor in any way violated the rights of the complainants, or deprived them of any gains and profits.

1. Authority to accept the surrender of an original patent and to grant a reissue is conferred upon the commissioner, and, in a case arising under the patent law then in force, the supreme court, more than thirty years ago, decided that where an act was to be done or a patent granted upon proofs to be had before a public officer upon which he was to decide, the fact that such officer had done the act or granted the patent was prima facie evidence that the proofs had been regularly made and that they were satisfactory, even though the patent did not contain any recitals that the prerequisites to the grant had been fulfilled; and such continued to be the rule until the question came up under a later act, when the supreme court held that the granting of a reissued patent closed all inquiry into the existence of inadvertence, accident or mistake, and left open only the question of fraud for the jury. Railroad Co. v. Stimpson, 14 Pet. [39 U. S.] 458; Stimpson v. Railroad Co., 4 How. [45 U. S.] 384. Since that time it

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

has been definitely settled, that neither reissued nor extended patents can be abrogated by an infringer, in a suit against him for damages or profits, upon the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner. Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 797. Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and decisive, and is not reexaminable in such a suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, and that there is such a repugnancy between the old and the new patents, that it must be held as matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original. Seymour v. Osborne, 11 Wall. [78 U. S.] 543. Both the original and the reissued patents were granted in the name of the same patentee, and it is settled law that the suit in such a case must be brought in the name of the patentee or his assignee. Goodyear v. Rubber Co. [Case No. 5,583]. Suppose the rule was otherwise, still it is clear, from the evidence in the case, that the legal title to the invention was in the patentee, both at the date of the original and of the reissued patent; but, in view of the circumstances, it is not deemed necessary to reproduce the details of the evidence.

2. Power to accept the surrender of an original patent and to grant a new one in its place is conferred upon the commissioner, but the act of congress giving that power expressly requires that the reissued patent must be for the same invention as the original. Patents may be surrendered to be corrected, and the power to surrender implies that the specification may be corrected to the extent necessary to cure the defects, and to supply the deficiencies, to render the patent operative and valid; but the patentee may not interpolate new features not described, suggested or substantially indicated either in the specification, drawings or patent office model. Interpolations of the kind, if material, show that the commissioner exceeded his jurisdiction, and, where that is done, it clearly becomes the duty of the court to declare the patent void. Courts of justice will avoid such a conclusion, if they can reasonably do so by a proper application of the maxim that patents are to receive a liberal construction, and, if practicable, be so interpreted as to uphold and not destroy the right of the inventor. Turrill v. Railroad Co., 1 Wall. [68 U. S.] 491; Ames v. Howard [Case No. 326]; Blanchard v. Sprague [Id. 1,517]; Milligan & Higgins Glue Co. v. Upton [Id. 9,607]. Slight changes will not sustain such a defence, nor will the court in any case declare the patent void on that account, if, by the true construction of the two instruments, the invention secured by the two instruments is not substantially different from that embodied in the original patent. Inquiries in such a case are restricted to a comparison of the terms and import of the two patents in view of the drawings and patent office model. If from these it results that the invention claimed in the reissue is not substantially different from the one described, suggested or indicated in the specification or drawings of the original patent or patent office model, the reissued patent must be held valid, as all other alterations and amendments plainly fall within the intent and purpose of the provision in the act of congress which allows a surrender and reissue; or, in other words, if the reissued patent does not, upon the face of the instrument, embrace anything not substantially described, suggested or indicated in the specifications, drawings or model of the original, the defence that the reissued patent is not for the same invention as the original must be overruled. Apply that rule to the case under consideration, and the court is of the opinion that the second defence is not sustained. Alterations and new explanations are made in the specification, but they are not of a nature to change the character of the original invention when tested by that rule. On comparing the specification and drawings of the original patent with those of the reissued patent, it is found that the drawings are exactly the same, and the court is clearly of the opinion that there is no such change in the descriptive words of the specification as will support the second defence.

3. Inventions secured by letters patent are presumed to be new and useful until the contrary is shown, and, in the absence of countervailing proof, that prima facie presumption is sufficient to entitle the complainant to a decree in a suit for infringement. Proofs upon that subject were introduced on both sides, and the court is of the opinion that those introduced by the complainants fully sustain the affirmative of the issue.

4. Before proceeding to the next defence, it becomes necessary to make some further reference to the patented specification, in order to understand what the difficulties were which the patentee had to encounter in his experiments. Machines for sewing waxed thread were in existence prior to the invention of the patentee, but most or all of them were only capable of using a single thread for the tambour stitch, it having been found impossible to form a seam by a double-thread or lock-stitch on heavy goods with a waxed or tarred thread.

Experience showed that the lock-stitch was the best, but it could not be made with a waxed thread in leather and other hard fabrics by the ordinary arrangement of devices found in machines then in use, for several reasons: First. Eye-pointed needles cannot conveniently be used on account of chafing the thread in the eye, as is more fully ex-

plained in the specification. Second. Because a waxed or tarred thread would stick in the longitudinal groove, and prevent the formation of a loop for the passage of a shuttle. Third. Because such a needle, in sewing thick goods, such as thorough-braces, would have to be so long that it would be inoperative.

Attempts, as the patentee states, have been made to obviate the difficulties in the use of the eye-pointed needle by employing an awl for puncturing the leather in combination with a hooked needle which pulls the thread down through the fabric; but these improvements will only produce a single-thread stitch, and that with difficulty, as it causes so much friction as to render it extremely difficult to use the shuttle.

Experiments were made to overcome those difficulties, and they showed that the following conditions in the machinery were desirable in order to produce a double or lock-stitch in leather or other fabrics that are to be united with a waxed thread: (1) That a substitute for an eye-pointed needle was required which would be free from the defects of the eye of the eye-pointed device. (2) That a shuttle or other device for interlocking one thread with another should be so combined with the other devices as to pass through the loop of the needle-thread without strain or friction. (3) That the tightening of the stitch should be performed, when the needle or other instrument is not in the goods, with the waxed thread. (4) That the thread, while it is being passed down through the fabric, should be slack, or without being subject to tension, during the whole time of its being so passed.

Pursuant to these suggestions, the patentee, when making the lock-stitch, employs an open-eyed hooked needle, combined with the shuttle shown in the drawings, and he also employs an apparatus called "take-up" in such a manner that while the thread is being conveyed through the fabric it is slack and subject to no tension. Detailed description is then given of every device in the sewing apparatus, and of the function which each performs, and of their mode of operation, but, in conclusion, the patentee states that the same result may be obtained by using the hook or crochet needle as the piercing instrument, and by binding the fabric by that or any other devices.

Six claims are appended to the descriptive portion of the specification, and the charge in the bill of complaint is that the respondents infringe the fifth and sixth, which are as follows: "(5) In combination with a rocker-shaft above the work-plate, the awl-bar and thread-guide, as and for the purpose set forth. (6) A shaft arranged above the work-plate, for the operation of the awl in combination with a shaft below the table, for the operation of the needle, and suitable connecting mechanism, as and for the purpose set forth."

Six or more patents were introduced in evidence by the respondents as comprising the patented invention of the complainants. These were all carefully examined and described by the expert witness called and examined a second time. In conclusion, he states, in very explicit terms, that he does not find in any of those exhibits a rock-shaft located in the goose-neck of the machine for the operation of an awl and thread-guide, nor that any of them employ a shaft below the table for the operation of a needle, and a shaft above the table for the operation of an awl, and a connecting mechanism, which he regards as the essence of the fifth and sixth claims of the reissued patent described in the bill of complaint.

Expert witnesses were also examined by the respondents, whose testimony differs from that referred to; but the court is of the opinion that the views expressed by the complainants' principal expert witness are correct, and that none of the patents in question are of a character to supersede the complainants' reissued patent.

5. Extended discussion of the question of infringement will be unnecessary, as the parties have agreed, in writing, that the respondents made, or participated in the making of, machines like the exhibit described in that specification. The court has already decided in the preceding case that such machines do infringe the mechanism described in the reissued specification. Nothing is exhibited in the present record to take the case out of the rule there laid down, and the court is of the opinion that the charge of infringement is fully proved.

Decree for complainants for an account and for an injunction, with costs.

THOMAS, The (STORAGE CO. v.). See Case No. 3,769.

THOMAS (STOWE v.). See Case No. 13,514.

Case No. 13,912.

THOMAS v. SUMMERS.

[5 Cranch, C. C. 434.] [1]

Circuit Court, District of Columbia. March Term, 1838.

JUDGMENT—SUPERSEDEAS—INDORSEMENT.

A justice of the peace cannot issue an execution, as on a supersedeas, upon the mere indorsement on the back of the original judgment, that it was superseded.

Appeal from the award of execution by a justice of the peace, upon a supposed supersedeas. The only evidence of a confession of judgment by way of supersedeas, according to the act of assembly of Maryland, was an indorsement on the back of the original warrant, upon which the original judgment

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

was entered, that it was superseded by Amelia Thomas, the appellant, and a similar entry on the justice's docket. Reversed (nem. con.).

Mr. Hoban, for plaintiff.

Mr. Redin, for defendant [Owen Summers].

THRUSTON, Circuit Judge, said that if there had been evidence that diligent search had been made among the deceased justice's papers for the regular certificate of the confession of judgment, he should think the indorsement of the justice sufficient.

THOMAS, The (TRUMP v.). See Case No. 14,206.

THOMAS (TURNBULL v.). See Case No. 14,243.

THOMAS (UNITED STATES v.). See Cases Nos. 16,472-16,477.

Case No. 13,913.

THOMAS v. WATSON.

[Taney, 297.] [1]

Circuit Court, D. Maryland. Aug. 27, 1846.

GAMING—USURY—PENALTIES—PLEADING IN EQUITY—ANSWER—RES JUDICATA—INSOLVENCY—SUIT BY TRUSTEE.

1. L. confessed judgment on two promissory notes, one of which was given upon a usurious and the other upon a gambling consideration, and afterwards became insolvent, and a trustee of his estate was appointed under the insolvent laws of Maryland. The trustee filed a bill for relief from an execution issued upon the judgment, and called on the judgment-creditor to state the true consideration of said notes.

2. On demurrer to the prayer for such discovery, *held*, that as the defendant had not objected to answering, on the ground that his answer might subject him to a penalty or forfeiture, and had not averred in his answer that the discovery sought for would bring him into any such danger, he could not avail himself of this defence on the argument.

3. Even if this defence had been made in the answer, it could not be sustained: (1) Because, as to the usury, the mere making of a usurious agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or forfeiture; (2) because, as to the gaming, he was not asked to state the circumstances under which the money was won; he was required simply to state whether the consideration was a gaming debt or not, and there are many ways in which he might have won the money without subjecting himself to a penalty.

4. Although an affirmative answer would undoubtedly prevent the party from recovering the money, yet that is not a penalty or forfeiture, within the meaning of the law, to excuse him from answering. If the money had been paid by L. upon these two notes, the complainant might, upon a bill filed, have recovered it back.

5. The principle upon which the court grants relief after a voluntary payment of money, must also entitle the party to relief after a voluntary confession of judgment.

6. The omission of L. to defend himself in the action at law, is no bar to the relief asked for by the complainant; these questions not having been raised in that suit, nor yet been decided in any court.

7. The rights and defences possessed by L. at the time of his release, are transferred to his trustee; and the complainant may now make the same defences, at law or in equity, against these claims, and against the judgment upon them, which L. could have made, if he had never become insolvent.

8. Although the Maryland act of 1845 (chapter 352) abrogates the penalties inflicted by the act of 1704 (chapter 69), in cases of usury, and permits the party to recover the sum actually loaned, with legal interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject, in that respect, remains unaltered.

The bill in this case was filed on the 18th day of December, 1845, by [Philip F. Thomas] the permanent trustee of J. M. Lloyd. Its object was to obtain relief, by injunction, against a judgment for $6,571.95, recovered in this court on the 18th day of April, 1844, against the said Lloyd, by Henry H. Watson, a resident of the city of New York. It stated that at the time of the confession of said judgment, Watson held two promissory notes of Lloyd, one of which amounted, principal and interest, at the date of the judgment, to about $4,328, and was given in consideration of a loan of money usuriously made by said Watson to said Lloyd; and the other of said notes was given for money lost at play, and for no other than a gambling consideration. That on the day of the rendition of the judgment, or immediately before, an agreement was entered into by the said Lloyd, with the counsel of Watson, to confess judgment for the sum of four thousand dollars and costs; that, at the time of the agreement, the promissory notes were not shown to Lloyd, nor was any calculation made of the amount due on them, the said Lloyd's agreement being to confess judgment for $4,000, and no more; and that he left town with the belief that judgment was so confessed, and remained under that impression till recently; that independently of said agreement, an error was made, as the defendant admits, in the rendition of the judgment, which is for $485.59 more than purports to be due on said notes. That said Watson had caused execution to be issued for the whole amount of the judgment, and had levied upon the lands held by said Lloyd at the date of the judgment, and had advertised the same for sale. That although Lloyd himself did not avail himself of the defences which he might have made to the suit on said notes, yet the complainant, as his trustee in insolvency, and in respect of the rights of his creditors, was entitled to be relieved from the effect of said judgment, to the extent of its excess over and above the money actually loaned by said Watson to said Lloyd, and the legal interest thereon, which he, the complainant, was willing and tendered to pay to said Watson. That the complainant claimed the benefit of

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

said defences to said judgment, which he asked to have reformed and corrected, and further prayed that the defendant in his answer might say—(1) Whether on the 18th of April, 1844, he was not the holder of two promissory notes given to him by James Murray Lloyd, and if he was, what was the amount due thereon, on said day, and that he might produce the same. (2) Whether said notes were not then in the possession of his counsel, in the city of Baltimore, and did not constitute the claim upon which the judgment in the circuit court of the United States for the district of Maryland, thereinbefore referred to, was rendered? (3) Whether said judgment was not rendered in pursuance of a supposed agreement with James Murray Lloyd, the defendant therein, and whether the same was not erroneously so rendered? (4) Whether the agreement in this bill alleged to have been entered into by said Lloyd, was not, in fact, the agreement he did make? (5) What was the consideration for which said notes were given by the said Lloyd to him, the said Watson, and what the consideration of each of them?

A short copy of the judgment was exhibited with the bill. The injunction prayed for was granted on the 20th of December, 1845. On the 10th of January, 1846, the defendant, Watson, filed his answer, in which he admitted the application of Lloyd for the benefit of the insolvent laws, the appointment of the complainant as his permanent trustee, the due execution of his bond, and the rendition of the judgment, as stated in the bill; but denied that any mistake was committed in the rendition of said judgment, except the one of $485.59, mentioned in the bill, which the defendant's counsel agreed to correct, immediately upon its discovery. He stated that, at the time of the confession of said judgment, he did hold two promissory notes of said Lloyd, which were placed in his counsel's hands for collection, and were deposited in this court at the time of the rendition of the judgment on them; but he denied that any such agreement as was set forth in the bill, in regard to said confession of judgment, was ever entered into, but he was informed by his counsel, and believed, that the only agreement made in reference to said confession of judgment was an agreement to confess judgment for the whole amount of the claim represented by said notes. To the first interrogatory he answered, that he was, at the time therein mentioned, the holder of two promissory notes of the said Lloyd, which were filed as aforesaid, and the amount due thereon was the sum stated in the judgment, less the amount aforesaid erroneously calculated as interest. To the second interrogatory he answered, that said notes did constitute the claim upon which said judgment was rendered. To the third interrogatory he answered, that said judgment was rendered upon the agreement stated in his answer, and upon no other agreement, and that there was no error in the rendition thereof, except the one stated in his answer. To the fourth interrogatory he answered, that there never was any such agreement as stated in this interrogatory. And the defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained, touching the consideration of the said notes, as being tainted either with usury or gaming, demurred thereto, for the following cause, to wit, that the said matters were triable and determinable, and available to the said Lloyd, at law, and ought not to be inquired of by this court. Wherefore, and for divers other errors and imperfections, the defendant prayed the judgment of this court, whether he should be compelled to make any further or other answer to said bill, or any of the matters and things therein contained.

To this answer the complainant excepted, the grounds assigned being—(1) That said defendant, in his answer, did not admit or deny the allegation, in the bill of the complaint contained, that the consideration of the note first therein mentioned, being the promissory note of the said James Murray Lloyd, for $4,000, was founded on an usurious consideration, but on the contrary thereof, had wholly omitted to answer the same. (2) That said defendant, in his said answer, did not admit or deny that the other promissory note referred to in the complainant's bill, being the promissory note of the said James Murray Lloyd, for $2,500, was founded on a gambling consideration, but on the contrary thereof, had wholly omitted to answer the same. (3) That the demurrer in said answer contained was insufficient, because—First. It contained no certificate of counsel that, in his opinion, it was well founded in point of law. Second. It was not supported by the affidavit of the defendant that it was not interposed for delay. Third. The same was unfounded in law. The defendant afterwards supplied the affidavit to the demurrer.

John Nelson and J. M. Buchanan, for complainant.

Reverdy Johnson, for defendant.

Before TANEY, Circuit Justice, and HEATH, District Judge.

TANEY, Circuit Justice. The court has taken time to examine this case with care, because the points raised in it are important, and some of them do not appear to have been fully settled by judicial decisions.

The case, as it comes before the court, is this: James Murray Lloyd, named in the proceedings, gave two promissory notes to Watson, the defendant, upon which a suit was afterwards instituted in this court, and judgment confessed by Lloyd, on the 18th of April, 1844, with an agreement entered on the record that no execution should issue on the judgment, provided the amount was paid

by the defendant in four equal annual instalments, counting from the day of entering the judgment, and in case of default in any instalment, execution to go for the whole sum then due. On the 15th of August 1845, Lloyd petitioned for the benefit of the insolvent laws of Maryland, and the complainant in this case was duly appointed his permanent trustee for the benefit of his creditors. Default having been made by Lloyd in the payment of the instalments hereinbefore mentioned, Watson issued an execution for the amount due on the judgment, which was levied upon lands held by Lloyd at the date of the said judgment; and thereupon, on the 18th of December 1845, the complainant, as trustee, filed this bill, and obtained from the district judge the injunction now in question.

Since the injunction issued, the answer of defendant has come in, and upon the facts stated in the answer, it is unnecessary to examine any of the allegations in the bill, upon which the injunction was granted, except those which relate to the consideration of the two notes given by Lloyd to Watson, and upon which the judgment in question was confessed.

The bill charges that one of the notes was given upon an usurious, and the other upon a gambling, consideration; offers to pay the amount actually loaned by the defendant to Lloyd, with legal interest thereon; prays to be relieved from the residue of the judgment; and calls on the respondent to state what was the consideration for which the said notes were given. To this interrogatory the defendant has demurred, setting forth as his cause of demurrer, that the consideration of the said notes was triable and determinable in the suit at law, and ought not, therefore, to be inquired into by this court, sitting as a court of chancery. The complainant excepts to this answer as insufficient, insisting that the defendant is bound to answer the interrogatory above mentioned; and the case now comes on, upon the hearing of the exceptions, and upon the motion to continue the injunction.

Several points have been raised in the argument, which will be noticed hereafter, but the main question in the case is, upon the effect of the judgment confessed in the action at law. The complainant, as trustee under the insolvent law, stands in the place of Lloyd; and undoubtedly the latter might, in the suit against him, have availed himself of the defences stated in the bill, and might have barred the action of Watson by pleading the matters now insisted on. As he failed to do so, he would not, in ordinary cases, be permitted to insist on them in a court of equity, after having neglected to rely on them in the suit at law. But it does not follow that the same rule is to be applied where contracts are made, or securities taken, in violation of law, or contrary to declared and established policy; and of this description are all securities, by note or otherwise, intended to secure usurious interest, or for money won at play.

In such cases the court are called upon to consider, not only the laches of the party who may have been grossly negligent in asserting his rights, but must look also to the conduct of the adverse party, and determine whether it is consistent with sound principles of jurisprudence, to protect him in the enjoyment of profits derived from securities taken in violation of the express provisions of a statute, and which the law declares shall be void. Undoubtedly, it is within the legitimate province of courts of justice, and it is their duty in the exercise of the powers confided to them, to carry into full effect the policy of the law, when that policy is sufficiently and clearly manifested. Nor can they suffer it to be defeated or embarrassed, by the application of rules which do not belong to cases of that description, but are appropriate to another class of cases, and which have been adopted in them, for the purpose of preventing unnecessary litigation, where nothing more is concerned in the issue than the individual rights of the contending parties.

The distinction between these two classes of cases, and the different rules which govern them, have been frequently recognised, where a party, by his voluntary act, has put it out of his power to use a legal defence which would have protected him from the payment of the claim. Thus, in ordinary cases of contract, if a party pays money with a full knowledge of the facts, but under the mistaken belief that he is bound by law to pay it, and afterwards discovers his error, he cannot recover it back again by any proceeding at law or in equity. Yet, in a case of usury or gaming, although he pays it not only with a knowledge of the facts, but with a knowledge of the law also, equity will relieve him and compel the adverse party to refund the money. As respects usurious interest paid to the lender, the amount paid over and above the legal interest may be recovered back again either by a suit at law or a bill in equity. 1 Fonbl. Eq. bk. 1, c. 4, § 7, note k. As regards a security for money lost by gaming, it was, indeed, said by Lord Talbot, that it could not be recovered, both parties being equally in fault; but that point did not arise in the case before him; it was an obiter dictum, when deciding upon a question of usury; and the point was decided otherwise in the case of Rawden v. Shadwell, Amb. 269. In the last-mentioned case, a bond had been given for money lost at play, and part of the money paid upon the bond; yet the court, upon a bill filed for that purpose, decreed that the bond should be delivered up to be canceled, and the money repaid. Indeed, there can be no sound reason for distinguishing securities for money won at play from securities founded in usury, so as to give any advantages to the former over the latter; for they are both

prohibited by law, both contrary to its settled policy; and while the laws against usury are intended to protect the necessitous against the oppression of the money-lender, and against hard and ruinous contracts forced upon them by their wants, the laws against gaming are founded upon a policy equally sound and clear, and are intended to discountenance and discourage a vice injurious to society, and often most ruinous to the individual.

If, therefore, the money had been paid by Lloyd upon these two notes, it is evident, that the complainant might, upon a bill filed, have recovered it back. And if a court of chancery would have interfered, after the money had been actually paid, is there any principle of equity which will prevent it from interposing, where the party has omitted to defend himself at law, and confessed a judgment?

There is nothing, certainly, in the technical character of a judgment that will prevent the interposition of a court of equity, for it is one of its ordinary functions to relieve against judgments at law, where a proper case is made out in equity. And if it will lend its aid to the party, after he has acknowledged the justice of the debt by the payment of the money, there can be no sufficient reason for refusing to interpose where the party has omitted to make the defence in an action at law, and acknowledged the debt by confessing the judgment. In either case, the court acts to prevent the party from retaining an advantage which he has obtained, under a contract forbidden by law, and to uphold an established public policy, intended, in the one case, to guard against oppression, and in the other, to suppress a vice injurious to society. If the mere confession of a judgment at law would secure a party in his ill-gotten gains, the statutes passed upon these subjects would be nugatory, since they could be constantly and easily evaded by substituting a confession of judgment in the place of a note or bond, or other security. When the public policy established by the legislature is so obvious, and is so clearly founded in the principles of justice, and required by the interests of society, it would ill become a court of equity, by narrow and technical constructions, to deprive itself of the power of enforcing it.

These principles are supported by high judicial authority. So far as the question of usury is concerned, the precise point before us appears to have been decided in the court of appeals of Maryland, upon full argument, in the case of West v. Beanes, 3 Har. & J. 568, and also in Fanning v. Dunham, 5 Johns. Ch. 142. It is true that, in the last-mentioned case, a warrant of attorney to confess the judgment was executed at the same time with the bond, and might perhaps be regarded as one of the securities taken by the lender; but the case evidently was not decided merely on that ground, but was likened by the court to the case of a borrower who had voluntarily paid the money, and thereby put it out of his power to resist, as defendant, the claim of the creditor.

As regards the money won at play, it is truly said, in 1 Story, Eq. Jur. §§ 303, 304, that there is no difference, in principle, between usurious and gaming contracts, in this respect, as the securities in both cases are void at law, and the contracts in each case against its policy.

We concur in these doctrines, and think the omission of Lloyd to defend himself in the action at law is no bar to the relief asked for by the complainant. If the question of usury or not, or of gaming or not, had been made in the suit at law, and decided against Lloyd, undoubtedly, the complainant could not be permitted to try the same questions over again in equity, and consequently, would not be entitled to the discovery he asks for; but these questions were not raised in that suit, and have not yet been decided in any court. The question before us is, whether it is too late now to raise them, and whether the judgment confessed shuts the door against further inquiry into the consideration of the notes upon which it is admitted to have been entered. We think it does not; and that the principle upon which the court grants relief after the voluntary payment of the money, must also entitle the party to relief after a voluntary confession of judgment. In each case, the party, by his voluntary act, has deprived himself of the opportunity of defending himself in a court of law.

The act of the general assembly of Maryland, passed at December session 1845, after these contracts were made, and indeed, after the bill in this case was filed, cannot, of course, have any influence on this decision. And if it could, it would not materially affect the principles hereinbefore stated; for although this law abrogates the penalties inflicted by the act of 1704, in cases of usury, and permits the party to recover the sum actually loaned, with legal interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject, in that respect, remains unaltered.

It has, moreover, been insisted, in the argument for the defendant, that the complainant is not entitled to the discovery, because the answer may subject the defendant to a penalty or forfeiture. Upon this point it is sufficient to say, that the defendant has not objected to answering on this ground, and does not aver, in his answer, that the discovery sought, would bring him into any such danger; it cannot, therefore, we think, be relied on in the argument. But if this defence had been made in the answer, it could hardly have been sustained; for, as relates to the usury, it is admitted by the bill, that no money was received by the defendant; and the mere making of an usurious agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or

forfeiture. Nor do we perceive how he will be brought into any such danger, by answering that part of the interrogatory which concerns the note alleged to have been given for a gaming debt. If he admits that the note was given for money won at play, it is difficult to imagine how that fact could be used to prove that he kept a faro-bank, or practised any other of those devices upon which the law inflicts a punishment; nor can we imagine how this fact could become a material link in any chain of evidence in a prosecution against him. He is not asked to state the circumstances under which the money was won; he is required simply to say whether the consideration was a gaming debt or not; and there are a multitude of ways in which he may have won the money without subjecting himself to a penalty.

In a defence of this kind, the bare statement of the defendant would hardly be sufficient, even if made in his answer; the court must be satisfied that he has some reasonable and probable grounds to apprehend danger from his answer, in case a prosecution should afterwards be instituted against him. The right to a discovery, so far as it can be maintained on principles of equity, would seem to be peculiarly necessary and appropriate in cases of this kind, where the winner most commonly takes the security in private; where no witnesses are present who know anything of the transaction; and does this, in order to deprive the loser of proof, if he should afterwards endeavor to resist the payment.

No doubt an affirmative answer in this case will prevent the party from recovering the money; but that is not a penalty or forfeiture within the meaning of the law. The object of every bill of discovery is to obtain from the defendant the admission of some fact, which the complainant supposes will enable him to prevent the recovery of some claim which the defendant has made against him, or enable him to enforce a claim against the defendant, which he has not otherwise sufficient testimony to establish.

It has been further argued that, as Lloyd himself has not made this defence, nor united in this proceeding, his trustee under the insolvent law has no right to bring these claims into question. But we regard it as settled law, that the permanent trustee, appointed upon the release of the insolvent, becomes immediately vested with all the rights, at law or in equity, which the latter then possessed, and may enforce any right, or make any defence, which the insolvent could have maintained or enforced at the time of his insolvency. These rights are transferred to the trustee, and the complainant may now make the same defences, at law or in equity, against these claims and against the judgment upon them, which Lloyd could have made if he had never become insolvent.

The first and second exceptions filed by the complainant must therefore be allowed, and the answer of the defendant in those respects adjudged insufficient; and the injunction heretofore granted be continued until the further order of this court. The third exception of the complainant is overruled.

Case No. 13,914.

THOMAS v. WEEKS et al.

[2 Paine, 92;[1] 1 Fish. Pat. Rep. 5.]

Circuit Court, S. D. New York. May Term, 1827.

PATENTS—SOLE INVENTOR — JOINT PATENT—PRELIMINARY INJUNCTION—WHEN GRANTED.

1. A patentee can sustain his patent only on the ground of his being the original and sole inventor; and if the idea of the principle of the inventor was, without being executed, suggested to him by another, he cannot claim to be the sole inventor.

2. Semble. That if after the suggestion the patentee reduces the invention to practice, a joint patent should be taken out.

3. To entitle himself to an injunction before a trial at law, the patentee must either show an exclusive possession for such a length of time as to warrant the presumption of right, or show a clear and unquestionable right in the first instance.

[Cited in Cross v. Livermore, 9 Fed. 607.]

[This was a motion for an injunction to restrain the defendants from infringing letters patent for an "improvement in bilge levers for supporting ships," granted to John Thomas, of New York, November 6, 1826. The nature of the improvement, the claim of the patent, and the points involved in controversy are fully set forth in the judge's decision.][2]

J. Oakley and G. Sullivan, for complainant.

W. P. Hallett. A. Jay and D. B. Ogden, for defendants.

THOMPSON, Circuit Justice. This is an application for an injunction to restrain the defendants from an infringement of what the complainant claims to be his patent right. The patent bears date on the 6th of November, 1826, and the right claimed is an improvement whereby to support ships in or on dock at the bilge, called "bilge levers." The specification commences with stating that "The improvement claimed, specified and described, consists of a new and useful method[3]

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [From 1 Fish. Pat. Rep. 5.]

[3] Mr. Godson, in his Treatise on Patents, contends that a method is not patentable. He says: "When an invention is not of a thing made, it can only be known by being taught by the inventor himself, or by being learned from experiments made on the faith of the description given of it in the specification. With that assistance, however well the method or process may be set forth, some time and experience must necessarily be required, before a person can make use of the invention so beneficially as the discoverer. But the public are not bound to make experiments, and, therefore, it seems reasonable to infer that a mere process or method cannot be the subject of a patent. But sup-

of supporting the bilge of the ship before she leaves the water, while in fact inaccessible to any other sure support." And after a description of the cradle or carriage upon which the vessel is to rest, and the application of the bilge levers, the specification sums up the improvement claimed as follows: "I describe the specific principle of my invention or improvement claimed to be patented and above described, to be the shoring or supporting vessels when on or in dock at the bilge, by means of levers of the second class, on each side raised to contact or bearing, and effectually propped or sustained."

The bill alleges that this was a new and useful improvement, and that the complainant was the true inventor thereof, and that prior to the 6th day of November, 1826, he made and constructed, and put in readiness for operation, the said improvement, at the city of New York; and having obtained his patent therefor, the improvement was put in operation under the license of the complainant, and that he became possessed of the exclusive right and liberty of making, constructing, using and vending the same, &c.; and after setting out the infringement complained of by the defendants, the bill prays that they and their agents may be enjoined and prohibited from using the aforesaid improvement on the bilge levers which they or either of them have constructed, in whole or in part, since the 13th day of May, in the year 1827, so ordered or directed to be constructed, and from completing any such bilge levers which they or either of them have at any time in part made or constructed, and from constructing and making hereafter any such bilge levers, without the consent in writing of the complainant.[4]

posing it possible that a new method of operating with the hand or a new process to be carried on by known implements or elements, might be so described as to be, by bare inspection, made as beneficial to the public as to the discoverer; that neither time nor labor, skill nor experience, are required to put it in practice; still it is not a substance or thing made by the hands of man; it is not vendible; which is an inherent, primary quality of a new manufacture. The advantages of a method or process, in truth, arise from the skill with which it is performed. Suppose, for instance, that one person can with a certain machine, produce a particular article of dress, of a certain quality; and another, with the same machine, by using it in a different manner, can make the same article in half the time, and reduce it to half the price; however new and ingenious this method may be, still it is nothing substantial or corporeal. But suppose that in thus using the machine, some apparently inconsiderable alteration is made, that would be sufficient to support a patent; and it is indeed difficult to imagine that any beneficial effect could be produced without some material alteration in the instrument itself; and then why not oblige the inventor to take out a patent for the improvement? It is expressly enacted in the statute of 21 James I. that the new manufacture must not be 'hurtful to trade, nor generally inconvenient.' To monopolize such methods as above enumerated, appears to be particularly hurtful to trade. In every branch of it there are workmen who use the machines employed in their respective trades more skilfully than their fellows. This superior skill may be in consequence of a particular method of applying their implements. But it would be carrying the doctrine to a great length to decide that the workmen are entitled to patents for their respective methods of working. And further, every master is bound to teach his apprentice the best way or means within his knowledge, of following his trade. If, therefore, a master obtained a patent for fourteen years, for a particular method of operating with known instruments, to produce a known article in less time than usual, or of making it better and more useful, such apprentice would not be allowed to exercise his hands in the most skilful manner he was able, until several years after he had commenced business for himself. Such a patent would, indeed, be 'generally inconvenient.' There would be a monopoly in every handicraft trade; one person only in each calling would be allowed to work in the most skilful manner. For these reasons—that Dr. Hartley's case is the only one in support of the doctrine, and he did not first make iron, nor first discover the effect of iron on fire, so that he was not the inventor of any substance or instrument—that a method does not possess the qualities which have been shown to be inherent in the subjects of patents, and can be known only by making experiments, and that it is inconvenient to the public, particularly to masters and apprentices, that methods should be monopolized; it might perhaps be fairly inferred, that a method or process is not a new manufacture within the meaning of the statute of monopolies."

[4] In the case of Moody v. Fiske [Case No. 9,745], Judge Story says: "Where the inventor claims several distinct and independent improvements in the same machine, and procures a patent for them in the aggregate, he is entitled to recover against any person who shall use any one of the improvements so patented, notwithstanding there has been no violation of the other improvements. There is no doubt, that by the law of England, a party who pirates any part of the invention of a patentee, is liable in damages, notwithstanding he has not violated the whole. It may be that the decisions have turned upon the peculiar language of the English patents; for in all the precedents which I have seen, the patent gives the exclusive right of the whole invention, and prohibits all other persons, 'directly and indirectly to make, use or put in practice, the said invention, or any part of the same, &c., or in anywise to counterfeit, imitate, or resemble the same, or make or cause to be made, any addition thereto, in subtraction from the same.' But as no such intimation is given in the reports, I incline to believe that the doctrine stands upon the general principles of law, that he who has the exclusive right to the whole of a thing, has the same right to all the parts which the general right legally includes; that is, (in cases like the present,) to all the parts which he has invented. The principal difficulty that arises, is in the application of the doctrine; and that may, in most cases, be removed by considering the nature and extent of the patent, or rather of the thing invented and patented. Where the patent goes for the whole of a machine as a new invention, and the machine is, in its structure, substantially new, any person who pirates a part of the machine, substantially new in its structure, deprives the inventor, so far, of his exclusive right in his invention, and may, in a great measure, destroy the value of the patent. Where the patent is for several distinct improvements in an existing machine, or for an improved machine, incorporating several distinct improvements, which are clearly specified, then if a person pirates one of the improvements, he violates the exclusive right of the patentee, for the patent is as broad as the invention, and the invention covers all the improvements; and it is a wrong

The defendants have not as yet put in their answers, but the motion coming before the court on notice, affidavits in support of and against the application have been introduced by the respective parties; and the motion is resisted on two grounds: (1) That if the improvement claimed be new, the complainant is not entitled to it as the first and sole inventor. (2) That it is not, in point of fact, new, but had been for some time in use in England before the complainant obtained his patent, and that it is in principle the same as the bilge blocks or wedges used in "Morton's patent slip," and for which a patent was granted in England in the year 1818.

The rules and principles by which this court is governed, in applications like the present, are laid down in the case of Sullivan v. Redfield [Case No. 13,597]. Whether the patent is good and valid, so as ultimately to secure the right claimed under it, belongs to a court of law, in which the parties have a right of trial by jury. The jurisdiction exercised by a court of equity, in granting an injunction, is in aid of the common law, and should not be asserted when the right was doubtful; and that the court, in granting the injunctions, acts upon the assumption that the right has been infringed, or that little or no doubt exists on that point. When there has been an exclusive possession, for some considerable time, of the patent right, the court will sometimes, on the ground of possession, grant an injunction, without putting the party previously to establish the validity of the patent at law. But when the patent is recent, and any real doubts are entertained of its validity, the court will require that to be established at law before it will grant the patentee the benefit of an injunction. These are believed to be principles well settled in this country and in the English chancery, and to be founded upon the soundest rules of justice and equity.[5]

Does the complainant then bring himself within these rules, either by showing an exclusive possession for such a length of time as to warrant the presumption of right, or by showing a clear and unquestionable right as the first inventor? The patent bears date in November last, and the improvement claimed does not, from the proofs, appear to have been carried into operation, until some time in the spring of 1826; and the complainant does not ask for an injunction to prohibit the use of bilge levers made prior to the 13th day of May last. This is not, therefore, a case which calls upon the court to protect the right, on the ground of possession; and, indeed, it is not easily perceived

done to the patentee, to deprive him of his exclusive right in any of his improvements. Where a patent is for a new combination of existing machinery or machines, and does not specify or claim any improvements or invention, except the combination, unless that combination is substantially violated, the patentee is not entitled to any remedy, although parts of the machinery are used by another, because the patent, by its terms, stands upon the combination only. In such a case, proof that the machines, or any part of their structure, existed before, forms no objection to the patent, unless the combination has existed before, for the reason, that the invention is limited to the combination. If there be different and distinct improvements constituting parts of the combination, which are specified as such in the patent and specification, and any one of them be pirated, the same rule seems to apply as in other cases, where part of an invention is pirated; for the patent then shows that the invention is not limited to the mere combination, but includes the particular improvements specified."

[5] Where the right is doubtful, and that doubt can only be removed by a trial at law, there is some plausibility in requiring a party to establish his right before an injunction is granted. But this is not always the course, even in doubtful cases. There are many instances in the books, where the courts have said that possession, under color of title, is enough to enjoin and continue the injunction until it is proved at law that it is only color, and not real title. The case of Bolton v. Bull, 3 Ves. 140, is one of that description. An injunction had been granted that the question as to the validity of a patent, might be tried in an action at law; and so doubtful was the right of the patentee that the court, upon a case stated, were equally divided. Yet the lord chancellor refused to dissolve the injunction, declaring that he would not put the party to accept a compensation. So, also, in the case of Universities of Oxford and Cambridge v. Richardson, 6 Ves. 707, Lord Eldon, in noticing what fell from Lord Mansfield, in Millar v. Taylor [4 Burrows, 2400], "that it was a universal rule, that if the title is not clear at law, the court will not sustain an injunction," said, that he could not accede to that proposition, so unqualified, for that there had been many instances within his own memory, in which an injunction had been granted, and continued under such circumstances until the hearing. The same doctrine is laid down in the case of Harmer v. Plane, 14 Ves. 132. And the lord chancellor said there would be less inconvenience in granting the injunction, until the legal question could be tried, than in dissolving it at the hazard that the grant of the crown may, in the result, prove to have been valid. That the question was not really between the parties upon the record; for unless the injunction is granted, any person might violate the patent, and the consequence would be that the patentee must be ruined by the litigation. This last observation is entitled to great weight and consideration, and furnishes a strong and cogent reason for granting injunctions in cases of this kind. The prevention of a multiplicity of suits is one of the most salutary powers of a court of equity. These cases are sufficient to show that it is the prevailing practice in England, even where the right is doubtful, and the case is sent to be tried at law, to send it with an injunction instead of denying it on that ground. But where the right is clear, an injunction is never refused; as when the right claimed appears on record, or is founded on an act of parliament, it is matter of course to grant an injunction without first obliging the party to establish his case at law. Cooper, Eq. Pl. 157; Mitf. Eq. Pl. 129, 1 Ves. Sr. 476. In the case of Blanchard v. Hill, 2 Atk. 485, Lord Hardwicke said, that in cases of monopolies, the rule that the court had governed itself by, was whether there was any act of parliament under which the restriction was founded. But the court will never establish a right of this kind, claimed under a charter only from the crown, unless there has been an action to try the right at law. This will be found, on examination, to be a governing distinction, running through the numerous cases cited on the argument. And whenever an injunction has been refused, the right was claimed under a patent from the crown, and that right considered doubtful.

how the complainant can be said to have had any possession, except what arises from the mere grant of the patent. There is no evidence of any recognition of his exclusive title by the purchase of the patent right or otherwise; nor is there anything to show that bilge levers have been practically carried into operation by him, except what is to be drawn from the circumstance of their having been built for the dry dock company, under his superintendence, and whilst he was in their employ at an annual salary, but which is not alleged in the bill as any infringement of the complainant's patent right. If there is anything, therefore, before the court to warrant the granting of an injunction, it must be on the ground that the complainant has clearly and satisfactorily shown himself the first inventor of the improvement claimed. That the patentee can sustain his patent only on the ground of his being the original inventor, is very clear from the language of the patent law of 1793. 2 Bior. & D. Laws, 350 [1 Stat. 322.] The 6th section of that act declares that, if it shall appear that the thing secured by the patent was not originally discovered by the patentee, or that he had surreptitiously obtained a patent for the discovery of another person, the patent shall be declared void; and the patentee, before he can obtain a patent, is required to swear that he believes himself to be the true inventor or discoverer of the thing for which he solicits a patent; and the judicial interpretation which has uniformly been given to this law is, that the patentee must be the first inventor in order to sustain the patent. Odiorne v. Winkley [Case No. 10,432]; Whittemore v. Cutter [Id. 17,600]; [Evans v. Eaton], 3 Wheat. [16 U. S.] 513; Fess. Pat. 47–59, cases collated. It is not intended, upon the present application, to express, nor would I be understood as having formed an opinion, whether or not the complainant is the original inventor of the improvement claimed. This is a question proper to be tried at law, when any reasonable grounds of doubt exist upon that point. It is not pretended, on the part of the complainant, that bilge levers had ever been discovered or used by him previous to his entering into the employment of the dry dock company, in July, 1825, to construct a marine railway; and the plan for supporting the vessel presented by him to the company as an improvement upon Morton's slips, contains no representation of bilge levers. The discovery, therefore, if his, was made during the time he was employed in constructing this railway; and it appears from one of his own witnesses, (Henry Steer,) that the marine rail was ready for hauling up vessels the latter part of February or early in March, 1826, and that the four first vessels hauled up were supported without the bilge levers. The brig Shark, which was the fifth hauled up, was the first to which the bilge levers were applied; and, from the affidavits of Ezra Weeks, the president, and Samuel Stebbins, junior, the cashier of the New York Dry Dock Company, it appears that, before the bilge levers were constructed or used, it became a matter of common conversation, and doubts were expressed whether vessels could be safely brought on the ways depending on the shear shores alone, which doubts or fears were communicated to the complainant by Stebbins, who mentioned to the complainant that he thought, by placing the end of a piece of timber on the cradle near the keel of the vessel, and raising the other end up, until it should meet the bilge of the vessel, and then supporting it, the vessel would be rendered more secure than by the shear shores alone: that the idea appeared to be new to him: that, in the frequent conversations with him on the subject of shoring and securing vessels on the railway, no mention was made by him of bilge levers; and, from the manner in which this communication was received, the deponents state that they verily believe that the complainant had never thought of constructing bilge levers until the idea was suggested by Stebbins. Whether this can be satisfactorily met and explained by the complainant, is a proper subject of inquiry on a trial at law. As the evidence now stands before the court, the suggestion first came from Stebbins of the use of supports to the bilge of vessels, in principle and substantially the same as that contained in the summary of the complainant's patent, which he described to be "the shoring or supporting vessels when on or in dock at the bilge, by means of levers of the second class on each side, raised to contact or bearing, and effectually propped or sustained."

If the suggestion, as above stated, was first made by Stebbins, and led to the construction and application of bilge levers, as used by the dry dock company, the question arises, how far will this affect the complainant's patent? Without intending to express any definitive opinion on this point on the present occasion, so as to preclude the consideration of it upon the trial at law, I am satisfied it throws so much doubt upon the complainant's right, as to render it improper to grant an injunction until that right has been tried at law.

In Tenant's Case, as reported in Fess. Pat. 162, it is held that the patentee must not only be the inventor, but the first and sole inventor of the thing which is the subject of the patent. In that case the action was brought by Tenant for an infringement of his patent for a bleaching liquor. The action was resisted on two grounds: That the same means for preparing the liquor had been used for some years before the date of the patent; and that the patentee was not the sole and first inventor. And in support of the latter ground, a chemist swore that he had had frequent conversations with Tenant on the means of improving bleaching

liquors, and in one of them had suggested to him that he would probably attain his end by keeping the lime-water constantly agitated; and Tenant afterwards informed the witness that this method had succeeded. This conversation was two years before the patented was obtained. Lord Ellenborough declared the patent to be equally unfounded in law and justice, and nonsuited the plaintiff; and one of the grounds taken was, that the chemist had suggested to Tenant the agitation of the lime-water, which was indispensable to the process; and therefore it was not the invention of the patentee. Here was the mere suggestion of the chemist, which the patentee took up and carried into practical operation. So, in the present case, the suggestion of the use of timbers, substantially in the manner afterwards adopted by Thomas, was first made by Stebbins. The mechanical improvement here suggested was plain and intelligible, and constitutes its whole value. The invention does not consist in the mere form of the application of the timbers to the bilge of the vessel. If Stebbins was the first inventor, he not having taken out any patent does not aid the complainant's right; and if the circumstances are such as to show that they both contributed to the improvement, so as to make them joint inventors, a joint patent should have been taken out. Barret v. Hall [Case No. 1,047].

The application for the injunction is therefore refused, on the ground that it does not satisfactorily appear that the complainant is the first and sole inventor of the improvement claimed to be secured by his patent; and this supersedes the necessity of examining the other objections that have been taken to the validity of the patent. See Langdon v. De Groot [Case No. 8,059]; Goodyear v. Mathews [Id. 5,576]; Morris v. Huntington [Id. 9,831]; Sullivan v. Redfield [Id. 13,597]. Motion denied.

[Patent granted to J. Thomas, November 6, 1826, has not, so far as ascertained, been involved in any other cases reported prior to 1880.]

Case No. 13,915.

THOMAS v. WOLCOTT et al.

[4 McLean, 365.] [1]

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

EVIDENCE—ADMISSIONS—PARTNERSHIP.

On an issue of partnership, an offer to pay the partnership note, if the holder would take property, is evidence. And also that the defendant said the note was signed by his partner.

At law.

Mr. Logan, for plaintiff.

Peter & Powell, for defendants.

OPINION OF THE COURT. This suit is brought upon a note. The defendants pleaded, 1st. Non-assumpsit. And 2d. That the note was signed by Wolcott, who was not the partner of Goodwin, and had no right to use his name. Affidavit as to the truth of the plea. Jury sworn. A witness states, that Goodwin, on presentation of the note, offered to pay it, if the person presenting it would take property; said the note was signed by his partner; not specifying whether he was his partner at the time the note was executed or not. It was proved that there had been no partnership between the parties, for ten years past, in Illinois. The note was dated 13th October, 1845. Parties lived formerly in New York.

THE COURT instructed the jury that the admission of Goodwin, that the note was signed by his partner, was evidence in the case, and from which, together with the offer to pay the note in property, they might infer a joint liability, unless such inference was opposed to other evidence in the case.

Verdict for plaintiff, and judgment.

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

Case No. 13,916.

THOMAS v. WOODBURY.

[1 Hask. 559.] [1]

District Court, D. Maine. Feb., 1875.

BANKRUPTCY—PREFERENCES—PAYMENT OF NOTE—ENDORSER—EXPRESS AGENT.

1. The Act of June 22, 1874 [18 Stat. 178], is inapplicable to a suit in equity by an assignee in bankruptcy to recover a preference made in fraud of the bankrupt act of 1867 [14 Stat. 517], where the bankruptcy proceedings were compulsory and commenced prior to December 1, 1873.

2. The payee and endorser of a note, paid by the maker in the usual course of business to the holder within four months of bankruptcy proceedings against the maker, is not chargeable with taking a preference under the bankrupt act, when he neither received the money, nor procured, suggested, or aided its payment, even though he knew of the maker's insolvency.

3. Money paid to the endorser, or by his procurement or arrangement to the holder, by the maker, with intent to give a preference, the endorser having reasonable cause to believe the maker to be insolvent, if paid within four months of bankruptcy proceedings is a fraudulent preference under the bankrupt act.

4. An express agent, being an endorser who receives from the maker of the note endorsed money to pay it, and forwards the same to the holder, does not thereby personally receive the money, nor procure, suggest or aid in the payment of the note.

5. An endorser, who receives from the maker of a note part thereof, and loans him the balance needed to pay it, and with these sums does pay it, is not chargeable with taking a preference beyond the amount paid to him by the maker.

In equity. Bill by [William W. Thomas] the assignee of a bankrupt to recover from the payee and endorser of the bankrupt's

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

notes sums received by him in payment of the same as a preference in fraud of the bankrupt act of 1867.

The respondent [Eben Woodbury] by answer denied all reason to believe that his debtor was insolvent when he paid the notes, and averred that whatever payments the bankrupt made were to innocent holders of the notes endorsed in the usual course of business, and insisted that he could not be held liable for payments made to others without his knowledge, aid or procurement.

William W. Thomas, Jr., for assignee.

Almon A. Strout and Geo. F. Holmes, for respondent.

FOX, District Judge. This is a bill in equity brought by an assignee in bankruptcy, to recover from the defendant, the amount of three notes, payable by the bankrupt to the defendant and by him endorsed, and paid within four months of the commencement of bankruptcy proceedings, so as to constitute, as is alleged, a fraudulent preference within the provisions of the bankrupt act. The petition was filed against said Carpenter by his creditors on the first day of January, A. D. 1873, and this bill was instituted on the 11th of May, 1874, prior to the act of June 22, 1874 [18 Stat. 178], amendatory of the bankrupt law. These amendments are not applicable to and can have no effect upon the rights of the parties to this suit, as being a case of compulsory bankruptcy instituted prior to December 1, 1873. See opinion of Treat, J., in Singer v. Sloan [Case No. 12,899], and cases there cited.

Carpenter resided at Houlton in Aroostook county, and was a surveyor and scaler of timber and interested to some extent in wild lands and lumbering operations therein. His supplies were obtained from the defendant, who for many years has been a trader at Houlton in good standing, and also agent for the Eastern Express Company. The first note paid by the bankrupt, which is charged as a fraudulent preference, was for $1,200, and fell due October 14–17, 1872, and it is important to ascertain the standing and condition of Carpenter at that date, and whether he was or not insolvent. It appears in evidence, that besides his indebtment to the defendant on this note of $1,200, he was at that date also indebted to the defendant for supplies to the amount of about $2,500, and to Wm. B. Hayford, on account for more than $1,000. He had also become liable to the holder of five drafts, drawn upon him in June and July by S. M. Ward, and by him accepted, the whole amounting to over $2,900. These drafts were payable some in ninety days, and some in four months, and although demanded were never paid by the acceptor or any other party. On October 14, the date of maturity of the $1,200 note, Carpenter sold all the real estate he owned to Powers, and after paying the mortgage then outstanding upon this property, he had left about $3,700, barely enough to discharge the notes endorsed by the defendant. On that day, October 14, four of the paid acceptances, amounting to nearly $1,800, were overdue, one having fallen due on September 17th and the others October 4th and 5th.

There is no evidence that Carpenter had any other property on October 14, than the real estate which he then sold. The avails therefrom were not sufficient to pay fifty per cent. of his outstanding liabilities. Some of these liabilities were his negotiable paper which had gone to protest, and had been overdue for weeks, and which from the testimony of the bankrupt, he neither had the purpose nor ability to discharge. Under these circumstances, it is quite clear that on the 14th of October the bankrupt was hopelessly insolvent; and it is equally clear, that the defendant had good reason to know and believe such to have been the condition of the bankrupt at that time.

He must of course have well known the extent of his own liabilities on the bankrupt's account, and he also knew that the acceptances of the said drafts, or of some of them at least were not paid by Carpenter. The defendant in his examination taken September 23, 1873, states, "My impression is, that I first knew that J. C. Carpenter was in embarrassed circumstances in September, 1872. I do not think that I had any such knowledge until Elias Thomas & Co.'s draft was sent to me for collection. I knew before that, that he had some trouble in meeting his bills as they matured, but I did not know that he was on the eve of failure. I had no difficulty in collecting my own bills of him before that draft was sent me to my knowledge. * * * I think that I remember receiving a draft on Carpenter drawn by Mr. Ward, payable to Elias Thomas & Co. It was sent to me as express agent for collection. When it came, Carpenter was away. When he came back we notified him that it was there, and he said that 'he should pay no more of Mr. Ward's drafts.'"

This draft was for $319.69 dated June 16, 1872, on ninety days, accepted by Carpenter, and fell due September 19, 1872. It also appears that Herring, a notary at Houlton, on the 4th day of October, 1872, protested for non-payment, at the request of the Eastern Express Company, another acceptance of Carpenter's of one of the Ward drafts for $245.04 due that day and payable to Whitney & Thomas. Knowledge of the non-payment of each of these drafts by the bankrupt is therefore brought directly home to the defendant, prior to October 1st, and he is to be held chargeable as the law then was, with all the information which he could have obtained on reasonable inquiry, and it is quite manifest that with the knowledge of the non-payment of these acceptances, and of the bankrupt's intention not to pay

any further sums on Mrs. Ward's account, the defendant must have learned of the condition of the bankrupt, and that he was then utterly insolvent.

The defendant, in his deposition, has undertaken to explain away his statement made in his examination touching his knowledge of Carpenter's failure to meet his bills, &c., but in the opinion of the court with but little success. The statement given by a party, of his knowledge of the pecuniary condition of a bankrupt, made without assistance and before he is aware of any controversy in relation thereto, is always much more reliable and satisfactory to the court, than one subsequently prepared to meet the emergency of the cause, when it is manifest, that the former statements, if allowed to remain unchanged, are quite inconsistent with any valid defense.

The note of $1,200, was dated June 15, 1872, and payable on four months at any bank in Bangor, and was given to defendant in renewal of a note of Carpenter's for $1,150, dated February 15, 1872. This last note was received from Carpenter by defendant in payment for supplies, was negotiated by him to Margerson & Sons, and was discounted at a bank in Bangor, and not being paid at maturity, was renewed by the $1,200 note, the difference being discount, expenses, &c. When this last note fell due, it was in one of the Bangor banks, and Carpenter brought to the Eastern Express office at Houlton $1,200, to be forwarded to pay the note. This amount was received by McIntire, the clerk, and also financial agent of defendant, at the store of defendant, which was also the office of the express company, and was forwarded by the express company to Margerson & Upton, they being advised of the purpose for which the money was sent by Carpenter, by a letter written October 15, by McIntire in behalf of the defendant. This money was received at Bangor by Margerson & Upton and the note was paid thereby and sent to defendant.

It is not shown that the defendant personally had any part in the payment of this note, or that its payment was in any way instigated or suggested by him. So far as appears, it was the act of Carpenter, meeting his negotiable paper at maturity, in the regular course of his business, through the express company, a common carrier, bound to receive and forward the funds for that purpose, the defendant not being in any way an actor or promoter of the affair, or doing anything in that behalf. The acts of McIntire in forwarding the package of money were done by him as the agent of the express company. He was obliged to perform them and would not have been justified in refusing so to do, neither could Woodbury himself, being the agent of the express company, have declined to forward the package by the express company if he had received it for that purpose instead of his clerk McIntire; and in my view, the payment of this note must be considered the same as if Carpenter had himself, without the knowledge or suspicion of the defendant, gone personally to the bank, and there paid and taken up the note with his own funds, and without the same being known by any other party.

The facts relating to the other notes are somewhat different. March 15, 1872, Carpenter being indebted to Woodbury for supplies, paid him on account thereof, $1,545, by his note on four months; this note was transferred by defendant to Twitchell & Champlain of Portland, and it was discounted at one of the banks in this city. When it fell due, Carpenter was not able to pay it, as his lumber was not through the boom, and to renew the same, made a new note for $1,606.80, dated July 15, payable to the order of the defendant in four months at any bank in Portland. This note was endorsed by defendant and sent by him to Twitchell, Champlain & Co., and the same was discounted, the proceeds being applied to the payment of the former note, the discount and expenses. This last note fell due November 15–18, and was paid by Carpenter under the following circumstances, as stated by defendant in his deposition. "Mr. Carpenter a few days before the note came due, I think on the 9th of November, came into my store which was also the express office, to send some money to Twitchell & Champlain to pay his note, which we supposed was held by them. I think he made some inquiry as to the expense of sending the money. * * * We gave him the information. He said that he had been trying to get a draft to send in place of the money, and that he could not get one. I asked McIntire if we had any funds on which we could draw. He replied that there was a balance in Bangor due us of about $1,700. It was said by one of us that Carpenter wanted about $1,606 to pay a note to T., C. & Co. McIntire replied that he could let him have this check, and T., C. & Co. would give us credit for the balance. He counted out $1,606 and paid it over to McIntire, and requested him to send the draft and get his note." The defendant denies that there was previously anything said or done by him to induce Carpenter to pay this amount.

A draft of $1,700 was sent by Woodbury to T., C. & Co., drawn on Wheelwright, Clark & Co., Bangor, with directions to appropriate $1,606 to payment of Carpenter's note, and to credit defendant with the balance on account, which directions were complied with, and the note of Carpenter's was sent back to Woodbury. This payment was made by Woodbury, by his own draft, and was his individual personal act, and not in any respect, any thing done by him as agent for the express company.

Woodbury here becomes an actor in making this payment. He receives the amount of the note from Carpenter a week or more be-

fore its maturity, and when the time of payment arrives, forwards a draft drawn by him on another party for a larger amount, with instructions to pay the Carpenter note from the proceeds, and apply the balance to his credit on account. By so doing his own actions make him a recipient of the payment. The money is brought home to him. He receives it, well knowing that Carpenter is insolvent, and that he intends a preference. He aids and assists in perfecting and completing this preference, and does his part therefore in accomplishing a preference which he knew the law would not sanction and sustain. Knowing all that he did, the law required of him to withhold this payment, and prevent Carpenter from completing it; and he certainly should not have taken any part in aiding Carpenter in his purpose to defeat the provisions of the bankrupt act.

A third note was given by Carpenter to Woodbury, August 17, 1872, in payment for supplies, for the sum of $900, on four months payable at any bank in Portland. This note was endorsed by Woodbury to C. J. Walker & Co., and was discounted at the First National Bank; it fell due December 17–20. A few days before its maturity, Carpenter went to defendant and informed him he had not money enough to pay this note, and wanted to borrow enough to pay it, and would pay in a few days. Defendant told his clerk to let him have enough money to make up what he was short, and to give him a draft on Wheelwright & Clark for $900, and take what bills he had and his due bill for the balance.

Carpenter paid McIntire $339, and borrowed of Woodbury $561, for which he gave his due bill, and the $900 draft was sent by defendant to C. J. Walker & Co., December 16, with instructions to pay Carpenter's note therewith. Walker testifies, he paid the note with this draft, and he thinks he returned the note to defendant, as it was customary with him to return notes when paid to the party from whom he received the money, and he had nothing to do with Carpenter in this matter. So far as the $339 paid to defendant by Carpenter, are in question, the case is in all respects similar to the payment of the note of $1,606. But it is claimed by the assignee that Woodbury having lent Carpenter the sum of $561, to pay the residue of the note, and it having thereby become Carpenter's property, and been subsequently applied to the payment, he has some right to recover this portion of the payment as being a fraudulent preference, as that paid by his own funds.

Such a ruling would certainly not be equitable or just as between the parties, and the assignee, demanding equity, should conform to it in his requirements. The whole is to be received as one transaction. Carpenter has not, in fact, paid from his own money, which his creditors had a right to expect should be applied to the satisfaction of their claims, anything beyond the $339, which belonged to him. The defendant has, in reality, paid from his funds the remainder of the note, and should not be held accountable to the estate therefor, as the estate of the bankrupt has not in any manner been reduced by such payment. Before this payment was made, Carptenter was indebted the full amount of the $900, and it could have been proved against his estate in bankruptcy. He has taken of defendant's money $561 to pay a balance due them, for which he is now indebted to the defendant. There has been in this transaction a mere change of creditors for this sum of $561, and the assignee has no cause of complaint in that behalf.

The testimony in the cause establishes that at the time of the payment of these three notes by the bankrupt, he was insolvent and that his insolvency was well known to defendant. If any doubt could exist in the mind of Carpenter, respecting the purpose and intent of defendant in paying these notes on the 18th of October when the $1,200 was paid, certainly there could be no possible question upon that subject in November when the second note was paid. At that time defendant could not but be aware of Carpenter's absolute refusal to pay his, Ward's acceptances, and that he had allowed them to go to protest; that he had in October, when the $1,200 note fell due disposed of all his lands to Powers, and had promptly paid therefrom his note for $1,200, the consideration of which had been supplies for his lumbering operations, of which he had personally received the benefit, and which from his conduct in paying it, instead of his overdue acceptances, defendant must have understood he deemed of such a character as to require at his hands protection and preference, rather than his other liabilities. This view must have been even more convincing and conclusive as to Carpenter's purpose in November when he came to defendant, money in hand, ready prepared to pay the full amount of the $1,606, also given defendant for supplies; and the court entertains no doubt that both parties well understood that Carpenter was to take care of and discharge this class of his liabilities to the entire exclusion of his other indebtment.

The law upon this subject of preference of endorsers by the maker of negotiable paper outstanding in hands of third parties was very fully examined by Leavitt, J., in Ahl v. Thorner [Case No. 103].

This was a bill in equity to recover of the defendants the amount of certain notes which had been paid by the bankrupts. It appeared that the bankrupts residing at Memphis, obtained the endorsement of Thorner who resided at Cincinnati upon their note for $5,000. This note was discounted at Cincinnati. It was not paid at maturity, and was renewed by the same parties. The renewal note fell due January 23, 1868. On

the 16th of January, defendant received from the makers drafts on New York for $5,300, with instructions to apply them to the payment of this note. These drafts were accepted by the holder in payment of the note, and the note was cancelled, the difference of $300 between the note and the draft was paid to the wife of the bankrupt. It appearing that the bankrupt was then insolvent, and that this note was paid with a view to a preference of Thorner over the other creditors, and that he had reasonable cause to believe the makers were insolvent, the court decided that Thorner's liability as creditor was such that the payment enured to his benefit, within the meaning of 35th section of the bankrupt act, and that he was liable to refund to the assignee the full amount so paid.

This case is identical therefore, with the present so far as the last two payments are involved, substituting the names of the parties in the present suit in that, with a change of the amounts, and it would present the very case now before us; and no reason can be given why it should not control the result in this suit.

In Bartholomew v. Bean, 18 Wall. [85 U. S.] 641, Miller, J., delivering the opinion of the supreme court says: "If the money had been paid to him," the endorser, "directly, instead of the holder of the note, it could have been recovered; or if this money or other property had been placed in his hand to meet the note, or to secure him instead of paying it to the bankers, he would have been liable. * * It is very obvious that the statute intended in pursuit of its policy of equal distributions, to exclude both the holder of the note and the surety or endorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place, and an evasion of it in another. It was made by the statute equally the duty of the holder of the note and of the endorser to refuse to receive such a payment."

I am constrained by these authorities to hold the defendant chargeable for the amount of the second note of $1,606, and also for the sum of $339, paid by Carpenter in part of the $900 note, with interest from the date of such payments. The claim for the amount paid on the $1,200 note is more doubtful; but the conclusion at which I have arrived is, that defendant is not chargeable therefor. He never received this amount; in no way did this money come into his possession; he had no part in making the payment. Carpenter, through a common carrier, freely and voluntarily, and without any suggestion from the defendant, forwarded this sum, in the usual, ordinary course of business, to meet his note at its maturity.

The defendant neither did nor said any thing to cause this payment to be made by Carpenter, and is as innocent of all connection with that transaction as he would have been if absent from the country at the time. Being an entire stranger to the transaction I do not think he should be held chargeable for the amount thus paid; for if he is to be held accountable, every endorser aware of the maker's insolvency, and of his purpose to pay his endorsed paper, would be chargeable and liable to refund all such payments made within four months of bankruptcy proceedings, although his liability was entirely contingent, and he was without knowledge of such payment until long afterwards. The cases before cited, recognize the liability of an endorser when he himself received the amount, or has directly or indirectly aided in the payment by the maker; but I do not think they can be extended to cover the present claim for the $1,200, and for this amount the defendant is not chargeable. Decree accordingly.

Case No. 13,917.

THOMAS v. WOODHOUSE.

[1 Cranch, C. C. 341.] [1]

Circuit Court, District of Columbia. July Term, 1806.

PRACTICE AT LAW—SECURITY FOR COSTS—NOTICE.

The defendant may, at the trial-court, give notice to a non-resident plaintiff, that security for costs will be required, and the cause will be continued if the plaintiff is not ready to give the security.

THE COURT continued this cause to enable the defendant to give notice (according to law of Virginia, P. P. 111), that security for costs will be required.

CRANCH, Chief Judge, contrà, thought that the law did not intend that the plaintiff should be defeated of his trial, unless sixty days' notice had already been given.

Mr. Swann and E. J. Lee, for plaintiff.

Mr. Taylor and Mr. Hiort, for defendant.

Case No. 13,918.

THOMAS et al. v. WOOLDRIDGE et al.

[2 Woods, 667.] [2]

Circuit Court, S. D. Missouri. May Term, 1875.

GARNISHMENT—JUDGMENT—STATE PROCESS.

A judgment rendered in a circuit court of the United States cannot be attached by process issued out of a state court against the plaintiff in the judgment.

[Cited in Alabama Gold Life Ins. Co. v. Girardy, 9 Fed. 142; Henry v. Gold Park Mining Co. 15 Fed. 650; Loomis v. Carrington, 18 Fed. 98.]

In equity. The case was as follows: On the 27th of May, 1874, [Edward] Wooldridge

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

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

recovered a judgment for $4,800 against the complainants as partners, in the circuit court of the United States for the Southern district of Mississippi. Afterwards, on the 2d of June, 1874, one Hedrich, a citizen of Louisiana, brought an attachment suit in the circuit court of Warren county, Mississippi, against Wooldridge for $6,000. Writs of attachment and garnishment were issued and served upon Wooldridge and upon the complainants in this suit, who were the judgment debtors of Wooldridge. In July following, the complainants paid to the marshal, who held an execution issued on the judgment against them, a sum sufficient to satisfy the costs of suit and the fees of the counsel of Wooldridge for obtaining said judgment, amounting to the sum of $1,077; and the execution was thereupon returned by the marshal to the United States circuit court. The complainants then filed their answer in the attachment suit in the state court, acknowledging themselves indebted to Wooldridge on the judgment in his favor in the sum of $3,773. Notwithstanding these facts, the attorneys of Wooldridge caused another execution to issue on the judgment against complainants, which was placed in the hands of the United States marshal, who threatened to seize and sell the property of the complainants to satisfy the same. The complainants, believing they were bound to pay the balance due on the judgment recovered against them by Wooldridge to Hedrich, the plaintiff in the attachment suit, filed the bill in this case against Wooldridge and his attorneys, and against the marshal, to enjoin proceedings to collect the balance due on said judgment by virtue of the execution issued thereon. A preliminary injunction was allowed, restraining the defendants according to the prayer of the bill. The case was heard for final decree upon the pleadings and evidence.

R. S. Buck and E. D. Clark, for complainants.

T. J. Catchings and W. K. Ingersoll, for defendants.

[Before BRADLEY, Circuit Justice, and HILL, District Judge.]

BRADLEY, Circuit Justice. The question in this case is, whether a judgment of this court may be attached by process issued out of a state court against the plaintiff in the judgment. The general rule applicable to foreign attachments by the custom of London (from which our attachment laws are derived) is, that a debt of record in a superior court, and even a debt in suit, cannot be attached. Different reasons have been assigned, namely, that a record is of too high a nature to be attached; that it is against the dignity of the court to be thus interfered with; that the debt is quasi in custodia legis, and that the party has no opportunity to plead the attachment. 1 Rolle, Abr. 552; Com. Dig. "Attachment" D.; Bac. Abr. "Customs of London" H, 1; 1 Leon. 29, Cro. Eliz. 63; Cro. Eliz. 691; Shinn v. Zimmerman, 3 Zab. [23 N. J. Law] 150. But whatever may have been the ground of the rule, it has been adhered to in many of the states, though not in all. Serg. Attachm. 73; Drake, Attachm. §§ 638–643. The question is made to depend somewhat on the statutes of the particular states. In those of Mississippi, there does not seem to be anything peculiar, if that would make any difference in the result. Perhaps the best reason for the rule is, that an attachment of a judgment would be an inconvenient and dangerous interference with judicial proceedings, opening the door to fraud and collusion for the purpose of preventing the due course of justice. And there are peculiar reasons why the judgments of state and federal courts should not be subject to attachments issued by each other, in the desire which each should have to avoid conflicts of jurisdiction. A court has not done with a case when judgment has been rendered. Many things have often to be done besides issuing executions, many adjustments of rights have to be made, which require that the court should keep the supervision and control of its own judgment in its own hands. Any interference by other courts with this control, or with the prerogatives of executing its judgments and decrees in its own way, is calculated to excite jealousies between the courts concerned. We think the rule is a good one, and that it ought to be sustained. It is not without sanction in the decisions of the United States courts. Besides that of Justice Story, in Franklin v. Ward [Case No. 5,055], which is referred to in the brief of counsel the case of Wallace v. McConnell, 13 Pet. [38 U. S.] 136, is very much to the point. There a debt was attached in a state court after suit had been brought upon it in the United States court, and the attachment was set up by way of a plea, puis darrein continuance. This plea was demurred to and overruled, and the supreme court, on error, affirmed the judgment. The court held that to sustain such an attachment would produce a collision in the jurisdiction of the courts that would extremely embarrass the administration of justice; but that if the attachment had issued before commencement of suit in the federal court, it might have been pleaded in abatement, if still pending, or in bar, if judgment had been rendered thereon. This case virtually decides the one before us, and precludes further discussion. The injunction must be dissolved and the bill dismissed with costs. Decree accordingly.

THOMAS (WOOLDRIDGE v.). See Case No. 13,925.

Case No. 13,919.

The THOMAS & HENRY v. UNITED STATES.

[1 Brock. 367.]

Circuit Court, D. Virginia. Nov. Term, 1818.

DEPOSITION—DE BENE ESSE—WAIVER OF OBJECTION—EFFECT OF—PENAL ACTIONS—PRESUMPTIONS—AFFIDAVIT—FORFEITURE.

1. A deposition taken de bene esse, was offered in the district court on behalf of the United States, to which it was objected, "that it was not taken and returned according to law." *Held*, in the appellate court, that this objection must be considered as applying to it as a deposition in chief, and does not dispense with the necessity of proving those circumstances which would have entitled the attorney for the United States to read it, as a deposition taken de bene esse.

[Cited in Hunter v. International Ry. Imp. Co., 28 Fed. 843.]

2. Where the party, against whom a deposition is taken, expressly waives all objection to it, this general waiver must be understood as extending to the deposition, only in the character in which it was taken, and not as imparting any new character to it, not intended by the party taking it. Thus, where a deposition was taken de bene esse, and the adverse party waived all objection, such a waiver does not make it a deposition in chief.

3. A deposition, taken before the trial, of an informer, who is entitled, under the act of congress, to a portion of a fine, forfeiture, or penalty, is not admissible evidence. The act of congress only makes such an informer a competent witness, when "he shall be necessary as a witness on the trial;" of which necessity, the court must judge after hearing the other testimony.

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

4. In prosecutions for a violation of the act regulating the collection of duties on imports and tonnage, the United States are not required to prove guilt, but the accused must prove innocence. If, in any case, such a legislative provision can be justified, it is in prosecutions under this act because the violation is generally perpetrated under all the secrecy that ingenuity can devise; and the means of proving innocence, at least to a reasonable extent, which is all that can be required, are in possession of the accused.

5. A claim to a vessel and cargo filed in an admiralty cause, though sworn to, is not evidence. The law does not allow to the affidavit the dignity of testimony. If it amounts to anything, it is to no more than "the exclusion of a conclusion."

6. A party, who offers as evidence in an appellate federal court, a deposition, taken de bene esse, must show, that the requisites of the judicial act have been complied with, viz. that the deponent is dead, out of the United States, or gone to a greater distance than 100 miles, &c., and, unless he does this, the deposition cannot be read.

7. The act of congress, requiring masters of vessels, &c., to make a report of their cargo, &c., does not forfeit the cargo for the omission of any specific article, constituting a part of the cargo, but only the article so omitted. Consequently, it is error in the court below, to render sentence of condemnation, forfeiting a portion of a cargo, unless the libel charges, that that particular portion was omitted in the report.

This cause came up on an appeal from the district court. The schooner Thomas & Henry was libelled in the district court of Norfolk, for acting in violation of the 30th section of the act of congress, passed the 2d of March, 1799, entitled, "An act to regulate the collection of duties on imports and tonnage." 1 Story, Laws, c. 128, § 30, 598 [1 Stat. 649, c. 22]. The libel charges, 1. That the schooner Thomas & Henry arrived from a foreign port, within the United States, and within the jurisdiction of this court, having on board a cargo consisting, principally, of distilled spirits, and that part of the said cargo, of the value, in all places, of more than $400, were unladen and delivered from on board the said schooner without any permit. 2. That the master of the said schooner did not, within forty-eight hours after his arrival, and the arrival of the said schooner, make any report, in writing, to the surveyor, acting as inspector of the revenue, for the port aforesaid, of the facts and circumstances required by law to be so reported The libel concludes by praying that a citation may issue against the Thomas & Henry, her tackle, apparel, and furniture, and her cargo, so far as the same consists of foreign distilled spirits; that the same may be condemned as forfeited to the United States, to be sold by a decree of the court, and the proceeds distributed according to law. Thomas Fletcher filed his claim, setting forth that he was joint owner with H. Parker, of the American schooner Thomas & Henry, and of thirty-four hogsheads of rum, and twenty barrels of limes, now libelled, and demanded the said vessel, her tackle, apparel, furniture, and cargo, to be restored to him. The claimant states, that he, and H. Parker, both native citizens of Virginia, and residents of the county of Accomack, are the owners of the Thomas & Henry, of which vessel, Thomas Fletcher, Jr. is master; that the said vessel, on the fifth day of March, 1811, while lying in the district of Folly-Landing where she had, a few days before, arrived, from the island of St. Bartholomews, with the rum and limes aforesaid, and while the custom-house officers of the United States were actually on board, engaged in gauging and measuring, the cargo was taken possession of by the revenue cutter, and conducted to the port of Norfolk, and there libelled, although "no act had been done, or omitted, on the part of the owners, or master of the said vessel, relative to the laws of the United States, whereby the vessel, or her cargo, became liable to seizure, or forfeiture; that no part of the said cargo" (thirty-four hogsheads, which were seized), "so brought in, was landed prior to the said seizure, but that the whole which was imported, was on board at the time of the seizure." A similar claim was filed by Henry Parker, the other joint owner. In the district court, the deposition of Thomas V. Butler, the mate of the revenue cutter, taken in open court, was introduced by the attorney for the United States. Butler states, that he was ordered by the captain of the cutter, to take posses-

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

sion of the Thomas & Henry; that he went in a boat into Pungoteaque river, where he found the vessel in the act of discharging two hogshead of rum, part of the cargo on deck, with a lighter alongside, and two hogsheads in the slings, and the crew breaking up the cargo in the hold; that he asked the captain of the vessel for his authority for landing his cargo. The captain stated that he had entered his vessel, but upon being asked for his permit to land, he produced none. The deponent further stated that the cutter was sent from the port of Norfolk, by the direction of the collector of the district of Norfolk and Portsmouth, to take possession of the said schooner Thomas & Henry, in consequence of information given by the mate and some of the crew of the said schooner: That at the time he took possession, and made seizure of the said vessel, she had on board thirty-four or thirty-five puncheons of rum, that after taking possession of her, with such cargo as she had on board, he proceeded with her to the port of Norfolk, where she was surrendered by deponent to the marshal. Upon being interrogated by the court, the witness stated, that a part of the cargo had been landed before he took possession of her. Witness was obliged to change the trim of the vessel, she being entirely out of trim. There was a large vacancy midships, occasioned, as he believed, by the removal of a part of the cargo. She was, consequently, too much by the stern.

There was no countervailing evidence introduced by the claimants, in the district court, but at the trial in the circuit court, the depositions of Robert Pitts, George P. Barnes, and William Pitts, taken subsequent to the trial in the district court, were offered. The deposition of Robert Pitts, stated, that he was on board the schooner Thomas & Henry, at the time that the boat from the revenue cutter boarded her and took possession, with intent to assist the inspector, George P. Barnes, in moving and marking the cargo; that it was necessary to move the hogsheads out of the way to get at the cargo, to gauge and mark it, and that there was, at that time, no appearance of any part of the cargo having been removed. George P. Barnes stated, that he was an inspector of the revenue for the district of Folly-Landing, in 1811, and that the schooner Thomas & Henry, Captain Thomas Fletcher, Jr., arrived at Pungoteaque, in the port of Folly-Landing, in March, 1811: that immediately after the arrival of the schooner, he went down to Pungoteaque, and went on board to inspect her cargo: that while he was on board, and was in the act of inspecting her cargo, and marking the hogsheads of rum, that a boat came alongside with the officer of a revenue cutter, belonging to the United States, commanded by a Captain Hamm: that some desultory conversation took place between the deponent, and the officers of the cutter, and that they either told him, or he was impressed with the belief, that his authority had ceased as an inspector on board the said schooner, and that he left her and returned home. To the best of deponent's recollection, there were about thirty or thirty-five puncheons of rum, and he did not discover any particular deficiency of cargo midships of said schooner, or that there was any breakage of the cargo in the midships. William Pitts was employed on board the Thomas & Henry, to assist in moving the cargo, for the inspection of the custom-house officer; and while he was so employed, in the presence of the custom-house, officer, the said schooner was seized, with her cargo, by Captain Hamm, of the revenue cutter. Witness stated, that the floor of the said schooner was then covered, from main to foremast, with hogsheads of rum, and barrels of limes; and there was no appearance of the cargo having been broken in any part of the vessel. In the district court, the vessel and cargo were condemned, and from this sentence of condemnation an appeal was taken to this court.

MARSHALL, Circuit Justice. Much of the testimony found in the record, has been objected to, and to these objections, the first attention of the court has been directed. The depositions of Lewis Gordon and John York, the persons on whose information the seizure was made, were taken de bene esse, and are offered as evidence. Two objections are made to their being read: 1st. That it does not appear, that they might not have been produced in the district court. 2d. That they are interested, and, therefore, incompetent witnesses.

According to the judicial act,[2] a deposition taken de bene esse cannot be read at the trial, unless it appear to the court, that the witness is dead, or has removed out of the United States, or to a greater distance from the place of trial, than one hundred miles, or that he is unable to attend the court. No one of these requisites appear on the record to have been complied with. But, it is said by the attorney for the United States, very correctly, that if a deposition be read without objection, all objections to it are understood to be waived, and if particular exceptions are taken, all others are waived. To

[2] See the judicial act of 1789. 1 Story, Laws, c. 20, §§ 30, 64 [1 Stat. 88]. "And if an appeal be had, such testimony" (depositions taken de bene esse, &c.) "may be used on the trial of the same, if it shall appear to the satisfaction of the court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid," (viz. one hundred miles,) "from the place where the court is sitting; or, that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court: but not otherwise. And, unless the same shall be made to appear on the trial of any cause, with respect to witnesses, whose depositions may have been taken therein, such depositions shall not be admitted, or used in the cause."

these depositions, he insists, a particular objection was made in the district court, which is not valid. The objection is, "that the deposition was not taken and returned according to law." I must understand this objection as being, that that deposition is not taken and returned, according to law, as a deposition in chief. It does not appear, that the attorney for the United States, offered to prove those circumstances, which would entitle him to read it, as a deposition taken de bene esse. This he ought to have done, when the objection was taken to it, as a deposition in chief. Although the attorney for the claimants might have explained himself more fully he was not bound so to do; and the party offering the deposition, was bound to show, that it was admissible. Even if this reasoning were incorrect, the certificate of the magistrate is insufficient. That is, that the deposition was taken, because the witness was a transient person. The deposition of John York was also objected to, because, "it did not appear to have been duly taken, according to the act of congress." This objection was overruled, because notice was given to the persons in possession of the property. This reason is certainly sufficient for overruling the objection, if taken to it as a deposition de bene esse. But if offered, unaccompanied by the evidence, which would justify its being read as a deposition de bene esse, it must be supported as a deposition, taken in chief, or it cannot be read. I think it not improbable, that the objections on the part of the claimant were understood to be made to the regularity of the depositions, as taken de bene esse, and that the fact of the witnesses having left the United States, or having removed to a distance of more than one hundred miles from the place of trial, was neither controverted, nor controvertible. But I deem it proper, in cases where depositions are taken under the act of congress, that the requisition of the act should be observed, and should appear to have been observed.

On the part of the United States, it is contended, that so far as respects the deposition of York, these requisites are dispensed with, by the appearance of the attorney of the claimants, under an express declaration, that he waived all objections to the proceedings. But I understand this general waiver, as extending to the deposition, in the character in which it was intended to be taken, not as giving it a new character, not intended by the party taking it. It was not taken under a commission, issued by the court, and is, consequently, taken de bene esse. The waiver of all objection to the proceeding, therefore, is a waiver of objection to the deposition, as one de bene esse, and cannot be understood to make it a deposition in chief.

The objection to the competency of these witnesses, is also entitled to serious consideration. The law certainly is, that the witness must be competent, when his testimony is given, and if he be not then competent, his testimony is inadmissible. If these witnesses were competent, it must be, because the very act of giving their depositions amounted to a release of their interest. Is this so? Had the depositions not been offered at the trial, but been shown to defeat a claim to their share of the forfeiture, would the attempt have succeeded? Had the depositions been rejected for any cause whatever, could they have extinguished the rights of the informers? I am not prepared to answer these questions in the affirmative. The language of the law would seem to justify these doubts.[3] If any person, entitled to a share of the forfeiture, "shall be necessary as a witness on the trial," says the act, "such person may be a witness upon the said trial," &c. Who is to judge of this necessity? Certainly not the collector. It is not for him to oust the informer for his own benefit. Then the court must judge of this necessity, and must judge of it, after hearing the other testimony. Such person "may be a witness on the trial." This language, I think, is not applicable to a deposition, taken before the trial. Gordon and York were not witnesses at the trial. They were witnesses before the trial, at the time when these depositions were taken by a magistrate. The act of congress does not speak of depositions, and it seems to me, that such persons can be rendered competent to give depositions, only by releasing their interest.

On both grounds, therefore, I think these depositions inadmissible. Indeed their testimony was either rejected or disregarded in the district court.

The direct testimony of the informers being discarded, the case turns on the other proofs in the cause. The act under which this seizure was made, declares that "in actions, suits, or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall be upon such claimant." See 1 Story, Laws, c. 128, § 71, p. 633 [1 Stat. 678, c. 22]. In this case, then, the United States are not required to establish guilt, but the claimants must prove innocence. It is not the duty of the judge to justify the legislature, but surely, if, in any case, such a legislative provision be proper, it is in this. The fact is generally premeditated, and is perpetrated under all the precautions and in all the secrecy

[3] "If any officer, or other person, entitled to a part or share of any of the fines, penalties, or forfeitures, incurred in virtue of this act, shall be necessary as a witness, on the trial, for such fine, penalty, or forfeiture, such officer, or other person, may be a witness upon the said trial; but in such case he shall not receive, &c., any part or share of the said fine, &c., and the part, or share, to which he otherwise would have been entitled, shall revert to the United States." Act 1799, c. 128, § 91; 1 Story, Laws, 656 [1 Stat. 697].

which ingenuity can suggest, and the means of proving innocence, at least, to a reasonable extent, which is all that can be required, are in possession of the accused. In such a case, he may, without a violation of principle, be required to prove his innocence. In such a case, the absence of testimony, clearly in the power of the claimants, if not supplied by other equivalent testimony, must be fatal. It is impossible to smuggle so large a part of a cargo, as is charged to have been smuggled in this case, without the knowledge of the master and crew. Consequently, their testimony against the fact, if believed, would be nearly conclusive. Why is it not produced? The master, being himself liable to a fine under one of the charges in this libel, was perhaps not admissible as a witness; but to the crew, no objection existed. Why were they not examined? If they were unattainable, this fact ought to have been shown, and might have excused their non-production. The deposition of one of them only was offered, and his was taken so irregularly, as to be rejected. No attempt appears to have been made to take it again, or to take the depositions of other mariners. The documentary papers which usually accompany a cargo, and show its amount, are not produced. There is no testimony to prove, and no reason to believe, that the thirty-four puncheons of rum, and twenty barrels of limes, mentioned in the paper called a report and manifest, if we add the barrel of sugar, and of coffee found on board, and not included in the paper, constituted a full cargo for the vessel; nor is there any testimony, of any description, to show that she sailed with less than a full cargo.

To the absence of important testimony in the power of the claimants, is to be added, the testimony on the part of the United States. The mate of the revenue cutter found a lighter by the side of the vessel, the use of which, it is fair to presume, was to receive goods from her, although no permit had been granted. I say none was granted, because none is produced: nor is any circumstance proved, to create a presumption that one was granted. The arrangement of the cargo forms a strong presumption, that a part of it had been taken out. A large vacancy was found in the place which would have been filled in preference; and the cargo, which did not appear to have been moved, was so disposed, that the vessel could not have been navigated. No evidence was offered to do away these causes of suspicion. I do not term the claims evidence, although they are sworn to, because the law does not allow to the affidavit made to them the dignity of testimony. If they amount to any thing, it is to no more, if I may use the phrase of Lord Coke, than "the exclusion of a conclusion."

Such are the circumstances under which this case appeared in the district court. The judge of that court was, I think very properly, of opinion, that they do not establish the innocence of the transaction.

In this court, the depositions of Robert Pitts, George P. Barnes, and Wm. Pitts, are offered. To the reading of these depositions, the attorney for the United States objects, because, they are taken de bene esse, and it does not appear, that the two Pitts have gone out of the United States, or to a greater distance from this place than one hundred miles. This objection is, undoubtedly, conclusive; but as I have no doubt of the fact, I should allow the counsel for the claimants now to prove it, if these depositions would alter the case. I shall, therefore, consider them as if they were admitted. They are intended to meet the testimony of Butler, the officer of the revenue cutter, and to disprove the strong circumstances stated by him.

Before examining the testimony particularly, I will notice some general circumstances attending it, which seem to me to be worthy of observation. The testimony of Butler was in the cause, long before it was tried. Why was not this explanatory or conflicting evidence offered in the district court? It must have been within the knowledge of the claimants; why was it not taken? Why have they now taken it ex-parte? If it be true that the law authorizes this proceeding, it is not less true, that testimony, acquired under such circumstances, ought to be critically examined, and not carried beyond the plain meaning of the words of the witness; that material omissions justify the conclusion, that the facts omitted to be noticed, could not be noticed satisfactorily. With these observations, I shall examine these depositions. Robert Pitts states, that he was on board of the vessel when she was seized; that they had to move the hogsheads out of the hatchway to get at the cargo, and there was no appearance of any thing having been moved when he went on board. He does not say how many hogsheads were removed. Two hogsheads were on the deck and one on the slings, according to the testimony of Butler, who also says, that appearances indicated the recent removal of three hogsheads. When the witness says, there was no appearance of any having been moved, he states his own conclusion, which may have been drawn from the appearance of the hogsheads he saw. He does not say, that there was not a large vacancy in the centre of the vessel, nor that the disposition of the cargo was compatible with the navigation of the vessel. George P. Barnes has, at least, sworn carelessly in saying, that he went on board the vessel immediately on her arrival. He says, he did not discover any particular deficiency of cargo midships of said schooner, nor that there appeared to be any particular breakage of the cargo in the midships. This testimony is entirely negative, and instead of stating facts from which his conclusions

are drawn, states the conclusion of the witness. He does not say that the midships were full; that the large vacancy, described by Butler, did not exist. He does not say that the hogsheads were there; but that no particular breakage of the cargo appeared. He may not have considered this vacancy, if he observed it, as evidence of the breakage of the cargo; and if he did not so consider it, the vacancy may have made no impression on him. William Pitts says, that the floor of the schooner, from main to foremast, was covered, when she was seized, with hogsheads of rum and barrels of limes, and that there was no appearance of the cargo having been broken in any part. This testimony is certainly more explicit than any other. Had it been taken in the district court, or were any satisfactory reasons assigned for its not having been taken; or had an opportunity been given to cross-examine the witness, I will not say, that his testimony would have outweighed the conflicting and more explicit testimony of Butler; but I will say, that it would have had much more influence on my mind than it now has.

I come now to consider the second charge in the libel, the omission to make the report required by law. The claimants contend that the allegation of this offence in the libel is too defective to sustain a sentence of condemnation, whatever the testimony may be. My opinion on this point depends on the construction of the act of congress. If, by that act, the rum is forfeited for the omission of any thing required, although the report may be perfect so far as respects the rum, then I rather think the libel is not so totally insufficient as to be incapable of sustaining the sentence. It alleges, in substance, that such a report as is required by the act, was not made. But if the forfeiture of the rum depends on some omission respecting that article, then I presume the attorney for the United States, would not hazard an argument in support of this count in the libel. Act 1799, c. 128, § 30 [1 Story, Laws, 598; 1 Stat. 649, c. 22]. On the best consideration I can give to this section of the act of congress, I am of opinion that the rum is not forfeited, unless something respecting that article be omitted in the report. The act requires that a certain report shall be made, and does not forfeit the cargo, if the report be not made in the form prescribed, but the rum which is omitted. If no rum be omitted, the article to be forfeited, does not exist. Let us vary the phraseology and read it thus, "On pain of five hundred dollars, and the article so omitted." All, I presume, will admit, that only so much of the cargo as was omitted, would be forfeited, and that it would be indispensable to the validity of the libel, that it should specify the omitted article. When, instead of saying that the omitted article shall be forfeited, the law says that the omitted rum shall be forfeited, I construe the law as equally requiring, to produce the forfeiture, that rum should be omitted, and consequently that the omission should be charged in the libel.

The following decree was rendered, reversing in part the sentence of the district court, and giving the attorney for the United States leave to amend his libel.

"This cause came on to be heard on the transcript of the record of the district court, and on the depositions taken in this court, and was argued by counsel. On consideration whereof, this court is of opinion, that there is error in so much of the sentence of the district court, as condemns the foreign distilled spirits therein mentioned, it being the opinion of this court, that the libel is insufficient to sustain that part of the sentence: It is, therefore, the opinion of this court, that so much of the sentence of the district court as condemns the foreign distilled spirits on board the Thomas & Henry, be reversed and annulled. And on the motion of the attorney for the United States, leave is given him to amend his libel, and the cause is retained for further proceedings."

Case No. 13,920.

The THOMAS A. SCOTT.

[Cited in Cartwright v. The Othello, Case No. 2,483. Nowhere reported; opinion not now accessible.]

Case No. 13,921.

The THOMAS A. SCOTT.

[1 Brown, Adm. 503; [1] 7 Chi. Leg. News, 19.]

District Court, E. D. Michigan. Aug., 1874.

COLLISION—VESSEL AGROUND—NARROW CHANNELS—STOPPING—JUDGMENT OF MASTER.

1. A vessel can be *held* in fault for her conduct only to the extent of risk or danger of collision with another vessel, as indicated by the relative situation of such other vessel at the time she determines upon a particular course of action, making proper allowance for the probability of a change in the relative situation of such other vessel.

[Cited in The Cherokee, 15 Fed. 122.]

2. It is not improper, under any and all circumstances, for a steam vessel to enter the old channel of St. Clair Flats, and attempt to pass through, while another vessel is aground upon one of its banks. It depends upon the apparent situation and circumstances of the vessel aground.

3. A vessel aground in a narrow channel, but in a situation to admit of other vessels passing her in safety, should, on the approach of another vessel, cease her efforts to get off until such other vessel has passed.

4. Where a schooner aground upon St. Clair Flats, upon an even keel, with room for other vessels to pass, saw a large propeller approaching, and did not cease her efforts to get off, but

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

swung partly across the channel: *Held*, that the propeller was not in fault for coming down the channel with the intention of passing the schooner while aground.

5. Nor was she in fault for pushing on and attempting to pass the schooner on her starboard side, instead of stopping and backing.

6. Having been placed in sudden peril by the fault of the schooner, the master of the propeller could not be blamed when, in the exercise of his best judgment, he adopted a course which may have been erroneous.

Libel for damage done to schooner Fred. A. Morse, by a collision upon St. Clair Flats. The schooner Morse, of 592 tons burden, arrived off the entrance to the flats, in tow of the tug Brockway, at 7 a. m., and lay there about two hours, waiting for the propeller Vanderbilt, then aground on the flats, to get off. As the propeller floated, she passed up the channel; and the tow supposing her bound up, entered it. The Vanderbilt, however, after passing the range lights, winded around, and came down the channel, meeting the tow about the middle stake. The swell was so great, she forced the Morse aground, on the starboard side of the channel, about 100 feet above the middle, where she lay on an even keel till just before the collision. Several propellers were lying at the Club House above the flats, waiting for the Vanderbilt to get off. The Thomas A. Scott, among the rest, had lain there two days. Seeing the Vanderbilt released, they all started down, the Fisk and Gould ahead. These two, as well as the bark Erastus Corning (a large grain vessel), in tow of a tug, passed the Brockway and Morse on their port side. The Scott followed, and after passing the range lights, observing the bow of the schooner swing two points to the port, whistled twice; the Brockway responded, and the Scott starboarded, and attempted to pass the tow on its starboard side, grounded a little below the stern of the schooner, forced her off and across the channel. The current swung her stern into the schooner and damaged her.

H. B. Brown, for libellant.

The propeller was in fault—

(1) In entering the channel at all while the schooner was aground. It is admitted the master of the propeller saw the schooner aground, and the tug at work upon her. He was bound to know the tug would pull her off some time, and that in swinging off, her bow would obstruct the channel more or less. If the master insisted upon going down and encountering this contingency, he took upon himself the risk, and must answer for the consequences. The Milwaukee [Case No. 9,626]; The Vicksburg [Id. 16,931]; The Helen R. Cooper [Id. 6,333], The Geo. Law [Id. 5,336]; The St. John [Id 12,224]; The Germania, 3 Marit. Law Cas. 269. In this connection, I refer to the rules of the supervising inspectors for the Western rivers, which forbid vessels entering narrow channels while others are passing through in an opposite direction. Though not in terms applicable to St. Clair Flats, it is but an enunciation of a general rule as to navigation in narrow channels.

(2) In going at too great speed, and in not stopping and backing before the peril became imminent. Her actual rate through the water is of small consequence. She was bound to keep herself entirely under control. The Alleghany, 9 Wall. [76 U. S.] 522. Precautions to avoid a collision must be seasonably taken. The Vanderbilt, 6 Wall. [73 U. S.] 225; The Russia, 3 Marit. Law Cas. 290. A vessel has no right to thrust herself into danger, and then complain that the consequences were inevitable. Best evidence of the speed of the propeller is the fact that, although she drew nearly two feet more water than the Morse, she did not fetch up until she had passed the stern of the Morse (then hard aground) from 20 to 50 feet.

W. A. Moore, for claimant.

There was no fault on the part of the propeller, and the collision must have been the result of inevitable accident. The City of London, Swab. 300; The Marpesia, L. R. 4 P. C. 212; The Morning Light, 2 Wall. [69 U. S.] 550; The Grace Girdler, 7 Wall. [74 U. S.] 203. Burden of proof, where inevitable accident is charged, is upon the party seeking to hold the other in fault. The Bolina, 3 Notes Cas. 208; 1 Pars. Shipp. & Adm. 527.

LONGYEAR, District Judge. 1. In the absence of positive law applicable to the case, a vessel can be held in fault for her conduct only to the extent of risk or danger of collision with another vessel, as indicated by the relative situation of such other vessel at the time she determines upon the particular course of action in question, making all proper and reasonable allowance for the probabilities of a change of the relative situation of such other vessel. It was not contended, and if it had been, I should not be prepared to hold that, as applied to the particular locality here in question (the old channel on the St. Clair Flats), it is improper, and a fault under any and all circumstances, for a vessel, especially a steam vessel, to enter the channel, and attempt to pass through, while another vessel is aground upon one of the channel banks; and the above rule is enunciated as applicable to this case, on the assumption that it is not improper, under any and all circumstances; or, in other words, that it may be proper or improper, a fault or not a fault, according to the situation and circumstances of the vessel aground apparent at the time of entering the channel. What, then, was the apparent situation of the Morse when the Scott entered the channel? She was bound up, and was aground on the, to her, starboard channel bank, on an even keel, lying parallel with the channel, and leaving ample room for vessels of the largest size to pass her in

safety. This was not only apparent from observation, but it had been made certain to the Scott by the fact that three vessels, each one as large as herself, had just passed through. Thus far, therefore, there was no impropriety in entering the channel and making the attempt to pass through. But it was said the efforts to get the Morse off then in progress were also apparent; and it was claimed that a probability of the position of the Morse being changed before the Scott could pass her ought to have been also taken into consideration, and that such probability rendered it improper to enter the channel while those efforts were going on. To that proposition I cannot give my unqualified assent. I think it more reasonable and consonant with the interests of navigation to hold that a vessel aground in a narrow channel, but in a situation to admit of other vessels passing her in safety, should, on the approach of another vessel, cease her efforts to get off until the other vessel has passed. To require other vessels, under such circumstances, to await the result of such efforts, would be contrary to universal practice, would tend to a serious hindrance to navigation, and would often occasion serious detriment to vessel owners who are in no manner in fault for the obstruction to the channel. A vessel aground in a situation not admitting of other vessels passing her in safety, presents, of course, a very different case, and one to which the foregoing has no application. The Scott was, therefore, not in fault for entering the channel as she did, and the first charge of fault is not sustained.

2. That the Scott's speed was too great under the circumstances. I think there is a decided preponderance of proof that as soon as the Morse swung out into the channel, the speed of the Scott was checked down to not exceeding four miles an hour, and that, having decided not to stop entirely, but to make the attempt to pass the Morse on her starboard side, her engine was stopped and reversed as soon as it was safe or necessary to do so. To have gone at a much less speed would have endangered her steerage way and her fetching up on the bank, and to have stopped and reversed sooner would have tended to swing her bows against the Morse. The second charge of fault is, therefore, not sustained.

3. That the Scott did not stop and reverse her engine until a collision had become inevitable. As we have already seen, the Scott was rightfully in the channel. If the Morse, when she saw the Scott approaching, had, as I think she ought to have done, desisted from her effort to get off until the Scott had passed, the accident would have been avoided. But she continued her efforts, and by doing so, threw herself athwart the channel and across the bows of the Scott, and that was the primary cause of the collision. Notwithstanding that, however, it was the duty of the Scott to avoid her if she could. Libellants' advocate contended that good seamanship required that the Scott should have stopped at once when she saw the Morse swing out across the channel. That it was within the power of the Scott to stop in time clearly appears by the proofs—the proofs showing that when the Scott saw the Morse swing out, the two vessels were from 500 to 600 feet distant from each other, and that the Scott, at the rate she was then running, could be stopped in about 200 feet. But it must be borne in mind that she was going with the current, and that the channel was too narrow to turn round with safety, and if she stopped, she was in danger of drifting upon the bank and getting aground herself. The master of the Scott, taking in the whole situation, and using his best judgment, as matters then and there appeared to him, thought that by checking and changing his course, he could safely pass the Morse on her starboard side, instead of on her port side, as he had intended, but which, on account of the manœuvres of the Morse, had become impossible, and he acted accordingly. The result proved his judgment correct, so far as to his being able to get his vessel by the Morse, between her and the starboard channel bank; and it is evident that he would have gone entirely clear, if the bow of the Scott had not brought up on the bank before she had entirely passed the Morse, causing her stern to swing round against the Morse, and doing the damage complained of. It may be that if the Scott had stopped, instead of making the attempt to pass after the Morse had changed her position, any accident to either vessel would have been avoided. But that is merely conjectural and speculative, and it must be borne in mind that the emergency was brought about by the Morse herself; that the master of the Scott had but a few moments in which to deliberate; that he had the circumstances and situation all before him, and in view of them decided upon his course—a decision which the result showed was at least not an unreasonable one—and the accident happened, as we have seen. Under all these circumstances, it would not be reasonable or just to charge the Scott with fault for doing as she did instead of stopping, even if the probabilities were stronger than they are that by stopping the accident would have been avoided. The third charge of fault is therefore not sustained. Libel dismissed, with costs to the respondent.

THOMAS EWING, The (VAN SYCKEL v.). See Case No. 16,877.

Case No. 13,922.

The THOMAS GIBBONS.

[Cited in The Francis, Case No. 5,036. Nowhere reported; opinion not now accessible. See The Thomas Gibbons, 8 Cranch (12 U. S.) 421.]

Case No. 13,923.

The THOMAS JEFFERSON.

[3 Ben. 302.] [1]

District Court, E. D. New York. June, 1869.

CHARTER-PARTY — BREACH — INSUFFICIENT SAIL — RUNNING ASHORE — NEGLIGENCE — DAMAGES.

1. A vessel was chartered to bring a cargo of oranges from Havana to New York, and, her sails being insufficient, she lost time on the voyage, and, on arriving off Cape May, put in, in anticipation of heavy weather, and came to anchor, and her master failed to keep a careful watch at night, and, the wind coming around so as to blow on shore, the chain parted and the vessel went ashore, the master's excuse for not dropping another anchor being that ice had formed on his decks, from snow which fell the evening before, so that the second anchor and chain were covered up by ice, and could not be let go. The deckload was discharged for the purpose of getting the vessel off, and the vessel was then got off and came to New York, without taking the deck-load on board again, and it was afterwards sent to New York by railroad and there tendered to the charterers, who refused to receive it, (it having been frozen and damaged,) and filed a libel against the vessel, to recover damages for the non-fulfilment of the charter-party. *Held*, that the vessel was chargeable with fault in not having her sails in proper condition, whereby the voyage was delayed.

2. The delay of the vessel being a fault, it was to be presumed against her that, but for that delay, she would not have been obliged to run into Delaware Bay, and the disaster there would not have occurred

3. The master was negligent in not keeping a vigilant watch while at anchor, and in not being prepared to drop a second anchor when the chain parted.

4. The freezing and consequent injury to the deck-load must, therefore, be attributed to the vessel.

5. She was chargeable with the injury to the deck-load, and with any damage sustained by the charterers, by the loss of any portion of her cargo by decay, arising from the delay of the vessel on the voyage.

This was a libel filed by Michael Morrow and others, charterers of the schooner Thomas Jefferson, to recover damages for the alleged non-fulfilment of a charter, by which the vessel was to bring a cargo of oranges from Havana. The libel alleged, that the vessel was not properly fitted with sails; that her master did not perform the voyage with proper diligence, and put into Delaware Bay, where, by negligence, he allowed the vessel to be blown ashore; that, having discharged the deck-load, he succeeded in getting the vessel off, but not with proper diligence, and then failed to take on board the deck-load; and that, by the decay of the cargo, consequent upon the delay and the freezing of the cargo, the libellants had been damaged. The answer denied any delay or negligence, and alleged that all the damage to the cargo was the result of perils of the sea. The evidence tended to show that the master of the schooner lost time on the voyage, by not carrying sail, and that, when the vessel reached Cape May, the weather being threatening, it was determined, with the approval of one of the charterers, who was on board, to put into Delaware Bay, and the vessel anchored there about nightfall. It came on to snow, which turned to rain, and the wind, about midnight, came out from the northwest and blew heavily on shore, and the weather grew very cold, and about 4 a. m. the chain parted. Efforts were made to let go the other anchor, and to hoist sail, but they were found to be so covered with ice that nothing could be done, and the vessel went ashore. The deck-load was afterwards discharged, and the vessel got off in three or four days, during part of which time the weather continued very cold, and ice made freely. After getting off, the vessel sailed for New York, without taking the deck-load on board again, and it was sent to New York by railroad, where it was tendered to the charterers, who refused to receive it.

Benedict & Benedict, for libellants.
John E. Parsons, for claimants.

BLATCHFORD, District Judge. The libellants, owners of a cargo of oranges and pine-apples, shipped them at Havana, on the 20th of February, 1868, on board of the schooner Thomas Jefferson, for New York, under a charter-party made of that vessel by the claimants, her owners, to some of the libellants, for a voyage from Havana to New York. The charter-money was duly paid. The charter-party excepted the dangers of the seas and of navigation. The libellants claim that, through fault and negligence on the part of the vessel, arising from the incompetency of her master, and defects in her sails, delays and disasters occurred, which protracted the voyage some eight days, and destroyed some of the fruit, so that it was not delivered to the libellants by the vessel. The answer denies all fault and negligence on the part of the vessel, and avers that, in the prosecution of her voyage, the vessel, by stress of weather and the force of the winds and the waves, was, on the 2d of March, 1868, driven into Delaware Bay, inside of Cape May, where, on the next day, she was, by force of the wind and of the floating ice, driven on shore; that, to float the vessel, it became necessary to send on shore a portion of her cargo of oranges, in a partially frozen condition, from the severity of the weather, which was done; that the vessel was unable to take on board again such portion of her cargo, having reference to the place and circumstances; but that the claimants, as soon as practicable, caused such portion of her cargo to be brought to New York and tendered to the libellants, and that any damage thereto was due to the perils and dangers of the seas, and not to any fault or negligence on the part of the vessel, or of those in charge of her.

I am satisfied that the libellants have

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

made out a case of negligence on the part of the master of the vessel, in respect to the occurrences in Delaware Bay, and of fault on the part of the vessel in having her sails in such poor condition that her master was obliged to heave his vessel to for some considerable time, on several occasions, and to shorten sail on other occasions, because he could not carry the sail which, under the same circumstances of wind and weather, he could have carried, and would have been bound, under the charter of the vessel, to carry, if the sails of the vessel had been in a proper condition. She put into Cape May on the eleventh day of her voyage, at which time, on the evidence, she ought to have been near New York, if not quite arrived there, under ordinary circumstances, if her sails had been in proper condition. It is shown that other vessels carrying full sail were seen outstripping her when she was going under shortened sail. Her delay being a fault, it is to be presumed against her that, but for such delay, she would not have been obliged to run into Delaware Bay, and the disasters there would not have occurred.

Under the circumstances which existed when she put in at Cape May, it was not improper for her to do so. But the evidence shows that her master was guilty of gross negligence, in not keeping his sails and windlass and his second anchor and chain free from ice, and in not having that anchor and chain in readiness for use, when the chain of the single anchor, with which he had anchored inside of Cape May, parted. If he had exercised proper vigilance in watching the weather and the wind, he could have been prepared to drop his second anchor the moment the chain to the first one parted. Instead of being vigilant he appears to have maintained no competent watch on deck, and to have known nothing himself of the condition of things which he testifies existed on his deck, arising from the change of wind and the sudden cold. Either such condition of things did not exist before the chain parted, and there was not the accumulation of ice on the sails and windlass and second anchor and chain which he now attempts to make out, as an excuse for the non-use of the second anchor, and for the drifting ashore of the vessel, or else he did not watch the formation of the ice, and attempt to check or obviate it. The master being in fault in allowing his vessel to be deprived of the use of her second anchor and chain, her driving on shore, and the freezing of her deck-load of oranges, and their loss by decay consequent thereon, and on their transportation to New York by land, and on the time consumed therein, must be attributed to fault on the part of the vessel. She must, therefore, be held liable for the value of such deck-load, which was wholly lost to the libellants, and which they were not obliged to accept in the condition in which it was tendered to them in New York, and for any legal damages sustained by the libellants, by any loss or decay of any other portion of the fruit, or in respect of any of the cargo of the vessel, arising from the delay of the vessel on her voyage, or from her going on shore at Cape May. I have not at all considered the question of whether the vessel was got off the shore at Cape May as soon as she might have been with proper diligence, because, inasmuch as the right of action on the part of the libellants was complete when the vessel went ashore, such right would not have been impaired, if the vessel and her cargo had remained there to this day.

There must be a reference to compute the amount of the libellants' damages on the principles above indicated, and a decree for such amount, in their favor, with costs.

Case No. 13,924.

The THOMAS KILEY.

[3 Ben. 228.] [1]

District Court, E. D. New York. April, 1869.

COLLISION—DAMAGES—EXCEPTIONS—DEMURRAGE—PRIVATE SALE OF CARGO.

1. Where a canal-boat, laden with coal, was sunk by a collision in the port of New York, and, after she was raised, her cargo was taken out and sold at private sale, without notice to the parties to be charged for the damages; and the boat was then taken to Elizabethport, N. J., to be repaired, where she was frozen in, so that she could not be repaired for over a month, and no sufficient reason was shown for taking her from New York to be repaired, and the commissioner, to whom it was referred to ascertain the damage, allowed demurrage for the whole time, and also an item of loss on the coal, and the claimants excepted to this report: *Held*, that the owners of the boat could not recover demurrage for all the time of the delay, but only for a period of time sufficient to complete the repairs, under ordinary circumstances.

[Cited in Johanssen v. The Eloina, 4 Fed. 574.]

[See The Baltic, Case No. 824.]

2. That the damage to the coal should have been ascertained by an appraisal, or by a sale upon notice; but, as it appeared that the cargo was, in fact, damaged, and that a sale at auction would probably have shown as much loss as was allowed, the court allowed the item to stand, marking its disapproval of the course pursued, by casting on the libellant the fees of witnesses called to prove that item.

This case came up upon exceptions to the commissioner's report. The action was brought to recover the damages occasioned to the libellants by the sinking of a canal-boat, laden with coal, in a collision, which occurred on the 17th of January, 1867, in the port of New York. It appeared that the vessel, with the coal on board, was raised on the 22d of January, and taken to the Atlantic docks. The coal was then taken out, and sold at private sale, the discharging occupying 2½ days. The boat was then taken to Elizabethport, New Jersey, to be repaired, and almost immediately, on her arrival there,

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

she was frozen in, so that she could not be put upon the ways until the 8th of March, when she was hauled out, and the repairs to her completed. The commissioner allowed the libellants demurrage, at the rate of $7 per day, for the whole period of 47½ days, to which allowance exception is taken. The commissioner also allowed $1.50 per ton for depreciation of the coal, by reason of the damages caused by the mud and water, to which exception was also taken.

BENEDICT, District Judge. As to the question of demurrage, I am of the opinion that the libellants are not entitled to recover demurrage for the period of detention caused by the fact that the boat was frozen in at Elizabethport, where she went to repair.

The collision occurred in the port of New York, where, as the evidence shows, the repairs could have been effected promptly, and without any risk of freezing up. It is not shown that the repairs could have been done more cheaply at Elizabethport than in New York, nor does it appear that that was the home port of the vessel, nor is any reason whatever suggested by the evidence for taking the boat to Elizabethport.

The taking of the boat, without any sufficient reason, to a port where she was in danger of being frozen up, and where she was, in fact, frozen up immediately upon her arrival, was an error on the part of the master of the canal-boat, for the consequences of which he alone is responsible. He cannot charge the respondents with a loss which the exercise of ordinary prudence on his part would have avoided.

The report must, therefore, be modified, by reducing the demurrage to a period of time sufficient to complete the repairs under ordinary circumstances. Any extra expense for taking the boat to Elizabethport must, for the same reason, be disallowed.

The next objection is to the allowance of $1.50 per ton, as the damage to the cargo of coal by mud and water. It appears that the damage was never appraised, and the coal was sold at private sale, in its damaged condition, without notice to the respondents, who were to be held responsible for the loss.

I disapprove of this mode of procedure. The damage to the coal should have been ascertained by a proper examination and appraisal, or by a sale upon notice to the respondents, or in some other way not open to the suspicions always attaching to a private sale of damaged property without notice. The allowance for this damage to the coal I permit to stand, simply because it appears affirmatively that the coal was wet and muddy, and I am of the opinion, looking at the whole evidence, that a sale at auction, on notice, would probably have shown as much loss as has been allowed; but I shall mark my disapproval of the course pursued, by casting upon the libellants the fees of the witnesses called to show the loss upon the coal. Had the coal been sold on notice, the necessity of any witnesses would probably have been avoided.

If the amount to be decreed in accordance with this opinion is not agreed upon, let the case be sent to the commissioner, to reform the report in the particulars referred to.

Case No. 13,925.

The THOMAS KILEY.

[5 Ben. 301.] [1]

District Court, D. Connecticut. Aug., 1871.

TOWAGE—PERIL OF THE SEA—ANCHOR—EVIDENCE.

1. The steamtug T. K. took in tow three canal-boats, loaded with coal, to tow them from Elizabethport, N. J., to New Haven, Connecticut. The boats were fastened together, and towed by hawsers astern of the tug. In Long Island Sound a high wind was encountered, and the tug and tow hauled in behind Charles Island, where the tug came to anchor, still holding the tow by the hawsers. The wind and sea increased, until the stock of the tug's anchor was broken, and she began to drag. Her captain then called to the canal-boats to throw over their anchors. This was done by the captain of the middle boat. The outside boats had anchors, but they were neither of them ready for use. The anchor of the D. which was on the starboard side, was in her bow cabin, and the only rope she had, which was fit to be used as a cable, had been used to fasten the boats together. The captain of the tug, hearing the anchor of the middle boat let go, dropped the canal-boats astern, by slacking his hawser, to allow that anchor to catch. His own boat, however, continued to drag, and after a vain endeavor to work up to his anchor, the whole tow being in danger of going ashore, he cast off the hawser, and cutting his own cable, went ahead under steam to the mouth of the harbor, where he remained until the storm moderated. Shortly after he cast off the hawser, the D. was found to have grounded, and she filled and sunk, she and her cargo sustaining serious loss. An insurance company which had paid the loss, filed a libel against the tug to recover the damage. *Held*, that the fact that the owner of the D. in settling for former towage services rendered by the owners of this tug, paid bills rendered which had on them the words "At the risk of the master and owners of the boat," was not sufficient to warrant the court in holding that those words formed a part of the towage contract in this case, the contract having been made not by the owner but by the master of the D. and nothing having been said on the subject when the contract was made.

2. The contract, therefore, must be taken to be the ordinary one of towage.

3. A tow-boat, towing under such a contract, is not a common carrier.

4. The breaking of the anchor of the tug was, on the evidence, a peril of the seas.

5. The tug was properly anchored and in a proper place.

6. The D. was not properly equipped for such navigation, in that she had not an anchor ready for use; and that she, and not the tug, was responsible for such negligence.

7. The fact that the captain of the tug cast off his hawser without giving notice to the canal-boats that he was about to do so, was immaterial, because he had given notice to them to throw out their anchors, and the failure of the D. to do so, cast upon her the burden of the loss.

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

In admiralty.

Charles R. Ingersoll, for libellants.
Robert D. Benedict, for claimants.

SHIPMAN, District Judge. The steamtug Thomas Kiley on the 20th of February, 1870, was engaged in towing the canal-boat D. H. Dygert, from Elizabethport, New Jersey, to New Haven, Connecticut. The Dygert was one of three boats which the tug had in tow. The boats were fastened together and towed by hawsers astern of the tug. When in Long Island Sound a high wind was encountered, and the tug, with her tow, hauled in near Charles Island, the tug coming to anchor and holding her tow astern by the hawsers. While in this situation the wind increased, and the captain of the tug, fearing danger, let go the hawsers, when the canal boats drifted on to the island, and the Dygert grounded and was lost. The libellants, the Home Insurance Co., having become liable for and paid the loss as underwriters, and subrogated to the rights of the insured, instituted this suit against the tug. The gravamen of the charge against the tug is contained in the second article of the libel, and is as follows: "That the said steamboat left the port of New York for the said port of New Haven, with said canal-boat and its said cargo (coal) in tow, on the 19th of February, 1870, and arrived off Charles Island about four o'clock in the afternoon of the 20th, the wind blowing hard; that the said tug or steamboat hauled in by the island with her said tow, holding the same by a hawser astern, and there anchored—that she lay there until almost half past six o'clock, the wind increasing, when the said tug let go the hawser by which her said tow was held, without notice to the tow of her intention so to do, and went out into the sound; that in consequence thereof, the said canal-boat drifted in shore and grounded on Charles Island, where she lay, and pounded on the bottom until she sprung a leak, and in about one hour after she first struck, sank and was totally lost." The third article of the libel adds, "that said loss occurred solely by reason of the negligence and want of care and skill of those in charge of said steamboat, in casting off said hawser and leaving said canal-boat, and in not returning to rescue her from the dangerous position into which she had drifted on being left by said steamboat."

The answer of the owner of the tug admits entering upon the towage service, but alleges that, by the terms of the agreement between them and the master and agent of the Dygert, the latter was to be towed at the risk of her owners. He admits, also, hauling in under Charles Island, and letting go of the hawser, and the drifting ashore of the Dygert, and her loss. The answer denies that those in charge of the tug were guilty of any negligence, want of care or skill, and alleges the cause of the loss to have been as follows, viz: "After the said steamboat and her tow had been at anchor for about two hours, the wind, which had been increasing, rose to a gale, and blew so heavily that by the force of the wind and the sea, the stock of the anchor which held the steamboat was broken, and the anchor began to drag, and there was danger that said steamboat and her tow might drag on shore. That orders were thereupon given to the canal-boats in tow, to put out their anchors. That only one of said boats was able to put out any anchor, and that the Dygert was not able to put out any anchor, because she had neither cable nor chain that she could use for that purpose. That one of said canal-boats, however, did put out an anchor. That said steamboat then started her engine, so as, if possible, to work up to her anchor, and find out what was the cause of its dragging, but was unable to do so with the tow hanging on astern, in consequence of the violence of the wind and sea, and was compelled to let go the hawser to save herself from going on shore, supposing that the canal-boats were safely anchored, but was still unable to raise her anchor, owing to the violence of the sea, and was compelled to slip her cable and steam against the wind in the mouth of the harbor until the violence of the storm had somewhat moderated, when she returned to the tow and found the Dygert grounded and full of water. And he alleges that the loss was occasioned, so far as the action of the steamboat was concerned, by a peril of the seas, for which he is not responsible, and as far as concerns the canal-boat, by the fault and negligence of her master and owners in not having her well equipped so that she could anchor."

As to the allegation in the answer, that the master and agent of the Dygert agreed that she was to be towed at the risk of her owner, I do not find it proved. The only evidence, in support of that allegation of the answer is the statement of one of the witnesses in his testimony, that the owner of the Dygert had, in settling for former towage services, rendered by the owners of the tug, paid bills rendered which had on them the words, "At the risk of the master and owners of the boat or vessel towed." From this fact the court is asked to infer that these words formed part of the contract in the present case. This claim is inadmissible. There is no proof that this subject was in any manner referred to at the time this contract was made. The contract was not made by the owner of the Dygert, but by her master and agent, Elliot, who appears to have simply gone to the office of the owner of the tug in New York and engaged a steamer to tow his boat. There is no proof that he knew anything about the clause referred to as having been in bills paid by the owner of his boat. The contract must therefore be taken to be the ordinary one of towage, subject to the usual obligations imposed by law upon tugs and tows under similar circumstances.

The facts of this case are very simple.

The tug had the Dygert and two other canal-boats in tow. The latter were lashed together, side by side, the Dygert being the starboard boat. They were towed astern of the tug by hawsers running from her to each of the outside boats. When near Charles Island the wind had increased to a degree that rendered it prudent to find a shelter. The tug hauled in under Charles Island, the most convenient, and so far as the evidence shows, the only feasible harbor. The captain of the tug anchored, holding his tow by the hawsers. They all lay comfortably till after six o'clock, when the wind increased and produced a heavy sea. The captain of the tug then found his anchor dragging, and hailed the canal-boats and told them to throw our their anchors. The anchor of the middle boat, the Curtis, was all ready and was immediately thrown over. The anchor of the Dygert was not ready. It was in the bow cabin, and the only line which could be used as a cable was then in use for fastening the Dygert to the Curtis, the middle boat. The anchor of the other outside boat was in her stable, with no cable to it.

When the captain of the tug got an answer to his hail, and heard the anchor of the Curtis go and the chain run out, he slacked away on his own cable, so that the canal-boats might fetch up on their anchors, and thus take some of the strain off from his. But his own anchor continued to drag. He then tried to work up to his anchor, towing the whole fleet, but could not, as his boat fell off broadside to the wind, and was in danger of going ashore, taking the canal-boats with her. He then slipped his hawsers and endeavored to work up to his anchor, but the sea ran so high that his men could not stand forward, and he slipped his cable. He then kept the head of his tug to wind, working her slowly, and subsequently went in his life-boat to take off the women on the canal-boats, and found the Dygert aground.

The charge of negligence against the captain of the tug is, that he slipped his hawsers, and thus left the canal-boats to drift ashore. But before he did this, he found his anchor dragging, and ordered the canal-boats to put over theirs. He supposed they had done so. The Curtis had, and had the anchors of the other boats been ready, they would have doubtless been thown out too. Soon after the Curtis's anchor was thrown over, those on the canal-boats discovered that the hawsers that had held them to the tug were no longer taut, but hanging over their bows, and the steamer gone. They then went to work hauling in the hawsers, and using them to fasten the Dygert to the other boats, so as to release her line, in order to use that as a cable to her anchor. Before they had completed this, they found that the Dygert had grounded.

According to the testimony of the captain of the Dygert, half an hour elapsed from the time the steamer disappeared in the darkness before his boat grounded. It must have been considerably more than that from the time the captain of the tug ordered the canal-boats to throw out their anchors to the time when the Dygert first struck. When this order was given, it was accompanied with the statement that the steamer was dragging her anchor. This the captain of the Curtis says he heard, though he says that when the steamer finally slipped her hawsers she gave no notice that such an act was contemplated. During all this time the wind blew a gale, and the sea ran high. Peril was apparent and obvious. Every consideration pressed on those on the canal-boats to use every effort to anchor their boats, as the steamer's anchor had failed to hold. But the trouble was, but one of the canal-boats had any anchor in a condition to use promptly, and that was insufficient to hold the three. Half an hour at least elapsed from the time they were notified of the danger (which ought to have been apparent), and the Curtis's anchor was thrown out, before the Dygert grounded. Had the latter been in a condition to have cast her anchor as promptly as the Curtis did, she might have been saved.

The proof is that the anchor of the tug was of a weight and character adapted to the boat and the business in which she was engaged. The violence of the wind and sea subjected it to an enormous strain, which broke the stock, and thus prevented its holding. So far as that accident is concerned, it is properly attributable to a peril of the seas.

The Dygert was not properly equipped. The navigation of Long Island Sound is often rough and dangerous, especially at the season of the year when this accident occurred. To attempt the passage in a canal-boat loaded with coal, and little more manageable in a high wind than a log, without an anchor ready for use, is gross negligence, unless the law exempts such a boat, when in tow, from this precaution, and throws the whole responsibility on the tug.

The extent of the responsibilities which a tug-boat assumes in regard to the boats she takes in tow has been the subject of considerable discussion in the text books and by judges. An examination of the decided cases has disclosed conflicting opinions. As early as 1835, the supreme court of New York held that the owners of a steamboat who undertook to tow a freight boat for hire, were bound only to the exercise of ordinary care and skill, and that they were not, quoad hoc, common carriers. Caton v. Rumney, 13 Wend. 387. Substantially the same doctrine was laid down in Alexander v. Greene, 3 Hill, 1. In this latter case the steamer was a regular tow-boat, and held herself out as such. The counsel for the tow endeavored to found a distinction on this circumstance, and thus distinguish the case from that of Caton v. Rumney. But

the court refused to recognize the distinction as a valid one, and held, that though the defendants were engaged in the business of towing boats laden with merchandise, yet they were not common carriers. That case went to the court of errors, and was reversed, but not on this point. What the views of a majority of the court were on this question does not appear. 7 Hill, 533; 2 Const. [2 N. Y.] 204. In the case last cited (2 Const. [2 N. Y.] 204), the doctrine that tug-boats are not common carriers was affirmed. In Vanderslice v. The Superior [Case No. 16,843], Kane, U. S. district judge, expresses dissatisfaction with the doctrine of Alexander v. Greene, and urges some reasons why, in his judgment, tow-boats should be either held as common carriers, or form a distinct and new class of bailees for hire, with peculiar obligations and responsibilities. But when that case came before the circuit court, Grier, J., refused to assent to the doctrine that such boats were common carriers. 1 Pars. Mar. Law (1st Ed.) 176. The state courts of Pennsylvania have repeatedly held that tow-boats were not common carriers. Leonard v. Hendrickson, 18 Pa. St. 40; Hays v. Paul, 51 Pa. St. 134; Brown v. Clegg, 63 Pa. St. 51.

In Louisiana and North Carolina a different doctrine has been held. Smith v. Pierce, 1 La. 129; Walston v. Myers, 5 Jones (N. C.) 174.

I have examined all the authorities on this point which a somewhat diligent search has brought to light, and I am satisfied that the weight, both of authority and reason, is against the doctrine that tow-boats are common carriers. The true principles applicable to such contracts are well stated by Lord Kingsdown, in speaking for the privy council in the case of The Julia. "When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to one, without any default on the part of the other, no cause of action would arise. Such an accident would be one of the risks of the engagement to which each party was subject, and would create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility on the party committing it. * * * These are plain rules of law by which their lordships think that the case is to be governed." The Julia, 1 Lush. 224, 231.

In the case before us no fault in the selection of the harbor, or shelter, of Charles Island by the tug, is alleged or proved. Nor is any fault alleged or proved as to the manner or position in which the tug placed her tow when she came to anchor. The witnesses for the libellant distinctly say that they all lay comfortably for two hours after the tug came to anchor, and till the wind had increased to great violence, and the anchor of the tug began to drag in consequence of the breaking of the stock. The tow was then notified to throw over their anchors. It is true, that the captain of the tug, when he first anchored, in reply to a question from the tow, said he thought his anchor would hold them. But this formed no excuse for the negligence of the Dygert in having no anchor in a condition to use, should occasion subsequently demand it. The storm was as apparent to those on the tow as to the captain of the tug. The necessity of having the anchor ready, in case the captain of the tug should deem it necessary to use it, was obvious to the captain of the Dygert, and it was his duty to have it in readiness in case an emergency should arise. Indeed, it was an obvious precaution which should have been provided by the Dygert before the voyage commenced. The suggestion made on the argument, that it was the duty of the captain of the tug to see that the anchor of the canal-boat was ready and equipped for use, is inadmissible. He had a right to rely on the necessary and proper equipment of the Dygert for such a voyage, and her ability and readiness to obey his orders, and put forth such practicable and ordinary efforts as might become necessary for her safety in rough weather. But it is suggested that the captain of the tug selected an improper place to anchor, one which allowed the tow to swing too near in shore while the canal-boats were held by the steamer. But, as already intimated, the proofs of the libellants do not bear out this claim. The Dygert did not ground till long after the steamer came to anchor, nor till half an hour after the wind and sea became still more violent, and the tug began to drag. Then her captain immediately ordered the canal-boats to throw over their anchors. The Curtis did so, but neither of the other boats had an anchor ready for use, and after the lapse of half an hour the Dygert struck.

It is impossible to resist the conclusion that the anchor of the Curtis being too light to hold the three boats, they dragged, and thus got into shallow water, where the Dygert grounded, and, in consequence, was lost.

It is said, however, that the captain of the tug cast off his hawser without giving notice to the tow. This is immaterial. He had given notice to the latter to throw over their anchors; his reasons for that order it was not necessary to communicate to the canal-boats. It was apparent to all that there was danger, and the canal-boats should have been in a condition to have performed their duty in attempting to avert it. The Curtis was in that condition, and promptly did her duty. The Dygert was not, and cannot now

be permitted to saddle her loss on the tug, in the absence of any fault on the part of the latter.

Let the libel be dismissed, with costs.

Case No. 13,926.

The THOMAS MARTIN.

[3 Blatchf. 517; 19 Law Rep. 379; 35 Hunt. Mer. Mag. 446.] [1]

Circuit Court, S. D. New York. Sept. 12, 1856.

COLLISION — RIGHT OF WAY — NAUTICAL RULES — LIGHTS—RACING.

1. It is a well-settled nautical rule, that when two sailing vessels are approaching each other, both having the wind free, the vessel on the larboard tack must give way, and each vessel must pass to the right; and the same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which one is to the windward.

2. It has long prevailed as a usage, and been recognized, to a certain extent, by the courts generally in this country and in England, that, both in narrow rivers and open seas, sailing vessels are not bound to carry lights when under way at night.

3. But, where two sailing vessels came into collision, while both were under way, approaching each other, on a night so overcast that a vessel without a light could not be seen at a distance of over half a mile, and the combined speed of the two vessels was ten or eleven miles an hour, and one of the vessels showed a light, which was seen by the other vessel some fifteen minutes before the collision, but the latter vessel showed no light: *Held*, on a libel by the former against the latter, the former having been lost by the collision, that, although the former was in fault, yet the latter was also in fault in not showing a light when she saw the other's light, and that the loss must be apportioned.

[Cited in Cooper v. The Saratoga, 40 Fed. 510.]

4. The latter was in fault for racing at the time with another vessel, at a rate of speed, and under circumstances, that were not justifiable, considering the character of the night.

[Cited in The Rhode Island, 17 Fed. 558.]

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

This was a libel in rem, filed in the district court, against the schooner Thomas Martin, by the owners of the schooner Industry, to recover damages for a collision which took place in the Atlantic ocean, several miles off the coast of New Jersey, in the neighborhood of Great Egg Harbor, by which the Industry was run down and became a total loss. The collision took place about nine o'clock at night, on the 14th of May, 1849, while the Thomas Martin was going down the coast, in ballast, bound for Norfolk, Va., and the Industry was coming up, heavily laden with corn, and bound for New Bedford, Mass. The district court dismissed the libel, on the ground that the Industry was in fault [case unreported], and the libellants appealed to this court.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 19 Law Rep. 379, contains only a partial report.]

Francis B. Cutting, for libellants.

James T. Brady, for claimants.

NELSON, Circuit Justice. The direction of the coast where the collision in this case occurred, is nearly northeast and southwest, and the two vessels were moving along it in opposite directions. The wind was northwest, or west by north, and both vessels claim that they were closehauled, the Industry on the larboard, and the Thomas Martin on the starboard tack; and, at the same time, each insists that she was the privileged vessel, and that the other had the wind free. The Industry further insists, that she was bearing in a direction towards the land, so as to get into smooth water under a lee shore, and was, therefore, necessarily, from her course, closehauled. The Industry had a bright light on her fore rigging, and was seen by the hands on the Thomas Martin some fifteen minutes or more before the collision; and, as the combined speed of the two vessels was some ten or eleven miles an hour, the vessels must, at this time, have been between two and three miles apart. The Thomas Martin had no lights, and she was not discovered by the hands on the Industry till within a few minutes before the collision occurred. The night was cloudy, and the sky overcast, and, although there is some discrepancy as to the degree of darkness, it seems to be generally agreed, that a vessel without lights could not be discovered beyond half a mile. Several of the witnesses fix the distance considerably short of this. At the distance of half a mile, the two vessels, with their combined speed, would meet in some three minutes. Both vessels claim that, when they saw each other, the approaching vessel was to the leeward, and continued so till the moment of the collision. As a consequence of this impression, each, in the emergency, put her helm hard down, both luffing into the wind, and into each other. The better opinion is, that if one of the vessels had at that time borne away, and the other had put her helm hard down, the collision would have been avoided. Judge Judson, who heard the cause below, dismissed the libel, holding that the Industry was in fault in not putting her helm to port, instead of hard down, and bearing away before the wind. The learned judge arrived at this conclusion upon the application of the nautical rule, which is well settled, that when two sailing vessels are approaching each other, both having the wind free, and, consequently, the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right; and the same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which one is to the windward.

I agree in this conclusion, as I am inclined to think, according to the evidence of the hands on the Industry, when properly weigh-

ed, that her position was such, in relation to the other vessel, that her helm should have been ported, and she should have passed to the right, instead of luffing into the wind, with the view of passing on the other side.

But I am unable to concur with the court below in the other branch of the case, namely, that the Thomas Martin was not in fault. I do not intend to disturb the general usage that prevails, both in narrow rivers and open seas, that sailing vessels are not bound to carry lights when under way at night. This usage has long prevailed, and has been recognized, to a certain extent, by the courts generally, in this country and in England. It was said, on the argument, that the rule had been recently changed in England by the Trinity masters. The soundness and propriety of the usage have often been questioned by eminent judges, both in England and this country. The fault chargeable upon the Thomas Martin is, I think, her neglect to show a light after she discovered the light of the Industry. If she had done so, there is every reason for believing that the collision would not have occurred. As I have already shown, the two vessels were at that time from two to three miles apart; and, within that distance, while running with the combined speed only of ten or twelve miles the hour, if each vessel had seen the other, it would have been strange if they could not have avoided the meeting. Although the night was not unusually dark, yet the sky was so overcast and cloudy, that it is admitted a vessel without a light could not be seen at a distance exceeding half a mile. While, therefore, the hands on the Thomas Martin had fifteen or more minutes' time, and the distance of some two and a half miles running, within which to adopt the proper measures for avoiding the Industry, the hands on board of the latter had only some three minutes' time, and half a mile's distance, within which to adopt the like measures.

The practice of showing lights when another vessel is seen approaching in a dark or cloudy night, is common among prudent and skilful navigators, and has frequently been made a subject of commendation by the courts, and been taken into consideration in determining cases of this description. Its fitness and propriety are too obvious to require illustration or argument. This case furnishes a striking exemplification of its necessity, and of the misfortune attending its neglect. The danger was impending almost at the moment the Thomas Martin was discovered by the Industry, and this from the neglect of the former vessel in not showing a light at the proper time.

I am also inclined to think the Thomas Martin in fault for racing with the schooner John Cunningham on that night. She had all her sails set, with a pretty fresh wind, and was running at a rate of speed, and under circumstances, that cannot well be justified, considering the character of the night. She had passed the Cunningham, and was some two miles ahead at the time, which the counsel for the claimants supposed put an end to the racing. But the struggle was to see which vessel could reach Norfolk ahead; and this accounts for all sails being kept set in the night, when most of the other vessels running the same course at the same time had taken in their light sails, in consequence of the freshness of the wind.

Upon the whole, I think both vessels in fault, and that the loss must be apportioned.

THOMAS, The N. W. See Case No. 10,386.

Case No. 13,927.

The THOMAS P. THORN.

[8 Ben. 3.] [1]

District Court, E. D. New York. Jan., 1875.

SHIPPING—PAROL AGREEMENT—BILL OF LADING—DAMAGE TO CARGO ON DECK.

1. A canal boat was loaded full of malt for a voyage from Lyons, on the Erie canal, to New York. She also brought 104 boxes of tobacco on deck. The tobacco was injured on the voyage by rain, and the consignees filed a libel against the canal boat to recover the damage. It appeared that for the malt a so-called bill of lading was given. It had a printed heading, stating a shipment in good order of the articles mentioned below, to be carried under deck and delivered at the place of destination stated, in like good order as addressed; and below this was an entry of the malt with address, under which was written. "Shipped by James Elmer, as above, to Emanuel Hoffman, 104 boxes of tobacco. Captain to collect, on safe delivery, 22 cents per 100 lbs., to be carried on deck under canvas." This document was signed by the shipper of the malt, the shipper of the tobacco and the captain of the boat. Evidence was given tending to show that the words "to be carried on deck under canvas," had been written in after the paper was signed by the shipper of the tobacco, and without his knowledge. It appeared that the agreement for the carriage of the tobacco was for a carriage on deck, and that the shipper saw it aboard on deck, and made himself acquainted with the method adopted to protect it from the weather, and did not suggest that this was contrary to his agreement: *Held*, that the contract, as to the mode of carriage of the tobacco, was in the parol agreement under which the tobacco was received on board.

2. On the evidence, it appeared that the damage resulted merely from the carriage of the goods on deck; that all reasonable care was taken of it during the voyage; and that the manner of its stowage and protection was known to and assented to by the shipper.

3. The inference was that the damage arose without fault of the carrier, and the boat was not liable.

In admiralty.

S. Kaufman, for libellant.

A. C. Davis, for claimant.

BENEDICT, District Judge. This action is brought by Emanuel Hoffman to recover

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

for damages done to certain tobacco consigned to him while being transported in the canal boat Thomas P. Thorn, upon the Erie canal and the Hudson river, from Lyons to New York. The tobacco, when shipped, was in good order. It was carried on deck, covered with tarpaulins, and upon arrival in New York was found damaged by water, for the most part upon the top. The libellant seeks to recover for this damage, on the ground that a bill of lading was given, which provided for a carriage under deck, and a safe delivery at the place of destination, without exception of perils of navigation. What is termed the bill of lading is an instrument somewhat peculiar. It has a printed heading which states a shipment, by one Myrick, of the articles mentioned below, and declares that such articles are to be carried under deck, and delivered at the place of destination in like good order, as addressed. Below this printed heading is an entry of 10,500 bushels of malt addressed to N. R. Myrick, the owner of the vessel, at New York.

This malt constituted the main cargo of the vessel and filled her hold. Under and separate from the entry of the malt upon this document is written: "Shipped by James Elmer, as above, to Emanuel Hoffman, 104 boxes of tobacco. Capt. collect on safe delivery 22 c. per 100 lbs., to be carried on deck under canvas." At the bottom of the page are affixed the signatures of the shipper of the malt, the shipper of the tobacco, and the captain of the boat. Testimony is presented to show that the words "to be carried on deck under canvas," were inserted after the document had been signed by the shipper of the tobacco, and without his knowledge. But I do not deem it necessary to determine the question of fact whether they were so inserted, for the reason that, if these words be omitted, still the instrument cannot be held to be a contract binding the vessel to carry the tobacco under deck. The words "shipped as above," do not necessarily include the covenant to carry under deck, which was made in respect to the malt, and may be considered as simply referring to the statement of a shipment on the boat. So considered, the instrument is in harmony with what has been shown by clear evidence to have been the understanding of the parties to the transaction. It is proved beyond dispute, that there was no thought of having the tobacco carried under deck; that the agreement upon which it was shipped was for a carriage on deck; that the shipper saw it stowed on deck, made himself acquainted with the method adopted to protect it from the weather, and at no time suggested that such a carriage was contrary to the agreement. After the lading was completed, the bill of lading, so called, was executed; and, read in the light of the actual understanding of the parties, it must be held to be, as far as the tobacco is concerned, no more than a simple acknowledgment of the receipt of 104 boxes of tobacco addressed to Emanuel Hoffman. The contract upon which the liability of the boat is to depend, so far as relates to the mode of carriage, is to be found in the parol agreement, under which, as is most clearly proved, the tobacco was received on board. The question remaining, then, is whether, upon a contract to carry on deck, this vessel is liable for the wetting of this tobacco. It is manifest that the injury to the tobacco arose simply from the fact that it was carried on deck. The malt, carried below, although an article easily injured, received no damage, and the voyage was performed with usual care, and without disaster. Indeed, there is evidence of a statement by the libellant, that tobacco must of necessity be injured by being carried on deck. But, under a contract to carry upon deck, the risk of any damage resulting from the place of carriage rests upon the shipper (The Paragon [Case No. 10,708]), and, without proof of negligence causing the damage, there can be no recovery. Here the evidence shows that all reasonable care was taken of the tobacco during its transportation; that the manner of stowing and covering it was known to and assented to by the shipper; and the inference is warranted that the injury arose, without fault of the carrier, from rain, to which merchandise transported on deck must necessarily be in some degree exposed. Any loss arising from damage thus occasioned is to be borne by the shipper. I must, therefore, dismiss the libel, with costs to be taxed.

THOMAS SCATTERGOOD, The (PHILLIPS v.). See Case No. 11,106.

Case No. 13,928.

THOMASSEN et al. v. WHITWELL.

[9 Ben. 113;[1] 23 Int. Rev. Rec. 146.]

District Court, E. D. New York. April 7, 1877.

ADMIRALTY — JURISDICTION IN ACTIONS BETWEEN FOREIGNERS—LACHES.

1. Jurisdiction of the defendant having been duly acquired, admiralty courts have power to entertain suits in personam and to determine the matter in controversy where the parties are foreigners of different nationalities.

2. When courts of admiralty with general admiralty powers have been constituted without any prohibition by the government against entertaining suits between foreigners, it is doubtful whether it is within the discretion of the judge of such a court to decline to hear a cause of collision arising on the high seas between vessels of different nationalities.

3. Delay in requesting the court to decline jurisdiction on the ground that the parties to the suit are foreigners, when during the period of the delay the position of the parties has changed in any material degree, and especially by action taken in court without objection, may afford a

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

special reason, if any is needed, for declining the application.

[Cited in Slocum v. Western Assur. Co., 42 Fed. 236.]

4. Where the respondent is represented by an agent in this state and has property within the territorial jurisdiction of the court which has been seized under process with an attachment clause, after which the respondent has entered a general appearance and has obtained the release of his property by giving a stipulation to abide the event, and has proceeded to take depositions de bene esse on his own behalf and has filed his answer to the libel, joining issue upon merits, and where testimony has been also taken by the libellants, the court will not refuse to entertain the action, nor will it grant an application to forbid the further prosecution of the action on the ground that libellants and respondent are aliens, neither domiciled nor temporarily present in the United States at or since the commencement of the action.

[See The Bee, Case No. 1,219.]

In admiralty.

C. Van Santvoord and James K. Hill, for libellants.

R. D. Benedict and Foster & Thomson, for respondents.

BENEDICT, District Judge. This is an action in personam brought by Jens Thomassen and Julius Smith, owners of the bark Daphne, against Mark Whitwell and others, composing the firm of Mark Whitwell & Co., owners of the steamship Great Western, to recover for the injuries sustained by the bark Daphne in a collision with the steamship Great Western that occurred on the 24th of March, 1876, on the high seas.

Upon the filing of the libel process was issued with an attachment clause, by virtue of which property of the defendant Mark Whitwell was seized within this district, whereupon the defendant entered a general appearance in the cause and obtained the release of his property by giving a stipulation to abide the event. Thereafter the testimony of three witnesses was taken de bene esse on the part of the respondent, and the depositions filed in court. Afterwards the testimony of seven witnesses was taken de bene esse on the part of the libellants and their depositions also filed in court on the 10th day of April, 1876. In November the defendant Whitwell filed his answer to the libel, wherein he joins issue upon the merits.

The respondent now makes known to the court that the libellants and the respondent are aliens who have never been domiciled in the United States, nor were they or either of them temporarily present in the United States at the commencement of the action or since, whereupon the respondent objects to the entertaining of this action by this court, and prays that the court would forbid the further prosecution thereof by reason of the facts made known as aforesaid.

In support of this application the ground has been taken that as matter of law the court is without jurisdiction to entertain an action in personam where the parties are aliens, neither domiciled nor temporarily present in the United States.

This position has not been strongly insisted on and cannot be maintained. The district courts of the United States have original jurisdiction of all civil cases of admiralty and maritime jurisdiction, and this jurisdiction depends upon the subject matter. Whenever the matter is maritime in its nature any district court may entertain jurisdiction, provided it acquires jurisdiction of the parties in the manner prescribed by law. Here the matter is conceded to be maritime in its nature, and jurisdiction over the person of the defendant has been duly acquired. There is therefore no room to question the power of the court to determine the matter in controversy. The most that can be claimed is that the court has power to decline to proceed in the cause upon being informed that the controversy is one between aliens. A doubt has been suggested whether a court of admiralty can in a case where jurisdiction of the person has been acquired rightfully decline to entertain jurisdiction of a cause of collision on the high seas (The Mali Ivo, 3 Mar. Law Cas. p. 245), and if such doubt would arise in any case it arises in a case like this where the parties are foreigners of different nationalities, and therefore cannot be remitted to any forum that will not be foreign to one of them.

In countries where the civil law forms the basis of their jurisprudence, and, in accordance with the maxim of the civil law, actor sequitur forum rei, personal actions must be brought before the tribunals of the place where the defendant has a domicile. Actions for collision have been made an exception, and may be brought where neither of the parties reside. The ground of the exception is the legal fiction that in case of a collision a quasi contract arises on the part of the wrong-doer to pay the damage he has caused, and as it cannot be supposed to be intended that such a contract is to be performed upon the sea, the place of its performance must be taken to be the port at which the injured vessel first arrives. Wherefore the tribunals of the port at which the vessel first arrives take cognizance of the action as being to recover a demand there payable. This is the ground taken in local tribunals. But courts of admiralty are in a fair sense international courts. As originally constituted in Europe, they are the appropriate tribunals to take cognizance of suits where the parties are foreigners. And if resort to such a fiction as above stated be allowable anywhere to support jurisdiction, it may be allowed in courts of admiralty. If allowed, the jurisdiction follows, as of course. The Jerusalem [Case No. 7,293].

The power of every government to prohibit its tribunals to be engaged in determining the rights of aliens of course exists, but when courts of admiralty with general admiralty powers have been constituted with-

out any such prohibition, it is much to say that it is within the discretion of the judge of such a court to decline to near a cause of collision arising on the high seas between vessels of different nationalities, and where consequently there is no home forum to which the parties can be remitted. "Where the question is one of jus gentium to be determined by sound discretion acting upon general principles, the court will hold plea of it." 2 Brown, Civil & Adm. Law, p. 119.

The remark in the opinion of the supreme court of the United States in the case of The Maggie Hammond, 9 Wall. [76 U. S.] 457, that "the question is one of discretion in every case," &c., is broad enough to cover cases of collision, but does not cover a case like this; and besides in that case the question was not raised by the pleadings, nor involved in the controversy there made. Reference has been made to numerous cases of foreign seamen—cases peculiarly maritime in character, where courts of admiralty have declined to entertain the action. But cases of this character bear a peculiar relation to commerce, and under some circumstances may cripple a maritime adventure. This relation has often given rise to the insertion in treaties of special provisions in regard to such actions. Such cases stand upon a somewhat different ground, therefore, from cases of collision, and I know not that I could agree with all that has been said with regard to entertaining jurisdiction even in wages cases.

Again, it is said that the law applicable in cases of foreigners is to be found in the implication arising from the remark of Story, that "suits are maintainable here between foreigners where either of them is within the territory of the state in which the suit is brought" (Conflict of Laws, § 542). In this case the defendant is here by his agents authorized to defend his interest, by his property which has been attached, and by his stipulation given upon which judgment is to be entered, if at all.

But assuming that the court may decline jurisdiction in such a case as this, it cannot be denied that a strong case must be shown to justify the exercise of that power. The present case is far from strong. It is true that the defendant is a foreigner without domicile here, but he is owner in a line of steamers that run regularly from New York, which line has a permanent office in the city of New York. His defence can be made here as well as anywhere, and his rights will here be adjudged according to the same rules administered by the courts of his own country. As between him and the libellants he is laid under no disadvantage, therefore, by being compelled here to answer this demand.

Moreover the request to decline jurisdiction has been delayed until the testimony has been taken and filed, and the libellants' evidence made known. It is said that as the matter rests with the court, and the ground on which jurisdiction will be declined arises out of the duty of the court to give its time to citizens rather than to aliens, delay in making the application is of no moment. But when during the period of delay the position of the parties has changed in any material degree, and especially by action taken in court without objection, delay may afford a reason for declining the application. The fact that this is a cause of collision where the parties have gone to the expense of taking the testimony of some thirteen witnesses, whose depositions have been received on the files of the court, appears to me to give the libellants just ground to require of this court to complete the proceeding that has been allowed to go on so far. Justice requires that the libellants be not compelled to take this testimony over again, and not put to the hazard of losing the evidence as it stands of record in the cause, and not compelled to lose the benefit of the security which the respondent has given in this cause without the suggestion of an intention to ask the court to decline to enforce it.

Furthermore it must be noticed, that this action is brought not only at the port where the disabled vessel first arrived after the accident, but where the damage to her was repaired, and the affidavits make it evident that the only real controversy between the parties is as to the amount of damage caused by the collision. The questions which the court will be called on to decide relate therefore to acts done and payments made in this port, and this is therefore the natural and proper place for an investigation of these questions.

It is for the interest of our nation that its ports be resorted to by foreigners for the purposes of repairing their ships. To say to foreigners so resorting to our ports that proof of the work there done cannot be made in our courts, as against aliens liable to pay for the same, would tend to deter parties from using our ports as a place of resort. As a matter of public policy, therefore, our courts should not decline to entertain such an action as the present. For these reasons the application is denied and the action must proceed.

[NOTE. Subsequently the owners of the Great Western sought by abandonment of the ship and freight to avoid personal liability, but the court held that since, at the time the offer to abandon was made, the title to the vessel had passed out of the respondents, they had nothing to abandon. Full damages in favor of the libellants were decreed. Case No. 13,929. They then made application for leave to file amended answer, which was denied. Id., 13,930. On appeal to the circuit court, it was held that the Great Western was liable for the proceeds of the wreck, amounting to $1,796.14, and gave a decree for that amount and interest, and for the costs of the libelants in this court. 12 Fed. 891. Appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 118 U. S. 520, 6 Sup. Ct. 1172.]

Case No. 13,929.

THOMASSEN et al. v. WHITWELL.

[9 Ben. 403;[1] 24 Int. Rev. Rec. 123.]

District Court, E. D. New York. March, 1878.[2]

SHIPPING—LIMITATION OF LIABILITY—FOREIGNERS—UNITED STATES STATUTES—LAW MARITIME—PRACTICE—FORFEITURE OF RIGHT TO LIMITATION.

1. The statutes of the United States, limiting the liability of ship-owners (Rev. St. §§ 4282–4289), cannot be invoked in an action between foreigners, arising out of a collision between foreign vessels in waters beyond the territorial limits of the United States, when none of the owners of either vessel are residents of the United States.

[Followed in Churchill v. The British America, Case No. 2,715. Cited in The John Bramall, Id. 7,334; Re Long Island, etc., Transp. Co., 5 Fed. 620.]

2. Where a collision occurred on the high seas between a Norwegian and a British vessel, neither the law of Norway nor the law of Great Britain can be resorted to by the courts of admiralty of the United States to determine the defendant's liability. The law of the seas—the law maritime according to the law of nations—furnishes the rule by which to determine the extent of such liability.

3. By the law maritime the liability of the ship-owner is limited to the value of the ship and freight, and the necessity of an abandonment thereof, in order to entitle the ship-owner to the benefit of the exemption from further liability, follows from the rule.

4. Where the defendant answering to the merits, by his answer also offered to surrender his vessel to the libellants, and upon the trial tendered a written surrender of his interest in the vessel as of the date of the collision, i. e., March 25, 1876: *Held*, that the surrender of his interest, as tendered in the answer and upon the trial, was in such form and at such time as under the maritime law to effect his release from liability to the libellants.

5. Where, after the collision, the vessel of the defendants, while pursuing her voyage, was stranded, and was afterward sold as a wreck at public auction by direction of her owners, and was delivered to other parties after the filing of the libel, but before the answer was filed: *Held*, that the defendant must, by the general maritime law, be held to have intentionally waived his right to claim exemption from personal liability beyond the ship and her freight, and cannot obtain the limitation of liability which he seeks.

[This was a libel in personam by Jens Thomassen and Julius Smith, owners of the Norwegian bark Daphne, against Mark Whitwell & Co., owners of the British steamship Great Western, for damages sustained by the bark in a collision with the steamship. The case was first heard upon application to dismiss for want of jurisdiction, on account of all parties being aliens. The application was denied. Case No. 13,928.]

Henry T. Wing, for libellants.

Foster & Thomson and R. D. Benedict, for claimant.

BENEDICT, District Judge. This is an action in personam, brought against the defendant as an owner of the steamship Great Western by the owners of the bark Daphne, to recover for injuries done to the bark Daphne by a collision with the Great Western that occurred on the 24th day of March, 1874. The evidence as to the circumstances under which the Great Western collided with the Daphne has left no room to contend that the accident arose from any other cause than the negligence of the Great Western, and accordingly no attempt has been made to dispute the liability of the defendant. The question made pertains to the extent of that liability. The facts out of which this question arises are as follows:

The collision which caused the damage sued for occurred on the high seas, and outside of the territorial waters of any nation. Both vessels were foreign to the United States, the one being a Norwegian bark, the other an English steamer. None of the owners of either vessel are residents of the United States. The defendant is a British subject and the libellants subjects of Norway and Sweden. The steamer sustained no damage from the collision, and after the accident proceeded on her voyage toward the port of New York, to which port she was bound; but before reaching her destination she stranded on Fire Island beach, and was afterward sold as a wreck at public auction by direction of her owners. Various parties were purchasers at this sale, and a considerable part of the proceeds, some $1,200, is in the hands of the agents of the owners in New York. The total amount realized from this sale of the steamer is much less than the sum claimed for the damage caused to the Norwegian bark; but the value of the steamer prior to her stranding far exceeded that sum.

The defendant, who was brought into court by a foreign attachment to answer the demand of the owners of the Norwegian bark, in his answer, offers to surrender the steamer to the libellants, and upon the trial tendered a written surrender of the defendant's interest in the steamer and her freight, as of the date of March 25, 1876. Upon these facts it is contended, on behalf of the defendant, that he is exempt from liability to the libellants for the collision in question.

This contention presents, at the outset, a question as to the effect of the statutes of the United States relating to the liability of ship-owners (Rev. St. U. S. §§ 4282–4283) upon the rights of the parties before the court.

An examination of those provisions of the statute renders it quite plain that no effect can be given them in an action like the present between foreigners, arising out of an oc-

---

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

[2] [Affirmed in 12 Fed. 891. Decree of circuit court affirmed by supreme court in 118 U. S. 520, 6 Sup. Ct. 1172.]

currence that took place beyond the territorial limits of the United States. The statute contains no language to indicate an intention to give it an extra territorial effect, and every presumption is against such an intention. A court of admiralty, which is in a proper sense an international court, "one of the functions of which, and not the least important, is to administer international justice in maritime suits between foreigners" (Dr. Phillimore), certainly in the absence of express language to that effect, would not be justified in enforcing against foreigners the provisions of a municipal statute of this character in a case like this. Says Vice-Chancellor Wood, speaking of the law of England relating to the liability of ship-owners: "I should entertain great doubt, to say the least of it, as to whether or not a foreign ship, meeting on the ocean with a British ship and being damaged by it, could be deprived of its rights by any act of parliament." General Iron Co. v. Schurmann, 1 Marit. Law Cas. 62.

It has been suggested in regard to statutes of this description that effect may be given to them in all cases upon the ground that they relate to the remedy. But manifestly such is not their true nature. The Amalia (Dr. Lushington) 1 Marit. Law Cas. 361.

In determining the case of The Amalia just cited, the privy council, noting the case of Cope v. Doherty [4 Kay & J. 367], where the collision was on the high seas between two American vessels, one of which sought in an English court to take the benefit of the English statute, say: "It seems extraordinary that any question should have ever been raised upon a case of this description;" and although they give the English owner the benefit of the English statute limiting the ship-owner's liability in the case before them, where the collision then in question occurred upon the high seas between an English and a foreign vessel, it is upon the sole ground of the words of the English statute, as shown by Dr. Phillimore in the case of The Halley, 2 Marit. Law Cas. 562.

The present case is different, because here, both parties being foreigners, the ship-owner does not invoke the statute, but the libellant invokes a statute of the United States to determine the extent of the ship-owner's liability, and that statute contains no language that will admit of the supposition that it was intended to apply to foreigners out of the jurisdiction.

It being impossible therefore to find, in our own statute law, the rule by which to determine the extent of the defendant's liability, it may next be inquired whether resort can be had to the law of the nation to which the parties belong; and here the answer seems plain. The parties are subjects of different nations, and no good reason can be given for resorting to the law of one of these nations rather than the other. The defendant, who is a British subject, has not brought himself within the control of the laws of Norway and Sweden, nor have the libellants the right to ask this court to apply in their behalf the law of Great Britain, the act, out of which the defendant's allegations arose, not having been done either in Norway or England. I am aware that it has been sometimes attempted in determining questions of this character to call in the aid of that fiction of law by which a ship, wherever she may be, is for certain purposes deemed to be a part of the land from which she hails. In this view, it could be here contended on the one hand, that the obligation of the defendant should be deemed to have been incurred in England because the acts of negligence which render him liable were acts done in the navigation of a British ship; while on the other hand it could be urged that the blow which did the injury was delivered on a Norwegian vessel and the obligation resulting from the blow must therefore be deemed to have been incurred in the kingdom of Norway and Sweden. Neither of these positions has been assumed by the advocates in this case; and it doubtless appeared to them as it does to me, that it would be carrying the fiction too far to decide that the collision in question occurred in either of the countries mentioned.

It seems quite plain that the defendant, as he was not in fact on board the Norwegian vessel, was neither in fact nor in law within the jurisdiction of Norway and Sweden at the time of doing the acts complained of; and if the law of England could be applied upon the ground that the acts of negligence were done upon an English vessel, it would be of no benefit to the defendant, as by that law the value of the vessel just before the collision is taken as the limit of the ship-owner's liability. Reg. v. Keyn, 2 Exch. Div. 63.

The nature and extent of the defendant's obligation must indeed be determined according to the law of the place where he incurred the obligation, and that place was not in England nor in Norway, but on the high seas. The law of the seas, "the law maritime according to the law of nations" (Sir John Nicholl, The Girolamo, 3 Hagg. Adm. 177), is therefore the law to be here administered.

There is a maritime law of the United States consisting of statutory provisions, and such of the customs of the sea as the courts may see fit to adopt. The Lottawanna, 21 Wall. [88 U. S.] 573. There is also a general maritime law in force on the sea which is part of the law of nations, and consists of certain rules applicable to affairs of the sea, which have been so often acted upon, and by so many different nations, that they are deemed to have been assented to by all, and according to which all persons going on the sea may justly be supposed to have agreed to be judged in respect to acts there done. This law courts of admiralty by the comity of na-

tions are in a proper case authorized to administer. See the case of The Scotia, 14 Wall. [81 U. S.] 187, where the international navigation rules were applied as having become part of the maritime law operative on the high seas by reason of the assent of most maritime nations, as expressed by the enactment of the rules.

The inquiry, therefore, arises, whether there be any rule of the general maritime law by which the defendant's liability is limited; for, if not, his liability upon principles of natural justice must be held to extend to the full measure of the damages occasioned by his wrongful act. As to the existence of a rule of the general maritime law upon the subject under consideration, there is no room for controversy, it having been ascertained and declared by the supreme court of the United States in the following language: "By the maritime law, the liability of the ship-owner was limited to his interest in the ship and freight, for all torts of the master and seamen, whether by collision or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest or by the vessel being lost on the voyage; and the maritime courts found no difficulty in carrying this law into execution." Norwich Co. v. Wright, 13 Wall. [80 U. S.] 119. The rule of the maritime law thus recognized by the supreme court of the United States has also been recognized by the legislation of many foreign countries, viz: Portugal, Holland, Hamburg, Denmark (Code of 1683), Sweden and Norway (Ordinance of 1667), Russia, the two Sicilies, Malta, in the Lombardo-Venetian Kingdom, Sardinia, the countries governed by the Ordinance of Bilboa,—that is, Mexico and the republics of South America,—and by Prussia. The rule can, therefore, well be applied here, as an existing rule of the general maritime law, upon the same ground that the international navigation rules were applied in the case of The Scotia above referred to. "In matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed, as in justice it should be." The Lottawanna, 21 Wall. [88 U. S.] 572. To the same effect is the remark of Dr. Phillimore when in deciding the case of The Halley, he says: "If, therefore, this collision had taken place upon the high seas, it must, upon general principles, have been adjudicated according to the lex maris."

The question presented in the case of The Halley related to the extent of the ship-owner's liability for the damages arising from a collision; and the opinion in that case contains observations which afford support to the position that upon this subject the rule is furnished by the Roman law, according to which the only limit of liability would be the extent of the damage. But the case then before the court was not one of a collision on the high seas; and the rule applicable to a collision of that description is plainly expressed in the language above quoted. As pointed out by Judge Ware in the case of The Rebecca [Case No. 11,619], by most if not all of the nations of Europe an important qualification of the general rule of the Roman law was admitted in the case of the ship-owner, namely that the extent of his liability was limited to the value of the ship and freight. It is only as thus qualified that the rule of the Roman law can be said to be the rule of the maritime law. Norwich Co. v. Wright, 13 Wall. [80 U. S.] 119.

The right to abandon the ship and freight, and thereby to be released from liability, and the necessity of such an abandonment, in order to be entitled to the benefit of the exemption, obviously follow from the rule. There remains, therefore, in this case, only the question whether the defendant has waived his right to claim exemption, and if not, whether the surrender of his interest, as tendered in his answer and upon the trial, was in such form and at such time as to effect his release from liability to the libellants. A citation or two from Caumont (Dictionnaire de Droit Maritime) will show authority which renders easy the decision of these questions. Says Caumont (title "Abandon," 87), "on principle, since the law fixes no limit of time for the surrender, it follows that the ship-owner, as long as he has not renounced his legal right expressly or tacitly, can make this surrender at any time and at any state of the cause, after the ship has foundered (Brussels, 31st of July, 1858), or been totally lost (Paris, May 24, 1862), or seized (Marseilles, June 30, 1828), or sold after a misfortune at sea (Bordeaux, Aug. 9, 1859)." Again, in section 91, decided (1) * * * and (2): "that the law fixing no limit for the exercise of the right of surrender, it ought to be admited, as long as no fact has intervened from which one can infer that the owner has renounced the exercise of his right. Such a renunciation cannot be inferred from a defence on the merits, if the surrender has been proposed by the same pleading as the defence on the merits." Cass., 31 Dec. 1856. The sale above alluded to must be a judicial or official and adverse sale, for the same author, in section 93, says: "The surrender may be proposed after a judicial sale. In authorizing the owner to free himself by a surrender, the legislature has wished to preserve the land fortune of the owner. This privilege is principally useful to him when events have made the expedition profitless. But the sale of the ship must be the consequence of fortune of the sea. If the sale was the consequence of the choice of the owner, the intention to renounce the right to surrender may be inferred." Bordeaux, Aug. 9, 1859.

These statements of the rule of the maritime law as applied in the maritime courts

of France may with safety be taken to show the understanding of the rule by maritime nations; and they will, I think, be found to be supported by accredited writers, whose works courts of this country have often considered to furnish sufficient evidence of the law.

According to the law, as above stated, it cannot be held that the defendant's tender of his interest in the vessel was defective in form, or having been made in the answer was too late in time, provided the right to abandon had not been lost, and an abandonment was then possible. "As to the form of surrender, the law has made no provision. It may be made by declaration before a notary signified to the creditors, or by a simple notice sent by an officer (exploit d'huissier), or even in the plea made by the owner to defeat the action constituted against him." Des Capitaines, Maitres, et Patrons, by Eloy and Guinand, p. 722.

But there remains a fatal difficulty for the defendant, viz. that when he made his tender he had no interest in the vessel to abandon. The undisputed evidence is, that on April 1, 1876, after the filing of the libel in this cause, and before the filing of the answer, the vessel (there was no freight) was sold by the defendant, and then passed into the possession and ownership of other parties. The vessel was not condemned and sold by process of law, nor was she abandoned to the underwriters and sold by them: but the sale was a voluntary act of the owners, and it transferred the ownership as well as the possession of the property to third parties, and without notice to these libellants. Even the proceeds have been in part made use of. It was not possible, therefore, for the defendant to surrender the vessel when he attempted to do so, for he had then no interest in her capable of being surrendered. This sale of his vessel, under such circumstances, not only warrants, but compels the inference, that there was an intentional waiver of the right to claim exemption from personal liability beyond the ship and her freight, and renders it impossible for the defendant now to obtain the limitation of liability that he seeks. As to the effect of a sale of the ship by the owner upon his right to exemption, see Bedarride, Com. du Code de Commerce, livre 2. Droit Maritime, tome, 1, §§ 290, 291, 293.

There must, therefore, be a decree in favor of the libellants for the full amount of the damage by them sustained.

[The application of the respondents for leave to file amended answer was subsequently denied. Case No. 13,930. On appeal from the decree of this case, allowing full damages for libellants, it was held that the Great Western was liable for the proceeds of the wreck, amounting to $1.796.14, and a decree given for that amount and interest, and for the costs of the libellants in this court. 12 Fed. 891. Appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 118 U. S. 520, 6 Sup. Ct. 1172.]

Case No. 13,930.

THOMASSEN et al. v. WHITWELL et al.

[9 Ben. 458.] [1]

District Court, E. D. New York. April, 1878.

SHIPPING—LIMITATION OF LIABILITY—PRACTICE—AMENDMENT OF PLEADINGS AFTER DECREE—LACHES.

1. A decree of the district court cannot be opened and an amended answer allowed to be filed on the ground that since the rendition of the decision of the district court, it has been ascertained that prior to such decision, the circuit court for the district had rendered a decision upon the point at issue conflicting with the decision of the district court. The proper course in such a case is to take an appeal, and so test the correctness of the conclusion arrived at by the district court.

2. A party seeking to take advantage of the statutes of the United States limiting the liability of ship-owners, cannot do so by answer. The proper method is to institute an independent proceeding under the general admiralty rules of 1872 (Rules 55–58).

3. It is not necessary to obtain leave of the court to institute the proceeding required by the admiralty rules under the statute providing for limitations of liability.

[This was a libel in personam by Jens Thomassen and Julius Smith, owners of the Norwegian bark Daphne, against Mark Whitwell & Co., owners of the British steamship Great Western, for damages on account of collision. The case was first heard upon application to dismiss for want of jurisdiction on account of all parties being aliens. The application was denied. Case No. 13,928. The respondents claimed, upon hearing, a right to exemption from personal liability upon abandonment of ship and freight. This was denied by the court upon the ground that they had parted with all title to the vessel before their tender of abandonment, and consequently had nothing to abandon. There was a decree in favor of libellants for full damages Id. 13,929. The case is now heard upon application for leave to file amended answer.]

C. Van Santvoord and Henry T. Wing, for libellants.

R. D. Benedict and Foster & Thomson, for respondent.

BENEDICT, District Judge. This case comes before the court upon an application for leave to file an amended answer and to have the cause retried.

The action is brought to recover damages for a collision that occurred on the high seas between two foreign vessels. It has already proceeded to a hearing upon pleadings and proofs, and a decree has been rendered whereby it was adjudged that the libellant is entitled to recover of the defendant the amount of damages caused by the collision in the pleadings mentioned, and it was ordered that a reference be had before a com-

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

missioner, to ascertain and report the amount of such damage.

Upon the hearing so had, among other questions decided was one relating to the limit of the defendant's liability. In re Thompson [Case No. 13,929]. At that hearing it was not contended on the part of the defendant that the statute of the United States limiting the liability of ship-owners (Rev. St. § 4283), had any effect upon the rights of these foreigners; on the contrary, the defendant insisted that neither of these parties could take the benefit of our statute, for the reason that the collision occurred beyond the territorial limits of the United States, and between two foreign vessels, and that the extent of the defendant's liability was to be determined according to the rule of the general maritime law. No decision of any court of the United States bearing upon the question of the effect of our statute in such a case was cited upon the hearing, and this court decided, first, that the general maritime law must govern such a case; and second, that by that law the defendant had waived his right to a limitation of his liability.

Pending the reference directed by the decree above mentioned, the defendant now applies to this court to open the decree and allow him to file an amended answer asking the benefit of the statute of the United States (Rev. St. U. S. § 4283), or to file a petition or libel to obtain the benefit of that statute and that the cause be thereupon heard anew.

The sole ground of this application is that, since the rendition of the decision of this court, it has come to the knowledge of the advocate of the defendant that, prior to such decision, it had been decided by the circuit court for the Southern district of New York, in the case of Levinson v. Oceanic Steam-Nav. Co. [Case No. 8,292], that the statute of the United States applied in all cases, which decision, it is contended, is controlling authority upon this court, and requires this court to determine the extent of the defendant's liability according to the statute of the United States.

In passing upon this application, I do not find occasion to examine the precise extent of the decision of the circuit court in the case of Levinson v. Oceanic Steam-Nav. Co. [supra] S. D. N. Y. Jan. 25, 1876, and certainly none to discuss the legal effect of that decision as authority binding upon this court. The existence of such a decision, it not having been reported, was unknown when this court made its decree. Had that decision been brought to the attention of this court before the rendition of a decision, it would certainly have received that careful consideration which the learning and ability of the judge who delivered the opinion must always compel, and no attempt would have been made to avoid the legal effect of his adjudication. But a different question is presented by the citation of that decision at the present stage of this case, when, before consideration can be given to it, a formal decree regularly entered must be set aside, and as the motion implies, an amendment of the answer permitted. Such a question can only be determined according to the legal rights of the parties, and not by reference to the wishes of this court to avoid a seeming disregard of the decision referred to.

The relief here sought cannot be granted unless some fact appears that furnishes legal ground for setting aside the decree and awarding the defendant a new trial upon an amended answer. The only fact relied on as such ground is that the attention of the court was not called to a decided case, which, it is supposed, would have been decisive of this case, the existence of such a decision being at the time unknown to the advocate. Such a fact does not, in my opinion, furnish just ground for depriving the libellant of the benefit of the decree which he has obtained. The proper course is to take an appeal and so try the correctness of the conclusion arrived at by this court.

Furthermore, this is an application for leave to take advantage of the statute of the United States limiting the liability of ship-owners, by an answer to be filed in this cause, and as a defence to the action brought by the libellant. But, in my judgment, the proper if not the only method by which to take advantage of the statute is to institute an independent proceeding. I have, in other cases, taken occasion to express the same opinion, and I now add a few remarks to what I have already said on former occasions

As I view the statute, while adopting the rule of the maritime law in respect to the limit of the ship-owner's liability, it also intended to require the taking of certain proceedings, in order to secure the benefit of the statutory limitation. This appears in section 4283, where provision is made for "appropriate proceedings in any court," meaning thereby, as the next section shows, "any court of competent jurisdiction." The supreme court of the United States (Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104) has decided that neither the circuit courts of the United States nor the state courts have jurisdiction to conduct those necessary proceedings, and that the district courts, as courts of original admiralty jurisdiction, have such authority, and they further say that when the proper proceedings have been taken such proceedings may be plead in bar to any action brought against the ship-owner.

Moreover, the supreme court, by the general admiralty rules of 1872 (Rules 55–58), have gone further and declared what proceedings are the appropriate proceedings required by the statute, and plainly intend that the proceedings described in the rules,

and no others, should be resorted to in order to secure the limitation provided for by the statute. Those rules described a proceeding independent of any pending action, and do not contemplate interposing the statute by way of defence. Thus rule 54 requires a libel or petition in which the limitation of liability is to be claimed and the proper relief prayed for. Upon this libel or petition a monition is to issue directed to all persons claiming damages arising out of the same disaster. These are provisions for the commencement of an action by the ship-owner, not for defending an action commenced against him. Rule 57 provides for the filing of the libel in any district where the ship has been libelled; but contains no language to indicate that when the ship has been libelled the proceeding is to be made a part of such action. It can hardly be that this rule would have been worded as it is if the intention had been to permit the proceeding to be taken by way of answer to the pending suit. It is true that rule 56 gives to the ship-owner the right to contest his liability or the liability of his ship in the proceeding taken by him, and that by virtue of this rule every proceeding to take advantage of the statute may, at the option of the ship-owner, be made to involve a determination of the facts and circumstances upon which his liability depends. But although the ship-owner may thus by his own proceeding compel an adjudication upon his liability as against all who assert such liability and at one time, it does not follow that he should be permitted to convert an action instituted by a single creditor for the simple purpose of an adjudication upon his liability to him alone into such a proceeding.

The remark in the opinion delivered in Norwich Co. v. Wright that the proper course would seem to be to file a petition either with or without an answer to the merits (13 Wall. [80 U. S.] 125), does not necessarily imply that the petition should form part of an answer, or that the proceeding by petition is to form part of a pending suit against the ship-owner for damages; and, besides, the formal rules promulgated subsequent to the delivery of the opinion must control the language of the opinion to which reference has been made.

It should also be remarked that in that very case, where the action was against the ship-owner, it was sought to secure the benefit of the statute by a petition filed in that cause and that the supreme court did not uphold that method of procedure; but directed the ship-owner to take an independent proceeding for the purpose of securing the benefit of the act; which independent proceeding was thereafter taken and upheld by this court as having been directed by the supreme court.

The practice since the promulgation of the rules, in this district at least, has always been to institute a separate proceeding. See Place v. The City of Norwich [Case No. 11,202]; The City of Norwich [Id. 2,762]; The Epsilon [Id. 4,506]; In re New York & W. Steamship Co [Id. 10,200]. In the case last cited the opinion delivered by this court contained the following observation: "The proceeding under the statute and the general admiralty rules has been treated as wholly distinct from any action in rem that may be pending, and it takes effect upon such action only by means of the restraining order authorized by rule 54." Upon appeal to the circuit the decision of this court in this case of New York & W. Steamship Co. [supra] was affirmed; and the observation just quoted, it would seem, was approved, otherwise it could hardly have escaped criticism.

Of course it is not intended to be intimated that where appropriate proceedings have been instituted according to the rules, and the limitation of the ship-owner's liability has been declared therein, the decree so made may not be plead in any action brought to enforce such liability. My intention on this occasion is simply to decide that the proper method of securing the advantages of the statute under consideration is to institute an independent proceeding for that purpose, and for this reason also I refuse the present application so far as it looks to taking advantage of the statute by way of answer.

I notice the application includes a prayer for leave to file a libel or petition, but leave of the court is not necessary to institute the proceeding to obtain the benefit of the statute required by the admiralty rules. If the respondent be advised now to institute such proceeding doubtless he has the right to do so, and to obtain the decision of this court in that action, with the consequent right of review upon appeal, as in other cases, if the decision be adverse. The motion is therefore denied.

[On appeal from the decree of this court allowing full damages to libellants (Case No. 13,929), the circuit court held that the Great Western was liable for the proceeds of the wreck, amounting to $1,796.14, and gave a decree for that amount and interest, and for the costs of the libellants in this court. 12 Fed. 891. Appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 118 U. S. 520, 6 Sup. Ct. 1172.]

THOMASSON (UNITED STATES v.). See Cases Nos. 16,478 and 16,479.

THOMAS SPARKS, The (NELSON v.). See Case No. 10,115.

Case No. 13,931.

The THOMAS SWAN.

[6 Ben. 42.] [1]

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

SHIPPING — STEAMBOAT ACT — INTER-STATE COMMERCE—PENALTY—SECURITY OF PASSENGERS.

1. A steamboat, engaged in carrying freight between New Jersey and New London, Con-

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

necticut, while at New London, received on board a number of persons and carried them to Mystic Island in the state of Connecticut, for the purpose of a prize fight, and then carried them to Noank, in Connecticut. She was not provided with life preservers, &c., as was required by the 5th section of the act of August 30th, 1852 (10 Stat. 61), nor had her boiler been inspected, as required by the 9th section of that act. A libel was filed against her, to recover a penalty of $500 therefor: *Held*, that the power of congress to regulate commerce among the several states extends to the waters traversed by the steamboat, but that it is requisite that the vessel which is to be subject to such regulations as those alleged to have been violated, should be engaged in inter-state or foreign commerce.

2. This steamboat was not shown to have been so engaged, within the principles laid down in the case of The Daniel Ball (10 Wall. [77 U. S.] 557).

[Cited in Re Long Island, etc., Transp. Co., 5 Fed. 604.]

In admiralty.

Thomas Simons, Asst. Dist. Atty., for the United States.

Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. This suit is brought by the United States against the steam propellor Thomas Swan, to recover the sum of $500, as a penalty. The libel of information alleges, that, on the 2d of March, 1870, the Thomas Swan, being a vessel propelled in whole or in part by steam, was navigated, with passengers on board, at and from the port of New London, in the state of Connecticut, without complying with the terms of the act of August 30th, 1852 (10 Stat. 61), in this, that she was then and there navigated, with passengers on board, not being provided with life preservers, and floats, and fire buckets, and axes, as required by the 5th section of said act, and also in this, that she was then and there navigated with passengers on board, without having been inspected, as required by the first subdivision of the 9th section of said act, contrary to the first section of said act; and that thereby the said vessel became subject to a penalty of five hundred dollars, and to be seized and proceeded against summarily, by way of libel, therefor, in this court The libel prays for a decree for the said penalty against the vessel, and for her condemnation and sale to satisfy the amount of the penalty.

The answer excepts to the libel, and alleges the following grounds of exception: (1) The libel does not show a cause of action against the vessel; (2) it is not set forth in the libel, that the alleged carrying of passengers was any except between ports in the same state and in the internal commerce thereof; (3) the libel does not set forth any cause of action, or carrying of passengers, on waters, or in a business, over which the United States had or has jurisdiction. As matter of fact, the answer avers, that, on the day stated in the libel, the vessel was, against the will of her master and owner, taken possession of by a mob, and used by such mob to carry them from New London, in the state of Connecticut, to Mystic Island, in the same state; that such transportation was against the wish and desire of the master, owner and authorized agent of the vessel, and against their rights; and that, for such acts of violence, neither the vessel nor her owner, who is the claimant, is responsible. The answer also states, as a ground of exception to the libel, that the libel does not allege that any suit or prosecution has ever been commenced or attempted, or any penalties found, against any person or persons who committed any of the acts alleged in the libel, and that, therefore, no lien exists against the vessel.

The libel alleges a seizure of the vessel, before suit brought, on waters navigable from the sea by vessels of ten or more tons burden, and within this district.

The 5th section of the act of August 30th, 1852, provides, hat "every such vessel, carrying passengers," that is, as defined in the 1st and 3d sections of the act, every "vessel propelled in whole or in part by steam," and carrying passengers, shall be provided with a certain number of life preservers or floats, and fire buckets and axes, as specified in the 5th section. The 1st subdivision of the 9th section of the same act provides for the inspection once in every year, at least, by certain inspectors, of every steamer employed in the carriage of passengers. The 1st section of the same act provides, that if any vessel propelled in whole or in part by steam, shall be navigated, with passengers on board, without complying with the terms of that act, the owners thereof and the vessel itself shall be subject to the penalties contained in the 2d section of the act of July 7th, 1838 (5 Stat. 304). The penalties contained in that section are the forfeiture and payment to the United States of the sum of five hundred dollars, for which sum the vessel "shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence."

The answer raises the question whether congress has any power, by legislation, to regulate the carrying of passengers by a vessel under such circumstances as existed in this case. The Thomas Swan was employed, at the time in question, in the regular business of carrying coal, from Hoboken in New Jersey, to New London and Norwich in Connecticut, and in taking back to Hoboken such cargo as she could procure. She had no accommodations for passengers, no cabin for them, and was not in the business of carrying them. She had been to Norwich and discharged there some iron which she had taken from Hoboken. From Norwich she went to New London, and there discharged all the rest of her cargo, being coal. Her boiler was injured on her trip from Norwich to New London, and it was repaired while she lay at New London. On the occasion in

question she carried a large number of persons from New London, to an island called Mystic Island, below the mouth of the harbor of New London, and near the Connecticut shore, on which island such persons landed, the vessel remaining at a wharf at the island. The persons so carried were some of them actors in, and others of them spectators at, a pugilistic combat which took place on the island. Afterwards such persons reembarked on the vessel, and were taken by her to and landed at a place called Noank, on the main land of Connecticut. From there the vessel proceeded, without any passengers, to the city of New York, touching on the way at a wharf in the harbor of New London. The trip with the persons referred to, other than the proper crew of the vessel, was wholly within waters in the state of Connecticut.

The power invoked under which it is claimed that the legislation of congress can be held to apply to this vessel, while engaged in the transaction in question, is that conferred on congress by the eighth section of the first article of the constitution, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." There is no doubt, since the decision in the case of Gibbons v. Ogden (9 Wheat. [22 U. S.] 1), that the power to regulate commerce among the several states, comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States, which are accessible from a state other than that in which they lie; and that such power, so far as locality is concerned, extends to the waters traversed by the Thomas Swan while carrying the persons referred to, on the occasion in question. Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, 724; The Daniel Ball, 10 Wall. [77 U. S.] 557, 564. But, while the conferring of that power authorizes all appropriate legislation to insure the convenient and safe navigation of all the navigable waters of the United States, including the subjection of vessels to inspection and license, in order to secure their proper construction and equipment, yet the legislation is only authorized when it protects or advances inter-state or foreign commerce; and this requires, at least in respect to regulations like those alleged to have been violated in this case, that the vessel, to be subject to such legislation, shall be engaged in inter-state or foreign commerce. The Daniel Ball, supra; The Bright Star [Case No. 1,880].

Was the Thomas Swan engaged in inter-state or foreign commerce, in respect to the carrying of passengers, on the occasion referred to? In the case of The Daniel Ball supra, a penalty was sought to be recovered against the vessel by the United States, because she had not been either licensed or inspected, as provided by the said acts of 1838 and 1852. It was set up, as a defence, that the vessel was engaged solely in domestic trade and commerce within the state of Michigan, and was not engaged in trade or commerce between two or more states, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed. The license was required for a vessel transporting merchandise or passengers; the inspection, for a vessel carrying passengers. The Daniel Ball was employed in transporting merchandise and passengers on a route wholly in the state of Michigan. Some of the goods she carried were shipped on her for places in other states than Michigan, and some came from other states, and were destined for places within the state of Michigan. She was a common carrier on the route on which she ran, although she did not run in connection with or in continuation of any lines of transportation beyond her route. The supreme court held, that, so far as the vessel was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan, and destined to places within that state, she was engaged in commerce between the states, and was subject to the legislation of congress. The ground of the decision was, that the vessel was employed as an instrument of commerce between the states—commerce between the states, in any commodity, commencing whenever such commodity has begun to move, as an article of trade, from one state to another—and that the fact that several different and independent agencies were employed in transporting the commodity, some acting entirely in one state, and some acting in two or more states, did not affect the character of the transaction, but each agency was subject to the regulation of congress to the extent in which it acted in such transportation.

I do not think the Thomas Swan is, on the evidence, brought within these principles. It is not shown that she transported any passenger whose destination was, in any proper sense, from any place without the state of Connecticut to Mystic Island, or from Mystic Island to any place without the state of Connecticut. She was not, in any proper sense, an instrument in carrying passengers from without the state of Connecticut to Mystic Island, or from Mystic Island to any place without the state of Connecticut. Nor is there any evidence that any passenger she carried was transported, in any proper sense, by her agency, from without the state of Connecticut to Mystic Island, or from Mystic Island to any place without the state of Connecticut. No circumstance like the buying of a ticket for transportation, though by different agencies, from any place without the state of Connecticut to Mystic Island, or from Mystic Island to any place without the state of Connecticut, on the part of any passenger carried by the Thomas Swan is shown. Nor is it shown that any person she took to Mystic Island had any destination to Mystic Island at any time while such person was

outside of the limits of Connecticut. The only tickets shown to have been sold connected with any transportation to Mystic Island, were tickets sold at New London, which entitled the buyers to transportation to Mystic Island and back to a point in Connecticut. The fact that the persons who returned from Mystic Island to the main land in the vessel, intended to go to places outside of Connecticut, cannot affect the question.

The libel must be dismissed.

THOMAS SWAN, The (UNITED STATES v.). See Case No. 16,480.

THOMAS SWANN, The (LUCAS v.). See Case No. 8,588.

THOMASTON MUT. FIRE INS. CO. (BABSON v.). See Case No 704.

Case No. 13,932.

The THOMAS TURRALL.

[6 Ben. 404.] [1]

District Court, E. D. New York. March, 1873.

HALF PILOTAGE—TENDER.

1. A Hell Gate pilot, on board of a vessel, claimed to have tendered his services as a pilot to a brig, which he was passing. He alleged that his services were refused, and filed a libel to recover half pilotage. His evidence of the refusal was contradicted by two witnesses from the brig: *Held*, that, as there were other witnesses to the alleged refusal, who were not called, nor their absence accounted for, the libellant was not entitled to a decree on such a state of the proofs.

2. Whether such a tender of services by a pilot is sufficient to entitle him to half pilotage, quære.

In admiralty.

F. A. Wilcox, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. This case presents a question of fact, upon which the libellant's right to recover depends, and that is whether the libellant's tender of his services as a Hell Gate pilot for the brig Thomas Turrall, was refused by the master of that brig.

The refusal being denied, it was incumbent upon the pilot to substantiate his claim by a preponderance of evidence, but the case has been presented to me upon the testimony of the pilot alone, as opposed to the testimony of two witnesses from the brig. It appears that there were other witnesses to the alleged tender and refusal, but they are not called, nor their absence accounted for.

Upon such a state of the proofs, the libellants cannot have a decree, and the more because the alleged tender of service is conceded to have been made by the pilot while he was on board another vessel, at the time passing the brig here proceeded against. Words exchanged between persons so situated might well be misunderstood, and a tender and refusal made under such circumstances, if relied upon, should be fully proved.

I must therefore dismiss the libel for want of preponderating proof of the averments it contains, and it becomes unnecessary to determine the question, whether a tender by a pilot of services, sufficient to afford foundation for a charge of half pilotage, within the meaning of the law, can be made without an actual presence at the side of the vessel sought to be piloted, with the intention and present ability at once to enter upon the service if accepted. Let the libel be dismissed, and with costs.

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

THOMAS WALKER, The (McCORKER v.). See Case No. 8,716

Case No. 13,933.

The THOMAS WATSON.

[Blatchf. Pr. Cas. 120.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—EVIDENCE TO ESTABLISH—TIME GIVEN.

1. The libel charged that the vessel, while attempting to violate the blockade, was burned, and that part of her cargo was saved as prize, but no proof was given in support of the libel. The court allowed the libellants thirty days to produce evidence, failing which the libel to be dismissed.

2. Where the testimony of witnesses from the delinquent vessel is dispensed with, adequate proof must be supplied, aliunde, of the delictum charged, before a condemnation will be awarded.

In admiralty.

BETTS, District Judge. In this case a parcel of merchandise of small value is libelled as prize on the allegation that it was part of the cargo of the ship Thomas Watson, which, in attempting to violate the blockade of the insurgent states, was run on shore, set fire to, and burned, and that this portion of the cargo was taken from the said ship by the naval forces of the United States, and sent to this port in the United States ship Vandalia, for adjudication. It was here libelled by the United States for forfeiture, and arrested by the marshal, under process therein, as prize of war. The property is still held by the marshal on that arrest, and due return is made by him of the seizure, and of public notice thereof. No claim or intervention is made in court for the property, and no proofs are given supporting the charges of the libel. Although, in cases of absolute necessity, proceedings in prize may be prosecuted to effect without the observance of the formalities required by the prize rules, and the attendance and testimony of witnesses from the delinquent ship may be dispensed with, yet adequate

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

proof must be supplied, aliunde, of the delictum charged, to enable the court to sustain the accusation. Jecker v. Montgomery, 13 How. [54 U. S.] 198, and 18 How. [59 U. S.] 110. There is no legal proof that the lost vessel committed the offence alleged, or that this parcel of goods was part of her cargo. There is, therefore, no foundation laid for the exercise of prize jurisdiction over it.

The libellants will be allowed a reasonable time to furnish evidence of these facts, and, if they fail to produce such within thirty days from the entry of this order, the suit will be dismissed as not brought within the cognizance of the court. Order accordingly.

THOMEE (KOONES v.). See Case No. 7,926.

THOMES (UNITED STATES v.). See Cases Nos. 16,481 and 16,482.

THOMPKINS (UNITED STATES v.). See Case No. 16,483.

Case No. 13,934.

Ex parte THOMPSON.

[1 Flip. 507; 15 Am. Law Reg. (N. S.) 522; 9 Chi. Leg. News, 19; 1 Cin. Law Bul. 235; 24 Pittsb. Leg. J. 47.] [1]

District Court, W. D. Tennessee. Feb. 24, 1876.

HABEAS CORPUS—IN STATE CUSTODY—INDICTMENT FOR LARCENY—TAKING UNDER FEDERAL REPLEVIN—WRITS.

1. Under the writ of habeas corpus the courts of the United States have power to discharge persons while under arrest by state officers, if it appears that they are held in custody under a state law which attempts to punish them for executing a law of the United States, or where the act for which they are held was done under process of a federal court.

2. If, however, a party be in the custody of an officer of the state government under an indictment for larceny, and as a justification for the act complained of sets up the fact of the issue of a writ of replevin from the United States court, the last named court on habeas corpus will inquire into the facts: and if it should appear that the writ was obtained fraudulently, with the purpose of carrying off property, the court will remand the relator to the custody of the state officers.

3. Where a writ is on its face regular, it is a justification to the officer to whom it is addressed for everything he may lawfully do under it; but a party who has procured a writ by fraud, does not come within the rule.

Waddy Thompson was arrested for larceny and for horse stealing by the grand jury of Shelby county. There were several indictments. This writ was issued, directing his body to be brought before the judge then holding the term of the federal court. The sheriff produced the relator, and returned that he held him on the indictments. Thompson claimed that he was the agent of his mother-in-law—one Mrs. Wilkerson, of St. Louis—and acting with an attorney of that city—one Arnett—had been endeavoring to obtain possession of certain goods and chattels unlawfully detained by parties at Memphis; that Arnett made the oath required by the statute, gave a bond with Elijah Smith and Benjamin F. Carroll as sureties; that thereupon process was issued to the marshal requiring him to take possession of the property mentioned therein, and deliver to plaintiff or her agents; that a part of the goods thereunder were taken and delivered to Arnett; that Hendrix, one of the defendants, then made oath before the clerk of the court that the bond given was insufficient, and obtained an order from the district judge which suspended further proceedings; that horses and other property taken into possession by Arnett had been placed aboard a steamer to be delivered to his principal in Missouri; that after said boat had been landed on the Arkansas shore, a short distance above Memphis, Hendrix, with a body of armed men, came on board, and by intimidation induced Arnett and the relator to return the property to them, under an agreement, however, that the title to same should be settled by civil suits then pending. Relator further alleged that, notwithstanding the writ had been regularly issued and executed, the defendants in the suit of replevin had procured indictments against himself and Arnett, and against the sureties, for perjury and larceny; that they were intended to hinder and delay his principal in prosecuting her replevin suit, and to oust the circuit court of the United States of its rightful jurisdiction, and to force the plaintiff into the state court, where it was hoped to obtain an undue advantage over her by reason of local influence; that after relator had given bonds for his appearance on the trial of these indictments, Hendrix, Carter & Co., defendants in replevin suit, had commenced an action against him and his principal for malicious prosecution. It was further alleged that the criminal court of Shelby county had no jurisdiction in the case; that he was unjustly restrained of his liberty; and if guilty of any wrongful act whatever, it was against the peace and dignity of the United States. Relator claimed that the federal court had exclusive jurisdiction in the matter, and that he had been guilty of no crime whatever. The facts, however, did not support the allegations of relator. It was shown that the sureties in the replevin suit were perfectly worthless, and the facts looked strongly towards a deliberate attempt on the part of Thompson to possess himself of the property in controversy, and dispose of it before it could be reclaimed, or any legal questions affecting the title could be disposed of. After other property had been taken by the marshal into possession, the order came suspending further proceedings.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 24 Pittsb. Leg. J. 47, contains only a partial report.]

T. W. Brown, W. C. Folkes, and J. J. Du Bose, for relator.

L. E. Wright, L. B. Horrigan, and L. B. McFarland, contra.

BROWN, District Judge. It is claimed by the relator that as the sheriff made no answer to the facts set forth in this petition, they are to be taken as true, and that he is therefore entitled to his discharge. I think, however, he misapprehends the law on this point. The petition is simply the basis upon which the writ is issued. No copy of it is required to be served upon the respondent in the writ, who is required to make his return to the writ itself, and not by way of answer to the petition, which has performed its office as soon as the fiat is signed. A return may be traversed or confessed by way of affidavit or oral testimony, but I know of no practice requiring an answer to be made to the petition itself. It would have been proper for the relator to confess and avoid the return by repeating in his denial the facts set up in the petition. This is evidently contemplated by section 760, hereafter quoted, though I know of no practice requiring it to be done. The testimony was taken as if the issue had been made upon the return, and as no objection was interposed to this course until the argument of the case, I shall proceed to dispose of it as if an issue had been made by the pleading.

By section 753 of the Revised Statutes, "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody * * * for an act done or omitted, in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof." Although the words used are those of exclusion, there is no doubt of the power of this court to issue a writ of habeas corpus in cases falling within the above provisions.

By section 754, application must be made "by complainant in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

By section 760, the petitioner "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath."

By section 761, the judge "shall proceed, in a summary way, to determine the facts in the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require."

The section first above quoted is substantially a re-enactment of the act of 1833, commonly known as the "Force Bill" [4 Stat. 634], and was adopted in view of the nullification laws of South Carolina, by which an attempt had been made to punish officers of the United States for executing the laws of congress within that state. But it is now settled that this act gives relief to one in state custody, not only when he is held under a law of the state which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the state which applies to all persons equally, where it appears he is justified for the act done, because done in pursuance of the process of a United States court. U. S. ex rel. Roberts v. Jailer [Case No. 15,463]. At the same time the power given to the federal courts thus to arrest the arm of the state authorities, and to discharge a person held by them, is one of great delicacy, and should only be exercised where it clearly appears that justice demands it. Such power has rarely been invoked, except under circumstances tending strongly to show that the state was about to use its authority to oppress the party imprisoned in defiance of the laws of the general government. Nothing could render the act more justly odious than to permit the writ of habeas corpus to be employed to relieve a party from the legal consequences of crime against the sovereignty of a state.

If it appears, however, that the relator was justified by the process of this court in doing what he has done, the sections above quoted authorize and require his discharge. The testimony, taken at considerable length, reveals substantially the following facts:

The relator, who was a son-in-law of Mrs. Wilkerson, holding a general power or attorney from her, came to Memphis from Missouri in the month of October, 1874, accompanied by one Arnett, an attorney-at-law at St. Louis, for the purpose of asserting her claim to the property covered by the writ of replevin. With the view of hastening the disposition of the case, it was conceded by the learned counsel for the state that the relator, in good faith, supposed that Mrs. Wilkerson was entitled to the possession of the property covered by the writ. On arriving at Memphis, he and Arnett put up at the Commercial Hotel, where they first met Carroll, who afterwards became one of the sureties upon the replevin bond. * * *

(The means used for obtaining worthless securities on the replevin bond were criticised at this place by his honor.)

After one or two ineffectual efforts he finally procured the services of an attorney, who drew an affidavit sworn to by Arnett, claiming the possession of the stock of liquors and safe and contents in the store of Hendrix, Carter & Co., the entire stock in trade of a firm of nurserymen, and three horses belonging to parties not connected in any way with the other defendants, though the horses had been purchased of Hendrix, Carter & Co. It may also be observed here that Hendrix, Carter & Co. were in no way connected with the owners of the nursery, and that plaintiff proceeding properly would

have been compelled to bring at least three, and probably four or five, separate suits to obtain possession of these distinct parcels. Upon this affidavit a sweeping writ of replevin was issued against defendants, commanding the marshal to take possession of all the property named in the writ, and to deliver the same to the plaintiff or her agent. Taking Arnett and his two sureties to the clerk's office, a bond was signed, prior to the issuing of the writ, by Arnett, as attorney for the plaintiff, by Homer B. Carroll, signing his name as Benjamin F. Carroll, and by Elijah Smith, whose true name, and, indeed, whose very existence is unknown. Each of these sureties swore that he was worth the sum of $30,000 in real estate in Shelby and Tipton counties. This was done in the presence and by direction of Thompson, who knew perfectly their utter insolvency. Shortly afterwards, Arnett advised Carroll to get out of town as soon as possible, which he proceeded to do by hiring a skiff to take him across the river. To secure the speedy service of the writ and transportation of the property, relator hired a steamboat plying between Memphis and Mound City, Arkansas, to wait over her usual time of departure, promising to pay ten dollars an hour for her detention. Deputies were dispatched from the marshal's office to different parts of the city where the property covered by the writ was lying. Six furniture wagons were sent to the nursery, and about a thousand pots of flowers, besides knives, forks, and spoons, and other articles, were loaded upon them and hurried away to the steamer, which was lying in waiting to take them across the river. Several horses were seized by another deputy, who at once drove them on board the steamboat. Fifty or sixty drays were sent to the store of Hendrix, Carter & Co. for the purpose of removing their entire stock in a similar way, and loading it upon the boat. The relator formerly had a desk in their establishment, knew the office hours of the partners, and instructed the marshal not to go there until the bookkeeper had gone away and locked the safe, and the steamer was on the point of departure. When the marshal announced his intention to Hendrix of seizing all the goods in his establishment, Hendrix asked for a little time, went to the clerk's office to look at the bond, satisfied himself the sureties were insolvent, and made affidavit of the fact, when the district judge was telegraphed to to stop the proceedings.

The marshal refused to place the property on the boat, but put custodians in charge during the night. His suspicions were excited none too soon. Great anxiety was manifested by Thompson to get possession of his stock, but finding himself foiled, the boat was compelled to put off without it. It proceeded to Mound City about sun down, with Thompson, Arnett, and Carroll, who had dismissed his skiff, on board. After arriving at Mound City, some of the defendants made up a party, hired a steam tug, went in pursuit, and compelled the return of the property. (That is, the property on board—knixes, forks, mules, etc.—not the stock of Hendrix, Carter & Co., as that was not on board.—Rep.) Relator afterwards returned to Memphis, saw the counsel employed by Hendrix, Carter & Co., confessed to him the bond was bogus and fraudulent, said they had him where he meant to get them, and promised if they would let him out he would furnish information to hold the clerk and marshal. I take pleasure in saying there is not the slightest evidence to show that these officers or their duputies acted corruptly or in bad faith, although in view of the magnitude of the bond a little more care in approving it would have been commendable. The writ of replevin was soon after dismissed, and his claim to the property abandoned.

This is but a bare outline of the facts fully proved—facts which the relator made but feeble attempt to deny. I am forced to the conclusion that it is a case of gross and infamous fraud practiced upon the court.

It is claimed by the relator, however, that admitting this to be true, he is still entitled to his discharge, inasmuch as the writ of replevin was valid upon its face. There is no question that a writ valid upon its face will protect the officer executing it, notwithstanding it may have been irregularly issued, or may be voidable for want of jurisdiction. There is a clear distinction, however, between the officer who executes the writ and the party who procures it to be issued; as against the latter, it may be shown to be void from facts not appearing upon its face. From a multitude of cases drawing this distinction, I cite the following:

Savacool v. Boughton, 5 Wend. 173; Loder v. Phelps, 13 Wend. 48; Adkins v. Brewer, 3 Cow. 206; Whitney v. Shufelt, 1 Denio, 594; State v. Weed, 1 Fost. [N. H.] 262; Rogers v. Mulliner, 6 Wend. 597; Taylor v. Trask, 7 Cow. 249.

By the Code of Tennessee, before a writ of replevin can be issued, a bond must be filed in double the value of the property covered by the writ. Whether the writ is totally void without such bond, it is perhaps unnecessary to consider. There is no doubt that a writ of attachment issued without such bond, where the statute requires it, is wholly void (see Drake on Attachments, etc.): and it is presumed that the same rule would be held to apply to writs of replevin, although in some states, where a bond is not required before the issuing of the writ, it is held that the writ is not thereby invalidated if the bond is executed before the property is delivered to the plaintiff. There is a clear distinction between the statutes which require the bond to be executed be-

fore the property is delivered over, and those which require it before the issuing of the writ. In this case no bond was ever given. It is not merely a case of insufficiency of sureties, which may be renewed by order of the court. The relator procured the execution of the bond by sureties whom he knew to be utterly irresponsible, and at least one of whom forged the signature of a fictitious person.

The position assumed by relator is, that if the writ upon its face authorized the taking, which is the subject of the larceny for which he is indicted, he "is entitled to his discharge, notwithstanding the writ was procured by perjury, and used for the purpose of committing a larceny. Counsel cannot have fully apprehended the consequences of this doctrine. May a deputy marshal holding a capias of this court deliberately murder the party he is seeking to arrest? There is no general power in the federal courts to punish murder, and if discharged from the custody of the state, his crime would go practically unpunished. This court, I think, is bound to inquire into the legality of the use as well as of the validity of the process itself. This was the view evidently taken by the learned judge for the district of Kentucky in the Roberts' Case, above cited.[2]

In Com. v. Low, Thacher's Cr. Cas. 477, it was held that, if a man having a right of action makes use of a process which he knows he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny.

It is well settled that a combination of two or more to accomplish a lawful purpose by unlawful means is indictable as a conspiracy. Says Lord Hale, P. C. 507: "A. has the mind to get the goods of B. into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods If it were animo furandi, it is larceny." So Lord Coke, 3 Inst. 108: "If a man seeing the horse of B. in his pasture, and having a mind to steal him, cometh to the sheriff, and, pretending the horse to be his, obtaineth the horse to be delivered to him by replevin, yet this is a felonious and fraudulent taking."

I have not lost sight of the concession in this case, that relator supposed he was entitled to the possession of this property. The question here is not whether he was entitled to the possession of the property, nor whether he was guilty of larceny in obtaining possession, not even whether he was entitled to possession, but whether he was justified by his writ in obtaining this possession. Now, nothing is better settled in the law of trespass than that an officer entitled to levy upon property becomes a trespasser ab initio by an abuse of the process. I am satisfied in this case that the relator commenced this suit, not for the purpose of asserting a bona fide claim to the property, but of spiriting it away under the forms of law, and disposing of it before proceedings could be taken for its reclamation. It would be a strange interpretation of the law if, having been guilty of forgery, fraud, and subornation of perjury in procuring the process of this court, he could still claim to be protected by it in carrying out his schemes. I hold then, that, although the marshal was protected by this writ in what he did in execution thereof, yet as to the relator in this case it was fraudulent and void, and that so far from being entitled to protection by this court, his case should be laid before the next grand jury of this district for such action as it may see fit to take, and the district attorney is directed to see that this is done; provided, however, that no action be taken on any indictment until he shall have been discharged by a state court.

It results that the prisoner must be remanded to the custody of the sheriff of Shelby county.

[2] See Case of U. S. ex rel. v. Weeden [Case No. 14,412], where the ruling in the Roberts Case has been modified.

Case No. 13,935.

In re THOMPSON.

[2 Ben. 166; [1] 1 N. B. R. 323 (Quarto, 65).]

District Court, S. D. New York. Feb., 1868.

BANKRUPTCY — EXAMINATION OF BANKRUPT — DISCHARGE—ADJOURNMENT.

The pendency of an examination of the bankrupt is good cause for an adjournment of the proceedings, on the order to show cause why the bankrupt should not be discharged.

[Cited in Re Seabury, Case No. 12,573.]

[In the matter of John Thompson, a bankrupt.]

BY ISAAC DAYTON, Register:

[The order for creditors to show cause why the above bankrupt should not be discharged, being returnable on the 18th day of February, 1868, at eleven o'clock, the bankrupt with his counsel, Mr. E. More, appeared before me, and Mr. G. A. Seixas, duly appeared for the Merchant's Exchange Bank, a creditor having duly proved his debt, and having by letter of attorney duly authorized Mr. Seixas to appear, &c. An examination of the bankrupt, pursuant to an order of this court, is now going on before me, the same having been carried on and adjourned from day to day for several days, and having been this day continued and not concluded.

[Mr. Seixas thereupon requested that all proceedings upon the return of said order to show cause be adjourned, pending the examination of the bankrupt and others.

[Mr. More, on behalf of the bankrupt, objected to any adjournment on the ground that, unless Mr. Seixas should first enter his appearance under rule 24, it would be irregu-

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

lar to so adjourn the proceedings as to enable a creditor to enter his appearance in opposition to the discharge at a future day.

[Mr. Seixas claimed and insisted that an adjournment of the hearing and proceedings, upon the order to show cause, necessarily operates to extend the time for a creditor to enter his appearance in opposition, and that the rights of a creditor on the adjourned day of the order to show cause, are the same in all respects as on the return day.

[The opinion of the register is, that the pendency of the examination of the bankrupt constitutes good cause, under the 6th general rule, for adjourning the business of showing cause, and that such adjournment can properly be made without requiring the creditors to file an appearance under rule 24, objecting to the discharge. I accordingly adjourned the business to a day agreed upon by the parties. The bankrupt thereupon requests me to certify my opinion to the court, which I now respectfully do.][2]

BLATCHFORD, District Judge. The register was correct in his decision.

Case No. 13,936.

In re THOMPSON et al.

[2 Biss. 166; 3 N. B. R. 184 (Quarto, 45); 16 Pittsb. Leg. J. 85; 2 Am. Law T. 107; 1 Chi. Leg. News, 345; 1 Leg. Gaz. 46; 1 Am. Law T. Rep. Bankr. 137.] [1]

District Court, N. D. Illinois. July Term, 1869.

BANKRUPTCY — STOPPING PAYMENTS — CONSTRUCTION OF STATUTE—REFUSAL ON GROUND OF LEGAL DEFENSE.

1. In the 39th section of the bankrupt law [of 1867 (14 Stat. 536)], "has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," the word "fraudulently" should be construed as limiting "stopped" only, and the words "fourteen days" as applying only to the suspension, &c.

[Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402.]

[Cited in Lindsey v. Flebbe (Colo. App.) 38 Pac. 399.]

2. When the stoppage is fraudulent it is not necessary that it be continued, and a suspension of payment for fourteen days, though without any element of fraud, constitutes an act of bankruptcy.

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Soc., Id. 6,402.]

[Cited in Marble v. Jamesville Manuf'g Co. (Mass.) 39 N. E. 1002.]

[See In re Ballard, Case No. 816.]

3. A refusal on the ground of a legal defense, is not a stoppage or suspension within the meaning of the law.

In bankruptcy. This was an involuntary petition alleging that Thompson and McClallen committed an act of bankruptcy within six calendar months next preceding the date of filing the petition, in that they, being merchants, on the 2d day of January, 1869, suspended, and have not resumed payment of their commercial paper within the period of fourteen days, setting forth what the commercial paper was. Respondents filed a general demurrer.

Bentley & Hart, for creditors.

C. C. Bonney, for respondent.

DRUMMOND, District Judge. [This is a very important question undoubtedly, but it is one that has been before me on several occasions, and although there never has been an express adjudication on the point, still, incidentally, I have expressed an opinion as to the true construction of this clause of the bankrupt law; and inasmuch as I have a decided opinion upon it, I might as well state that opinion now, with some of the reasons upon which it is formed.] [2]

An objection is taken on the part of Thompson and McClallen that this is not an act of bankruptcy within the meaning of the law. The clause of the 39th section of the bankrupt law under which the question arises is this: "Or who, being a banker, merchant or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within the period of fourteen days."

That constitutes an act of bankruptcy on the part of any person who is within the conditions named, and the only question, as I conceive, is whether the word "fraudulently" applies to and qualifies the whole of the clause—whether it is to be read as if written: "who, being a banker, merchant or trader, has fraudulently stopped or fraudulently suspended, and not resumed payment of his commercial paper within the period of fourteen days," or whether it is to be read as if written in this way: "or who, being a banker, merchant or trader, has fraudulently stopped" payment of his commercial paper; or who, being a banker, merchant or trader, has "suspended and not resumed payment of his commercial paper within a period of fourteen days," applying the words "fourteen days" to the suspension only, and without the use of the word "fraudulently"; and I think the latter is the true construction. It would seem to be unreasonable to say that in order to constitute an act of bankruptcy, a merchant, banker or trader must stop during fourteen days by a continuous act of fraud. It would seem as though one act of fraud, by stopping payment of his commercial paper, committed by a banker, merchant or trader, should constitute an act of bankruptcy. There is no reason why there should be a continued fraud for the period of fourteen days, in order to constitute an act of bankruptcy; because where a merchant, banker or trader—and who is there-

[2] [From 1 N. B. R. 323 (Quarto, 65).]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 Leg. Gaz. 46, contains only a partial report.]

[2] [From 3 N. B. R. 184 (Quarto, 45).]

fore within the terms of the law—deliberately commits an act of fraud, by refusing to pay or by stopping payment of his commercial paper, he is in that condition where his creditors ought to have the right to call upon him to surrender his property for their benefit. He has acted dishonestly, and he should have his property administered in a bankrupt court.

And on the other hand, where he merely suspends the payment of his commercial paper, it was highly proper that some time should be fixed, within which, if he does not resume, it should be treated as an act of bankruptcy; because it was foreseen that he might suspend payment of his commercial paper, through accident, a particular emergency or exigency, which might be temporary in its character, as in consequence of the non-receipt of remittances, or of the non-arrival of a vessel, or from other similar causes, and therefore the law intended that if there was a suspension in consequence of any of these causes, it should not be treated as an act of bankruptcy unless it continued for a certain time; and inasmuch as it was the province of the law-maker to declare what that time should be, he, in his discretion has fixed the time at fourteen days.

But if a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension, as I understand it, within the meaning of the bankrupt law.

But where the paper is due and it is not paid because, without adequate legal excuse, he will not pay, or because he is unable to pay, and it is continued for the period of fourteen days, that constitutes an act of bankruptcy.

I am aware that different constructions have been given to this clause by different courts, but it seems to me that this is the only construction which is consistent with the general scope and spirit of the bankrupt law. The law ought to make no compromises with a fraudulent act, but if the construction contended for on the part of the defense is the true construction, then it does make terms with an act of fraud, and declares the fraud may be continued day after day, but, if less than fourteen, no act of bankruptcy has been committed.

I do not think that could have been the intention of the law-maker in the use of this language. It may be conceded that it is not so clear and distinct as it might have been; but we have to construe it with a view of carrying into effect the spirit of the law, and the construction which I have placed upon it I think best accomplishes that result. Demurrer overruled.

[For hearing on an application for a discharge, see Case No. 13,937.]

NOTE. Consult In re Shea [Case No. 12,729], and authorities there cited. That refusal to pay on the ground of a valid defense, claim or set-off is not an act of bankruptcy: In re Chandler [Id. 2,591]; M. & M. National Bank of Pittsburgh v. Brady's Bend Iron Co. [Id. 9,018]; In re Hercules Mut. Life Assur. Co. [Id. 6,402]; In re Munn [Id. 9,925].

Case No. 13,937.

In re THOMPSON.

[2 Biss. 481.] [1]

District Court, N. D. Illinois. March Term, 1871.

BANKRUPTCY — DISCHARGE — FIFTY PER CENT. CLAUSE—FAIR CASH VALUE—DIVIDENDS—EXAGGERATED SCHEDULE.

1. [Fifty per cent. clause] is not operative against a bankrupt, if the fair cash value of the assets turned over to the assignee is equal to 50 per cent. of the claims proved, on which he was liable as principal debtor.

2. The change made by the amendment of July 27th, 1868 [15 Stat. 227], clearly indicates that the discharge is not contingent upon the amount of dividend actually received by creditors.

[Cited in Re Waggoner, 5 Fed. 917.]

3. It seems—that if the bankrupt schedules the goods at an exaggerated value a creditor may resist the application, and introduce proof of the actual value of the goods turned over.

In bankruptcy.

Application by bankrupts for their discharge. On the 20th day of July, 1869, Wm. P. Thompson and Geo. H. McClallen were, as co-partners and individually, duly adjudged bankrupts by this court on creditors' petition. [Case No. 13,936.] An assignee of their estate was duly elected, and the estate transferred to him. The total amount of debts proved against the firm was $20,890.98, contracted after January 1, 1869, most of which were not due at the time proceedings were commenced. The indebtedness proved against the estate of Wm. P. Thompson amounted to $116.75, all of which was contracted prior to January 1, 1869. The debts proved against said McClallen individually amounted to $10,683.03, all of which were contracted prior to January 1, 1869, and had been paid by the proceeds of his separate estate. The firm assets, including the choses in action, were scheduled by the firm at nearly seventeen thousand dollars. The goods and fixtures were sold by the marshal, as messenger of the court, before the election of the assignee, and at the instance and request of the majority in number and value of the creditors; and the total amount realized by such sale, and also from collections, was about seven thousand five hundred dollars. The bankrupts took and filed in the case the evidence of several persons who were acquainted with their stock of goods and knew their value, showing that the value of said goods was fully equal to the amount stated in the schedule, and that the sale of said goods was made for much less than

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

half their fair cash value in the market. The actual value of the assets of the bankrupts was, therefore, more than equal to 50 per cent. of the debts proved against them; while the amount realized in money by the assignee for the payment of dividends to the creditors, fell far short of 50 per centum.

Bentley & Hart, for creditors.
Rich & Noble, for Thompson.
Bonney & Griggs, for McClallen.

BLODGETT, District Judge. The bankrupts now apply for a discharge, and the question is, are they entitled to a discharge on the facts as they appear on the record? No written consent of the creditors or any part of them to such discharge is filed.

By the provisions of the bankrupt act as originally passed, no person who was adjudged bankrupt after one year from the time the act took effect, was entitled to his discharge, unless his assets were sufficient to pay fifty cents on the dollar of his proved debts. But by the amendment of the 27th of July, 1868, the change between the original act and the law as it now stands amended, is noteworthy, and seems clearly to indicate that the discharge is not contingent upon the amount of dividend actually realized by the creditors if the fair value of the assets turned over to the assignee was equal to fifty cents on the dollar of the claims proved against him.

The assets must be equal to fifty cents on the dollar of the debts proved. This will not admit of a fictitious or exaggerated valuation of his assets by the bankrupt in his schedule or inventory; while on the contrary, if the assets are, at a fair and just estimate and valuation, equal to fifty per cent. of the debts proved, the bankrupt is not to be denied his discharge by reason of any sacrifice made by the assignee or creditors to convert the assets into cash, or because of the absorption of so large a proportion of the proceeds by expenses as to prevent the payment of fifty cents on the dollar.

In this case the assets taken by the marshal, at their fair cash valuation, amount to more that fifty cents on the dollar of the proved debts. And there is no objection interposed to the discharge on the ground that the assets were overvalued; but, on the contrary, the proof taken shows that the goods were worth all they were scheduled at, and that they were sold within a very few days after the proceedings were commenced, at the instance of a majority of the creditors, and against the protest of the bankrupts; so that if there was any loss on the goods, it was fairly chargeable to the creditors. Undoubtedly any creditor might resist the application for discharge on the ground that the assets surrendered did not bear the required proportion to the debts, and upon the issue thus made, proof of the actual value of the assets could be heard by the court.

But where no such objections are made, and the record shows assets equal in value to fifty per cent. of the debts proved, I think the discharge should issue, if no cause is shown to the contrary; and as no such cause is shown in this case, the discharges will be issued to the bankrupts respectively, on their taking the required oaths and otherwise complying with the rules provided for granting discharges.

NOTE. This rule applies to an involuntary as well as to a voluntary bankrupt. In re Bunster [Case No. 2,136]. The word "assets" in this connection construed. In re Freiderick [Id. 5,092]; In re Kahley [Id. 7,594]. The assets consist of the sum which remains after discharging all liens. In re Graham [Id. 5,661]. It is held in Re Borden [Id. 1,654] that in the absence of proof to the contrary the proceeds in the hands of the assignee will be taken to be the true value of the assets. By the amendment to this 33d section, approved July 14th, 1870 [16 Stat. 276], the fifty per cent. clause does not apply to debts contracted prior to January 1st, 1869. For such debts he may obtain a discharge without reference to this clause. In re Seay [Case No. 12,597]. Consult In re Kahley [Id. 7,593]; In re Lincoln [Id. 8,353].

Case No. 13,938.

In re THOMPSON.

[13 N. B. R. 300;[1] 2 N. Y. Wkly. Dig. 4.]

District Court, E. D. Michigan. 1876.

BANKRUPTCY—MONEY IN POSSESSION OF BANKRUPT—WHAT ENTITLED TO RETAIN.

1. Where the assignee petitions for an order that the bankrupt pay over to him the proceeds of a mortgage negotiated two days before filing the petition, *held*, that the bankrupt was entitled to retain therefrom: First. The amount paid his counsel for preparing his petition and schedules. Second. Such amount as the assignee should determine to be necessary for the temporary support of himself and family, not exceeding, with his furniture and other articles, the sum of five hundred dollars; but that he was not entitled to retain the probable expenses of procuring his discharge.

[2. Cited in Re M'Kenna, 9 Fed. 29, to the point that a summary petition by the assignee, and not a plenary suit, is the proper remedy against the bankrupt to recover property illegally withheld by him.]

[3. Cited in Re Jessup, 19 Fed. 96, to the point that the bankrupt, after filing his petition, has no right to sell any of his property even to raise money to pay lawful fees.]

On petition by the assignee, for an order that the bankrupt [James Thompson] pay over to him the proceeds of a certain mortgage, negotiated by the bankrupt prior to his adjudication. Thompson was adjudicated a bankrupt upon his own petition, on the 10th of June, 1875. Two days prior to this, and upon the same day the petition was drawn and verified, Thompson raised one thousand dollars, by a mortgage upon certain real estate, of which he paid one hundred and ten dollars to his counsel for drawing his petition and schedules, and the residue to his wife.

[1] [Reprinted from 13 N. B. R. 300, by permission.]

The assignee petitioned for an order that he should account for and pay the same over to him. It was not disputed upon the argument, that the money was still under the control of the bankrupt.

F. H. Lewis, assignee, in person.
Eldredge & Walker, for bankrupt.

BROWN, District Judge. By section 5044, the title of the assignee relates back to the commencement of proceedings in bankruptcy. As the money was obtained by the bankrupt prior to the filing of his petition, there can be no doubt that the assignee is entitled to it, under the provision of the above section, unless, by virtue of some other provision of the law, the bankrupt may devote it to other purposes.

First. As to the item of one hundred and ten dollars, paid counsel for drawing the petition and schedules, it is claimed that as the payment was actually made at the time the services were performed, the bankrupt cannot be compelled to repay the amount to the assignee, notwithstanding the fact that his counsel was not entitled to priority of payment from the assets of the estate. It was held by this court in the Case of Gies [Case No. 5,407], that attorneys of a voluntary bankrupt are not entitled to payment from the assets, as preferred creditors, for their services to preparing the petition and schedules; but it was intimated that the attorney might demand and receive a reasonable compensation before rendering his services, and that the payment therefor would be valid. Upon further reflection, I am satisfied that the bankrupt has a perfect right to employ counsel for the purpose, and if necessary to raise the money and pay him, and that such payment ought not to be regarded as a preference, or as made in fraud of the act. The preparation of the petition and schedules is frequently a work of considerable difficulty. It might be impossible for the bankrupt to prepare them himself, without the employment of competent counsel, and he thereby be prevented from having himself adjudicated as such. The entire bankrupt system is based upon the theory that a business man, finding himself insolvent, ought to make public announcement of the fact, and have his property distributed equally among his creditors. The creditors themselves are interested in having their debtor declared a bankrupt, and in having a full disclosure of his debts and assets. As the payment in this case was made at the time the services were rendered, I see no ground upon which it can be claimed as a preference. An insolvent person is not debarred by his insolvency from making necessary purchases and paying for them on the spot. I see no difference in this regard between a payment for professional services and the payment of a grocer's or butcher's bill. Both are equally meritorious. Had the service been performed on credit, and the money afterward paid to counsel the question of preference might have arisen; but I see in this case nothing more than the purchase of professional services, and the immediate payment therefor. I think the authorities fully sustain this position. See In re Rosenfield [Case No. 12,057].

Second. It is claimed that the bankrupt is also entitled to deduct from this amount the necessary expenses of procuring his discharge. The considerations above adduced do not apply to services of this nature. The creditors have no possible interest in having their debtor discharged. The debtor has no more right to reserve the cost of professional services to be rendered after his adjudication than to reserve money for any other future purpose unconnected with the support of his family. I must hold this defense cannot be maintained.

Third. The bankrupt also claims the right to reserve money enough to pay the expenses of his family for a reasonable time, and until he can again establish himself in business. Section 5045 exempts from the operation of a conveyance to the assignee "the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, but altogether not to exceed in value in any case the sum of five hundred dollars." This exemption may undoubtedly include provisions and such other articles, not being land or luxuries, as are necessary for the maintenance of a family. Whether it may include money has been much mooted, and the decisions are in irreconcilable conflict. All the authorities upon this subject, so far as I am acquainted with them, are collated in the opinion of Judge Lowell, of the district of Massachusetts, in the Case of Hay [Case No. 6,253], and the conclusion reached, that the assignee may designate a sum of money as necessaries, under the statute. With much doubt whether the rule of ejusdem generis ought not to be applied to exclude from the category of necessaries everything which is not actually used in housekeeping, I have come to the conclusion that it is more consonant with the spirit of the bankrupt law [of 1867 (14 Stat. 517)], and with the modern policy of the several states upon the subject of exemptions, that this clause should receive the liberal construction claimed by the bankrupt. The same word similarly used in the act of 1841 [5 Stat. 440], was held by Judge Story, in the Case of Grant [Case No. 5,693], to include money necessary for the temporary support of a family. It is hardly just to say that one man who has laid in a supply of fuel and provisions shall be entitled to more consideration than another who has been equally unfortunate but less provident; and that the creditors of the latter should have the benefit of the money which he might have expended in the purchase of the same articles. I think, too, the use of the word "necessaries"

in the admiralty law, as including the money used in the purchase of necessaries, furnishes a strong analogy. In all cases, however, where it is held that money may be set apart, the necessity—that is, whether the condition and circumstances of the bankrupt require the exemption of money—is first to be determined by the assignee, subject to the final decision in the court upon exceptions. In a note to Hay's Case it appeared there was evidence tending to show that the bankrupts had earned something since the bankruptcy; that two of them had no family depending upon their exertions, and were skilled workmen; that the wife of the third had some little property, and that the assets were small compared with the debts. The judge sustained the action of the assignee in refusing the exemption. In another case it appeared that the bankrupt and his family had suffered much from illness; that a large part of their clothing and bedding had been destroyed through fear of infection; that he was an old man, and his assets were considerable. An allowance was thereupon ordered. As it does not appear in the present case whether since the adjudication, the bankrupt has been engaged in profitable employment, or has been able to support himself and family, I think the question of exempting money must be left primarily to the judgment of the assignee upon the best information he can obtain, subject to the review of the court.

It results that an order must be made requiring the bankrupt to pay over to the assignee the amount realized by the mortgage, less the sum of one hundred and ten dollars paid to his counsel for services in preparing the petition and schedules, and less such further sum as the assignee may determine to be necessary for the temporary support of the bankrupt and his family, not exceeding, with his furniture and other articles, the sum of five hundred dollars.

Case No. 13,939.

THOMPSON v. AFFLICK.

[2 Cranch, C. C. 46.] [1]

Circuit Court, District of Columbia. June Term, 1812.

LIMITATION OF ACTIONS—PLEA—WHEN TO BE FILED.

The court will not permit the plea of the statute of limitations to be filed after the rule-day, unless it be shown by affidavit to be necessary for the justice of the case.

[This was an action by Thompson's administrator against Afflick's administrator.]

Mr. Jones, for defendant, before the plea day, indorsed on the declaration, these words, "Non assumpsit; Stat. Lim.: set-off; account in bar," as his pleas.

Upon the calling of the imparlance docket, Mr. Key objected to the plea of the statute of limitations because it was not written out at full length and filed at or before the rule-day.

Mr. Jones offered to file it nunc pro tunc.

But THE COURT (THRUSTON, Circuit Judge, absent) refused to receive it, unless it should be shown by affidavit to be necessary for the justice of the case.

[See Case No. 13,940.]

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

Case No. 13,940.

THOMPSON v. AFFLICK.

[2 Cranch, C. C. 67.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

WITNESS — COMPETENCY — INTEREST — SURETY ON ADMINISTRATOR'S BOND.

A surety in an administration bond is a competent witness for the administrator.

Mr. Caldwell, for defendant [Afflick's administrator], offered to examine as witness for the defendant, Charles Glover, who was a surety in the defendant's administration bond.

Mr. Key, for plaintiff [Thompson's administrator], objected that the witness was interested.

But THE COURT overruled the objection.

[See Case No. 13,939.]

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

Case No. 13,941.

THOMPSON v. BALTIMORE PASS. R. CO.

[Cited in Cully v. Baltimore & O. R. Co., Case No. 3,466. Nowhere reported; opinion not now accessible.]

Case No. 13,942.

THOMPSON et al. v. BARRY et al.

[2 Wkly. Notes, Cas. 100.]

Circuit Court, E. D. Pennsylvania. Oct. 27, 1875.

PATENTS—PRELIMINARY INJUNCTION—ASSIGNMENT—MOTION TO DISSOLVE.

Assignment by a complainant, after preliminary injunction granted, no ground on which to dissolve the injunction.

BY THE COURT. Motion to dissolve preliminary injunction. A bill was filed by complainants to restrain infringements of the reissued and extended letters patent Nos. 2,569, 2,570, and 2,571 and to obtain an account of profits and assessment of damages arising from said infringement. A preliminary injunction was granted on October 19, 1871. In June, 1874, complainants amended their bill, setting forth an assignment, dated after the granting of injunction, by the complainant, Thompson, of all his interest in said letters patent to the Pennsylvania

Salt Company. An answer was filed by defendants in July, 1874. In October, 1875, and before the taking of any proofs in the cause by either party, the defendant obtained leave to file a supplemental answer, in which he set up that, at the time of granting the injunction, the complainant, the Pennsylvania Salt Company, had no interest in said letters patent, and that the complainant, Thompson, by the aforesaid assignment, had, since the injunction, parted with all his right under the patents. The facts were not denied.

Mr. Baldwin, for the motion, cited Wheeler v. McCormick [Case No. 17,499].

Mr. Harding, contra.

C. A. V. Motion overruled.

[For other cases involving this patent, see note to Pennsylvania Salt Manuf'g Co. v. Gugenheim, Case No. 10,954.]

Case No. 13,943.

THOMPSON v. BERRY.

[1 Cranch, C. C. 45.] [1]

Circuit Court, District of Columbia. Dec. Term, 1801.

ASSAULT AND BATTERY—DEFENDANT'S LAND—PUSHING OFF.

A man cannot lawfully push another off from his land without first requesting him to go off.

Assault and battery. Plea, molliter manus imposuit.

Mr. Hewitt, for defendant, prayed THE COURT to instruct the jury that if they should be of opinion, from the evidence, that the defendant had legal possession of the place where, &c., he had a right to remove the plaintiff by pushing him off.

THE COURT refused to give the instruction as prayed; being of opinion that a previous request to the plaintiff to go off was necessary.

KILTY, Chief Judge, absent.

THOMPSON v. BOARD OF SUPR'S OF LEE COUNTY. See Case No. 15,589.

THOMPSON (BRITISH CONSUL v.). See Case No. 1,899.

Case No. 13,944.

THOMPSON v. BUSCH.

[4 Wash. C. C. 338.] [2]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

SEAMEN—JUSTIFICATION FOR DISCHARGE OF MATE—WAGES—DUTIES OF OFFICERS AND SEAMEN—FORFEITURE.

1. If the mate act so improperly as to justify the master in degrading and dismissing him from his office, he is not entitled to his wages. But if he be improperly dismissed, he is entitled to them; and is not bound to perform the duties of a common seaman.

2. What are the relative duties of the inferior officers and seamen to the master, and of him to them.

[Cited in Fuller v. Colby, Case No. 5,149.]

3. The mate may forfeit his right to command and his wages, by fraudulent, unfaithful, and illegal practices, by gross and repeated negligence, or flagrant, wilful, and unjustifiable disobedience; by incapacity, induced by his own fault, or palpable want of skill in his profession; but the causes of removal should be evident, strong, and legally important.

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

In admiralty.

WASHINGTON, Circuit Justice. This is an appeal from a sentence of the district court upon a libel of the appellee, the mate of the ship Benjamin Rush, for wages. The objection made by the owner of the vessel to the sentence of the court below is, that the mate was, for a justifiable cause, dismissed from his office at Calcutta by the master, and that he performed no duty on the return voyage to Philadelphia.

The evidence in the cause establishes the following facts: That the mate was sober in his habits; was well acquainted with the duties of his station on board; and upon all occasions performed them faithfully during the outward voyage from Philadelphia to Calcutta. No one instance of disobedience to the orders of the captain is proved, or even alleged. The captain frequently disagreed with his officers during the voyage, and was in the habit of using very harsh and abusive language towards them, in the presence of the crew. It is stated by one witness, that he has heard the mate give disrespectful answers to the captain, which probably happened at those times when his temper was ruffled by what he may have considered as ill treatment; but it does not appear that, upon any one of these occasions of disagreement between these two officers, any thing was said by the mate which called for, or was followed by, the infliction of the slightest punishment. It is however in full proof that the mate frequently spoke of the captain, out of his presence, but within hearing of the crew, in very disrespectful terms, applying to him many gross and vulgar epithets. On one occasion he went so far as to propose to the carpenter and sailmaker to go aft and flog the captain. Frequently, when the men would complain to him of being overworked, or otherwise ill treated, he would desire them to go and speak to the captain, who was the proper person to grant redress; and upon similar occasions he would advise them to speak for their rights to the captain, and would abuse them for not doing so. The vessel having suffered considerably in a gale, to which she was exposed soon after she left

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

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

the capes of Delaware, the mate ventured, in the presence of some of the crew, to censure the captain for not putting into the Brazils to refit, giving it as his opinion that it was a rash undertaking to proceed upon the voyage without having done so. Soon after the arrival of the ship at Calcutta, Spinney, one of the crew, against whom the mate had complained to the captain on account of some alleged misconduct, gave some information to the captain respecting the mate, which led to the measure of collecting all the crew upon the quarter deck, for the purpose, it would seem, of an inquiry into the conduct of that officer during the voyage. The mariner who had given this information, then stated, that if the crew had followed the directions of the mate, the ship would not have arrived; as he had endeavoured, by some undermining way, to create disturbance on board, and to establish insubordination; that when the men would speak to him of their ill usage, he would abuse them for not going aft and speaking for their rights. The carpenter next spoke, and observed that, upon one occasion, the mate asked him if the captain was not an old rascal, and added something about shooting, to which the carpenter replied, that the captain was as good a shot as he, the mate, was; that nothing further was said on the subject. Another of the crew came forward, and declared that he had never heard any thing said of a meeting, or of insubordination on board the vessel; but that he had frequently heard the mate speak desrespectfully of the captain, and in answer to the complaints of the crew, would tell them to go to the captain, who was the proper person to afford them redress. The captain then asked the rest of the crew if they knew any thing of the matter, and was answered by each of them that he knew nothing of meetings or of insubordination, but had often heard the mate speak in disrespectful terms of the captain. Immediately upon receiving these answers, the captain informed the mate that he was removed from his office, which was followed by appointing the second mate to succeed him. This order of dismission was never afterwards revoked. On the home passage, the mate made no offer to do work on board, nor was he required by the captain to do any.

These are all the facts in the case which I consider to be at all material; and the question is, whether they warranted the dismission of the mate from his office? If they did, they subject him to a forfeiture of his wages, since, by his own misconduct, he incapacitated himself to comply with his contract to perform the duties of a mate during the whole voyage out and in. If, on the other hand, he was improperly dismissed, the law considers the prevention from performing these duties, in consequence of his dismission, a sufficient excuse for his non-performance, and he was not bound to act in the capacity of a common mariner, even if the captain had required of him to do so. What were the precise reasons which influenced the captain to dismiss this officer at Calcutta, can only be conjectured, since he did not think it necessary to assign any at that time. We may nevertheless conclude that his removal was caused by the communications made by the three seamen upon the quarter deck; and the inquiry will be, whether the facts related by those men justified the measure which was then adopted, and was afterwards persevered in. It is not to be doubted but that the master is entitled to, and has a right to exact from his officers and crew, not only a strict observance of all his lawful orders in matters relating to the navigation of the ship, and the preservation of good order on board, but also to a respectful demeanour towards himself. In cases of disobedience of such orders, or of violations of the rules of decorum, which are, in a great degree, essential to the good government and discipline of the ship, the master has authority to correct the offender by moderate chastisement, temporary confinement, or reasonable privations of his ordinary comforts and privileges. But the design of such punishments being to produce reformation in the offender, and to deter others of his comrades from committing similar offences; they ought to cease as soon as the offences are atoned for by repentance, and an offer of the offender to return to his duty. If these be some of the duties of the inferior officers and crew towards their commander, he is, on his part, bound to observe towards them a temperate conduct, and not to provoke them by abusive language, or unnecessary mortifications, to treat him with disrespect. And although the misconduct of the master in these particulars will not justify disobedience, or even insolence on the part of the crew; it will, nevertheless, be entitled to great consideration when the nature and degree of the punishment inflicted on the offending mariner become the subject of judicial inquiry. There is a great want of precision in most of the foreign ordinances and sea laws, in defining those acts of a mariner which will subject him to a forfeiture of wages. By some of them, the master is authorised to turn away any thieving, quarrelsome, or factious mariner; but it is added, that in relation to the two latter offences, the master should have a little patience, to see if the offender can be brought to reason. By others, it would seem, as if contemptuous conduct, or other ill behaviour to the master, disorderly and riotous proceedings amongst the crew, or unfaithful conduct, will warrant the master in turning away the offender, and depriving him of his wages. But the degree to which these offences must advance in order to amount to such a breach of the contract on the part of the mariner, as to be visited by a forfeiture of wages, is no where defined by those laws, so as to become rules of decision in

the numerous cases which every day occur on board of merchant vessels. After an attentive examination of this subject, with a view to arrive at the real spirit and policy of these marine regulations, I accede without hesitation to the rules laid down by the learned judge of this district in the case of Atkyns v. Burrows [Case No. 618], which was the case of a mate, who had been dismissed for alleged misconduct, in which it was said, that "that officer may forfeit his right to command and wages by fraudulent, unfaithful, and illegal practices, by gross and repeated negligence, or flagrant, wilful and unjustifiable disobedience, by incapacity brought upon him by his own fault, or palpable want of skill in his profession; but the causes of removal should be evident, strong, and legally important."

I notice the disrespectful language in which Busch was in the habit of speaking to his comrades of the captain, merely for the purpose of condemning it. Had it been used in the presence and hearing of the captain, he would justly have subjected himself to punishment. How far the infliction of any punishment for such misconduct, long after it had been committed, and when no ill consequences either to the master or to the service had been produced by it, is to be justified, need not be decided in this case, since nothing can be more clear, than that it did not warrant his dismission and loss of wages. Since no charge was even alleged against this officer by the persons who gave evidence upon his examination of fraud, unfaithfulness, negligence, incapacity, or disobedience of orders, I am forced to conclude that the cause of his dismission was illegal practices tending to introduce insubordination and mutiny on board of the ship. And how was this charge supported? The opinion of Spinney, and the conclusions which he undertook to draw from the general conduct of the mate, or from particular facts, ought not, upon the most common principles of justice and of fair inquiry, to have resulted in his condemnation. I totally disregard therefore the declarations of that seaman, even if he appeared in the character of an unprejudiced witness, "that if the crew had followed the directions of the mate, the ship would not have arrived; and that he had endeavoured by some undermining way to create disturbance on board, and to establish insubordination." Did he arrive at that conclusion from the fact, and the only one which he stated, that in answer to the complaints of the crew of ill usage, he abused them for not going to the captain and speaking for their rights? If he did, I can only say that the conclusion, in my mind, was irrational, and unwarranted by the fact. If the object of the mate was to subvert the authority of the master, by introducing amongst the crew a general spirit of disaffection and insubordination, for the purpose of rendering himself popular with them, or for that of frustrating the voyage, would he have set an example, by his own conduct, of the strictest obedience to the orders of the captain upon all occasions? And would he have lost the opportunity, which the complaints of the crew on account of their ill treatment presented, of fostering their discontents, and of inducing them to look rather to himself for redress, than to the master, to whom, upon all such occasions, he uniformly referred them? I know of no way in which he could more effectually affirm the authority of that officer, and lead the crew to recognize and respect it, than by always presenting him to their view as their sole chief, and alone clothed with the power to redress their grievances. The proposition which he made to two of the men to flog the captain, as stated by them in their depositions, or of shooting, as mentioned by one of them on the quarter deck examination at Calcutta; may possibly have been caused by some provocation, real or imaginary, which the harsh conduct of the captain to his officers may have excited. However this may be, his conduct upon the occasion was unjustifiable; and had the suggestion been followed up by any overt act, I will not say that he would not legally have exposed himself to the penalty of dismission. But surely, I do not exercise more charity than the circumstances attending that transaction warrant, when I conclude, that either the proposition was not seriously made, or that it was immediately after repented of; for the carpenter accompanied his testimony by the declaration, that nothing more was said upon the occasion, and in his deposition, he swears that the subject was never afterwards renewed.

The expression by the mate, of his opinion that the ship ought to have put into the Brazils to refit, was, to say the most of it, a venial offence, and I pass it over with the single observation, that, as it was not made a charge against him by any of the crew, it could have had no influence in causing the sentence of dismission at Calcutta.

In reviewing the whole of this man's conduct, I see much to approve and to condemn. In many respects we find him acting the part of a useful officer, sober in his habits, obedient to orders, skilful and laborious in all the duties of his station. But he wanted the dignity of character which would have pointed out to him the impropriety of making the crew the confidants of his discontents and ill humor. Soured by the abusive language of the master, to which, in common with the other officers and the men, he was too frequently exposed, he spoke to them of that officer in language which degraded himself; and was calculated, though probably not intended, to excite dissatisfaction amongst them. But that he seriously meditated, at any time, a criminal opposition to the authority of the captain, or that he sought to encourage in the crew a disposition tending to such a result, cannot, in my opinion, be fairly inferred

from the evidence in the cause. On the contrary, it is deposed by all the crew who have been examined on oath, that they never heard an intimation from the mate which savoured of insubordination, or which was calculated to encourage secret meetings of any kind. As to depriving the master of his command, Dexter, one of the men who gave evidence against the mate at Calcutta, swears that he never heard such a word; and his evidence is, in this respect, confirmed by the testimony of two others of the crew. I acknowledge that I was, for a time during the argument, very unfavourably impressed against the mate, under the idea that, by his silence on the above examination at Calcutta, he impliedly admitted the truth of the general charge made by Spinney, of insidious endeavours to excite disaffection in the crew. Had this charge been proved, or admitted by the accused, expressly or by implication, I should have considered him very unfit to retain his command on board of the ship. But the irregularity, not to say unfairness, which marked all the proceedings of that extraordinary examination, relieves the mate from the imputation of an implied admission of such a charge. Sentence followed the examination of those who were called upon to testify against him, without affording him the opportunity to confess or to deny what was alleged against him, or to examine witnesses in his defence. This opportunity however awaited him on the return of the ship to this port, where he was acquitted, and I think rightly, of the charge of endeavouring to make a revolt, by a jury of his fellow citizens. Upon the whole, I am of opinion that there is no error in the sentence of the district court, and I therefore affirm it with costs. Affirmed.

Case No. 13,944a.

THOMPSON et al. v. CAMPBELL.

[Hempst. 8.] [1]

Superior Court, Territory of Arkansas. June, 1821.

PRACTICE AT LAW—NONSUIT—CONSENT OF PLAINTIFF—WHEN ALLOWED.

1. It is erroneous to order a plaintiff to be nonsuited against his consent. [Elmore v. Grymes], 1 Pet. [26 U. S.] 471; [D'Wolf v. Rabaud] Id. 497; [Crane v. Morris] 6 Pet. [31 U. S.] 609.

2. When nonsuit may be taken.

Appeal from Lawrence circuit court [in an action by Thompson and Matthews against Campbell.]

Before JOHNSON and SCOTT, JJ.

OPINION OF THE COURT. It is clear that the court erred in rejecting the evidence offered by the plaintiff as stated in the bill of exceptions, and also in ordering the plaintiff to be nonsuited against his consent. The evidence was clearly admissible to support the cause of action as laid in the declaration, and should have been received. Reversed.

NOTE. A plaintiff cannot be nonsuited against his consent, because he has a right by law to have his case submitted to a jury and the court. He may agree to a nonsuit; but, if he does not choose so to do, the court cannot compel him to submit to it. Elmore v. Grymes, 1 Pet. [26 U. S.] 471; D'Wolf v. Rabaud, 1 Pet. [26 U. S.] 497; Crane v. Morris, 6 Pet. [31 U. S.] 609; Mitchell v. New England Mar. Ins. Co., 6 Pick. 118; Booe v. Davis, 5 Blackf. 115; Martin v. Webb, 5 Ark. 74; Wells v. Gaty, 8 Mo. 681; Hunt v. Stewart, 7 Ala. 525; Scruggs v. Brackin, 4 Yerg. 528. A plaintiff may take a nonsuit at any time before the court or jury have actually rendered a verdict. Lawrin v. Hawks, 3 McCord, 559; M'Lughn v. Bovard, 4 Watts, 308; Wooster v. Burr, 2 Wend. 295; Haskell v. Whitney, 12 Mass. 49, note. In Arkansas it is provided by statute that "no plaintiff shall be permitted to suffer a nonsuit on trial after the jury have retired from the bar, or the cause has been submitted to the court." Digest, p. 813, § 111. A nonsuit cannot be ordered by the court without the acquiescence of the plaintiff. The correct practice is to instruct the jury that, if the evidence has not proven a matter necessary to be proven, the jury must find for the defendant. Martin v. Webb, 5 Ark. 74; Ringo v. Field, 1 Eng. [Ark.] 49; Carr v. Crain, 2 Eng. [Ark.] 249.

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

Case No. 13,945.

THOMPSON v. CARBERY.

[2 Cranch, C. C. 35.] [1]

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

WITNESS—COMPETENCY—INTEREST—SURETY ON REPLEVIN-BOND.

A surety in a replevin-bond is not a competent witness for the plaintiff in replevin, although he has an indemnifying bond.

Replevin. Ignatius Middleton, one of the sureties in the replevin-bond, being sworn in chief, and asked if he was interested in the cause, said he was not. He was then examined and cross-examined. It was afterward discovered by the defendant's counsel that he was a surety in the replevin-bond. He acknowledged himself to be the person, but said he had a bond of indemnification, which he produced. The plaintiff then called him again, to examine him further. The defendant objected, and THE COURT refused to suffer him to be further examined; and told the jury that what he had already testified was not evidence.

[See Case No. 13,946.]

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

Case No. 13,946.

THOMPSON v. CARBERY.

[2 Cranch, C. C. 39.] [1]

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

NEW TRIAL—REPLEVIN—VERDICT FOR VALUE AND DAMAGES.

In replevin, if the title to the goods be in issue, the court will grant a new trial, if the jury give the defendant a verdict for the value of the goods, as well as damages for taking them.

This was a motion for a new trial in an action of replevin, for a female slave, in which there was a verdict for the defendant for 425 dollars damages.

F. S. Key, for plaintiff. The jury have given the value of the slave in damages; and as there will be judgment for a return of the property the defendant will get twice the value of the slave.

Mr. Jones, contrà, said he had contended for vindictive damages; and the question is whether these damages are enormous.

THE COURT said it was evident that the jury had given their verdict under a mistake, having given the value of the negro as well as damages; and that as the defendant would have judgment for a return of the property, and a remedy upon the replevin-bond if it should not be returned, they would grant a new trial, unless the parties would agree upon a compromise. The defendant refused, and a new trial was granted upon payment of all the costs.

FITZHUGH, Circuit Judge, absent.

[See Case No. 13,945.]

Case No. 13,947.

THOMPSON v. CARENOUGH.

[1 Cranch, C. C. 267.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

BAIL IN CIVIL CASE—RETURN—APPEARANCE.

If there be no declaration the court will not require special bail, unless the plaintiff appears at the return of the writ

Assumpsit. No declaration filed; but the plaintiff had ordered the writ in person and had filed an account, sworn to. The marshal brought in the defendant. The plaintiff, being called, and not appearing, and having employed no attorney, THE COURT did not order the defendant to give bail, nor to be committed; but permitted the defendant's appearance to be taken without bail.

Case No. 13,948.

THOMPSON v. CARSON.

[Cited in Russell v. The Oriental, Case No. 12,159. Nowhere reported; opinion not now accessible.]

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

Case No. 13,949.

THOMPSON et al. v. The CATHARINA.

[1 Pet. Adm. 104.] [1]

District Court, D. Pennsylvania. 1795.

ADMIRALTY JURISDICTION—MARITIME CODES.

1. Laws and principles which govern the maritime courts of the United States.

[Cited in The Jerusalem, Case No. 7,293; Bains v. The James and Catherine, Id. 756; U. S. v. New Bedford Bridge, Id. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 473; Bucker v. Klorkgeter, Case No. 2,083; The Comet, Id. 3,050; The Becherdass Ambaidass, Id. 1,203.]

2. This court must be governed by the Maritime Code we possessed before the Revolution, where not altered by law or by a change of circumstances.

3. Parties may mould their contracts at their pleasure, in cases not against common justice.

This was the case of a foreign ship, which came before the court on a claim for wages by her seamen [Thompson, Jacobson, and others], who by their contracts had engaged to return to the port from which they shipped. During the progress of the cause, the following opinion was given by the district judge.

"An objection is made, though not very seriously pressed, to my decision on a point, on which our own municipal laws are silent. This objection, however, obliges me to give my sentiments on the question, 'What laws or rules shall direct or govern the decisions of maritime courts here, in points on which we have no regulations established by our own national legislature?' There are, in most nations concerned in commerce, municipal and local laws relative to contracts with mariners, and other maritime covenants and agreements; though the great leading principles, or outlines, are in all nearly the same. On this account among others, I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen, are concerned. I have in general, left them to settle their differences before their own tribunals. On several occasions, I have seen it part of the contract, that the mariners should not sue in any other than their own courts;—and I consider such a contract lawful. It would be against law, and void, if it were, that the mariner should not sue in any case; or, that he should not sue in the proper court, or courts of his country. But where the voyage of a foreign ship ended here, or was broken up, and no treaty or compact designated the mode of proceeding, I have permitted suits to be prosecuted. In such cases, I have determined according to the laws of the country to which the ship belonged, if there existed any peculiar variance or difference from those generally prevailing. I have seldom found any very material difference in principle. The laws and customs of

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

Spain,[2] relating to mariners, are more rigid than those of other nations, on similar points. Among other points of variance from other laws, those of Spain grant the master, a lien on the ship, for his wages. In the present case, the contract was in part, with mariners of the United States; and these seamen were to be discharged in an American port. I apply the authority of this court to the case of our own citizens. If by our own municipal laws, there are rules established, our courts are bound exclusively to follow them. But in cases where no such rules are instituted, we must resort to the regulations of other maritime countries, which have stood the test of time and experience, to direct our judgments, as rules of decision. We ought not to betray so much vanity, as to take it for granted, that we could establish more salutary and useful regulations than those which have, for ages, governed the most commercial and powerful nations, and led them to wealth and greatness.

The laws of the Rhodians were followed and adopted by the Romans, in their most prosperous state of commerce and power. Those in the celebrated Consolato del Mare,[3] prevailing in the Mediterranean, and established, in concert with other trading states and countries, by the Venetians and Genoese, in the periods of their naval power and commercial prosperity, are collections of, and improvements on, more ancient customs and laws. Of these, the Amalfitan Code (the first and most respected of what are called, as they relate in point of time to those of the Rhodians and Romans, "Modern Sea Laws,") furnished the predominant and most generally received principles.[4] The laws of Oleron, occupy now a portion of the famous Black Book of the British Admiralty, which is consulted by all their courts on subjects of maritime and commercial controversy. These laws of Oleron were not entirely of British growth. They were compiled at first, as French authors assert, and from the face of them it would seem probable, by Queen Eleonora, Duchess of Guienne, for her continental dominions, and afterwards improved and enlarged by her son Richard the First, of England, in no small degree from the maritime laws and customs, not only of his own country, but also from the laws and customs prevailing among the continental trading nations. Of these, the Saxons were, at an early period, the most conspicuous and practically intelligent in nautical affairs. They introduced into England their maritime knowledge, as they did some valuable principles of the common law. What was entitled, the Saxon shore, extended from the western parts of Denmark, to the western parts of France. The excellence and importance of these laws of Oleron, are evinced by a contest for their origin between two great nations, who have wisdom and liberality enough to follow them, be the fact of origin how it may. The maritime ordinances of France (where also the laws of Oleron, or Roll d'Oleron, are in force, and claimed, as of French origin) are

[2] Spain cannot be said to have a general national code. She possesses a number of local collections and ordinances, operating in different maritime districts of that extensive kingdom. 1. Their civil law, consists of a great number of particular laws compiled in the form of codes. 2. Each has particular titles. See 1 Azuni, Mar. Law, pp. 404, 405. 3. The Consolato del Mare, is an adopted code, and governs in the Spanish courts of the Mediterranean. 4. The laws and ordinances of the Consulate of Bilboa, prevail on the Spanish coasts of the Atlantic. 5. The commerce of the Indies is regulated by a particular code, distinct from others. It is governed by, and subject to, the usages of the Contractacion, or Consulate of Seville. See Azuni, of whom, in addition to many more ancient writers, I have made much use on those subjects.

[3] Il Consolato del Mare. These are the most ancient, celebrated and authentic sea laws, after those of the Rhodians, Greeks, and Romans. Yet Hubner, because he found (as Emerigon alleges), a passage in them contradictory to a favorite dogma, vituperates and deprecates them, to his own disgrace, and not to their disparagement. As a respectable part of the laws of nations, they have always been received in the English courts of admiralty, and those of this country. Their origin is enveloped in obscurity, though attributed to several nations, as well as to the Pisans, to whom a modern author labours to ascribe them. Their influence, value and authority, have been appreciated by claims to their origin, set up by various people of maritime countries. Those laws have prevailed in the countries occupying the coasts of the Mediterranean, and in the neighbouring parts of Southern Europe, for centuries. Although some special and local laws exist, in several national districts of that region, yet the Consolato del Mare is, to this day, the leading directrix, in their maritime jurisprudence, and naval affairs. This body of maritime law is a compilation "of the best maritime laws then existing, comprising judicial proceedings, principles and decisions, settled by men of great experience and consummate prudence; who, having reason and custom for their guides, established these excellent regulations, concerning navigation and maritime contracts." It may, indeed, be called the "Common Law of Maritime Europe," where it is universally adopted and respected.

[4] The city of Amalfi was situate in, what is now called, the province of Salerno, in the kingdom of Naples. Nothing great remains of it, but its celebrity for the most extensive commerce of its time, its immense wealth and magnificence, and its great weight in all questions of maritime concern. Like the Rhodians, the Amalfitans furnished principles for the codes of other maritime countries of Southern Europe. These remain engrafted into the laws of other nations; though the Amalfitan Code, or, as it is sometimes called, "Table," is not preserved. To the Amalfitans, the invention of the mariner's compass is ascribed. Dr. Robertson gives the discovery to a native of Amalphi. But no opinion about ancient transactions, seems to be at rest. Azuni says, the French invented—the Amalfitans improved—and the Portuguese perfected, this compass, in their discoveries of the New World. The Chinese forestall the whole, in the antiquity of their claims, to this most eminent of all useful inventions. The Pisans and the Amalfitans share the credit of the discovery and preservation of the Pandects of Justinian, after their having been long buried in obscurity, during the barbarous ages.

very much grounded on the sea laws of other nations, mixed with their own. Those of Louis the Fourteenth, were compiled under the direction of the great minister Colbert, from such materials, with local additions, suited to that country. The laws of the Hanse Towns,[5] are nearly in substance the same with those called the laws of Wisbuy, and both are principally founded on those of Oleron. The sea laws of Spain are, in no small degree, collections from those of other nations. There is a striking similarity in the leading principles of all these laws. So far from sound principles becoming obsolete, or injured by time, that it will be found, on careful investigation, that the oldest sea laws we know, those of the Rhodians,[6] have furnished the outline and leading character of the whole. With such examples before us, we need not hesitate to be guided by the rules and principles, established in the maritime laws of other countries. As the ocean is common, it is proper and essentially convenient, that its laws should be also common to all who travel this "high road of nations."

I shall not contend with those who say, we ought to have a maritime code of our own, about the binding force of all these laws on us. By the general laws of nations we certainly are bound. These apply, most frequently, in the prize court; but there are many cases of salvage, wreck, &c. on the instance or civil side of the court, which necessarily must be determined under the general law. The wisdom and experience, evidenced in the particular maritime institutions of other commercial countries, ought at least to be greatly respected. If they serve only as faithful guides, and tried and long established rules of decision, in similar cases, they are of high and exemplary importance. It must be granted, that it is safer to follow them, than to trust entirely to the varying and crooked line of discretion.[7]

Where a reciprocity of decision, in certain cases, is necessary, the court of one country is often guided by the customs, laws, and decisions of the tribunals of another, in similar cases. But the change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence, we inherited from our ancestors, and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law,[8] in all cases, consistent with the

[5] The laws of the Hanse Towns were published first in 1591, and reviewed in 1614, and posterior to those of Wisbuy or Oleron. The history of this commercial confederacy is well known. Although in itself and its dependencies, it consisted of 62 cities, originally, it is now reduced to six, consisting of Lubeck, Hamburgh, Dantzig, Bremen, Rostock, and Cologne. Its existence to this day, in any state of respectable combination, is a singular instance of survivorship over the ravages of time, the jealousies of powerful nations, and the exposure to interior danger and dissension; to which all multitudinous associations, whether national or individual, are constantly, often fatally, liable.

[6] In a note to the case of Walton v. The Neptune [Case No. 17,135], it will appear, that Azuni, in his book on Maritime Law collects all the authorities for and against the authenticity of the fragments of Rhodian laws, published by Simon Scardius and others, and continued to our time, in collections of sea laws as genuine. Azuni declares them spurious. But although, according to him, these may not be genuine, as to the text and very words (which other respectable writers either impliedly or positively assert they are) they contain many of the principles we see in other codes and works. Azuni allows, agreeably to a cloud of authorities he could not controvert, that "the Rhodian Laws, whatever may be the period of their publication, are the fountain of maritime jurisprudence." 1 Azuni, Mar. Law (New York Ed. 1806) 277. The Rhodians applied themselves exclusively to commerce, and avoided every idea of extension of territory. Their fleet was so powerful, and their naval regulations so excellent, that they were courted by the most mighty nations of their time They held the empire of the sea, and by confining their strength and resources to maritime objects, they not only protected and extended their own commerce, but scoured the ocean of pirates who annoyed the trade of all countries. Alexander the Great treated them with marked distinction. The Romans were their admirers, allies, and friends. These powerful islanders entitled themselves to the friendship and esteem of other commercial nations, by aiding and protecting, and not by restraining similar pursuits. Their superiority, in mercantile and naval talent and enterprise, gained them the admiration and respect of their contemporaries; when a spirit of monopoly, jealousy and plunder, would have handed them down to us, not to be imitated, but detested.

[7] The foregoing enumeration of some of the maritime codes, is not intended to comprehend the whole, which would swell the account too extensively. It is given merely to shew, that the most renowned maritime nations always adopted the principles, when long tried and tested, of their predecessors, or contemporaries. England has not collected into a body, or code, the maritime laws by which she deems herself bound peculiarly, though she has enacted some laws, in addition to the laws or judgments of Oleron; such as the statute De Mercatoribus, the articles of Quinsborough, the acts relative to the powers of the admiralty, her navigation act, prize acts, &c. Her law merchant, and that part of it relating to assurances particularly, as well as maritime law, are chiefly collected in the decisions of her courts. These are founded on usages and established customs, as well of her own, as of all countries possessing respectable codes or principles of maritime law. When they are duly canvassed, and have stood the test of time and sound discussion, they become part of their common law, and settled as precedents of indisputable authority. In their courts, respectable foreign jurists and publicists are cited, and their reasonings, opinions, and statements regarded, in the decision of maritime questions. Such has also been the practice in the courts, particularly of maritime jurisdiction, of our country. Holland, though its existence depended on commerce, has never had any peculiar national code of maritime laws,—possibly owing to the division of her territory into separate provinces.

[8] The feudal parts of this law, and such as are inconsistent with the principles of our government are not, nor can they be, in force. Those who are best acquainted with its wise and just principles, as they relate to contracts, and the property, as well as the personal rights of individuals, admire the common law as the

change of our government, and the principles on which it is founded. They possess, in like manner, the maritime law, which is part of the common law, existing at the same period; and this is peculiarly within the cognizance of courts, invested with maritime jurisdiction; although it is referred to, in all our courts on maritime questions. It is, then, not to be disputed, on sound principles, that this court must be governed in its decisions, by the Maritime Code we possessed at the period before stated; as well as by the particular laws since established by our own government, or which may hereafter be enacted. These laws and the decisions under them, must be received as authorities, in this, and other courts of our country "in all cases of admiralty and maritime jurisdiction," to which, by the constitution, it is declared "the judicial power of the United States shall extend." Nor shall I think myself warranted to exclude more modern expositions, or adjudged cases from being produced here. Whatever may, in strictness, be thought of their binding authority, I shall always be ready to hear the opinions of the learned and wise jurisprudents or judicial characters of any country. On subjects agitated in this court, often deeply affecting the property and reputation of the suitors, I am not so confident in my own judgment, as not to wish for all the lights and information, it may be in my power to obtain, from any respectable sources. If, in any instance, the laws or the decisions, under them, shall be found or deemed severe, or not suited to a particular exigency or course of trade, parties may mould their contracts at their will, according to circumstances, by mutual agreement and consent. Let the law be what it may, "modus et conventio vincunt legem," in all contracts, not radically against common justice, moral and political obligations, and those principles which the law will not suffer to be destroyed or perverted for private purposes.[9] If under a contract, by a casualty, a particular inconvenience arises from the general principles of the maritime law, the party must submit. He must consider what he loses or pays as a contribution to the great and general interests of commerce, or the predominant policy and advantage of his country.[10]

venerable and solid bulwark of both liberty and property. Statute laws innovating upon it, have seldom been found, on experience, to be real improvements. Those who do not know the common law suppose it to be everything, that it is not. Its rules and principles are not arbitrary, but fixed and settled by the wisdom and decisions of the most respectable and intelligent sages, of both ancient and modern times. Many of the objections raised against it shew a want of acquaintance with its system and principles. Some of these objections are founded in innovation made by statutes altering or obscuring, the common law. Others have nothing in either common or statute law to support them.

[9] The conditions of bonds, or considerations of promises, or agreements in contracts accounted illegal and void, are numerous and well known to lawyers. A contract cannot be legally binding which defeats its own object—such as that no suit shall be brought at all for a bona fide debt, agreed to be paid—a condition in a deed to do an act malum in se, as to beat, or kill a man, or commit any crime—insurance on a illegal voyage—bonds for general restraint of trade are void, though good where the condition is not to carry it on in any particular place—a bond to a third person that the obligor, a witness, shall not prosecute one confined for felony, perjury, &c. and many other instances which might be given. A bond with impossible conditions is absolute, and the condition a nullity. An agreement or contract not to bring a suit to enforce performance is, if made at the time, well. But if made posterior to the bond, contract or agreement, it amounts to a general release.

[10] The cause, in which the foregoing opinion was delivered, was of a mixed character. Part of the complainants were foreigners, and bound to return home with the ship, although with a view to sail out of our port, at our high wages, they endeavored on pretext of deviation, to obtain their discharge. The cause was dismissed as to them—they were referred to their own courts for decision. Wages were decreed to two American seamen, who were by contract to be discharged here. In the case of Willendson v. The Försöket [Case No. 17,682], the principles adopted by the court, relative to foreign seamen, are further elucidated and explained.

THOMPSON (CENTRAL OHIO R. R. v.). See Case No. 2,550.

Case No. 13,950.

THOMPSON et al. v. CINCINNATI, W. & Z. R CO.

[1 Bond, 152.] [1]

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

SALE—CONTRACT—SHIPMENT—CARRIERS—NONDELIVERY—MEASURE OF DAMAGES.

1. Under a contract for the delivery of nine thousand tons of railroad iron, the contract is not complied with on the shipment of the iron.

[Cited in Hobbie v. Smith, 27 Fed. 662.]

2. Where five hundred and ninety tons of iron shipped under such a contract were lost at sea, the risk of the transportation was on the seller.

3. In estimating the loss of the purchaser, by reason of the non-delivery of the iron thus lost, the rule of damage is the difference between the contract price and the market value at the time and place of the delivery

[This was an action by Thompson and Foreman against the Cincinnati, Wilmington & Zanesville Railroad Company.]

Walker, Kebler & Force, for plaintiffs.
Henry Stanbery, for defendants.

OPINION OF THE COURT. This case involves the construction of a contract in writing entered into at the city of New York by the plaintiffs, through their agents, and Franklin Corwin, as agent and president of the Cincinnati, Wilmington and Zanesville Railroad Company, April 1, 1852. By

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

this contract, the plaintiffs, manufacturers of railroad iron in Wales, agreed to sell to the defendant 9,000 tons of railroad iron at $38 per ton; 2,500 tons of which was to be shipped to New Orleans on or before the 15th of September following, and 2,500 tons to be shipped to that place by the 1st of January following; the remaining 4,000 tons to be shipped to New York by the 1st of January following. It appears that the whole of the 9,000 tons of iron was shipped by the plaintiff, of which 590 tons were lost at sea. The remaining tons of iron were received by the defendant, and paid for according to the contract, with the exception of a balance of $24,827.25. The plaintiffs, in some of the counts of their declaration, claim payment for the whole 9,000 tons at the contract price. In some, they seek to recover only the said sum of $24,827.25, unpaid on the iron delivered, with the interest. In support of the claim for full payment of the 9,000 tons, it is insisted that under the contract the plaintiffs' obligation was complied with on the shipment of the iron, and that, on proof of shipment, they are entitled to judgment for the whole quantity at the contract price. Does the contract warrant this construction? It seems clear, taking the whole contract together, that the plaintiffs were bound to deliver the iron at the times and places mentioned, and that there was no obligation to pay until and unless it was delivered. Indeed, it is a part of the contract that defendant shall make payment for the iron as the same shall be delivered, implying that the delivery was a condition precedent to the obligation to pay. There is also an express obligation on the defendant to have an agent at the two places of delivery to receive the iron—from which the obligation to deliver is plain. All the circumstances of the case negative the presumption that it was the meaning of the parties that there was to be any payment till the delivery of the iron. Is the plaintiff entitled to recover the amount unpaid on the iron delivered? The defendant has given notice that he will claim as a set-off to this, the damages sustained by him, by reason of the non-delivery of the 590 tons of iron lost at sea. It is agreed that between the date of the contract and the latest date mentioned for the delivery of the iron, the market value had risen to $72.50 the ton. If the contract is for the delivery of the iron, it follows that the plaintiff is liable for damage sustained by defendant for the non-delivery. The risk of the transportation was on the plaintiff.

The rule of damage in such case is the difference between the contract price and the market value at the time and place of the delivery. It is to be inferred, from the fact that defendant contracted for 9,000 tons, that the whole was necessary for his purposes, and it is shown that he was obliged to buy the deficient quantity at the then market price. He is damaged, therefore, to the amount that he is obliged to pay beyond what he had contracted to pay. It can make no difference, in the view taken of this contract, that the plaintiffs shipped the iron, and that it was lost at sea. Such loss is his misfortune, but is no answer to the contract to deliver. Deducting the damage sustained by the defendant for the non-delivery of the 590 tons, there is still a balance due the plaintiffs, for which judgment will be entered. This balance is $4,472.25, with interest from December 24, 1853.

Case No. 13,951.

THOMPSON v. CLARKE.

[2 Cranch, C. C. 145.] [1]

Circuit Court, District of Columbia. Dec. Term, 1817.

SLAVERY—MANUMISSION BY WILL—RENUNCIATION OF PROVISIONS BY WIDOW—EFFECT ON MANUMITTING CLAUSE.

If a testator by his will manumits his slaves after a certain term of service, and the widow renounces the provision made for her by the will, and adheres to her rights under the law of Maryland, and there is sufficient personal estate to satisfy her thirds without resorting to the slaves, they will be entitled to their freedom, although the executor shall have assigned them to the widow in part satisfaction of her claim.

This was a petition for freedom [by Jo. Thompson, a negro, against Walter Clarke]. John Thompson by his will dated December 31st, 1804, devised, that if his wife should not have a child within nine months after his death, the petitioner, his slave, should be free after ten years service. The widow renounced the provision made for her by the will and adhered to her legal rights; and the executor assigned to her the petitioner in part of her thirds, there being other personal property enough to satisfy her claim without resorting specifically to the slaves. Those assigned to her did not exceed her proportion of the slaves. By the Maryland act of 1798, c. 101, subc. 13, § 2 [1 Dorsey's Laws, 406], the widow who renounces the provision made for her by the will is entitled to one third only of the personal estate after payment of debts. By the Maryland act of 1796, c. 67, § 13 [1 Dorsey's Laws, 337], a person may manumit his slaves by his will, if the same be not in prejudice of creditors. By the act of 1798, c. 101, subc. 11, § 16, if the surplus, after payment of debts, consists of specific property, and the administrator cannot distribute it satisfactorily among the parties, the orphans' court may distribute it, or order it to be sold. By the act of 1729, c. 24, § 2 [1 Maxoy's Laws, 197], it is enacted that no negro, or other slave shall be sold by an executor or administrator, or taken in execution for any debt due from any testator or intestate, so long as there shall be other goods sufficient, &c.

Mr. Taney and Mr. Key, for petitioner, con-

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

tended that the right of the widow was not absolutely to a third part of the specific property; but only one third in value of the personal estate. That the surplus of the personal estate vests specifically in the executor on whom the legal title and estate of the personal property devolves by law, and he is answerable to the respective legatees. That if the slaves had been specifically bequeathed, and there had been other property enough left to satisfy the widow's thirds, the rights of the specific legatee would be protected, and the executor could not assign to the widow any part of the property thus specifically bequeathed. That the slaves must be considered as specific legatees, and their rights protected by the same principle. They cited Jac. Law. Dict. tit. "Dower," to show the distinction between dower and thirds, and that the widow had no specific title to the property; and 3 Bac. Abr. tit. "Executors and Administrators," p. 67, to show that the assent of the executor was necessary to complete the title to a legacy; and page 426, to show that when a specific legacy is taken in execution the legatee may recover the value.

Mr. Jones, contra, contended that the rights of the widow were paramount to the will. The testator, in his lifetime, might dispose of all his personal estate, but he could not, in his will, deprive her of her thirds. She claims as a distributee. As to her, her husband died intestate. Distributees have a right to the specific property which is to be distributed; and it is to be distributed specifically if possible. They cannot be compelled to take the risk of any loss which may be incurred by a sale. The legatees have no right to have the effects marshalled to suit their purposes. A general legatee cannot marshal against a devisee of land, but may against the heir at law. Herne v. Meyrick, 1 P. Wms. 201; Clifton v. Burt, Id. 678; Haslewood v. Pope, 3 P. Wms. 324. So a widow shall have the assets so marshalled as to save her bona paraphernalia, or to recompense her, in case they should be taken to pay debts. Tipping v. Tipping, 1 P. Wms. 729. In that case Lord Chancellor Macclesfield said: "I take it that bona paraphernalia are not devisable by the husband from the wife, and more than heir-looms from the heir; so that the right of the wife to the bona paraphernalia is to be preferred to that of a legatee. If the husband, by his will, gives a lease, or a horse, or any specific legacy, and leaves a debt by mortgage or bond, in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; but though the creditor may subject this specific legacy to his debt, yet the specific or any other legatee shall, in equity, stand in the place of the bond creditor or mortgagee, and take as much, out of the real assets, as such creditor by bond or mortgage shall have taken from his specific or other legacy. Wherefore, if a legatee shall have this favor in equity, much more shall the wife be privileged with respect to her bona paraphernalia, which are preferred to legacies." The wife's thirds are as much privileged as her paraphernalia. They cannot be devised away from her. She claims paramount to the will. In the case of Snelson v. Corbet, 3 Atk. 369, Lord Chancellor Hardwicke said: "At law, where the husband dies indebted, the widow cannot have her paraphernalia; but this court does not determine so strictly, for if the personal estate has been exhausted in payment of specialty creditors, she shall stand in their place, as to so much, upon the real assets of the heir at law, for she has a prior right, and a superior one to legatees who take only from the bounty of the testator." Graham v. Londonderry, 3 Atk. 395; Tynt v. Tynt, 2 P. Wms. 544; Toll. Ex'rs, 231.

THE COURT (nem. con.) stopped Mr. Key in reply, and refused to instruct the jury that the petitioner was not entitled to freedom under the will.

Verdict for the petitioner, and judgment. Although the title of several other of the slaves depended upon the same will, no writ of error was issued. See the case of Fenwick v. Chapman, 9 Pet. [34 U. S.] 461, accord.

Case No. 13,952.

THOMPSON v. COOK et al.

[2 McLean, 122.] [1]

Circuit Court, D Illinois. June Term, 1840.

PLEADING AT LAW—AVERMENT OF CITIZENSHIP—NAMES OF PARTIES COMPOSING FIRM—NOTES—PLACE OF PAYMENT.

1. A general averment of the citizenship of the plaintiff, sufficient.

2. Where a note has been assigned by a firm, it is unnecessary for the assignee to aver, and prove the names of the persons who compose the firm.

3. This is the rule at common law, and there is nothing in the act of congress, in regard to assignments, or in the limited jurisdiction of this court, which should change the rule.

4. Where a note is made payable at a particular place, the declaration need not aver that the note, when due, was presented at such place for payment.

[This was an action at law by Jonathan Thompson against Cook and Spalding.]

Mr. Arnold, for defendant.

OPINION OF THE COURT. This action was brought on a promissory note, given by the defendants, to John W. Taylor & Co., and by them assigned, under the same name, to the plaintiff. The defendants, having filed a special demurrer, take several exceptions to the declaration. The plaintiff, in the declaration, is stated to be a citizen of the state of New York; but, it is objected, that there is no averment of his being a citizen, at the time the suit was commenced. That it does

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

not follow, from his being a citizen of New York at the time the declaration was filed, that he was a citizen at the time the writ was issued. In this respect, the declaration is in the usual form, and we think it is good. In a late case, the supreme court decided that, if the citizenship of the plaintiff appeared in any part of the pleadings, it is sufficient. In that case (Bradstreet v. Thomas, 12 Pet. [37 U. S.] 64) the citizenship of the plaintiff was alledged in the joinder to the demurrer, and, under the circumstances, it was held good.

One of the defendants is alledged, in the declaration, to be a citizen of Illinois, and the other of Missouri. The writ was served only on the citizen of Illinois. It has often been ruled that, where there are several plaintiffs and defendants, the court must have jurisdiction, as between each of the plaintiffs and defendants. In the case under consideration, the plaintiff being a citizen of New York, the suit being brought in the state of Illinois, the court can take no jurisdiction against the defendant, who is a citizen of Missouri. But as this defendant is not, in fact, a party to the suit, the process not having been served on him, the act of congress of the 28th Feb., 1839, 1st section [5 Stat. 321], covers the case, and authorizes the suit against one of the parties to the note. And, indeed, without the provisions of this statute, the defendant being liable to pay the note, and the other party not being, in any way, prejudiced by the proceeding, a judgment might have been entered against the party before the court. But the late law provides for the case, and removes all doubt on the subject. It is also objected, that the declaration does not show who compose the firm of John W. Taylor & Co., the payees and indorsers of the note. And, it is insisted, that this is material, in order to give jurisdiction to the court. Where an individual derives his right through an assignment of a firm, as in this case, it is never necessary for him, at common law, to state, in his declaration, the names composing the firm.

In this case the declaration alledges that John W. Taylor & Co. are citizens of the state of New York, and no necessity is perceived for a more specific allegation. The defendants promise to pay John W. Taylor & Co.; and, by the same name, the note is indorsed to the plaintiff. Why should he be held bound to ascertain and set forth, in his declaration, the individuals who compose the firm? If the note had been transferred by ten or twenty firms, it would be just as necessary to state the individuals who compose each of them, as in the present case. This would not only establish the rule in this court, different from that which exists in other courts, but it would materially affect the negotiable character of bills or notes. There is nothing in the act of congress referred to, or in the limited jurisdiction of this court, which should change the rule. It is always in the power of the defendant to plead to the jurisdiction of the court, and take advantage of any fact which may exist, going to show a want of jurisdiction.

In the last place, it is objected that the note, upon its face, is payable at the State Bank of Illinois, and the declaration contains no averment that, when due, it was presented to the bank for payment. As matter of description, it is proper to state where the note is payable; but the law is now well settled, that it is not necessary, where a note is payable at a particular place, to state, in the declaration, that a demand of payment was made at such place. There are some conflicting decisions on this point in this country; but the weight of authority is, that no demand need be made. And, until lately, in England, there was no question which produced more conflicting decisions, than this one. The king's bench decided one way, and the common pleas another; and this conflict continued until the point was decided, in the house of lords, against the king's bench, that a demand of payment, at the place where the note was made payable, was essential to the right of action on the note. No one, it is presumed, can read the opinion given in the house of lords, and not be struck with the forcible reasoning, and superior ability, on the side of the minority in the house. Lord Eldon was in favor of the decision given; but eight of the twelve judges were against it, and in favor of the decision made by the king's bench. And, it does seem, that the masterly views presented by the eight judges, are conclusive on the subject. The case was Rowe v. Young, 2 Brod. & B. 180. This decision of the house of lords does not seem to have been satisfactory, as, immediately afterwards, an act of parliament (1 & 2 Geo. IV. c. 78) was passed, which substantially sustained the doctrine of the king's bench. Where a note is payable at a particular place, as in the present instance, at a bank, the maker of the note may show a deposit of the money to meet the note, or a readiness to pay, had a demand been made. And this seems to be a proper subject matter for defence. Why should the holder of the paper be required to make a demand of payment, at the place designated, any more than a demand of the maker, at his usual place of residence, where no place is named?

This question, in the case of Wallace v. McConnell, 13 Pet. [38 U. S.] 144, was fully considered, and decided by the supreme court. It is, therefore, no longer an open question before the courts of the United States. The demurrer is overruled; and, there being no further defence, judgment is entered for the plaintiff on the note.

THOMPSON (COOPER v.). See Case No. 3,202.

THOMPSON (CRAGIN v.). See Case No. 3,320.

Case No. 13,953.

THOMPSON v. EMMERT.

[4 McLean, 96.] [1]

Circuit Court, D. Illinois. June Term, 1846.

RECORDS — FACTS STATED THEREIN — DENIAL BY PLEA—APPEARANCE—VOID JUDGMENT—JUDGMENT ON ATTACHMENT—ACTION UPON.

1. Where from the record it appears that the defendant appeared in the action, that fact can not be denied by plea or otherwise.

[Cited in U. S. v. Walsh, 22 Fed. 648.]

2. As well might there be a denial of a judgment.

3. But where from the record it does appear that there was no personal service on the defendant, who entered no appearance, the judgment is a nullity.

[Cited in brief in Barney v. White, 46 Mo. 138.]

4. To such a record the plea of nul tiel record is proper.

5. A judgment on an attachment being a proceeding in rem. is no ground for an action out of the state.

[Cited in Gibbs v. Queen Ins. Co., 63 N. Y. 128.]

[This was an action by William R. Thompson against David Emmert.]

Mr. Logan, for plaintiff.

Mr. Campbell, for defendant.

OPINION OF THE COURT. This suit is brought on the record of a judgment rendered in the district court of Allegheny county, state of Pennsylvania. The defendant pleaded nul tiel record; and also that process was not served on the defendant. A motion is made by the plaintiff's counsel, that the defendant shall be required to make his election of one of the two pleas filed, on which he will rely for his defense. This court held, in Lincoln v. Tower [Case No. 8,355], that where it appeared from the record the defendant had personally appeared, the fact could not be controverted by a plea. That it was a fact verified by the record, and under the act of congress, could not be contradicted by plea or otherwise, any more than the judgment itself. A reference is made to that case, where the principles which apply to this case, were discussed. But the record of the judgment of Pennsylvania, on which this proceeding is founded, does not show that there was an appearance to the suit by Emmert. A foreign attachment was issued against him, as a non-resident, and against others who were named as residents, on one of whom the attachment was served. Several persons were served as garnishees of Emmert. An alias and a pluries writ of attachment were issued. A judgment was entered against Emmert "for want of an appearance and plea," for the sum of four thousand five hundred thirty-eight dollars and thirty-two cents. On the 6th of March, 1841, there was a rule to show cause, on Saturday next, why the judgment and proceedings should not be set aside. This motion was afterward withdrawn, and on the 8th of December, 1841, rule was granted to show cause why judgment should not be set aside. On the 8th December, 1842, leave was given to the plaintiff to amend his declaration, which was objected to. And then follows the entry, "that the judgment entered on record against Emmert is set aside as irregular; and now, to wit, December 8th, 1842, judgment against defendants, for want of an affidavit of defense;" and on the 5th of February, 1842, on argument the court set aside the judgment, if any there be against these, who were summoned as garnishees only. The liquidated sum is stated to be five thousand one hundred fifty-eight dollars and ninety-four cents. On the 9th of July, 1839, the record states an execution was issued against Emmert, not including the other defendants, which was returned nulla bona; and then an entry, this was under the judgment first entered, which was afterward set aside; and that a sci. fa. issued against garnishees, to July term, 1839; and that they all answered and showed that there were no effects of Emmert's in their hands, and that they were not indebted to him. From an inspection of the record, it no where appears that Emmert was personally served with process, or that his property was attached. The record is extremely irregular, and how a judgment could have been entered against Emmert, is not easily perceived. If the property of Emmert had been attached, the rule is well settled, that a judgment entered against him on such a process, he not having had personal notice of the suit, nor entered his appearance, can have no effect, out of Pennsylvania, against the defendant. It is considered a proceeding in rem, and out of the state can not affect the rights of the defendant beyond the property attached. In Pennsylvania, as in Ohio, such a judgment may be good against all the property of the defendant in the state. This, perhaps, may be within the power of the state; the property within its jurisdiction may be made subject to the payment of debts in the mode which the law-making power may deem just. But such a law can have no extra territorial effect; nor can a judgment entered on an attachment be considered in another state, as of any validity to charge the defendant.

We are inclined to think that under the plea of nul tiel record, the record must be rejected, if upon its face it appears no notice was served on the person against whom the judgment was entered. If the proceedings were void for a want of this notice, then is there no valid record upon which a recovery can be had, and, consequently, there is no such record as the plaintiff has set out in his declaration. The plea of nul tiel record is

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

sustained, and as there is no other ground on which the action can be sustained, a nonsuit is the consequence.

THOMPSON (ENGLAND v.). See Case No. 4,487.

Case No. 13,954.

THOMPSON et al. v. FAUSSAT.

[1 Pet. C. C. 182.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

SEAMEN—WAGES—RECEIPT—WHEN CONCLUSIVE—CAPTURE ON HOMEWARD VOYAGE—TO WHAT TIME WAGES DUE—NEW CONTRACT.

1. The appellants filed their libel for wages, on a voyage from Philadelphia to a port in France; and for half the time the vessel lay at the port, at which the homeward cargo was taken on board. The vessel landed her cargo at her destined port, St. Jean de Luz, proceeded to Bayonne, remained there six months; and then went to La Teste, where she took on board a cargo, sailed on her homeward voyage, was captured by the British, carried into England, and condemned as a prize. The libellants returned to Philadelphia, after having been detained for some time, as prisoners of war. The respondents on being applied to, offered to pay only half wages, from the time the vessel arrived at St. Jean de Luz; and stated, that if they did not think proper to accept of this offer, they might take advice, and determine on the proposition. The libellants afterwards accepted their wages, according to the terms offered, and gave acquittances in full. They claimed in their libel, full wages to La Teste, and half wages during the time of her stay there.

2. A receipt in full is only prima facie evidence of what it purports; and if clearly proved to have been obtained by fraud, mistake, or ignorance of the rights of the party, it will be examined into and corrected in a court of law, as well as in a court of equity; but if such evidence is not given, the presumption in favour of the validity of this instrument will prevail.

[Cited in brief in Lawrence v. Schuylkill Nav. Co., Case No. 8,143; The Topsy, 44 Fed. 632.]

[Cited in Girard v. St. Louis Car-Wheel Co. (Mo. Sup.) 27 S. W. 650; Russell v. First Presbyterian Church, 65 Pa. 15.]

3. If the legal rights of a party are doubtful, honestly contested, and opportunity given him to satisfy himself in relation to them; a receipt given by him for less than he was in strictness entitled to, will not be set aside.

4. When a vessel is lost on her homeward voyage, full wages are due to the seamen up to the time of her arrival at the last port of delivery, of the outward cargo; and half wages from that time until her departure from the last port at which the return cargo was taken on board; the time of her going from port to port to obtain the cargo, being considered the same as if she had remained at her port of delivery, and taken a full cargo there.

[Cited in The Two Catherines, Case No. 14,288; Bronde v. Haven, Id. 1,924; Pitman v. Hooper, Id. 11,186; The Niphon's Crew, Id. 10,277.]

[Cited in Gookin v. New England Mut. Marine Ins. Co., 12 Gray, 516. Cited in Washington Ins. Co. v. White, 103 Mass. 240.]

5. Retaining seamen on board, by direction of the owner, after the determination of the voyage for which they shipped, amounts to a new contract for the return voyage, upon the same terms as the outward voyage.

This was an appeal from the decree of the district court, upon a libel filed in that court, by the appellants, for their wages, as seamen on board the Squirrel, belonging to the appellee, on a voyage from Philadelphia, to a port in France. The facts of the case were; that this vessel arrived at St. Jean de Luz, on the 14th day of March, 1813, and after discharging her cargo at that port, on the 26th of the same month, proceeded to Bayonne. A return cargo was provided for her at Bordeaux, by the consignees, when instructions were received by the master from the consignees, to remain with the vessel in France, until September, and in the mean time to discharge part of the crew. A part of the crew was accordingly discharged, and a part retained, amongst whom were the libellants. On the 21st of September, 1813, the vessel sailed from Bayonne, and arrived next day at the port of La Teste; where the cargo, for the return voyage, was received and laded on board. On the 12th of December, in the same year, she sailed from La Teste on her homeward voyage; and in two days afterwards, she was captured by a British frigate, carried into England and condemned as a lawful prize. The libellants having remained on board of this vessel, from the time of her departure from Philadelphia, to the period of her capture, and carrying in for adjudication; demanded their full wages, from the time the vessel sailed from Philadelphia, until her arrival at La Teste, that being the last port of lading and departure; and for half the time, during which she remained at the said port. It was proved in the cause, that when the libellants called upon the respondents to demand their wages, they were informed by the respondents, that they had taken legal advice, and that the libellants were entitled to only half wages after the brig arrived at St. Jean de Luz; that they had been informed that other vessels had settled on the same terms; and that they were ready to settle with them upon the same principle. They further stated to the libellants, that if they did not think proper to settle upon this principle, they could take advice and call again in the afternoon. They did call accordingly, and received the wages which the respondents had offered to pay, for which they severally gave receipts in full of all demands, against the brig Squirrel, her owner and officers. The district court dismissed the libel.

It was contended by Messrs. Coxe & Dillingham, for the appellants, that an acquittance is only prima facie evidence of the payment of the sum mentioned in it: and though given in full of all demands, it may be inquired into: and if it was given under circumstances of fraud, imposition or mis-

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

take, the parties are not bound by it; that the rule applies with peculiar force in cases of acquittances given by seamen. 1 Eq. Cas. Abr. 170, note; 2 Term R. 366; 5 Ves. 87; 5 East, 232; 1 Johns. Cas. 145; 2 Johns. Cas. 448; 5 Johns. 68; 8 Johns. 389; Thorne v. White [Case No. 13,989]; Jackson v. White [Id. 7,151]; Whiteman v. The Neptune [Id. 17,569]. They insisted there was ground for charging the appellees with imposition; as they have offered no evidence to show they had received the advice they pretended they had, or that settlements in similar cases and upon the same principle, had been made by the seamen of other vessels.

Secondly, they contended, that there is a clear mistake; since the rule in such cases being, that the seamen are entitled to full wages up to the time of the arrival of the vessel, at the last port of her lading or departure, which La Teste was, and to half wages, during her stay there. Beaw. Lex Merc. 109; 12 Mod. 408; 5 Com. Dig. 115; 2 Vern. 727; 4 Bac. Abr. 617; Relf v. The Maria [Case No. 11,692]; Walton v. The Neptune [Id. 17,135]; Giles v. The Cynthia [Id. 5,424]; Thompson v. The Philadelphia [Id. 13,973], Johnson v. Sims [Id. 7,413]; Cranmer v. Gernon [Id. 3,359].

Mr. Phillips, for the appellee, admitted that a receipt is not conclusive; but he insisted, that where there is no fraud, and the party giving it, had a full opportunity to take advice, and he afterwards consents to receive a sum less than he was entitled to; he is bound by it. Secondly, he contested the rule laid down on the other side, and insisted that full wages were due only to the port of discharge, and half wages for the residue of the time, that this vessel was detained.

Coxe & Dillingham, for appellants.
Mr. Phillips, for appellee.

WASHINGTON, Circuit Justice. The principle contended for by the appellants' counsel, that a receipt in full of all demands, is not conclusive, against the giver of it, is, as a general principle, unquestionably correct. It is so settled in the English and American courts. Like a settled account, it is only prima facie evidence of what it purports to be, upon the face of it; and upon satisfactory proof being made, that it was obtained by fraud, or was given under a mistake, either of facts, or under an ignorance of the legal rights of the party who gave it; it may be inquired into and corrected in a court of law, as well as in a court of equity. When this is made out by evidence, it then appears, that beyond the sum actually paid, it was given without consideration. But this want of consideration, ought to be made clearly to appear by the party who attempts to impeach the validity of the instrument. If this is not done, the presumption in favour of the written acknowledgment of the party, must prevail. An agreement for instance, made for the purpose of settling family differences, will not be set aside even in equity, though it were founded on mistake. In like manner, I conceive, if the legal rights of the party who gives the receipt, be doubtful, and are honestly contested by the other side; and time and opportunity are afforded him to satisfy himself upon the matter in dispute, and he finally agrees to compromise, and to accept less that he might in strictness be entitled to; the court will hold him bound.

As to the point of law, arising in this case, in relation to the wages, which these seamen had a right to claim; it appears to be quite unsettled. I have met with no case, which precisely resembles it, in any book of reports; nor with any principle in the ordinances, or usages of other nations, which strictly applies to it. In the cases cited from 12 Mod. 409, and Ld. Raym. 739, it is laid down as a general principle; that if the vessel be lost on her return voyage, the seamen are entitled only to full wages to the last port of delivery; and to half wages, for the time she was in such port. In the case of Giles v. The Cynthia [Case No. 5,424], the same rule was laid down. In the case of Cranmer v. Gernon [Id. 3,359], the same decision was made; the Isle of Bourbon being considered as the last port of delivery. It is true, that in this latter case, the judge states, that he had decided; that when a cargo is purchased, at several neighboring ports, and the vessel proceeds to each of them to receive it, the last port of lading and departure, is the one to which full wages should be paid. But I think it fair to apply this doctrine, thus generally stated, to the particular case the judge was deciding, which will make it consistent with his other reported decisions, and with the cases before mentioned. 12 Mod. 409, and Ld. Raym. 739. What proves the propriety of thus qualifying the dictum of the learned judge is, that he immediately observes, that it is immaterial, whether the ship lay at the port of her original destination, while her cargo was collecting, and brought in lighters, or goes to the port where it was purchased. Now if it be immaterial, and if remaining at the port of her original destination, the seamen would have been entitled to no more than full wages to that port, and half wages, during her continuance there; they would be entitled to no more, if the ship had gone to other ports, to take in her cargo there, instead of waiting to have it sent to her.

My own opinion, upon this new, and somewhat difficult case is; that whenever the vessel is lost on her return voyage, her arrival at the last port of delivery of the outward cargo, or at the last port of destination, if there be no cargo; fixes the time, to which full wages are to be allowed; and that one half time of her stay there should be added to the outward, and the other half

to the homeward voyage; and to be considered respectively, as parts thereof. If the vessel leaves her port of destination or unlading, for the purpose of receiving a return cargo; she is at such ports, to be considered, either as on her return voyage, or as being in the same situation, as if she had remained at her last port of unlading, there to receive her cargo. If the former, then the whole of the wages, from the time she left her port of unlading, including half the time she lay there, would be lost, in consequence of the subsequent capture; if the latter, the seamen would be entitled to half wages only, during the whole time the ship lay at the port of delivery, and the port of lading and departure. But upon no principle, that I can distinctly comprehend, can the port of lading and departure, be considered as the port of delivery, or, in other words, the termination of the outward voyage; unless there be something particular in the contract made with the seamen. In this case, the contract was for a port in France. After the cargo was delivered at St. Jean de Luz, it terminated; and the seamen were at liberty to leave the vessel. But the retaining of them, in consequence of the directions of the owners, amounted to a new contract for the return voyage; upon the same terms, as had been agreed upon, for the outward voyage, as it does not appear, that any new contract was expressly made with them. The going to Bayonne, for the purpose of taking in a return cargo, which was to be sent thither from Bordeaux; and the subsequent departure from Bayonne, and arrival at La Teste, where the cargo was actually taken on board; were either parts of the return voyage, or those ports are to be considered, in relation to St. Jean de Luz, as one port. In the former case, the appellants have received more than they were entitled to, and in the latter, precisely what they were entitled to.

I am therefore of opinion, that the claims of the appellants, were settled on fair principles; and that the decree of the district court, ought to be affirmed with costs. Decree affirmed.

THOMPSON (FLANDERS v.). See Case No. 4,853.

Case No. 13,955.

THOMPSON v. GEORGETOWN.

[1 Hayw. & H. 226.] [1]

Circuit Court, District of Columbia. Nov. 1, 1845.

ACTION OF COVENANT — CONTRACT — MEASURE OF DAMAGES — PROFIT.

The plaintiff contracted with the defendant to excavate and cut a passage way through a bar that crossed the main channel of the river Potomac between Georgetown and the Potomac bridge. The plaintiff excavated a part of the amount agreed to be excavated and a freshet cleared away the balance, leaving the channel free to the satisfaction of the defendant, and the plaintiff was, thereupon, stopped by the defendant from completing the contract. On a suit brought on the covenants, it was *held*: That the amount of damages is not the contract price of the residue, but the fair and reasonable profit that would be made by the plaintiff if he were allowed to complete the contract.

[Action of covenant by Oscar D. Thompson against the corporation of Georgetown.]

Joseph H. Bradley, for plaintiff.

Clement Cox, for corporation.

BY THE COURT. This was an action on the covenants contained in a contract entered into between the plaintiff and the corporation of Georgetown, to excavate and cut a passage way through the bar that crosses the main channel of the river Potomac, between Georgetown and the Potomac bridge. There were two counts in the declaration. The first, averring that it was a covenant for at least 8,000 cubic yards at 35c., amounting to $2,800. That the plaintiff was to provide a dredging machine equal to the excavation of 150 cubic yards per working day. That he did provide such a machine and entered upon the execution thereof, as provided therein until the defendant was satisfied with the channel in the river, and he was stopped by defendant and claiming $2,800. The second, averring that he was always ready and willing, and then, that the corporation and plaintiff agreed to stop the work on a day mentioned. The plaintiff retaining his right to recover the stipulated amount which the corporation has refused to pay.

On the trial, the following instructions were given: (1) If the jury shall believe from the evidence that the contract given in evidence was abandoned by mutual consent of the parties before being completely executed without any reservation by the plaintiff at the time of any claim against the defendant beyond the stipulated rate of compensation for the work actually excavated by the plaintiff, and that the defendant had paid him the full price at that rate before the institution of this suit, then the plaintiff is not entitled to recover. (2) And if the jury shall further believe from the evidence, that the plaintiff only excavated 4,240 yards, part of the 8,000 yards mentioned in the contract given in evidence, and that he was prevented by the defendant from excavating the residue of the said quantity without his consent, and that, in fact, before such act of the defendant, if such act be found by the jury, the said residue or as much in the proposed line of excavation or any other equally satisfactory to the defendant had been excavated by a freshet in the river; then the plaintiff is not entitled to charge the defendant with the quantity excavated by the freshet as if made by him, and, although the jury shall find that

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

the plaintiff was prevented from excavating said residue as aforesaid, the true measure of damages to which the plaintiff is entitled under the circumstances is not the gross contract price of said residue at 35 cents per cubic yard, but is the fair and reasonable profit, if any, that the jury shall find from the evidence that the plaintiff would have made by excavating said residue over and above the expense to him of making such excavation. CRANCH, Chief Judge, dissenting. (3) And if the jury shall further find from the evidence, that the defendant has already paid the plaintiff any sum of money over and above the contract price of the work actually excavated by him, then such sum of money is in such case to be deducted from any allowance of profits as aforesaid. CRANCH, Chief Judge, dissenting.

Verdict for the plaintiff. The defendant moved for a new trial, because the verdict was against the evidence. Motion overruled and judgment rendered on the verdict for the plaintiff and damages at $600.

Case No. 13,956.

THOMPSON v. HAIGHT.

[1 U. S. Law J. 85.]

District Court, S. D. New York. Aug. 12, 1820.

VACATING PATENTS—RULE TO SHOW CAUSE—PRACTICE—AFFIDAVITS.

[1. Upon a motion to make absolute a rule to show cause why a patent should not be vacated as surreptitiously obtained, the question as to the legality and sufficiency of the affidavits upon which the rule was issued cannot be considered. If any error has been committed in granting the rule, it can only be corrected upon notice and motion to vacate the rule.]

[2. An affidavit taken for the purpose of showing that a patent was fraudulently procured, and which is intended to be used as the foundation for a rule to show cause why the patent shall not be vacated, should not be entitled as in a proceeding already pending in the court, when, in fact, no proceeding has yet been instituted. To so entitle the affidavit is good ground for vacating a rule to show cause, which has been granted upon the strength of the affidavit.]

[3. An affidavit to the effect that a patent has been obtained "surreptitiously and upon false suggestions" is sufficient to warrant a judge, in his discretion, to grant a rule to show cause why the patent should not be vacated. It is, however, proper for him to receive other affidavits, no matter when made, as well as other collateral evidence; not, however, as the foundation for granting the rule, but to support and corroborate the principal affidavit, and satisfy his conscience as to the truth of its allegations.]

[Rule to show cause why the patent granted August 12, 1820, to John and Nicholas Haight, should not be vacated.] On the tenth day of February, one thousand eight hundred and twenty-two, Alexander Thompson and Donald Malcolm respectively made affidavits, before Judge Van Ness, that the above mentioned patent had been obtained upon false suggestions. Upon these, together with other affidavits made in Scotland, and sworn to before the American consul at Glasgow, a motion was made in open court, the same day, pursuant to the provisions of the tenth section of the act of congress, for a rule directing the above named patentees "to show cause why process should not issue to repeal their patent." The matter alleged appeared to the judge sufficient, and he granted the rule prayed for. On the 18th day of March, in the said year, in obedience to the rule, both parties, as well the complainants as the patentees, appeared in court, attended by their counsel. It was moved by the counsel ror the complainants, that the rule to show cause, granted in this case, now be made absolute: and that the judge order process to be issued against the patentees to repeal their patent, agreeably to the tenth section of the statute before cited. Under this motion, the counsel for the patentees commenced their argument against the legality and sufficiency of the affidavits on which the rule to show cause was granted, when they were stopped by THE COURT. The judge said, that the patentees were not now in court, to show that the original rule had been granted erroneously, or upon irregular or insufficient affidavits; but, in the words of the tenth section of the patent law, to show cause why process should not issue to repeal the patent. That was the requisition of the rule, and that was all that could be shown while it was in force. The course pursued by the counsel was therefore irregular. If any error had been committed, in granting the rule to show cause, it could only be corrected upon notice and motion to vacate the rule. The counsel then prayed for time to give the notice and make the motion, which was granted

On the twenty-seventh day of March, one thousand eight hundred and twenty-two, the complainants, as well as the patentees, appeared in court by their counsel, agreeably to the notice which had been granted; and it was moved by the counsel for the patentees that the rule to show cause be vacated on these grounds: First. That two of the affidavits taken in the city of New York were entitled in the following manner, to wit: "District Court of the United States for the Southern District: In the matter of the patent granted by the United States of America to John Haight and Nicholas Haight, dated the twelfth day of August, one thousand eight hundred and twenty," when, in fact, they ought not to have been entitled at all; since, when they were so entitled, no matter was pending concerning the said patent in this court; and the first proceeding, to wit, the motion for a rule to show cause, and the rule itself, were founded upon them. Secondly. That several of the affidavits were taken and sworn to in Scotland, and not "before the judge of the district court where the patentee, his executors, administrators or assigns, reside," as directed by the act, and could not therefore form the foundation of

the rule which by the tenth section the judge was authorized to grant. Thirdly. Admitting the affidavits filed in this case to be legal in every other respect, they did not contain sufficient matter to sustain a rule to show cause, not to authorize any inquiry into the validity of the above described patent.

The foregoing points were argued by I. Wells, D. B. Ogden, and B. Haight, for patentees, and by T. A. Emmet, Charles Graham, and D. Roberts, for complainants.

Upon the first point THE COURT decided that the affidavit in question ought not to have been entitled, and on that ground ordered the rule to be vacated. The judge went on to remark, as this decision disposed of the whole case, it was unnecessary for him to express an opinion upon the two remaining points; but with a view to regulate future practice, and prevent repeated discussions, it might perhaps be useful and proper that he should state the views he had taken of the other objections that had been urged to the admissibility and sufficiency of the affidavits, upon which the rule to show cause had been granted. He said he thought the judgment would be within the limits of the jurisdiction allowed him by the first clause of the tenth section of the patent law, if he granted the rule to show cause upon a general affidavit that the patent had been obtained "surreptitiously and upon false suggestions"; that an oath to that effect, seemed to be all that was required by the terms of the act: he was not however prepared to say, that would always be a wise and judicious exercise of his discretion to grant a rule upon such an affidavit. He had no doubt, however, after this oath had been made before the proper judge, within the time, in the form, and in the terms prescribed by the act, it would be perfectly regular for the judge to receive other affidavits, no matter when made, in order to remove his doubts, and other collateral evidence, not as the foundation upon which to grant the rule, but to support and corroborate the principal affidavit, and to satisfy his conscience as to the truth of the general allegations it contained. He was therefore of opinion that the affidavits made in Scotland had been in the first instance properly received and considered, and that the matters alleged in all the affidavits were sufficient to authorize the rule which had been granted. It was decided that the rule, when granted, and all subsequent proceedings, should be entitled as between complainant and defendant; and the judge directed that, when a copy of the rule to show cause was served, copies of the affidavits upon which it was granted should be annexed.

Subsequent to the adoption of the foregoing rules of practice, there was a full trial in the case of Thompson v. Haight before the district judge [Case No. 13,957], which consumed several days, and a large number of witnesses were examined. The rules laid down by the district judge in the case of Thompson v. Haight [supra], when taken in connexion with the opinion [in McGaw v. Bryan, Case No. 8,793], may be considered as the practice of the district court for the Southern district of New York, in patent cases.

Case No. 13,957.

THOMPSON et al. v. HAIGHT et al.

[1 U. S. Law J. 563.]

Circuit Court, S. D. New York. 1826.

PATENTS—FOR WHAT GRANTED—INVENTOR—USE—USEFULNESS—NOVELTY.

An invention or improvement, to be the subject of a patent, under the act of Congress, passed in 1793 [1 Stat. 318], entitled "An act to promote the progress of the useful arts," must be both new and useful; and it is not enough, that the person claiming to be an inventor, is really the author of the invention or improvement, but he must assert his claim to this character, and sue out his patent, while the invention is yet recent, and before it has come into general use; and the thing invented, or the improvement, must be substantially useful, and not a mere contrivance, without any other merit than that of novelty.

This case was summed up with much learning and ability, by T. A. Emmet and Daniel Robert, for the complainants, and by J. O. Hoffman and George Griffin, for the defendants, after a long and patient trial, that consumed several days, from the great number of witnesses examined, and the various points of law collaterally involved in the controversy. [See Case No. 13,956.] We do not deem a summary of the evidence requisite. We think the opinion explains itself.

VAN NESS, District Judge. The patent in question is dated on the 12th day of August, 1820. The specification annexed, is in these words: "This invention or improvement, in the composition, or making, or manufacturing, of ingrained carpets or carpeting, consists in making the warp thereof, that is, the threads that extend lengthways of the same, of cotton, flaxen tow, or hempen yarn or thread, and weaving or combining them therewith, in the manner of weaving carpets or carpeting; the filling, that is, the threads that extend crossways, to consist of woolen or worsted yarn, by the weaving or combination of which materials, in the manner of weaving carpets, or carpeting, of any figures or colours, can be made or manufactured." On the 17th day of February last, the complainant, by his counsel, moved this court for a rule that the patentees show cause why process should not issue against them to repeal the above patent. The application was founded, and the rule granted, upon affidavits alleging that the patent in question had been obtained surreptitiously, or upon false suggestion; and this allegation, supported by other evidence, tending to show that the manufacture, for the ex-

clusive working and making of which the respondents had obtained the patent, was not new, or, in other words, that they were not the true inventors or discoverers. The rule was granted, and in compliance with a decision which had been made in another case, after full argument and deliberation, the parties upon the hearing went into the whole merits of the case, and the alleged originality of the manufacture in question was investigated with much labour and assiduity.

The general novelty of the questions involved in this case has produced some difficulties in its investigation, and the pecuniary value ascribed to the exclusive privilege claimed by the respondents imparts to it an unusual degree of interest and delicacy. Not only are the questions now before me novel, but the whole law relating to patents may still, in this country, be regarded in that light. The "Act to promote the progress of useful arts," has seldom been the subject of judicial examination or exposition. Some suits, it is true, have, at different times, been brought under the fifth and sixth sections; but they have not been numerous, nor can we derive from their reported progress and results much aid in our present inquiries. Even in England the law of patents has, until recently, remained in much obscurity. It is a circumstance worthy of remark, and difficult to explain, that, although the law regulating the granting of patents has been established, as it now stands, ever since the reign of James I., yet, with one exception only, there is no case reported in the books prior to the 25th year of George III. It is too evident, however, that the privileges already obtained and daily acquired under this act will furnish fruitful sources of future litigation. The seeds of controversy are already sown in every quarter of the country. The very great and very alarming facility with which patents are procured is producing evils of great magnitude. It encourages the flagitious peculations of imposters, and the arrogant pretensions of vain and fraudulent projectors. Interfering patents are constantly presented to our observation, and patentees are everywhere in conflict. Amidst this strife and collision, the community suffers under the most diversified extortions. Exactions and frauds, in all the forms which rapacity can suggest, are daily imposed and practised under the pretence of some legal sanction. The most frivolous and useless alterations in articles in common use are denominated improvements, and made pretexts for increasing their prices, while all complaint and remonstrance are effectually resisted by an exhibition of the great seal. Implements and utensils, as old as the civilization of man, are daily, by means of some ingenious artifice, converted into subjects for patents. If they have usually been made straight, some man of genius will have them made crooked, and, in the phraseology of the privileged order, will swear out a patent. If, from time immemorial, their form has been circular, some distinguished artizan will make them triangular, and he will swear out a patent, relying upon combinations among themselves, and that love of novelty which pervades the human race, and is the besetting sin of our own people, to exclude the old and introduce the new article into use, with an enhanced price for the pretended improvement. Impositions of this sort, are of common occurrence, and will continue to multiply while the door to imposture is left open and unguarded. More than three thousand patents have been granted since the year 1790. The number obtained for the same or similar objects is well worthy of observation. Eighty are for improvements on the steam engine and on steam boats; more than a hundred for different modes of manufacturing nails; from sixty to seventy for washing machines; from forty to fifty for threshing machines; sixty for pumps; fifty for churns; and a still greater number for stoves. The demand for this article has called forth much ingenuity and competition. There are now not less than sixty patents for stoves, pretended to be constructed upon different principles. Some are patented, as it is called, because they have ten plates; some, because they have eleven; some, because the smoke is permitted to escape at one side, and some because it is let out at the other. Some indefatigable projectors have contrived them with a door on each side, and others, still more acute and profound, make them with a door on one side. But all must be compensated, in the price of the article, for the time, labour, and learning, employed in making their several improvements. All are men of genius; and surely, genius, in a new and enterprising country, must be rewarded! The contribution levied upon the community, in the sale of these articles, is enormous, and would be sufficient to satisfy the most inordinate avarice, if it were not distributed among so many men of merit. With great justice many men of genuine skill and true genius complain that they are robbed of their lawful and legitimate rewards, by constant and incessant encroachments upon their rights. They are, indeed, often made the victims of itinerant pretenders, who traverse the country with a view to examine new inventions, and by some cunning device evade the patents that protect them. Sometimes the introduction or subtraction of a wheel, or some other frivolous alteration, is made, to satisfy their conscience in testifying to the novelty of their contrivance, and then they issue forth, with their parchment and great seal, in the redoubtable character of patentees and discoverers of some great and useful improvement in the arts. The consequences always are, litigation and endless trouble, if not

total ruin, to the true inventor. These evils are accumulating apace, and will soon, it is hoped, attract the attention of the legislature. The system that produces them must be bad. Some mode should be devised of examining into the novelty and utility of alleged inventions, before patents are issued to the applicants. This was directed to be done by the first act of congress, passed relative to this subject; but, unfortunately, I think, it is not required by that now in force. In England, as I have shewn in another place, this investigation generally is, and always may be, instituted. But there, another very effectual, though not, perhaps, a very commendable, security exists, against frivolous applications for patents. It is the very great expense attending the proceedings necessary to obtain them. It amounts to above six hundred dollars,— a sum, which, added to the hazard of a failure, would seem sufficient to deter all but very sturdy impostors from making experiments upon the credulity of the government. In France, in an early stage of the Revolution, a law was enacted for the encouragement of artists and new inventions. The general principles of the English system were adopted as the basis of the act; but, in the spirit of innovation and change which then prevailed, this pernicious modification was introduced, which opened the door to impostures. and patents, as here, were gratuitously issued to all who sought them. The evils, however, inherent in such a system were soon perceived, and for many years past no patent has been issued but upon due examination into the alleged importance of the subject.

A more rigid scrutiny than is made into the merits of pretended inventions is recommended by every consideration of prudence and safety. It is due to the comfort and peace of every organized community that such a protection should be incorporated into every system devised for the encouragement of individual enterprize. It has been said, and often repeated, that the abuse of a privilege is no argument against the privilege itself. I think it is. I think the liability of a privilege to abuse is always a fair argument against granting it. But, in this enlightened age, I trust, few, if any, will be found to deny the propriety and equity of granting to ingenious men the exclusive use of their inventions or discoveries for a reasonable time. It is not that exercise of the legislative power of the country of which I am disposed to complain. It is not the great principle upon which the act is founded, but the means adopted to effectuate its purposes, which I think reprehensible. The security and benefits to which the inventors of valuable improvements are entitled can never be adequate to their merits, while patents are issued without inquiry, without limitation or restraint. They should only be granted, as I conceive, upon due examination into the merits of the application, and then the rights granted should be well secured, and well protected. The present regulations frustrate and defeat the great principle and design of the act. If it were necessary to fortify or support this position by a reference to facts or experience of any sort, we have both in abundance before us. It is unnecessary to look farther than to see the fate of Whitney, Evans, and above all, Fulton, or those who represent him. Instead of deriving peace, honour, and affluence from their incessant labour and incomparable skill, they have sunk under vexation and the pressure of litigation. Patent upon patent and privilege upon privilege have been granted, infringing the original rights, until their hopes and anticipated rewards were converted into despair and poverty. In the degrading conflict, even the laurels they had fairly won withered amidst the wreck of their fame and their fortunes.

If means are not devised and adopted to arrest this torrent of fraud and imposition, engendered and invited by the present system of granting patents, it will be in vain we look to the great principles of the statute of James, or to any other barriers against the growth and introduction of all the evils that distinguished the ancient system of monopolies. The exclusive privileges authorized by that statute and our own are but modifications of the monopolies and grants by which the people of every quarter of the globe have, for ages, been oppressed. Under some form or other, their existence may be traced far back into antiquity,—to all times and all countries to which the researches of the historian have extended. In various ways and for different purposes, they were practised or enforced, by individuals or societies, to the injury or oppression of the public. Their deleterious influence often pervaded the body politic, and was manifested in the depression of individual enterprize, and the extinction of public spirit. It sullied, at times, the purity of the church, contaminated the morality of the philosopher, and corrupted the integrity of the magistrate. The right to authorize them was, however, at a very early period, claimed as an attribute of sovereignty; and, until a different example was furnished by the statute of James, was held to be inherent in the regal office. But these pernicious expedients for increasing the revenue, or replenishing the exhausted coffers of the crown, were never employed in the extent to which they were pushed by the immediate predecessor of James I. Elizabeth lavished them, with a munificent hand, upon her courtiers and her servants, whether distinguished by her personal favour or for their public services. All trade and commerce, whether foreign or domestic, was appropriated by monopolists. Industry and the arts languished alike, under these unnatural restraints and fictitious embarrassments. Emulation was extinguished, and individual enterprize sunk under such various and multiplied oppres-

sions. Notwithstanding the renown and external glory of this reign, the nation was oppressed and miserable. The masculine and heroic temper of the sovereign, united to the vigour and genius of her military councils gave victory to her arms, and added laurels to her crown, but brought ruin to her people. The legitimate resources and revenues of the government were dilapidated and exhausted, while the sale and gratuitous distribution of monopolies were relied on to supply the munificence and relieve the necessities of the crown. This abuse of the prerogative at length exhausted the patience of the people and awakened a spirit of resistance, which ultimately produced the statute of James.

With the passing of this act terminates the political history of monopolies or patents. This statute effected an important and salutary change in the prerogative rights of the British crown. As has already been observed, notwithstanding some vague claims of the parliament, and the occasional decisions of the courts, the king had immemorially exercised a supreme and unlimited control over both the foreign and domestic trade of the nation; and on that foundation rested the whole multitude of exclusive privileges which had been granted to powerful associations or mercenary individuals. This statute abolished all that were deemed unjust or oppressive, and provided an effectual remedy against the recurrence of similar evils, for it left the crown only the naked right to grant to ingenious men the exclusive use of their own inventions or discoveries for a limited period. The nature and extent of the restriction thus imposed upon the prerogative of the king will appear more distinctly by referring to the received and established definition of a monopoly, or patent, prior and subsequent to the statute,—the one by Lord Coke, and the other by Hawkins. "A monopoly," says Coke, "is an institution or allowance by the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." After the statute of James was passed, Hawkins defined a monopoly thus: "A monopoly is an allowance by the king, to any person, for the sole making, selling, &c., any thing so that no person be restrained in what he had before, or in using his lawful trade." There would seem to be an inaccuracy here. The saving of the statute only goes to the working and making. The selling remains under the general prohibition, as will be seen under the fifth and sixth sections of the act. The first definition states it to be a grant in derogation of the general freedom of trade, and of rights at the time enjoyed by the public. The second defines it to be a grant of a privilege, which neither abridges any right nor restrains any privilege previously possessed or enjoyed. This latter definition is founded on the sixth section of the statute, which exhibits the only remaining remnant of the ancient prerogative applicable to this subject. The provisions of this act, and this definition of the grants it authorizes, confirm and establish the great principle that the right of the people to the practise of any known and useful art is not to be abridged, by the grants of the crown, and that they are not thus to be restrained in the enjoyment of anything in common use. The only power remaining in the crown, in respect to monopolies or patents, is to grant privileges "for fourteen years or under for the working, or making, of any manner of new manufacture, within the realm, to the true and first inventor or inventors of such manufacture, which others, at the time of making such letters and grants, shall not use, so that they be not contrary to the law, nor mischievous to the state."

It is this power in the British crown, as it existed and was understood at the time of the adoption of the constitution of the United States, which by that instrument is conceived to be vested in congress. The constitution of the United States declares that "the congress shall have power to promote the progress of science and useful arts, by securing, for limited terms, to authors and inventors, the exclusive right to their respective writings and discoveries." The legislature has, accordingly, in the act of 1793 [1 Stat. 318], entitled "An act to promote the progress of useful arts," adopted the fundamental principles, if not the details, of the English system. That act provides "that when any person or persons, being a citizen or citizens of the United States, shall allege that he or they have invented any new or useful art, machine, manufacture or composition of matter, not known or used before the application, and shall present a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the same, and praying that a patent may be granted therefor, it shall and may be lawful for the said secretary of state, to cause letters patent to be made out in the name of the United States," &c., "granting to such petitioner or petitioners, his, her, or their heirs, administrators, or assigns, for a term not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery," &c. The British statute leaves to the crown the right to grant letters patent for "the sole working or making of any manner of new manufactures, to the true and first inventor." That of the United States authorizes letters patent to be issued to any person who has invented "any new or useful art, machine, manufacture, or composition of mat-

ter, not known or used, before the application." These clauses are, respectively, the foundation upon which the law of patents rests in the two countries; and, although their phraseology differs, they are in substance the same. There is a great coincidence in these fundamental provisions of the two acts: "Any manner of new manufacture" is equivalent to "any new or useful art, machine, manufacture, or composition of matter." The judicial expositions, therefore, of each will be mainly applicable to the other.

In England, within the last forty years, questions upon patents have frequently arisen, and have drawn from their courts, in some important cases, very able expositions of the system they have erected upon the statute of James. Wherever, therefore, the two systems coincide, and where the circumstances of the cases are similar, we may derive important aid, in the application of our own law, from the luminous decisions of the British courts. The part of our statute, or, rather, of the clause I have just recited, which first presents itself for consideration, is the term "new." The "art, machine, manufacture, or composition of matter," for which a patent is claimed, must be "new." In relation to this point, the British statute has received a construction, which, with great respect, seems to me to be at variance with its whole scope and object, and is not justified, in my judgment, by any rules of construction applicable to the English language. It has been decided that a manufacture brought from abroad, if new in England, is a new manufacture, within the meaning of the statute. The words are, "The sole working or making any manner of new manufactures within the realm;" not manufactures, new within the realm, but, as I conceive, new manufactures, worked and made within the realm. The working and making must be within the realm, and the manufactures new,—new everywhere. For what sort of new manufacture is that which is known the world over, though not yet introduced in England? What sort of new machine is it, that has been in use for centuries in a neighboring kingdom? And what sort of an inventor is he, who makes a trip from Dover to Calais to get it? But he must be an inventor; for the statute allows patents to issue only to the "true and first inventors." A patentee, therefore, must be an inventor, and he must swear to it, too, to bring himself within the act, or the king will withhold the grant. The received construction, then, of the statute of James, appears to me, to involve gross absurdities, and to be a palpable perversion of the terms and plain meaning of the act. It is a departure from its spirit, and defeats its avowed object. It is everywhere said that this prerogative power was left in the crown, for the purpose of rewarding the personal merit of ingenious men,—to stimulate their inventive powers. But this alleged object of the act is at war with its practical application, and places the plagiarist and original inventor upon the same footing. This construction is given to the statute in the case of Edgeberry v. Stephens, [2 Salk. 446], the first reported decision upon the statute of James, and has its origin, I am constrained to believe, in the policy of the government. Expediency and the policy of the state have, no doubt, contributed to uphold it. It has been uniformly adhered to, and is everywhere laid down as established law; but I have nowhere seen it supported, as the true and grammatical construction of the language of the act. The policy may be good. It is not that I mean to condemn. But it ought to have been authorized and supported by a legislative provision, and not founded on a judicial perversion of the language of the law. From the 21st James to the time when the case of Edgeberry v. Stephens was decided, there is no judicial exposition of the statute on record. How it was understood and executed during that long interval is not known, nor is there any reported case from that of Edgeberry v. Stephens to the 25th of George III., in which this clause of the statute is expounded, or which throws any light upon the general law of patents.

Our own statute is not liable to the ambiguity upon which I have remarked. It allows patent monopolies to those who have invented "any new and useful art, machine, manufacture or composition of matter, not known or used before the application." This clause of the act of 1793 is plain and explicit. It is not obscured by any artificial arrangement of words, generating doubts to be resolved by policy or expediency. The art, &c., must be new; not new in one place, and old in another; but new, both at home and abroad. A patent cannot be obtained here for a manufacture known and practiced in a foreign country. A patentee must be an inventor, not an inporter. The patent must be for the result of his own ingenuity, not for a stolen or borrowed product. If even the act of 1793 left room for a doubt, which it does not, that of 1800 would remove it. That act very clearly develops the policy of the legislature. Its provisions, and the oath it prescribes, show, too obviously to admit of doubt or misconception, that it did not mean, in any case, to grant patents or monopolies for imported novelties, but to leave their introduction to the enterprize of the public. At the argument of this cause, one of the counsel proposed to contend that it was immaterial whether the alleged improvement of the defendants was known or used in England, or not. I could not but admire the adventurous and enterprizing spirit that prompted the effort; and while I express my respect for his high and singular endowments, must be allowed to regret that he estimated mine so low as to hazard the suggestion.

While, therefore, in England, it is deemed enough if the manufacture, for which a pat-

ent is claimed, be new "within the realm," here, I hold it most clear, that the art, &c., must be absolutely new. Although this word seems sufficiently to indicate and establish the meaning of either statute, yet the legislatures of both countries, from abundant caution, have gone farther and declared,—the one, that the manufacture must not only be new, but such as "others, at the time of making such letters patent, and grants, shall not use;" the other, that the art, &c., must be "not known or used before the application" for a patent. Although the phraseology of these clauses is somewhat different, yet the meaning of them seems to me to be precisely the same; and the coincidence is sufficiently clear and close to render the expositions of the one useful in elucidating the other. Whatever may be its grammatical sense and true meaning, it will readily be perceived that this clause of the statute of James must be construed in subordination to the judicial decisions of the English courts, which proceed on the ground that the statute refers to manufactures new "within the realm." The "use," therefore, must have been "within the realm," or it will not vitiate the grant. Thus understood, the law is applied and enforced with great rigor. The utmost caution and secrecy is necessary on the part of inventors; for any knowledge or use of their discoveries by others, previous to the sealing of their patents, will avoid them. It is unnecessary to cite authorities in support of this doctrine. It follows necessarily from the very letter of the statute. It pervades the whole law of patents, and every case reported in the books. It is fundamental in the British system, and, with great deference, I think it is so in our own. I hold, in what I conceive to be the plain and explicit language of the statute, that the invention or discovery for which a patent is claimed must not have been "known or used before the application," and if it were, that the patent, if obtained, would be void. I have reflected maturely on this branch of the subject, and, as the opinion I have formed differs widely from those which have been expressed by other judges, for whose experience, sound judgment, and valuable attainments I entertain a very high and very sincere respect, it becomes me to state the reasons upon which it is founded.

It must be admitted that the clauses of the British and American statutes, which I have quoted, are expressed in synonymous terms, and, as far as they are allowed to operate, their construction and effect must be the same. But, it is said, in an "Essay on the Law of Patents, &c.," a late American work, that "there is a difference between our statute and that of Great Britain on this subject. In England, if the invention has been put in use before the patent is obtained, it is void. But our act does not, like the English statute, refer to the grant of letters patent, but to the time of the invention." Fess. Pat. 50. I should have been utterly unable to ascertain from what part of the act this doctrine has been drawn, if the author had not, at the same time, stated that "the terms of the first section ought to be construed with reference and in subordination to the sixth section." I cannot acquiesce in this construction of the statute. It is, as I conceive, in direct conflict with the fundamental principles of the system which the legislature intended to establish, and subversive of great public rights, which congress has no authority under the constitution, to abridge. The first section of the act of 1793 develops, in plain and unambiguous terms, the principles of the law, and the manner in which the legislature proposed to lend its assistance and authority to promote the progress of useful arts. It authorizes letters patent to issue to any citizen or citizens of the United States who shall allege that he or they have invented any new and useful art, &c., "not known or used before the application." If the invention be neither new nor useful, or if it be known, or in use, at the time the application is made, the patent cannot lawfully issue, and, if issued, would be void; for it must be conceded that the statute gives the power to repeal or annul an illegal patent.

The words "not known or used before the application" form no part of the necessary allegations in the petition. They are directory to the department from which the patent must issue, and explanatory of what shall be deemed a new art, &c., viz. that it be not known or used at the time the petition is presented. The petitioner alleges that the art, &c., is new, and the department shall receive the allegation as true, if the art, &c., be not known or in use. If it be, the allegation is false, and the patent must be withheld. The act does in no way refer to the time of the invention, but most obviously to the time of making the application. In the common, if not in the critical, sense of the term, the petitioner may be an inventor, and a true inventor, but the inventor of an old, not a new, art. To entitle him, however, to a patent, he must have invented something which is new when he makes his application; and a new art I trust, will be admitted to be a new thing. He may have invented something that was new at the time of the invention, but which has become old and known before he applies for a patent. For such an art, or thing, no patent can issue. It is not alone his merit as an inventor which entitles a patentee to his grant. He is supposed to possess information which, if known, would be publicly beneficial, and, for disclosing it, he is rewarded with a monopoly. That disclosure forms the inducement to the grant, and the foundation on which it rests. If he has already imparted his knowledge gratuitously, or lost the exclusive possession of it negligently, he has no longer any thing new and useful to communicate, and, in either case, is not entitled to a patent. It is a precedent condition that he add something to the

stock of existing knowledge. The third section is conclusive on this subject. It declares, not only that the inventor, before he can receive a patent, shall swear that he is a true inventor, but shall furnish a written description of his invention, "in such full, clear, and exact terms, as to distinguish the same from all other things before known,"—known before the granting of the patent, as is evident from the subsequent requisition of the section. Why else require the description of the invention to be so plain as to "enable any person skilled in the art," &c., "to make, compound, and use the same." And in the case of a machine, the inventor "shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." And he shall deliver a model of his machine, if required, and "accompany the whole with drawings and written references, when the nature of the case admits thereof." And when the invention is a composition of matter, he shall furnish "specimens of the ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment." If the act does not "refer to the time of the grant of the letters patent, but to the time of the invention," how are all these explanations and descriptions necessary? Surely they are not required to enable a skilful person to practice an art already known and in use, or to make a machine which may be seen on the highway, or to distinguish the invention from all others known half a century before, for that is a period within the inventive life of man. How is it to be ascertained what was known 30, 40, or 50 years ago? There may be some rational grounds on which to determine the novelty of an invention, at the time when the patent is granted, but very inadequate means, if any, to judge of its novelty at the remote period which may be specified by a fraudulent applicant.

Under the construction I am resisting, a man may have a patent for an invention or discovery made at any period of his life, no matter how long or how publicly it has been known or used. Every thing which has been introduced into use, within the period assigned to the continuance of human life, may now be patented. But the statute does not require, nor does it admit of, a construction so absurd, and one which involves consequences so pernicious to the state. Our system of patent law was undoubtedly meant to be erected upon the great principles of the British statute. That statute professed to be declaratory of the common law, and it could not have been intended to revive, here, doctrines repudiated and denounced by both; doctrines, which had, in that country, oppressed the industry and extinguished the enterprize of the people; which had been proclaimed throughout the land as of the essence of despotism, and had been resisted to the very verge of insurrection. Their abandonment was extorted from the crown by the indignant spirit of the British parliament, and the statute of James stands upon its records as a great and lasting monument of the victory achieved by the recuperative energy of the nation. I cannot admit, that these principles have been transferred to our system. They do not I think, lurk under any of the provisions of our act, and they are not to be resuscitated and regenerated by construction. I do not hesitate to negative every part of the law relative to this branch of the subject, as laid down in the work to which I have referred. I contend that there is no "difference between our statute and that of Great Britain on this subject." That here, as in England, "if the invention has been put in use, before the patent is obtained, the patent is void." That our act does, like the English statute, "refer to the time of the grant of the letters patent, and not to the time of invention." That the terms of the first section ought not to be construed "with reference, and in subordination to, the sixth section." The first section, as I have already remarked, lays down, plainly and explicitly, the principles upon which the legislature meant to proceed, and forms the basis of the superstructure which has been erected. The loose provisions, inartificial phrases, and vague expressions, that may be found in subsequent sections, must be construed in reference to the first. It is there we see the scope and spirit of the law; and by that provisions otherwise doubtful must be tested.

If the act of 1793 admits of doubt, it is explained, and the construction I contend for established, by the act of 1800. By that act, aliens, who have resided two years within the United States, are entitled to all "the rights given to citizens of the United States, respecting patents for new inventions, by the act of 1793, and they shall enjoy the privilege, granted thereby, in as full and ample manner as citizens." The oath prescribed to them is that the art or discovery, for which they ask a patent, "hath not, to his or her knowledge, or belief, been known, or used. either in this, or any foreign country." That this knowledge or use is intended to "refer to the grant of the letters patent," and not "to the time of the invention," is demonstrated by the next provision, which declares "that every patent which shall be obtained," &c., "for any invention," &c., "which it shall afterwards appear, had been known, or used, previous to such application for a patent, shall be utterly void." Now, if, in the one case, the "knowledge and use refer to the time of the invention," and in the other to the "time of the grant of the letters patent," aliens and citizens are not on the same, but on a very different, footing; and the express object of the act of 1800 [2 Stat. 37], would thus be totally defeated. But I see no unsuperable incongruity in the act of 1793. The fifth section of that act, or,

rather, the third of the act of 1800, and sixth of the act of 1793, give the patentee a remedy for the infringement of his patent, by an action on the case, and allow the defendant to protect himself, by showing, among other things, "that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee." In either case judgment shall be rendered for the defendant, and the patent declared void. It is these clauses, which are said to be in conflict with the principles of the first section. But, under the first section, the patentee must be an original discoverer, or inventor; and in this respect the two sections coincide. The date of the discovery must be determined by the date of the patent; for the discovery must have been new, and not used, when the patent was issued. That is the date the patentee has, himself, affixed to his discovery, by his own allegation, when applying for his patent, under the first section, and he cannot be permitted to falsify it under this. How else can the date of the discovery be ascertained? The patentee may have had some vague and undefined notion of a new thing floating in his imagination, through half his life, and fix the consummation of his scheme at any and at various periods, suited to his interest. But that is not the evidence which the law requires. He may show, it is said, that he reduced his speculation to practice, and use, anterior to the date of the patent. Then, he shows too much. Then, by his own shewing, by the common law, and by the controlling principles of our own, his patent, as I contend, is void. It was obtained surreptitiously and upon false suggestion. It was bad, in its origin, under the first section, and cannot be good under this. A patent could only be rightfully granted to him for a thing, at the time, not known or used. If, then, the defendant shows, and, in my judgment, it is all he can be required to show, that the thing secured by the patent was in use, or had been described in some public work, anterior to the date of the patent, he shows that it was so anterior to the supposed discovery of the patentee; for the discovery must be supposed coetaneous with the patent. This construction of the sixth section, in which I have entire confidence, reconciles its provisions with the general principles of the act, and steers clear of the constitutional objections to which the other is exposed. Even if the construction I have adopted be wrong, yet this section does not control the terms of the first section, nor the principles upon which a patent may be repealed, upon a scire facias. Although it should receive the opposite construction, and the date of the patent should not be adopted as the date of the invention, yet that will prevail only in actions for damages, in the circuit court. It must be confined to proceedings under that section, and can, in no way justify the exposition of the general law, adopted in the "Essay on the Law of Patents."

If the construction of the patent law, which I have opposed, had been incidental, merely, I should not have given it so much attention. But, it pervades the work, and professes to derive support from the decision in the case of Evans v. Weiss [Case No. 4,572], in the circuit court for the Third circuit. With all my habitual respect for the great experience and profound discernment of the judge who presides in that court, I feel it my duty, while the subject is open for discussion, to express my dissent from some of the positions assumed, and some of the principles maintained, in that case. That the construction, given to the proviso in the "Act for the Relief of Oliver Evans" [6 Stat. 70], was correct, is most readily admitted. It was rational, and required by the terms of the law. But, as I most respectfully conceive, the act itself was a nullity. Evans possessed, at the time, no right which could be secured under the constitution. The right he once had was lost. It had become public property. And, I maintain, with confidence, the broad principle that the congress had no authority to grant a monopoly of a thing which is known, and in common use. It is, then, publici juris, and the enjoyment of it can never again be made exclusive, in the hands of an individual. When this law was passed, Evans' patent had been declared void, under the sixth section of the act of 1793, which forever put an end to the monopoly. For, whether the inventor gratuitously throws open his invention to the public, or whether it becomes known by other means; whether the patent expires by its own limitation, or is declared void by judgment of law,—is perfectly immaterial. In either case, no second patent can issue. The invention is then the property of the public, and of that the legislature cannot grant a monopoly. Though a first or original inventor has a right, if you please, to the exclusive enjoyment of the product of his own labour and ingenuity, he can only enjoy it thus while he keeps it as his own, and in his own exclusive possession. His ideas and intellectual operations, and all the enjoyments that attend them are his own, while withheld from the world; but, if he proclaim them, they enter into the mass of public knowledge, and cannot be withdrawn. The individual and secret knowledge of the petitioner, when he applies for his patent, belongs exclusively to himself; and it is the beneficial and public application and use of it which the legislature is authorized to secure to him for limited time. But, instead of securing to him his own, the legislature has no right to give to him what has become the property of others. It cannot deprive the public of what it possesses, to give it to an individual. It cannot prohibit the people

from the use and application of their own knowledge to any beneficial purpose, or from the practice of any art, useful to themselves, and not injurious to the state. Knowledge, diffused, is as common to the use and enjoyment of mankind as the atmosphere in which we live and move. It can never happen, then, as decided in the case to which I have referred, that "a man, after he shall have gone to the expense of erecting a machine, for which the inventor has not, then, and never may, obtain a patent, shall be prevented from using it, by the grant of a subsequent patent, and its relation back to the patentee's prior invention." A patent can have no relation back. It is very true that "the right to a patent belongs to him who is the first inventor, even before the patent is granted." That is, none but the first inventor can have a patent. But neither he, nor another, can have a patent, if the invention be in use. It cannot, in that case, be patented at all. So that he "who, knowing that another is the inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine," cannot "be cut out of the use of the machine, thus erected, by a subsequent patent." Id. If he knows how to construct it, he may make it, and use it, and can never be obstructed in the exercise of the right he has thus acquired. Neither individuals nor the public can suffer if "an obstinate or negligent inventor should decline obtaining a patent, and, at the same time, keep others at arm's length, so as to prevent them from profiting by the invention, for a length of time." Id. An effort, like that, would be wholly unavailing and fruitless. An inventor possesses no such right, and there exists no power to confer it upon him.

The principles maintained, in the case of Evans v. Weiss [supra], go the whole length of affirming that any art now practiced, and any machine, now in use, may be withdrawn from the enjoyment of the public by the original inventor. If that be so, we are thrown back to the situation of the people of England, prior to the statute of James. We are daily exposed to a revival of all the monopolies which were terminated by that act, and of all the evils which led to their suppression. I cannot accede to an exposition of the law, or a construction of the constitution, involving so direct an invasion of the inherent and indefeasible rights of the people. Evans' patent, having been annulled in due course of law, the invention or improvement for which it was granted had passed into common and general use. Congress possessed no right or power to make it private property again by authorizing the department to issue another patent to the inventor. Even the parliament of Great Britain, with all its undefined powers, and vague claims to political omnipotence, had never attempted to exercise an authority so destructive to the industry of the nation, and so subversive of public freedom. It sometimes extends the duration of the patent beyond the fourteen years to which it must be limited by the crown. But this is always done before its expiration. For then the invention is still private property. It remains so as long as the patent endures. While it continues private, its exclusive use may be prolonged. Perhaps congress possesses a similar power, though even that may be doubted. But its power over the subject expires with the patent.

The construction of the sixth section of the act of 1793 has given rise to much discussion, on other occasions and in other places; but, whatever difference of opinion may prevail, I cannot doubt that its phraseology was inadvertently adopted, and without intending to control the leading principles of the first section. I have, perhaps, devoted more time to the consideration of this section than, at first view, may appear necessary. But it must be recollected that a principal point, in this case is that the manufacture, for which the patent is granted, is not new. It becomes necessary, therefore, in order to decide it understandingly, to ascertain, as far as is practicable, the legal import of the term. While on the subject of the sixth section, I must be permitted to remark, without stopping long to illustrate the observation, that the provision which requires the defendant to prove that the specification was left deficient, or made redundant, for the purpose of deceiving the public, is pernicious in its practical operation, and at war with all the principles on which, alone, a patent or monopoly can or ought to be granted. Exclusive privileges, as we are taught, are conferred as a reward to the patentee for communicating something new and useful to the public. If he does not communicate it, so that it can be understood, what matters it whether the concealment or addition be the result of fraud or negligence? In either case the public receives no equivalent for the benefit conferred upon him. What he has invented or discovered, it is fair to presume he can describe intelligently; and defects in the specification should in all cases avoid the patent. How is the design to be proved? It seldom, if ever, can; and the public may often times, after much wealth has been accumulated by the individual and the patent expired, be left as ignorant as before it was granted.

It has been seen, plainly, I think, that the subject of a patent must be both "new" and "not known or used, before the application." It must also be "useful." This term has been defined to mean such an invention as is "not frivolous, or injurious to the well being, good policy, or sound morals of society" (Lowell v. Lewis [Case No. 8,568]); such an invention "as may be applied to some beneficial use in society in contradistinction to an invention which is injurious to the morals, the health, or the good order of so-

ciety" (Bedford v. Hunt [Id. 1,217]). A more enlarged and comprehensive signification may safely and properly be ascribed to the term "useful." It may well be added, that it must be an art, &c., not mischievous to the state, or generally inconvenient, which brings it within the terms of the British statute. It seems to me to have been used and intended as equivalent to that clause in the sixth section of the statute of James, which defines the nature of the new manufactures which will be exempted from the general prohibition of the act. What, if I may be allowed the phraseology, can be less useful than a patent that interrupts the practice of an art, &c., commonly known? What more pernicious to the state than the monopoly of a machine or manufacture already in use? I should not hesitate to decide, under this expression in the act, if the point were presented, that such an art, &c., or such a machine or manufacture, were not patentable, and that the grant was void. As this case, in my view of it, does not turn on this point, it is not necessary to pursue its investigation further.

THOMPSON (CITY OF HASTINGS v.). See Case No. 6,202.

THOMPSON (HAWKINS v.). See Case No. 6,246.

Case No. 13,958.

THOMPSON v. HOLTON.

[6 McLean, 386.][1]

Circuit Court, D. Indiana. May Term, 1855.

TAXATION—PUBLIC LANDS—IMMUNITY FROM TAXATION—REPEAL—SALE—CONSTITUTIONAL LAW—IMPAIRING CONTRACTS.

1. Under a compact with the United States, a law of Indiana was passed declaring that lands sold by the United States, within the state, should not be taxed until after the expiration of five years from the time of sale.

2. In 1847, an act of congress was passed [9 Stat. 118] declaring that in all the states which came into the Union previous to the year 1820, the restriction of taxation in such states should be annulled.

3. The act of Indiana, however, remained unrepealed until 1852.

4. Prior to the repeal certain lands were sold, and after the repeal, but before the five years had expired from the time of the sale, and the purchaser asked relief—the court *held* that the repeal of the act after the purchase, and before the termination of five years from the purchase of the land, impaired the contract made with such purchasers, and was consequently void.

[Cited in Brooks v. Board, etc., of Jasper Co., 20 Ind. 418.]

[Bill in equity by James Thompson against James N. Holton, treasurer of Benton county.]

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

Morrison, Ray & Morrison, for plaintiff.
Gregory & Jones, for defendant.

OPINION OF THE COURT. This is a bill to enjoin the defendant from collecting taxes alleged to have been illegally assessed, on the lands of the complainant, in Benton county, Indiana, for the year 1853. It is averred that the lands were not and are yet taxable; because at the time of the purchase, which was in March, 1852, the laws of the state then in force exempted from taxation, "all lands sold by the United States until the term of five years from the day of sale shall have expired." Rev. St. 1843, 208. This exemption was no doubt induced by the act of the 19th April, 1816, "to enable the people of Indiana territory to form a constitution," &c., and the irrevocable ordinance of the people of the territory accepting the propositions contained in the act, one of which was, "that all lands sold by the United States after the 1st of December, 1816, should be and remain exempt from any tax until the expiration of five years from the time of sale." Congress by its act of the 26th January, 1847, assented that the several states admitted into the Union prior to the 4th of April, 1820, may impose a tax upon all lands that might be sold by the United States, in said states, from and after the day of sale. But the law of Indiana exempting such land from taxation remained in force until the 17th of June, 1852. The complainant purchased his lands in Benton county, in March, 1851, more than a year before the exemption was repealed. At the time the complainant purchased his land, a law of the state exempted it from taxation for five years from the time of purchase, and this it is contended, is not a contract between a state and the complainant. What is a contract? By the supreme court, and by every body, it is defined to be an agreement to do or not to do a certain thing. As in the case before us, by this law the state agreed not to tax lands purchased of congress within the state, for five years after the purchase. Here is a stipulation, as express as words could make it, to all purchasers; and every purchaser accepts the proposition by making the purchase. Here is a contract as express as words can make it. For aught that appears, the exemption was the motive to the purchase. And no one can say that the policy of the state in this respect is an unwise one. It is an object with every new state to increase its population, and this is done by exempting lands purchased from taxation for a greater or less period of time. In the case under consideration, it exonerated the plaintiff from the annual payment of near $1000 in taxes. This is a considerable sum to the purchaser, and it may enable him to improve his farm in a few years.

It is argued that if the land in question be exempted from taxation on the same principle, the land purchased by revolutionary soldiers in the state would forever be exempted from taxes. The law, at present, exempts the lands

of revolutionary soldiers from taxation, consequently a purchase by such soldiers of land in Indiana, would make the exemption perpetual. Now this case has no analogy whatever to the one under consideration. The exemption in the one case is for the term of five years, in the other it is for the present, not for any specific time or for all time to come, but merely from present taxation. In the one case, it is a matter for the exercise of the discretion of the legislature, in the other no such discretion can be exercised, as the exemption is for five years. In the one case there is a specific contract, in the other there is no contract; and no obligation to extend the exemption beyond the present time; the next year the law may be repealed, and there is no ground of complaint; but in the other a repeal of the exemption before the termination of five years, would impair the obligation of the contract.

The legislature of Arkansas chartered a bank on the funds of the state, and provided in the act that the notes of the bank should be receivable in payment of public dues to the state. By an improper management of the bank its specie became exhausted so that it could no longer pay specie for its notes; the notes consequently were discredited, and the state refused to receive them in payment of taxes, and the legislature repealed the section declaring the notes should be received in payment of public dues. A tender being made of the notes to the treasurer, or by the treasurer in paying an amount due the state, the notes were refused, and suit was brought by the state against the debtor. In the supreme court of the state a judgment was entered in behalf of the state against the defendant, the court holding that after the repeal of the above section, the notes could not be paid into the state treasury.

A writ of error was presented to the supreme court of the United States, which decided that every individual who held a note of the bank, at the time of the repeal, had a right under the charter to pay it into the state treasury for public dues, and that, as against such holders of the notes of the bank, the act of the legislature of Arkansas impaired the obligation of the contract between the state and the holder, and was, consequently, void. But that notes received subsequent to the repeal were not so payable. The state being the owner of the bank had a right to repeal the charter, but that, by such repeal, it could not impair the right of the holder of the paper received before the repeal, and under the guaranty that the notes should be receivable in payment of debts to the state.

The case before us is a much stronger one than that referred to, from Arkansas. In Hanna v. Board of Com'rs of Allen Co., 8 Blackf. 352, the court say "the purchasers could not complain, because the first act contained no exemption, express or implied, and by the second the right to repeal the act exempting the lands from taxation was expressly reserved in the act itself." The court, however, say, "if no reservation had been made of the right to repeal the act of 1834 [Laws 1834, p. 343] we should certainly have been obliged to conclude that the state was deprived of the power of taxing the lands therein referred to," &c. This point, it was true, was not involved technically in the case, but in effect it was, when the court was obliged to put the power to repeal on the reservation in the act; consequently, if there had been no reservation, there could have been no power to repeal. The injunction heretofore allowed in this case is made perpetual, at the costs of defendant.

Case No. 13,959.

THOMPSON et al. v. The JACHIN.

[N. Y. Times. June 10, 1862.]

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

ADMIRALTY PRACTICE—RIGHT OF AGENT TO SUE—COMPETENCY AS WITNESS—DISCHARGE FROM RECORD.

Motion to strike from the record a libelant.

This was a motion [by Samuel W. Thompson] to strike out the name of a party libelant. The action was brought to enforce a bottomry bond. The papers on the motion showed that the interest in the bond was really vested in other parties than the nominal obligee, who was only their agent.

HELD BY THE COURT: That in admiralty an agent is recognized as a competent party to sue in his own name in behalf of others in whom the actual interest exists. That to avoid the rigor of the common-law rule, and also generally of its own course of practice, which interdicts a party to the record from being heard as a witness, the familiar practice of the admiralty, as well as of chancery, is to discharge a party from the record, in order to reintegrate his competency as a witness, when no further interest than such technical one exists with him, and also to relieve him of his obligation of suretyship to the court for costs, on other surety being substituted. That there is, therefore, no foundation for the objections interposed on behalf of the respondent, as he does not allege that he will be deprived of any matter of defence by the means.

Motion granted, but, inasmuch as it does not rest on any equity, accruing since the suit was brought, it is granted on payment of costs of this hearing, and on condition that the defendant be allowed to add to the defence already interposed such as may be appropriate to or required by the change of parties in the action.

Case No. 13,960.

THOMPSON et al. v. JAMESSON.

[1 Cranch, C. C. 295.] [1]

Circuit Court, District of Columbia. March Term, 1806.

STATUTE OF FRAUDS—DEBT OF ANOTHER—EFFECT OF ANSWER ADMITTING AGREEMENT.

A court of equity will not decree the execution of a verbal agreement to pay the debt of another, although confessed in the answer, if the statute of frauds be pleaded and insisted upon in the answer.

Bill to charge the defendant for goods furnished to Samuel M. Brown, at the request of defendant. The plaintiffs sold the goods to Brown on the credit of the defendant. Brown is dead, insolvent; and the defendant or his agent administered on his estate. Plaintiffs heretofore filed a bill in equity to offset this demand against a judgment of Mandeville & Jamesson, and Jamesson's answer and plea are exhibited.

Mr. Swann, for plaintiffs. If a verbal promise to pay for the debt of another be not in writing, yet if the defendant admits it by his answer it will be decreed to be executed. If the plea stood alone, it would be good, but if the answer admits the parol agreement, the plea shall be overruled. Cottington v. Fletcher, 2 Atk. 155. A letter acknowledging a former verbal promise is sufficient. Mountacue v. Maxwell, 1 Strange, 237. A fortiori an answer on oath to a former bill.

Mr. Youngs, contra. The statute is of no use if you compel the defendant to answer, and to admit the parol agreement. Jamesson's answer to the former bill cannot be produced in evidence. The warranty must be entered into at the time of the original contract. The answer, although it acknowledges the promise, relies on the statute of frauds to defeat it. The defendant was compelled to answer. The bill alleges that the goods were sold to Jamesson, but at his request were delivered to Brown. The bill demands a discovery how the defendant became bound and on what terms, and therefore the defendant was bound to answer as to the parol agreement. The answer does not waive the plea but relies thereon. By the statute the promise was void, not voidable. It can never be set up. An acknowledgment that such a void promise was made, will not make it a binding promise, when at the same time that he makes this acknowledgment he says he was never bound by it. The court cannot dispense with the express words of the act. The court are not left to say whether there is in fact any fraud, or any danger of perjury.

C. Lee, on the same side. If the defendant pleads the statute, it is a bar in equity; so if he insists upon it in his answer. Whitchurch v. Bevis, 2 Brown, Ch. 565. A court cannot dispense with the law, which is positive; but if the defendant will admit the parol agreement, and not insist on the statute, the court will enforce the agreement. 1 Fonbl. 168.

Mr. Swann, in reply. There are cases within the words of the act, which are yet out of its purview and spirit; as a parol agreement, prevented by defendant from being put in writing; a parol agreement in part executed; a parol agreement confessed and the statute not insisted on. What right has the court to decree the execution of these? Because there is no danger of perjury or fraud. 1 Pow. Cont. 291, 309; Lacon v. Mertins, 3 Atk. 1, 3, S. C.; Whitchurch v. Bevis, 1 Harr. Ch. Prac. 371, 372. The justice of this case is with plaintiffs, and ought to prevail unless stern law be against them. The weight of authorities is in their favor.

CRANCH, Chief Judge. This cause came on to be heard on the bill, answer, plea, and replication. The only facts on which a decree can be founded are those confessed by the answer to this bill or by the answer to a former bill, which is made an exhibit in the present bill. By the answer of the present defendant to a former bill of the complainants against Mandeville & Jamesson, the defendant "admits that he gave a verbal promise to the complainants to pay them the amount of the goods if Brown should be unable to pay for them," but relies and insists on the statute of frauds in the same manner as if he had pleaded it. To the present bill the defendant pleads the statute, and then "not waiving his said plea but wholly relying and insisting thereon, says, he believes it may be true that the complainants sold the goods to Brown, and that the defendant verbally promised to pay for them if Brown should be unable;" and denies that he made any other promise; and denies that the goods were sold to himself, &c. And then says, "And this defendant again relying upon the statute to prevent frauds and perjuries, as aforesaid pleaded, to bar the complainants' demand against him for the supposed undertaking aforesaid, prays to be hence dismissed, &c." To this plea and answer there was a general replication and issue.

On the part of the complainants it is contended that if the parol agreement to pay the debt of another be confessed by the answer, although it relies on the statute of frauds, or although the statute be pleaded, yet the court ought to decree a performance of the agreement, because there can be no danger of fraud or perjury, the prevention of which is the sole object and interest of the statute. It is also said that if a man confess in writing that he did make such a parol agreement, although at the time of such confession he insist that the parol agreement imposed no obligation on him, because the statute makes all such agreements void, yet the court ought to decree its performance, because such con-

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

fession takes the case out of the evil of the statute. The first case cited in support of these principles is Cottington v. Fletcher, 2 Atk. 155, where the plaintiff charged the defendant with holding a term as trustee for the plaintiff. The defendant pleaded the statute of fraud and perjuries, alleging that there was no declaration of the trust in writing, but by his answer admitted the trust. Lord Chancellor Hardwicke was of opinion that the plea ought to be overruled, and said that if the plea stood by itself it might have been a sufficient plea, but coupled with the answer, which is a full admission of the facts, it must overrule the plea. In that case it does not appear that the defendant, in his answer, still insisted on his plea, and the benefit of the statute. His answer therefore might be considered as a waiver of his plea. But in the present case the defendant, conceiving himself obliged to answer, still takes the utmost care to guard against the confession being considered as a waiver of his plea or defence. If the defendant is obliged to answer and confess a parol agreement, there is no possible case in which a parol agreement can be vacated by that statute; unless the defendant will commit perjury by denying it. Instead therefore of preventing frauds and perjuries, the statute would tend to increase them; for by preventing the plaintiff from proving a parol agreement by any other evidence than the defendant's own oath, it holds out to the defendant the strongest temptation to perjury, and at the same time gives him a perfect security against detection. If the defendant is bound to confess the parol agreement it must be because when confessed he could not avail himself of the statute. But it is settled that he may avail himself of the statute. Hence it seems to follow that he is not bound to confess; for this would be to compel him to confess an immaterial fact. The question then occurs whether, if the defendant voluntarily confess the parol agreement, he can insist on the statute? It is said in Mitf. Treat. 114, that if a plea is coupled with an answer to any part of the bill covered by the plea, the plea will, upon argument, be overruled, and he cites the case of Cottington v. Fletcher, 2 Atk. 155; and in page 124 Mitford says an answer will overrule a plea. But cannot the defendant guard his answer so as to prevent it from having that effect? In the present case, if the answer overrules the plea, yet the answer itself sets up and insists on the same defence. And in 1 Fonbl. p. 171, note d, it is said that it seems to be immaterial whether the defendant set up the defence in the shape of a plea or of an answer; the statute not having prescribed any mode in particular by which a defendant must avail himself of such defence. And he refers to the case of Stewart v. Careless, cited in Whitchurch v. Bevis, 2 Brown, Ch. 566. The question then occurs, whether the statute is in equity, to be considered as a bar to the relief, or a bar to the discovery only. The words of the statute are "that no action shall be brought whereby to charge the defendant," &c., "unless the promise or agreement upon which such action shall be brought, shall be in writing," &c. The act refers evidently to the relief, and is at least as strongly expressed as if it had said that no action shall be maintained upon a parol promise, even if proved in any manner whatever. The confession therefore of a parol promise is not a confession of any cause of action either at law or in equity. A court of equity cannot, more than a court of law, dispense with the positive and clear prohibition of a statute.

There is no case, in which a court of equity has enforced such a parol agreement, when the confession was accompanied with a claim of indemnity under the statute. In Cottington v. Fletcher, the plea was considered as superseded by the answer, which did not insist on the statute. It was therefore the case of an admission of the agreement without claiming the benefit of the statute. The case of Lacon v. Mertins, 3 Atk. 3, has been cited, but the opinion of Lord Chancellor Hardwicke, which is relied on, is only a dictum in a supposed case. He says, "If the bill had been brought by Mrs. Hayes, in her lifetime, and the defendant, Mertins, had admitted the agreement, though he had insisted on not performing it, the court would have decreed it, because the admission takes it out of the statute of fraud and perjuries." He does not say, though he had insisted on the statute; but on not performing it, which is a different thing; and that he did not mean to say on the statute, is evident from the case which was then before him, in which the defendant confessed the agreement, and "offered to perform it." The case of Mountacue v. Maxwell, 1 Strange, 236, has also been cited, to prove that a parol promise, acknowledged afterwards in writing, is sufficient to take the case out of the statute. But the point does not appear in the case. The writing relied on, was not an acknowledgment of the parol promise simply, but a new promise in writing, to perform the parol promise, and this is evidently the ground on which the chancellor overruled the plea, and ordered it to stand for an answer. The statute was not insisted on. The opinion of 1 Pow. Cont. p. 291, has also been cited. But that opinion is founded only upon authorities, in which the statute was not insisted upon; and in one of the cases which he cites (Croyston v. Banes, Finch, Prec. 208), the distinction is expressly taken between the case where a parol agreement is confessed, without insisting upon the statute, and a confession accompanied by a reliance on the statute. There being, therefore, no case in which such a parol agreement, confessed, has been carried into execution, when the defendant has insisted on the statute, this court will not say that it is not bound to obey the

positive injunction of the statute, which forbids any action to be brought upon such an agreement. The bill must be dismissed with costs.

Case No. 13,961.

THOMPSON et al. v. JEWETT.

[4 Leg. Gaz. 50.]

Circuit Court, E. D. Pennsylvania. Feb. 5, 1872.

PATENTS—EQUIVALENTS—INVENTION IN SEVERAL PARTS—EFFECT OF DISCONTINUANCE OF PROCEEDINGS—ACQUIESCENCE—AFFIDAVITS.

1. A patent for "caustic alkali, encased or enveloped in a tight metallic integument or metallic casing," having been declared valid, the sale of a substance containing caustic alkali with oil or rosin mechanically distributed through, but not in chemical union with it, and enclosed in a metallic integument, is an infringement.

2. An averment in the bill that several re-issue patents were granted to the patentee in part imports also an averment that the invention consisted of "distinct and separate parts," and is prima facie sustained by the exhibition of the said patents alone.

3. The discontinuance of proceedings against a respondent for an infringement does not estop the complainant from bringing a second suit; there was no adjudication of any sort upon the merits.

4. The mere discontinuance of a suit, and forbearance to sue any of the parties thereto for the period of a year or more thereafter, are not to be construed into an acquiescence in the infringement complained of.

5. The affidavit annexed to the bill, that the patentee was the original and first inventor of the thing patented, can be made by the assignee of the patent as well as by the patentee himself.

[This was a bill in equity by George Thompson and the Pennsylvania Salt Manufacturing Company against James B. Jewett.]

Motion for preliminary injunction.

McKENNAN, Circuit Judge. The bill in this case sets up two patents, numbered 2570 and 2571. They are divisions and re-issues of letters patent [No. 15,957] granted to George Thompson, October 21st, 1856, and have been extended for seven years from October 21st, 1870. The complainants now move for a preliminary injunction to restrain the alleged infringement of 2571. They have shown the possession and enjoyment of the exclusive rights, secured by this patent, for upwards of fifteen years, and that its validity has been established by litigation in the circuit court for this circuit, in several cases determined in 1868 and 1871. Penn. Salt Manuf'g. Co. v. Thomas [Case No. 10,956]. decided October 2d, 1871. In the face of these facts, the affidavits presented by the respondent, denying the novelty of the invention claimed, cannot have the effect of impugning the complainants' title. So far as concerns the present motion, it must be treated as established.

The respondent has been engaged in the sale only of an article, enclosed in small metal cans, with printed labels on them, marked "Compound Condensed Lye," and thus he is alleged to have infringed the complainants' patent. He denies that the substance thus enclosed is caustic alkali, or that, as it is put up and prepared for the market, it is within the scope of the patent. If this denial is true, in either of its branches, the respondent is not an infringer.

The claim of the patent in question is for "caustic alkali, encased or enveloped in a tight metallic integument or metallic casing, substantially as described" in the specification. And it is thus described: "I have discovered that by enclosing or encasing caustic alkali tightly in metallic integuments or casings, the deliquescence may be prevented, and the caustic alkali may be preserved practically for any length of time, and transported without destruction or accident. When it is desired to prepare the article for family use only, I enclose in each metallic integument or casing such quantity of caustic alkali as it would be desirable to use in a family at each single occasion. And one mode which I adopted and found to answer well for enclosing the material in a metallic integument is to provide boxes or canisters of sheet iron, or other material, made tight at the joints with infusible cement or otherwise, and into these I force the caustic alkali in a molten state, until they are nearly or quite full. The lid is then pressed down, so as to exclude air or moisture, and is secured by cement or otherwise." The invention then consists of these constituents: 1st. Caustic alkali. 2d A metallic integument to enclose it, of such size as will contain a quantity of the alkali, which it may be "desirable to use in a family at each single occasion," and made air-tight by infusible cement, or other equivalent means.

Does the article shown to have been sold by the respondent embody these constituents of the complainants' invention? The substance contained in the cans is alleged to be a compound, produced by the thorough incorporation with the caustic alkali of oil and rosin, by which it is "rendered independent of any need for the exclusion of the air from it." The mode of putting it up is stated to be, first, to pour into the can a small quantity of oil or rosin, and then melted caustic alkali and oil, or oil and rosin, in alternate layers, until the can is nearly full, when the whole is stirred and mixed, is allowed to cool, and a finishing layer of oil and rosin is then poured on the top. This, it is claimed, is a substance materially different from the "concentrated lye" put up by the complainants, under their patent. The proofs presented on both sides do not sustain this position of the respondent. Taken altogether, they satisfactorily show, that the substance contained in the respondent's cans is caustic soda, with oil or rosin mechanically distributed through it, but not in chemical union with it. This is the result of careful analysis, and it is confirmed by the prompt

and palpable deliquescence of the contents of some of the cans, which were opened and exposed to the atmosphere during the hearing of this motion. And this is still further confirmed by the known incompatibility of these elements, without the presence of water. This "compound" then consists chiefly of caustic soda with oil and rosin intermixed, but not combined so as to form a new substance, or to change the peculiar properties of the alkali. Deriving its distinctive character from caustic soda—its predominant constituent—it must be regarded as substantially caustic soda. We have here then all the elements of the complainants' invention, viz.: Caustic soda, enclosed in a metallic integument, containing a quantity adapted to family use at one time, and secluded from the atmosphere by an impermeable cement.

It is urged, however, that the mode of excluding the air is essentially different from that indicated in the complainants' patent. The argument is perhaps more pertinent to another patent, set up in the bill, but not involved in this motion, than to the patent in question, which is for a product only, but it is not unworthy of a brief notice. In his specification, the patentee, as he was bound to do, describes a method of effectuating his invention, and he proposed to effect the exclusion of the air by the application of infusible cement to the joints of the cans, and by pressing down the lids and securing them by infusible cement or otherwise. But he does not limit himself to the use of infusible cement, or prescribe its exterior application as essential to the production of his invention. The specific object of the use of cement is to exclude the air. Obviously, then, it is its impermeability, not its infusibility, which is made available for that purpose. An infusible cement applied on the outside of the can may be of additional utility, but it does not change the fact, that the avowed and essential function of the cement is to protect the caustic soda from the effect of exposure to the air. Any method, analogous to that described in the specification, by which this is accomplished, is within the scope of the patent, and where there is this substantial identity of means and result, it is immaterial what sort of cement is employed, or whether it is applied inside or outside of the integument. There is no substantial difference in the product.

An objection is made to the allowance of the motion, founded upon an alleged material defect in the complainants' bill. The patent in question is one of the divisions of a re-issue of the original patent, and it is maintained that the bill must aver that each division was for a distinct invention. That a patent may be re-issued in divisions is unquestionable. By the act of 1836 and its sequents, the commissioner of patents is authorized, when a re-issue is applied for, to grant several patents for "distinct and separate parts of the thing invented." Whether the "thing invented" is susceptible of division into "distinct and separate parts" rests, primarily at least, in the judgment of the commissioner. When he has so decided, every presumption is in favor of the rightful exercise of his authority. This is a familiar rule, and has been often applied to the decisions of the commissioner. The re-issue of a patent then, in divisions, carries with it the intendment that the invention described in the original consisted of "distinct and separate parts." And it follows, that an averment in the bill that several re-issued patents were granted to the patentee imports also an averment that the invention consisted of "distinct and separate parts," and is prima facie sustained by the exhibition of the said patents alone. If the respondent desires to contest the divisibility of the invention, and the validity of the patents, the duty is upon him to present the question by appropriate and specific averments in his answer.

In 1868 and 1869, bills were filed in the circuit court by the Pennsylvania Salt Manufacturing Company, one of the complainants now, against several persons,—among them T. Chalkley Taylor, the patentee of the "Compound Condensed Lye," which has been exhibited at this hearing,—to enjoin them against the infringement of the complainants' patent. After some time and the taking of proofs in one of the cases, the bills were discontinued by the complainant, and these discontinuances are now urged as a bar to the present bill. That the complainants are not estopped by the record of these former suits is clear without argument to demonstrate it. Such estoppel is founded on the reason that the matters in controversy have been once judicially determined, and, therefore, cannot again be drawn into controversy between the same parties or their privies. But here there was no adjudication, of any sort, upon the merits, but the complainants withdrew their suits from the cognizance of the court before any hearing was had, or any conclusive decree could have been pronounced, which alone could have the effect of a record estoppel.

It is argued, however, that these acts of the complainants, and the delay in the bringing of this suit, are to be construed as acquiescence in and encouragement of the infringement complained of, and that the complainants are, therefore, estopped in equity. If these acts necessarily imported the significance claimed for them, and the respondent acted upon them, there would be force in the argument. But the mere logical interpretation of their conduct is, that they withdrew their suits for the very purpose of averting the estoppel of an adverse decision, not to indicate their acquiescence in the alleged invasion of their rights, and thereby disable themselves from seeking redress in the future. Nor do the further acts—or rather the non-action—of the complainants strengthen the respondent's position. Mere abstention from the enforcement of a right is no authority for

its appropriation by another. There must be something more. Concealment of rights when they ought to be made known, or encouragement by one person to another to expend his money or alter his condition, upon the faith of which the latter has acted, are essential elements of such an estoppel as is set up here. In other words, the estoppel must rest upon such conduct of the complainants, upon the faith of which the respondent has innocently acted, that, to allow the former to enforce their right, would be a fraud upon the latter. Conceding that the respondent may fairly invoke the equities of the manufacturer, whose factor or agent he is, the affidavits presented do not show any such foundation for an estoppel. They do not show, that the rights claimed by the complainants were unknown to the respondent or his principal, or that they were induced by any act of the complainants to expend money, or in any wise to alter their condition. Their import is the converse of this. For it is apparent from them, that the complainants' patent was well known to the respondent's principal, when the suits referred to were brought; that he had before established the manufacture and sale of the infringing article; that he continued after the discontinuance of these suits, to manufacture and sell it, as before, without change, and that he claimed the right to do this under the patent of T. Chalkley Taylor, without reference to any act of the complainants. I cannot hold, therefore, that the complainants, by merely discontinuing their former suits, and forbearing to sue any of the parties thereto for a period but little more than a year thereafter, have thereby disabled themselves from maintaining this suit.

The last objection urged is, that the affidavit annexed to the bill and read at the hearing, that George Thompson is believed by the affiant to be the original and first inventor of the thing patented, is not verified by the patentee, but by the president of the other complainant. 2 Daniell, Ch. Prac. 1664, and Curt. Pat. § 408, are referred to in support of this objection. The first of these states the rule upon the authority of Hill v. Thompson, 3 Mer. 624, and the latter upon the authority of Rogers v. Abbott [Case No. 12,004], and Sullivan v. Redfield [Id. 13,597]. It originated with Lord Eldon, who first announced it in Hill v. Thompson [3 Mer. 622], as applicable only to ex parte applications for injunctions. So it was treated by Mr. Justice Thompson, in Sullivan v. Redfield [supra]. He there said: "The present case, however, cannot be considered as strictly within this rule. The application is not altogether ex parte. It is made on a notice of the motion, and has been resisted by counsel, and was open to the hearing of opposing affidavits." And he suggests it as proper to be adopted in all cases, where the bill does not allege the complainant to be the original inventor. However well supported by authority the rule may be, it cannot be considered as imperative in this case, where the bill contains an averment, that the patentee is the first and original inventor of the invention claimed, and the motion has been made upon notice, has been heard by counsel on both sides, and opposing affidavits have been presented by the respondent. But it is to be further observed, that, in all the cases the patentee was the complainant, that the requirement is to be understood as made upon him in his character as a party, and that they do not hold, that no one else, sustaining a like relation to the suit, is not competent to make the affidavit. Indeed where, as in this case, the patentee has assigned all his interest in the patent, and is only a nominal party, there seems to me to be special propriety in imposing this duty upon the assignee, who, for his own protection, invokes the intervention of the court.

Having exhibited a title to the invention described in the patent, which, for the present, must be treated as established, and, having shown infringement of their rights, the complainants are entitled to protection in some form. But that must be adequate, as well as considerate of the interests of the respondent, until the question of right can be finally determined. The complainants are engaged in the manufacture of the patented invention, and their profits arise from the monopoly of its sale. To this they are entitled if to anything. The competition of the respondent may be highly injurious to their rights, and this is the injury complained of. An order merely, that respondent keep an account of his sales, and give bond to secure the payment of the profits, would not, therefore, prevent the mischief. The appropriate and only sufficient remedy is to restrain him. An injunction, until final hearing or further order, must, therefore, be ordered.

[For other cases involving this patent, see note to Pennsylvania Salt Co. v. Gugenheim, Case No. 10,954.]

THOMPSON (KIBBE v.). See Case No. 7,754.

Case No. 13,962.

THOMPSON et ux. v. KING.

[3 Cranch, C. C. 662.] [1]

Circuit Court, District of Columbia. April 5, 1832. [2]

SPECIFIC PERFORMANCE — AGREEMENT — IMPROVEMENTS.

The court will decree a specific execution of an agreement to convey real estate, although the evidence of the conclusion of the agreement be not very clear, if the party in expectation of such an agreement has been put into possession, and has made valuable and expensive improvements upon the property.

The bill, in this case, states the intermarriage of the plaintiffs in 1812, or 1813, the

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

[2] [Reversed in 9 Pet. (34 U. S.) 204.]

wife being the daughter of George King, who was then universally supposed to be wealthy, and was seized of a house and lot in Cecil alley, in Georgetown, which was very much out of repair, and which the plaintiff Josiah, at the request of the said George King, who said he always intended that property for his daughter, (the plaintiff,) repaired, at the expense of $4,000, and occupied it until 1816, when he removed to the western country. The bill then states that a correspondence was carried on between the plaintiff Josiah and the said George King, respecting the house and lot, which closed with George King's letter of the 29th of April, 1816, accepting the plaintiff Josiah's first proposition, in his letter of the 28th, to take the property at its worth before the repairs, and offering to convey part of the property to the plaintiff Josiah, and the residue to his wife; provided she would not part with it during her life. After this, George King leased the property, as agent for the plaintiff Josiah, and received the rents for him, and accounted with him for them, and always acknowledged the plaintiff's right to the property until his (George King's) death, in the year 1820. (See the letters in the report of the case, 9 Pet. [34 U. S.] 204.) The defendants are the heirs at law of George King. The bill then prays that the defendants may be decreed to convey the property to the plaintiffs, or, if that cannot be done, that the property may stand charged with the amount of the repairs and improvements; and for general relief. The defendants, in their answer, say, that being unapprised of the facts stated in the bill, they neither admit nor deny them, but submit them to the jurisdiction of the court.

CRANCH, Chief Judge. The evidence does not, in my opinion, establish any contract for the conveyance of the lot to the plaintiffs, which can be decreed to be specifically executed; but it shows expensive and permanent improvements and repairs, made by Josiah Thompson, under the expectation, encouraged by George King, that the property should be conveyed by him to the plaintiffs, or to one of them; an expectation which seems to create an equity in favor of J. Thompson; but whether it creates a special lien on the property, so as to give him a right to priority of payment, I am not yet satisfied.

THE COURT, however, on the 5th of April, 1832 (CRANCH, Chief Judge, absent), pronounced a decree, directing a conveyance in fee of the property claimed in the bill to Josiah Thompson.

[An appeal was taken to the supreme court, which reversed this decree, and ordered the remandment of the cause to the circuit court. 9 Pet. (34 U. S.) 204. Subsequently this court directed the sale of the property. See Case No. 13,963.]

Case No. 13,963.

THOMPSON et al. v. KING.

[5 Cranch, C. C. 93.] [1]

Circuit Court, District of Columbia. November Term, 1836.[2]

INSOLVENCY — GENERAL CREDITOR — DEFICIENCY FROM SALE UNDER LIEN.

A decree that one has a specific lien on a lot, for the amount expended in improving it, under an expectation of obtaining a title, authorizes him to come upon the insolvent estate of the owner of the lot as a general creditor, for the balance of the money thus expended, after crediting the proceeds of the sale of the lot.

The bill in equity in this case was filed in 1826, by Josiah Thompson and his wife, against the heirs of George King, to obtain the conveyance of a house and lot in Georgetown, in execution of an agreement between Thompson and G. King, in the lifetime of the latter; or that the cost of the improvements made by Thompson, in expectation of obtaining the title, should be decreed to be a specific lien on the lot, George King having died insolvent.

This court (CRANCH, Chief Judge, contra), in April, 1832, decreed a conveyance to Thompson [Case No. 13,962], which decree was reversed by the supreme court of the United States in 1835 (9 Pet. [34 U. S.] 204), "with instructions to this court to order the property to be sold," "and the proceeds first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate of King." Mr. Justice McLean, in delivering the opinion of the court, said, "and if the terms of the contract were established so that the court could decree a specific execution of it, they would pronounce such a decree. But as a specific performance cannot be decreed, the inquiry remains, whether the complainant has a lien on the property for the money he expended in improving it." Again, he said, "If the money has been judiciously expended under such circumstances as to entitle the complainant to a lien, the court must give effect to it. It is an equitable mortgage, and, in a court of chancery, is as binding on the parties, as if a mortgage in form had been duly executed." "It would be most unjust to leave the complainant, as a creditor, to receive a dividend on the distribution of the estate of King." "Indeed, there can be no doubt that the complainant considered the property as his own; and it was so treated by George King, for he collected the rents as the agent of the complainant, and accounted to him for them." The property was sold under the decree of the court, but did not produce sufficient to pay the amount expended by Thompson in improvements, and his counsel, R. S. Coxe now

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

[2] [Reversed in 13 Pet. (38 U. S.) 128.]

contended that he was entitled to come in as a general creditor of the estate of George King for the balance.

C. Cox, contra, contended that it was not a debt due by George King in his lifetime; and if it was, it is barred by the statute of limitations.

R. S. Coxe, in reply, as to the limitation, contended that the debt, if it be one, was established by the decree of the supreme court, and cannot now be controverted.

CRANCH, Chief Judge, was of opinion that Thompson could not now come in as a general creditor of King's estate for the balance.

MORSELL, Circuit Judge, contra.

THRUSTON, Circuit Judge, being absent, the case was continued to the next term, when upon further argument by the same counsel,

THE COURT (CRANCH, Chief Judge, contra), stopped R. S. Coxe in reply, and decided that Thompson could come in as a general creditor, upon the assets of George King's estate, for the difference between the amount of sales of the house and lot, and the amount of the value of Thompson's improvements as found by the auditor.

Reversed by the supreme court of the United States, 23d February, 1839. 13 Pet. [38 U. S.] 128.

THOMPSON (KING v.). See Case No. 7,807.

Case No. 13,964.

THOMPSON v. KNICKERBOCKER LIFE INS. CO.

[2 Woods, 547; [1] 5 Ins. Laws J. 817; 5 Bigelow, Ins. Cas. 8; 3 Cent. Law J. 561; 3 Am. Law T. Rep. (N. S.) 370; 1 Cin. Law Bul. 210.]

Circuit Court, S. D. Alabama. June Term, 1876.[2]

INSURANCE — LIFE — PREMIUM NOTES — PAYMENT MADE CONDITION PRECEDENT—ELECTION —CUSTOM.

1. The policy issued by a life insurance company provided that promissory notes payable during the year might be given by the assured for portions of the annual premium, and declared that, in case such notes were not paid at maturity, the policy should then and thereafter be void, without notice to any party or parties interested therein, and the notes also contained the same stipulation. *Held*, that the payment at maturity of the notes given for the premium was a condition precedent to the continuance of the policy, and on a failure to pay the notes the policy became void.

2. Where it was the custom of a life insurance company to give notice to the assured that the premium or premium note was about falling due, a neglect on the part of the company to give such notice will not save the policy from forfeiture, if the assured fails to pay the premium or premium note when due, unless the failure to give notice was fraudulent, and for the purpose of throwing the assured off his guard.

[Distinguished in Briggs v. National Life Ins. Co., 11 Fed. 459.]

3. Where a policy of life insurance, and a premium note, contained the stipulations set out in the first head-note, and the premium note was not paid at maturity: *Held*, that the insurance company was not bound to elect whether or not the policy should be forfeited, or to give any notice of such election.

4. Where it was the custom of a life insurance company not to exact punctual payment of its premium notes, but to allow thirty days' grace thereon, the company is not bound to pay the insurance money if the assured dies within the thirty days without having paid the premium note.

[Cited in Marston v. Massachusetts Life Ins. Co., 59 N. H. 94.]

Action at law. Heard on demurrer to replications.

This suit was brought upon a policy of insurance, dated January 24, 1870, whereby the Knickerbocker Life Insurance Company, in consideration of the sum of $410 paid in hand by Ruth E. Thompson, and a like sum to be paid by her on or before the 24th of January, in every year, during the continuance of the policy, did insure the life of John Y. Thompson, in the sum of $5,000, for the benefit of said Ruth E. Thompson, his wife. The complaint averred the death of John Y. Thompson, on November 3, 1874, while the policy was in force, that proof of death had been made to the company, and that all the terms and conditions of the policy had been complied with, and prayed judgment for the insurance money and interest. To this complaint the defendant, besides the general issue, pleaded two special pleas, which, however, set up in effect the same defense.

The defense was in substance as follows: That the payment of the premium of four hundred and ten dollars on or before the 24th of January of each year, during the life of John Y. Thompson, was a condition precedent to the continuance of the policy. That by the terms of the policy an annual credit of a portion of the premium was provided for, and the policy contained a condition that the omission to pay the annual premium on or before noon of the 24th day of January of each year, or the failure to pay at maturity any note, obligation, or indebtedness for premium or interest due under said policy, should then and thereafter cause said policy to be void without notice to any party or parties interested therein. That the annual premium was not paid on or before January 24, 1874, and the defendant thereupon gave said Thompson time for the payment of the premium upon the condition named in the note to be hereafter mentioned, and took certain promissory notes of said Thompson for the instalments of the premium, one of which was as follows: "$109. New York, Jan. 24, 1874. Nine months after date, without grace, I promise to pay the Knickerbocker Life Insurance Company, one

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

[2] [Affirmed in 104 U. S. 252.]

hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void, in case this note is not paid at maturity, according to contract in the said policy." That the terms and conditions of said note formed a part of the contract for the extension of the time given for the payment of said annual premium, that the note was not paid at maturity nor in the lifetime of John Y. Thompson, nor has it been paid since; and that said policy became null and void from and after the 24th day of October, 1874, when said note fell due, and that said John Y. Thompson died after said date, and the amount of said note has never been paid to the defendant.

The plaintiff, as authorized by section 2564 of the Revised Code of Alabama, filed four replications to these pleas. She says: First. That the payment of said note was not a condition precedent to the continuance of the policy; that Thompson had the money in hand to pay the note, and intended to pay it, but before the maturity thereof he was taken violently ill, and before and at the time the same fell due was prostrated by fatal disease, and so remained until November 3, 1874, when he died, and during all that time was mentally and physically incapable of attending to his business, and was non compos mentis, and that the existence of the note was not known to plaintiff. Second. That before said note fell due it had long been the custom of the defendant, in like cases, to give notice of the day of payment to policy holders, and such was the uniform custom of insurance companies, and defendant had, in its dealings with John Y. Thompson, complied with such custom. Yet the defendant in this instance failed to give notice of the maturity of said note, although it knew that Thompson was in the city of Mobile, and was sick; that Thompson was ready to pay the note, had notice of its maturity been given, and that the plaintiff had no notice of the existence of the note. Third. That on the 24th of January, 1874, said policy was renewed and extended for one year; that the note was for the residue of the premium for that year, which defendant agreed should be deferred as specified in the note; that by said agreement the policy was not to become void on the nonpayment alone of the note at maturity; but was to become void at the instance and election of defendant, and the defendant did not elect to cancel said policy or take any steps to avoid it, or give any notice of such intention during the life of said John Y. Thompson or since, and still holds said note. against the estate of said Thompson. Fourth. That it was the general usage and custom of defendant not to demand punctual payment of said premium notes at maturity, but to give thirty days' grace, and the defendant had repeatedly so done with said Thompson and others, and this led said Thompson to rely on such leniency, and he was thereby deceived and the note was not paid.

The defendant filed a demurrer which put in issue the sufficiency of these replications as replies to the defense set up in the pleas.

John T. Taylor, for plaintiff.

Thomas H. Herndon and John Little Smith, contra.

WOODS, Circuit Judge. The first replication presents the question whether the payment of the premium note was a condition precedent to the continuance of the policy. If no time had been given for the payment of the premium there could be no question that its payment for a year in advance was a condition precedent to the continuance of the policy for that year. The terms of the policy as set out in the pleas make this perfectly clear. Does the taking of a note for a portion of the premium change this rule and make the payment of the note a condition subsequent? That, it seems to me, depends on the agreement of the parties. If the insurance company had simply agreed to continue the policy for a year, and instead of exacting the premium in cash, had consented to take the note of the assured, payable at a future day, undoubtedly the policy would be binding even though the note were not paid at maturity. But according to the pleas, it was expressly stipulated that in case the note were not paid at maturity, the policy should become void without notice to any party or parties interested therein. Ordinarily the payment of the annual premium was a condition precedent. This was changed by dividing the annual premium for the accommodation of the assured into several payments, with the same stipulation in case of nonpayment. This was authorized by the terms of the policy. By the very terms of the contract between the parties, the nonpayment of any of the instalments into which the annual premium was divided rendered the policy void. The fact that a note had been given for the instalment does not change the case, for as soon as the policy became void the note also became invalid for want of consideration. What effect the transfer of the note by the insurance company before maturity would have upon the question it is unnecessary to decide, because no such fact appears in the case. "By taking a note for a portion of the premium, the rights and duties of the insurer and assured remain unchanged. Nor could an admission in the policy that the premium was paid preclude inquiry into the real facts." M'Crea v. Purmort, 16 Wend. 460; Robert v. New England Mut. Life Ins. Co., 2 Bigelow, Ins. Cas. 145; Slaughter v. Hamm, 2 Ohio, 271; 1 Greenl. Ev. § 26.

We must give effect to the contract of the parties. It is plain and explicit, as set out both in the policy of insurance and in the note, that a failure to pay the note at maturity avoids the policy. The payment is, there-

fore, a condition precedent to the continuance of the policy. Roehner v. Knickerbocker Life Ins. Co., 4 Daly, 512; Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276; Patch v. Phœnix Mut. Life Ins. Co., 44 Vt. 481; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Anderson v. St. Louis Mut. Life Ins. Co. [Case No. 362]; Russum v. St. Louis Mut. Life Ins. Co. [1 Mo. App. 228]; Robert v. New England Mut. Life Ins. Co., 1 Bigelow, Ins. Cas. 634. If the payment of the premium was a condition precedent, the fact that the assured was prevented from making payment by illness or other cause beyond his control, does not relieve him from the consequences of nonpayment. Howell v. Knickerbocker Life Ins. Co., supra. The fact that the plaintiff, for whose benefit the insurance was made, did not know of the existence of the premium note, does not change the rights of the parties. Baker v. Union Mut. Life Ins. Co., 43 N. Y. 283. The first replication, therefore, which denies that payment of the note at maturity was a condition precedent to the continuance of the policy and avers the fatal illness of the party whose life was assured as an excuse for nonpayment, is not a good answer to the pleas.

The demurrer to the second replication raises the question, whether, in a case where it has been the custom of an insurance company to give notice that the premium, or a premium note, is about falling due, the failure to give such notice saves the policy from forfeiture when the assured fails to pay the premium. As a general rule, no duty is imposed upon the holder of a note or bill of exchange to give notice to the maker or acceptor of the day of payment, or to demand payment when it is due. It is the duty of the debtor to remember when his obligations fall due, and to find his creditor and pay him. The fact that the creditor has once or twice, or in a great number of instances, given notice to his debtor of the fact that his obligation was about to fall due, does not make it obligatory on him to continue the practice. A failure to give notice does not relieve the debtor from any of the consequences of nonpayment, unless it be averred that the custom to give notice and the omission were fraudulent, for the purpose of throwing the party off his guard. Leslie v. Knickerbocker Life Ins. Co. [63 N. Y. 27,] N. Y. Court of Appeals; Roehner v. Knickerbocker Life Ins. Co., supra; Appleman v. Fisher, 34 Md. 553. But, see contra, Mayers v. Mutual Life Ins. Co., 4 Bigelow, Ins. Cas. 62.

The third replication alleges that after the failure to pay the premium note on October 24, 1874, the defendant company was, by its contract, required to elect, whether it would declare the policy forfeited or not, and that it made no election, and gave the plaintiff no notice of its election to forfeit the policy. A careless reader of the replication might infer that it had reference to some contract or stipulation not already referred to in the previous pleadings. But it is not so averred in the replication; and taking the pleading most strongly against the pleader, this replication only puts a construction on the contract of the parties already set out, and does not purport to set out any new agreement. The express stipulation of the policy was, that it was to become void without notice to any party or parties interested, in case the premium note was not paid at maturity. We cannot ignore this part of the contract. On nonpayment of the note at maturity, both the policy and the note became void. The policy might have been revived by consent of the insurance company during the life of the assured, but without such assent it remained void and of no effect. Mutual Benefit Life Ins. Co. v. French, 4 Bigelow, Ins. Cas. 369; Bliss, Ins. §§ 179, 180.

The fourth replication sets up the fact that it was the custom of the defendant not to exact punctual payment of the premium notes, but to give thirty days' grace for their payment, and defendant had repeatedly so done with said Thompson and others, and had thus led Thompson to rely on such leniency, whereby Thompson was deceived, and the note was not paid. This replication is clearly defective in not alleging that it was the custom of defendant to consider itself bound, without payment of the premium, for thirty days, even in case of the death of the assured within that time. When default was made in the payment of the premium note, at whose risk was the life of the assured during the thirty days' grace? Was it the understanding of the company that if the assured died within thirty days after the maturity of the premium note, it would pay the policy whether the premium note had been paid or not? If such were the fact, it should have been so averred. As the replication now stands, its fair construction is, that it was the custom of the company to receive payment of the premium note at any time within thirty days after its maturity, provided the assured were living at the time of payment. As there is no averment that the assured paid the premium within thirty days, and before his death, the replication is clearly bad. May, Ins. §§ 352–354; Mutual Benefit Life Ins. Co. v. Ruse, 8 Ga. 534; Ruse v. Mutual Benefit Life Ins. Co., 23 N. Y. 516; Pritchard v. Merchants' & Tradesman's Mut. Life Assur. Co., 3 C. B. (N. S.) 622.

In my judgment, the demurrer to all four replications should be sustained. The case appears from the pleadings to belong to that large class in which attempts are made to collect the insurance money without the payment of the premiums according to the contract of insurance. It is the duty of officers of insurance companies, who are acting as trustees for others, to resist all such attempts. The assured should comply with his part of the contract, or be excused therefrom by the act or agreement of the insurance company before any just claim can be set up to the insurance money. There is no ground for a re-

covery in this case upon the pleadings as they now stand.

[The case was removed by writ of error to the supreme court, where the judgment of this court was affirmed. 104 U. S. 252.]

Case No. 13,965.

THOMPSON v. LACY.

[1 Cranch, C. C. 79.] [1]

Circuit Court, District of Columbia. March Term, 1802.

ARREST—DISTRICT OF COLUMBIA.

An inhabitant of Alexandria county may be arrested in Washington county without a non est in Alexandria county.

The defendant, being an inhabitant of Alexandria county was arrested in Washington county, no writ having issued against him in the former county.

Motion for a nonsuit, under the act of Maryland of 1796 (chapter 43) [1 Dorsey's Laws, 334]. Refused.

THOMPSON (LEE v.). See Case No. 8,202.

Case No. 13,966.

THOMPSON v. LIVERPOOL & LONDON & GLOBE INS. CO.

[2 Hask. 363.] [2]

Circuit Court, D. Maine. July, 1879.

INSURANCE—FIRE—PROOF OF LOSS—OBJECTIONS—WAIVER—OMISSIONS—VOID STIPULATIONS—INDEMNITY.

1. An insurance company, by making specific objections to a proof of loss, waives all other objections thereto of which it had knowledge.

2. The involuntary omission of an existing mortgage from a proof of loss is immaterial.

3. Incendiary threats made so long prior to the insurance as not to increase the hazard, if concealed, will not avoid the policy.

4. Stipulations in a policy of insurance, not required by, or conforming to, the statutes of Maine, may be disregarded, for they are void.

5. Under a policy, restricting the damages to the cost of replacing the property destroyed less its depreciation from use, &c., the assured should be indemnified for his actual loss; and the value of buildings, and land prior to the fire, less the value of the land, after the fire, will not give such indemnity.

Assumpsit [by Lena Thompson and others] upon a policy of fire insurance to recover damages for the burning of a dwelling and barn. Plea, non-assumpsit with brief statement, setting out a non-compliance by the assured with the conditions of the policy. The cause was heard by the court without a jury. Proof of loss was duly and reasonably made after the fire, and specific objections were made to it by the insurance company.

Josiah H. Drummond, for plaintiffs.

Henry B. Cleaves and Nathan Cleaves, for defendant.

FOX, District Judge. In the proof of loss as presented in October, the plaintiffs claimed to be sole owners in fee of the premises. It is conceded that the property was subject to a mortgage of $1,000 given by their mother, whose estate they inherited.

The statute of Maine as well as the terms of the policy require that the interest of the assured should be stated in the proof of loss; but it has been repeatedly decided that the insurers may waive the proof of loss, either in whole or in part, and, if they so do, they cannot insist on the objection at the trial.

It appears in the present instance the defendant in July was apprised of the existence of this mortgage by written notice from the holder, and that, in their objection which they made to the proof of loss, nothing was said about the omission of this mortgage; they therefore must be deemed to have waived it, and cannot now rely upon it.

It does not appear that the plaintiffs, the daughters of the mortgagor knew of this mortgage, or that the defendant has in any respect suffered any detriment by its omission from the proof of loss. They had an insurable interest to the full value of the property, and the statement, though erroneous, was in this respect immaterial, and in no way injured the defendant; and the plaintiffs are not to be concluded by this mistake and misstatement. Wood, Fire Ins. 736.

It is claimed that plaintiffs should not recover, by reason of the concealment of threats made to the father of plaintiffs, which were material. It appears that, more than two years before the fire, an anonymous letter was received by their father, J. M. Thompson, informing him that if he did not attend to his own business he might be homeless; that on another occasion, there was some difficulty between him and one Nelson Thompson at a school meeting, about a teacher, in which Nelson told him, perhaps he would not have a home long; that at the time he supposed it had reference to his wife who had separated from him, and that, if there was a divorce, he might have to give up his house.

It does not appear that this difficulty with Nelson Thompson was before the policy was issued; and it is manifest that it was not understood as a threat to burn the buildings, which would never have been made at a public meeting of the school district.

The insurance was not procured at or about the time the letter was found under the door, addressed to the father, but a long time afterwards, and then only at the repeated importunities of the agent of the defendant. In Wood on Fire Insurance (398) it is said, "In order to avoid the policy upon the ground of incendiary threats, the danger

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

[2] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

must be real and substantial, and such as materially enhances the risk, and which a person of ordinary prudence would not regard as mere idle talk or report." The facts of the present case do not support this objection, and it cannot prevent a recovery.

The specifications of defence set forth various stipulations found in this policy, with which, it is averred, the plaintiffs did not comply; these, however, are not required by, or in conformity with the statute of this state, which expressly declares, that "all provisions contained in any policy of insurance in conflict with any of the provisions hereof are null and void."

The remaining question is as to the damages, the house being insured for $3,000, and the barn for $400. They were almost entirely consumed, and no serious question is made as to the plaintiff's right to recover the amount thus insured upon the barn. It is claimed there was an overvaluation of the house, which was of brick with a wooden addition, built some ten or twelve years since, at a cost, it is said, of about $4,800 by the father of the plaintiffs; these were farm buildings in Newfield, the farm containing about 115 acres, 35 of which were cultivated. A large number of witnesses estimate the value of the entire property before the buildings were destroyed as $3,000, and the land as worth now from $900 to $1,200.

There is not found in this policy the usual stipulation that the insured, in case of loss, may recover the actual cash value of the buildings; nor is there any express stipulation as to how, or on what basis the loss shall be estimated; but it is provided, "that the cash value of the property destroyed shall in no case exceed the cost to the insured of replacing the same, and, in case of a depreciation from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value."

Spencer Rogers, an experienced builder in this city, has visited the premises since the fire and ascertained the dimensions and character of the house, and he estimates the cost of replacing the same, using the old material, at $2,573.

The rule of damages as established by the supreme court of Massachusetts in Brinley v. National Ins. Co., 11 Metc. [Mass.] 195, is that the assured is to be indemnified for his actual loss; but, by the terms of the policy, a suitable deduction is to be made from the cost of replacing the building, if buildings destroyed had been diminished in value. In this case, the building being of brick, the diminution in value would be principally confined to the roof and painting and inside finish, all which must to some extent have been defaced or injured during the ten or twelve years since it was completed.

As Rogers never saw the building, I do not think his judgment is entitled to as much weight as it would have been if he had been conversant with them. Nor is the amount at which the estate could have been sold for before the fire, with the deduction of the present value of the land, the sole criterion as to an indemnity to the assured within the terms of the present policy.

Taking into consideration all the circumstances here presented, and that the repairs would have cost two hundred dollars to restore the buildings to their original condition, I find the value of the house at the time of the fire to have been $2,500; and for this sum and the $400 insurance on the barn with interest from Dec. 2, 1878, the plaintiffs are entitled to judgment.

THOMPSON (LOVREIN v.). See Case No. 8,557.

THOMPSON (MACOMBER v.). See Case No. 8,919.

THOMPSON (MAGNIAC v.). See Case No. 8,956.

Case No. 13,967.

THOMPSON v. MANUFACTURING CO.

[Cited in Thompson v. American Bank Note Co., 35 Fed. 204. Nowhere reported; opinion not now accessible.]

THOMPSON (MELLUS v.). See Case No. 9,405.

Case No. 13,968.

THOMPSON et al. v. MENDELSOHN.

[5 Fish. Pat. Cas. 187;[1] 28 Leg. Int. 388; 8 Phila. 166; 19 Pittsb. Leg. J. 83.]

Circuit Court, E. D. Pennsylvania. Nov. 28, 1871.

PATENTS—WHEN SUIT BROUGHT—EFFECTUAL RELIEF.

1. A suit in equity for the infringement of letters patent may be brought in the circuit court for any district in which the defendant may be found, although the infringement has been committed in another district, in which the defendant resides.

2. The process of the court is primarily directed against the person of the wrong-doer, and it is no sufficient reason against the court to award it, that it may not furnish to the plaintiff effectual relief, or that its operation may be evaded by the defendant.

Motion for provisional injunction.

Suit brought [by George Thompson and the Pennsylvania Salt Company against Samuel Mendelsohn] upon letters patent [No. 15,957] for "improvement in devices for putting up caustic alkalies," granted to George Thompson, and more particularly referred to in the reports of the cases of Pennsylvania Salt Co. v. Gugenheim [Case No. 10,954], and Pennsylvania Salt Co. v. Thomas [Id. 10,956]. Since the decision of the latter case, the pat-

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

ent had been extended for seven years, from October 21, 1870 [Nos. 2,570 and 2,571]. The defendant resided in the city of New Orleans, and was engaged in the business of putting up and selling caustic alkali in that place. He was served with process while passing through the city of Philadelphia.

George Harding, for complainant.

George H. Earle, T. M. Marshall, and T. C. Lazear, for defendant.

McKENNAN, Circuit Judge. This is a motion for a preliminary injunction. The patent set up in the bill has been twice contested in suits brought in the circuit court for this district, upon substantially the same grounds stated in the answer of the respondent here, and it was sustained. For all the purposes of the present motion then, the plaintiff's title must be taken as established; and, as infringement is not denied, the plaintiffs would seem to be entitled to a preliminary injunction.

But the answer alleges that the respondent is resident in the state of Louisiana, and that the infringement of the plaintiffs' patent has been committed there, and not in the Eastern district of Pennsylvania. It is therefore urged that this court has no power to grant the injunction.

The patent laws confer exclusive jurisdiction upon the circuit courts of all suits, in law or equity, for invasion of the rights of inventors under them, and the judiciary act expressly authorizes such suits to be brought and process to be served upon defendants in any district in which they may be found. The conclusion is inevitable that where these conditions are complied with, the court has power to afford such measure of protection to the plaintiffs' rights as it is competent to afford in any case, of the subject matter of which it has jurisdiction, and in which the parties are before it by the due service of process. Certainly by no act of congress is this power restricted by the fact of the defendant's residence in another district, or that the wrong imputed to him was not committed in the district in which the suit is brought. The process of the court is primarily directed against the person of the wrongdoer, and it is no sufficient reason against the power of the court to award it, that it may not furnish to the plaintiffs effectual relief, or that its operation may be evaded by the defendant.

The bill was filed in the circuit court for the Eastern district of Pennsylvania; the defendant, Mendelsohn, was found there, and was there duly served with the subpœna. He is, therefore, subject to all such decrees as the court may adjudge to be necessary for the due administration of equity. The preliminary injunction against him is awarded.

[For other cases involving this patent, see note to Pennsylvania Salt Co. v. Gugenheim, Case No. 10,954.]

Case No. 13,969.

THOMPSON v. MILLIGAN.

[2 Cranch, C. C. 207.] [1]

Circuit Court, District of Columbia. June Term, 1820.

LOTTERIES — MARYLAND STATUTE — DISTRICT OF COLUMBIA—NOTE—ILLEGAL CONSIDERATION.

It was not lawful, in 1812, in the District of Columbia, to sell lottery tickets, in the Potomac and Shenandoah Navigation Lottery, although the lottery was authorized by an act of the legislature of Maryland passed in 1809 [1 Dorsey's Laws, 590]; and a note given for the purchase of such tickets, in 1812, being given for an unlawful consideration was void.

[Cited in Smith v. Chesapeake & O. Canal Co., Case No. 13,024.]

Assumpsit, upon the defendant's promissory note for $2,422.50, given for the purchase of tickets in the second class of the Potomac and Shenandoah Navigation Lottery, authorized by an act of Maryland passed in 1809.

Mr. Jones, for defendant [Joseph Milligan], contended that the sale of such tickets in this county is void as being contrary to the act of Maryland, 1792, c. 58 [1 Dorsey's Laws, 288], adopted by the act of congress of 27th February, 1801 (2 Stat. 103), as decided by this court in Hawkins v. Cox [Case No. 6,243], at June term, 1819.

Mr. Key, for plaintiff.

The plaintiff [Jonah Thompson] became nonsuit.

THOMPSON (MITCHELL v.). See Case No. 9,669.

Case No. 13,970.

THOMPSON v. NORWOOD.

[1 Brunner, Col. Cas. 221; [2] 1 Cooke, 346.]

Circuit Court, D. Tennessee. 1813.

PUBLIC LAND—SURVEY—ENTRY—OCCUPATION.

1. A survey is placed on the same footing as an entry by the Tennessee act of 1807 [1 Scott's Laws, p. 981].

2. An occupation entry made without an occupancy to justify it is good, except as against persons who entered their claims as soon as the preference in favor of occupants ceased.

This was an ejectment brought to recover a tract of land lying in Franklin county. The plaintiff [Thompson's lessee] derived his title under a grant from the state of Tennessee to William Bean, dated the 8th day of December, 1808, upon an occupant entry made on the 3d day of August, 1807. The defendant claimed under a grant from the state of Tennessee, dated the 28th day of May, 1812, founded upon an occupant entry made the 3d of July, 1811, in pursuance of a previous survey of the 9th of March, 1808.

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

[2] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

It was admitted that William Bean was not an occupant at the time he made his entry, and it was also admitted that at the time Norwood made his survey, he was in the actual occupancy.

Mr. Whiteside, for plaintiff, insisted that the right of occupancy of William Bean could not be contested by verbal testimony after it had passed the proper officer. When application is made to make an occupant entry proof must be exhibited to the surveyor of the actual occupancy, and his act ought to be considered as not controvertible by verbal testimony. In this case, however, it will not be very material whether the act of the surveyor can be impeached or not, inasmuch as the title of the defendant is not so situated as to enable him to do it. Admitting that Bean was not an actual settler, yet he may be viewed in the same light as the holder of a common warrant, and as such, his entry will be a good one against all subsequent enterers. Norwood has no right to complain; the land had been previously appropriated, and whether by an actual occupancy or not, was to him perfectly immaterial, because Bean had a right to make his entry as the holder of a common warrant long previous to the date of the entry made by Norwood. To enable this court to go beyond the grant there must be some previous title existing in the defendant, and that title, where he has the youngest grant, must be by an elder legal entry. In the present instance both the entry and grant of the defendant are of a younger date than the grant to the plaintiff. There is then no title existing in the defendant to enable him to inquire about the plaintiff's title beyond the date of his grant.

Mr. Cooke, for defendant, said that two questions arose in the cause: First, could the defendant resort back to his survey as the origin of his claim; and secondly, whether by doing so he could avail himself of the want of occupancy on the part of Bean. It has been determined in this country that the person holding under the youngest grant cannot in a court of law contest the right of his adversary, unless by producing a legal entry of an older date than the grant of his adversary. The principle, however, can only apply to such of our land claims as arise under those parts of the land law which speak of the entry being the beginning of the title. Under the general land law and the occupant law of 1806 [1 Scott's Laws, p. 889], an entry was the first thing to be done by a claimant exhibiting a wish to appropriate any particular spot of ground; but by the occupant law of 1807, under which the defendant's claim originated, the entry is only a secondary act; the first is the survey. From the provisions of the law of 1807 the occupant is first to make a survey of the land as an evidence of his disposition to appropriate it as an occupant; and at an after period he is to make his entry in pursuance of the survey, and apply his warrant. Upon the same principle therefore that in other cases permission is given the party having the youngest grant to rely also upon his entry in a court of law, the defendant in this case ought to be permitted to go back with his title to the survey. This being of an older date than the grant to Bean, the inquiry then properly occurs with respect to the validity of the previous entry upon which that grant is founded. Bean's entry upon the face of it appears to be upon an occupant claim. It is admitted that he was not an occupant; and inasmuch as when a claim is made under the provisions of a statute those provisions ought strictly to be pursued, it would seem that Bean's entry is wholly illegal. And such was the opinion of this court in the case of Bass v. Dinwiddie [Case No. 1,092], decided at last term.

BY THE COURT. We do not consider that the act of the surveyor in permitting the entry to be made is conclusive evidence of the right of occupancy on the part of Bean. If it were so an imposition upon that officer which might be easily effected in a case where the proceeding is wholly ex parte could not afterwards be detected. This the court are not disposed to tolerate. It is a general rule that the person claiming under the youngest grant cannot in a court of law impeach the grant of his adversary except by showing an elder legal entry. But it has been urged by the counsel for the defendant that under the law of 1807 a survey is placed upon the same footing. The court are inclined to think that as between two occupants the position contended for is correct. The survey is an appropriation of the land, and will stand good against any subsequent claim whether by survey or by entry. But in this case we are of opinion that although the defendant may have a title at law originating with the date of his survey, still he cannot be permitted to contest Bean's right of occupancy. Had the survey of Norwood been made after the date of Bean's entry, and at a time when none but occupants could enter, the question would have been of a different description. When the office opened in 1807 the common holders of warrants were obliged to have them listed, and draw for priority of entry. This was not the case with respect to occupant claims. These were entitled to be entered before the others. If under such circumstances a man should claim to be an occupant, and make his entry as such, when in truth he was no occupant, he could not hold the land in opposition to an entry made by the common holder of a warrant as soon as the obstruction created by the occupant preference was removed. In this case the survey of Norwood was not made until the 19th of March, 1808, long after the obstruction alluded to had ceased to exist. To him it was

perfectly immaterial whether Bean entered as an occupant or not. We are therefore of opinion that Bean's entry as it regards Norwood's claim is to be considered as a good one, upon the ground of his being the holder of a warrant, who in some shape had a right to make an entry without attending to the question of occupancy. The case of Bass v. Dinwiddie [supra], is widely distinguishable from this. There the entry of Dinwiddie was made when none but occupants had a right to enter; and the entry of Bass was made only two days afterwards, the moment the obstruction enacted by the occupant preference was removed.

Case No. 13,971.

THOMPSON et al. v. The OAKLAND.

[4 Law Rep. 349.]

District Court, D. Massachusetts. Nov., 1841.

SEAMEN—SHIPPING ARTICLES—PAROL AGREEMENT—COMPLETION OF VOYAGE—WAGES AS COMPENSATION.

1. Shipping articles described the voyage to be from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States: *Held*, that the description was sufficiently certain to bind the parties to the performance of the voyage.

2. A parol understanding that the vessel was not to complete the voyage described in the shipping articles, is not admissible.

3. Inability to obtain freight is not such a necessity as absolves the owner from his contract to perform the voyage described in the articles.

4. Where owners refused to perform the voyage to Europe, and the ship returned with the seamen on board to the home port, a sum equal to one month's wages was allowed to each seaman as compensation for the loss of the voyage to Europe.

In admiralty.

R. H. Dana, Jr., for libellants.
Wm. Dehon, for respondents.

SPRAGUE, District Judge. The libellants were mariners on board the ship. The voyage, as described in the shipping articles, was "from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States." They sailed from Boston on the 21st of June, and arrived in Hampton Roads about the 3d of July. The captain proceeded to Petersburg, and endeavored to obtain freight for Europe. He also, by correspondence, made inquiries at Charleston, Savannah, and Mobile, but did not succeed in obtaining business. About the 7th of August the captain determined to return to Boston, and on that day the whole crew went aft and inquired of the captain whether he meant to get other men in the place of those (four or five in number) who had been discharged from sickness. He replied, no; that, as the ship would return to Boston, he did not intend to procure other hands. They then asked for their discharge, saying they thought the articles broken by not going to Europe. The captain refused to discharge any of them, and declared that they should all return with him to Boston. They were then ordered by the mate to go to work, and they obeyed. On the next day (the 8th of August), the ship sailed for Boston, and arrived on the 14th. The crew were discharged the same day. The libellants were paid their wages, at the rates stipulated in the articles, up to the time of their discharge. They now claim compensation for the loss of the voyage to Europe, and for being refused their discharge at James river.

To this claim it is objected on the part of the respondents—first, that the articles are not obligatory, because it is said that the voyage is not sufficiently described; that there is no description of ports, no prescribed terminus, and no limitation of time. It is argued that the articles admit of any number of voyages between ports south, and then between ports in Europe. To this the libellants' counsel replies, that the fair understanding of the articles is, that the ports south shall be visited only for the purposes of the European voyage, and the ports in Europe only for the purposes of the home voyage. This, I think, is the true interpretation, and makes the voyage sufficiently definite to be obligatory upon the parties. In Brown v. Jones [Case No. 2,017], cited for the libellants, the voyage described was "from the port of Boston to the Pacific, Indian, and Chinese Oceans and elsewhere, and on a trading voyage, and from thence to Boston." There no ports were designated, nor any time limited, yet it was held that the oceans must be visited in the order in which they were mentioned, and wages were decreed to the crew, who deserted the vessel at Canton, whence she was about to return to the north-west coast. In the case of The Saratoga [Id. 12,355], the voyage described was "from Boston to Amelia Island, at and from thence to port or ports in Europe, and at and from thence to her port of discharge in the United States." The suit was for wages, and was zealously defended by most eminent counsel, yet no question was made, either by counsel or by the court, of the sufficiency of the description of the voyage. In the case of The Crusader [Id. 3,456], which has been pressed upon the court by the counsel for the respondent, there were no written articles, and the vessel was to be employed in the coasting trade, from place to place, without any limitation of time or restriction of places. If this contract was obligatory, it would bind the libellant to perpetual service, at the will of the master; while, on the other hand, the master might terminate it at pleasure, by giving up the trade, and there was therefore, no mutuality. On these grounds the court was of opinion, that the libellant might terminate the contract at any reason-

able time and place. The difference between that case and the present is manifest.

The next ground taken in the defense is, that it is the usage of the port of Boston for ships which go south in search of freight for Europe to return, if freight cannot be obtained. Without pausing to inquire how far a usage of any port can vary the written articles so carefully prescribed by acts of congress, it is sufficient that no usage has been proved which can affect the present case. Respectable ship owners have testified that they have long been engaged in this trade, and that they know of constant instances of vessels returning when they fail of procuring freight, and that they never knew an instance of a claim for compensation for the loss of the voyage to Europe. They admitted, however, that the original crews very seldom returned in the vessels; and we have, moreover, no evidence that the articles did not in those cases, provide for the return to Boston.

The next objection is, that there was, in this case, an understanding between the libellants and the owner that the vessel might return, and that some of the libellants received additional advance in consideration of this chance. This is not sufficiently proved, and even if the evidence of it were much stronger than it is, it would not be permitted to control the written articles. This would be inconsistent with well-established principles of law, and with the statutes of the United States, which have sought with much solicitude to give to seamen the protection of a written contract. Act, 1840 [Langtree's Ed.] c. 23, § 3 [5 Stat. 395, c. 48].

It is further contended, that the voyage was abandoned from necessity, because freight for Europe could not be obtained. It is replied on behalf of the libellants, that this is not the kind of necessity which will excuse the owner from performing his contract; that it must be vis major, or an inevitable, overpowering necessity; in the nature of a common calamity; while this is a mere contingency in trade, one very likely to occur, and which could have been foreseen and provided for in the contract. The only authority adduced for the respondents' view is a remark of Sir Christopher Robinson, in giving his opinion in the case of The Cambridge, 2 Hag. Adm. 247, in which he says that he finds in Sir Edward Simpson's notes, cases in which the necessity of going to St. Petersburg for a cargo which the master had been disappointed in obtaining at Hamburg, and detentions arising from the stress of weather, or the order of the government, have been held not to be deviations amounting to a breach of the mariner's contract, such as would entitle them to their discharge. The terms of the contract do not appear, and they are most material to be known, in order to understand a question of mere deviation, as that was; or are we enlightened by any particulars of the case or reasons of the court. On the other hand, Sir John Nicholl states that very case of inability to obtain freight as not discharging the owner from his contract with the mariners: "A mariner, it is true, may be entitled to wages, even if no freight is earned, as when a vessel is sent out on a seeking voyage, in search of freight, and obtains none." The Lady Durham, 3 Hag. Adm. 202. In the case of The Mary [Case No. 9,186], the mariners shipped for a voyage from New York to New Orleans and back to New York or such other port as the ship might take freight for. Freight was earned to New Orleans, but the ship remained there a year without obtaining freight for any other port, and then the master discharged the seamen. It was contended, that, as the ship did not earn freight after her arrival at New Orleans, the crew were not entitled to wages; but the court gave them wages for the whole time the vessel lay at New Orleans, and up to the time of their return to New York.[1]

The only remaining question is the amount of compensation to be awarded. This is governed by no fixed rule. The court is to give as much as, under the circumstances of the case, it shall deem proper. There is nothing in the conduct of the owner that calls for exemplary damages. There has been no wanton violation of the contract, and the men have been brought to a home port and paid their wages to the time of their discharge. He has also made some offer of additional compensation. On the other hand, the conduct of the libellants has been exemplary. When their requests to be discharged were refused, they went quietly back to their work, and faithfully performed their duty until discharged. In a case in which the voyage was broken up at the home port, Judge Peters allowed one month's pay in addition to the wages actually earned. What the voyage was, and where begun is not stated. Woolf v. The Oder [Case No. 18,027]. The same judge in Hindman v. Shaw [Id. 6,514], says that in voyages broken up in the West Indies, or distant ports in the United States, he has given seamen one month's pay, although this has been sometimes refused.

On the whole, I am of opinion that the libellants are entitled to one month's pay each, as damages, and to the costs.

THOMPSON (OTTERIDGE v.). See Case No. 10,618.

---

[1] In addition to 3 Hag. Adm. 202, and The Mary [supra], the counsel for the libellant cited, to this point, The Saratoga [supra]; Curt. Merch. Seam. 295; and 1 Hag. Adm. 347.

Case No. 13,972.

THOMPSON v. PERKINS et al.

[3 Mason, 232.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1823.

PRINCIPAL AND AGENT — DEL CREDERE AGENT — NOTES TAKEN—TRACING PROPERTY.

1. If a factor del credere sells the goods of his principal, and takes negotiable securities in payment, and fails before they become due, and assigns those securities to his assignees, in favor of his creditors, and the assignees afterwards receive the money when the notes become due, the principal may recover the money from the assignees, subject to a deduction of the lien of the factor for his commissions and charges.

[Cited in Calais Steamboat Co. v. Scudder, 2 Black (67 U. S.) 385: Nutter v. Wheeler, Case No. 10,384.]

[Cited in Lewis v. Brehme, 33 Md. 421; Lee v. Hennick (Ohio Sup.) 39 N. E. 474; Ilsley v. Jones, 12 Gray, 264. Cited in brief in Dickinson v. Gray, 7 Allen, 31; Baker v. New York Nat. Exch. Bank, 100 N. Y. 34, 2 N. E. 452.]

2. Wherever the principal can trace his property, as distinct from that of the factor, he can recover it, into whosesoever hands it may come.

[Applied in Yates v. Curtis, Case No. 18,127. Cited in Piatt v. Oliver, Id. 11,115; Whelpley v. Erie Ry. Co., Id. 17,504; Terry v. Bamberger, Id. 13,837; Commercial Nat. Bank v. Armstrong, 39 Fed. 692.]

[Cited in Boston & M. R. Co. v. Warrior Mower Co., 76 Me. 261; Merrill v. Bank of Norfolk, 19 Pick. 34; Baker v. New York Nat. Exch. Bank, 100 N. Y. 34, 2 N. E. 452; Roca v. Byrne (N. Y. App.) 39 N. E. 813; Overseers of Poor v. Bank of Virginia, 2 Grat. 548; Vance v. Kirk, 29 W. Va. 354, 1 S. E. 717.]

Assumpsit on the money counts. Plea, the general issue.

The case at the trial was this. The plaintiff [Edward Thompson], a merchant of Philadelphia, consigned goods to Messrs. Winslow, Channing & Co. who were auctioneers in Boston, for sale. Messrs. Winslow, Channing & Co. accordingly sold the same, and took negotiable promissory notes, payable on time, in their own names, for the amount of the sales. Afterwards, and before the notes became due, they failed and assigned their property to the defendants [Thomas H. Perkins and others], as assignees, for the benefit of their creditors, and among other assigned property were the notes taken for the goods of the plaintiff. The assignees received payment of the notes; and the present action was brought to recover the amount of the money so received on these notes, deducting the commissions and charges of the auctioneers, who acted under a del credere commission. At the trial a verdict was taken for the plaintiff, subject to the opinion of the court.

Mr. Hubbard, for plaintiff, argued that the plaintiff was entitled to recover. The general principle is, that the owner is entitled to recover, whenever he can trace his own property, or its proceeds, as distinguished from the factor's. It makes no difference, that the notes are taken in the factor's name. So is Scott v. Surman, Willes, 400. The same doctrine is stated in a stronger case, Price v. Ralston, 2 Dall. [2 U. S.] 60. And the same doctrine is recognized in Goodenow v. Tyler, 7 Mass. 36. The sale does not vest any property in the factor. The money is still that of the principal. George v. Clagett, 7 Term R. 359. Neither does the payment of a del credere commission change the operation of the principle. A guaranty is not a purchase of the goods by the factor. It is merely a collateral undertaking to pay in case of the insolvency of the vendee. If it were otherwise, the principal would lose the security of the vendee, and possess only that of the factor. If the vendee were not also liable to the principal in such case, then it would not be a case of guaranty, but of direct original purchase by the factor. But the law is otherwise; the vendee is originally liable to the principal, and the factor's responsibility is only auxiliary. There are two securities, and not one only. Ex parte Murray, Cooke, Bankr. Laws, 400, is in point. Also, 1 Mont. Bankr. 577; Bull. N. P. 42; 3 Willes, 187; Scrimshire v. Alderton, 2 Strange, 1182; Estcott v. Milward, 7 Term R. 359, note; Mace v. Cadell; Cowp. 232; 13 Vin. Abr. "Factor C." p. 4; 2 Marsh. Ins. 295; 1 Liverm. Princ. & Ag. 274, 275. The cases in respect to mutual credit do not apply here. They only respect the vendee and factor; not the right of the principal. 7 Term R. 359. The case of Grove v. Dubois, 1 Term R. 112, has been doubted. 2 Mont. Bankr. 128. He cited, also, Ex parte Dumas, 1 Atk. 232; 2 W. Bl. 1154; 3 Burrows, 1368; 18 Ves. 239; 2 Vern. 638; 5 Term R. 227; 3 Maule & S. 562.

William Sullivan, for defendants.

The plaintiff was not owner of these notes. They were the notes of the factors taken in their own name, though for the sale of the goods of the plaintiff. The factors acted under a del credere commission; this made them in effect, as to the plaintiff, principals, and not merely collaterally liable. A factor del credere is directly liable. Grove v. Dubois, 1 Term R. 112. The plaintiff could never have recovered these notes from the factors in any suit. If the principal will release the factors from the guaranty, he may entitle himself to the notes, paying the commissions and charges; but not otherwise. The principal could not, in a case like this, if the notes had been paid to the factors, have sued the factors for money had and received; but his remedy must be by suit on the guaranty. Gall v. Comber, 1 Moore, C. P. 279; Baring v. Corrie, 2 Barn. & Ald. 137; Mackenzie v. Scott, 6 Brown, Parl. Cas. 280. The case here is not like cases under the bankrupt act. The assignees here took for creditors, and received the notes in part payment of their debts. Paley, Prin. & Ag. p. 39. Under the bankrupt act, the party is discharged by the act of the creditors. Here, it is a private

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

agreement and discharge and in consideration of a private assignment.

Mr. Hubbard, in reply.

Whether the plaintiff can recover or not depends on this, whether he had property in the notes. If he had, the money received by the assignees was to his use. If the goods had not been sold, the assignees could not, on such an assignment, have held them. We contend, that these notes were the plaintiff's, as much so as the goods. The money received was therefore the plaintiff's money. The assignees were but trustees of the factors.

STORY, Circuit Justice. In this case the sole question is, whether the notes taken in payment for the goods of the plaintiff, upon the sale by Messrs. Winslow, Channing & Co. were the property of the latter at the time of their failure. If so, then they passed by the assignment to the defendants; if not, then the present action is completely sustained. Nothing is better settled at the present day than the doctrine, that the principal is entitled to recover, whenever he can trace his own property and distinguish it, or its proceeds, from the mass of the property of his factor. If it has been sold and notes taken in payment, and these can be specifically ascertained, they remain the property of the principal, and he has a right to receive them, discharging at the same time any lien of the factor. I need not cite authorities on this point. They are very numerous, and have ably collected in Mr. Livermore's very valuable treatise on Agency, and in Mr. Montague's on the Bankrupt Laws. 1 Liverm. Princ. & Ag. (1818) p. 267, c. 7; Mont. Bankr. Laws (1819) p. 577, c. 40. The case of Scott v. Surman, Willes, 400 (see, also, Taylor v. Plumer, 3 Maule & S. 562), is a leading case on the subject; and in it, Lord Chief Justice Willes, with his accustomed diligence, accuracy, and learning, has summed up and expounded the general principles and authorities. That case completely disposes of this, for there the factor took the notes payable to himself, or order, unless the fact, that the factors were acting under a commission del credere, or, in other words, were guarantees of the payment, changes the legal posture of the parties. And it is insisted, that the guaranty made the notes the absolute property of the factors. That is a proposition, however, extremely difficult to be maintained upon principle, and as little consonant with authority.

It is true, that in Grove v. Dubois, 1 Durn. & E. [Term R.] 112, which was the case of a policy broker, Lord Mansfield lays down the doctrine, that a commission del credere is an absolute engagement to the principal from the broker, and makes him liable in the first instance without any necessity of resorting to the purchaser, or other contracting party. And Mr. Justice Buller, in the same case, said, that a previous demand and refusal of the debtor had never been in practice required. Whether this doctrine can now be supported is matter of great doubt. It has been questioned by a very acute reporter, (7 Taunt. 480, note a), and seems utterly at variance with the decision of Lord Chief Justice Gibbs, in a recent case. Peele v. Northcote, 7 Taunt. 478. He there said, speaking of a policy broker, that he "was to guarantee all the underwriters for a del credere commission, and was therefore, it was quite clear, liable only in the second instance to make good the loss, in case a loss should arise." Lord Ellenborough too, in delivering the opinion of the court, in Morris v. Cleasby, 4 Maule & S. 566, expressly declared, that the court could not accede to the proposition laid down in Grove v. Dubois. "The doctrine so laid down," says he, "appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law on this subject." See, also, Gall v. Comber, 7 Taunt. 558. But it is not necessary to consider this point, because Lord Mansfield, in the same breath admits, that the law allows the principal, in such a case, for his benefit, to resort to the debtor, as a collateral security. This is a plain admission, that the property in the policy is not, by the guaranty, vested absolutely in the broker, but that the assured might control it. It tacitly concedes, that a guaranty does not vest any title in the broker, which the law would not otherwise vest in him. In truth, the case before his lordship did not call his attention to the rights of the principal in this respect, but merely to the right of set-off by the broker against the underwriter, as a case of "mutual credit," under the bankrupt acts. And for the same reason we may dismiss the later cases, which have turned upon similar discussions. See Baker v. Langhorn, 4 Camp. 396, and note, 399; Koster v. Eason, 2 Maule & S. 112; Morris v. Cleasby, 4 Maule & S. 566. Lord Ellenborough, in one of them, uses this strong language, "that the broker, with a del credere commission, may be looked upon as the owner of the policy, and he being answerable to the insured for the loss, the amount may be considered as due to him." Wienholt v. Roberts, 2 Camp. 586. It may be so as between the broker and underwriter on a set off of "mutual credit;" but it is quite a different question as between the broker and his principal. For, as between the latter, the cases abundantly show, that the insured is the real owner, subject only to the lien of the broker. See Cumming v. Forester, 1 Maule & S. 494; Peele v. Northcote, 7 Taunt. 478. The analogy, therefore, so far as it bears upon the present question, is against the distinction, which the defendants attempt to set up.

The case of Mackenzie v. Scott, 6 Brown, Parl. Cas. 280, has also been cited in support of this distinction; but upon examination it

will not be found to apply. It is not very easy to ascertain upon what precise point that judgment turned, as no reasons are given by the house of lords. But it may be gathered from the facts, that the principal controversy was, whether a factor, with a del credere commission, was discharged from liability by remitting the amount to his principal in an unproductive bill, payable to and endorsed by the factor. It was decided, that he was not; and as it may be fairly presumed, either upon the common ground, that the factor was liable upon his indorsement, or, that the bill was not received as an absolute payment, so as to extinguish the guaranty. At all events, it is no rashness to assert, that it steers wide of the present question.

The case of Gall v. Comber, reported in 1 Moore, C. P. 279, and 7 Taunt. 558, turned upon this point, that at all events the principal could not maintain a suit of indebitatus assumpsit for goods sold and delivered against his factor del credere, after a sale of the goods; for if the factor was strictly liable to the principal, it was not as purchaser of the goods, but as making a contract of a peculiar nature, and that it ought to be specially laid in the declaration, as arising from the del credere commission. And at the trial, Lord Chief Justice Gibbs considered it as merely a guaranty, that the price should be paid. So far as this case goes, it shows that the factor does not become the purchaser of the goods by a sale under a del credere commission. The view thus taken of a del credere commission is confirmed by what fell from Lord Ellenborough, in Morris v. Cleasby, 4 Maule & S. 566, 574. His language is: "The guarantee is to answer for the solvency of the vendee, and to pay the money if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good. Where the form of the action makes it necessary to declare on the guaranty, application to the principal must be stated on the record."

No other cases have been cited by the defendants, that require any particular observation. I will now shortly advert to those, which establish a doctrine wholly inconsistent with the argument of the defendants. And first, the case of Scrimshire v. Alderton, 2 Strange, 1182. There the plaintiff consigned some goods for sale to a factor, with a del credere commission. After the sale, and before payment by the purchaser, the factor failed, and the plaintiff brought his action after notice and demand against the purchaser to recover the amount. Lord Chief Justice Lee held, against the opinion of a special jury, that the plaintiff was entitled to recover, upon the ground, that the factor's sale created a contract between the owner and the buyer. And his opinion was afterwards confirmed by the whole court; and has ever since been held to be good law. See Estcot v. Milward, cited in Cooke, Bankr. Law, 383. The doctrine in Bull. N. P. 130, is therefore overruled. Here then we have a direct authority, that the guaranty did not change the relation of the factor; and that the money due was still the money of the principal. If this be so, what difference can it make, that a note has been taken to secure the payment? Must not an instrument, which merely evidences, but does not extinguish, the debt, follow the nature of its principal? If the owner is entitled to the debt, is he not entitled to that, which was taken to evidence it? I meddle not with the fact, that here there were negotiable instruments. If they had been negotiated, and the money received by the factors, in the course of business, that would have deserved a very different consideration. But let the rightful possession of the notes be in whom they may, if the money due was still, notwithstanding the guaranty, the money of the plaintiff, when the defendants received it, it was, in point of law, upon the authority of this case, money had and received to his use. To the same effect is Ex parte Murray, Cooke, Bankr. Law (8th Ed.) 384, where the lord chancellor held, that money received by the assignees after the bankruptcy, in payment of goods sold by the bankrupt under a del credere commission, belonged to the owner of the goods, and decreed the assignees to pay it accordingly.

No answer has been given to these decisions, except that they arose under the bankrupt laws. But that circumstance would make them of stronger application on the other side, if they were contested upon the ground, not of real ownership, but of reputed ownership under the bankrupt act of 21 Jac. I., c. 19, § 11. It does not however appear, that in Scrimshire v. Alderton the case arose in bankruptcy. The case of Robson v. Wilson, reported by Mr. Marshall in his work on Insurance (1 Marsh. Ins. bk. 1, p. 295, c. 8, § 2), is a very strong authority to the same effect. There, Wilson, a broker at Liverpool, was in the habit of sending orders to Stoddart, a broker at Newcastle, to effect insurances. Wilson, for a del credere commission, guaranteed the premiums on all the orders, and was to pay them, as received, to Stoddart, and Stoddart was to pay all losses, and for a like commission Stoddart also guaranteed the premiums to the underwriters. Stoddart became bankrupt, and at the time of his bankruptcy £79 were in the hands of Wilson, being the premium on a policy underwritten by one Robson, the plaintiff. The latter had settled accounts for premiums with Stoddart, and taken his notes for the general balance, and brought his action against Wilson for the £79, as money received to his use. The court held him entitled to recover. And Lord Kenyon, on that occasion, said: "Where a factor has received money belonging to his principal, and it becomes blended

with his own estate, and cannot be distinguished from it, the principal must come in with the general creditors. But here it is clearly distinguishable from the bankrupt's estate. Before it is paid to the factor del credere, he becomes a bankrupt; it is therefore no part of the general fund, and the principal has a right to claim it." Here is a case decided with no reference to any peculiar doctrine in bankruptcy; but standing on general principles, and necessarily affirming, that a del credere commission did not create an original ownership of the premium in the broker, or change the general relation between the principal and the underwriter, as debtor and creditor.

If then these decisions constitute the law, (and they have been no where denied, but on the contrary, referred to by the best elementary writers,—1 Mont. Bankr. 577, c. 40; 1 Cooke, Bankr. Law, 4th Ed., 400, etc.,—as settling the doctrine,) there is an end of the defence, and judgment must be given for the plaintiff. And I may add, that our own state court has fully recognised the doctrine. In Kelley v. Munson, 7 Mass. 319 (see, also, Price v. Ralston, 2 Dall. [2 U. S.] 60; Messier v. Amery, 1 Yeates, 540; Hourquebie v. Girard [Case No. 6,732]; Whart. Dig. 10, pl. 39), Mr. Justice Sewall, referring to the case of a guaranty, admits, that the principal may intercept the debt in the hands of the buyer, not prejudicing thereby any right of set-off in the latter against the factor, who deals in his own name, without disclosing the agency. And upon principle, if there were no authority in point, the result must be the same. The moment it is conceded, that notes taken by the factor in his own name, in payment for the goods of the principal, when identified, are the property of the principal, (and the authorities on this point are entirely conclusive,—Scott v. Surman, Willes, 400; Ex parte Dumas, 1 Atk. 232; Ex parte Emery, 2 Ves. 674,)—it can make no legal difference, whether the factor be with or without a commission del credere. What is the nature of such a guaranty? It is merely an undertaking to pay, in case there should be a failure of payment by the buyer. It is not a direct, original liability to the principal, in the same way as if the factor was himself the purchaser, excluding the liability of the real purchaser. The principal may, at any time, waive the guaranty and claim possession of the notes from the hands of the factor, discharging any lien of the latter. In short, the guaranty does not any more transfer such notes to the factor as property, than a guaranty of any other notes held by the principal, not arising under factorage business. Suppose the buyer should actually pay the money to the principal, what pretence would there be for the factor to recover it back from the principal? Upon reason, upon the nature of the contract, upon general justice and equity, the produce of property ought to belong to the owner, if it is distinguishable from that of the factor. His undertaking that the owner shall, at all events, receive it, in no shape changes the nature of the property, or the rights of the owner, growing out of that consideration. The factor, without a commission of del credere, has but a lien on the proceeds for his charges; with it, he has still but a lien for additional charges, growing out of the extraordinary responsibility. The character of the transaction is not thereby changed in its nature, but only in degree. A guaranty superinduced after the sale would not change the property in the notes. Why then should an antecedent guaranty?

My opinion, upon the most mature reflection, is, that the plaintiff is entitled to judgment for the full amount of all the notes of which the defendants have received payment. Judgment accordingly.

THOMPSON (PERRINE v.). See Case No. 10,997.

Case No. 13,973.

THOMPSON v. The PHILADELPHIA.

[1 Pet. Adm. 210.] [1]

District Court, D. Pennsylvania. 1805.

SEAMAN — WAGES — FAILURE TO REPORT AT TIME APPOINTED IN ARTICLES—INDULGENCE BY MASTER—UNLADING—WITNESS.

1. Wages withheld by the owner of the ship in consequence of the mariner not having rendered himself on board at the hour appointed in the articles.

2. Wages decreed, on proof of special indulgence to the mariner.

3. Time given beyond 15 days, on special circumstances, for unlading.

[Cited in The Martha, Case No. 9,144; The Mary, Id. 9,191.]

4. Where seamen may be admitted witnesses for each other; and where not.

A sum of money, said to be due to a seaman for wages, was withheld as a penalty for not rendering himself on board, agreeably to act of congress, at the hour appointed. A seaman, one of the crew, who was involved with the present complainant, in a controversy with the owners, by an entry in the log-book, for neglect to render himself on board, was offered as a witness by the complainant's counsel. The entry in the log-book was insisted on by the owner of the ship, as incontrovertible evidence.

PETERS, District Judge. At first I thought the witness should be rejected, as one concerned in interest on the same points, agreeably to the law, as laid down in Strange and other books of authority. But as it is stated, that special circumstances attend the case of the complainant, distinguishing it from that of others, I admit the witness. As to the

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

entry in the log-book, it is only prima facie evidence. The witness proving an indulgence given to the seaman by the captain, beyond the hour set down on the articles, wages in full decreed to be paid. In this case, although the ship had ended her voyage more than fifteen days, yet it having been alleged and not denied, that due diligence had been used, but the vessel could not be unloaded, I give further time for payment.

On the point of admitting seamen to be witnesses for each other, it is settled here, that one seaman cannot be a witness for another, if the witness and the party have a common interest in the point in contest. If the question be the loss of the ship—embezzlement equally affecting the whole crew—negligence, misfeazance, or malfeazance, to which all must contribute in damages, one of the crew cannot be admitted a witness for another. But where special circumstances distinguish cases—where one having made a similar contract with the other, the breach or performance whereof may happen without affecting the other—where special indulgences are given to one, though not to the rest, a seaman may be a witness for another. Where seamen are involved in similar breaches of contract, though the agreement of each is separate and independent, I hear them with caution. But this affects credit, not competency.

Case No. 13,974.

THOMPSON v. PHILLIPS.

[Baldw 246.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1830.

EXECUTION — SALE OF LAND UNDER — MARSHAL'S DEED—LIEN OF JUDGMENT—CONSTRUCTION BY STATE COURT.

1. Where a levy and inquisition were set aside by the court, but the fieri facias not set aside, a new inquisition was held and returned with the fieri facias and levy annexed, condemning the property; a venditioni exponas was issued, the property sold and deed acknowledged by the marshal in open court: *Held*, that the validity of the sale was not affected by the want of an alias fieri facias, or a new levy.

[Cited in Dudley's Case, Case No. 4,114; Dawson v. Daniel, Id. 3,669.]

2. The acknowledgment of a sheriff's or marshal's deed is a judicial act, which cures all defects in process or its execution, which the court have power to remedy by their order.

3. If the court has jurisdiction of the case, the parties, and power to order the sale by a venditioni exponas, a sale so made, and a deed acknowledged, cannot be set aside in a collateral action.

4. An objection to such sale must show the want of power in the court

5. Irregularities must be corrected by the court which issues the process.

6. Erroneous proceedings must be reversed on a writ of error, or they are binding.

7. The state law of 1798, limiting the lien of judgments, is a law of property and title applicable to judgments in this court, of record before its passage.

8. This act does not admit of the same construction as the statute of Westminster, giving a scire facias after a year and a day, there being no analogy between them as to the mischief or remedy.

9. A capias ad satisfaciendum taken out and returned non est inventus, does not preserve the lien of a judgment without a scire facias within five years from its entry.

10. As a general principle, an elder judgment is entitled to prior satisfaction; a sale under a younger judgment does not affect the prior one, or prevent a sale under it so as to pass the title; and if the question was open, this court would give such construction to the fourth section of the state law of 1705.

11. But the rule established by the supreme court of this state is otherwise, and will be adopted as the construction of a state law.

12. That a sale by a sheriff, under a judgment in the court of common pleas in this state, passes a title to the purchaser discharged from a prior judgment in this court, either against the defendant, as whose property it was sold, or against any persons from whom it was conveyed to the defendant.

[Cited in brief in Dazet v. Landry (Nev.) 30 Pac. 1065.]

13. The settled construction of a state law, by the highest court of the state, is considered by the federal courts as their rule of decision under the thirty-fourth section of the judiciary act, such construction being taken as a part of the law.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Cropsey v. Crandell, Id. 3,418; Ward v. Chamberlain, Id. 17,152; New England Screw Co. v. Bliven, Id. 10,156; Mitchell v. Lippincott, Id. 9,665; Ex parte McNiel, 13 Wall. (80 U. S.) 243.]

[Cited in Andrews v. Doe, 6 How. 554.]

This was an action of ejectment for a house and lot in Philadelphia. Both parties claimed under Charles Hurst, who was seised in fee of the premises in May, 1775, subject to a ground rent. The plaintiff claimed title by a deed from Charles Hurst to Edward Evans, dated 18th of May, 1775, and a deed of the 21st of August, 1787, from Evans to Charles Hurst. On the 11th of April, 1791, a judgment was obtained in this court, by Thomas and John Wilson against Charles Hurst, under which the premises in question were sold by the marshal, and by a deed acknowledged in court on the 11th of April, 1825, conveyed by him to Elizabeth Hess, who, on the 26th of March, 1826, conveyed the same to the lessor of the plaintiff. The defendant claimed title by a deed from Charles Hurst to John Lang, dated 1st of February, 1795, and a regular chain of intermediate deeds to Alexander Hemphill, against whom a judgment was entered in the court of common pleas of Philadelphia county, on the 23d of May, 1814, under which the premises were sold by the sheriff; and by deed acknowledged in court on the 22d of May, 1815, conveyed by him to John B. Newman, under whom the defendant is in possession. John Lang, and those claiming under him, have been in possession of the premises from the date of the deed from

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

Charles Hurst, in 1795, and made valuable improvements thereon. On the judgment of Wilson v. Hurst, in 1791,[2] several writs of execution and venditioni exponas had issued, on which sales had been made by the marshal, deeds acknowledged and given to the respective purchasers; but no levy was made on the premises in question before April 1823, though they were bound by the judgment at the time of the conveyance by Hurst to Lang.

Four questions were raised on the trial: 1. On the validity of the marshal's sale and deed to Elizabeth Hess, which was alleged by the defendant to be void for want of a levy. 2. Whether the lien of the judgment of Wilson v. Hurst, on which the plaintiffs rested their title, was not lost by omitting to revive it, pursuant to the provisions of the state law of 4th of April, 1798. 3. Whether the sheriff's sale on the judgment against Hemphill, did not discharge the property sold from all existing liens, and turn Wilson over to his action against the sheriff for the purchase money. 4. Whether the plaintiff is not barred by the lapse of time, from 1795 till 1823, during which the purchasers under Hurst were in possession, and no levy made on the premises; and whether the law will not presume the judgment to have been released, so far as it could affect the property thus held.

The first question was made on the admissibility in evidence of the marshal's deed to Mrs. Hess, and was elaborately argued on both sides, the court admitted the deed to be read without delivering any opinion, the same point arose as to its effect, and the argument was the same in substance as was made on the objection to its being read to the jury. On the first question it is unnecessary to refer to the proceedings on Wilson's judgment prior to March, 1823. On the 31st of March, 1823 a fieri facias for residue was issued, returnable at April term, on which there was a levy on the lot in question and other property, an inquisition and condemnation returned; on the 19th of April, Mr. Todd, on behalf of Mr. Newman, under whom the defendant holds, obtained a rule to show cause why the levy and inquisition should not be set aside, on the 30th of April the rule was made absolute by the court. No fieri facias appears to have been taken out afterwards, none was produced, nor was there any entry on the record of one having issued. But the plaintiff produced an inquisition, taken on the 18th of October, 1823, to which the fieri facias of March was attached with a levy thereto annexed, embracing the same property as was before levied on. The property levied on was condemned by the inquest, the fieri facias and a levy were returned with the inquisition on the 20th of October, 1823, as appeared by an indorsement thereon in the pencil mark of the clerk of the court. The plaintiff also produced a notice of the holding the inquisition, which was served on Mr. Todd, who attended at the first day, but not at the adjournment on the 18th, as testified by the marshal. Mr. Todd on being called, testified, that he was not present at the inquisition; having discovered that the marshal had no writ, and consulted Mr. Binney, they concluded that it was not necessary. At the time of the sale by the marshal, Mr. Todd, on behalf of Mr. Newman, gave notice that the validity of the sale would be contested for want of a fieri facias and levy.

On the second question arising under the law of 1798, the following entries on the record are all which are material to be stated. The judgment of Wilson v. Hurst [Case No. 17,808], was entered on the 11th of April 1791, a capias ad satisfaciendum was taken out on the 19th of September, returnable to October term, 1791—returned non est inventus; no further proceedings took place till the 23d of April, 1805, when a scire facias, returnable to October term, 1805, was issued against Charles Hurst, and returned served. No notice appears to have been served on the terre tenants, though the lot was then, and had for ten years been in possession of persons claiming by purchase from Charles Hurst. The first section of the act of 1798 declares, "that no judgment now on record in any court within this commonwealth, shall continue a lien on the real estate of the person against whom the same has been entered, during a longer term than five years from and after the passing of this act, unless the person who has obtained such judgment, or his legal representatives, or other person interested, shall, within the said term of five years, sue out of the court wherein the same has been entered, a writ of scire facias to revive the same." The third section provides, "that all such writs of scire facias shall be served on the terre tenants or persons occupying the real estates bound by such judgments, and also where he or they can be found, on the defendant or defendants, his or their feofee or feoffees, or on their heirs, executors or administrators." 3 Smith's Laws, 331, 332.

The third question arising on the effect of the sheriff's sale in 1814, 1815, depended on the construction of the act of 1705, for taking and selling lands on execution pursuant to judgments and mortgages. The regularity of the sheriff's sale on the judgment against Hemphill, was not questioned; its effect turned on the fourth section of that law, which declares, that lands sold under execution shall be held and enjoyed by the purchaser, "as fully and amply, and for such estate and estates, and under such rents and services, as he or they for whose debt or duty the same shall be so sold or delivered, might, could or ought to do, at or before the taking thereof in execution." 1 Smith's Laws, 59.

The fourth question turned on the general principles of law, applicable to legal presumptions from the lapse of time.

[2] [Case No. 17,808.]

Mr. Sergeant, for plaintiff, on the first question.

The plaintiff's claim is founded on a marshal's deed, duly acknowledged after a regular sale on a venditioni exponas, issued after a fieri facias, levy and an inquisition of condemnation. The defendant had notice of the levy, inquisition, and all subsequent proceedings, but made no objection to the acknowledgement of the deed, though he had every opportunity of doing so. Had he made his objections in time, the sale, if illegal, might have been set aside without prejudice to the purchaser; now having paid the purchase money, the land and money are lost if the objection prevails. Such conduct may make the plaintiff's title good, though it would have been bad otherwise. Willing v. Brown, 7 Serg. & R. 467. The only defect relied on is the want of a new fieri facias and levy, after the first levy had been set aside on the motion of Mr. Todd. The court were not asked to set aside the fieri facias; none of the exceptions applied to the levy on the property in question, and if it were necessary to support the subsequent proceedings, the court would amend their order setting the levy aside, so as to set aside such parts only as come within the exceptions, or would so construe the entry as not to affect such part of it as was necessary to support the subsequent proceedings. A fieri facias returned with a levy is properly executed, the setting aside the levy has no effect on the fieri facias, its efficacy remains, and its exigency may be performed after the return day; the law is settled that an inquisition may be held at any time afterwards, and there is no decision that a levy may not be attached to the fieri facias after the return. In Burd v. Dansdale's Lessee, 2 Bin. 80, there was no levy in fact, none was attached to the proceedings, and the venditioni issued contrary to the order of the court setting the levy aside, which was to levy anew, and which was not done. Here was a levy in fact, attached to the fieri facias, returned to the court with the inquisition before the venditioni issued; the defendant's objection is thus narrowed down to the want of an alias fieri facias, the only use of which would be an accumulation of costs. In Miller v. Milford it is settled, that an alias fieri facias is not necessary where the act can be done on one which is returned. 2 Serg. & R. 35.

A levy on land, under the execution law of this state, is different from a levy on goods, no seizure or entry on the land is requisite, it may be done on paper, by the sheriff designating the property on which he intends to hold the inquisition; the law requires notice of the time and place of holding the inquisition, which must be on the premises levied on, if requested by the party. The levy is a mere formal act, one which must precede the inquisition, in order to ascertain the rents and profits of the property selected to satisfy the execution; it is of no importance to the defendant, whether this selection is made by the sheriff before or after the return of the fieri facias. If the land is improved it cannot be sold under the fieri facias, there must be an inquisition finding the rents and profits insufficient to pay the incumbrance on it in seven years; this is the important act on which the power of the court to order a sale depends, and the only one by which the defendant can be injured; if this can be done after the return of the fieri facias, a fortiori, the mere act of form preparatory to it can be. When the sale is ordered, it is not on the fieri facias, but a new writ of venditioni exponas; the levy returned with the inquisition is a part of it, when or how it is made is no matter of inquiry, it is enough if the court see that the inquest have acted on the specific property. There must be a levy in form, but it will always be presumed in support of proceedings which depend upon it, unless the contrary appears. 11 Johns. 517; 17 Johns. 13. 17; 19 Johns. 345. The venditioni issued in this case is a recognition by the court of the existence of such a levy as authorized the inquisition; the omission to take out an alias fieri facias was, if any defect, a mere irregularity, or at the most an error in the proceedings of the court, which was cured by their judicial act in receiving the acknowledgement of the marshal's deed. Their proceedings are good till reversed, being voidable only if erroneous and not valid, the title of a purchaser is not affected by the reversal, by the principles of the common law, which are affirmed in the provisions of the act of assembly of 1705. 1 Smith 61. The defendant obtains restitution only of the money for which the property sold. The purchaser is also protected though the judgment under which he buys is fraudulent. [Simms v. Slacum] 3 Cranch [7 U. S.] 306.

The alleged defect in this proceeding being one of mere form, in a matter which the consent of parties could cure, and of which the defendant could have availed himself, as he had full notice, he shall be deemed to have assented to the levy on the old fieri facias, or to have waived the irregularity; the time is passed when he ought to be heard, as his silence has led to the sale and the payment of the money by the plaintiff; the case thus comes within the principle of Willing v. Brown. But there is neither irregularity nor error in the proceeding, the court had complete jurisdiction of the case, the parties, and full power to order a sale of the property: their acts are reversible for irregularity only by themselves on motion, or by a superior court on a writ of error; they will be presumed to have done what they had power to do, and to have done every thing necessary to bring the power to sell into action. After this power has been exercised their proceedings cannot be examined collaterally on any other ground

than the want of jurisdiction. Thompson v. Tolmie, 2 Pet. [27 U. S.] 57, 162; M'Pherson v. Cunliff, 11 Serg. & R. 431; 11 Mass. 221. The want of an alias fieri facias, or the time of making a levy, is not a thing which affects jurisdiction or power; the mandate of the writ is not to levy or hold an inquisition, it is to make the money out of the land; the power to hold the inquisition after the return of the fieri facias continues in force, the levy is a mere preparatory act, which does not, as in the case of chattels, give the sheriff any right of possession or property. The fieri facias was the authority to the marshal to do all acts preparatory to a venditioni, he returned a levy which was good except in two particulars, for which it was set aside, he then strikes from the levy the objected matter, attaches the remainder to the fieri facias, and holds the inquisition. Thus connecting what had been done before the return, with what followed, the whole proceeding is strictly regular, according to the principles settled in 2 Serg. & R. 161, 162, and 8 Serg. & R. 380. The direct order of the court would cure any irregularity as to the time of levy or sale, the sheriff may sell after the return of the venditioni if the land is put up on the return day (2 Bin. 80; 1 Serg. & R. 92), or during the first week of the term, if there is an usage to that effect in the county (10 Serg. & R. 261). Here the execution was begun to be executed before the return. It was defectively done in part, when the defect was remedied. The subsequent acts of the marshal become connected with the first, so as to make a good and perfect levy for all the purposes of the law. But the conclusive answer to all objections to a sheriff's sale, which do not reach the jurisdiction and power of the court, is that they are cured by the acknowledgement of the deed; this is a judicial act, a judgment affirming all previous proceedings, which remains binding on all parties till reversed.

On the second question. Independently of the act of 1798, the lien of a judgment continues till satisfied by payment, or such a case arises as from length of time raises a presumption of payment, which the jury may find on a plea of payment. In this case the proceedings on the judgment of Wilson, preclude such presumption. It was of record, every person who could be affected by it was bound to take notice of it, it bound all the real estate of the defendant, Hurst, in the district for twenty years; whether the present defendants had notice, in fact, or not, the law presumes they had notice of the judgment, and all its consequences, as of a deed duly recorded. The words of the law show that it was so viewed by the legislature, in the preamble "suffering judgments to remain a lien an indefinite length of time," and the old law prevails in all cases which are not embraced by the provisions of this act. It had been settled by the supreme court in 1809, that if an execution has issued within a year and a day from the entry of the judgment or stay of execution, so that the plaintiff could have an alias execution, without a scire facias under the statute of Westm. II., the judgment remains a lien without a scire facias under the act of 1798. Young v. Taylor, 2 Bin. 218. Though the fieri facias is not returned, the judgment is kept alive by the entry of continuances on the roll with the entry of vice comes non misit breve, and an alias fieri facias has thus been held good after eleven years from the issuing of an oiginal not returned. Lewis v. Smith, 2 Serg. & R. 160. The court construe the act of 1798 by the rules applied in England to the statute of Westminster. Any execution which shows that the money was not paid when it was issued, rebuts the presumption of payment after the year and day, saves the necessity of a scire facias, and authorizes an alias. 1 Arcbb. Prac. 256; Pennock v. Hart, 8 Serg. & R. 376. As a capias ad satisfaciendum issued on this judgment within the year and day, the case comes within the settled construction of the law of 1798. But this law does not apply to the courts of the United States, they are not courts of record in this commonwealth, nor did the legislature ever intend to interfere with their judgments, over which, or the proceedings of the court, they have no control. This judgment when entered, had by the laws then in force a lien indefinite as to time, which no state law can diminish or affect; state laws prescribing rules of title and property are binding in this court, but this law prescribes the issuing of certain process on judgments, in order to continue their lien, it is therefore a process act not binding on this court. Wayman v. Southard, 10 Wheat. [23 U. S.] 20; Bank of the United States v. Halstead, Id. 51. Though it has been in force for more than thirty years, it has never been acted on or adopted in this court; in the only case which has arisen under it, it was held not to apply between judgment creditors, but only to purchasers and mortgagees, for whose protection and security it was passed. Hurst v. Hurst [Case No. 6,931]. In that case this law was set up by Wilson, the plaintiff, in the judgment now before us, to bar a previous judgment obtained by Brownjohn in the supreme court of the state, who, as was alleged, had lost his lien for the want of a scire facias. The contest was between that judgment and the present one, which was entitled to the proceeds of a sale by the marshal, of the property of Charles Hurst; the court directed the payment to be made to Brownjohn, because the act of 1798 did not protect Wilson's judgment. As this is a decision of this court on the judgment which is the foundation of the plaintiff's title in this case, it is conclusive upon it, so far as depends on the act of 1798. The law of this court has not become changed by the subsequent decision of the supreme court in 3 Bin. 337, constru-

ing the law to apply between judgment creditors. Had it been on a question of property or title to land depending on the law of the state, which had not been construed by the supreme court of the state, the rule in the federal courts is to adhere to their construction, though a contrary one may be afterwards given by the courts of the state, as in Huidekoper v. Douglass, 3 Cranch [7 U. S.] 1, &c. Since the decision of that case, there has been a radical difference between the federal and state courts respecting the title by warrant under the law of 1792.

On the third question. The plaintiffs in the judgment of Wilson v. Hurst [Case No. 17,808], are foreigners, who have a right to demand in this court, the assertion of their rights by the law of the federal courts, as they existed at the rendition of the judgment in their favour. The conveyance by Hurst could then vest no title, not subject to this judgment, until it is paid. Wilson could not be affected by any proceedings in the state court, of which he had no notice, nor was he bound to inquire into their proceedings, unless in some way brought in by notice. He had a lien on this property, which Charles Hurst could not divest or impair by deed, or the confession of judgment; this lien could be enforced by a sale under the judgment, the effect of which is to pass the title of Hurst, as he had it at the time of the judgment rendered. The deed of the marshal, is his deed by operation of law, so declared by the supreme court of the state, as the result of the sale and acknowledgement of the sheriff's deed. By the fourth section of the act of 1705, the purchaser holds the same estate as the defendant in the execution, but no greater, it is subject to all incumbrances which were upon it, at the time of the judgment on which it is sold, no other estate would pass by the deed of the defendant, and the sheriff cannot convey what the defendant could not. The acts of the law are substituted for the act of the defendant in the judgment, in order to pass against his consent, the estate he held, to the same extent to which he could convey it voluntarily; the power of the sheriff is made precisely what the power of the defendant was, when the judgment was rendered, which put the sheriff, by operation of law, in his place for the purposes of a sale, but gave him no power to divest a prior lien. That the prior lien gives the right to prior satisfaction, is an universal principal of law, it can be divested by no process or sale under a subsequent incumbrance, the right as acquired by the purchaser, remains subject to the prior lien, under which the property bound may be sold and held, notwithstanding a former sale under a junior incumbrance. Scott v. Rankin, 12 Wheat. [25 U. S.] 177. This principle covers the present question, and the decision of the supreme court is a rule for this, though state courts disregard it; the jurisdiction of the federal courts is complete, per se, and cannot be affected by any proceedings in state courts, which tend to impair or take away the lien and effect of their judgments.

On the fourth question. There is no ground for any legal presumption of payment, satisfaction or release of this judgment; the plaintiff has been guilty of no laches, or done any act of which the present defendant can complain, or of which he had not express notice in time to avail himself of it. He stands in no better situation than Lang, under whom he purchased would, if now in possession. When Lang purchased in 1795, the judgment of Wilson was undoubtedly a lien on the property, of which Lang was bound to take notice, and the law presumes him to have the same notice, as of a recorded deed from Hurst to Wilson. Lang improved at his peril, he ran the risk voluntarily, and those under him down to the present defendant, have continued to remain inactive till this suit. In October, 1823, Newman knew of the levy and inquisition on this lot, he never asserted any claim to be exempted from its effects, but rested on the technical objection to the fieri facias and levy. If under such circumstances the principles of a court of equity could be applied, he would now be prevented from setting up any presumed release. his silence and acquiescence would bind him. On the other hand, the judgment creditor has proceeded with all the diligence which the law required, he has acted by the order and under the process of the court, who have given a judicial sanction to every thing done, by receiving the acknowledgement of the marshal's deed. After this act, the court can make no presumption which would in any manner invalidate the deed or impair its legal effect; for that would be to presume in opposition to their own judgment, affirming all that had been done, which is tantamount to a prior order. A release of one defendant in a judgment, or of a part of the property bound by it, would be a release of the whole, which cannot be presumed without affecting the judgment as to other parts, to which there can be no pretence of abandonment. A partial release can now be given under the act of 1820, which alters the common law and must be confined to the case provided for. There is therefore no circumstance to authorize the presumption, that the judgment creditor has done any act which can deprive him of the legal effects of his judgment, or affect injuriously the rights of a purchaser, who has paid his money on the faith of judicial proceedings deliberately sanctioned by the court, in receiving the acknowledgement of the marshal's deed.

Mr. Todd and Mr. Binney, on the first question, for defendant.

As no new fieri facias issued after the April term, 1823, all subsequent proceedings under the judgment of Wilson are void, and

the fieri facias previously issued was returned, and all proceedings under it set aside. It must, therefore, be considered as not having been executed, or its execution as not having been begun before the return day, and comes within the well established rule, that if no act is done towards the execution of a fieri facias, before the return day, nothing can be done afterwards, though, if execution be begun before, it may be completed after the return. 6 Mass. 20; 2 Caines, 244. After the setting aside the former levy, no new one could be made, as the marshal had no writ to authorize it, this brings this case within that of Burd v. Dansdale's Lessee, in which the supreme court of the state decided, that where a levy had been set aside, and a sale was made without a new one, the sale was void for want of authority. 2 Bin. 80. This defect is not cured by Mr. Todd attending at the inquisition pursuant to notice, the object of the inquisition was merely to ascertain whether the rents and profits of the land would pay the incumbrances in seven years; the judgment creditor held it at his peril, it was void if the marshal had not a fieri facias in his hands and had made a levy under it, and the purchaser is bound to look to the authority of the marshal to sell under a judgment. The mandate of the fieri facias having expired, the marshal had no control over it after its return to the court, his taking it out of the office could give him no new authority, nor could the court order it to be executed anew; there must be a fieri facias duly executed, and a venditioni exponas to make the sale valid. The levy is an indispensable part of the execution of the fieri facias, according to Burd v. Dansdale, and the writ cannot attach to the land without it; it is the declaration and act of the officer, that he has taken specific property for its satisfaction, without doing which he can proceed no further. The inquisition is no part of the mandate of the writ, but must come after it has been spent by the levy, unless the land is unimproved, or the interest of the defendant such as may be terminated in less than seven years, as an estate for life or in tail. If the land is held in fee and improved, the levy is the only act which can be done under the fieri facias, the inquisition is directed by law, as a foundation for a liberari facias or a venditioni, according to the finding of the inquest. Hence the necessity of a levy, and it may be presumed from facts, as in 11 and 18 Johns. referred to in the argument on the admission of the deed; but this shows the rule to be, that there must be one or there is no need of presumptions. It must be made before the return of the writ, and if made without a writ, it is void. Saxton v. Wheaton, 4 Wheat. [17. U. S.] 503. The last day for its execution is that of its return; a levy afterwards is void for the want of authority. Vale v. Lewis, 4 Johns. 456. The sheriff is a trespasser, and no title passes to the purchaser in such case. Devoe v. Elliot, 2 Caines, 244; Prescott v. Wright, 6 Mass. 20. An inquisition may be held after the return, where the levy is made before, for it is the completion of the requisition of the law, but the universal practice of taking out an alias fieri facias, when no levy has been made on a former one, shows the necessity of doing it, else why take out an alias in any case. In this case the record is complete, there is no allegation of mistake, or room for presuming an alias or a levy, for the old fieri facias and levy are returned with the inquisition, as the authority under which it was taken, and must be deemed the only authority existing. A writ of levari facias de bonis ecclesiasticis, is a continuing writ, on which the sheriff may levy from time to time, but if he returns it his power ceases. 2 H. Bl. 582. So of a habere facias on a recovery in ejectment. Runn. Ej. 434.

The want of a fieri facias and levy are not irregularity or error, as forms and modes of proceeding, which are cured by the acknowledgment of the marshal's deed in open court; these defects are fatal to the authority of the marshal, which the court cannot cure by their order to the marshal to proceed on the old writ, the court can act only by a new writ issued according to law. This case is in a court of law, in which no consideration of an equitable nature, arising out of the notice to Mr. Todd, and his appearing at the inquisition on behalf of Mr. Newman can be listened to, the plaintiff must make out a legal title. But in this case, after thirty-five years' possession, he can have no equity to disturb the defendant, even if this court could act on the principles of equity in an ejectment. We do not question the general principle, that a purchaser of real estate, under the process of a court which has jurisdiction of the cause, and power to order the sale, shall be protected, nor is he to suffer by the irregular proceedings or errors of judgment in the court. But our exception to this deed and its legal effect is, that there was a want of authority in the court to proceed to a sale without an execution, or which is the same thing, on a dead and void fieri facias, which was a mere nullity after its return; the defect was radical, as it left the marshal without a shadow of authority. No subsequent act of the court, in accepting the inquisition and ordering a venditioni, could operate retrospectively, so as to supply the want of an original authority in them or its officer, to divest the title of the defendant in the judgment. The power of the court to sell, is only in virtue of a fieri facias and levy, by which their power is brought to bear on any piece of property, it must fasten upon it, and remain so during the whole process of sale, from inception by levy, to the confirmation by deed acknowledged. A venditioni is process to complete the execution of the fieri facias, levy and inquisition; it is void if either are want-

ing; though a sale is made and deed acknowledged, it passes no title. Burd v. Dansdale's Lessee covers this case. It was a sale under a venditioni after a levy had been set aside, and no new one appearing to be made, the court would not presume one. On an inspection of this record, there appears no act or order of the court, in any way approving the acts of the marshal; the whole proceeding, subsequent to April, 1823, was the act of the plaintiff in the judgment. We neither admit nor deny the power of the court to order a new levy on a returned fieri facias, but as no such order appears, and the record is complete, none can be presumed, and we have a right to consider that none was made. This defect was never waived; the notice given at the time of the sale, showed our intention to contest the sale on this ground, and Mrs. Hess purchased at her peril.

On the second question. The act of 1798 covers this case in all its parts. There was no scire facias till after the expiration of seven years after the passage of the law, and when one was issued, it was not served on the terre tenants, or any notice given to them. This law applies to judgment creditors, as well as purchasers. 3 Bin. 347. It is a law respecting property and rights, which is as much a rule for the courts of the United States, under the thirty-fourth section of the judiciary act [1 Stat. 92], as for the courts of the state. As a part of the system of state jurisprudence respecting the lien on land, and the mode of selling it on execution, it is a rule of property and title, not of process or remedy, and this court is bound by it as a general law. [D'Wolf v. Raband] 1 Pet. [26 U. S.] 485; James v. Stookey [Case No. 7,184]; U. S. v. Wonson [Id. 16,750].

The subject matter is one peculiarly proper for state legislation, and it is important that there should be an uniformity between the rules of all courts respecting the lien of judgments, which cannot be preferred if state laws do not regulate it, for congress have no power to legislate on judgments in state courts No act of congress gives a lien on a judgment, it depends solely on the law of the state, a judgment is enforced in this court by the laws of the state; the legislature may repeal the whole system, by which the proceedings on judgments of this court, would be suspended till congress would interfere. The thirty-fourth section is not confined to state laws then in force, but extends to all subsequent ones, affecting the rights and transmissions of property, and the supreme court pays such respect to state laws, and their construction by the courts of the state, that they will postpone a decision of a case arising on them, to await the judgment of the state court on the question. Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 524. This and the supreme court have always been governed by the intestate law of 1794, and the law which regulates proceedings in orphans' courts. The effect of this law is in the nature of an act limiting and abridging a right before indefinite, to five years without a scire facias; a limitation on the lien of judgment, not an act devising the form and mode of process to enforce it. It prescribes a condition, on which alone real estate within the state shall continue bound by a judgment, which the state is competent to do, and which becomes a rule of decision for this court, in giving judgment on a right of property accruing by a judgment. The supreme court are governed by state limitation acts, on all subjects. Bell v. Morrison, 1 Pet. [26 U. S.] 355; McCluny v. Silliman, 3 Pet. [28 U. S.] 270. So of recording acts or those for quitting titles and possessions. Hort v. Lamphire, Id. 289, 290. The law of 1798 partakes of all these characters, and is a most salutary one for the protection of creditors and purchasers against dormant and inactive judgments. It extends in terms to the judgments of this court, which are of record in this commonwealth, and has the same effect on a right depending on them, as if the case arose on a contract or deed. Though it was once held in this court, that the law did not apply between judgment and judgment, but only between a judgment creditor and a purchaser; yet the supreme court of the state have held otherwise, and their decision on a local statute is binding under the thirty-fourth section as a part of the statute. [Jackson v. Chew] 12 Wheat. [25 U. S.] 162. This is not the case of a creditor, however, the defendant is a purchaser under the sheriff's sale of the right of Hemphill, and stands upon his deed from the sheriff. It only remains to inquire whether the plaintiff has done any thing which can be deemed a substitute for the scire facias, as a substantial compliance with the terms of the law. The plaintiff has failed in establishing any analogy between this act and the statute of 2 Westm., the objects and remedies of which were different. The English practice of entering continuances of V. C. N. M. B. on the roll, though adopted in the state court, would not be sanctioned if the question was res integra. 13 Serg. & R. 149. It has never been adopted in this court, and is so utterly inconsistent with the words and spirit of the law, that it ought to be repudiated. An entry of non est inventus on a capias ad satisfaciendum, or of V. C. N. M. B. on the roll of a fieri facias not returned, can be no substitute for the scire facias, and notice to the terre tenants, expressly directed by the law. The statute of 2 Westm. prescribes no such notice. Courts were thus left at liberty to devise a substitute, but here there can be none. Purchasers cannot be protected without notice to inform them of what property was held bound by the judgment. This was the great object of the law (Hurst v. Hurst [Case No. 6,931]), whereas, the statute of Westminster applied only to the parties to the judgment. The plaintiff's construction would make a capias ad satisfaciendum returned non est inventus, or a fieri facias not

returned, equivalent to a scire facias, actually sued on a purchaser terre tenant. The supreme court of the state has never sanctioned this doctrine, and it cannot be the law of this court.

On the third question. The defendant claims under a purchaser from the sheriff, by a deed acknowledged, which, according to the construction by the supreme court of this state of the fourth section of the act of 1705, gave the purchaser a title disencumbered from all previous judgments against the person as whose property it was sold, as well as all those from whom the title passed to him. This was the principle decided in Com. v. Alexander, by which the law on this subject was finally settled in 1826, after remaining long doubtful. 14 Serg. & R. 257, &c. It had been previously settled, that a sale under an order of the orphan's court, discharged the land from all judgments against the intestate, by the provisions of the law of 1794 (Moliere v. Noe, 4 Dall. [4 U. S.] 450), both of which decisions were in accordance with the general opinion and practice of the bar. The same rule has been applied to a legacy charged on land, unless the land is sold subject to the legacy. Barnet v. Washebaugh, 16 Serg. & R. 410. The case of a mortgage stands by itself, and is thought not to come within the principle, though it has been decided otherwise in Willard v. Norris, 2 Rawle, 56. There can be no doubt, that it was in the power of the legislature to prescribe the effect of a sheriff's sale, nor that the construction of the act of 1705, as finally settled by the court of the last resort in the state, is a binding decision on this court. The case of Rankin v. Scott, 12 Wheat. [25 U. S.] 179, was decided on the local law of Missouri; it must be taken as the law of that state; though it may be correct in the general principles it asserts, it cannot control the law of this state as judicially settled. The local laws of every state are held to be binding as rules of property, whether they are those of usage or legislative enactment. [Jackson v. Chew] Id. 162. The great inconvenience of conflicting decisions on the construction of a state law, especially one on which so many titles depend as that of 1705, is a powerful reason for the acquiescence of the federal court in the settled course of state adjudication on local statutes.

On the fourth question. The plaintiff suffered the defendant and those under whom he claims, to take and hold the lot in question, and cover it with valuable improvements, without giving him or them notice, that he intended to hold it liable to his judgment, till after the expiration of more than thirty years from the entry of his judgment. In a court of equity every presumption would be made against a claim so stale. 1 Madd. 79, 90; 2 Ves. 13, 280; 2 Ves. Jr. 583. The plaintiff would be bound by his silence and acquiescence. 1 Fonbl. 151. Though the lapse of time is itself no limitation, it is so by analogy to the statute. This principle of equity is applied by courts of law in instructing a jury to presume any fact which will bar a stale demand; it is an universal one (2 Atk. 144), applying to all acts which the law can presume to have been done, the evidence of which has been lost by accident, or obliterated by time. The ground of the presumption is not the belief or proof of the act, it stands in place of specific or individual belief, as a rule indispensable for the peace of society and the security of possession. 12 Ves. Sr. 252, 265; [M'Clung v. Silliman] 6 Wheat. [19 U. S.] 604; Prevost v. Gratz [Id. 481]; 2 Saund. 175, 176. Any act necessary for this purpose, from a deed to an act of parliament, may be presumed (Cowp. 209, 210, 215); and when a legal presumption exists, it is equivalent to direct proof of a fact, or the production of a paper proving it. Payment of a bond is presumed after twenty years, and so of a judgment, mortgage, or rent. 7 Serg. & R. 410; 14 Serg. & R. 15, 16; 10 Johns. 414, 417; [Higginson v. Mein] 4 Cranch [8 U. S.] 415. Such presumption is judicial belief, and is matter of law where no circumstances are offered to account for the delay, if evidence is given touching such circumstances, the jury decide on the facts, and the court on their sufficiency in law, to take the case out of the principle of presumption. 9 Serg. & R. 382; 14 Serg. & R. 21; 7 Serg. & R. 410. Presumptions are applied not only to acts which extinguish, but to those which grant or create rights of property, as a right of way (3 East, 294); of a landing (2 Ball & B. 667); to open windows (2 Barn. & C. 686); the use of a water course (10 Serg. & R. 63). In all cases where the act of limitation bars an ejectment, any collateral right to land will be barred by the legal presumption as matter of law; it may be left to the jury to presume on less than the period of the statute. Here thirty-two years have elapsed from the date of the judgment, and twenty-eight from the purchase and possession of the defendant, the law will presume the judgment paid, satisfied or released, as to this property, on the same principle that possession by the mortgagor for twenty years, bars the right of the mortgagee to the money, and possession by the mortgagee for the same time, bars the equity of redemption. The law presumes a release of the lien of the mortgagee on the land in the one case, and the lien of the mortgagor on the legal estate of the mortgagee in the other. 7 Johns. Ch. 122; 2 Schoales & L. 636; [Hughes v. Edwards] 9 Wheat. [22 U. S.] 497; [Willison v. Watkins] 3 Pet. [28 U. S.] 52. It was competent to the judgment creditor to release the lien of his judgment on this lot; it was a common practice to execute partial releases of liens before the passage of the act of 1820, which expressly authorizes it; that such a release, or some other equivalent act has been executed, will be presumed. The plaintiff offers nothing to rebut the presumption, but rests upon the record to show that the judg-

ment is not satisfied, and that there can be no presumption against it. This may be admitted without impairing the principle for which we contend. It is indispensable for the security of purchasers, under circumstances like the present, for if the judgment can be enforced on property which has been held adversely for twenty-eight years, the possession of one hundred years cannot avail him. As to the property which the judgment creditor has pursued within twenty years, his rights are not affected by any presumption of law; but as to that which has been abandoned, as the present has been, the law will presume him to have done some act which will, in the language and policy of the law, quiet a long and peaceable possession, either by way of release, estoppel, or abandonment.

Mr. Rawle, Sr., in reply, was informed by the court, that they were not desirous of hearing him on the objections to the marshal's deed, he then proceeded to answer the other objections to the plaintiff's title. This is no case for the doctrine of legal presumptions in favour of any of the persons under whom defendant claims. Lang purchased only four years after the entry of the judgment of Wilson, and for ten years before the purchase of Newman, the judgment continued in active operation by sales of the property of Hurst from time to time. Newman purchased in 1815, only nine years after the judgment on the scire facias in 1806, which was record evidence that the judgment was unsatisfied, conclusive on Hurst and all claiming under him after April, 1791, unless collusion or fraud existed. This was legal notice to Newman before he bought, whether he had notice in fact, is immaterial; if he had not, it cannot be presumed that he obtained a release, if he had notice, he has bought with his eyes open. Nor can he claim the benefit of the presumption of payment after the lapse of twenty years, he had been in possession only eight years, when a levy was made on the property he purchased, notice whereof was given to him. The notice given by Mr. Todd on the 19th of April, alleges no satisfaction of the judgment, nor did Newman pretend it on the 8th of October following, in his reply to the notice of the plaintiff in the judgment; the complaint in April, 1823, was that the burthen on his property is increased by not embracing in the levy all the property bound by the judgment, thus admitting his own to be still bound. The presumption of payment of a bond, mortgage or judgment, does not attach as matter of law, unless it has been dormant for twenty years; the jury alone can presume it as a fact in less time, under the direction of the court, this is the general rule. 14 Serg. & R. 15, 19. But after twenty years, the presumption does not attach; if there are any circumstances legally sufficient to account for the inaction, they will be left to a jury to rebut the presumption. 10 Johns. 414; Dunlop v. Ball, 2 Cranch [6 U. S.] 183, 184; [Higginson v. Mein] 4 Cranch [8 U. S.] 415; Goldhawk v. Duane [Case No. 5,511]. In this case there has been no period of twenty years from the entry of the judgment, during which it has been inactive, and the whole record is full of entries, which would rebut the presumption, if there was any colour for raising it. It was no laches in Wilson not to give notice of his judgment when this lot was about to be sold as the property of Hemphill; it was the duty of the sheriff to look for incumbrances upon it, and of Newman the purchaser to examine the titles, and the liens upon the property. Newman purchased in February, 1815, a scire facias issued to revive Wilson's judgment against the executors of Hurst to October, 1815, which remained open till July, 1817, when judgment was entered. With legal notice of these proceedings, and actual notice of the levy and inquisition in October, 1823, Newman neither prayed an audita querela, or moved the court to interfere with the proceedings, as he was bound to do, as was decided by this court in cases arising on the judgment of Wilson [Id. 17,808]. It was also decided that notice to purchasers or terre tenants was unnecessary. Every presumption which the law can raise is against Newman, and so far from the law presuming the judgment released or abandoned, it conclusively appears that it was in operation with his knowledge, and asserted as a lien on his property, before the law could raise any presumption in his favour, or imputation of laches in the judgment creditor, after his purchase. He will be presumed to have waived his objection to the levy, and admitted the existence of the lien of the judgment to have been a continuing one till that time.

There is no authority in a state legislature to bind this court; the law of 1798 was intended to apply only to the courts of the state, nor could it have been intended, to affect a judgment rendered in a court over whose proceedings they had no control. Here was a judgment, a capias ad satisfaciendum returned non est inventus, on which by the settled rule of the common law, as adopted by this court, an execution could be issued at any time without a scire facias; no state law will be held to be an order to them to change their established rules, and to annul a judgment, unless revived by scire facias in 1803. The words of the law may be satisfied by confining it to the courts of the commonwealth, and such has been its construction by the bar. My practice has been to take out a fieri facias and keep it in my drawer, when I wished to continue the lien of a judgment in this court, and to enter continuances by V. C. N. M. Breve, when desirous to take out an alias fieri facias, which could not be done without a scire facias, if the writ is returned. It has also been the practice, to search in the office of this court for all judgments, without regard to the law of 1798, which has been considered as a pro-

cess act, not applicable to the proceedings here. A scire facias is process; the time and circumstances under which it must issue, as well as the persons on whom it shall be served, are the modes of proceeding adopted by the court, which it ought not to suffer to be varied by a state law. It will be time enough to do it when the supreme court of the United States shall declare the law to be applicable to judgments here, as was done in [Bank of Hamilton v. Dudley] 2 Pet. [27 U. S.] 522, this has not been done as to this law, so that the court is left free to act upon its own opinion. The judicial power of the United States is created by the constitution, not the judiciary act; the thirty-fourth section makes the laws of the states rules for the decision of this court, but this has been held to apply as a guide to the judgment to be rendered, not to any proceedings to carry the judgment into effect; state laws on this subject are only acts regulating process. [Wayman v. Southard] 10 Wheat. [23 U. S.] 20; [Bank of U. S. v. Halstead] Id. 51, &c.

The late decisions of the supreme court of this state, respecting sheriff's sales, will operate most oppressively on judgment creditors in this court, if they are followed here; if a sale on a judgment in any court of common pleas in this district, destroys the lien of a judgment in this court, there is no security. The state laws require no notice of a sheriff's sale to be given elsewhere than in the county, and that by advertisement only; no notice need be given the judgment creditors, or other incumbrancers, of the contemplated sale, so that the prior lien of a judgment in this court, may become extinguished without the act of the party, the court, or notice. In a case like the present, all means of protection are unavailing, the property sold under the judgment against Hemphill was advertised in his name; a creditor of Charles Hurst was not bound to know that it interfered with the lien of his judgment. An advertisement in a newspaper is not made evidence as to third persons, it is sufficient notice as to the defendant whose property is to be sold, but cannot impair rights attached to it before it came into his hands. The sheriff searches only for incumbrances against the defendant, the money is appropriated to the eldest lien thus appearing, while the judgment creditor, who has the first pledge of the land against a former owner, is kept in utter ignorance that his rights are in danger until they are lost, as well his lien on the land, as the purchase money for which it sold. No such rule existed when Wilson obtained his judgment; it has not been adopted in this court, and is in direct contradiction to the rule settled by the supreme court of the United States in [Rankin v. Scott] 12 Wheat. [25 U. S.] 177. The supreme court of the state have several times declared that the effect of a sale under a younger judgment, on the lien of an older one, was an open one. 4 Yeates, 216; 2 Bin. 218, decided in 1809. No general rule was established till the case in 14 Serg. & R. 257, in 1826, long after the rights of the present parties had become fixed.

BALDWIN, Circuit Justice (charging jury). The first of the important questions which have arisen in this case, and very ably argued, is, whether the sale of the premises in question by the marshal, under the judgment of Wilson v. Hurst [Case No. 17,808], is void for want of an alias fieri facias, and a levy thereon to October term, 1823. If the writ of fieri facias, with a levy on specific real estate, was the only authority to a sheriff to make a sale, and vested him with the possession or right of property therein, this objection would be fatal; for an execution must be in part executed, or its execution be begun, before its return, in order to give any efficacy to subsequent proceedings upon it, otherwise the authority of the officer expires with his writ. But where the fieri facias and levy are only initiatory process, as the foundation of another writ, which is indispensable to authorize a sale, their effect is very different, because the fieri facias operates, when levied, neither to vest a right of property, or confers a power to sell. The mandate of a fieri facias in both cases is the same, to levy the amount of the judgment, and bring the money into court; the manner of levying on the personal or real property of a defendant, as well as of converting it into money is, however, widely different. In the execution of a fieri facias levied on personal property, the mode of proceeding is regulated by the common law; when levied on land, it is prescribed by the act of assembly of 1705, which authorized the sale of lands on execution. It is therefore necessary to consider the office and effect of a fieri facias and levy, as to the two species of property, in order to decide whether the same rules apply to both. A fieri facias is plenary authority to sell chattels, a levy under it gives the sheriff a property in them, in virtue of which he may, and is obliged to sell. 1 Salk. 323; 6 Mod. 293; [Zane v. Cowperthwaite] 1 Dall. [1 U. S.] 313; 11 Serg. & R. 304; Barnes v. Billington [Case No. 1,015]; [Wayman v. Southard] 10 Wheat. [23 U. S.] 45. After the levy his property in the goods continues; though the fieri facias is returned he may sell. The court may order him to bring the money into court, issue a distringas or venditioni exponas to compel him to sell, he becomes liable for the money by the levy; if he has made a sufficient one, the goods are his own, and he may sell when he pleases, unless otherwise ordered by the court. 5 Bin. 268, 273; [Wayman v. Southard] 10 Wheat. [23 U. S.] 45; 17 Serg. & R. 438; 2 Saund. 343, 344; 2 Law R. 1074. When he begins the execution of a fieri facias, he must complete it; his authority continues though he is out of office. 2 Bac. Abr. 366; 4 Day, Com. Dig. 234; 1 Salk. 12, 318, 323;

1 Lil. Reg. 767, 824. A distringas or venditioni gives no new authority to sell; it is merely compulsory process (1 Ves. Sr. 196; 4 Day, Com. Dig. 236; Shep. Abr. 547; 6 Mod. 295; [Zane v. Cowperthwaite] 1 Dall. [1 U. S.] 313) to execute a power resulting from the fieri facias, and the right of property by the levy.

As the levy is the operative act, it must be made by an actual seizure of the goods, in whole, or part in name of the whole. The sheriff may seize them by force (16 Johns. Rep. 288), take, and hold possession. The lien on them attaches when the writ comes to his hands till the return day, without a levy, but if no levy is made before it is past, the lien is lost, and the goods may be taken by a purchaser, or on a subsequent writ. 2 Serg. & R. 157. As to land, the lien attaches by the judgment, and remains though no levy is made on the fieri facias, the sheriff has no right to take possession, or to enter upon it to make a levy, and after levy he has neither the right to possession of property, or power to sell an estate of freehold in the defendant, if the property is improved, and his interest in it is of a nature which must continue for more than seven years, and the rents and profits will pay the incumbrances on it in that time. In this case the property in dispute was improved at the time of the fieri facias, and held in fee, a levy upon it could give no power to sell, the only further act which the sheriff could do was to hold an inquisition and return it to the court; the fieri facias, and all his power under it, became then functus officio. In case of an extent, he must have a liberari facias to authorize him to give possession to the plaintiff; in case of a condemnation, a venditioni exponas to give power to sell, it is an authority given by the act of assembly, additional to that given by the fieri facias. [Zane v. Cowperthwaite] 1 Dall. [1 U. S.] 313; 1 Serg. & R. 99; 4 Yeates, 213, 214. Hence it is obvious that there is no one particular in which the levy on chattels is analogous to a levy on land, where an inquisition is necessary; as the sheriff cannot enter on the land to make it, no act in pais can be necessary, its office is merely to designate the item of real estate which the sheriff selects for the satisfaction of the debt, on the rents and profits of which the inquisition is to be held, in order to ascertain whether it can be exposed to sale.

By the first section of the law, lands are made liable to be seized and sold by judgment and execution. The second section is a proviso, that when an execution is awarded to be levied upon lands, the sheriff shall not by such execution, or any writs thereupon, sell any lands which are sufficient to pay the debt in seven years, but shall deliver them to the plaintiff, as on an elegit in England. By the third section, which is also a proviso, that if the profits of such lands shall not be sufficient, the sheriff shall so certify on the return of the execution, whereupon a writ of venditioni exponas shall issue to sell such lands, in the manner directed concerning the sale of other lands, which is in the fourth section, enacting, "That the sheriff, by a levari facias, may seize and take all other lands in execution, and with convenient speed, with or without any writ of venditioni exponas, make public sale thereof on giving the notice prescribed, whereupon he shall make a return thereof, indorsed or annexed to the levari facias."

The entire silence of the law as to what shall be deemed a seizure of land, before the inquisition directed in the third, or the sale authorized by the fourth section, shows clearly that the time and mode of seizure or levy were not deemed essential; the second and third sections are conclusive declarations of the legislature, that the fieri facias and seizure did not authorize a sale of lands which would pay the debt in seven years. Thus excluding all analogy between the effect of a fieri facias and levy on goods, and productive real estate, and leading to the conclusion that the seizure of land was only to describe what the inquest was to pass upon, or the sheriff to sell. What the law deemed essential it prescribed, the holding the inquisition, its return, the venditioni, the notice of sale, its return indorsed or annexed, a deed by the sheriff acknowledged in court, and then, to leave no doubt of the effect of such proceedings, declaring, "that lands so sold shall be held by the purchaser for such estate as the debtor held it." 1 Smith's Laws, 57, 59. It would be an unauthorized construction of this law to declare, that after every prescribed requisite had been complied with, the sale was void for not doing an act not required, viz. the making a levy before the return of the fieri facias. It cannot be made by any visible, notorious act, or marks on the ground, or by an actual seizure; it must consequently be done on paper, and giving notice to the defendant of the property selected, with the time and place of holding the inquisition, which is all that could be done by the sheriff going to the premises, and proclaiming a levy in fact. No form or mode of making a levy on land, or the time in which it must be made, are prescribed by the act of assembly; every object for which one is required, either to authorize the sheriff to hold the inquisition, or to protect the debtor, is fully answered by notice to him of the levy and inquisition. It is wholly immaterial whether the levy is indorsed upon the writ before or after the return day, if done in a reasonable time before the notice of an inquisition. Without any reason, therefore, for requiring the levy to precede the return, any positive law prescribing any possible effect to be produced by it, or any adjudication of a state court declaring it indispensable to support subsequent proceedings, we cannot say that it is a fatal defect in the plaintiff's title.

The first section of the law is limited and restrained by the proviso in the second, in order to hold an inquisition for the protection of the debtor, yet it prescribed no notice of either a levy or of the inquisition; that was not made necessary till 1806. 4 Yeates, 21; 2 Bin. 215; S. P., 4 Day, Com. Dig. 242. It was then directed that for want of sufficient personal property, the sheriff should levy the real estate of the defendant, return his proceedings to the next court, and give notice of the inquisition (4 Smith's Laws, 331); but it required no notice of the levy, or prescribed the mode or time in which it should have been made. It would be strange to suppose that the act of 1705 had made a levy before the return of the fieri facias, indispensable to further proceedings, and that the want of it was fatal to the power of the court to order, and the sheriff to make a sale under a venditioni; and yet, in 1806, the legislature made no provision for notice to defendant of the levy, while they require it as to the inquisition. The nature and object of the inquisition clearly indicate the intent of both laws, it was the all important proceeding, without which an estate in fee in improved lands could not be sold, the want of it arrested all further proceeding, and notice was prescribed to enable the defendant to show the rents and profits. None was required as to the levy, for the obvious reason that the mode and time of making it had no effect on the rents and profits, and notice of the inquisition specified property on which the inquest was to pass. The construction of these laws by the supreme court tends to the same conclusion, they have always held an inquisition necessary to the validity of a sale, but that it may be held after the return of the fieri facias, though years may have elapsed, and where an inquisition has been quashed for irregularity, a new one may be held without an alias fieri facias. [Weaver v. Lawrence] 1 Dall. [1 U. S.] 379. So a sale after the return of the venditioni is good. 2 Bin. 91, 92; 1 Serg. & R. 98, 99; 10 Serg. & R. 261. Though the law directs the return of the inquisition and venditioni, the omission to make it does not affect the validity of the sale. 1 Rawle, 96. 97. If property is condemned at the suit of A, it may be sold on a venditioni at the suit of B, without a new inquisition. 1 Serg. & R. 92, 97, 98, 100.

In this case there was a fieri facias and levy before the return. The levy was set aside as irregular, but a new one could be made under it on the same principle which applies to the new inquisition after quashing an irregular one; whether this was done by correcting the first levy, adopting it as to the property in question, is immaterial. The court had the power to order a new or amended levy on the old fieri facias, or might adopt and sanction the act of the marshal on the return of the inquisition with the fieri facias and levy, it was not a matter affecting the power or jurisdiction of the court, but related to the execution of their process, of which they had the right of judging and directing the marshal [Wayman v. Southard] 10 Wheat. [23 U. S.] 45, &c.; 1 Serg. & R. 101. On the return of the inquisition the court issued a venditioni, reciting and adopting what had been done, this is a mandatory writ, which the marshal was bound to obey by a sale, it is the writ of the court, its order, not that of the party who sues it out, having the same efficacy whether issued on a præcipe of an attorney or by special order on motion. It justifies the marshal in its execution by a sale, and passes the title to the property sold, if the court has jurisdiction and power to order a sale. But if the proceeding was irregular it can be corrected only by the court on motion, or, if erroneous, by a writ of error: neither the irregularities nor errors of a court will affect the title of a purchaser, under their process, where their power to order the sale has arisen. A superior court may revise their proceedings by their appellate power, if a writ of error or an appeal is presented within the time prescribed by law; but if that time has expired, a judgment or execution cannot be reversed, however erroneous. Though personal property is sold on an execution which has issued contrary to an express act of congress, the sale is valid. Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328, 333. The purchaser is protected by a settled principle of jurisprudence, that the proceedings of a court of competent jurisdiction cannot be called in question collaterally, when they cannot be examined directly. This is a rule indispensable to the security of property, held by sale under judicial process, especially applicable to the sales of real estate by execution in this state. Vide [Voorhees v. Jackson] 10 Pet. [35 U. S.] 473, 478, acc.

The defendant, or any person claiming under him, has every opportunity of calling into question the regularity of the proceedings, by an application to the court before the sale; he may object to the acknowledgement of the deed, when the court will set the sale aside, if they are irregular or erroneous, and he may have his writ of error. If there is just cause for either, justice can be done to the party complaining, without injury to any party; if the sale is set aside, the purchase money is refunded, or its payment not exacted, if the judgment is reversed, the purchaser is protected by the common law and the act of 1705, and restitution of the purchase money only is awarded. Whereas if the sale can be avoided in a collateral action, the grossest injustice is done to the purchaser, he loses both purchase money and land, and the defendant whose debt has been paid by the sale, holds the land without any obligation to refund. Hence has resulted the rule adopted in all courts, that in a collateral action, the only open question is, the jurisdiction and power of the court to order the sale. [Thompson v. Tolmie] 2 Pet. [27 U. S.] 160; 11 Serg. & R. 424. If the writ justifies the officer in its execution,

a sale under it is valid. 10 Coke, 76 a, b; 1 Ves. Sr. 195; [Tayloe v. Thompson] 5 Pet. [30 U. S. 370]; [Voorhees v. Jackson] 10 Pet. [35 U. S.] 473, u. In this state, the reception of an acknowledgement of a sheriff's deed is a judicial act, in the nature of a judgment of confirmation of all the acts preceding the sale, curing all defects in process or its execution, which the court has power to act upon. Vide [Voorhees v. Jackson] 10 Pet. [35 U. S.] 472, 476. When the acknowledgement is once taken, every thing which has been done, is considered as done by the previous order, or subsequent sanction of the court, and cannot be afterwards disaffirmed collaterally. 1 Serg. & R. 101; 4 Yeates, 214; 6 Bin. 254; 2 Serg. & R. 54, 55. The court which directs the sale, can alone judge of the legality of acts done under its authority, 1 Serg. & R. 101; 2 Serg. & R. 54. It follows, that all questions arising on judicial sales, when their validity is questioned in an ejectment, must be those of authority, not of irregularity, or error in awarding, executing, or confirming process, or acts in pursuance of it. If the power of the court is once brought into action, no tribunal can declare their proceedings nullities; if an act is necessary to be done before their power to sell can be exercised, it will be presumed they had evidence of it unless the contrary expressly appears; as the existence of debts and of minor children to support a sale by order of an orphan's court (11 Serg. & R. 424; [Thompson v. Tolmie] 2 Pet. [27 U. S.] 161); or a levy on land to support a sheriff's sale. (11 Johns. 517; [Voorhees v. Jackson] 10 Pet. [35 U. S.] 473, acc.).

It has been much pressed on us, that a contrary principle is established in Burd v. Dansdale's Lessee, 2 Bin. 80, and Saxton v. Wheaton, 4 Wheat. [17 U. S.] 503; but we think them perfectly in accordance with our views of the law. In the former, the levy had been set aside by the court with directions "to levy anew," a sale was made without any new levy, which the court declared void expressly on the ground, of "the venditioni exponas having issued contrary to the order of the court." 2 Bin. 92. In Saxton v. Wheaton the sale was made under the fieri facias, which authorized a sale of land by the law of Maryland in force in the District of Columbia (without any other process or the acknowledgement of the deed to the purchaser), in the same manner as the sale of a chattel. The levy then was the all important act to authorize the sale, and as in the case of goods must be made before the return, according to the construction put on the law of Maryland [Wheaton v. Sexton] 4 Wheat. [17 U. S.] 506, though it is no authority for a similar construction of the law of this state, which is widely different. It is therefore our opinion that the defendants have failed in sustaining their first objection to the plaintiff's title.

The next objection is, that the lien of Wilson's judgment having been lost for the want of a scire facias, under the act of 1798, the marshal's sale gave no title to the property in controversy. The terms of this law extend to all judgments, in any court of record within this state, which are broad enough to take in those in this court; its object is declared to be "to prevent the risk and inconveniences to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time, without any process to continue or revive the same," which apply in whatever court such judgments are rendered. We cannot consider it as a mere process act, it is a part of a great system of jurisprudence, for the safety and protection of purchasers, from secret or dormant incumbrances or deeds, long adopted, and amended from time to time, as occasion required existing evils to be remedied by supplementary provisions. No form of process is prescribed for enforcing a judgment, the plaintiff is required to do certain acts to continue the lien of his judgment, partaking of the nature of an act of limitations, a recording act, or a supplement to the law for docketing judgments, and destroying their lien by relation and compelling an entry of satisfaction. 8 Serg. & R. 379. So it seems to have been considered by the court and bar in Hurst v. Hurst [Case No. 6,931], without questioning its application to the federal courts, except as between one judgment creditor and another; that question does not arise here, as the defendant is a purchaser, both under a deed from the defendant in the judgment, and under the sheriff by deed acknowledged in open court. The effect of the law in all cases to which it applies, is to absolve the property from the lien of the judgment, as completely, as in the case of a deed or mortgage not recorded in the time prescribed by the recording acts, a judgment not docketed, or fieri facias not delivered to the sheriff. The questions arising under it are those of property, title, and the rights of purchasers for a valuable consideration, on the faith of a law providing for their case. It cannot be doubted that in a suit in a state court, this law would be the rule of decision on the rights of the parties; it is difficult to perceive a reason why a different rule should be adopted in this court, merely because the plaintiff being a citizen of another state, may bring his suit here or in the state court, at his option. Both courts administer the laws and jurisprudence of the state, the rules of property and title are the same, as well as the mode of transmission by judicial process; all regulated by state laws, there ought to be one uniform course of adjudication upon them. If a judgment which by the law of the state has lost its lien, can be made the basis of a sale by the process of this court, and the sale be held valid to pass the title, so that a purchaser under the defendant, or the judicial process of a state court, cannot avail himself of the protection of the state law, we must adopt this principle. That a judi-

cial sale of real estate in Pennsylvania, which is void by its law, is valid in this court, and a judicial sale, valid to pass the title by the laws and in the courts of the state, is void by the laws of the United States. We do not feel authorized to so decide in a suit at common law, in which the rights of both parties depend on the laws of the state, on a subject matter on which congress possesses no constitutional jurisdiction, nor has in any matter assumed its exercise. There can therefore be no collision between the state laws, and the constitution, laws or treaties of the United States, so that the case comes clearly within the provisions of the thirty-fourth section of the judiciary act. Its application is not confined to state laws in force at its passage in 1789, but extends to all laws which affect the right in litigation at the trial, which prescribe a rule for the judgment to be rendered, embracing the whole subject of the transfer of property, liens upon it, and all consequent judicial proceedings, whether in courts of common law, or special jurisdiction. These are subjects of internal police and state regulation, over which the states have delegated no power to the federal government, on which the states can legislate in any manner, and to any extent, not prohibited by the constitution of the state or the union. Laws which relate to practice, process, or modes of proceeding before or after judgment, are exceptions to the thirty-fourth section, as congress have legislated on the subject. The supreme court of the United States have established the distinction to be this, state laws, which furnish the court a rule for forming a judgment, are binding on the federal courts, not laws for carrying that judgment into execution, that is governed by the acts of congress and the rules and practice adopted pursuant thereto. [Wayman v. Southard] 10 Wheat. [23 U. S.] 24–51, 65. This distinction is illustrated in the case of Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 525, 526. The occupying claimant law of Ohio, passed in 1810, was held to be a rule of property and decision in the federal courts, but that they could not carry it into effect by changing their modes of proceeding, as established and regulated by practice and the acts of congress, though the right of the party to the benefit of the law, was not impaired by the inability of the court to act upon it in the manner directed.

Feeling bound, then, to adjudicate upon the rights of the parties in this case, according to the law of 1798, we proceed to the question of its effect on the judgment of Wilson v. Hurst [supra]. A capias ad satisfaciendum was issued to October, 1791, returned non est inventus, without any further proceedings for fourteen years from the date of the judgment, and seven years from the passage of the law, which contains no exception, admits of no construction, or any substitute for the scire facias, and its service on the terre tenants, who were purchasers, and for whose protection the law was passed.

It has been strenuously urged by the plaintiff's counsel, that this law admits of the same construction which has been given in England and this state to the statute of 13 Edw. I., st. 1, c. 45, 1 Ruffh. St. 109, directing a scire facias where no execution had issued within a year and a day, but we can perceive no analogy between them. That provided and extended a remedy, by process, to enforce a judgment. this limits, restrains and annuls its lien, making all process to enforce it of no effect; that cured a mischief putting a plaintiff to a new suit, this protected a purchaser from the mischief of an indefinite lien; that had for its object an award of execution, in virtue of the scire facias, this made one indispensable, to save the lien of the judgment for a term of five years. Vide 3 Rawle, 12, 13. As the statute of Westminster was a remedial one to the plaintiff, it was liberally construed in his favour, so that when an execution had been taken out and not returned, entries on the roll of continuances by vice comes non misit breve. would authorize an alias fieri facias to issue at any time, on which a levy could be made on real or personal property. Hence arose the opinion that the judgment remained a lien on land, while ever the plaintiff could take out a fieri facias; it followed, that the lien of the judgment being as indefinite as the length of the continuance roll, produced the very evil which was intended to be remedied by the act of 1798. A strong illustration of the effect of this construction of the statute of Westminster, if applied to purchasers of real estate, is furnished in the case of Lewis v. Smith. A pocketed fieri facias had been continued eleven years, by the entry of vice comes non misit breve, after an alias had issued, and the alias was held to have issued regularly. 2 Serg. & R. 154, 158. In that case the levy was on personal property only, and so not affected by the act of 1798, had it arisen before its passage, and a levy made on lands in the hands of a purchaser, no one could have doubted the wisdom, justice or policy of the law, for the purchaser would have no means of ascertaining from the record what was due on the judgment at the time of his purchase, and have continued exposed to every inconvenience which the legislature intended to remove.

If a doubt could exist, whether such a case or the one before us comes within the preamble and the enacting words of the first section, it would be removed by the third, which requires the scire facias to be served on the persons occupying the real estate, on the defendant, his feoffees, or their heirs or administrators, &c. It would be a perversion of the law to construe a capias ad satisfaciendum issued in 1791, to be a scire facias issued in five years after 1798; a

return of non est inventus to be a service on the terre tenants, the defendant or his feoffees, or a capias ad satisfaciendum returned non est inventus, to be a fieri facias continued fourteen years by an entry of vice comes non misit breve. No decision of the supreme court of the state has been had, which has settled the construction of this law as to its application to land in the hands of a purchaser, under circumstances like the present, or established any principle which would bring this case within the doctrine of Lewis v. Smith. We cannot consider the opinions or declarations of the judges, that the act of 1798 is analogous to the statute of Westminster, to be such an adjudication of the point as makes it our duty to consider the construction of the law to have been settled as a rule of property.[1] In this court the question is entirely open, and being free to decide upon our views of the law, we have no hesitation in instructing you that as its requisitions have not been complied with, the judgment of Wilson had ceased to be a lien on the property in question before 1805. The consequence is, that the incumbrance on the property having been removed by the operation of the act of 1798, the purchaser under Hurst must hold it under his conveyance; for a scire facias issued after the five years could not restore the lien so as to affect a purchaser, though it would keep it alive as to the defendant, who does not come within the words or policy of the law. This objection to the plaintiff's recovery is therefore fatal, and would render it unnecessary to consider the remaining ones for the purposes of this case; but as they would be equally decisive if they can be sustained, as they are of great importance, and have been fully argued, we feel it our duty to express an opinion on one. It must arise in this court on future sales of real estate, on which there is an incumbrance older than the one under which it is sold; every consideration calls for its speedy decision, it arises directly in this case, and is as vital a question as those already disposed of. Had it been first considered and decided against the plaintiff, the others would have been as unnecessary for this cause, as this may be now; but the order in which the court takes up the various questions in a cause does not make their opinion on the last more extra judicial than the first, where they all arise in the cause, and could not be evaded if they were presented singly, they ought to be decided.

The third objection to the plaintiff's recovery is, that the sale by the sheriff in 1815, on the judgment of Tompkins v. Hemphill, in the court of common pleas, operated as a discharge of this property from all prior incumbrances; and that, by the sheriff's deed, Newman held an unincumbered title, admitting that the judgment of Wilson v. Hurst was till then an existing lien. This objection presents a question wholly new in this court, arising under the fourth section of the act of 1705, on which an indefinite number of titles depend, yet for more than a century after its passage it remained unsettled; though often discussed at the bar and on the bench, the supreme court of the state have repeatedly and expressly declared it open (Keen v. Swaine, 3 Yeates, 562, 564; Patterson v. Sample, 4 Yeates, 316; Young v. Taylor, 2 Bin. 231); and so it remained till 1826. If the effect of a sheriff's sale under a younger judgment depended on general principles, we should be bound by the opinion of the supreme court of the United States in Scott v. Rankin. The plaintiff claimed real estate on a sheriff's sale to himself under the older judgment due to himself; the defendant claimed under a prior sheriff's sale to himself, under a younger judgment due to him. The court declared it as an "universal principle, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien is intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into effect has never been considered as such an act. In the case at bar the judgment is notice to the purchaser of the prior lien, and there is no act of the legislature to protect the purchaser from that lien." [Rankin v. Scott] 12 Wheat. [25 U. S.] 177. The second sale under the elder judgment was held to pass the title. This decision is authoritative on this court, and settles the general principle, that the prior lien is entitled to prior satisfaction; the only question which would remain is,

[1] Though the supreme court of this state in Pennock v. Hart, 8 Serg. & R. 376, and Com. v. M'Kisson, 13 Serg. & R. 146, affirmed the doctrine of Lewis v. Smith, yet they declared that if it were res integra, without precedent or practice to the contrary, they would not so construe the act of 1798, and cautiously forbore an opinion how far an execution not levied, and no actual renewal for more than five years, would keep alive the lien by an entry of continuances on the record. 13 Serg. & R. 149. In Vitry v. Dauci, 3 Rawle, 12, the analogy between the statute of Westminster and the act of 1798 is repudiated, one conclusive reason for which is given by the chief justice; in the former case, the statute gives the scire facias in order to enable the plaintiff to take out execution, whereas the act of 1798 declares the object of the scire facias to be to continue the lien for another term of five years. The doctrine of Smith v. Lewis was also repudiated in that case, and most conclusively so in Brown v. Campbell, in which it was held, that an execution levied, preserves the lien only on the land levied on, unless a scire facias is taken out within five years, and that the practice of perpetuating the lien by an execution levied on any thing but the land itself, has never received the sanction of judicial decision. 1 Watts 42; Sp., Id. 381; 1 Pa. St. 276, 279; 3 Pa. St. 444, 445. These cases are also decisive of the fourth question made by the defendants in this case, and in favour of the objection to the plaintiff's title, on the ground that no levy was made on the property in question before 1823.

whether the legislature have protected the purchaser under the younger lien against the operation of this principle. After providing for the sale on execution of lands, the rents and profits whereof would not pay the debt in seven years, and the delivery to the plaintiff on a liberari facias of lands which would so pay the debt, to be so held by him as of his free tenement till his debt was paid, the fourth section declares the effect of both a sale and an extent: "All which said lands, tenements, hereditaments and premises, so as aforesaid to be sold or delivered by the sheriff or officer aforesaid, with all their appurtenances, shall or may be quietly and peaceably held and enjoyed by the person or persons, or bodies politic, to whom the same shall be sold or delivered, and by his and their heirs, successors and assigns, as fully and amply, and for such estate and estates, and under such rents and services as he or they for whose debt or duty the same shall be so sold or delivered, might, could or ought to do at and before the taking thereof in execution." 1 Smith's Laws, 59. A previous act passed in 1700, had provided for the sale of lands on execution and appraisement, after which it declares, "such lands shall be and remain a free and clear estate to the purchaser or creditor, to whom they are so made over or sold, his heirs and assigns for ever, as fully and amply as ever they were to the debtor." Id. 7. In the sixth section of the act of 1705, after providing for the sale of mortgaged lands on a levari facias, or their delivery to the mortgagee for the want of buyers, the effect of such proceeding is declared to be, "and when the said lands and hereditaments shall be so sold or delivered as aforesaid, the person or persons to whom they shall be so sold or delivered, shall and may hold and enjoy the same with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged or freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagors, their heirs and assigns, and such sales shall be available in law and the respective vendees, mortgagees or creditors, their heirs and assigns, shall hold and enjoy the same, freed and discharged as aforesaid." Id. 60. In the eighth section is a proviso, "that no sale or delivery which shall be made by virtue of this act, shall be extended to create any further term or estate to the vendees, mortgagees or creditors, than the lands or hereditaments so sold or delivered shall appear to be mortgaged for by the said respective mortgages or defeasible deeds." Id. 61. In giving a construction to the fourth section of the act of 1705, we cannot pass over the striking difference, between the effect of a sale or delivery of lands under that, and the act of 1700; the latter says it shall be and remain, "a free and clear estate," "as fully and amply as ever they were to the debtor," which of course removes all incumbrances done or suffered by him. Had it been intended that the same effect should be given to a sale or delivery under the act of 1705, the same words would have been used, whereas the words "free and clear estate" are omitted, and the words "as fully and amply as ever they were to the debtor," are carefully supplied by "as fully and amply and for such estate and estates and under such rents and services, as the debtor might or could do, at or before the taking them in execution." It would be carrying construction to an unwarrantable extent, to hold these two provisions to have the same meaning; but if we could do this, it would be in direct contradiction to other parts of the act of 1705.

The second section directs, that in case the rents and profits will pay the debt in seven years, "the lands shall be delivered on an extent, in the same manner and method as lands are delivered upon elegits in England." Now the settled rule in England was then, and is now, that if a creditor by statute, recognizance, or judgment, takes the land of a debtor by elegit, a creditor by an elder incumbrance may levy on the moiety of the same lands, and hold it by his elegit (Yel. 12; Cro. Eliz. 797; Noy, 47; 1 Goldes. 38; 3 Leon. 239; 4 Leon. 10; Co. Litt. 289, b; Law Ex. J. 184, 186; Gilb. Law Ex. 55); the reason for which is, that the first judgment binds the moiety of the land, and the second can extend only the fourth part; therefore if the last judgment extends the moiety of the whole, the first judgment shall extend from him the half, because a moiety by the statute, is to be attendant to satisfy the first judgment (Gilb. Law, Ex. 55). Where an execution is levied on goods, the rule is different, because the judgment binding only from the delivery of the fieri facias, the first which comes to the hands of the sheriff, is entitled to prior satisfaction. By applying the English rule as to elegits, instead of the fieri facias, the legislature have conclusively declared, that an extent on a younger judgment, shall not postpone the elder judgment, but that the lands may be taken from the younger creditor. The words in the fourth section, "to hold to him as his free tenement for the satisfaction of his debt," &c., are taken from the writ of elegit, Fitzh. Nat. Brev. 598, they are used because a remedy by assise is given in case of eviction, still the tenant by eligit has no freehold but only a chattel interest, which devolves on his executors. 2 Co. Inst. 396; 2 Saund. 68, note. These words cannot therefore give to the younger creditor any right to hold the land on an extent against the prior creditor, while his judgment is unpaid; and as the law applies equally to lands sold on a venditioni exponas or delivered on a liberari facias, the conclusion is inevitable. That as the right of the prior judgment is not affected by a delivery on a younger one,

it cannot be impaired by a sale under the younger; the words of the law admit of no distinction, "all land so as aforesaid to be sold or delivered," shall be held and enjoyed by the person, "to whom the same shall be sold and delivered." Nor does it admit of the construction, that creditors who receive possession under a liberari, shall hold and enjoy the land against a prior judgment creditor, as it would be contrary to the law of eligit in England, adopted expressly in the second section. It necessarily follows, that as the purchaser from the sheriff is on the same footing, he must hold subject to prior judgments. The creditor who holds the lands till the debt is paid, or the one who purchases, takes it as the debtor held it (and to remove all doubt the law defines the time), at or before the taking thereof in execution; not before judgments had been rendered against him. Taking also the second and fourth sections of the law, in connection with the sixth, which defines the effect of the sale or delivery of mortgaged lands, the meaning of the fourth is still plainer; the land shall be held and enjoyed freed from all equity of redemption and all incumbrances made or suffered by the mortgagor, his heirs and assigns. If it was intended that the same effect should be given to a sale, or delivery on execution on a judgment, it would have been so declared; or if it had been intended that the same effect should be given to a sale and delivery on process on a mortgage, as on a judgment, the same words would have been applied to the former, either by repeating them, or a reference to the fourth section. Hence, we are clearly of opinion, that a sheriff's sale under a judgment, pursuant to the fourth section, has no greater effect than to pass the estate as the debtor held it, when taken in execution, and can no more extinguish or impair the lien of an older judgment, than a deed from the debtor. When the legislature intended to discharge the land from incumbrances, they did so in express terms, the two sections are parts of the same law and same system, providing different modes of selling lands on a judgment or a mortgage; it was their peculiar province to define the effect of the respective modes of sale and delivery, on the incumbrances existing at the time. In our opinion, it would be judicial legislation for us to so construe the law, as to confound distinctions plainly made. It is not for us to inquire into their reasons, or the sound policy of the one or the other mode; the law has defined the effect of both modes of proceedings too plainly to be mistaken. We can perceive neither in the words, nor manifest intention of the law, any thing to exclude from this case, the universal principle laid down by the supreme court, in Scott v. Rankin, that the prior lien is entitled to prior satisfaction, nor any thing in the law, by which the purchaser under a younger lien can be protected from its application. But if we are wrong in this view of the case, and the true meaning of the law is, to give to both modes of proceeding the same effect, the case of the defendant requires us to go much further. A sale under a mortgage discharges the land, only "from incumbrances made or suffered by the mortgagor, his heirs and assigns," leaving it subject to incumbrances upon it, when it came to his hands, if a sale under a judgment has no greater effect, the defendant cannot make out his case. The plaintiff claims by a sale, under a judgment against Charles Hurst, before he had made any conveyance, the defendant claims under a sale made on a judgment against Hemphill; he must therefore establish the proposition, that such a sale discharged the land from all incumbrances upon it, made or suffered by any former owner. This will require the fourth section to be stretched, not only so as to cover the sixth, to carry it not only to the full extent of the act of 1700, by giving the purchaser "a free and clear estate" in the lands as fully and amply as ever they were to the debtor, but further yet, to give "a free and clear estate, as fully and amply," as any former owner had held it, before any incumbrance whatever existed. It would be deemed a bold construction of the sixth section, to hold a sale under a mortgage to be a discharge of incumbrances made or suffered by any person who had owned the land before the mortgagor; it would be overlooking entirely the definition of the effect given by the legislature, and substituting one made by the judiciary in opposition to it. And if the point were new, it would be a still bolder assumption, in carrying the effect of a sale under the fourth section, so far beyond either the sixth section of the act of 1705, and even beyond that of 1700. The proposition is a startling one, as a matter of construction on the whole system of state jurisprudence, in relation to selling land for debts. By an act of assembly passed in 1705, the orphan's court was authorized to sell the lands of an intestate for the payment of his debts, maintenance and education of children, but it did not define the effect of such sale. 1 Dall. Laws, Append. 44, 45.

In 1794 another law was passed, declaring, "that no lands so sold shall be liable in the hands of the purchaser for the debts of the intestate." 3 Dall. Laws 530. This is much more explicit, than the fourth section of the act under consideration, but it certainly cannot be held to discharge the land from any debts, other than those due by the intestate. In the case of Moliere v. Noe, 4 Dall. [4 U. S.] 450, 454, it was strenuously contended that it did not extend to judgments against the intestate; in deciding that the purchaser held the lands discharged from such judgments, the supreme court of this state did not intimate the doctrine that the land was not still bound by incumbrances suffered by former owners, or construe the act of 1794

to extend to a mortgage given by the intestate himself. On the contrary, they declared a mortgage to be on a different footing from a judgment, and that the orphan's court had no power to sell a greater estate, than the mortgagor was possessed of. This court would not be the first to declare, that a sheriff's sale under the act of 1705, would discharge the land from incumbrances prior to the judgment on which it was sold, when a sale under the act of 1794 would not discharge it from the lien of a mortgage given by the intestate. We could not construe the deed of the defendant in the judgment, conveying the estate in the words of the fourth section of the act of 1705, as a covenant to pay existing incumbrances; the purchaser would buy at his risk; a covenant in the words of the sixth to pay "incumbrances made or suffered by the mortgagor," would not extend to judgments against a former owner, nor would a covenant to pay "the debts of an intestate," in the words of the act of 1794, create any obligation to pay any debt, not of the intestate, though it was a charge upon the land in his hands.

We cannot give to a sheriff's deed, made in pursuance of a law defining its effect, any greater efficacy, than the deed of the debtor, made with covenants in the words of the law. If then the question presented by this objection remains to be decided by our opinion of the act of assembly, or the principles settled by the supreme court of the United States, we should not hesitate in declaring, that the sale under the judgment against Hemplfill, did not impair the plaintiff's right of recovery. If land after being sold by order of an orphan's court remains charged in the hands of a purchaser, with a mortgage given by the intestate; a fortiori, land sold by the sheriff remains charged with all incumbrances, prior to the judgment on which it was sold, and so we should feel if our duty to instruct you, if we are governed by the acts of assembly, the case of Scott v. Rankin [supra], decided in 1827, or Moliere v. Noe [supra], decided in 1806. But we find that the supreme court of this state in 1826 gave a different construction to the act of 1705 in Com. v. Alexander, 14 Serg. & R. 257, etc. In that case they decided that a sheriff's sale discharged the land from all prior judgments against the defendant, as whose property it was sold, and any other person from whom it came to him. In Barnet v. Washebaugh they applied the same rule as to a legacy charged upon the land. 16 Serg. & R. 410. In Willard v. Norris they held that a sale on a judgment discharged the land from a prior mortgage. 2 Rawle, 56. In M'Lenahan v. Wyant the court declare the same rule to be applicable to all judicial sales, whether by an order of orphan's court, or by a sheriff; and that they divest all liens whether general or specific. 1 Pen. & W. 112, 113. Such has been the course of adjudication in the court of the last resort in the state for the last four years, in direct affirmance of the doctrine contended for by the defendant's counsel; it is now a rule of property and title, and as a settled construction of a state law, it is deemed to be a part of the law itself, and, generally speaking, as much a rule of decision in the federal courts under the thirty-fourth section of the judiciary act, as the text of which it is the judicial exposition. [Shelby v. Guy] 11 Wheat. [24 U. S.] 367. The extinguishment of a prior lien is not impairing the obligation of a contract, for none exists between the prior creditor, the sheriff, or his vendee; the effect of the law so construed divests a vested right, but unless this right is founded on a contract, it is not obnoxious to any prohibition in the constitution of the United States. [Satterlee v. Matthewson] 2 Pet. [27 U. S.] 412.

Those are the settled principles of the supreme court of the United States, to which we must conform; they will yield their own construction of the statutes of a state to that of the state courts previously made, respect their local common law and usage, and administer the jurisprudence of the states as their own courts do. [Bell v. Morrison] 1 Pet. [26 U. S.] 359, 360; [Brown v. Van Braam] 3 Dall. [3 U. S.] 344; [M'Keen v. Delancy] 5 Cranch [9 U. S.] 22, 32; [Polk v. Wendal] 9 Cranch [13 U. S.] 87; [Martin v. Hunter] 1 Wheat. [14 U. S.] 379; [Shipp. v. Miller] 2 Wheat. [15 U. S.] 316; [Thatcher v. Powell] 6 Wheat. [19 U. S.] 119; [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 152; [Shelby v. Guy] 11 Wheat. [24 U. S.] 361; [Jackson v. Chew] 12 Wheat. [25 U. S.] 153; [Bank of Hamilton v. Dudley] 2 Pet. [27 U. S.] 505, 556; [Bell v. Cunningham] 3 Pet. [28 U. S.] 85; [Hollingsworth v. Barbour] 4 Pet. [29 U. S.] 468; [Society for the Propagation of the Gospel v. Town of Pawlet] Id. 392. They will hold a case under advisement after argument, when it turns on a point of local law depending in a state court; and, though they will hold it not to be conclusive authority, will pay great respect to it. [Bank of Hamilton v. Dudley] 2 Pet. [27 U. S.] 520, 521. So where there had been an uniform course of professional opinion and practice. [Gardner v. Collins] 2 Pet. [27 U. S.] 85. The same rule will not be applicable to a single decision of a state court, where the supreme court of the United States had previously decided otherwise. [Shelby v. Guy] 11 Wheat. [24 U. S.] 367, 369. But we do not feel at liberty to make the exception in this case, especially as the legislature at their last session, with full knowledge of this course of decisions, have not made any change of the law as to the lien of judgments, though they have done it as to mortgages on land sold under a younger judgment. Though this is not a legislative construction of the fourth section of the act of 1705, yet it is an implied sanction of its judicial exposition. As the case of Rankin v. Scott was directly in favour of our construction of the law of the state, prior to Gurney v. Alexander, and was

decided only eight months afterwards, and first promulgated, it was not without some difficulty that we came to the conclusion, that though it was the decision of a court by whom our judgments can be revised we could not apply it to this case. An anxiety to administer the law of the state in this court, by the same rules which prevail in the highest judicial tribunal of the state; to be governed by the most liberal principles of comity and respect, which the supreme court of the United States have adopted in relation to state adjudication, and to give the most free construction to the thirty-fourth section which it can authorize, has induced us to this course. It is necessary to create confidence and preserve harmony between the courts, which, organised under different governments, administer the same laws; and this court ought never, unless in a very clear case, to decide in opposition to state laws or judicial decisions. Cases of doubt and difficulty should be referred to the supreme judicial tribunal of the union. Had the case of Scott v. Rankin been first decided (or arisen under the act of 1705) we should have followed it, though subsequent decisions of the state court had been different. The case of Huidekoper v. Douglass, 3 Cranch [7 U. S.] 1, has been uniformly adhered to in this court, though it turned on the construction of a land law of this state, which the supreme court of the state have ever since construed differently. But as the decision in Gurney v. Alexander was first given, is decisive of the question, and has since been followed in all the courts of the state, we felt it our duty to instruct you, that the sale under the judgment against Hemphill gave the defendant a title to the premises in question, unincumbered by the judgment of Wilson. It is satisfactory to us to know that the cause is in a train for the correction of any error we may have committed.

For reasons applicable to one of the judges, no opinion will be given on the fourth question made in the cause. Though we have referred to the act of 1705 in relation to mortgages, by way of illustration, we must be distinctly understood as expressing no opinion on the effect of a sale under a judgment, on a prior mortgage. The defendant, in our opinion, is entitled to your verdict.

Case No. 13,975.

THOMPSON v. SCOTT.

[4 Dill. 508; 22 Int. Rev. Rec. 376; 3 Cent. Law J. 737; 14 Alb. Law J. 400.] [1]

Circuit Court, D. Iowa. Oct. Term, 1876.

CONTEMPT — ACTIONS AGAINST RECEIVERS — HOW PROCEEDED WITH.

1. A person who brings an action in one court, against a receiver appointed by another court, without the consent of the court who appointed the receiver, is guilty of a contempt of the latter court: and this is so although such action may not result in disturbing the possession of the receiver. This doctrine applies with peculiar force to cases where suits are brought in the state courts against receivers appointed by the federal courts, in suits brought by citizens of other states to foreclose railway mortgages. The doctrine adopted by the supreme court of Iowa in Allen v Central R. Co., 42 Iowa, 683, and by the supreme court of Wisconsin in Kinney v. Crocker, 18 Wis. 75, denied.

[Cited in Kennedy v. Indianapolis, C. & L. R. Co., 3 Fed. 100. Distinguished in The Willamette Valley, 62 Fed. 305. Cited in Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 907; Otis v. Gross, 96 Ill. 614; Walker v. Geo. Taylor Commission Co. (Ark.) 18 S. W. 1057 Cited in brief in Town of Roxbury v. Central Vt. R. Co., 60 Vt. 130, 14 Atl. 92.]

2. In such cases, the proper practice is for the person having a demand against the funds in the hands of the receiver, to bring his demand into the court appointing the receiver, and the court will direct him to be examined, pro interesse suo, before the master, and if, upon auditing his claim, the court finds it to be a just one, it will direct the receiver to pay it without litigation, but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it before some competent court—consulting herein the convenience of parties and exercising a judicial discretion.

[Cited in Re Cunningham, Case No. 3,478.]

At law.

Grant & Smith, for receiver.

L. O. Hatch, for respondent.

LOVE, District Judge. The respondent is before the court by virtue of an order against him to show cause why he should not be attached for contempt. The alleged contempt is that, without obtaining leave, he commenced a suit in the circuit court of Clayton county, Iowa, against the complainant, a receiver appointed by this court.

The question before us to be decided is, whether or not a party may, of right, sue in a state court a receiver appointed by this court, without first coming here for leave to do so. The counsel for the respondent maintains the affirmative of this proposition, and relies upon the following authorities: Page v. Smith, 99 Mass. 395; Kinney v. Crocker, 18 Wis. 75; Hills v. Parker, 111 Mass. 508; Camp v. Barney, 11 N. Y. Sup. Ct. [4 Hun] 373; and especially upon the recent case of Allen v. Central R. Co., 42 Iowa, 683, decided by the supreme court of Iowa.

The doctrine of the Wisconsin decision, quoted and approved by the supreme court of Iowa in Allen v. Central R. Co., is expressed in these words: "There can be no room to question this conclusion, that in all cases where there is no attempt to interfere with actual possession of property, which the receiver holds under the order of a court of chancery, but only an attempt to obtain judgment at law, etc., it is not necessary to obtain leave of the court."

That this doctrine is, however, against

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 14 Alb. Law J. 400, contains only a partial report.]

the weight of authority in both England and America, is beyond doubt. Mr. High, the author of the work on "Receivers," in a late article in the Southern Law Review (October, 1876), in which he attempts to maintain the distinction taken by the Wisconsin court between actions which affect the actual possession of the receiver, and suits which merely aim to obtain an adjudication of the party's rights, acknowledges that the weight of authority is against the doctrine. He says: "It is undoubtedly true that the present weight of authority is adverse to the exercise of any right of action against a receiver, other than that from which he derives his appointment and to which alone he is amenable. Deriving their notions of the sanctity of the receiver's office and functions from the English chancery, courts of equity in this country have almost uniformly denied any right of action against their receivers, unless leave of the court be first had for that purpose." The learned writer cites, in support of this statement, a large number of authorities, both English and American.

But whatever may be the rule for other courts, we think there can be no doubt as to the practice by which we are to be governed. We find the law laid down by the supreme court of the United States, in Wiswall v. Sampson, 14 How. [55 U. S.] 65, 66, and 67, as follows: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in Angel v. Smith, 9 Ves. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined pro interesse suo. Brooks v. Greathed, 1 Jac. & W. 176; 3 Daniell, Ch. Prac. 1984. And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined pro interesse suo, and this, though their right to the possession is clear. 1 Cox, 422; 6 Ves. 287. The proper course to be pursued, says Mr. Daniell, in his valuable treatise on pleading and practice in chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination pro interesse suo, and an order for such examination may be obtained by a party interested, as well when the property consists of goods and chattels or personalty, as when it is real estate. And the mode of proceeding is the same in the case of the receiver. 6 Ves. 287; 9 Ves. 336; 1 Jac. & W. 178; 3 Daniell, Ch. Prac. 1984. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgage, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly. It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless. As we have already said, it is sufficient for the disposition of this case, to hold that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose. And upon this ground we hold that the sale by the marshal, on the two judgments, was illegal and void, and passed no title to the purchaser. This proceeding was explained by Lord Eldon, in Angel v. Smith, 9 Ves. 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession, under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave, upon the principle that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court

of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined, pro interesse suo; the practice being to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it. See, also, 10 Beav. 318; 2 Daniell, Ch. Prac. 1271; 2 Madd. 21; 1 P. Wms. 308.' "

The doctrine of the Wisconsin and Iowa cases is that any party seeking satisfaction out of a fund in the hands of a receiver, may prosecute his claim and have his rights adjudicated in a suit against the receiver, in any court of competent jurisdiction, without the permission of the court from which the receiver derives his appointment, provided the proceeding be such as not to disturb the actual possession of the receiver. If this doctrine be taken in all its latitude, I am not aware of any action at law which may not be thus maintained against a receiver, except replevin and attachment. The action of ejectment, though possessory, does not, in the first instance, touch the actual possession of the property involved. It determines the right of possession, but not until that right is established by judgment, and the court issues its writ of possession, is the actual possession of the defendant touched by the proceeding. Why, then, if the Iowa and Wisconsin doctrine be sound, might not ejectment, as well as trespass and all other actions, except replevin and attachment, be prosecuted against a receiver without any leave of the court of his appointment? And if this can be done, innumerable claims may be set up and established by the judgment of other courts against the judgment of the court holding the fund by the hand of its receiver. Can this be done? Could ejectment, for instance, be thus maintained against a receiver? Certainly not, so far as the federal courts are concerned. Wiswall v. Sampson, 14 How. [55 U. S.] 65.

In my judgment, the doctrine of the Iowa decision contravenes the whole scheme of equity jurisdiction in the matter of appointing receivers, and in the taking of possession, through them, of the property in litigation. The court of equity takes cognizance of a suit against an insolvent company or corporation, and where the danger exists that the litigation may prove fruitless to creditors, by waste or a fraudulent disposition of the property, the court will take it into possession by the appointment of a receiver. The property thus becomes a fund subject to the disposition of the court, and under its exclusive control. The principle that the court which has possession and control of a fund, has the exclusive right to determine all claims and liens asserted against it, is fundamental. Hence, every court of equity in such a case assumes to decide all controversies touching the subject matter of the suit and the fund; to determine the existence and priority of all liens; to adjust and settle all disputed claims; marshal the assets, and finally to distribute the surplus among the general creditors pro rata, upon its own principle of equality among creditors. The very ground and reason of this jurisdiction is the inadequacy of mere legal remedies. But, according to the Iowa decision, there is no reason why any party claiming satisfaction out of the fund, may not, without the consent of the receiver's court, assert his rights in any competent court, provided he does not attempt to disturb the possession of the receiver; and thus may the decision of the claims and controversies involved in the litigation be withdrawn from the court of equity, where they properly belong, and transferred to the courts of law. And the result would be that claims against the fund would be determined, not by the court having jurisdiction of the case and control of the fund, but by other and different tribunals. Judgments would thus be rendered against the receiver—in other words, against the fund; and the court having the fund in its possession would be compelled to treat such judgments as nullities, or recognize and pay them. Before the court of equity could, perhaps, make a final determination of the rights of the parties before it, other courts might render judgments against its receiver to an amount sufficient to absorb the whole fund or property, and the litigation would prove barren of results to the parties in equity. Such judgments against the receiver would be either valid or invalid. If invalid, it follows that suits against the receiver, resulting in such judgments, would be perfectly futile and useless, and for that reason they ought to be stopped by the receiver's court; for certainly such suits would harass and embarrass the receiver, and expose him to the heavy costs of litigation; and, if they resulted in no benefit to the parties prosecuting them, it would be simply idle, if not absurd, to allow such actions to proceed against the receiver. But, doubtless, if the doctrine of the Iowa court be sound, judgments against the receiver would be valid to all intents and purposes, and they must be so treated by all courts in which they should be pleaded. This being the case, what follows? Why, that the court of equity, having control of the fund, would have no alternative but to recognize and pay the judgments and decrees rendered elsewhere against its receiver, and if the fund consisted, in whole or part, of real estate, the judgments against the receiver would become liens upon the property, thus encumbering and casting a cloud upon the title. Under such conditions, the sale of the property, under the decree of the court of equity, to satisfy its judgments, would be hopeless and ineffectual. Thus would the whole purpose of the litigation in equity and of the taking possession of property through the receiver, be utterly defeated. The absurdity of such a result requires no explanation.

The view thus presented applies with re-

doubled force to railroad foreclosure suits in the United States circuit court. The non-resident citizen comes here to set up and enforce the lien of his mortgage, for the very reason that he thinks he would be exposed to injustice in the state courts from local prejudice. But no sooner does he get the railroad property in the hands of a receiver, than that officer, if the doctrine of the Iowa court be sound, is exposed to suits in the state courts upon claims and demands of all kinds, and thus the substantial ends for which the non-resident complainant comes here, is practically defeated. The receiver himself has no beneficial interests in the controversies waged against him in the local courts, and the litigation is, practically, between the non-resident citizen and the citizen of Iowa. Suits may be brought, and judgments innumerable rendered against the receiver, all along the line of a railway, by justices of the peace and other local courts. These judgments may, if valid, be made liens upon the railway property, and the federal court must reject them as nullities, or recognize and pay them out of the mortgaged property. If the federal court must recognize and pay them, the state courts thus take from the former court the power of determining, first, what debt shall be paid out of the funds in its hands; second, what claims shall be made liens upon the mortgaged property. Thus would the federal court sit merely to register and pay the judgments and decrees of the state courts.

But what if the judgments and decrees of the state courts are to be treated here as nullities, and so disregarded? Then why should the plaintiff in the state courts be allowed to prosecute suits against the receiver? Cui bono? The plaintiff in the state court does not sue the receiver in his own right, but in his official capacity as receiver. He, in fact, sues the fund through the receiver who represents it. He cannot levy execution of his judgment upon the receiver's individual property. Unless he can obtain satisfaction of his judgment out of the fund in this court, his suit and judgment against the receiver are worthless. Then why should he be permitted to prosecute such suits? Why not require him to come at once, and in the first instance, into the only court which can give him any real satisfaction; the only court which has in its possession any property from which he can obtain payment of his claim?

But, assuming that this court would not sit here merely to register the judgments and decrees of the state courts, and to pay them, without inquiry, out of the trust fund in its possession, it may be asked what harm will result to the non-resident creditors, from permitting suits to proceed against receivers? I answer that such judgments, even if we repudiate them and refuse to pay them, would cast a cloud upon our title and seriously affect a sale of the railroad property. When the receivership is at an end and the property no longer under our control, but in the hands of a purchaser at the foreclosure sale, I know of no reason why the state court might not proceed to enforce their judgment by execution and sale. At all events, the apprehension of such a result would cast such a cloud upon the title as effectually to defeat an advantageous sale, and this furnishes an all-sufficient reason why we should, by injunction, and by process of contempt, prevent the prosecution of suits against our receivers.

Again, if any and everybody may sue our receiver without our consent, along the line of the road, innumerable suits may be prosecuted against him, and he may be thus exposed to the costs and expenses of ruinous litigation. Now, he is our officer, and suits would be prosecuted against him as such, and not against him as an individual. We have placed him in the breach and exposed him to a deadly fire. Shall we leave him naked to his enemies? Shall the court abandon him to his fate and compel him to pay the costs and charges of a ruinous litigation out of his own pocket? Or, if the court should authorize him to employ counsel and pay the costs of numberless suits out of the trust fund, what then? Why, it would follow that the fund in our hands might be wasted and squandered in useless and fruitless litigation.

Again, such a course would result in endless multiplicity of suits, which equity abhors. If, instead of prohibiting suits against our receivers, and requiring all parties having claims to come into the suit already pending before us, we allow any and every party so disposed to sue the receivers in the state courts of record, and before the numerous justices of the peace, a vast multiplicity of suits would be the inevitable result. But, on the other hand, let all claimants bring in their demands here, and we will direct them to be examined pro interesse suo before the master, and if, upon auditing them, we find them to be just, we will direct the receiver to allow and pay them, without litigation. If we find the claimant's demand doubtful, we will give him leave to prosecute his claim against the receiver before some competent court. Thus, by the exercise of sound and just discretion, this court may do speedy justice, and avert troublesome and expensive litigation. And such has been the uniform practice. When leave to sue is asked of us, if we find that a suit is necessary, we direct in what forum—consulting herein the convenience of parties, and exercising a judicial discretion.

The argument of the supreme court of Wisconsin, is that the federal court "appoints receivers, who take possession of, and operate, the road. While so operating it, they make thousands, perhaps millions, of legal contracts for the transportation of freights and passengers, etc. Yet, upon the doctrine contended for, all litigation upon these causes of

action, although, in many cases, being only between citizens of this state, would be drawn into the federal courts; and the state courts absolutely divested of jurisdiction, unless the federal courts saw fit first to grant it."

Now, this argument, from inconvenience, it must be admitted, is quite specious; but I cannot see its cogency, since it is admitted that the federal court being in possession of the entire property of the corporation, no execution could be levied without its consent. Of what avail, therefore, would a judgment be against the receiver, without the consent of the federal court? What practical difference can there be between the necessity of obtaining this consent before, and after, judgment? If the suitor comes into the federal court and prosecutes his claim, there is a fund under the control of the court recognizing his claim or giving him judgment, to satisfy his claim or judgment. If, on the contrary, he goes into the state court, he may get a judgment, but there is nothing out of which he can obtain its satisfaction. His judgment is barren of results. Which, then, is the better forum for the claimant to resort to, assuming that both will deal justly with him? Since all suits against the receiver, as such, for claims growing out of his operation of the road, must be against him in that capacity, and must be satisfied, if paid at all, out of the property under the control of the federal court, why should not the suit be brought in the same court, or elsewhere, with its consent?

It must, moreover, be borne in mind that the inconveniences suggested by the supreme court of Wisconsin, are necessarily but temporary, since the possession of the court ceases with the close of the litigation. Unless the respondent shall stipulate to dismiss the suit in the state court, an attachment against him will issue. Ordered accordingly.

THOMPSON (SHAW v.). See Case No. 12,726.

THOMPSON (SHIPLEY v.). See Case No. 12,790.

Case No. 13,976.

THOMPSON et al. v. SMITH.

[2 Bond, 320.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1869.

PRACTICE IN EQUITY—MASTER'S REPORT—OATH—REFERENCE—ACCOUNTS—COPIES.

1. It is no ground for setting aside a master's report, in a suit in chancery, that he was not sworn; there being no statute of the United States, or any rule of court, requiring a master's report to be under oath.

2. It is competent for the court, in the order of reference, to require the master to be sworn, but if not specially so ordered, it is no objection to the report that he was not sworn.

3. The authority to refer to a master is inherent in a court of the United States, in the exercise of its chancery jurisdiction.

4. There is no reason for requiring an oath, where the judge or court ordering the reference has personal knowledge of the integrity and intelligence of the person appointed.

5. The master did not err in admitting copies of accounts and papers from the office of the quartermaster-general of the United States, properly authenticated as true copies by the third auditor of the treasury, whose official character was certified to, in proper form, by the secretary of the treasury, as the act of congress expressly provides that copies so verified shall be admissible as evidence in the courts.

[This was a bill by Thompson and Groom against E. A. Smith.]

A. F. Perry, for complainants.

Woodruff & Tilden, for defendant.

OPINION OF THE COURT. This is a bill in equity, in which the complainants allege that, in 1861, there existed a partnership between them and the defendants in the purchase and sale of horses and mules, and that there has been no settlement of the business of the firm. They also allege that there is a large sum due them from the said Smith, accruing from the transactions of the firm; and they pray for an account and other relief. The hearing, on a motion for a reference to a master to inquire into and report as to the transactions of the firm, took place before Justice Swayne, at April term, 1868. The learned judge, at that term, directed an interlocutory decree to be entered, finding the existence of a partnership between these parties, and that the complainants were entitled to an account as prayed for. And an order was entered referring the inquiry to J. D. Cox, as master, to report, as to the state of the accounts between the parties, with the limitation, in effect, that he was not to decide or report, as to the time of the expiration of the partnership, but merely to state the facts proved as to that matter. It appearing that the date of the expiration of the partnership was the material question in controversy, on the decision of which the claim of the complainants essentially depended, Justice Swayne properly reserved that inquiry for the final hearing. In pursuance of the order of reference, the master proceeded to investigate the accounts of the parties, calling before him all the witnesses named by either party, who were examined with great minuteness, and at great length, in the presence of the counsel on both sides. The master, in a full and elaborate report, has stated his conclusion as to accounts between the parties, upon the different theories and claims of the parties as to the duration of the partnership, avoiding any opinion as to the date of its expiration. A motion is now made by the defendant's counsel to accept and affirm the report of the master; and by the complainants that the report be set aside, and a new order of refer-

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

ence be made. The only question now before the court is, whether the exceptions filed by the complainants are sufficient to set aside the report. These exceptions are numerous, no less than twenty-five, many of them exceedingly technical in their character. It will be unnecessary to notice them in detail. A large proportion of them involve the correctness of the master's conclusion as to the allowance of credits to the complainants. It is clear that these afford no sufficient ground for ordering a reference to another master.

The exceptions which it seems material to notice, are: 1. That the master was not sworn, and his report is not under oath. 2. That he admitted incompetent testimony. As to the first point, the authorities on the subject do not require the master to be sworn, unless made necessary by an express statutory provision, or a rule of court, or by the court in the order of reference. As there is no statute of the United States, or any rule making the oath necessary, this exception can not be sustained. The learned judge, who made the order of reference, knowing well the high character of the distinguished gentleman appointed master, did not think it necessary to require that the report should be under oath. He doubtless acted under the authority of a well-established principle, that the courts of the United States, in the exercise of their chancery powers, possess an inherent authority, in proper cases, to order a reference to a master. They may unquestionably order the master to be sworn; but if the judge, knowing the trustworthiness and intelligence of the person appointed, does not require an oath, the want of it does not invalidate the report. This exception must therefore be overruled. As to the second ground of exception, namely, that the master admitted incompetent testimony, the court is not aware of any reason for sustaining it. The objection is, that the master admitted copies of accounts and papers on file or of record in the office of the quartermaster-general. These accounts and papers related to the sale and delivery of horses and mules for the use of the government by these parties. The proper place for the deposit of the papers was in the quartermaster's department. They are properly authenticated by the certificate of the third auditor of the treasury as true copies; and the secretary of the treasury has given his certificate of the official character of the third auditor. Under the act of congress, providing that copies of papers and records in the executive departments of the general government should be admissible as evidence in the courts, the master did not err in admitting them in the investigation committed to him. They are properly verified and authenticated as true copies, and were correctly allowed as legal testimony by the master. This exception must therefore be overruled.

THE COURT has now only to remark, that after a careful examination of the master's report, no sufficient reason appears for again referring this case to a master. It bears intrinsic evidence of laborious and critical examination of the facts; and there is no reason to doubt the accuracy of his conclusion in regard to the complicated transactions of these parties. As to the purity of his motives, there can be no possible doubt. I am persuaded he has discharged his onerous duties, not only with great fairness, but with great ability.

The motion for setting aside the report and for a reference is overruled, and the case continued for final hearing.

Case No. 13,977.

THOMPSON v. SMITH et al.

[1 Dill. 458.] [1]

Circuit Court, D. Minnesota. 1870.

WRIT OF ASSISTANCE — AGAINST WHOM ISSUED — PARTIES TO SUIT—VOID TITLE.

The power of a court of chancery to put the purchaser of the mortgaged premises into possession by a writ of assistance, or summary proceedings, extends only to the parties to the suit and those coming in under them after suit commenced, and does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative, by statute.

In equity.

Morris Lamprey, for complainant.
Greenleaf Clark, for defendants.

NELSON, District Judge. An application is made by petition, to modify a writ of assistance, granted to put the complainant into possession of the mortgaged premises. The writ of assistance was issued by the clerk, not only against the mortgagor and T. R. Fletcher, defendants in the suit, but also against the wife of the mortgagor, who was not a party to the suit, but who lived upon the premises with him. This application is made in behalf of the wife, Mary T. B. Smith, who claims the possession of the mortgaged premises under color of title derived from one of the defendants, prior to the commencement of the suit for a foreclosure. It is a well settled rule, founded in reason and justice, that the power of a court of chancery to put a purchaser of the mortgaged premises into the possession, by a summary process, extends only to the parties to the suit, or those coming into the possession under the parties to the suit, subsequent to the commencement of the same. If, therefore, Mary T. B. Smith was in the possession of any portion of the mortgaged premises, prior to the commencement of the foreclosure suit, she can-

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

not be dispossessed by this summary proceeding. She is capable of acquiring, by purchase, or otherwise, real property, and holding the title to the same, under the laws of the state of Minnesota. Now, the evidence offered upon the hearing of the motion clearly establishes the fact that she was in possession of these premises, prior to the commencement of suit, under color of title, and this evidence is not controverted by the purchaser at the master's sale. Her possession is not denied, but it is alleged that her right to that possession is not valid, the deed under which she claims being void or inoperative by statute, as against the mortgagee and purchaser. This raises a question of title which cannot be disposed of in this summary proceeding. The purchaser must seek the usual remedy for settling such questions. The writ of assistance is modified, and all proceedings stayed, so far as Mary T. B. Smith is concerned. Writ modified.

Case No. 13,978.

THOMPSON v. TOD.

[Pet. C. C. 380.] [1]

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

SPECIFIC PERFORMANCE — COMPLAINANT'S UNFAIR CONDUCT — REPRESENTATIONS — STATUTE OF FRAUDS—PART PERFORMANCE—PLEADING—EFFECT OF ADMISSIONS IN ANSWER.

1. Bill in equity for the specific performance of a parol agreement. If the agreement admitted by the answer differs from that stated in the bill, the plaintiff cannot have a decree, unless he can prove the contract aliunde.

[Cited in Baker v. Biddle, Case No. 764; Tilghman v. Tilghman, Id., 14,045; Keene v. Wheatley, Id. 7,644.]

2. Under what circumstances, equity will refuse to decree a specific performance.

3. A court of equity will not compel the specific performance of a parol agreement to convey lands, in a case in which he who asks the assistance of the court, is charged with unfair conduct in relation to the contract which he seeks to enforce; but will turn the party away from that forum, and leave him to his legal remedy.

[Cited in Rutland Marble Co. v. Ripley, 10 Wall. (77 U. S.) 358.]

4. The same construction must be given, and the same consequences will follow from verbal representations, made at the time of a parol agreement, as, had they been inserted in a written agreement, a court of equity would assign to them.

5. In a suit for a specific performance of a parol agreement to convey lands, although the defendant answer and admit the agreement, he may, nevertheless, protect himself against a performance of it, by pleading the statute of frauds.

6. Part performance has no other effect, except that the plaintiff is thereby let in to prove the agreement aliunde, where it is not confessed.

[7. Cited in Ayer v Hawkes, 11 N. H. 153, and in Kidder v. Barr. 35 N. H. 255, to the point that a payment of a substantial part of the purchase money is a part performance sufficient to take the case out of the statute.]

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

This case was argued at the last term, and was kept under advisement, until the present term, when the following opinion was delivered:

WASHINGTON, Circuit Justice. The object of this bill is to obtain the specific performance of a parol agreement, entered into between the complainant and the defendant, on or about the 24th of July, 1786, for the conveyance of a tract of land, called "Peachblossom Farm," in the state of New Jersey. It appears by the allegations in the bill and the acknowledgments in the answer, that on the 16th of December, 1785, a written agreement was entered into between the defendant and one Henry C. Baker; by which the defendant bound himself to sell to Baker, this farm, containing about 750 acres, for the price of £8 per acre, to be paid in the following manner, viz: £250 on the 25th of December in the same year; £1,250 on the 1st of March, 1786, when Baker was to receive possession; £1,000 on the 1st of March, 1787, when a conveyance was to have been made; and £1,000 on the 1st of March, 1788. All the above sums were to be without interest, until after the respective periods when the payments were to be made. The residue of the purchase money was to be paid in annual instalments, of 1,000 dollars on the 1st of March in the succeeding years, and for securing the same, Baker was to give a mortgage on the farm. The answer admits, that between the time of making the said agreement, and the 25th of March, 1786, Baker paid to the defendant at different periods, in part performance, the sum of £931 1s. 9d. On the 25th of March, 1786, Baker and the complainant entered into written articles, by which Baker agreed to sell this farm to the complainant, and to make a conveyance of the same on the 10th day of the succeeding month. The consideration was to be certain real property in Maryland, New Jersey, and Virginia, a house and lot in the northern liberties of the city of Philadelphia, and bonds and notes for £1,000 which, in the opinion of one or more competent judges, should be deemed to be good. On the 14th of June, 1786, a third contract in writing was entered into, between Baker, the complainant, and the defendant, whereby it was agreed, that the complainant should pay to the defendant, by way of an advance on the part of Baker, the sum of £1,950 on the 20th day of the succeeding month, on which day, the defendant was to convey Peachblossom farm to the complainant; and to enable Baker to secure the defendant as to the residue of the purchase money, agreeably to the contract of the 16th of December, 1785, the complainant was at the same time to convey to Baker, the real property mentioned in the contract of the 25th of March, 1786, with a slight variation, and also to deliver to him bonds and notes, such as competent judges should pronounce to be good, to the amount of £600 as also a bond of

Francis Baker for £3,500; all which property was to be conveyed and assigned by Baker to the defendant, for the purposes aforesaid. It was further stipulated, that this last agreement should not affect the two former agreements, but that they were to remain in full force if this agreement should not be complied with by all the parties to it. The complainant admits in his bill, that he was unable to pay the £1,950 on the 20th of July, in consequence of which, he alleges the contract of the 14th of June became of no effect, and was so declared by the parol agreement which this bill seeks to enforce. It would seem, nevertheless, that with the above variation the parties to the agreement of the 14th of June prepared themselves to fulfil the same; as it appears, that the bonds and notes for £1,000, were assigned by the complainant to Baker, prior to the 20th of July, 1786, and that deeds were executed by him for the real property mentioned in the said agreement, which deeds bear date on the said 20th of July, as does also a deed from the defendant to the complainant. No delivery however was made of this latter deed, in consequence no doubt of the inability of the complainant to perform his part of the contract.

We are now brought to the parol contract which has given rise to this controversy, and which is the sole basis of it. The complainant states in his bill, that it was entered into on or about the 24th of July, 1786, and was to the following effect: First, that the articles of the 14th of June should be cancelled; second, that the defendant should execute a conveyance of the Peachblossom farm to the complainant; third, that the complainant should pay the defendant £100 in cash, give a mortgage on the said farm with a judgment bond for the payment of £600 in twelve months, give his own bond for £850 payable on the 25th of March following, and his four promissory notes for £100 each, payable in 90 days, amounting in the whole to the sum of £1,950, which by the articles of the 14th of June was to have been paid on the 20th of July following. Of this contract the complainant has produced no proof, but relies upon the acknowledgments contained in the answer to establish it. It remains therefore to inquire, whether the contract stated in the bill is admitted in the answer. The answer denies in general but positive terms, that this agreement was entered into. But, being called upon to state what was the agreement, if the same should not be truly set forth in the bill, the defendant admits that on some day near the end of July, or the beginning of August, 1786, a verbal agreement was concluded between the complainant, Henry C. Baker and himself, whereby it was stipulated that the articles of the 14th of June should be cancelled, and that all acts done in part performance of the same should be of no effect; —that the complainant should pay to the defendant £100 in cash—give his bond for £850 payable on the 25th of March, 1787—his four notes for £100 each, payable ninety days after date, and his bond for £600 payable on the 20th of July, 1787, to be secured by a mortgage on Peachblossom farm, after the complainant should obtain a title for the same. The answer further states, that the complainant engaged that Baker should mortgage to the defendant the real estate mentioned in the agreement of the 25th of March, 1786, and should assign to him the bonds and notes of sundry persons in New Jersey, to the amount of £1,000, all which was to secure to the defendant the payment of the residue of the purchase money for the aforesaid farm, with interest, at the price of £8 an acre, at the periods and on the terms mentioned in Baker's bond, dated the 20th of July, 1786. Now, if this answer amounts to a substantial admission of the contract alleged in the bill, it must be conceded that the general denial of that contract will go for nothing. But it is most apparent, that the contract alleged and the one admitted vary from each other in this essential particular, that the former, were a performance of it to be decreed, would leave the defendant without any security but the personal responsibility of Baker for the payment of the balance of the purchase money. The security provided by the articles between Baker and the defendant of the 16th of December, 1785, was a mortgage of the Peachblossom farm, which Baker could not give, if, according to the parol agreement, the defendant was to convey that farm at once to the complainant. According to this agreement no other security was substituted, and the complainant would be exposed to no responsibility, if Baker should refuse to mortgage to the defendant the property which the complainant had bound himself to convey to him by their contract of the 25th of March, 1786. The defendant on the contrary asserts, that the complainant undertook that Baker should give him a security upon that property for the performance of his contract of the 16th of December, 1785, and that upon the performance of these acts by the complainant, and by Baker, the defendant was to convey the farm.

There is another difference between the two contracts, not less material than that just noticed. The answer states, that the real property to be conveyed to him by Baker to secure the residue of the purchase money, was represented by the complainant to be of a certain value, that the title to the same was unexceptionable, and as to the bonds and notes, that he would assign the same to Baker, so as to enable him to recover the sums expressed in them. The bill takes no notice of this engagement, important as it certainly was to the security of the defendant. It was contended by the plaintiff's counsel, that these assurances if untrue amounted to nothing more than misrepresentations, and ought not to be con-

sidered as forming part of the contract. But if they amounted to misrepresentations, an abundant reason would be thereby afforded for refusing the aid of this court to carry that contract into specific execution. A court of equity will never exert this extraordinary branch of its jurisdiction, in a case where the party who asks its assistance, is chargeable with unfair conduct in relation to the contract which he seeks to enforce, but will turn him away from that forum, and leave him to his legal remedy. But, I can by no means agree that these representations, made at the time when the agreement was forming, were no part of that agreement. If the contract had been reduced to writing, it surely would not be contended that such statements, being inserted in it, would not have amounted to covenants on the part of the complainant which a court of equity would require to be fulfilled. If so, the same construction must be given, and the same consequences will follow, when they accompany a verbal contract which is sought to be enforced. If, then, the contract alleged in the bill is neither proved nor admitted, it is impossible that a specific performance of it can be decreed. But, if the contract were admitted as it is stated in the bill, there are other insuperable objections to the complainant's success. It appears, by the evidence, that the property which was to be conveyed to the defendant to secure the payment of the residue of the purchase money, was totally insufficient for that purpose; and the circumstances attending it, which are in proof, justify the imputation of unfairness in the conduct both of Baker and of the complainant. The house and lot, for instance, in the Northern Liberties of Philadelphia, were encumbered with arrearages of rents to their full value. The bonds and notes, or most of them, were disputed, if not altogether irrecoverable; and the Virginia lands, amounting in quantity to upwards of 20,000 acres, which formed the bulk of the property, are proved to have been barren, unfit for cultivation, and of very little value. A knowledge of all these facts is fairly chargeable upon the complainant, from the correspondence between him and Richard Mason, his partner and agent, which appears amongst the exhibits. But, admit that the security to which the defendant was entitled, had been adequate, what evidence has the complainant given of performance on his part or an offer to perform? He states in his bill, that immediately after the parol agreement was concluded, he sealed and delivered the mortgage and bond for £600—paid the £100, and executed his obligation for £850, which mortgage and bonds, together with his four notes for £100 each, he left with A. Humphreys, the mutual agent of the complainant and the defendant. That, in the evening of the same day, he executed conveyances to Baker for all the property mentioned in the contract of the 25th of March, and that Baker, at the same time executed a mortgage deed of the said property to the defendant agreeably to the contract between him and the defendant and delivered the same to the defendant. That the complainant also delivered to the defendant bonds and notes to the amount of £1,000, which the defendant selected from many others, after several weeks' deliberation and inquiry, agreeing to take the same at his own risk.

These allegations are unsupported by any evidence in the cause, and, if not altogether denied in the answer, are not admitted. In respect to them, the answer states, that soon after the contract was entered into, the defendant discovered that the whole transaction was a gross fraud concerted between the complainant and Baker, who at that time was insolvent, to deprive the defendant of his farm; in consequence of which, he refused to deliver the deed for the same, which he had previously executed. He further denies that Humphreys was his agent, and asserts, that the conveyances by the complainant to Baker of a great part of the real property, were defective, and that no conveyance of the same by way of mortgage, was made or tendered to the defendant by Baker, according to the stipulations of the parol agreement;—and finally, that even the conveyances from the complainant to Baker, and the assignment of the bonds and notes, were made, not under the parol agreement, but under the written contract of the 14th of June. This latter allegation, if it required to be supported by proof, is strongly confirmed by the dates of the conveyances and assignments, all of which precede the day fixed by both the complainant and the defendant, as that on which the parol agreement was made. Not only is there an absence of all proof that the complainant has ever offered to perform this contract, but, it appears from the action of covenant which he instituted against the defendant, in the same year that that contract was entered into, that he had determined to abandon it altogether, and to rely upon the written articles of the 14th of June. From the time that suit was brought, until the year 1811, when this was instituted, the defendant has been permitted to remain in the quiet and undisturbed possession of his farm, and to expend his money and labour upon its improvement, without a whisper of dissatisfaction from the complainant, so far as appears in this cause. In consequence of these improvements, and the extraordinary appreciation in the value of real property generally, this estate, which was agreed to be sold in 1786, for £8 an acre, is now worth eighty dollars. And, under all the above circumstances, ought a court of equity to compel the defendant to

convey this estate to the complainant, and receive in return, next to nothing? Such a decree, I confidently believe, would be without a solitary precedent to give it countenance.

I shall add a very few words as to the plea of the statute of frauds, which I think is a complete defence against the prayer of this bill. That an opinion at one time prevailed, that on a suit for the specific execution of a parol agreement for the sale of land, the defendant must either confess or deny the agreement, and that, in the former case, the plea of the statute of frauds would be unavailing, is not less true than strange. But this doctrine has been repeatedly overruled (Coop. Eq. Pl. 256, 257; 2 H. Bl. 63; 2 Brown, Ch. 563; 4 Ves. 23; 6 Ves. 543), and it is now the settled rule of the court, that although the defendant should answer and admit the agreement as stated in the bill, he may nevertheless protect himself against a performance, by pleading the statute. But even the condemned doctrine would not avail the complainant, since the contract alleged in the bill, is neither admitted nor proved.

It is contended, however, that the statute is no protection where the contract has been in part performed. Now there are two insuperable answers to that argument, as applied to this case. The first is, that part performance can have no other effect than to let the plaintiff in to prove the contract aliunde, where it is not confessed; but, in this case, no such proof has been given, and, it must be admitted, that if the contract be neither admitted nor proved, performance cannot be decreed. The next answer is, that although it should be admitted that under all the circumstances of this case, the payment of a part of the purchase money will amount to a part performance, still it should appear, beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended. Now, in this case, the payment of the £100 is not proved nor admitted to have been made in part performance of the verbal contract. To say the most in its favour, it is doubtful whether it was made with a view to that contract, or to the contract of the 14th of June, and this doubt is of itself, a sufficient answer to the argument. But, I think there are stronger reasons for presuming the latter than the former. For, since it is clear that the conveyances by the complainant to Baker, and by Baker to the defendant, and the assignment of the bonds and notes, were done in part execution of the written agreement, it is highly probable that this money was paid on the 20th of July, as the defendant states the fact to the best of his recollection, in part of the £1,950 agreed to be paid on that day. Upon the whole, I am of opinion that the plaintiff is not entitled to the relief which he has specifically prayed for.

The only remaining question is, whether the complainant is entitled to any other and what relief? He claims a decree for the money paid to the defendant by H. C. Baker, under his contract of the 16th of December, 1785, and also for the £100 paid by the complainant, with interest upon those sums. The first is altogether inadmissible, as it is not pretended that the money paid by Baker, belonged to the complainant; and if it did, still the court could not decide that fact in this cause to which Baker's representatives are no parties. As to the £100 paid by the complainant, he is entitled to a decree for that sum, with interest from the 20th of July, 1786, but without costs.

THOMPSON (TOLMIE v.). See Case No. 14,080.

THOMPSON (TOOKER v.). See Case No. 14,097.

THOMPSON (UNITED STATES v.). See Cases Nos. 16,484–16,492.

THOMPSON (VALARINO v.). See Case No. 16,810a.

THOMPSON (VALERINO v.). See Case No. 16,813a.

Case No. 13,979.

THOMPSON et al v. VOSS.

[1 Cranch, C. C. 108.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

WRIT OF ERROR—SUPERSEDEAS—AGREEMENT.

A writ of error is not a supersedeas unless served within ten days after the rendition of the judgment, although the parties should have agreed to a stay of execution for two months; and the writ of error should be served before the expiration of that time.

[This was an action by Thompson & Veitch against Nicholas Voss.]

Fieri facias. Motion to quash the execution, on the ground that a writ of error had issued, and the plaintiffs had joined in error at the supreme court. The judgment below was signed on the 27th of March, 1802, and the execution was, by consent, stayed two months, before the expiration of which time viz., on the 19th of May, the writ of error was filed; and bond given and citation issued. On the 28th of May, a ca. sa. returnable to July term, was issued, but did not go out of the office. On the 8th of September, 1802, the fieri facias issued returnable to December term. At the supreme court of the United States in August, 1802, the defendants in error appeared and joined issue on the assignment of errors.

THE COURT refused to quash the execution, being of opinion that the writ of error is not a supersedeas, unless served by a

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

copy thereof, being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment. Judiciary Act 1789, § 23 (1 Stat. 85).

THOMPSON (VOWELL v.). See Case No. 17,023.

THOMPSON (WARD v.). See Case No. 17,162.

Case No. 13,980.

THOMPSON v. WELLS et al.

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

Circuit Court, District of Columbia. Dec., 1826.

REPLEVIN—REINSTATEMENT—APPEARANCE.

If the defendant in replevin does not appear at the return term of the writ, the action is discontinued, and the court will not, at a subsequent term, reinstate it, upon affidavit that the defendant requested an attorney to enter an appearance for him, and supposed it had been done.

Replevin. The action was discontinued by the non-appearance of the defendants at the last term.

Mr. Key, for the defendants [Wells and Nicholls], now moved to reinstate it on the docket, upon affidavit of the defendant Wells that on the first day of the last term he requested Mr. Key to enter an appearance for him, and supposed it had been done.

Mr. Key afterwards withdrew his motion, being satisfied that the practice of this court was against him.

THOMPSON, The ISABELLA. See Case No. 7,102.

Case No. 13,981.

THOMSON v. BRADFORD et al.

[7 Biss. 351.] [2]

District Court, D. Indiana. Jan., 1877.

PRACTICE IN EQUITY — DISTRIBUTION OF FUND — MORTGAGES—PRIORITY OF INSTALLMENTS.

1. When a court of equity obtains control of a fund and the parties entitled to it, it will at once place the money where it will ultimately go.

2. Priority of installments of mortgage debt has its foundation in the rule governing the application of payments, and does not apply to mortgage notes given to secure indorsements.

[This was a bill in equity by John A. Thomson, assignee, against Chandler Bradford and others.]

The petition, which was filed on the 30th day of April, 1874, recites a previous order of court made in Re Joshua Shipp, in bankruptcy, for the sale of certain lands of Shipp, freed of a mortgage to Harvey Lewis, and alleges that all the lands had been sold except one parcel, in which Chandler Bradford claimed an interest, which was a cloud on the title. The purpose of the bill is to extinguish Bradford's claim. Bradford answered May 29, 1875, setting up title by purchase on the —— day of ——, 1871. On the 27th of August, 1874, Overstreet and Holmes, assignees of Harvey Lewis in bankruptcy, filed a cross-bill setting up a mortgage by Shipp to Lewis on the lands, executed May 1st, 1875, to secure four notes of that date for $5,000 each, at one, two, three and four years, that the second and third of these notes had been assigned by Lewis to Nathan Powell; that Lewis had become bankrupt, and Overstreet and Holmes were appointed his assignees, and that the first and fourth of these notes, together with the mortgage, had come to them as such assignees as assets of Lewis's estate; prayer for payment out of proceeds of sale. On the 27th of August, 1875, Nathan Powell, having been admitted as a party, answered confessing the cross-bill. He also at the same time filed his cross-bill setting up his title to the two notes by bona fide purchase before maturity, and praying the same relief as Overstreet and Holmes in their cross-bill, and such additional relief as might be equitable. Issues were joined on the bill and cross-bills. After the land was sold and certain payments made, a balance of $5,056.71 was left, applicable to the Lewis mortgage.

Byfield & Howe, for assignees of Lewis.

Baker, Hord & Hendricks, for Nathan Powell.

GRESHAM, Circuit Judge. The only question now in the case is as to the distribution of this fund. Lewis's assignees in bankruptcy, claim it as being the holders of the first of the four $5,000 notes. Powell claims it by assignment from Lewis of the second and third notes. Copies of these notes are annexed to Powell's cross-bill. The assignment of them is in these words: "For value received, I assign the within note to N. Powell, and agree to take it up at maturity. H. Lewis." The testimony taken by the master shows that the mortgage to Lewis was merely to indemnify him as indorser for Shipp on divers notes and bills, the particulars of which as to dates and times of maturity are not given, and that the four notes described in the mortgage were mere fictions.

Whatever right Powell had as against Lewis he has against his assignees in bankruptcy. Powell's rights were in nowise impaired by the bankruptcy of Lewis. The assignees of Lewis can assert no right, as against Powell, that Lewis himself might not assert, if he were not a bankrupt. The assignees are

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

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

in strict privity with Lewis, and bound by his contract with Powell. The bankruptcy of Lewis conferred no greater right on his assignees to the fund in court than Lewis himself would have had.

It is insisted by Lewis's assignees, that the priority accorded to successive installments of a mortgage debt entitles them as the holders of the first note to the fund in court as against Powell, who holds the second and third notes. But the mortgage notes do not represent installments of indebtedness—they are mere fictions, and had no other effect than to fix the time for paying the damnified indorser Lewis could not have foreclosed against Shipp for the amount of the notes. The priority accorded to successive payments of a mortgage debt has its foundation in the rule governing the application of payments. Goodall v. Mopley, 45 Ind. 355. That rule has no application to this case.

When the second and third notes passed into the hands of Powell before maturity without notice of their character, they ceased to be fictions. Shipp then became liable to Powell, whether Lewis was damnified or not, and if Lewis had sued Shipp to recover money paid on indorsements the latter could have pleaded the assignment of the second and third notes to Powell. As between Shipp and Lewis the assignment to Powell was a payment by Shipp to Lewis. That payment would stand against the first sum that Lewis might be obliged to pay as Shipp's indorser. Lewis had no right to sell Shipp's notes, and in doing so he committed a fraud.

The fund and parties are all in court. Courts of equity are not inclined to favor circuity of action, and they never require a vain or foolish thing. It would seem to be trifling with justice to order the money in court to be paid into the hands of Lewis's assignees and then require them to pay it over to Powell, or to remand Powell to an action to recover it. When a court of equity gets control of a fund and the parties entitled to it, it will at once place the money where it must ultimately go. Dixon v. Clayville, 44 Md. 573.

An order will be entered directing the money in court to be paid to Powell.

THOMSON (BUTLER v.). See Case No. 2,244.

Case No. 13,982.

THOMSON et al. v. JACOBS et al.

[12 O. G. 890.]

Circuit Court, S. D. New York. Nov., 1877.

PATENTS—INFRINGEMENT—VALIDITY—IMPROVEMENT IN CORSETS.

Reissue letters patent No. 6,100, granted H. A. Lyman, October 27, 1874 (Thomson, Langdon & Co., assignees), declared to be valid, in view of the previous state of the art and of the invention exercised in producing its subject-matter.

In equity. This was a suit [by William S. Thomson, Charles H. Langdon, and George C. Batcheller against Solomon L. Jacobs, Abraham Strouse, Rebecca Mayer, and Max Adler], brought under reissue No. 6,100, granted to the assignees, Thomson, Langdon & Co., October 27, 1874, for "improvements in corsets." [The original letters patent No. 97,418 were granted November 30, 1869.] The corset is known to the trade as "Thomson's Glove-Fitting Corset."

George Gifford and J. C. Clayton, for complainants.

Starr & Ruggles, for defendants.

BLATCHFORD, District Judge. I think that the claim of the reissued patent, No. 6,100, covers a patentable improvement, and involved and required invention to arrive at it, in view of the state of the art; that what is embodied in such claim was not a mere change in form, proportions and degree; and that the invertion is not anticipated by any of the earlier articles produced in evidence. As the infringement is conceded, the plaintiffs are entitled to the usual decree with costs.

Decree. This cause having come on to be heard upon the bill of complaint herein, the answer thereto of all the defendants, the replication thereto of the complainants to such answer, and the proofs, oral, documentary, and written, taken and filed in said cause, and having been argued by counsel for the respective parties—Now, therefore, in consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge, and decree, as follows, viz: That the letters patent reissue No. 6,100, granted and issued on the 27th day of October, 1874, to William S. Thomson, Charles H. Langdon, and George C. Batcheller, the complainants herein, as assignees of Henry A. Lyman, for improvements in corsets, being the letters patent referred to in the bill of complaint herein, are good and valid in law. That the said Henry A. Lyman was the first and original inventor and discoverer of the improvements in corsets described and claimed in the said reissued letters patent No. 6,100, and the specification annexed thereto, and that the said William S. Thomson, Charles H. Langdon, and George C. Batcheller, the complainants herein, are now, and ever since the 27th day of October, 1874, have been, the exclusive owners of said reissued letters patent No. 6,100, and of all claims for infringing the same at any time. That the said Solomon L. Jacobs, Abraham Strouse, Rebecca Mayer, and Max Adler, the defendants herein, have infringed upon the said reissued letters patent No. 6,100, and upon the exclusive rights of the complainants under the same—that is to say, by making and selling corsets containing and embodying the

invention, discovery, improvements, and combinations, substantially as set forth and claimed in the aforesaid reissued letters patent No. 6,100. in manner and form as charged in the said bill of complaint. And it is further ordered, adjudged, and decreed, that the complainants do recover of the defendants the profits and gains which the said defendants have received or made, or which have arisen or accrued to them from the infringement of the said reissued letters patent No. 6,100, by the manufacture, use, and sale of corsets, as described and claimed in said reissued letters patent since the 27th day of October, 1874; and also the damages which the complainants have sustained by reason of the said infringement of said reissued letters patent No. 6,100. And it is further ordered, adjudged, and decreed that it be referred to Joseph Gutman, Jr., Esq., of New York City, who is hereby appointed and constituted master of this court pro hac vice, to ascertain, and take and state, and report to the court an account of the number of infringing corsets made, and also the numbers used and sold by the said defendants, and also the gains and profits which the said defendants have received, or which have accrued or arisen to said defendants from infringing the said exclusive rights of the said complainants, by the manufacture, use, or sale of the said improvements patented in the said reissued letters patent No. 6,100; and also to assess, ascertain, and state the amount of the damages which the complainants have sustained by reason of said infringements. And it is further ordered, adjudged, and decreed that the complainants on such accounting have the right to cause an examination of the said defendants, ore tenus or otherwise, and also the production of the books, vouchers, and documents of the said defendants; and that the said defendants attend before the said master, from time to time, within this district, as said master shall direct. And it is also further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against said defendants, restraining them and their agents, clerks, servants, and workmen, and all claiming or holding under or through them, from making, using, or selling, or in any manner disposing of corsets constructed according to or embodying the invention or improvements described and claimed in the said reissued letters patent No. 6,100, pursuant to the prayer of the said bill of complaint. And it is further ordered, adjudged, and decreed that the complainants do recover of the defendants the costs of this suit to be taxed. And it is ordered that the question of increase of damages, and all other questions be reserved until the coming in of the master's report.

THOMSON (MAGNIAC v.). See Case No. 8,957.

Case No. 13,983.

THOMSON et al. v. MAXWELL.

[2 Blatchf. 385.] [1]

Circuit Court, S. D. New York. July 1, 1852.

CUSTOMS DUTIES—APPRAISED VALUE—SWORN INVOICE—MANUFACTURER—PROTEST.

1. Under the 16th section of the tariff act of August 30, 1842 (5 Stat. 563), and the 8th section of the tariff act of July 30, 1846 (9 Stat. 43), it is the duty of a collector to assess duties upon the appraised value of goods imported by their manufacturer, notwithstanding there is an invoice sworn to by their owner. Those sections are not confined to goods imported by a purchaser.[2]

2. Under the Act of February 26, 1845 (5 Stat. 727), it is a condition precedent to a right of action against a collector for the return of duties paid under protest, that the claimant shall, in his protest, point out to the collector, by positive and direct notice, every particular of fact and of law which he relies upon as protecting his goods from the duties demanded.

[Cited in Pierson v. Lawrence, Case No. 11,158; Crowley v. Maxwell, Id. 3,449; Curtis v. Fiedler, 2 Black. (67 U. S.) 481; Davies v. Arthur, Case No. 3,611; Id., 96 U. S. 152; Chung Yune v. Kelly, 14 Fed. 641; Muser v. Robertson, 17 Fed. 502; Herrman v. Robertson, 152 U. S. 525, 14 Sup. Ct. 688.]

3. Where a protest was in these words: "We protest against paying additional duty and penalty on" (describing the goods) "they being appraised too high. We claim to have" (naming the amount) "refunded, being amount paid for additional duty and penalty:" *Held*, that the person making such protest could not, in an action against the collector for the return of the amount so paid, raise any objection to the regularity of the appraisal proceedings.

[Cited in Durand v. Lawrence, Case No. 4,187.]

4. Where a protest is written on an entry, they compose, in effect, one paper, and it is unnecessary to repeat in the protest the description given of the goods in the entry.

5. Where goods were described in the invoice as "plain Indiana squares," "embd. Indiana hdkfs," "emb. Indiana shawls," "embd. handkfs." and "plain do.," with no allusion to the material of which they were composed, and were described in the entry as "worsted and cotton shawls," and were reported by the appraisers as "wool and cotton, and worsted and cotton shawls, suitable for wear," and as "worsted shawls, suitable for wear," and the protest under which duties were paid on them described them simply as "cotton and worsted shawls," and they were subjected by the collector to a duty of thirty per cent.: *Held*, in an action to recover back the excess of duties paid beyond twenty-five per cent., there being no evidence explaining the character of the articles, that they were properly chargeable with thirty per cent.,

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

[2] The reverse of this doctrine was held by the supreme court of the United States, in Belcher v. Lawrason, at the December term, 1858, the opinion of the court being delivered by Mr. Justice Nelson. It was there held by that court, that neither the 16th section of the act of August 30, 1842, nor the 8th section of the act of July 30, 1846, has any application whatever to any goods obtained otherwise than by purchase, but that such goods, in regard both to the mode of appraisement and the penalty for undervaluation, are embraced within the 17th section of the act of August 30, 1842. See 21 How. [62 U. S. 251].

as being "articles worn by men, women or children," and falling within Schedule C. of the tariff act of July 30, 1846 (9 Stat. 44).

6. Where the time of exportation is taken by the appraisers as the time of valuation, and the importer claims that the time of manufacture or production should have been taken, he must make that a ground of protest, and must give evidence to show the incorrectness of the appraisal. Ordinarily, the two periods may properly be treated as the same.

7. Where goods are, on appraisal, valued at more than ten per cent. above the invoice price, they are, nevertheless, not liable to an additional duty of twenty per cent. under the 8th section of the tariff act of July 30, 1846 (9 Stat. 43), if they were manufactured by the importer, or were procured by him in the country of their production otherwise than by purchase.

See Belcher v. Lawrason, 21 How. [62 U. S. 251].

This was an action of assumpsit [by Thomas Thomson and others] against [Hugh Maxwell] the defendant, as collector of the port of New-York, to recover back certain duties and penalties paid by the plaintiffs on two importations of shawls from Liverpool, consigned to them for sale under guaranty by Whitehill & Co., of Paisley, Scotland, the manufacturers and owners of the shawls. The facts were these: On the 8th of September, 1849, four bales of shawls were shipped by the steamer Cambria. Two of the bales, Nos. 255 and 256, were invoiced as containing each 200 "plain woollen shawls;" one bale, No. 257, as containing 144 "plain-shot woollen shawls;" and one bale, No. 258, as containing 100 "woollen tartan long shawls." On the 22d of September, 1849, all four of the bales were entered by the plaintiffs at the custom house in New York as "woollen shawls," at the invoice valuation of £215. 8s. 0d. The public appraisers reported their value to be £263. 16s., with charges, a difference of £48. 8s., or twenty-two per cent. The plaintiffs applied to the collector for an appraisal of the goods by merchant appraisers. That appraisal was made on the 14th of October, 1849, at £258. 16s., and did not diminish the valuation by the public appraisers to within ten per cent. of the invoice valuation. The duties on the appraised value, and a penalty of twenty per cent. thereon, were added at the custom house, and were paid by the plaintiffs under the following protest: "We hereby protest against paying addl. duty and penalty on 255 a 258, being appraised too high. We claim to have $270 70 refunded, being amount paid for addl. and penalty. Thomson, Quick & McIntosh." Two bales of the shawls, Nos. 259 and 260, were imported in the steamer Canada, about the 5th of October, 1849, and were valued on the invoice and entry at £112. 6s. 9d. The public appraisers appraised them as being worth, at the time and place of exportation, £139. 14s., a difference of twenty-four and one quarter per cent. The plaintiffs paid the additional duties, and a penalty of twenty per cent. imposed in consequence of the appraisement, under the following protest: "We also protest against paying addl. duty and penalty, the goods being appraised (259, 260) too high; we claim to have $174 80 refunded." The entry of importations by the Cambria, made by the plaintiffs, included three cases, Nos. 252, 253 and 254, described as "worsted and cotton shawls," which were subjected by the collector to a duty of thirty per cent., and also some cases of "worsted and cotton" goods and some cases of "cotton" goods, which were charged with a duty of only twenty-five per cent. The plaintiffs wrote on the entry: "We hereby protest against the payment of 30 per cent. duty charged on all cotton and worsted shawls contained in this entry, claiming to enter the same at 25 per cent. We pay the amount exacted, in order to get possession of the goods, claiming to have the difference refunded. Thomson, Quick & McIntosh." By a note on the invoice, the appraisers reported the three cases, Nos. 252, 253 and 254, as "wool and cotton, and worsted and cotton shawls, suitable for wear." The invoice description of these three cases was: "plain Indiana squares," with no allusion to the material of which they were composed. The entry of importations by the Canada, made by the plaintiffs, included three cases, Nos. 261, 262 and 263, described as "worsted and cotton shawls." These were subjected to a duty of thirty per cent. The plaintiffs wrote on the entry a protest, the same in language as that on the entry of cases Nos. 252, 253 and 254 by the Cambria. Case No. 261 was described in the invoice as containing "embd. Indiana hdkfs." and "emb. Indiana shawls;" case No. 262 as containing "plain Indiana squares;" and case No. 263 as containing "embd. handkfs." and "plain do.;" and all three were returned by the appraisers as "worsted shawls, suitable for wear." The other facts necessary to an understanding of the case are sufficiently stated in the opinion of the court. At the trial before Betts, J., and a jury, in October, 1851, a verdict was rendered for the plaintiffs for $600, subject to the opinion of the court upon a case to be made, and subject to adjustment at the custom house.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The main proposition urged by the plaintiffs on the question of valuation is, that the invoice, sworn to as required by statute, must be taken as proof of the true value of the goods in the foreign market, until it is disproved by legal evidence produced on the part of the government. The plaintiffs deny that either the appraisement by the official appraisers, or that by the merchant appraisers, amounts to such evidence. We do not deem it necessary to review the reasoning urged in support of

this position, as, in our opinion, the point is covered by express enactments in the tariff laws and by the decision of the supreme court.

It is enacted by the 16th section of the act of August 30, 1842 (5 Stat. 563), that in all cases where there is or shall be imposed any ad valorem rate of duty on any goods, &c., imported into the United States, it shall be the duty of the collector within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof, at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States, &c., to be appraised, estimated and ascertained, &c.; and it shall be the duty of the appraisers, &c., by all reasonable ways and means in their power, to ascertain, estimate and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, &c. The 8th section of the act of July 30, 1846 (9 Stat. 43), re-affirms these directions. That this enactment embraces goods imported by their manufacturer, as well as goods imported by a purchaser, is made manifest by the proviso to the 16th section of the act of 1842, if any doubt might be fairly raised in that respect from the expression, "the time when purchased," used in the enacting clause. But we think that the general and positive language of the act would not be qualified by that expression, so as to be limited to purchasers. The invoice and the owner's affidavit, accordingly, place no impediment in the way of the collector, to prevent his assessing duties upon the appraised valuation, nor can he be required, in the first instance, to produce extraneous evidence contradicting such affidavit or supporting the appraisement. Rankin v. Hoyt, 4 How [45 U. S.] 327.

It is proper to advert to another ground of objection taken to the appraisement, and earnestly insisted on by the plaintiffs' counsel, before stating what, in our judgment, are the controlling considerations in this case. That objection is, that the appraisement is nugatory and void: (1) Because the collector acquired no authority, under the facts in the case, to order it. (2) Because he in fact did not direct it to be made. (3) Because he did not designate, as required by law, one out of every twenty packages to be appraised. (4) Because the official appraisers, in acting in the matter, did not all of them act together. (5) Because no one of them ever saw the goods which they appraised. (6) Because neither the official appraisers nor the merchant appraisers were legally qualified, the proper oath not having been administered to them. (7) Because the appraisal was not made at the proper place. A carefully prepared argument was presented to the court in maintenance of these various suggestions against the validity of the appraisement. We do not discuss the correctness of these positions or of the objection itself, because, in our opinion, the plaintiffs have not placed themselves in a situation which entitles them to demand the judgment of the court upon the correctness of either.

This action is brought against the defendant to recover back moneys received by him in his official character, for the United States, which have been paid into the treasury. Upon general principles of law, the action would not be maintainable unless notice had been given to the defendant, before such payment over was made by him, that he had no authority to exact the duties and that the plaintiffs would claim their return. Elliott v. Swartwout, 10 Pet. [35 U. S.] 137; Bend v. Hoyt, 13 Pet. [38 U. S.] 263; Aldridge v. Williams, 3 How. [44 U. S.] 9.

Congress, by the act of February 26, 1845, (5 Stat. 727), regulated the rights of the merchant and those of the collector in this respect, and, after recognizing the liability of collectors to be sued for duties illegally exacted, after the payment of such duties into the treasury, enacted as follows: "nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." These provisions are conditional to a right of action on the part of an importer, a proper protest in the case being the basis of the action and a fundamental pre-requisite to a recovery. The courts exact a strict compliance with these conditions. Chief Justice Taney says, that the words requiring the claimant to set forth distinctly and specifically the grounds of his objection to the demand of duties, are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of the law, and that the object of the provision is, to prevent a party from taking advantage of objections when it is too late to correct them. Mason v. Kane [Case No. 9,241], Circuit Court, Maryland district, April term, 1851.

We think there is a manifest propriety in adhering closely to the provisions of this law. It is intended by congress to settle all uncertainty as to the manner in which collectors can be made responsible in actions for duties collected under protest, and the motive to its enactment seems palpably to have been, to take from parties the power of imposing upon collectors damages and costs by personal suits in respect to their official transactions, unless they were plainly and directly apprised, at the time they received the duties, what objections the claimant had to the payment. It is most reasonable that a public officer should be put on his guard against a mistake or error in the exercise of his functions prejudicially to another, who is cognizant of the error and intends to hold him responsible for it, by an explicit notice

from such person to him of his error in fact or in law. He might thus at once correct the wrong, without delay or expense to either party. The great number of prosecutions against the collector, with which the dockets of this court have been crowded of late years, founded upon claims for return duties, admonishes the court that it is important to the maintenance of uniformity in custom house transactions, as well as to the interests of the importers and of the government, that the precautions wisely enacted in this law should be rigidly enforced in every instance.

The party who offers his goods for entry has the means of ascertaining at once whether any well-founded objections exist for contesting the legality of the rate of duties demanded at the custom house, and, if he neglects to lay those objections before the collector, or omits to make the inquiries necessary to his own information on the subject, it is right that the loss resulting from his inattention or remissness should be borne exclusively by himself. We understand the act of 1845 to be imperative in its character. But, independently of the solicitude of the court to execute faithfully all the directions of a public law, we are convinced that, on general principles, a peremptory law of that character will prove to be not less salutary and important to the navigation and trade of the country than to the fiscal operations of the government. We shall persevere in applying the rule adopted in the present case to all others coming before us for judgment, and in holding that the claimant must, in his protest, point out to the collector, by positive and direct notice, every particular of fact and of law which he relies upon as protecting his goods from the payment demanded.

Testing by this rule the protests put in by the claimants in this case, it is obvious that they afford no indication to the collector that he or the other officers of the customs had committed any irregularity in the mode adopted for ascertaining or imposing the duties demanded. We accordingly lay out of view all the allegations made on the argument respecting the regularity of the proceedings at the custom house preparatory to an appraisal of the goods, and the competency of the oath administered to the appraisers, and the necessity that all the appraisers should act together in examining the goods, and the sufficiency of the report made by them to the collector, or of his directions to them, or of their memoranda upon the invoices or the entries. The protests specify none of these particulars, and the claimants must be held to be debarred of all objections which are not distinctly and specifically pointed out in the protests or made certain by the papers which accompany them. Had the collector been notified that an improper oath had been administered to the appraisers, or that they had been guilty of irregularities in making the appraisement, or of any lack of form or substance in the proceedings in the custom house, it would have been in his power, and we are to presume it would have been his desire, to rectify them at once, and thus save all the delay and expense of a judicial investigation into the matter. We are persuaded the purpose of the law cannot be sustained without holding to this interpretation and application of its provisions. We accordingly hold that this branch of the case, which was most strenuously urged upon the argument, cannot be made a ground of contestation on the pleadings and proofs as they are presented. The points and objections taken in this behalf are, therefore, overruled.

The protests in this case are written upon the entries, and, the two papers being thus before the collector, the plaintiffs are entitled to avail themselves of the descriptions given of the goods in the entries, the same as if those descriptions were repeated in the protests—the protest and the entry composing, in effect, in respect to the notice to the collector, one paper. This point has been repeatedly before this court, and has been uniformly ruled in this way.

No evidence was given on the trial in respect to the character of the "worsted and cotton shawls" imported by the Cambria, nor any reason shown why they should be subject to thirty per cent. duty rather than twenty-five per cent., other than the note or report of the appraisers on the invoice; and the court has nothing to guide its judgment, except to compare the description of the goods with the provisions of the tariff act, and thus ascertain whether the statute determines the question.

Articles liable to a duty of thirty per cent. are enumerated under Schedule C., in the 11th section of the act of July 30, 1846. In this schedule are classed: "Articles worn by men, women or children, of whatever material composed, made up, or made wholly or in part by hand;" "manufactures of cotton" "or worsted, if embroidered or tamboured, in the loom or otherwise, by machinery or with the needle or other process." Articles subject to a duty of twenty-five per cent. are classed under Schedule D.; in which list are enumerated "cotton laces, cotton insertings, cotton trimming laces, cotton laces and braids, manufactures composed wholly of cotton, not otherwise provided for." The "worsted and cotton shawls," imported by the Cambria, do not, by the name of "plain Indiana squares," fall under any specific denomination embraced within either Schedule C. or Schedule D. The entry of them as "worsted and cotton shawls" restrains the plaintiffs from claiming that they should be classed with any of the descriptions of cotton manufactures enumerated under Schedule D. If they were "embroidered" or "tamboured," they are specifically provided for in Schedule C.; and they may very fairly be

denominated "articles worn by men, women or children," and thus be placed under the thirty per cent. rate of duty.

Acting upon the protest, invoice and entry, without any evidence explaining particularly the character of these articles, we must regard the classification of them made at the custom house as correct, and must hold that a duty of thirty per cent. was properly imposed on them.

The "worsted and cotton shawls" imported by the Canada have been entered by the plaintiffs under that designation, and, as they furnish no evidence that the articles are not those "worn by men, women or children," or that any specification in Schedule D. applies to them, we think the collector properly subjected them to a duty of thirty per cent.

We are, accordingly, of opinion, that the plaintiffs have shown no ground for a recovery against the defendant for any excess of duties exacted from them beyond what the law authorized.

As to the woollen shawls, the appraisers took the period of their exportation as that of the valuation, and no evidence is adduced showing an over-appreciation of them on that basis. The plaintiffs insisted, on the argument, that the time when and the place where the goods were manufactured or produced must be adopted as governing their prices. But, admitting the law to be so, the plaintiffs have not made that a ground of protest, and they fail to prove that Paisley was the chief place or market of the country of exportation, or what was the real time of manufacture or production, or whether there was any difference of prices between the time of manufacture or production and the time of exportation. In ordinary usage, the two nearly coincide, or approximate so closely as to be properly treated as the same. It has already been shown that the invoices themselves do not countervail the appraisements, and the plaintiffs give no evidence that the invoices were dated or made up prior to the times of exportation, so as to be entitled to appeal to the invoices as indicating that the goods were purchased or otherwise procured at earlier dates. Therefore, no foundatior is laid for questioning the justness of the appraisals, and they must stand as fixing the dutiable value of the woollen shawls

We think the collector had no authority in law to impose an additional duty of twenty per cent. on the prices as so raised. The goods were owned and imported by the manufacturer, and were not obtained at the place of exportation, or in a foreign country, by purchase. In the case of Greely v. Thompson, 10 How. [51 U. S.] 225, this point was directly determined by the supreme court, and it was settled by that case, that, under the provisions of the 8th section of the tariff act of July 30th, 1846 (9 Stat. 43), the importer is not liable to the additional duty of twenty per cent. when the goods were manufactured by him, or were procured by him in the country of their production otherwise than by purchase, although on appraisement their prices be advanced more than ten per cent. above the invoice prices. Accordingly, the plaintiffs are entitled to recover $196 60, the penalty paid on the invoice by the Cambria, with interest from October 6th, 1849, and $135 20, the penalty paid on the invoice by the Canada, with interest from October 13th, 1849; and the defendant is discharged from all the demands of the plaintiffs for the re-payment of duties on the appraised valuations. Judgment accordingly.

Case No. 13,984.

THOMSON et al. v. The NANNY.

FERGUSON et al. v. The JACK PARK.

[Bee. 217.] [1]

District Court, D. South Carolina. 1805.

ADMIRALTY — JURISDICTION — SEAMEN'S WAGES — FOREIGN VESSEL.

British seamen, belonging to two vessels in the harbour of Charleston apply to this court for a discharge, and wages, though the voyage is not ended. Court refused to interfere, (without deciding against its jurisdiction in all cases) principally because these men might have had redress before a tribunal of their own country in Surinam.

[Cited in The Jerusalem, Case No. 7,293; Davis v. Leslie, Id. 3,639; Ex parte Newman, 14 Wall. (81 U. S.) 169; The Topsy, 44 Fed. 635.]

[These were libels for wages by John Thomson and others against the ship Nanny, John Ainsworth, master, and Frederic Ferguson and others against the Jack Park, James Remsen, master.]

BEE, District Judge. The circumstances of these two cases are so nearly similar that all the arguments applicable to either apply to both. I shall, therefore, consider them together in this decree. The libel states that on the 17th September, 1804, the parties libellant were shipped in the port of Liverpool on board the above-named vessels, (being letters of marque) to proceed from thence to the coast of Africa; thence to a port or ports in the West Indies; thence to a port in the United States; and thence back to Liverpool, where the voyage was to end, at the respective wages mentioned in an exhibit filed with the libels. That they performed their duty as seamen on board, until their arrival in the port of Charleston on 22d June last, having stopped at St. Thomas and Surinam. The libel also states that on the voyage from Africa to the West Indies, the captains of these two armed vessels, confederating together and with their chief mates, pursued a system of plunder and piracy on the high seas, and on the 12th May last boarded a Portuguese ship and plundered her of sundry articles

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

stated in the libel; and on the 14th May following, pursued the same conduct towards another Portuguese ship. The libels also charge, that during the voyage the seamen were unnecessarily put to short allowance, and one of them illegally confined. That, on their arrival in Charleston, the libellants, as well from a sense of moral duty, as from a fear of being tried as pirates and partakers of the guilt of the unlawful acts aforesaid, instituted prosecutions against the captains and mates in the circuit court of the United States, and have been bound under recognizance to appear and prosecute for the offences aforesaid; and, therefore, that it would be improper for them to proceed to sea in the said vessel, because they could not return in time to fulfil their recognizance, and because it would subject them to the danger of being taken as pirates: as the former conduct of the said captains and mates made it probable that they would proceed in their career of plunder, to which they did not desire to be instrumental: because also the libellants would probably be treated inhumanly, and prevented thereby from proceeding in said prosecution. For these reasons, they think themselves entitled to their discharge. from said vessels, and to payment of their wages now due.

To these libels, claims and answers have been put in by J. Ainsworth and J. Remsen, subjects of the king of Great Britain, and commanders, respectively, of the ships Nanny and Jack Park, duly commissioned, armed and equipped as letters of marque and private ships of war. These answers admit the several matters stated in the libels, as to the nature of the voyage and terms of enlistment. They also acknowledge the boarding, at sea, of two Portuguese vessels, and taking from them sundry articles of which they were in want, and which they thought they were entitled to take, on paying for the same, agreeably to the regulations of certain acts of the British parliament; and, so far from meaning to act illegally, they gave their names and the names of their vessels to the captains of said Portuguese vessels, with every particular relative thereto. A list of the articles taken by them is given in their answers; and they affirm that if any thing was taken, not mentioned in said list, it must have been taken by some of the boat's crew, without their consent or knowledge, or that of their mates. The answers also admit the putting to short allowance, from necessity; and the confining of some of the men, for mutinous conduct. The prosecution of the voyage, and arrival in Charleston, as stated in the libel, are also admitted. The claimants then conclude with a plea to the jurisdiction of this court, alleging that the said ships are British letters of marque, and the libellants subjects of his Britannic majesty; that their claims to wages are solely cognizable in British courts: and they also plead in bar the treaty of amity and commerce between the United States, and his Britannic majesty, dated at London, 19th November, 1794, the 25th article of which they desire particularly to rely on.

In arguing the case, it was contended, in support of the plea to the jurisdiction, that the simple question was whether, the vessels being foreign, the seamen foreigners, and the voyage not ended, this plea should not be maintained. That the vessels were entitled, by treaty, to protection in the courts of the United States, as being private vessels of war. That every country has its own laws and regulations in military matters, with which this court can no more interfere than with its laws of revenue. That if this court should interfere to break up the voyage and cruize of these vessels, it would do so in violation of our neutrality, and in breach of our treaty with Great Britain. That, as an act of congress interdicted the parties from recruiting in our ports, these vessels could obtain no seamen here, and would be altogether destitute of their crews, if the libellants should succeed in obtaining their discharge; that freight being the mother of wages, none can be demanded until the voyage be ended, and the freight earned; that the articles are a solemn contract between the parties, which, not a law of congress, much less an act of this court, can dissolve; that the libellants, became bound to prosecute by their own voluntary act; that the information should have been given at Surinam, where a British court could have determined the matter without delay; that the seamen postponed their complaint merely to set up claims which, by desertion, they have forfeited.

On the part of the libellants it was contended, that there were two classes of seamen, parties to the suit; 1st, Those who claimed their discharge on account of cruel treatment. 2d, Those who claim a discharge by operation of law. It was argued that the voyage was ended by the act of the captain, and that this court has jurisdiction, and will extend protection to all who claim it. That by the laws of England, foreigners arriving there must be protected in all their courts, which will take notice of the lex loci where the foreigner belongs, and give redress accordingly. Contracts bearing interest of 20 per cent. had been enforced in England, because such was the legal interest of the place where the contract was made. That the voyage being ended, and the men discharged by operation of law, they are entitled to wages. That from the peculiar situation of seamen their remedy is chiefly in rem; and two cases were quoted (Canizares v. The Santissima Trinidad [Case No. 2,383], and Moran v. Baudin [Id. 9,785]) to shew that courts of admiralty (contrary to the doctrine of Sir William Scott) would and did exercise this jurisdiction. The argument was closed by observing that the recognizance to appear and prosecute was virtually a discharge, whether wages were due, or not; though the one was a necessary consequence of the other.

In reply, two cases from Robinson's Re-

ports (1 C. Rob. Adm. 271, and 4 C. Rob. Adm. 240, Eng. Ed.) were relied on to shew that a neutral court cannot exercise jurisdiction over foreign seamen and vessels, where the voyage is not ended; or, admitting that they have a concurrent jurisdiction, they are not bound to exercise it. Three facts, it was said, were evident from the pleadings: 1st, That the vessels were British; 2d, that the seamen were also British; 3d, that the vessels were armed, and by their articles obliged to return to Great Britain. That the libellants, therefore, have no claim upon the jurisdiction of the courts of this country, which may be exercised or not, as those courts shall see fit. That seamen's wages were not originally of admiralty jurisdiction, however salutary might have been the stretch of power that made them so. That the recognizance neither does. nor ought to, operate as a discharge; since, if it did, a mere affidavit of an assault would be sufficient to destroy a voyage, by releasing the seamen from their articles, to the infinite injury, if not total annihilation of commerce. In answer to the cases from Robinson, it was contended that seamen's wages were as much determinable by the law of nations, as salvage. On a former occasion, about seven years ago, I determined a question on a plea to the jurisdiction of this court, in a case somewhat similar to this; since which I have declined interfering between foreigners, respecting seamen's wages, from a conviction that, unless under very particular circumstances, it was proper to refer them to the tribunals of their own country, where the lex loci being better understood, more complete justice could be done than in a foreign court, at a distance, and not thoroughly acquainted with the rules obtaining in the country of the parties. I stated my doubts on this point at the commencement of this cause, declaring at the same time my wish to have the matter reargued. I have attended to the arguments and observations, on both sides, with satisfaction, and I proceed to deliver my decree after much reflection, and a full consideration of all that has been said.

Mariner's wages were not always recoverable in the courts of civil law, even amongst maritime nations; and in England, it was after long contests between the judges of these courts and those of the courts of common law, that the latter yielded the point. Two reasons operated to produce the concession: 1st, That seamen could, in the civil law courts, join in one suit; 2d, that, in these courts they could obtain summary justice, which, in those of common law, was denied by the nature of the proceedings there. Nevertheless, a concurrent jurisdiction is exercised by the latter. Two cases from Robinson's Admiralty Reports were produced, and much relied on by defendants' counsel, relative to the jurisdiction of British courts of admiralty, respecting foreigners. Two cases [Cases Nos. 2,383 and 9,785] were relied upon by the counsel opposed to them, as being directly hostile to the general doctrine. I have carefully examined these four cases, but do not see the variance contended for. In the case from 1 C. Rob. Adm. 251, Sir William Scott overruled the plea to the jurisdiction of the court, partly because it was not a case in which foreigners alone were concerned, and partly because it was a question of salvage, which, he says, is peculiarly referable to the jus gentium, and materially different from a mariner's contract which is created by the particular institutions of each country, and must be applied, construed and explained by its own particular rules. He goes on to say, "There might be good reason, therefore, for this court to refuse its interference in such cases, remitting them to their own domestic forum." He adds: "Between parties, all foreigners, if there were the slightest disinclination to submit to the jurisdiction, I should be inclined not to interfere." He desires, however, not to be understood as delivering a settled opinion, although it involved a case of salvage. In the other case from 4 C. Rob. Adm. 240, which respected the possession of a vessel, (but involved property too) the judge says that it was accompanied by a letter from the American minister, stating that the parties were all Americans, and willing to submit to the jurisdiction of the court. He was, therefore, induced to entertain the suit, which, without such application from a foreign minister, and such consent of parties, he should by no means have been willing to do, having no disposition to interfere in the disputes of foreigners. In the first case quoted (Canizares v. The Santissima Trinidad [supra]), two separate causes of suit are contained; one respecting an hypothecation, made that the vessel might be enabled to proceed from Havanna to Philadelphia; the other for wages on board said vessel from Havanna to Philadelphia, as a pilot. The voyage therefore was ended, on her arrival at Philadelphia, as to both these causes of action, and the court could not decline the jurisdiction. This case, therefore, does not differ from the principles laid down by Sir William Scott. The other case (Moran v. Baudin [supra]) was that of a vessel and crew wholly French. The suit was brought on an engagement for a voyage certain, from which there had been a total deviation for upwards of two years. France and America were then allied, and no consular convention existed. The prayer was for wages and a discharge, and no plea was made to the jurisdiction. Under these circumstances the court took cognizance of the cause. But from this solitary case nothing can be inferred to impugn the doctrine laid down by Sir William Scott, strengthened as it is by the two cases from 3 Ves. 447, and 4 Ves. 577, for though this question did not expressly come before the court of chancery,

yet the determination in both the last mentioned cases, shews the reluctance of that court to interfere between foreigners. In 2 Brown, Civ. & Adm. Law, 119, the author says: "It doth not seem possible to draw an exact line about the jurisdiction which this court will exercise as to foreigners. It must depend on the nature of the question; if it arises from the particular institutions of any country, to be applied, construed, and explained by the particular rules of that country, it will not be entertained. Such are questions arising upon the contracts of mariners, which will be remitted to their own forum; because the contract for wages cannot be the subject of a suit, till the return of the vessel, or end of the voyage. But (he adds) where the question is one arising out of the jus gentium, to be determined by sound discretion, acting upon general principles, the court will hold plea of it. Cases of salvage, &c. and suits on bottomry have often been entertained in this court between an Englishman and foreigner, and between two foreigners."

Upon mature consideration of these cases, and of the reasoning thereon, I am of the opinion which I stated at the opening of the cause: "that this court should be very cautious in exercising jurisdiction as to foreigners, unless under peculiar circumstances." At the same time, I would not be understood as relinquishing jurisdiction where it may appear proper or necessary to prevent a failure of justice. In the case before me, it is admitted on all hands, that the voyage is not ended, and that, by the contract, no wages are due till then. But it is contended that the seamen are discharged by operation of law. If so, this court cannot prevent it; but it will not, by any act of its own, impair the obligation of the contract. If an act of piracy has been committed, and if the recognizance to prosecute is a legal discharge, another consideration arises, namely, that in piracy all are principals; and where (says Molloy) a letter of marque commits piracy, it brings on a forfeiture of the ship, and the wages are also lost.

Upon the whole, although I do not say that this court has no jurisdiction in matters respecting foreign seamen, yet I think it ought not to exercise any in the case now before it, but remit the parties to their own domestic forum. The libellants cannot complain at being thus turned over to their own courts; for they might have applied for redress at Surinam, where such courts exist. Having neglected to do so, they must blame themselves.

I order and decree that the libel be dismissed, but without costs; for suits heretofore maintained, in cases apparently similar to this, might well mislead the parties in the present case.

THOMSON (WATERMAN v.). See Case No. 17,260.

THOMSON (WEAVER v.). See Case No. 17,311.

Case No. 13,985.

THOMSON et al. v. UNITED STATES.

The PATRIOT.

[1 Brock. 407.] [1]

Circuit Court, D. Virginia. May Term, 1820.

NON-INTERCOURSE — ARRIVAL WITHIN UNITED STATES—TAKING PILOT—DECLARATION OF WAR—EFFECT ON ALIEN ENEMY.

1. Under the third section of the act of congress, passed on the 1st of March, 1809 [2 Stat. 528], "to interdict the commercial intercourse between the United States, and Great Britain, and France, and for other purposes," commonly called the non-intercourse law; which was re-enacted "against Great Britain, her colonies, and dependencies," on the 2d of March, 1811 [2 Stat. 651], the forfeiture of the vessel and cargo attached, in accordance both with the letter and spirit of the law, the instant that a British vessel came, voluntarily, within the limits of the United States. And the arrival of the vessel within the Chesapeake Bay, is an "arrival within the limits of the United States," in the sense of the act.

[Cited in The Sam Slick, Case No. 12,282.]

2. The allegation, admitting it be true, that the owner was advised to take a pilot on board, because a storm might be expected, (the weather being fair at the time,) is not sufficient to bring the vessel within the exception of the law, viz., vessels "forced in by distress, or by the dangers of the sea."

3. The non-intercourse law, was not repealed by the declaration of war with Great Britain, except so far as its provisions were inconsistent with a state of war, and were annulled by the paramount operation of the laws of war. The laws of war condemn the vessel, but do not reach the cargo. The municipal law condemned both vessel and cargo. The non-intercourse law, therefore, was not entirely abrogated by the declaration of war, but was left to operate in full force on the cargo

4. Where a subject of a foreign government, at peace with the United States, is employed by American citizens, as agent and supercargo, to carry a cargo to a foreign port, dispose of it there, and bring back to the United States, a return cargo, consisting of articles interdicted by the municipal law; and before the arrival of the agent, with the return cargo, within the United States, war is declared between the United States, and the government of which the agent and supercargo is a subject; and after such declaration of war, the agent and supercargo, brings the vessel, (the property of the agent,) with her cargo, within the limits of the United States; the cargo is not exempted by these circumstances, from the operation of the municipal law, interdicting its introduction, under pain of forfeiture. Although the agent, at the time of the arrival of the vessel and cargo, within the United States, was an alien enemy, and although war, if it does not dissolve, at least suspends, all contracts between enemies, and enables the belligerent to annul them; although the cargo was brought within the United States, by the enemy agent, without the consent of the American proprietors' still, the enemy character of the agent, acting under his original authority, cannot exempt his employers from the penalty attached, by law, to the offence so committed.

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

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

This was a libel against the schooner Patriot, a British vessel, and her cargo, owned partly by a British subject, and partly by citizens of the United States, which arrived in the Chesapeake Bay, in June 1812, three days after the declaration of war, between the United States and Great Britain, from the island of Guadaloupe, a British colony, contrary to the several acts of congress, to interdict the commercial intercourse between the United States and Great Britain, her colonies and dependencies. The district court of the United States at Norfolk, condemned the vessel and her cargo [case unreported], and from this decree, the claimants appealed to this court.

MARSHALL, Circuit Justice. The schooner Patriot, a British vessel, then lying in the port of Norfolk, was purchased in February 1812, by Oswald Lawson, a British subject, then, and for some time before, a resident of the town of Norfolk. This purchase was made by Lawson, at the instance of Henry Thomson, and Robert Dixon, citizens of the United States, whose object was, a mercantile voyage to the West Indies, and who advanced the whole purchase-money, and took a bottomry bond, as security for the repayment thereof. The schooner sailed for the West Indies in Feb. 1812, with a cargo owned by Thomson & Dixon, which was placed under the control of Oswald Lawson, as supercargo. He sold his cargo in the West Indies, and took on board at Guadaloupe, a return cargo, consisting of sugars, belonging chiefly to Thomson & Dixon, with which he sailed from Guadaloupe in May 1812, bound to Halifax, in Nova Scotia, but with a determination to lie off the capes of Virginia, until explicit instructions should be received from Thomson, one of the owners of the cargo, residing in Norfolk. She arrived off the capes of Virginia in June, immediately after the declaration of war was known in Norfolk. Lawson, the supercargo and owner of the vessel, being ignorant of that event, despatched the mate with a letter of advice to Thomson, and determined to await the return of his messenger off the coast. In this interval, however, he entered the capes, but sailed out of them again, without coming to anchor. The mate never returned, he being seized in Norfolk, as a prisoner of war. Two days after the mate had been landed, while the Patriot was lying off on the coast, about ten miles from land, and about forty south of the capes, she fell in with a pilot boat, and took a pilot on board. The supercargo says, that he at first declined taking a pilot on board, as the vessel was not bound inward, but was persuaded by the pilot to do so, who represented the probability of an approaching storm from the coast. To avoid this storm, he determined to wait within the capes for instructions. The pilot taken on board, who was an apprentice of the owner of the boat, denies that such advice was given. The vessel was brought within the capes, with the knowledge of Lawson, the owner and supercargo. On its being known in Norfolk, that a British vessel was off the capes, the revenue cutter was sent to take her, and fell in with her, about three miles within the capes, in the road leading to Lynhaven Bay, and also to Hampton Roads. She was brought into Norfolk and libelled. The first allegation of the libel is, that she was a British schooner, which had come within the limits and territories of the United States of America, having on board a cargo of the growth, &c., of a dependency of Great Britain, to wit, of the island of Guadaloupe. The second allegation is, that the cargo was imported into the United States, contrary to the true intent and meaning of the acts of congress. The third charge alleges, that the cargo was taken on board, for the purpose of being imported into the United States, with the knowledge of the owner.

Before entering into the consideration of the arguments belonging to the cause, it may not be altogether improper to notice some preliminary observations, which were made on the union of the prize jurisdiction, with that over municipal forfeitures, in the courts of the United States. As this union is not the act of the court, the only remark which will be made respecting it, is, that in this case, it can have no possible operation on the claimants, unless it be one which is beneficial to them. By mingling the proceedings, ship papers, which were obtained under the practice in prize causes, might be offered on a prosecution for a municipal forfeiture. How far the use of such papers might be allowed, is a question which will be decided, when the case occurs. In this case, those papers are not offered. Having been seized by the officers of the United States, the owners are excused for their non-production, and the voyage is admitted to be, according to their own statement of it. The seizure of the ship's papers, therefore, is either unimportant in this case, or an advantage to the claimants. The forfeiture of the vessel and cargo, is claimed under the third section of the act, "to interdict the commercial intercourse between the United States, and Great Britain, and France, and for other purposes," which was passed on the 1st of March, 1809, and was re-enacted "against Great Britain, her colonies, and dependencies," on the 2d of March, 1811. 2 Story's Laws, p. 1115, c. 91, § 3 [2 Stat. 529, c. 24] and 2 Story's Laws, p. 1187, c. 96 [2 Stat. 651, c. 29]. By the third section of the act of 1809, the entrance into the harbours and waters of the United States, is interdicted to all ships or other vessels, sailing under the flag of Great Britain, or France, or owned, in whole or in part, by any subject or citizen of either. And if any such vessel shall "arrive, either with or

without a cargo, within the limits of the United States, or of the territories thereof, such ship or vessel, together with the cargo, if any, which shall be found on board, shall be forfeited," &c. Under this section the Patriot, which was a British vessel, and her cargo, part of which belonged to citizens of the United States, were condemned in the district court.

The claimants have appeared, and contend that this sentence is erroneous; because,

1st. The Patriot had not arrived within the limits of the United States, at the time when she was seized by the revenue cutter. The term "arrival," when applied to a vessel, is said to be equivalent to the term "importation," when applied to goods; and a vessel cannot be properly said to have arrived, within the meaning of the act, whose cargo might not, with equal propriety, be said to be imported. Without denying or affirming that in the laws of congress, the term "importation," when applied to a cargo, is precisely equivalent to the term "arrival," when applied to a vessel, I will inquire, whether the meaning of the word itself be in any manner ambiguous. "To arrive" is a neuter verb, which, when applied to an object moving from place to place, designates the fact of "coming to" or "reaching" one place from another, or of coming to or reaching a place by travelling, or moving towards it. If the place be designated, then the object which reaches that place has arrived at it. A person who is coming to Richmond, has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate destination, or the end of his journey. A person going from Richmond to Norfolk, by water, arrives within Hampton Roads, when he reaches that place; or, if he diverges from the direct course, he arrives in Petersburg, when he enters that town. This is, I believe, the universal understanding of the term. Thus, the duty law requires, that the master of every vessel bound to Bermuda Hundred, or City Point, shall, on his arrival in Hampton Roads, or at Sewall's Point, deposit his manifest with the collector of Norfolk, or of Hampton. It also requires, that the master of any vessel, bound to any port of the United States, shall, on his arrival within four leagues of the coast, upon demand, produce his manifest, in writing, to any officer of the customs who shall first come on board. No person can doubt, that in the first case, the vessel bound to City Point, has arrived in Hampton Roads, when she enters the Roads; and that a vessel bound to any port of the United States, say to Boston, has arrived within four leagues of the coast, when she comes within that distance of land. It would be useless to multiply quotations on this point. The literal sense of the word seems too plain for controversy. When the law enacts, that a British vessel, which arrives within the limits of the United States shall be forfeited, the forfeiture attaches, according to its letter, the instant that a vessel comes, voluntarily, within those limits. Now, whatever doubt may exist respecting the application of this term to any part of the open sea, no doubt, I believe, has ever been suggested respecting the Chesapeake Bay. That bay is clearly within the limits of the United States; and the forfeiture, under the letter of the act, is as complete as if it had attached, by the words, on her arrival within the Chesapeake Bay. Is the spirit of the law more favourable to the claim than its letter? By the spirit of the law, I understand, the intention of the legislature, to be collected from the general language of the act, the scope of its provisions, and the objects to be attained.

The object of this section cannot be doubted. It is to exclude all vessels owned by British subjects, from the waters of the United States. Its language conveys this intention, and is obviously calculated to carry it into full effect. The other sections of the law, which are designed to prohibit all intercourse with Great Britain, and to exclude all British goods, show a rigorous determination on this whole subject, which forbids the suspicion that the intention of the legislature, or in other words, the spirit of the law, is more favourable to the claimants than its letter. If this be the object of the act, can we doubt that it would have been completely defeated by allowing British vessels to come unmolested within the Chesapeake, and the other bays of the United States? If the Patriot might enter the Chesapeake with impunity, where is the line drawn, or who has drawn it, which she might not pass? Might she not pass the mouth of the James, the York, the Rappahannock, or the Potomac? Are any of these points more certainly within the limits of the United States, than this middle ground within the capes? And if British vessels, laden with British goods, might with impunity lie within the Chesapeake, and the other bays of the United States, what would become of the non-intercourse act? The Patriot being completely within the enacting clause, it is scarcely necessary to say that she has not brought herself within the exception. She was not "forced in by distress, or by the dangers of the sea." The only allegation which looks towards this subject is, that the owner was advised to take a pilot on board, because a storm might be expected. No storm had commenced. All was fair. But the pilot said one might be expected. Even this is denied by the pilot who was put on board. But, admitting the allegation to be true in its utmost extent, can this imagined fear, this apprehension of uncertain danger, satisfy the words, "forced in by the dangers of the sea?" If they may, language seems to have lost its use, and I am persuaded that non-intercourse laws would do very little good

or harm.[2] I think, then, it cannot be doubted, that the Patriot, being stated in the claim to have belonged to a British subject, comes within the third section of the act. This would be my opinion, were it a case of the first impression. But the point is, I think, decided in The Penobscot v. U. S., 7 Cranch [11 U. S.] 356; 2 Pet. Cond. R. 528.

2d. The second point made for the claimants is, that the non-intercourse act of 1809, was not re-enacted by the act of March 2d, 1811, so far as respected British vessels. Although the third section of that act is expressly re-enacted, yet its re-enactment is limited. It is to be carried into effect, "against Great Britain, her colonies, and dependencies." So much of the act, then, as relates merely to British vessels, has been, it is said, permitted to expire. This strict exposition of the words is the more to be insisted on, because the law is highly penal. Let this argument be examined. The original act respected equally the vessels of France and Britain, and articles of their growth, produce, or manufacture. Its object was to interdict the entrance into the waters of the United States, to the vessels of both nations, and to forbid all commercial intercourse with either of them. The 1st and 2d sections of the act, relate solely to national ships. The 3d section is confined to vessels owned, wholly, or in part, by the subjects of Great Britain or of France. The 4th, 5th, and other sections, relate to the dominions, &c. of the two countries, and to articles which are the growth, produce, or manufacture of either. They also contain provisions, calculated to secure the exclusion of those articles from the United States. After making a painful experiment of the restrictive system against both nations, the law was permitted to expire, and the policy of the United States was in some degree varied. An act was passed on the 1st of May, 1810 [2 Stat. 605], promising, that if either belligerent would so revoke or modify its edicts, that they should cease to violate the neutral commerce of the United States, the sections of the non-intercourse law, which have been recapitulated, should, three months thereafter, be "revived, and have full force and effect, so far as relates to the dominions, colonies, and dependencies, and to the articles, the growth, produce, or manufacture of the dominions, colonies, and dependencies, of the nation refusing or neglecting to revoke, or modify, her edicts, in the manner aforesaid." The president having issued his proclamation, on the 2d of November, 1810, announcing, as a fact, that the decrees of France were revoked, as required by the act of the 1st of May preceding, congress, on the 2d of March, 1811, passed the act under which the Patriot and her cargo have been condemned. The case depends on the question, whether the 3d section is re-enacted so far as respects British vessels. The language of the law, certainly, does not import a complete re-enactment of the whole of those sections. They are in terms re-enacted, "against Great Britain, her colonies, and dependencies." The question, whether these words comprehend the interdiction of our waters, to vessels owned by British subjects, is undoubtedly open for argument, and for consideration. In deciding it, we must search by legitimate means for the intention of the legislature, and be guided by that intention. Was it the intention of the legislature to revive the whole act, so far as it respected Great Britain, with, perhaps, the exception of its territorial operation, which may be created by omitting its provision respecting her possessions? Or only to revive those parts of the act, which relate exclusively to those breaches of it, which are connected with territory? Such, for example, as importing a cargo from "Great Britain, her colonies, or dependencies"? That the act of 1809 is not revived generally, is satisfactorily accounted for, when we recollect that it was originally directed against both Great Britain and France, and that the legislature designed to re-enact it against Great Britain only. If we advert to this fact, and recollect the history of the times, we shall be but little inclined to the opinion, that congress could have intended to leave our ports open to British vessels, when all commercial intercourse between the two countries was prohibited. It seems impossible to assign a motive for this particular relaxation. The policy of the United States, was directed with at least as much earnestness against the navigation, as against the manufactures, of Great Britain. But what seems conclusive on this point is, that the section is expressly revived, and yet contains not one word which relates to the territories of Great Britain, its colonies, or dependencies. The section is limited to ships owned wholly or in part by British subjects. Consequently, it applies to those vessels or to nothing. The legislature might have revived the 3d section only. Had this been done, could it have been said that it was not revived as to vessels, because it was said to be revived against Great Britain, her colonies, and dependencies? Not a syllable in the section relates to colonies and dependencies; and not a syllable to Great Britain, except the prohibition to her vessels. To have said in that case, that the section was not revived as to vessels, would have been to ascribe to the legislature a declaration, that a particu-

[2] The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well grounded apprehension of the loss of the vessel and cargo, or of the lives of the crew. It is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade. Livingston, J., in the case of The New York, 3 Wheat. [16 U. S.] 68; The Aeolus, Id. 395.

lar section should be revived in a manner to have no effect whatever: or to make a law, with an exception co-extensive with its whole enactment. Such a construction must be totally inadmissible. The actual case is stronger than that supposed, because, in the actual case, other sections are revived, which might suggest the propriety of adding the words, "colonies and dominions" to Great Britain.

It cannot, I think, be necessary to add any thing to this argument. Yet I will observe, that the act of May 1, 1810, which was perpetual, provided for the whole subject which was re-enacted in March, 1811. I can conceive no motive for the last law, other than an apprehension, which I believe was not well founded, that the courts might not have received the proclamation of the president as conclusive evidence that the fact had occurred, on which the non-intercourse was to be enforced against Great Britain; or might have received other testimony than his proclamation, to prove that Great Britain had modified her edicts so as not to affect the neutral commerce of the United States. Choosing to place it beyond doubt, that this fact was to be decided by the president alone, congress passed the act of March 2, 1811. This being the sole conceivable motive for that act, it cannot be doubted that it was made, or at least intended to be made, co-extensive with the act of May 1, 1810. Yet there are many material variances in the language of the two acts. That of May 1, 1810, enacts, that if the one nation shall revoke her edict, and the other shall not, then the 3d, 4th, &c. sections of the non-intercourse act "shall be revived, and have full force and effect so far as relates to the dominions, colonies, and dependencies, and to the articles, the growth, produce, or manufacture of the dominions, colonies, and dependencies, of the nation so refusing, &c." The act of March 2, 1811, which carries this promise and threat into execution omits the very material words "and to the articles, the growth, produce, or manufactures," &c., and declares only, that the several recited sections of the original act, "shall be carried into effect against Great Britain, her colonies and dependencies." The omission of these very material words might be urged to prove, that the non-intercourse law was not re-enacted with respect to articles of the growth, produce or manufacture of Great Britain, her colonies or dominions, if imported from other than British territory, with at least as much plausibility as the omission to declare, in reviving the 3d section, which relates only to British vessels, that it shall be enforced against British vessels. To prove that the law was not revived as to British vessels, it has been urged, that if it was in force when the Patriot was seized, it is in force now, for which no person will contend; or at least remained in force until a commercial treaty was formed between the two nations, since it was certainly not repealed by the act of the 14th of April, 1814. This is true; but I do not think that an inadvertence of this kind, an inadvertence sufficiently accounted for, by the existence of a war, which of itself excluded British vessels, when the repealing act passed, and the oblivion into which the return of peace threw the whole subject, can influence the construction of the acts of 1810 and 1811.[3]

An argument which produces the only serious doubt which can arise in this case, remains to be noticed. It is, that the 3d section of the non-intercourse act was repealed by the declaration of war. It has been argued, that all the provisions of that act were obviously adapted to a state of peace: that the declaration of war changed so entirely the relations of the two countries to each other, as to render those provisions, which were made for a state of peace, totally inapplicable to that new state in which war placed the parties. This argument has been illustrated, by showing the incompatibility of those provisions which respect the national ships of Great Britain, with a state of war. It is certainly true that the whole system of non-intercourse was framed, with a view to a continuance of a state of peace. But it does not follow, that positive and general regulations, formed in language equally adapted to peace or war, shall, because they were particularly intended for a state of peace, expire on a declaration of war, unless there be something in war totally incompatible with their continuance. When this is the case, the declaration of war, being a national act of complete obligation, repeals all laws inconsistent with the state in which it places the nation, on the principle that posterior laws abrogate those which are anterior. But when the laws can exist and be executed together, I know of no principle which will authorize the court to say that the last law repeals the first. This principle is completely illustrated by different parts of the case now under consideration. The first section of the original non-intercourse act, forbids the national vessels of Great Britain, to enter the waters of the United States, and authorizes the president to employ the military and naval force of the nation, for the removal of any vessel, which shall violate this provision of the act. The declaration of war, makes it the duty of the president not to obey this mandate of the non-intercourse law, but to capture the vessel as prize of war. It is obvious, that this last law as entirely abrogates the first during its continuance, as if it had in terms commanded the president not to remove the offending vessel from the waters of the United States, but to cause her to be brought in as prize of war. But those provisions of the act, which prohibit the im-

[3] Note by Circuit Justice Marshall: This is a mistake. There is a repealing act, which was not observed when this opinion was drawn.

portation of goods of British manufacture, &c., though framed in time of peace, for a state of peace, are not incompatible with a state of war, and they may be continued, or discontinued, at the will of the legislature. I cannot, then, consider them as repealed by the mere declaration of war. British manufactures, the property of a friend, may be introduced or prohibited, in peace or in war, as shall seem wise to the legislature. A law, then, prohibiting them, which does not in its terms, depend on peace or war, would seem to me not to be repealed by a declaration of war. The will of the legislature for its repeal must be more directly expressed, or the law continues in force.

But if we examine our course of legislation on this subject, we shall find conclusive evidence that, in the opinion of the legislature, the law continued in force. Immediately after the declaration of war, the prize act was passed. The 14th section of this act repeals so much of all preceding acts, as may prohibit the introduction, into the United States, of goods of British manufacture, &c. as may be captured from the enemy, and be made good and lawful prize of war. (Act concerning letters or marque, prizes and prize goods, passed June 26, 1812. 2 Story's Laws, p. 1264, c. 107, § 14 [2 Stat. 763, c. 107].) There cannot be a stronger evidence of the opinion of the legislature, that this declaration of war left their non-intercourse law in full force Afterwards, on the 14th of April, 1814 [3 Stat. 123], the act laying an embargo was repealed, and so much of every act, as prohibits the importation of British goods, &c., or as prohibits the importation of any goods from Great Britain, &c., is repealed. We observe, that the embargo law is totally repealed. But the non-intercourse law is repealed only in part. The language of the act, shows the opinion of the legislature to have been, that parts of the act still remained in force. If, then, we respect the very intelligible opinion of the legislature, or are governed by those rules which generally prevail, in the construction of statutes, I think, we must be brought to the conclusion, that the non-intercourse law, so far as respected goods, &c., imported from Great Britain, her colonies, or dependencies, or articles of the growth, produce, or manufactures of Great Britain, or her dependencies, imported from any place whatever, continued in force, after the declaration of war.

That the act continued in force, so far as respected vessels, owned by British subjects, is not quite so obvious. Since every vessel, forfeited under the non-intercourse law, would also, if captured, be forfeited by the laws of war, it may well be doubted, whether the declaration of war does not suspend so much, at least, of the non-intercourse law, as applies to the very objects, to which the laws of war apply. The Patriot, for example, was a vessel belonging to the enemy, subject to capture, according to the laws of war. The revenue cutters are a part of the naval force of the United States, which may be employed by the president, to prosecute the war, and the 14th section of the prize act, recognizes captures made by them. It may, therefore, admit of some doubt, whether this, so far as respects the vessel itself, may not be a belligerent capture. But suppose this to be admitted, does it follow, that the non-intercourse law may not apply to the cargo? The laws of war condemn the vessel, but do not reach the cargo. The municipal law condemns both vessel and cargo. If the paramount operation of the laws of war upon the subject, overreaches the municipal forfeiture of the vessel, does it, therefore, discharge the cargo, to which its provisions do not extend? The declaration of war does not appear to me, to affect the municipal forfeiture in any case, in which it does not itself dispose of the subject.

The strongest point of view, in which this question has been placed, remains still to be considered. The owner of the Patriot was an enemy. He was on board, and had the control of the vessel. He brought her into the Chesapeake, and it is denied, that his act can forfeit the goods of the American claimant. War, it is said, by way of illustrating this argument, dissolves all contracts between enemies; and, if the owner of the Patriot, instead of bringing her into the Chesapeake, had carried her into theThames, he would not, even after the return of peace, have been responsible to the owners of the cargo. It will be admitted, that war, if it does not dissolve contracts between enemies, suspends their obligation, and enables the belligerent to annul them. It is also admitted, as a consequence of this principle, that if the owner of the Patriot had carried her into the Thames, and there libelled her cargo, he could not have been made responsible for it. The reason is, that those paramount duties which the war imposed upon him, would, in a legal sense, justify the act of carrying enemy property into the ports of his country, and protect him from the consequences of that act. The right of property would have been changed, by an act which the law had rendered lawful; and, however that act may wound the moral sense, the law cannot punish it. But, although the war would have justified the carrying the Patriot into the Thames, it did not justify bringing her into the Chesapeake, in violation of a statute of the United States. That act, therefore, remains exposed to the same punishment, as if war had not been declared.

It has been argued, that the act of an enemy, to which the American proprietor of the cargo has not consented, ought not to affect his property; and that the declaration of war having dissolved the connexion between the parties, the act of bringing the vessel into the waters of the United States, is to be considered as if it had been an act of violence by any other person, without au-

thority. But this argument is rather calculated to perplex, than to satisfy, the mind. Lawson had, in fact, the direction of the voyage, and continued in that direction. Although he might, with impunity, have ceased to act as the agent of the owners of the cargo, and have acted as an enemy, yet he did not divest himself of the character of an agent, nor assume that of an enemy. Acting under his original authority, he violated the laws of the United States; and those who employed him must, I think, pay the penalty incurred by that violation. The enemy character of an agent, cannot, I think, exempt his employer from the penalty attached by law, to an offence. But the words of the act, subject to forfeiture the cargo of a citizen imported in a British vessel. The terms of the law punish the act, without inquiring into the criminal intent. The cargo of a British vessel, arriving within the limits of the United States, is exempt from forfeiture only, if "forced in by distress, or by the dangers of the sea." These are the only exceptions found in the act. If any others can be introduced by construction, they must be founded on the substantial principles of equity, not on the technical subtleties of law.

It has also been argued, that had this vessel been captured and brought in by an American cruizer, or even by the owners themselves, the cargo would not have been forfeited. This may be true. But in that case, the captors would have been in the exercise of the rights of war; and the vessel, with her cargo, would have been brought in jure belli. In this case, the act declaring war, and the prize act, might have operated on the municipal forfeiture, and have suspended it. But in the case which has occurred, the act which created the forfeiture is not performed in the exercise of the rights of war, but is an act totally unconnected with war.

I have considered this case with no disposition favourable to the condemnation of this cargo. But, according to the view I have taken of the subject, the cargo is liable to forfeiture, in consequence of being in a British vessel, which has arrived within the limits of the United States, while the non-intercourse law was in force. I shall not regret it, if a higher tribunal shall be of a different opinion.

The sentence of the district court is affirmed with costs.

THORN (UNITED STATES v.). See Case No. 16,493.

Case No. 13,985a.

THORN v. The VICTORIA.

[Nowhere reported; opinion not now accessible.]

Case No. 13,986.

THORNBURGH v. SAVAGE MIN. CO.

[1 Pac. Law Mag. 267; 7 Morr. Min. Rep. 667.]

Circuit Court, D. Nevada. 1867.

MINING—SURVEY—INJUNCTION—COURT'S JURISDICTION—SERVICE UPON CORPORATIONS—FOREIGN CORPORATION.

1. A court of equity has the power, in a mining case, to compel an inspection and survey of the claims and works of the parties, and ought to issue such order when satisfied that the application therefor is made in good faith and for the information of the court upon the questions involved in the case.

[Cited in Montana Co. v. St. Louis Mining & Milling Co., 152 U. S. 166, 14 Sup. Ct. 507.]

2. The court has acquired jurisdiction over the defendant—First, by his voluntary appearance in the action; and, second, by service of the subpœna upon the superintendent and general managing agent of the defendant within this district; that thereby the person of the defendant was found in the district, within the meaning of the judicial act of 1789; that by a strict construction of that act, and of the constitution, no corporation could be a party to a suit in the national courts.

3. There is "nothing in the character of a corporation to prevent its suing or being sued like a natural person. It is, in legal contemplation, a person having existence, invested with rights and subjected to liabilities, and very properly a party to proceedings in courts of law or equity whenever those rights or liabilities are drawn in controversy."

4. The corporation in this case in mining property, and carrying on a general business, by its officers and agents, within this district, ought to be, and is, subject to all the liabilities growing out of that business, and can be reached by process out of this court served upon such resident managing officers or agents, under section 29 of the practice act of this state, adopted by the rules of this court.

5. Any corporation having property in the state is "a body politic within this state," according to the thirteenth section of the act, directing proceedings against trustees of debtors.

The plaintiff [William B. Thornburgh] claimed to be the owner of a portion of a certain quartz ledge in Storey county, Nevada, called the "Mitchell Lode," and had commenced an action at law for the possession thereof, claiming that said lode was distinct from, but next adjacent to, the Comstock lode. The above action was brought in equity to restrain defendant, a corporation organized under the laws of the state of California, but owning property and doing mining business in the state of Nevada, from mining the premises in dispute at law. An injunction issued upon the return day of a rule to show cause, which rule the court found to have been properly served upon Charles Bonner, the superintendent and general managing agent of the defendant. While the injunction was pending, complainant moved, upon bill and affidavit before one of the judges of said court, at chambers, for an order of survey and inspection of the premises in dispute. The judge issued a rule

upon defendant to show cause therein, returnable the following day.

On the return day of said rule, in response thereto, the complainant, by Messrs. Mesick & Seely, solicitors, and the defendant, by Messrs. Hillyer & Whitman, solicitors, appeared before said judge at chambers, whereupon the complainant, through his solicitors, made formal application for the order of survey.

Mr. Hillyer, on behalf of the defendant, moved a postponement of the hearing until additional counsel could be procured from San Francisco.

A postponement for several hours was allowed to enable defendant's solicitors to prepare an argument against the order. When the hour arrived to which the hearing had been adjourned, Messrs. Hillyer & Whitman presented an affidavit of Mr. Charles Bonner in opposition to the application, setting up, among other things, that the complainant was not the true owner; that the real party in interest was not in court; praying time for the discovery of said facts; that the order was served on the defendant the day previous; that the principal counsel of the defendant resided in San Francisco, and that it was necessary that the defendant should have time to consult his counsel, and prepare his answer to the order; denying that the so-called "Mitchell Lode" was distinct from the Comstock lode, but claiming that the Comstock was the only lode in the premises in dispute, &c. Complainant's solicitors were given until seven o'clock to procure rebutting testimony, at which time they presented complainant's affidavit, traversing the affidavit of Mr. Bonner, whereupon the motion was argued pro and con and submitted. The judge, having taken the same under advisement, on the succeeding day granted the order. It was issued and served, and obeyed by defendant three days.

On the 26th of January, defendant, by Hillyer & Whitman, its solicitors, filed a cross bill, praying, among other things, an order of discovery upon the complainant under oath as to the nature of his claims to the premises in dispute, and the relation of other parties thereto, and for an injunction restraining the defendant from further proceeding. The injunction was denied, when the defendant closed its works, disobeying the order of the survey. The corporation of Mr. Bonner, the superintendent thereof, were cited to show cause why they should not be punished for contempt. The superintendent undertook to purge himself, on the ground that he was acting under advice of counsel, and that the order of survey was void for want of jurisdiction in the court granting it. The corporation was found guilty of the contempt, the court holding that it had acquired jurisdiction. Afterwards, pending the final termination of complainant's motion for an injunction, Mr. Hillyer, the solicitor for defendant, obtained leave to make a special appearance, and submitted a motion to quash all proceedings in the action, on the grounds —First, that the court has no jurisdiction of the case; second, that the court has no jurisdiction of the person of the defendant; third, that no service has ever been had on the defendant; and, fourth, that no service can ever be had on the defendant. The motion was overruled, and complainant renewed his motion for an injunction.

THE COURT asked Mr. Hillyer if he wished to make any resistance to the motion, intimating that time and opportunity for trial on the merits would be allowed. The response was in the negative, unless defendant be allowed to resist the injunction without being held a general appearance in the action.

BALDWIN, Circuit Justice. On the 12th day of February, instant, an injunction was granted against the defendant in this action, restraining it from mining upon certain premises in the complainant's bill described. The injunction issued upon the return day of a rule to show cause, which rule the court found to have been properly served upon the defendant. While the injunction was not immediately contested, prior to the granting thereof by the court, questions had arisen in the action, and adjudications had been made, of which, as well as of the facts which had transpired, it is thought best to preserve a record. On the 23d day of January, 1867, the complainant filed his bill in this court. The defendant is a corporation organized under the laws of California, but holding property and carrying on its business of mining in this state. A subpœna was issued upon the bill, and by the marshal served upon Charles Bonner, the superintendent and general managing agent of the defendant. The subject matter of the litigation thus commenced was a quartz vein called the "Mitchell Lode," alleged to exist immediately east of another vein admitted to belong to the defendant, and styled the "Comstock Lode." The day after it was filed, the complainant's solicitors, upon the bill and an affidavit, moved before one of the judges of this court, at chambers, for an order of survey and inspection of the premises in dispute, and of such mining works adjacent as might serve to enlighten the issues of fact in the action. At the same time a rule to show cause why an injunction should not issue was applied for, and, as is usual, was granted. The judge had in a previous case determined the propriety of granting an order of survey such as the complainant sought for here, but, in deference to the convenience of the defendant, declined to act ex parte, and issued a rule to show cause, returnable the following day.

The complainant's affidavit, upon which, together with his bill, the application for survey was based, and the judge's order thereon, it is thought worth while to copy in this opinion:

"United States of America, in the Circuit Court of the United States for the District of Nevada. In Equity. William B. Thornburgh, Complainant, v. The Savage Mining Company, Defendant. District of Nevada—ss.: Wm. B. Thornburgh, being duly sworn, deposes and says: That he is the complainant in the above-entitled suit. That the same has been brought and is pending in the above-entitled court, for the purpose of enjoining and preventing the defendant from further working or taking out ore or other mineral substance from or upon the premises and property of deponent, which are described as follows, to wit: That portion of a certain quartz lode commonly called and known as the 'Mitchell Lode,' and lying adjacent to, and next east of, the quartz lode commonly called and known as the 'Comstock Lode,' bounded on the north by the southern boundary line of the mining claim located and known as the 'Breckenridge Company's Claims,' and on the south by a line drawn at right angles with the course of the quartz lode worked by the Hale & Norcross Company, across said Mitchell lode, and through the said Hale & Norcross Company's north line, and being the northern portion of the mining claim located by I. E. Brokaw and others on the twenty-fifth day of January, A. D. 1861, as commencing at a certain stake at Burk's blacksmith shop, near C street, in Virginia City, and running thence southerly along and on said Mitchell lode, together with the dips, spurs, angles, and variations thereof, and surface room for the convenient working of the same as a mine, and the appurtenances, said premises and property being situated in the Virginia mining district, in Storey county, Nevada; which suit is in aid of an action at law, brought and pending on the law side of said court by the deponent against the defendant above named to recover possession of said property and premises from them. That the said defendants are in the exclusive possession of the said premises and property, and of all works, drifts, and developments by which the questions in controversy between the parties to said suit and action can be determined, and from an inspection of which only can the merits of the controversy be seen and understood. That the main question involved in the suit is, whether the premises and property described is a separate and distinct quartz lode, different and independent of and from the quartz lode known as the 'Comstock Lode'; the complainant, this deponent, contending and believing that the affirmative answer is true, and the defendant contending that the negative is the true answer. And this deponent further says that the premises, property, and quartz lode above described is a separate, distinct, and independent lode of and from the quartz lode known as the 'Comstock Lode,' and that the truth will be shown so to be by an inspection and survey of the works and drifts, and developments, existing in, upon, and over the said two lodes, and the intervening space, and such inspection and survey are necessary to the premises. [Signed] W. B. Thornburgh.

"Sworn and subscribed to before me, this January 24, 1867. Alex. W. Baldwin, U. S. Judge."

Endorsed: "Filed January 26, 1867. Silas Caulkins, Clerk."

"Wm. B. Thornburgh, Complainant, v. The Savage Mining Company, Defendant. District of Nevada—ss.: On reading the affidavit of Wm. B. Thornburgh, complainant in the above-entitled suit, and good cause appearing therefor, on motion of Mesick & Seely, solicitors for complainant, it is ordered that an inspection and survey be made by the complainant and his employés and attendants, not exceeding nine in number, of the following described premises, property, works, drifts, and developments, to wit: All that portion of a certain quartz lode commonly called and known as the 'Mitchell Lode,' and lying adjacent to and next east of the quartz lode commonly called and known as the 'Comstock Lode,' bounded on the north by the southerly boundary line of the mining claim located and known as the 'Breckenridge Company's Claims,' and on the south by a line drawn at right angles with the course of the quartz lode worked by the Hale & Norcross Company across said Mitchell lode, and through the said Hale & Norcross Company's north line, and being the northern portion of the mining claims located by I. E. Brokaw and others on the twenty-first day of January, A. D. 1861, as commencing at a certain stake at Burk's blacksmith shop, near C. street, in Virginia City, and running thence southerly along and on said Mitchell lode, together with the dips, spurs, angles, and variations thereof, and surface room for the convenient working of the same as a mine, and the appurtenances. Also, the Comstock lode, and any intervening space between said lodes, or the spaces on either side thereof, upon, in, or through which there exist any works, drifts, or other developments, together with all such works, drifts, or other developments, the same being situated in the Virginia mining district, county of Storey, and state of Nevada. That the defendants, their servants, agents, and employés, in charge of or working upon or in the aforementioned premises, property, works, drifts, or developments, permit the said survey and inspection to be made, and furnish and provide all the means in their possession of ingress and egress and traversing the same, to the said complainant and his employés and attendants aforesaid, each day, for the period hereinafter limited, and that this order take effect and be in force and binding upon all parties and persons upon the presentation to them, or any of them, of this order; and that the same continue in force for the period of five successive days on which such inspection and survey is being made. Let the

defendant show cause before me, at my chambers in the city of Virginia, on Friday, the twenty-fifth day of January, instant, at 10 o'clock a. m., why the above moved for order should not be granted. Alex. W. Baldwin, United States Judge, District of Nevada."

At 10 o'clock of the return day of this rule, and in response thereto, the complainant, by Messrs. Mesick & Seely, and the defendant, by Messrs. Hillyer & Whitman, came before the judge at his chambers. All these gentlemen are solicitors of this court. The complainant, through his solicitors, formally made his application for the order of the survey. Mr. Hillyer, on behalf of the defendant, requested the judge to postpone the hearing until additional associate counsel could be procured from San Francisco. A postponement for several hours was allowed, to enable the defendant's solicitors to prepare an argument in opposition to the order. When the hour arrived to which the hearing had been adjourned, the solicitors of the parties again came before the judge. In opposition to the application, Messrs. Hillyer & Whitman presented the affidavit of Mr. Charles Bonner, drawn by them, of which the following is a copy:

"Affidavit of Charles Bonner: United States of America, in the Circuit Court of the United States for the District of Nevada. In Equity. Wm. B. Thornburgh, Complainant, v. The Savage Mining Company, Defendant. In the matter of the application of the complainant for an order of survey. Before Justice Baldwin, sitting in chambers. Now comes Chas. Bonner, superintendent of the defendant, the Savage Mining Company, and having charge of its litigation in the state of Nevada, and, being first duly sworn, deposes and says that he is informed and believes, and so charges the truth to be, that Wm. B. Thornburgh, complainant above named, is not the real party in interest in the premises he seeks to recover; that he is not the owner thereof; that he paid no consideration therefor; that the same have been transferred to him; that, being the nominal and apparent legal owner, he might bring suit, as he hath done, before the circuit court in and for the district of Nevada; that defendant desires to make issue with said complainant upon such point of ownership, in order to test the truth thereof, and to compel a dismissal of this suit in event the fact be according to the information of the defendant; that for such purpose affiant desires to proceed by bill of discovery, plea to the jurisdiction of said court, or application for injunction in equity, as he may be advised, after full, fair, and free statement of defendant's case to its counsel, and under their advice; that notice of this application was given to defendant at nine (9) o'clock p. m. of the twenty-fourth instant, and not before; that the papers in the suit to which this application is auxiliary were served on the defendant on the twenty-third instant, and copies thereof transmitted by affiant to San Francisco so soon as they could be prepared; that defendant hath twenty days from the service of said papers, exclusive of the day thereof and of Sundays, within which to appear in such causes; that the principal counsel of defendant reside in San Francisco, and that it is necessary, for the proper appearance and defence of defendant, that they should be consulted before the defendant takes any definite action in the premises; that to decide upon the course of defendant's action will take more time than is allowed for the hearing of this motion, which is set for four p. m. this day, instant; that to make the order asked by complainant, or any order of such nature, would inflict upon defendant great hardship, inconvenience, and expense, namely an expense of not less than five hundred dollars per day; that such order should not be made unless the complainant hath the right of action in the suits referred to; and that defendant should be allowed a reasonable time to appear in such suit, and be heard therein upon the preliminary question of complainant's rights, before he is required to respond to this motion, or before the same is granted.

"To the end, therefore, that defendant may have opportunity to test complainant's real character and position with regard to the property in controversy, defendant asks that the hearing of the motion be postponed for such time as may be reasonable for the ascertainment of such fact, and until proof touching the same can be heard. Affiant further shows that he is a practical miner, and has been engaged in such business for twelve years last past; that for four years last he has been engaged in such business in the county of Storey, state of Nevada; that he is well acquainted with the works of the mine of defendant, and the developments therein; that there is no other lode than the Comstock lode therein, and that defendant is not now working upon or extracting ore from any lode or lead of mineral-bearing rock other than the Comstock; that neither complainant nor his predecessors in interest, nor the locators of the 'Mitchell Lode,' so called, or any other person or persons, have ever done any work or made any explorations upon said Mitchell lode, or in search therefor, within the boundaries of defendant's mining claim, or within the boundaries, set forth in complainant's complaint, as affiant is informed and believes; that defendant hath had open, notorious, exclusive, and uninterrupted possession, custody, and control of the place where it is now working, and of all places where it has done work, adverse to all the world, for more than three years last past; that all the work done by defendant is laid down upon maps drawn by competent surveyors, which heretofore

have been kept in the office of the company, open to public inspection, as complainant well knows; that from time to time during the last year many persons have visited the workings of the defendant, and there has been no concealment thereabout; that complainant could have visited the same at any time prior to the commencement of this suit, had he so desired, as he well knows; that affiant is informed and believes, and so charges the truth to be, that the object of complainant in seeking this order is to annoy and harass the defendant, to hinder its workings, or for some other object or purpose contrary to equity and good conscience. Charles Bonner.

"Subscribed and sworn to before me, this the 25th day of January, 1867. Alex. W. Baldwin, United States Judge."

Endorsed: "Filed February 2d, 1867. Silas Caulkins, Clerk."

The complainant's solicitors were then given until seven o'clock to procure rebutting testimony. At this hour the parties again came before the judge, and the complainant's solicitors presented his affidavit, traversing most of the statements in that of Mr. Bonner. The argument then proceeded—

Mr. Mesick, for the complainant, urging the judge to grant the order.

Mr. Hillyer, for the defendant, resisting it.

The argument concluded, the judge took the matter under advisement, and the next day decided that the plaintiff was entitled to the order of inspection and survey, in the form applied for, and ordered it to issue in the action. The order was served upon the solicitors and superintendent of the defendant, and for three days it was obeyed. On the twenty-sixth day of January the Savage Mining Company, by Hillyer & Whitman, its solicitors, filed in this court its bill against William B. Thornburgh, of which the following is a copy:

"United States of America, in the Circuit Court of the United States for the District of Nevada. In Equity. The Savage Mining Company, Complainant, v. Wm. B. Thornburgh, Defendant. To the Honorable the Judges of the Circuit Court of the United States for the District of Nevada: Your orator, the Savage Mining Company, shows to this honorable court that it is a corporation, incorporated in the state of California and under the laws thereof, and having its principal place of business in said state, and is a citizen thereof; that William B. Thornburgh, the defendant, is a citizen of the state of Nevada. Your orator further shows that it is now, and for five years last past has been, the owner, entitled to the possession, and in the possession, of a certain mining claim and quartz lode situate in the county of Storey, said state, known as the 'Savage Claim,' and described as follows: 'Eight hundred (800) feet in length upon the quartz lode, commonly known as the "Comstock Lode," bounded on the north by the Gould & Curry claims, and on the south by the Hale & Norcross claim, and including all the dips, angles, and spurs of said lode between said north and south boundaries.' Your orator further shows that on the 23d day of this month the defendant, Wm. B. Thornburgh, commenced an action in this honorable court against this complainant, the nature of which action fully appears from the complaint therein, a copy of which is hereto attached, marked 'Exhibit A.' Your orator further shows, upon information and belief, and avers the fact to be, that the said Wm. B. Thornburgh is not in fact the real owner of the property described in said complaint, nor the real party in interest in said action; but that the real parties in interest as complainant in said action are other parties, whose names are unknown to this complainant, and who are citizens of California, and not of the state of Nevada. Your orator further shows, upon information and belief, and avers the fact to be, that shortly before the commencing of said action the real parties in interest as complainant in the same, and the only parties besides this complainant owning, or making claim of ownership to, said property, for the fraudulent purpose of enabling said actions to be commenced in a court of the United States, and for no other purpose, executed, or procured to be executed, to said Thornburgh a conveyance or conveyances of the said property by deed or deeds of conveyance purporting on their face to convey the title to said property, but which in fact were merely colorable, and made, not to convey any real interest in the same, but solely to invest said defendant with a nominal title, in order that the action against the complainant might be brought in the federal court, instead of being brought in the court of a state. Your orator further shows, that it is desirous of contesting the jurisdiction of the said honorable court in said action, and procuring a dismissal of the same, upon the ground that the real parties in interest in the same are not citizens of different states, as therein alleged, which fact would appear if the said Wm. B. Thornburgh would discover and set forth the real condition of the title to said property upon which he bases his right to recover therein, and that for the proof of said facts a discovery by the said defendant, in the manner herein prayed for, is material and essential to this complainant.

"In consideration whereof, and forasmuch as your orator is remediless in the premises at common law, and cannot have a complete discovery of the condition of said title without the aid of this honorable court, and to the end that said Wm. B. Thornburgh may, upon his corporal oath, full, true, direct, and perfect answer make to all and singular the matters and charges aforesaid, and that not

only to the best of his knowledge and remembrance, but also the best of his information and belief, particularly that the said defendant may discover and set forth in manner aforesaid:

"First. Whether he is in fact the real and true owner of the said property upon which the right to recover in said action is based in said complaint, and whether other parties, and, if so, what parties, are the real equitable and beneficial owners of the same.

"Second. Whether he, the defendant, is the sole beneficial owner of the said property and title, and whether other parties are not legally or beneficially interested in the same, and, if so, what parties, what is the extent and character of their interest, and what is their place of residence.

"Third. At what time, place, from whom, and by what means, the said defendant obtained the title which he sets forth and relies upon in said action.

"Fourth. What was the consideration, if any, paid by the defendant for said title, and when, where, and under what circumstances was the same paid.

"Fifth. What were the negotiations which took place in reference to the obtaining of said title by defendant, and with whom said negotiations were made, who were present at the time the said negotiations were conducted, and what conversation was then or previously had in the presence of defendant in reference to the object of making a transfer to said defendant, and in reference to the beneficial interest in the said property which should be had by the defendant or by other parties.

"Sixth. Whether said defendant has in his possession or control, or knows of the existence of, a certain deed from one Charles Lintott to one Thomas Farrel, purporting to convey the title to said property, and, if so, whether defendant has any knowledge or belief, and, if so, what, as to the real consideration of said deed, and as to the purpose and objects for which the same was paid.

"Seventh. Whether said Thomas Farrel made a conveyance of said title to defendant, and, if so, at what time and place it was made, and who were then present, and what then, or in that conversation, was said to or in the presence of defendant in reference to the objects and purposes of said conveyance.

"Eighth. Whether the consideration mentioned in said deed from Farrel to defendant was ever paid, or any part of the same, and, if so, at what time, place, and to whom.

"Ninth. Whether the defendant has not made a contract with one or more persons, either written or verbal, by which said other persons bear the whole or some portion of the expense of litigating said action, or the purchase of said title, or are to have an interest in said property, or in the benefits accruing from the litigation of the same with this complainant, and, if so, what is such contract, and when and with whom was it made.

"Tenth. Whether one C. L. Low is not, to the knowledge or belief of the defendant, a real party in interest in said title to said property and in said litigation, and, if so, the character and extent of said interest, and when and how acquired, and of what state the said Low is a citizen.

"Eleventh. Whether it was not stated or understood, either at the time of taking the conveyance from said Farrel, or during the negotiations for the same, that the real object of making the same was to enable the said action to be brought in the circuit court of the United States for the state of Nevada.

"And that the said Wm. B. Thornburgh may make a full and true disclosure and discovery of the several matters aforesaid, to the end that your orator may be better enabled to show the want of jurisdiction by this honorable court of said action, and that in the meantime, and until the said Thornburgh shall have made such discovery, as aforesaid, that he may be restrained by the order and injunction of this honorable court from further proceedings in the said action and all others therein.

"May it please your honors to grant your orator not only the most gracious writ of injunction issuing out of this honorable court, according to the form of the statute in such case made and provided, and under the seal of this honorable court to be directed to the said Wm. B. Thornburgh, restraining him, his servants, agents, attorneys, and every of them, from proceeding further in said action, or under any order made in the same, but also a writ of subpœna of the United States of America to be directed by the said Wm. B. Thornburgh, thereby commanding him at a certain day, and under a certain pain, therein to be specified, personally to be and appear before your honors in this honorable court, and then to answer, all and singular, the premises and to stand to, perform, and abide such order therein as to your honors shall seem meet; and your orator shall ever pray, and complainant prays, for such other relief as may to your honors seem proper. Hillyer & Whitman, Solicitors for Complainant."

"United States of America, State of Nevada, County of Storey—ss.: Charles Bonner, being first duly sworn, deposes and says that he is the superintendent and general managing agent of the Savage Mining Company, the complainant in the above-entitled action; that he has heard read over the foregoing bill of complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true. Charles Bonner.

"Subscribed and sworn to before me, this 26th day of January, A. D. 1861. S. H. Rob-

inson, U. S. Commissioner, Nevada district, Nevada."

Appended to and made a part of this cross bill was the original bill in the action. The cross bill was by the solicitors of the Savage Company presented to one of the judges of this court, and an injunction in accordance with its terms asked for. This was denied. Then for the first time the Savage Mining Company closed its works, and, in disobedience of the order of survey, denied admittance to the complainant and his attendants. The corporation, also Mr. Bonner, the superintendent and general managing agent, were cited to appear before the court, and show cause why they should not be punished for contempt, and, while the former made no appearance, the superintendent undertook to purge himself, on the grounds that he was acting under the advice of counsel, and that in their and his estimation the order of survey was void, because this court at the time of granting it had not acquired jurisdiction of the person of the defendant.

The court held that it had acquired jurisdiction, adjudged Mr. Bonner, the superintendent, guilty of the contempt charged, and imposed upon him a fine.

The court also adjudged the corporation, the Savage Mining Company, to be in contempt, and, for the purpose of compelling obedience to its authority, ordered a writ of distringas to issue against the property. For the purpose of preventing the execution of this writ by the marshal of the United States, the defendant invoked the authority of a state court, but the tribunal appeared to decline to interfere.

On Tuesday, the 15th day of February, this court convened at Carson City. The complainant exhibited his rule to show cause on the injunction, properly served upon the superintendent and general agent of the corporation, defendant, and upon its solicitors, Hillyer & Whitman, and moved for an injunction thereon. Pending the determination of this motion, Mr. Hillyer obtained leave to make a special appearance, and submit a motion to quash all proceedings in the action, on the grounds—First, that the court has no jurisdiction of the case; second, that the court has no jurisdiction of the person of the defendant; third, that no service has ever been had on the defendant; fourth, that no service can be had on the defendant. This motion was by the court overruled, and complainant renewed his motion for an injunction. As Mr. Hillyer, the generally retained solicitor of the defendant, was present, the judge desired to know if he wished to make any resistance to the granting of the injunction, intimating that time and opportunity for a trial upon the merits would be offered, to which it was responded in the negative, unless the court would permit the defendant to contest the application for an injunction without holding it to a general appearance in the action. Inasmuch as the sole object of the action was to obtain an injunction, it was not competent for the court to allow that object to be resisted by the defendant, without being committed to a general appearance in the cause. Besides, the court had already distinctly held that the defendant had generally appeared. The complainant renewed his motion for the injunction and the court ordered it to issue in the form prayed for.

The foregoing statement comprises the facts which up to this period have occurred in this case. The propositions of law which they involve are:

First. Ought a court of equity, in a mining case, when it has been convicted of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto, by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmation of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject matter of the action, has the power to enforce an order of this kind, will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take as an illustration the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered, except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth of the issue between the parties. Can a court justly decide a cause without knowing the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz. Bainb. Mines. Of course, before granting an order of this kind, the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected.

The next question in this case, and the most important one which has occurred, is as to the jurisdiction of this court over the person of the defendant. Has this court acquired such jurisdiction? The negative of this proposition has been vehemently urged by the defendant's counsel. This is conceived to be a fair statement of their position: They submit—First, that the judicial act of 1789 [1 Stat. 73] provides that no suit shall be brought against an inhabitant of the United States by original process in any other district than that whereof he is an inhabit-

ant, or in which he shall be found at the time of serving the writ; second, that the defendant is a corporation, organized under the laws of the state of California, and that it cannot exist or be found beyond the limits of that sovereignty. While this court is of opinion that the defendant was, within the meaning of the foregoing provision of the judicial act, found in this district at the time process was served, even if such were not the case, the court, by defendant's voluntary appearance, had acquired jurisdiction before the want of it was suggested.

Judge Conkling, in his treatise on United States Courts (page 127), in discussing the provision under consideration, holds it not to be restrictive of the jurisdiction of the court, but, taken together, merely to import that process for the institution of a suit at law or in equity shall not run beyond the limit of the district for which the court from which it issues is held. The author, continuing, says: "This prohibition, as already intimated, has been adjudged not to amount to a denial of jurisdiction over causes otherwise in themselves cognizable in the national courts, but only to a privilege given to the defendant; of which, however, he must avail himself at the outset, or he will be held to have waived it." An appearance, therefore, by a defendant, and answering, generally, without objection, has always been considered to be a waiver. In Gracie v. Palmer, 8 Wheat. [21 U. S.] 699, the court say: "It is not necessary to aver, on the record, that the defendant in the circuit court was an inhabitant of the district, or was found therein, at the time of serving the writ. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service." This is the tenor of all authorities, nor, indeed, has their effect been disputed by any counsel in this case.

Prior to the taking of any exception to the jurisdiction of the court, the defendant, in response to a rule to show cause, addressed to it, why an order in the action should not be allowed, had, by generally retained counsel, solicitor of the court, appeared before the judge, and in opposition to the order, introduced testimony and made argument. From the very testimony introduced, the affidavit of Mr. Bonner, drawn by the solicitors, it appears that the defendant had been served and proposed to answer Does this not show a voluntary submission to the authority of the court?

The order of survey was evidently regarded by this defendant as an important step in the litigation. It was strenuously resisted. Not only was this jurisdictional exception not suggested then, but, all opposition to the granting of the order having been found ineffectual, the authority of the court was recognized and admitted by obedience to it. Does this not indicate that the defendant waived his privilege to hold itself beyond access by the process of this court? The defendant could very easily have found means to suggest to the judge the fact of its residence beyond the reach of his process, and the consequent impropriety of allowing the action to proceed against it. But it rather chose to appear before him, and contest the order on its merits. That appearance was general, and, for every purpose of the action, is manifest from the fact that it was unreserved and unrestricted by any limitation. A voluntary appearance by a defendant consists in his submitting himself to the authority of the court, and the manner of entering it is usually regulated by rule. But it by no means follows that a party may not be held to appear in an action without formally complying with such rule. See 1 Barb. Ch. Prac. 77, 82, 87. In Tallman v. McCarty, 11 Wis. 401, it was held that making a motion in a case was an appearance. In Cooley v. Lawrence, 5 Duer. 605, the court, after reviewing the authorities, says: "All the authorities show that the question is whether the appearance of the defendant has been an act importing that he submits the determination of a material question of this case to the judgment of the court." Asking for a continuance in a cause is held in Iowa to be a full appearance. Hotchkiss v. Thompson, Morris [Iowa] 156; Ulmer v. Hiatt, 4 G. Greene, 439; H. 382; H. 441. Also, that moving to suppress depositions, or to call into action the power of the court for any purpose, except to pass upon its jurisdiction, is an appearance. See, also, 4 Cal. 304, 306. But in this action the defendant has actually appeared upon the record, for its cross bill, which has been set forth in this opinion, is to all legal intent an answer in this cause. Says Daniell, in his Chancery Pleading and Practice (volume 2, p. 1649): "A cross bill is a mode of defense. The original bill and the cross bill are but one cause. If a cross bill be taken as confessed, it may be used as evidence against the plaintiff in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer. To sustain the doctrine of the text the author cites many respectable authorities. In Cockrell v. Warner, 14 Ark. 346 (quoted in note to Daniell, Ch. Pl. Prac. 1549), it was held that, when a defendant files a cross bill on matters clearly cognizable in equity, the cross bill will supply any defect in jurisdiction, and place the whole cause before the court, and impose the duty of granting relief to the party entitled. 2 Cart. 90; 2 Barb. Ch. 127, 136; Story, Eq. Pl. 389, 390.

It is the opinion of this court that it acquired jurisdiction of the person of the defendant by virtue of the service of the subpœna upon its superintendent and general managing agent. In other words, that by such service the defendant was found in this district, within the meaning of the judicial act of 1789. The force of the argument of defendant's counsel, based upon a literal

and rigid construction of the language of that statute and of the constitution, is candidly admitted. But the supreme court of the United States has not so construed. If it had done so, in no case could a corporation be a party to a suit in the national courts.

The constitution of the United States limits the jurisdiction of the federal courts, so far as respects the character of the parties in this particular case, "to controversies between citizens of different states." That a corporation can in any sense be considered a citizen no one has ever claimed. That a corporation is a unity, independent of and distinct from the individuals who have created it, and who are interested in it, is equally well settled. "That in a corporation all the parties are not the whole is not only true of its conduct or administration; it is also true of its rights of property. They are referred, not to all the members, but entire and undivided to the judicial person, as a unity in law." Hence, for the purpose of a suit, the corporation must appear by its constitutional organs or curators; the appearance of each and every member is no appearance at all. Bro. Corporation, 28; Co. Litt. 66b.

Notwithstanding this definition and perfectly established legal status of a corporation, and of its relations to its members, the supreme court, in the leading case of Bank v. Deveaux, 5 Cranch [9 U. S.] 61, and in all subsequent decisions involving the question, has held that federal courts will look beyond the charter, to see whether the individual members are citizens, to have right under the constitution to sue in those courts; and the court has so decided in all of these cases, as will appear from any analysis of them, for the purpose of advancing the remedy in the national tribunals, and preventing a failure of justice therein, and for no other purpose.

It is a matter of regret that the briefs of the eminent counsel in Bank v. Deveaux are not contained in the report of that case; but we are told, upon the authority of a contemporary (Attorney-General Legare), that their great argument there was "that a corporation, not being a citizen of a state under the constitution, if the court did not look beyond the charter, to the individuals who composed the company, there would be a denial of justice in a great number of the most important cases." And, indeed, that it was this view which controlled the decision is sufficiently evident from the language of the great judge who delivered the opinion. Says Chief Justice Marshall: "The duties of this court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

A constitution, from its nature, deals in generalities, not in details. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles. The judicial department was introduced into the American constitution under impressions and with views which are too apparent not to be perceived by all. However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, or can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the person whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of a corporation are aliens or citizens of a different state, from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

In Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 326, it is said by Mr. Justice Grier: "By the constitution the jurisdiction of the courts of the United States is declared to extend, inter alia, to controversies between citizens of different states." The judiciary act confers on the circuit courts jurisdiction "in suits between a citizen of the state where the suit is brought and a citizen of another state." 1 Stat. 73. The reasons for conferring this jurisdiction on the courts of the United States are thus correctly stated by a contemporary writer (Federalist, No. 80): "It may be esteemed as the basis of the Union 'that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens."

These authorities are considered sufficient, although more might be cited, to show the length to which the supreme court has felt justified in going, in order to effectuate the substantial guaranties of the constitution, so far as access to the national courts was concerned. To secure the remedy to these tribunals, it has divested a corporation of its cardinal and essential characteristic,—perfect ideal unity. Conformably with the reasons and principles which have influenced the supreme court in the cases cited, it is believed that the process of this court can reach the defendant, that it may be "found" within this district.

The Savage Mining Company is a corporation organized under the laws of California. The purpose and object of its organization, as declared in its charter, is mining in the state of Nevada. Its property, consisting of a mining claim, mills, etc., is all situated in this state. Through a superintendent and general managing agent, resident here, it holds possession of its property, makes contracts, and carries on a general and extensive business. If the defendant cannot be reached by the process of this court, there is an utter failure and denial of justice; for the property in controversy being situated within the state, and the distinction between local and transitory actions having always been recognized in the federal courts, none could be maintained in the district of California. Conk. Prac. p. 172.

Thus, while the corporation, by a strained construction of the constitution in its favor, is allowed free access to the national courts, the citizen, by a forced and narrow construction of the judicial act, is denied all redress. Surely the courts will not, when, for the purpose of advancing the remedy and doing justice, they have opened their doors to corporations, invest them in this way with absolute immunity from legal procedure. Much more reasonable is it to hold that a corporation is "found," where it transacts its business through an officer having general charge thereof, where its property is situated, which may be taken on execution, where it makes its contracts, which are liable to be litigated. Indeed, if language is to be construed as literally as counsel insist, a corporation can be "found" nowhere. It is a metaphysical entity, no more susceptible of being handled, seen, or corporally touched, than a will-o'-the-wisp. How could this corporation be "found" in the district of California? If it be answered by service upon some officer thereof, as authorized by the statutes of that state, still there would be no compliance with the literal meaning of the judicial act, nor could a judgment obtained upon such service, however binding upon the person of the corporation, ever be enforced, because its property is all situated within another jurisdiction. So that, it being actually and physically impossible to find a corporation anywhere, the question is, what will the courts, animated by a desire to advance the remedy and do justice, consider a "finding" of a corporation? If it be by legal fiction that the corporation be found at all, it would certainly seem just and reasonable that it would be found in some jurisdiction where judgment against it may be enforced. If the position taken by defendant's counsel be correct, a corporation, by having its officers in one state, and all its property in another, could escape amenability to the process of all courts.

The thirteenth section of the attachment law of New Hampshire provides that, "when any corporation or body politic within this state shall be possessed of any money," etc. The supreme court of that state, in 9 N. H. 397, held that this clause of the statute was not confined to corporations created by the laws of that state, but included any corporation having property there or suable there. The clearness and force which characterizes the opinion in that case, and its general application to the question under consideration here, justify an extended quotation from it:

"Wilcox, J. This case involves the inquiry whether a foreign corporation can be sued in this state. It has been held in Massachusetts (Peckham v. Inhabitants of North Parish in Haverhill, 16 Pick. 286) that a foreign corporation cannot be sued in that state. Such, also, seems to be the doctrine in New York. M'Queen v. Middletown Manuf'g Co., 16 Johns. 5. The only reason given for these decisions is that no writ can by their laws be legally served against a corporation in another state. Such process, it is said, must be served on its head or principal officers within the jurisdiction of the sovereignty where this artificial body exists; and 'if the president of a bank of another state were to come into New York, his functions would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived his character.' The question has been adjudged in favor of the liability of a foreign corporation in Pennsylvania. Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 176. It has often been held that a corporation may sustain a suit beyond the jurisdiction within which it was constituted. A Dutch corporation was allowed to sue in England (Dutch West India Co. v. Van Moyses, 2 Ld. Raym. 1535; 1 Strange, 612), and the same doctrine has been held more recently in regard to foreign corporations (Chit. Cont. 86; 1 Russ. & M. 190). See, also, 2 Rand. (Va.) 465; 10 Mass. 91; 4 Johns. Ch. 370; 6 Cow. 46; 17 Mass. 97. We have, also, recognized the right of a foreign corporation to hold estate, real and personal, within this state. Lumbard v. Aldrich, 8 N. H. 31.

"There is 'nothing in the character of a corporation to prevent its suing or being sued like a natural person. It is, in legal contemplation, a person having existence, invested with rights and subjected to liabilities, and very properly a party to proceedings in courts of law or equity, whenever

those rights or liabilities are drawn in controversy.' And if, upon principles of law and comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for the one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here. There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so, in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of our courts. But in either case, when the service can be made, or when the person or corporation appears, and submits to our jurisdiction, we see no objection to the authority of the court to proceed. If a citizen of another state is found here, and process is served on him personally, that gives the court jurisdiction. It may well be doubted, however, whether the casual presence of the principal officer of a foreign corporation here, and service upon him, would be sufficient. But if the corporation have estate here, or if it send its officer, upon whom, by our law, process is to be served, to reside here, and transact business upon its account, we cannot see why an attachment of such estate, or service upon such officer, may not be sufficient. The same difficulty in regard to the service of a writ does not exist here as is found in Massachusetts and New York. Our state laws (87) provide: 'That, when any body, politic or corporate, are sued in this state, who have no clerk or member residing therein on whom service can be made, an attested copy of the writ shall be delivered to the agent, overseer, or person having the care or control of the corporate property, or part thereof, in this state.' It is objected that the thirteenth section of the act, directing proceedings against trustees of debtors, does not extend to foreign corporations. That section provides that, 'when any corporation or body politic within this state shall be possessed of any money,' etc. We are of opinion that this clause of the statute is not confined to corporations erected by the laws of this state, but that any corporation having any property here is, within the meaning of this statute, a 'body politic within this state.'"

The whole stress of defendant's position rests upon the assertion that it cannot exist beyond the boundaries of the sovereignty which created it; and authorities are cited in support of this proposition, which it is not deemed necessary to dispute. In view of the appalling consequences which might ensue therefrom, this court will hesitate long before it decides that a corporation can exercise no powers beyond the state which charters it. Indeed that it may do so is expressly decided in the case of Bank of Augusta v. Earle [13 Pet. (38 U. S.) 519]. If the corporation exercise powers in this state, it must do so through an officer or agent. If this officer or agent be competent to represent the corporation here in making contracts and holding property, why may he not be said to represent it when the enforcement of its liabilities is sought? Especially when it is considered that a corporation is at best a myth, can be literally found nowhere, cannot, in the case of a local action, be prosecuted to judgment where chartered, and that, even if it could be, the judgment could never be enforced against it. The defendant makes contracts here. It practically enjoys all of the privileges which could be enjoyed by a natural person, inhabitant here. All this it does by the permission of this state, and through the agency of an officer resident here, who is invested with plenary powers. In other words, under the decision of Bank of Augusta v. Earle, the defendant, though a resident in another sovereignty, may, through its agents, hold property and make contracts here, provided this state acquiesce in so doing. Inasmuch as this state does, by acquiescence, accord to the defendant these great privileges, by every principle of equity, upon the occurrence of litigation growing out of the exercise of these privileges, it should be stopped from asserting that it cannot be found within the state.

Yet another reason for holding the service as made to be effectual upon the defendant consists in the fact that this court has by rule adopted the civil practice act of this state. By section 29 of the act, to regulate proceedings in civil cases (page 318, St. Nev. 1861), it is provided that the summons in an action may be served upon a corporation by delivering a copy thereof to its superintendent or general managing agent. In Conk. Prac. (page 81), the author says: "It is proper, however, here to observe that there is one description of cases attended by circumstances so peculiar as to have been deemed sufficient to warrant a departure in practice from the strict letter of this enactment. When a party residing out of the jurisdiction of the court has obtained a judgment at law, which is sought to be enjoined by bill in equity filed by defendant in judgment on the equity side of the court, or, where a nonresident has instituted a suit in equity, and a cross bill is filed by the defendant, in such suit, the court, upon motion, will order that a service of the subpœna upon the attorney or solicitor of such nonresident party shall be sufficient." Hitner v. Suckley [Case No. 6,543]; Eckert v. Bauert [Id. 4,266]; Ward v. Seabry [Id. 17,161]; Read v. Consequa [Id. 11,606].

An examination of the case referred to and considered as authority for the text shows clearly enough that the court predi-

cated the validity of a service upon the solicitor of a party, neither found within nor an inhabitant of the district, upon its adoption of the rules of English chancery practice. Thus have the federal courts kept step with the progress of the age. In order to preserve the substantial guaranty of the constitution, and to prevent a denial of justice, they have enlarged its terms and gone beyond its letter. They have not permitted that important category of cases which embraces corporations to be excluded from their jurisdiction by attaching to the word "citizen" any restricted significance. For the same reasons, and to accomplish the same end, they have, as has been seen, departed from the letter of the limitation imposed by the judicial act. They have frequently repudiated the fact of the state courts being open to suitors as affording any argument against their exercising, in behalf of such as preferred their tribunals, a not expressly warranted jurisdiction.

In conformity with these principles, a stronger case than the one at bar for the exercise of the jurisdiction of this court cannot easily be conceived.

The case of Day v. Newark India Rubber Manuf'g Co. [Case No. 3,685], relied on by the defendant's counsel, is not considered in point, for these reasons: First. The service in that case was upon an officer of a corporation, who casually came within the jurisdiction of the state of New York. Second. The laws of the state of New York provided no means for serving process upon a nonresident corporation. Third. The action was transitory, and no failure of justice would occur in remitting the complainant to the circuit court for the district where the corporation resided. In such and every one of these essential respects that case diametrically differs from this.

The importance of the main question involved is, perhaps, a sufficient excuse for the length of this opinion. It only remains to be said that the calm and studious reflection which the preparation of it has involved has only served to strengthen and confirm my belief in the correctness of the rulings which have been made in the action.

Case No. 13,987.

THORNDIKE v. UNITED STATES.

[2 Mason, 1.] [1]

Circuit Court, D. Massachusetts. May Term, 1819.

PAYMENT—TENDER—LEGAL TENDER—TREASURY NOTES—INTEREST.

1. Treasury notes issued under Act Cong. 1814, c. 77 [12 Weightman's Laws, 276], and chapter 699 [4 Bior. & D. Laws 737; 3 Stat. 161, c. 17], being by their terms receivable in payment of duties, taxes, and land debts, due to the United States, for the principal and interest due thereon, are a good tender and may be pleaded as such to such debts.

[Cited in Knox v. Lee, 12 Wall. (79 U. S.) 610.]

2. These treasury notes are on their face payable in one year with interest up to the day when due, but if not then paid by the government the interest does not stop; but continues until paid, and may be required by the holder in the same manner as interest might be claimed on a private contract of a like nature.

[Error to the district court of the United States for the district of Massachusetts.]

At the March term of the district court of the district of Massachusetts, 1819, the district attorney brought an action of debt in the name of the United States, against the plaintiff in error [Israel Thorndike], on a bond given to the collector of the port of Boston, for duties by the plaintiff in error, which bond became payable on the 21st day of November. Upon oyer prayed the bond with the condition was set forth, the condition being in the common form of a bond for duties, "to pay the sum of forty thousand dollars, or the amount of duties to be ascertained as due and arising on certain goods, wares, and merchandizes, entered by the above bounden Israel, as imported in the Beverly, Edes master, from Canton." The memorandum in the margin was, "good for $28,480.03." The defendants then plead "that the United States ought not to recover any damages for the detention of said debt, because they say, that before the time for the payment of said sum of money in said condition mentioned had elapsed, to wit, on the 20th day of November last past, the amount of duties due and arising on the goods, wares and merchandises in said condition mentioned, was ascertained to be the sum of $28,480.03 and no more, to wit, at," &c.; and they further say, that before the time when the said payment was to be made according to the condition of the said writing obligatory, certain bills or notes, commonly called treasury notes, were issued by authority of a certain act of the United States, entitled "An act to authorize," &c. and of a certain other act of the said congress entitled "An act supplemental," &c. and had been signed in behalf of the United States, by certain persons appointed for that purpose, by the president thereof, which said treasury notes, at the time of the tender hereafter mentioned, were by the laws of the said United States current and receivable in every part of the said United States, in payment of all duties and taxes laid by the authority of the said United States, and were transferable by delivery, and assignment endorsed thereon by the persons, to whose order the same respectively were made payable, and the said Israel, &c. before any default had been made in the payment of the said sum of money in said condition mentioned, to wit, on the said 21st day of November, A. D. 1817, offered to H.

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

A. S. Dearborn, Esq. who was then and there collector of the customs of the United States, for the district of Boston, and Charlestown, in payment of the said sum so ascertained to be due, and arising for duties, the sum of three dollars and fifteen cents of the money of the United States, and also divers of the said treasury notes before then issued as aforesaid in behalf of the United States, each and every of which said treasury notes contained a promise or engagement in writing on the part of the said United States, to pay the payee therein named or to his order, at Philadelphia, on a certain day therein specified, being one year from the date thereof respectively, the principal sum therein expressed with interest from the date thereof until that day, at $5^2/_5$ per cent. per annum, in conformity with the act of congress of the fourth day of March, A. D. 1814, and which said notes so offered as aforesaid were endorsed and assigned by the several persons, to whose order the same were respectively made payable, and were severally issued and bore date more than one year before the said 21st day of November in the year 1817, and the said Israel, &c. were then and there the lawful owners of the said notes, and by virtue thereof were entitled to demand and receive of and from the said United States for the whole amount of the principal sums therein contained the sum of $24,640, and for the interest which had accrued therein computed from the said several days of issuing the same until the said 21st day of November, A. D. 1817, the further sum of $3,836^{88}/_{100}$ of the lawful money of the said United States, and the said sum of $\$3^{15}/_{100}$ together with the said treasury notes were then and there of the value of, and by the laws of the said United States, ought to have been received in payment for the said sum of $\$28,480^{3}/_{100}$ so due as aforesaid for duties; but the said collector then and there refused to receive the said treasury notes in payment of the said sum, to wit, at, &c.—And the said Israel, &c. further say, that at the time designated on the face of the said notes respectively for the payment of the principal sums therein specified, to wit, at the expiration of one year from the respective times of issuing said notes, the same were presented at the place therein designated for the payment thereof, to wit, at Philadelphia, to the officer designated for that purpose pursuant to the laws of the United States in such case made and provided, who then and there was requested to pay the sums therein severally specified, but the said officer then and there refused so to do.—And they further say, that afterwards and after the said treasury notes had become due and payable according to the tenor thereof, and before the same were so offered in payment to the said collector, to wit, on the 31st day of July, A. D. 1817, the said treasury notes were presented at the said place designated to the said officer designated, and he was requested to pay the sums specified in the said notes, with the interest, which had thereupon accrued, but the said officer then and there refused to pay the same.—And they further say, that afterwards, to wit, on the 8th day of August in said last mentioned year, the said treasury notes, being then unpaid, were presented to the accounting officers of the treasury of the United States for their examination, who then and there refused to allow the said principal sums and interest thereon accrued, and afterwards, to wit, on the same day and year last aforesaid, the said treasury notes were presented at the treasury of the said United States, to the proper officer of the said United States by law appointed for this purpose, for payment thereof, who then and there refused to allow and pay the said principal sums and interest thereon accrued, to wit, &c. And the said Israel, &c. further say, that they were ready and always from the time of the offer aforesaid until the present time have been ready to pay and deliver the said $3.15 and the said treasury notes to the United States in payment of the said sum so ascertained to be due and arising for duties, according to the form and the condition of said writing obligatory, and they bring the same here into court to be paid and delivered to the said United States in payment and discharge of the said sum, if the said United States will accept the same. Wherefore they pray judgment," &c. To this the district attorney replied—"that the United States ought not to be precluded from having its action, &c. because they say, that all, and singular the bills and notes commonly called treasury notes, which are mentioned and referred to in the plea of the said defendants, and which are therein alleged to have been offered and tendered to the said H. A. S. Dearborn, collector, &c. in payment and satisfaction of the bond aforesaid, were certain treasury notes, which according to the tenor and import thereof respectively were payable at the city of Philadelphia, after the first day of August, A. D. 1815—and that, after the issuing of the said treasury notes and each and every of them, to wit, on the 3d day of March, A. D. 1815, in and by virtue of an act of the congress of the United States, made and passed on the day last mentioned, it was among other things made and provided, that it should be lawful for the secretary of the treasury to cause to be paid the interest upon treasury notes, which had then become due and remained unpaid, as well with respect to the time elapsed before they became due, as with respect to the time that should elapse after they became due, and until funds should be assigned for the payment of the said treasury notes, and notice thereof should be given by the said secretary of the treasury.—And the United States further say, that on 19th day of June, in the year last before mentioned, the funds for the payment of the

said treasury notes were duly assigned in conformity with the act of congress in such case provided; and afterwards, to wit, on the 23d day of the same month of June, due and sufficient notice thereof was given and issued by the said secretary of the treasury according to law,—and that the said treasury notes, which were payable at Philadelphia as aforesaid, would be paid on the application of the holders thereof respectively at the loan office in Philadelphia, on the day or days, on which they should respectively become due, and that interest on the said notes would cease to be payable thereafter; so the said United States say, that on each of the aforesaid treasury notes which were offered and tendered by the said defendants to the said H. A. S. Dearborn, collector as aforesaid, as alleged in the plea, the interest did accordingly cease to accrue at the expiration of one year from the date of the said notes respectively. And the United States further say, that the total amount of all the said treasury notes alleged in the plea of the said defendants, to have been offered and tendered to the said H. A. S. Dearborn, collector, &c. in satisfaction of the obligation aforesaid, computing the interest on said notes at the rate of 5 2-5ths per cent. per annum for the term of one year from the date of the said notes respectively, was the sum of $25,970.56 and no more—and that by reason of the premises the defendants, as the owners and holders of said notes, were not entitled to demand and receive of and from the said United States, for the interest, which had accrued thereon before the said 21st day of November, A. D. 1817, the sum of $3,836.88 of the lawful money of the United States, and that the said sum of $3.15 together with said treasury notes, were not then and there of the value of, and by the law of the United States, ought not to have been received in payment for the said sum of $28,480.03, being the amount then due on the aforesaid bond for duties in manner and form, as the defendants, in their said plea, have alleged and set forth—and this they are, &c. wherefore." To this replication the defendants demur generally, and the plaintiffs join the demurrer. The judgment of the district court, was entered at March term, 1819, as follows:

"And now at this term came as well the said attorney of the said United States, for the district aforesaid, as the said Thorndike and others by their attornies, whereupon all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court here, that the said plea in manner and form aforesaid by the said attorney for the United States, above in reply pleaded, and the matters therein contained, are sufficient in law for the said United States, to have and to maintain their aforesaid action thereof against the said Thorndike, &c. Wherefore the said United States, ought to recover against the said Thorndike, &c. their said debt together with the damages by them sustained on occasion of the detention thereof. But because the said Thorndike, &c. have prayed the said court here to inquire how much is due to the said plaintiffs according to equity and to render judgment therefor, and it is convenient and necessary, that judgment should not be given hereupon until the said court shall have enquired, and assessed the said sum so due to the said plaintiffs according to equity, according to the statute in such case made and provided, therefore let judgment hereupon be stayed in the meantime, and let the said parties appear before our said court on the 20th day of April, A. D. 1819, that they may be heard in the matter aforesaid, and that the said court may inquire how much is due according to equity to the said plaintiffs, neither of the said parties requesting that the same should be inquired of and assessed by a jury.—At which day come the parties aforesaid by their attornies, and it is shewn to the court here, that the said defendants on the day, when the said sum in the condition of said writing obligatory mentioned became due and payable, according to the form of said condition, did tender and offer to the said collector of the customs, divers treasury notes of the said United States, of the form described in said defendants plea, a schedule of which said notes is hereto subjoined marked 'A,' and also three dollars and fifteen cents in money, which said treasury notes and money, if interest be computed on said notes to the time of said tender, were sufficient to pay and satisfy the whole sum due on said bond, but if interest be computed to such times, as the said collector was willing to allow, viz. one year from the several times of issuing said notes would amount to $2,506.32 less than the sum due and payable according to the condition of said writing obligatory. And thereupon the said Thorndike, at the request and with the consent of said collector, did deposit the said treasury notes so tendered and the said cash, together with certain other like notes, amounting in the whole with interest computed for one year from their respective dates to a greater sum than was due on said writing obligatory, in the office of discount and deposit of the bank of the United States at said Boston, sealed up and subject only to the order and control of the collector, and it was then and there agreed that said defendants should not thereby be precluded from the benefit of a judicial determination by the proper court of the United States, ascertaining to what time interest ought to be computed upon said treasury notes, and that when such determination should be had the said collector should restore to said defendants, such part of said notes, as according to the computation so determined to be just and legal should exceed the amount actually due and owing upon said writing obligatory—and the said treasury

notes, excepting such part as has been brought into this court, are still so deposited and subject to the order of said collector. Wherefore it is considered by the court here, that there is due according to equity, to the said plaintiffs, the sum of $2,509.47, being the difference between the interest upon said treasury notes, tendered and mentioned in the defendants' plea, computed for one year from their respective dates, and interest upon the same notes computed to the time of their being so tendered, and that the said United States do recover against the said defendants the said sum of $2,509.47, and also one cent for their damages, which they have sustained on occasion of the detaining of said debt, &c." The general error was assigned.

Gallison & Prescott, for plaintiff in error, contended: (1) That upon the facts stated in their plea, interest was to be computed on the treasury notes from the time of their date to the time of the actual payment of them. And that therefore at the time of their being tendered, they were, together with three dollars and fifteen cents in cash, also tendered, a complete satisfaction of, and offset to the bond; and that being deposited in a bank under the exclusive control of the collector from that day, the bond must be considered as then paid. (2) They were, at the time of the plea a legal set off to the bond.

1. By the laws authorizing the treasury notes the intent is plain, that they should bear interest until paid. By Act 4th March, 1814 (4 Bior. & D. Laws, p. 649, § 3 [3 Stat. 100]), it is provided, that the said treasury notes shall be reimbursed by the United States, at such places respectively, as may be expressed on the face of said notes, one year respectively after the day on which the same shall have been issued; from which day of issue they shall bear interest, at the rate of $5^2/_5$ per cent. a year, payable to the owner or owners of such notes, at the treasury, or by the commissioners of loans, &c. Section 8 makes them receivable in payment for taxes and duties, and says, "On every such payment, credit shall be given for the amount of both the principal and interest, which, on the day of such payment, may appear due on the note or notes thus given in payment," &c. The act of 26th December, 1814 [3 Stat. 161], refers to the principal act of 4th March. The act of 24th February, 1815 (4 Bior. & D. Laws, 808 [3 Stat. 213]), may afford some light on this question, although none of these notes were issued under it. The 6th section of that act provides that they "shall be every where received in all payments to the United States, and shall be received for the amount of both principal and interest, which on the day of payment may appear due on such as bear interest." The phrase "5 2-5ths per cent, a year" in the first statute shows, that interest was not to be limited to one year, and the expressions used in providing for the receipt of these notes in payment show, that interest was to be computed up to the very day of offering them in payment. There is no restriction requiring the party to offer them on the day when payable, or before. If it had not been intended to allow interest up to the day when paid, whether before or after they became due, the statute would so have expressed it. But section 9, of the law of 4th March, 1814 (4 Bior. & D. Laws, 650 [3 Stat. 101]), is decisive as to the intention. It is there provided, that every collector, &c. who shall receive any such notes, shall be charged with interest from the time of receiving them to the time of his paying over, and shall be credited interest to the time of paying them to the bank or office of the United States. Suppose the notes paid to a collector at the very expiration of the year, months might elapse before he pays them to the treasury or to the bank. During all this time they carry interest, and the interest is not made to accrue during such time by this section. The object is to provide a mode of settling the account; the interest is spoken of as accruing of course; and this section only provides, how it shall be charged and credited. The same forms of expression are used in the act of 24th February, 1815 (4 Bior. & D. Laws, 809 [3 Stat. 214]), respecting computation of interest (see sections 6, 7), as in the two principal acts—but this last law does not even limit a time for payment. By section 4 the treasury notes may be presented "at any time," and the holder is entitled to certificates of funded stock to the whole amount of principal and interest, computed up to the time of presenting. The argument from this act becomes irresistible, when we find by section 9 all the treasury notes, issued under previous laws, put upon the same footing with those under this law, as to the holders being entitled to certificates of stock. They are to be converted "upon the same terms" and "in the same manner."

2. If we are right in this construction of the intent of the laws, a presumption arises, that the form of the treasury note is such as to execute that intention. And it would be necessary that they should expressly negative the payment of interest, to prevent their bearing interest for such time, as the law has provided. Suppose them silent as to interest, still they would bear interest by the effect of the law. Even if they expressly said, "without interest" this being repugnant to the law would be void, and the other part of the note would stand good, and the law would annex the interest. If not so construed, they must be treated as altogether void, not being pursuant to the law; but they are to be so construed as to have effect if possible, "ut res magis valeat quam pereat." But the form of the note, so far from excluding interest, contains a promise to pay interest according to the law. It is, "with interest from the

date thereof until that day at five and two fifths per centum per annum, in conformity with the act of congress of 4th March, 1814." Had it stopped at "per annum" there would have been no exclusion of interest after the year. But the reference to the statute makes it equivalent to a promise to pay such interest, as the act provides. The words—"until that day" only show an expectation, that they would be paid on the day appointed. It was unnecessary to say any thing as to interest after the day appointed for payment, because from that time interest was due of course.

3. Interest is always an accessary to the debt. Indebitatus assumpsit, and debt lies for interest alone. Herries v. Jamieson, 5 Term R. 556; Cooley v. Rose, 3 Mass. 221; Greenleaf v. Kellogg, 2 Mass. 568. Interest is not given as damages, though in assumpsit the form of the action requires, that it should be included under that name, as well as the principal sum. And in debt a technical rule makes it necessary to comprehend the interest in the damages for detention, but in truth the interest is an accessary to the debt. Hence it is always computed by the court, when necessary, without a reference to the jury. When there is any interval between the verdict and judgment, interest is carried down to the time of the judgment, without a new inquiry by the jury, unless the plaintiff himself occasions the delay. This was done in Robinson v. Bland, 2 Burrows, 1087. In that case Lord Mansfield was glad of an opportunity to correct a practice, which had prevailed, of allowing interest only to the commencement of the action. This mistake he thinks arose from not distinguishing between assumpsit for money, and common actions of trespass. He says (page 1087): "Where a man brings an action of assumpsit for principal and interest, upon a contract obliging the defendant to pay such principal money with interest for such a time, he complains of the nonpayment of both, the interest is an accessary to the principal." "In chancery, interest is computed even up to the day, when it is conjectured or agreed, that the master's report will be confirmed, though a future day." I don't know of any court in any country (and I have looked into the matter) which does not carry interest down to the time of the last act by which the sum is liquidated. In page 1086, he says, although this be nominally an action for damages, and damages be nominally recovered in it; yet it is really and effectually brought for a specific performance of the contract, for where money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time, and to pay interest for it from the given day, in case of failure of payment at that day. So that the action is in effect brought to obtain a specific performance of this contract. For pecuniary damages upon a contract for payment of money are, from the nature of the thing, a "specific performance."

Interest is sometimes made the measure of damages, as in Bodily v. Bellamy, 2 Burrows, 1097, but it is not recovered as damages. So interest is often given in shape of costs. Id., and 2 Term R. 78. Interest is computed in the exchequer chamber upon affirming a judgment in error, up to the time of affirmance. And on scire facias against the bail in error, it is allowed and computed by the master, from the time of affirmance in the exchequer chamber. Welford v. Davidson, 4 Burrows, 2124. In Blaney v. Hendricks, 2 W. Bl. 761: "Interest is due on all liquidated sums from the instant the principal becomes due and payable." In this case, the strictly legal effect of the promise perhaps is, that on the day designated for payment, the principal and interest then coming due began to carry interest jointly, precisely as if the promise had been to pay on that day a sum equal to the principal and the interest for one year. Until 37 Hen. VIII., c. 9, all interest was illegal. That statute allowed interest at 10 per cent. See the act and Lowe v. Waller, Doug. 740. In U. S. v. Gurney, 4 Cranch [8 U. S.] 345, Chief Justice Marshall says: "The majority of the court is not satisfied, that in waiving those damages, the obligee has without any agreement on the subject relinquished that right to interest, which is attached to all contracts for the payment of money;" and the court ordered judgment for the sum with interest from the time, when it should have been paid. In Farquhar v. Morris, 7 Term R. 124, bond with penalty for payment of a less sum, and no day fixed and nothing said as to interest. Held, that it was payable on the day of the date; and that interest was payable from that time, though not expressly reserved and though no request proved. In Marshall v. Poole, 13 East. 98. Where goods were sold, to be paid for in bills at two months, and no bills were given—held, that interest was recoverable upon a count for goods sold and delivered from the time the bills would have been due, and Lord Eldon says: "Interest may be considered in this case as parcel of the price of the goods sold and delivered; if they had been paid for at the time of delivery the price would have been as much less." In Trelawney v. Thomas, 1 H. Bl. 303. Interest for money paid to the use of another is to be computed, the amount being liquidated. In Young v. Leven, 4 Dow, 143. Where a collector of excise suffered the duties to be in arrear, and claimed and received interest of the debtor, it was held that the interest could not be recovered back by the party paying it; for, says Lord Eldon, if the duties were not paid at the time they were payable, and interest was charged, whether that interest belonged to the officer or to the public as issuing from the corpus of that fund, which belonged to the public, the trader had no reason to complain. In mons-

trans de droit against the king, if there be judgment for plaintiff there also shall be judgment for the mesne issues and profits. Com. Dig. D. 82.

Mr. Blake, Dist. Atty.

The question is, whether interest shall be computed on the treasury notes so as to be made a subject of tender, after the notes became payable up to the time of tender. Firstly, it may safely be admitted, in the outset, that in equity this claim of interest is well founded, and might be recovered if the United States were suable, or by petition of right, or monstrans de droit, but the objections are, 1st, that extra interest cannot be subject matter of tender. 2d. That it is not good in the way of set off.

1st. As to tender. Was the collector bound to receive these notes with allowance of interest as claimed; and is the action barred by his refusal. This depends on the construction of the laws of the United States, relative to this subject. This debt is on bond for payment of duties, as to which, by Act March, 1799, § 74 [1 Stat. 680], nothing is receivable but "money of the United States" or "foreign gold and silver coins at certain rates." Nothing else can be tendered in satisfaction. Six per cent. stock part due, could not be tendered. Suppose treasury notes, "the United States promise to pay A. B. or bearer" and nothing said about their being receivable for taxes, &c. they clearly could not be received. The question then is, whether upon the construction of the several acts enacting this species of paper, it is made receivable for duties, with accruing interest? On this point, whatever may be the words of the statute, the intention of congress is clear. No government could anticipate inability to fulfil its engagements. All financial operations proceed on the ground of exact punctuality. Failure is national bankruptcy. But what is the construction to be put upon the acts of congress relating to this subject? And what is the import of the promise on the face of these notes? All the acts preceding that of March, 1815, clearly contemplate payment of the notes at the expiration of one year from their date, and such also is the tenor of the notes themselves. But in March, 1815, some notes had already laid over, and the secretary of the treasury was authorized to continue the interest on them. This shows the sense of congress that no such authority previously existed. He is, however, authorized to allow interest sub modo only, until funds are assigned and notice given. Here such funds were assigned, and notice given. And the interest therefore ceased; such was the secretary's construction, and such the fact. But suppose the secretary had been authorized to continue the interest on these notes; does it thence follow that the interest can be allowed by the collector in payment of duties, without, at least, instructions from the secretary; clearly not. Suppose the secretary had been authorized to redeem Mississippi stock; or the Louisiana debt, as he has been the three millions on the next October. Yet this would not be receivable for duties and could not be tendered. So of old continental money or any other demand upon the United States. Besides, these treasury notes were made payable at Philadelphia, and the duties were payable at Boston: the place at which payments are to be made is important in fiscal arrangements. Another difficulty is to determine the rate of interest. Is it to be computed at 5⅔ per cent. or at 6 per cent. according to the legal rate in Massachusetts, or at 7, according to that of New York? There is no legal rate of interest, established by the United States. Suppose there was a failure on the part of the United States, to redeem a portion of the three per cent. stock, interest afterwards should not be confined to the 3 per cent. for the detention of the money is worth 6 per cent. at least. But it is said that interest is accessary to the principal, and follows as a matter of course, and that debt, assumpsit, &c. lies to recover it; and 5 term R. 556; 6 Mass. 262; 2 Burrows, 1087; 1 Term R. 343,—are cited. But all three proceed on the ground of an implied promise in the case of individuals. There is no such implication, where the sovereign is a party. All the contracts of government are express.

2d. Can the defendant avail himself of this claim by way of set off? The objections to this are (1) That the plea in this case is a plea of tender and not of set off. (2) Off set is unknown at common law. (3) The statute of 6 Geo. I., c. 2, is not binding here. (4) This act confines set off to goods sold or services rendered. (5) Our statute of 1784, c. 28, § 12, is confined to actions brought on book account stated, quantum meruit, quantum valebant, or services rendered. In this state the account must be filed seven days in the clerk's office. Besides, the claim to be set off must be an original one, not derived from assignment, transfer, &c. See Holland v. Makepeace, 8 Mass. 421; Makepeace v. Coates, Id. 451. Set off must be of debts certain. As bond, covenant, assumpsit, but not case when the damages are uncertain. Uncertain demands are refused in off set. See Winchester v. Hackley, 2 Cranch [6 U. S.] 342. This is only a claim of uncertain damages for the detention of a debt.

Mr. Prescott, in reply, was stopped by the court.

STORY, Circuit Justice. The replication of the United States is clearly bad for several reasons. In the first place it relies upon an act of congress (Act March 3, 1815, c. 76S; 4 Bior. & D. Laws, Ed. 1816, 831 [3 Stat. 227, c. 87]) as justifying a stoppage of interest

upon the treasury notes tendered in payment of this bond, which is wholly inapplicable. That act is confined to treasury notes, which had already become due and remained unpaid; and the replication itself avers, that the treasury notes now in question were not due until after the first day of the succeeding August. In the next place, if we could surmount this difficulty, the replication would still be bad, because it neither traverses, nor avoids the matter alleged in the plea. If funds were assigned for the payment of these treasury notes, and yet the proper officers of the government refused to pay them out of these funds, there is no pretence to say, that such an assignment, with a refusal of payment, was within the purview of the act, or that it is a legal answer to the matter of the plea. We are therefore driven to consider the sufficiency of the plea itself, which in truth covers the whole controversy between the parties, and involves matter of law of no inconsiderable importance. By the statutes of the United States (Act March 4, 1814, c. 77 [12 Weightman's Laws 276]; 4 Bior & D. Laws, p. 649, § 8 [3 Stat. 101, c. 18]; Act Dec. 26, 1814, c. 699; 4 Bior. & D. Laws, p. 737, § 3 [3 Stat. 162, c. 17]), under which treasury notes have from time to time been issued, it is enacted, that all such notes shall be receivable in payments to the United States for duties, taxes and sales of public lands, to the full amount of the principal and interest, accruing due on such notes. It follows of course, that they are a legal tender in payment of debts of this nature due to the United States, and by the very tenor of the acts, public officers are bound to receive them.

The single question, therefore, presented for the consideration of the court is, up to what time interest is to be calculated upon the treasury notes stated in the plea. If up to the time of the tender, then the plea is a good bar; if otherwise, then judgment must pass for the United States. The district attorney contends, that no interest is allowable beyond the times at which the notes respectively became due; on the other hand, the original defendants contend, that interest is to be allowed up to the time of the tender, the United States having refused to pay them at the time, when they became due, and at all subsequent times. All these treasury notes contain on their face a promise by the United States to pay the principal in one year from their date, with interest from that time, at the rate of $5^2/_5$ per cent. per annum, until that day; and the argument is, that as no interest is stipulated for beyond that day, none can grow due upon the contract. But the consequence does not follow from the premises; for the law upon every such contract between private citizens implies, that if the money is not paid at the day, the party shall pay interest for the delay of payment. Robinson v. Bland, 2 Burrows, 1077, 1086. Lord Mansfield has laid down this doctrine in very emphatic terms. He says, "where money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time, and to pay interest from the given day, in case of failure of payment at that day." Robinson v. Bland, 2 Burrows, 1077, 1086. And we all know, that it is a uniform rule of courts of law, upon all contracts for payment of money at a stipulated time, to allow interest upon non-payment at the day, as a right, which is attached to all such contracts, when they are silent as to interest. Farquhar v. Morris, 7 Term R. 124; Marshall v. Poole, 13 East, 98; Clark v. Barlow, 4 Johns. 183. And the rule has been enforced by the supreme court in a case where the United States were a party to the contract, and sought the benefit of the rule. U. S. v. Gurney, 4 Cranch [8 U. S.] 345. Nor can it make any difference, that the contract contains an express stipulation for interest until the day fixed for payment; for that is not inconsistent with the implication, that if not paid at the day, interest is to be paid afterwards, since without such express stipulation no interest would grow due until a default of payment. The maxim then, expressum facit cessare tacitum, does not apply; for the contract does not speak to the particular case.

If the present then were a contract between private citizens, there can be no doubt, that the court would be bound to give interest upon the contract up to the time of payment. And if by law the amount due on the contract could be pleaded as a tender or a set off to a private debt, it would be a good bar to the full extent of the principal and interest due at the time of such tender or set off. Nay more, if the note or promise were given by a citizen to the government, the latter might enforce its claim to the like extent. Can it make any difference in the construction of the contract, that the government is the debtor instead of the creditor? In reason, in justice, in equity, it ought to make none; and there is not a scintilla of law to justify any. And if a suit could be maintained against the government, I do not perceive, why it would not be as much the duty of the court to render judgment on such suit for the principal and interest, in the same manner and to the same extent as it would in the case of private citizens. The United States have no prerogative to claim one law upon their own contracts, as creditors, and another as debtors. If, as creditors, they are entitled to interest, as debtors, they are bound also to pay it. Nor is there the slightest pretence to assert that the acts, under which these treasury notes were issued, prohibit the payment of interest after a year from their respective dates. They authorize the issuing of treasury notes in the exact terms, in which the present are

couched. The most that can be urged is, that the acts are silent as to the payment of interest after the year; but in such cases the law steps in and by implication supplies, as matter of necessary inference, what is not expressly declared.

But it is not necessary to rest this construction upon the general principles of law, strong and unexceptionable as that ground appears to the court. There are clauses in the statutes cited at the bar, which manifestly contemplate that interest is due after the year, whenever treasury notes are then outstanding and unpaid. The collectors of the revenue, who are bound to receive the notes in payment of public debts as well after as before the expiration of the year, are in all cases chargeable with interest from the receipt until payment of the notes into the treasury. Act 4th March, 1814, c. 77, § 7 [12 Weightman's Laws, 277; 3 Stat. 101, c. 18]. Yet why should this be done on payments after the expiration of the year, if interest by the terms of the contract had then ceased? The very clause in the statute of 1815 (Act 3d March, 1815, c. 76S, § 7 [4 Bior. & D. Laws, 833; 3 Stat. 228, c. 87]) which has been relied upon by the government, does seem to me to justify the same construction. It authorizes the secretary of the treasury to pay the interest upon treasury notes then due and unpaid, as well with respect to the time elapsed before as after they became due, until funds shall be assigned for their payment. Why should interest, eo nomine be paid upon such notes, after they became due, if the legislature did not clearly comprehend, that the faith of the government was pledged to that extent? The statute does not purport to make a new allowance, but simply to authorize a payment of an existing debt or duty

It has been asked, whether upon all contracts of the government, which are not strictly performed according to their terms, interest is to be allowed in the same manner as upon private contracts? In point of justice or law no reason is perceived by the court, why the government, if it were suable, ought not to pay, what as a creditor it could compel its own debtor to pay. But we may leave this case to be decided, when it shall arise. Here the government have expressly stipulated for interest at a specific rate; the contract is received by the citizens upon the public faith; and that rate of interest becomes as between the government and the citizens the law of the contract, until it is paid. If a different measure of compensation could be dealt out by judicial tribunals, in my judgment it would seem as little to comport with the dignity of the government, as it does with sound policy and the eternal dictates of justice.

The judgment of the district court is reversed, and a judgment must be entered, that the plea in bar is good, and that the United States take nothing by their writ.

Case No. 13,988.

THORNE v. The VICTORIA.

[21 Betts, D. C. MS. 63.]

District Court, S. D. New York. March Term, 1852.

ADMIRALTY — COSTS — HOW AWARDED — STATUTE — PROCTOR'S COSTS.

[Cited in U. S. v. One Package Ready-Made Clothing, Case No. 15,950, to the point that the act of 1853 excludes all costs to officers of the court which are not specifically appointed by the statute.]

[This was a libel by Charles E. Thorne against the schooner Victoria and George Coombs, master.]

Before BETTS, District Judge.

(1) The bill of costs made up by the proctor of the libellant, and submitted to the clerk for taxation, is not authorized by the existing law, and the appeal from the decision of the clerk cannot be maintained.

(2) The act of congress of February 26, 1853 [10 Stat. 161], was manifestly intended to make specific allowances in all cases of costs, taxable by officers of the United States courts, and in relation to attorneys, solicitors, and proctors, alike in respect to adversary parties and their own clients. Title of act and clause 12 of section 1. This legislative purpose and policy the courts will carry out in good faith, and, as the act is remedial, with a liberal interpretation, it now supplies the only law of costs, and indeed takes from courts all implied authority to award them. 3 Denio, 174; 1 Sandf. 669.

(3) The repealing provisions embrace not only costs previously appointed and allotted by statute, but those given by rules or regulations of the courts. Section 5 and introductory clause.

(4) Costs in admiralty courts are not of statutory appointment, and are usually given at the discretion of the courts, whether specified in each particular decree, or awarded in conformity to general regulations of the courts. Ben. Adm. 550; 2 Conk. Prac. 778, 779.

(5) Advocates in admiralty and counsel in common law and equity cases have no fees allotted to them under those titles by the act in question. They cannot claim costs by force of usages or regulations of the court, those being explicitly abrogated by the act (section 5); and, if this was not so in terms, the allowance must be denied as contrary to the manifest scope and intent of the statute.

(6) For although counsel and attorneys are distinct officers, performing different functions, and receiving and holding their offices under distinct appellations (U. S. Sup. Ct. Rules, Feb. 5, 1790), and proctors and advocates in admiralty correspond to those law officers (1 Conk. Adm. Prac. 355; Betts, Adm. 9, 10), yet the attorney and proctor are the stamen of their respective orders, and are only subdivided in names

and functions for the convenience, or pursuant to the usages, of the tribunals in which they practice (Jac. Law Dict. "Attorney, Proctor," etc.).

(7) In admiralty, the proctor is the only proxy of the party known upon the act or dockets of the court, and, in strictness, advocates are but a class of proctors, and not independent officers, in the constitution of that court. Clarke, Praxis, tit. 8 (Hall's annotations). The advocates in ecclesiastical and maritime courts and counsellor in courts of law are officers of correspondent grades and services. Jac. Law Dict. "Vore."

(8) The act of February 26, 1853, would thus naturally be interpreted as implying the term "proctor" to embrace all proxies of the party in an admiralty cause, as does "attorney" and "solicitor" those in common-law and equity cases.

(9) There is but a single fee allowed by the statute to be taxed to this class of officers for services in an admiralty cause, and that is a docket fee, and the act assumes to designate and fix the whole compensation to those officers for their services in any cause, as against the adversary party.

(10) There is a good deal of obscurity in the frame of those provisions, but that apparently results from the act being penned particularly with a view to regulate the costs taxable by United States district attorneys; and that the clause including all attorneys, solicitors, and proctors in the United States courts was probably interpreted without a technical adaptation of phraseology to antecedent and subsequent clauses.

The taxation of the clerk is confirmed, and the appeal therefore dismissed.

THORNE (BLACK v.). See Cases Nos. 1,465 and 1,466.

Case No. 13,989.

THORNE v. WHITE.

[1 Pet. Adm. 168.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES—FORFEITURES AND DEDUCTIONS—MISCONDUCT—QUARRELS AND AFFRAYS—AUTHORITY OF MASTER—CRUEL PUNISHMENTS—RECEIPTS FOR WAGES.

[1. Criminal offences by mariners do not destroy their contracts. Being amenable to a criminal prosecution, and liable to fine and imprisonment, they should not receive a double punishment by forfeiture of wages.]

[Cited in The Nimrod, Case No. 10,267; The Maria, Id. 9,074; Thomas v. Gray, Id. 13,898; The Antioch, 11 Fed. 168.]

[2. Broils, assaults on, or resistance to, masters, do not ordinarily operate to forfeit wages, nor do they amount to mutiny or revolt, which crimes are defined by statute, and are punishable with death.]

[3. It is the duty of seamen to bear with the ill temper of the master, and get out of his way when he is in a passion. The master must not pursue a seaman who flies from him when enraged.]

[Cited in Fuller v. Colby, Case No. 5,149.]

[4. When the crime of a sailor is too great for the master's authority to punish, the master must not take the law into his own hands, but must seize the criminal, put him in irons, and bring him to justice on the return home.]

[Cited in Fuller v. Colby, Case No. 5,149.]

[5. The loss or damage accruing to the owner or master by any negligence or crime may be set off against wages.]

[6. The master should maintain a temperate demeanor and orderly and decent conduct towards the seamen. He may inflict moderate physical correction, but, if he commences a dispute with improper and illegal behavior, he risks the consequences.]

[Cited in Butler v. McLellan, Case No. 2,242; Gardner v. Bibbins, Id. 5,222; Sheridan v. Furbur, Id. 12,761; Fuller v. Colby, Id. 5,149.]

[7. When a seaman is incorrigibly disobedient, and will not submit and offer to do duty and make amends, the master may discharge him, or correct and confine him on board, or dock him of his provisions.]

[Cited in Hutchinson v. Coombs, Case No. 6,955; Smith v. Treat, Id. 13,117; Lamb v. Briard, Id. 8,010; The Cornelia Amsden, Id. 3,234; The Stacey Clarke, 54 Fed. 533.]

[8. If a seaman is prevented by confinement under the master's orders from doing duty, he is excused from it by the master's act; and, on submission, the master must, in ordinary cases, accept his services.]

[Cited in The Nimrod, Case No. 10,267; The Mentor, Id. 9,427; Fuller v. Colby, Id. 5,149.]

[9. Receipts given by seamen in full of all demands are only prima facie evidence, and the facts may be examined into.]

A seaman cited the master, to shew cause why process should not issue against the ship, for wages.[2]

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

[2] At the circuit court of the United States, October, 1806, before Judges Washington and Peters, one Magill, mate of the brig Rover, Budden, master, lying, at the time when the offence was said to have been committed, in the haven of Cape Francois, was indicted for murder, in killing, with malice, &c., his captain. The death ensued a quarrel and affray, originating from intoxication on the part of Budden, and imprudently aggravated by intemperate language and ill-timed resistance on the side of the mate. The fatal stroke was given with a very large club, on board the vessel, but the death took place on shore. The testimony supported only one of the counts in the indictment; and was substantially as before stated. The defence on the merits was suspended, to take the opinion of the court on the point of jurisdiction. It was alleged, and so ruled by the court, that the stroke having been given at sea, or in the haven, and the death occurring on land, within a foreign territory, the crime was not completed within the jurisdiction of the court, which only embraced offences "on the high seas." On two of the counts, a nol. pros. was entered, and a verdict of acquittal taken on the third; though some doubts arose whether, if the court had no jurisdiction, the verdict could legally be recorded. Many authorities from the British books were cited by the prisoner's counsel, to shew, that the place where the stroke was given, and that of the death, must be within the juris-

Cause shewn. That the mariner, who had conducted himself well, in other respects, during the whole voyage had a difference with the captain, in the river Delaware, on the ship's return. A quarrel ensued, and blows passed. The master began the affray, with violence and intemperate passion. He threw scalding water, into the seaman's face—provoked resistance first, and afterwards a return of blows, from the seaman. Both parties conducted themselves improperly. The master confined the mariner in the fore-castle, and threatened his life, if he came on deck. A neglect, and refusal to do duty was alleged, which the mariner denied. No order, or demand to do duty, was proved. The resistance to, and attack on, the captain, and the sailor's leaving the ship, before she was unladen, were also insisted on, to repel the claim to wages.

BY THE COURT (HOPKINSON, District Judge). It is unreasonable to insist on the neglect of duty, when the seaman was prevented by confinement and threats. Passes at him, with a drawn sword were made by the captain, at one time, when he attempted to come on deck. If affrays on board ships, arising from sudden quarrels, are to forfeit wages, forfeitures would be very common indeed. It is a mistake, frequently entertained by owners and masters of ships, that broils, assaults on, or resistance to masters (produced most commonly by faults on both sides) forfeit wages. Such offences are often improperly called mutiny or revolt; but they do not amount to this offence, which is defined by our statute, and declared to be a capital crime, and punishable with death. They may be, when the fact justifies the conclusion, evidence of intent, or overt acts, furnishing ingredients for this crime. But in general, they are merely the intemperate effects of personal animosities, sudden passion, the pride of power, and the sourness of reluctant obedience, or mulish resistance. It is the duty of seamen to bear even the illtemper of the master, and to get out of his way, when instances of passion occur. Consulato del Mare, 16; Sea Laws, 139, 140. Some of the maritime laws are particular in adjusting how a mariner shall demean himself when the master is enraged, and when he may stand on his defence. A master must not pursue (as was done in the case before me) a mariner, who flies from him when enraged. Many of the sea laws are curiously directory in such points. When a sailor is disobedient or mutinous, the captain is to hold up the ship's towel (according to one of the sea laws), for a certain time, within which the mariner is to submit, under the penalties therein prescribed. The law warrants moderate correction of mariners; but, this

---

diction; and the offence was not complete unless both circumstances concurred. Unless the stroke and death so concurred, it was not murder "on the high seas." The name of the offence is only mentioned in the act of congress; its definition is left to common law interpretation—and the authorities cited shew the construction. On the part of the United States it was contended; that the authorities cited, only applied to the subject of vicinage, and were directory of the place of trial, as it respects the summoning the jury. The place of trial is here fixed by our law—to wit, the district of first arrival, or apprehension of the party, and therefore the British authorities are irrelevant and useless. That the British admiralty jurisdiction extended to parts beyond the seas, though, the jurisdiction not being local, but personal over their subjects, in whatever country they committed offences, cognizance was not taken by their ordinary courts. A court, consisting of the admiral and constable, had cognizance in cases of offences committed by British subjects beyond seas. This court is obsolete by non user; but the jurisdiction remains among the powers of admiralty and maritime cognizance; though it is not exercised in modern times. Its existence is only suspended not destroyed. Civilians (Domat, etc.) have asserted this jurisdiction in other countries.—No case of the actual exercise of this authority was produced. It was further contended, that the constitution having given to congress, and they having assigned, by the 11th section of the judiciary act, the jurisdiction contended for, the court is legally invested therewith. If it be not within admiralty and maritime jurisdiction (in which no distinction appears in the constitution between civil and criminal cases) congress have no power to legislate in the case; and so such heinous offences must go unpunished, when attended with circumstances like those of the present transaction. It was replied by the defendant's counsel (Mr. Ingersol), that the 8th section of the act relating to crimes (and not the 11th section of the judiciary act) is explanatory and decisive, being subsequent to the judiciary act. The only enquiry under this section is—whether murder was committed on the high seas? The stroke and death must be in the same place, to fix a jurisdiction. Although one was on the high seas, both were not, as they should have been to warrant the court in taking jurisdiction, or cognizance in this case; and therefore the cause is coram non judice, &c.

The court agreed in the general result, though Judge Peters gave no opinion as to the general powers included in the words "admiralty and maritime jurisdiction." Judge Washington, declared that no cognizance was given, over offences committed on land in foreign parts, by these words; but both judges agreed that the stroke and death must occur on the "high seas" to warrant the jurisdiction of this court. It was also agreed by the court—that congress might define the offence, and fix the punishment, if either substantial ingredient happened on the "high seas." They might declare it capital, and punishable as murder, if the stroke, with malice and intent to kill, was given on the "high seas," and the death, in consequence, occurred on land. And so vice-versâ. The defendant was bound over to answer at the next court, to a charge of assault and battery, &c. Dallas, attorney of the U. S. Ingersol and Jos. Reed, for the defendant. In a former case, one Russel, a ship master, was charged with murder, in killing his cabin boy—the stroke was given at sea, the death ensued on land. The prisoner was discharged—He was bound over on a charge of assault and battery, but the court was divided on the point of jurisdiction, which Judge Peters asserted, and Judge Chase denied. He agreed that congress had the power to give the jurisdiction, but they had not vested it in the court. Some doubts arose as to the merger of the lesser offence, in the greater, but no decision was given; and thus Russel was discharged, and escaped any farther trial or investigation into his conduct. Rawle, attorney for the district. Lewis, for the defendant.

correction, by the law of Oleron (Laws of Oleron, art. 12), is confined to one stroke of the fist. The laws of Wisbuy, among others, are very severe on mariners striking the master; but the cruel punishment therein designated is disused. All these laws regulate the authority of the master; and confine it to moderate correction. When the crime of a sailor is too great for the master's authority to punish (which should be evident on the trial, to justify severe measures) the master and his officers are to seize the criminal, put him in irons, and not take the law into their own hands, but bring him to justice on their return.[3] But the contract for wages is not affected.

Although it is laid down as a general rule, that criminal offences, and especially those of inferior grade, do not affect civil contracts, I would not be understood to say, that this rule cannot have exceptions. There may be cases so atrocious as to render the seaman unworthy of further trust, and operate in violation of his contract. It may be dangerous to retain him in service, or to suffer his being at large in the ship. Such cases must always be determined on the special circumstances attached to them. Loss or damage, accruing to the owner or master by any negligence, or crime, may be set off against wages, as in case of any other demand. I have generally thought myself warranted to give a latitude of construction to the words "moderate correction," where chastisement was salutary and merited, and in this I have never been overnice. The safety of a ship sometimes depends on promptly checking disobedience, and stimulating exertion. Subordination is peculiarly essential to be enforced, among a class of men whose manners and habits partake of the attributes of the element, on which they are employed. I have never bound over a master for correcting a sailor, unless cruelty was exercised, or improper weapons used. Instances have not been rare in this court (and they have not been overlooked) where the most enormously cruel, and unjustifiable acts of tyranny, and wanton abuses of power, have been exhibited by masters of ships.[4] Seamen too frequently provoke, and receive, proper correction; but masters should set examples of discretion, and regulate their passions. They must stop at the point, beyond which the law forbids them to pass. The sea laws enjoin on the master a temperate demeanor, and orderly and decent conduct, towards seamen. By several of these laws, he is finable for abusive expressions, or misconduct, towards mariners. He risks the consequences, if he commences a dispute with illegal conduct, and improper behavior. It is impossible to fix with certainty, the nice tints and colours, which mark the boundaries, between a justifiable command, and an improper exercise of authority; but these accuracies are seldom required. In the case stated, the circumstances are strongly marked. The laws, though often applied to for this purpose, do not encourage or gratify revenge; they only punish for reformation, or example. When a mariner is incorrigibly disobedient, and will not submit, and offer to do duty and make amends, the master may discharge him. He may correct and confine him on board the ship, or dock him of his provisions. If he refuses, or obstinately neglects, to do duty, for any length of time, he does not perform his contract. Such negligence and disobedience, not temporary and fugacious, but continued, must be set off against his demand, for the period during which they exist. If he is restrained from duty by confinement, he is excused from it by the act of the master; who must, on submission, accept of his services, in most cases.[5] But the true ground of this

[3] In a case wherein confinement on board the ship, of two disobedient seamen, appeared to me proper, and indispensable, and where frequent endeavours to reclaim were ineffectually tried, for almost the whole latter section of the return voyage, I held the confinement in irons, so justifiable and necessary for the safety of the ship, that I refused to allow wages for that part of the voyage. The two seamen were influential characters, and atrocious leaders of a rebellious crew. They had not misbehaved on the former part of the voyage, I considered it to be a partial breach of contract, and not a forfeiture in toto. These seamen complained, I thought without cause, of high-handed and cruel treatment. I left them to their remedy at common law, by action for false imprisonment, or any other mode of redress.

[4] This is by no means mentioned as a general censure, but as an inducement to strict examination into cases likely to develope such incidents. An enumeration of them would not only be shocking to humanity, but offensive to common decency. It would include not only melancholy consequences of sudden and unbridled passion, but calm, deliberate, and cruelly protracted torture, not exceeded by many accounts we have of the rack, or the real or fabled torments of the inquisition. Some of the perpetrators of these enormities have escaped by defect of testimony, owing to witnesses being absent, and some by doubts about jurisdiction. I have had only to determine on the facts, as they related to contracts. When suits at common law were recommended, or the parties left to their own course, the poverty of the victims, or the difficulty of retaining transient witnesses to give evidence, has precluded prosecutions, or suits, entirely; or, where instituted, prevented punishments, or recoveries. Aware of these obstacles to retribution, some have accepted trifling compromises, to which their "poverty and not their will consented."

[5] Where seamen have been deemed mutinous or dangerous, and in some instances for affrontive expressions, in others for very trifling offences, masters have thought themselves justified in confining them in prisons, or guardships, at foreign ports, I have not considered this as legally justifiable, though some occasions have appeared to render it unavoidable. Some have alleged that the police of the port required it. In the greater number of instances, I have found these punishments to proceed from arbitrary and tyrannical tempers, and, if not entirely unwarranted by the offence yet not defensible in the extremes to which they were extended. Many seamen have perished by diseases and hardships, to which they were subjected in loathsome prisons or infected ships; more have been rendered wretched, and incapable of further service by chronic diseases, or the consequences of acute disorders. I have had to ad-

case is, that a mariner's contract is not destroyed, by such criminal offences. He is amenable to a criminal prosecution; and liable to fine and punishment. He must not be twice punished for the same offence; first, by forfeiture of wages—secondly, by the fines and punishments affixed by the sea laws, or the municipal law of our country.

I have, on sundry former occasions, given my opinion upon the points—when a seaman's contract for the voyage expires, and when he may leave the service of the ship.

This is a summary of my decisions, as well in the case stated, as in many others, similar in circumstances.[6] See the case of Edwards v. The Susan [Case No. 4,299].

Wages ordered to be paid. It appeared that cross prosecutions, for the criminal offences, were commenced before a magistrate. A receipt in full of all debts, dues, and demands was produced. The judge stated, such receipts are frequently taken, where quarrels have arisen at sea, to repel prosecutions. They are only prima facie evidence, and may be examined into—Seamen are denied their wages often, unless they sign such receipts. But this is illegal, and no such terms ought to be insisted on.

THORNER (AHL v.). See Case No. 103.

THORNHILL v. BANK OF LEE. See Cases Nos. 13,990–13,992.

Case No. 13,990.

THORNHILL et al. v. BANK OF LOUISIANA.

WILLIAMS et al. v. SAME.

[3 N. B. R. 435 (Quarto, 110) [1] 3 Am. Law T. 38; 2 Chi. Leg. News, 157; 1 Am. Law T. Rep. Bankr. 156.]

District Court, D. Louisiana. Jan. 11, 1870.[2]

BANKRUPTCY — STATE INSOLVENCY — BANKS — FORFEITURE OF CHARTER—ASSETS.

1. A bank, incorporated under the laws of the state of Louisiana, became insolvent, and the attorney-general of the state of 1868 proceeded in a state court at the instance and by request of the bank, and thereupon a decree was rendered forfeiting its charter, and directing its affairs to be wound up in accordance with the insolvent laws of the state. In 1869, creditors of the bank petitioned to have its assets surrendered and administered upon in bankruptcy, and were opposed by the state insolvent commissioners. *Held*, the state laws relating to insolvency, insolvent debtors, etc., were superseded on the 1st of June, 1867, by the bankruptcy act of 1867 [14 Stat. 517].

[Disapproved in Re New Amsterdam Fire Ins. Co., Case No. 10,140. Cited in Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

2. The state court had no jurisdiction in the premises except to the extent of decreeing a forfeiture of the bank charter when its jurisdiction ended.

3. It was the duty of the directors of the bank, upon learning its insolvency, to have taken proceedings to surrender its assets to be administered upon under the United States bankruptcy act.

4. The fact that the bank was extinct, as a corporation, and its assets being administered upon under decree of the state court, and according to state laws, at the time of creditors filing said petition in bankruptcy does not affect the jurisdiction of the United States bankruptcy court, and it will lay hold of the assets of the bank, in whosesoever hands they may be, and distribute

---

just numberless altercations in these cases, about physicians' bills, gaol fees, or costs paid to military or police officers. I generally determined according as the original cause, prompting the punishment, justified or not, or palliated the proceeding. I have always held the step to require strong justificatory proof. But I could not conceive myself warranted, while the seaman was undergoing one punishment to inflict another, by allowing deductions from wages, or pay for the hire of another, especially when repentance, or offer to return to duty was in proof. Some instances have occurred to warrant the measure, and bear out the master in refusing the re-acceptance of service, and totally ejecting the offender from the ship. Some years ago it was not infrequent for masters, at foreign ports, to terrify mariners into an abandonment of their contract, by threats to deliver them to officers of belligerent ships; and some native, and other adopted citizens, were so delivered; others were hired in their stead at low wages, or to work their passages. I checked this practice, by decreeing wages for the voyage, the causes for those unjustifiable threats, or dismission from the ship, commonly appearing unlawful and sordid.

[6] I have repeatedly found great difficulties in the way of doing justice to either party, in cases of disobedience or neglect. Sailors have so many peculiar propensities, as well vicious as venial, that it is not easy to arrive, or stop when there, at the true points of either punishment or forgiveness. To punish every fault would be endless; and would, by driving seamen from their own, to seek some other occupation, tend to lay up our ships. I could, therefore, do nothing more satisfactory to myself, than to establish some general principle, and disregard niceties in the application. Without balancing much as to degrees of fault or negligence, I have required proof of special damage, in either case. Where damage, or loss, has been sustained, I have ordered retribution; having regard to the circumstances and ability of this class of men. Where neither loss or damage has been in proof, I have overlooked the offence or neglect, where it did not require exemplary notice and punishment. Officers of ships are authorized to use correction for common faults; and can exercise compulsory means, as stimulants to duty. To fix occasional crimes, or faults, as repellants to claims under contracts, would be tantamount to superceding most agreements by mariners. The old sea laws attempted a reformation by mulcts and punishments for enumerated crimes, offences and neglects. These being obsolete in this part of their arrangement, and in some details cruel and inefficacious, are not now practised upon. There can therefore be no accurately marked line; and loss or damage must form the general rule. Included in this rule, are all deductions for loss of service, by refusal or voluntary and unnecessary neglect of duty; as well as retributions for malfeazance, misfeazance, or gross negligence. Casual misconduct may be forgiven, or retributed; but inveterate and incorrigible habits of long continuance and dangerous tendency, either entirely annul, or vacate the contract, during their existence, according to circumstances.

[1] [Reprinted from 3 N. B. R. 435 (Quarto, 110), by permission.]

[2] [Affirmed in Case No. 13,992.]

the same in accordance with the provisions of the bankruptcy act.

5. Judgment rendered and decree entered accordingly.

[These were suits by John Thornhill and others and Sarah Williams and others against the Bank of Louisiana.]

Cooley & Phillips, for petitioning creditors.

DURELL, District Judge. These suits were brought by certain creditors of the Bank of Louisiana, with the intent of forcing said bank to make a surrender of its assets to be administered upon, under and in accordance with the provisions of an act entitled "An act to establish a uniform system of bankruptcy throughout the United States." The questions at issue have been twice argued before the court; first in the month of June last, and again a few days before the last adjournment for the holidays. The arguments made by counsel were very able, and I have given to the questions mooted much consideration.

The facts involved are these: In 1868, about one year before the filing of the petition in the first of these suits, the Bank of Louisiana, through its president, took steps for the liquidation of its affairs, under certain statutes of the state touching the liquidation of insolvent corporations. The bank applied, by petition, to one of the courts of the state for an order, calling a meeting of its stockholders, to be held before one of the notaries public of the city, for the purpose of voting upon the question of the propriety of a surrender of its charter; the bank alleging, in said petition, that it was insolvent; that its property was being seized by creditors; and that unless a surrender of its charter were made, and its assets administered upon as in a case of insolvency, the most vigilant creditor would be the most favored, contrary to the policy of the law of the state. Subsequently, and but a few months after the taking of this action, the attorney-general of the state, at the instance and by the request of the bank, instituted suit in the Sixth district court of New Orleans, for and in behalf of the state and against the bank, praying for a decree of forfeiture of its charter. The attorney-general, in his petition, alleged, as the bank had before alleged, that the bank was insolvent, that its affairs were daily growing to a worse condition, and that for the protection of its creditors, and for an equitable distribution of its assets, a decree of forfeiture of its charter should be rendered, the corporation dissolved, and its property placed in the possession of commissioners appointed by the court, to be administered in accordance with the provisions of the insolvent laws of the state. A decree was rendered in accordance with the prayer of the attorney-general's petition, and three commissioners, appointed also in answer to said prayer, have now, for more than eighteen months, and for more than one year prior to the application made here by Thornhill for a forced surrender, been in possession of, and administering upon, the assets of the bank, as in a case of insolvency. In the month of May last, Thornhill and others, creditors of the bank, believing that its assets might be better and more equitably administered upon under the provisions of an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, applied by petition to this court, sitting in bankruptcy, for an order requiring said bank, its president and directors, and said commissioners, to surrender all of the assets of said bank to be administered upon in this court, as in a case of forced surrender in bankruptcy. The commissioners alone oppose the application. In answer to the petition of Thornhill et al., they say: 1st. That the bank is dead; its charter having been taken from it by the decree of a court of competent jurisdiction, more than a year before Thornhill put on file his petition for a forced surrender. 2d. That the property of the bank is now being properly administered upon under state laws for such purposes long since made and provided.

The 8th section of the constitution of the United States provides, among other things, that "congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States." On the 2d of March, 1867, congress, in pursuance of the power thus granted, enacted the law entitled "An act to establish a uniform system of bankruptcy throughout the United States," being chapter 76 of the second session of the 39th congress. The 37th section of said act reads as follows: "And be it further enacted, that the provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint stock companies; and that, upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors, of such corporation or company, made and presented in the manner hereinafter provided, in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors. And all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, convey-

ances, and assignments, declared fraudulent and void by this act, when made by a debtor, shall, in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof: Provided, that whenever any corporation, by proceedings under this act, shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations, in the manner provided in this act in respect to natural persons." Now, this act, under the provisions of its 50th section, came into full force and effect on the 1st day of June, 1867, one year before the attorney-general of the state, acting at the instance and request of the bank, asked for a judicial forfeiture of its charter. If, then, the president and directors of the bank had, at the time they instigated action on the part of the attorney-general, come to the conclusion that the bank was hopelessly insolvent, and that its property should be administered upon as in cases of insolvency, what was it their duty to do? It was, most assuredly, to have made a surrender of the property of the corporation over which they presided, into this court sitting in bankruptcy, to be passed upon as in cases of voluntary surrender under the act. At the time action was taken by the attorney-general for a forfeiture of the charter of the bank; at the time of the rendering of the decree of forfeiture by the court taking jurisdiction of the same; and at the time of the appointment of the commissioners who now have possession of the property of the bank, and who here oppose the proceedings of Thornhill and his associates, all statutes of the state of Louisiana touching proceedings in insolvency, insolvent debtors, insolvent corporations, were superseded, and made to be of no effect, by the enactment of the act of March 2, 1867, establishing a uniform system of bankruptcy. The Sixth district court of the city of New Orleans had jurisdiction of the action taken by the attorney-general, as far as the forfeiture of the charter was concerned; but with the decree of forfeiture its jurisdiction ended. It could not go on and administer upon the property of the bank as the property of an insolvent corporation, for the insolvent laws of the state touching corporations, by virtue of which the court could alone act, were no longer in force.

It has been said by counsel for the commissioners that, inasmuch as the bank expired, or became extinct as a corporation at the date of the forfeiture of its charter, no being now exists contradictorily with whom these proceedings can be taken. But this court, looking to the interests of creditors, and to an equitable distribution among them of the property of their debtors, in accordance with the provisions of the bankrupt act, will lay hold of such property wherever it can find it; and persons in possession of the same, whether claiming in open wrong, or under a show of title, are parties proper to be made defendants in proceedings of this character. Were it otherwise, any corporation might escape the regime of the bankrupt act by a simple dissolution or surrender of its charter.

Judgment is therefore rendered in favor of the petitioners in these cases, and a decree will be entered in accordance with the several prayers on file.

[NOTE. Within 10 days from the date of the above decree, a petition of review was filed by the commissioners in the circuit court, and that court entered a decree affirming the orders and decrees of the district court. Case No. 13,992. Application was immediately made by the commissioners for an appeal to the supreme court, which was refused by the circuit judge, but was subsequently granted by one of the associate justices of the supreme court, more than 10 days, however, from the date of the decree of the circuit court. It was contended that the appeal subsequently allowed operated as a supersedeas from the date of the first application, and a decree was made by the circuit court that all orders in this cause subsequent to the 21st of January, 1870, be vacated and annulled. Case No. 13,991. After the appeal was filed in the supreme court, the appellees filed a motion to dismiss the same for the want of jurisdiction. The motion was granted. 11 Wall. (78 U. S.) 65.]

Case No. 13,991.

THORNHILL et al. v. BANK OF LOUISIANA.

WILLIAMS v. SAME.

[5 N. B. R. 377;[1] 4 Am. Law T. Rep. U. S. Cts. 245; 1 Am. Law T. Rep. Bankr. 287.]

Circuit Court, D. Louisiana. April Term, 1870.

APPEAL—STAY OF PROCEEDINGS—ORDERS SUBSEQUENTLY MADE.

1. Where a party appeals from the decision of the United States circuit court to the United States supreme court, the allowance of the appeal is to relate back to the time when the original application was made for an appeal to the judge of the circuit court, and entitles a party to a stay of proceedings.

2. Decreed that all orders in the above entitled cause made by the circuit or district courts since the date of the injunction granted by the circuit judge, be vacated and annulled, and it is ordered that all things be restored to the condition in which they stood at the date of said injunction.

In bankruptcy.

BRADLEY, Circuit Justice. In this case, we have taken the matter into consideration, and have come to the conclusion that the appellant was entitled to a supersedeas. By the act of 1789 (section 23) [1 Stat. 85], a writ of error, (which was the only process then given for resort to an appellate court) as well in equity as in common law cases was a supersedeas and a stay of execution in cases

[1] [Reprinted from 5 N. B. R. 377, by permission.]

only where the writ of error was served by a copy thereof being lodged for the adverse party in the clerk's office, where the record remained, within ten days, (Sundays exclusive) after rendering the judgment or passing the decree complained of. A writ of error is no longer the process for reviewing the decrees in equity or admiralty. By the act of March 3, 1803 [2 Stat. 244], it is declared that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute shall exceed the sum of fifty dollars, shall be allowed to the circuit court; and from all final judgments or decrees rendered in any circuit court, in any cases of equity, admiralty, or maritime jurisdiction, etc., an appeal, where the matter in dispute exceeds two thousand dollars, shall be allowed to the supreme court of the United States, and such appeal shall be subject to the same rules, regulations and restrictions as are prescribed in the law in cases of writs of error. This clause adopts the rules, regulations and restrictions contained in the act of 1789—the time within which the writ of error must be lodged in the clerk's office, in order to operate as a supersedeas, the citation to the adverse party, the security to be given to the plaintiff in error—the directions in reference to all these things are applicable to appeals under the act of 1803, and are to be substantially observed, except where the appeal is made at the same term and in open court, when a citation is not necessary.

Now, it is evident that the twenty-third section of the act of 1789 cannot be literally complied with in cases of appeal. For example, the writ of error or a copy of it cannot be filed for the adverse party in the clerk's office within ten days, for there is no writ of error. Only the spirit of the act of 1789 can, in many particulars, be carried out. In cases of appeal, the appeal may be taken orally in court. No written application need be made, either in court or to the judge. It is so held by the supreme court in 18 Howard. In such a case, a copy of the writ of error, or copy of anything like a writ of error, or analogous to it cannot be filed. But it is evident that something must be done by the appellant within ten days, in order to comply with the spirit of the act of 1789; that is, he must take his appeal and present his bond to the court or judge within that time, and he must file in the clerk's office either the bond or some other paper, or an entry must be made upon the minutes of the court, or something else must be done to show that the appeal has been taken within the ten days.

In this case the petition of appeal was presented to the judge within the ten days, accompanied by the bond. The bond was approved by the judge, but the petition of appeal was not allowed, because in his opinion it was not a case for an appeal. The approval of the bond was endorsed by the judge on the bond, and his disallowance of the petition of appeal was endorsed on the petition and both were filed within five days in the clerk's office. Now, it is evident that the party did all that he could possibly do in order to entitle himself to the protection of the law, except one thing, which he proceeded to do. He repaired to a justice of the supreme court, after having made his application to the judge of the circuit court and having been refused, and thereupon the justice of the supreme court allowed the appeal. A new petition of appeal, it is true, was presented, but the facts were fully stated therein—the fact of the former petition of appeal being presented and overruled, as well as the fact of the decree from which the appeal was taken. The associate justice of the supreme court allowed the appeal, and approved of the identical bond which had been previously presented to and approved by the circuit judge. This new petition of appeal, with the allowance on it, was filed on twenty-fourth of March, some twenty-one days after the decree was rendered.

Now, the question is whether the allowance of the appeal in this case is to relate back to the time when the original application was made for an appeal to the judge of the circuit court. We are of the opinion that it does; that this party has done everything that in him lay to entitle him to a suspension of proceedings. At any rate, in the circuit court, which has control over its own processes and proceedings, we can do that which the supreme court would require us to do by supersedeas. Whatever might be the disability or incapacity of a judge at chambers, we are under no such embarrassment. We can direct proceedings to be suspended to the same extent that the supreme court would direct them to be suspended if it were applied to.

There may be some question as to the operation of the supersedeas in this case. The proceedings in bankruptcy are in the district court. A petition was presented to this court for the review of a certain decree or order of the district court. The proceedings in the district court were suspended until that review was had in this court. Upon that review this court came to the conclusion to confirm the decision of the district court. The appeal suspends the operation of that adjudication of the circuit court, and consequently holds the matter in statu quo, as if the judge of the circuit court yet held the matter under advisement, and had not made any order in the case. This we consider to be the effect of the appeal as a supersedeas; consequently all facts made or done by either court since the appeal was applied for are to be considered as vacated. If any order is necessary to effect it, it will be made. Matters will remain in statu quo, that is, they will remain as they were prior to any decree being rendered by this court.

It is hereby adjudged and decreed that all

orders in the above entitled cause made by the circuit or district court since the 21st of January, 1870, the date of the injunction granted by the circuit judge, are hereby vacated and annulled, and it is ordered that all things be restored to the condition in which they stood at the date of said injunction.

[After the appeal was filed in the supreme court, the appellees filed a motion to dismiss the same for the want of jurisdiction. The motion was granted. 11 Wall. (78 U. S.) 65.]

Case No. 13,992.

THORNHILL v. BANK OF LOUISIANA.

[1 Woods, 1;[1] 5 N. B. R. 367.]

Circuit Court, D. Louisiana. March, 1870.[2]

BANKRUPTCY—STATE INSOLVENT LAWS—BANKS—PROCEEDINGS AFTER PASSAGE OF BANKRUPT LAW—REVIEW—PETITION—WHERE HEARD.

1. An act of the state of Louisiana, entitled "An act to provide for the liquidation of banks," approved March 14, 1842 [Laws 1842, p. 234], which provided for the forfeiture of the charter of an insolvent bank, for a stay of all suits against such bank and for the appointment of commissioners to collect the assets and pay the debts of the bank, and distribute any surplus there might be, among the stockholders, is in effect a bankrupt law for banks, and was suspended by the passage by congress of the general bankrupt act.

[Cited, but not followed, in Re New Amsterdam Fire Ins. Co., Case No. 10,140. Cited in Re Independent Ins. Co., Id. 7,017.]

2. Proceedings under said act in the state court, after the passage of the general bankrupt law, were without authority, and void.

[Cited in brief in Republic Life Ins. Co. v. Swigert, 135 Ill. 153, 25 N. E. 680.]

3. The decree of the state court, made by virtue of proceedings under said act declaring the charter of the bank forfeited, constitutes no bar to a proceeding in involuntary bankruptcy against the bank under the general bankrupt law.

[Cited in Re Independent Ins. Co., Case No. 7,017; Re Hathorn, Id. 6,214.]

4. An adjudication of bankruptcy, made by the bankrupt court, may be reviewed and reversed or affirmed by the circuit court or judge, upon bill or petition filed under the second section of the bankrupt act.

5. Such bill or petition may be heard by the circuit judge in chambers, at any place within the circuit, whether within or without the district where the proceedings in bankruptcy are pending.

This was a petition addressed to the supervisory jurisdiction of the circuit judge under the second section of the general bankrupt act, to review a decision of the district court for the district of Louisiana. It was heard in chambers at Mobile, in the state of Alabama, on the 31st of January, 1870. The point was made, among others, that the circuit judge was without jurisdiction to hear the cause out of the district of Louisiana.

John A. Campbell and Edward Phillips, for petitioners in review.

Charles M. Conrad, Thomas Allen Clarke, Thomas Hunton, and James B. Eustis, contra.

WOODS, Circuit Judge. John Thornhill and others filed their petition against the Bank of Louisiana in the United States district court for the district of Louisiana, for an adjudication of involuntary bankruptcy against said bank. After argument and reargument, the court (Hon. E. H. Durell, Judge), on the 11th day of January, 1870, rendered judgment declaring and adjudging the Bank of Louisiana a bankrupt. [Case No. 13,990.] To review and reverse this adjudication, this petition of review was filed on January 22d, in the United States circuit court for the Fifth judicial circuit and the district of Louisiana by C. E. Willoz, P. H. Morgan and J. F. Irvine, as commissioners of the Bank of Louisiana, appointed under a state law, by the Sixth district court of the parish of Orleans, for the purpose of liquidating the affairs of the bank. The defendants to the petition of review except to the petition on the ground that the petitioners (the commissioners aforesaid) are not the legal representatives of the bank; that the act of the general assembly of Louisiana, under color of which the petitioners claim to represent the bank, and which was approved March 14, 1842, was a bankrupt and insolvent law and was suspended by the act of congress approved March 2, 1867 [14 Stat. 517], to establish a uniform system of bankruptcy throughout the United States; that, therefore, the petitioners are without right or authority to interfere in these proceedings, and that they have not been aggrieved by the adjudication aforesaid, and their petition of review should be dismissed.

It appears from the agreed statement of facts, that on the 11th day of February, 1868, the board of directors of the bank passed a resolution authorizing the president of the bank to instruct its counsel to institute proceedings under the second section of the act of the general assembly of Louisiana, approved March 14, 1842, for a meeting of the stockholders of the bank to deliberate and determine upon the expediency of surrendering its charter with a view to a liquidation of the affairs of the bank for the common benefit and advantage of its creditors and stockholders, and in conformity with the provisions of law. By authority of this resolution the counsel of the bank on the 24th of February, 1868, filed in the Sixth district court of New Orleans the petition of the president, directors and company, alleging that the bank was in a position which rendered it impossible for it at that time to discharge its liabilities to its creditors and stockholders, reciting the resolution above mentioned, and praying the court to order a meeting of the stockholders for the purpose of deliberating and determining on the expediency of surrendering

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

[2] [Affirming Case No. 13,990].

the charter of the bank. It having been found impossible to obtain the necessary attendance of the stockholders to make a voluntary surrender of the charter, the attorney general of the state of Louisiana, on May 1, 1868, filed a petition in the same court for the forfeiture of the charter of the bank. The bank filed no answer to the petition, but the board of directors having been informed by the president that he had been served with an injunction and a citation, and a copy of the petition from the Sixth district court in a suit instituted by the attorney general for the forfeiture of the charter of the bank, the board of directors thereupon "resolved, that the cashier be authorized to inform the attorney general that no answer would be made in said cause, and that the court will decide the question raised upon the facts put in proof on the part of the state." On the 20th of May, 1868, the Sixth district court ordered and decreed that the charter of the bank be declared forfeited, null and void; that all judicial proceedings against the bank be stayed; that a board of commissioners, of whom Charles Eugene Willoz should be one, should be organized for the liquidation of its affairs. Under this judgment three commissioners were appointed who immediately assumed the administration of the property and assets of the bank, and proceeded to a liquidation of the affairs of the bank under the laws of the state of Louisiana, until their proceedings were arrested by the filing of the petition of John Thornhill and others in the United States district court of Louisiana, on May 20, 1869, to have the bank adjudged bankrupt.

The act of the general assembly of Louisiana, under which these proceedings were had, is entitled "An act to provide for the liquidation of banks." The first section of the act provides in certain specified cases for the forced forfeiture by judicial proceedings of the charters of any of the banks located in the city of New Orleans, at the instance of the attorney general, on petition filed by him in the name of the state. The second, third, fourth, fifth, and sixth sections provide for a voluntary surrender of charters and dissolution of the corporations by certain proceedings of the stockholders and the decree of the court. In case either of a forced forfeiture or a voluntary surrender of the charter of a bank, the act requires the court to appoint commissioners who are empowered to take possession of all the property and effects of the bank of every description, with all its books, papers and accounts, to make an inventory of the property and effects, to supervise the destruction of all the notes of the bank found on hand, to collect the assets and pay the debts of the bank, and having done this, to distribute any balance that may remain on hand among the stockholders, ratably, according to the number of shares held by each. The petitioners in review claim that under the provisions of this act, the charter of the Bank of Louisiana was declared forfeited, null and void by a court of competent and general jurisdiction; that as a consequence of this decree, the bank, when proceedings in bankruptcy were commenced against it, was no longer in existence as a corporate body, that it was dead, and no proceedings could therefore be taken against it.

The conflicting views of the petitioners in review and the defendants in review bring up the question whether the act of March 14, 1842, remained in force after the taking effect of the general bankrupt act, on March 2, 1867. If the state law was suspended or repealed by the bankrupt act, the Sixth district court had no jurisdiction to proceed under that law, and notwithstanding it may be a court of general jurisdiction, its decree is void. Where there is no jurisdiction of the subject matter, the action of the court is a nullity and may be impeached collaterally. In Thompson v. Tolmie, 2 Pet. [27 U. S.] 163, it was held that "if there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question." In Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 474, the court held that "a judgment or execution irreversible by a supreme court cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties, the subject matter, with authority to use the process it has issued. The errors of the court do not impair their validity; binding until reversed, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done coram non judice; that is, by persons assuming the judicial function in the given case without authority of law." In determining whether the act of 1842 continued in force after the taking effect of the general bankrupt act, and as a consequence, whether the Sixth district court had jurisdiction to proceed under that law, it is pertinent to inquire into the nature, purpose and effect of the act. From an inspection of the law, it is evident that it is intended as a bankrupt or insolvent act. It provides for the voluntary and involuntary bankruptcy of insolvent banks. By virtue of the provisions of the law, the entire property of the corporation is taken from its control and placed in the hands of commissioners appointed by a power other than the bank. They, and they alone, are authorized and required to collect its assets, pay its debts, and distribute the surplus, if any, among the stockholders, and by a decree of forfeiture or dissolution, the corporation is discharged from liability after the final settlement of its affairs; for, being dead, it cannot be sued or stand in judgment. Section 24 of the act provides that in all mat-

ters not specially provided for in the act, the powers, duties and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates.

Here we have all the elements of a bankrupt law. Insolvency, surrender of property, its administration by assignees or commissioners, distribution among creditors of the assets, and, in effect the discharge of the insolvent corporation. The act of 1842 has been repeatedly held by the supreme court of Louisiana, to be a bankrupt or insolvent law. In Citizens' Bank of Louisiana v. Levee Steam Cotton Press Co., 7 La. Ann. 288, Eustis, C. J., referring to the act of 1842, says: "We do not perceive in this legislation any thing more than an exercise of the power which the government of a state has over bankrupt estates. This power is inherent in all well regulated governments under which commerce is regulated." In Mudge v. Commissioners of Exchange & Banking Co., 10 Rob. (La.) 464, the court says: "We concur in the opinion expressed by our learned brother of the commercial court that the power of the legislature to provide for the distribution of the property of insolvent corporations which have forfeited their charters, among the creditors is undoubted, and in considering these acts for the liquidation of banks as no other than insolvent laws applicable to such corporations." See, also, Dorville v. Citizens' Bank, 9 Rob. (La.) 366, and French v. Stanton, 1 La. Ann. 8. I am therefore forced by the terms of the law itself and by the construction put upon it by the supreme court of Louisiana, to the conclusion that the act of 1842 is a bankrupt or insolvent law. An examination of the act further shows that its provisions apply, as well as those of the general bankrupt act, to moneyed corporations, and that it prescribes a different rule for the distribution of the assets of insolvent corporations from that established by the bankrupt law.

Can these two laws, applicable to the same subject matter and prescribing different modes of proceeding and different results, co-exist? If not, which must give way? The constitution of the United States having empowered the congress to establish uniform laws on the subject of bankruptcies throughout the United States, and the congress having exercised this power in the enactment of the bankrupt law, and the constitution further providing that the laws of the United States which shall be made in pursuance of the constitution, shall be the supreme law of the land, the inference is irresistible that state laws on the subject of bankruptcy and insolvency must yield to the law of congress on the same subject. Where the state law applies to the same subject matter, and where it differs in material respects from the law of congress, it appears clear that the state law is suspended as long as the law of congress remains in force. Thus in Griswold v. Pratt, 9 Metc. [Mass.] 23, the court held: "Considering our insolvent law to be a system introduced for the purpose of sequestering the effects of the insolvent debtor and of discharging him from all debts contracted after the enactment of the law, we are satisfied that the two systems cannot stand together; that the provision of the constitution authorizing congress to establish a uniform bankrupt law does not of itself prevent the enactment of insolvent laws by individual states, yet when the power is exercised by congress and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result." In May v. Breed, 7 Cush. 40, the court uses this language: "When a uniform system of bankruptcy under a law of the United States is actually in force, to the extent to which it reaches, it must of necessity suspend state laws, because they would be repugnant." In Clarke v. Rosenda, 5 Rob. (La.) 33, Garland, J., in speaking of the effect of the general bankrupt act of 1841 [5 Stat. 440], says: "I cannot imagine a more ample investment of jurisdiction than congress has conferred on the circuit and district courts of the United States; and the extent of the jurisdiction proves that the national legislature, whilst exercising its constitutional power to establish a uniform system of bankruptcy, intended to suspend, if not sweep out of existence, the insolvent laws of the states and the jurisdiction of their tribunals, and to establish other tribunals with ample powers where justice should be administered alike to all, and a general system formed and controlled by a body of judges deriving their authority from the same power that made the law." Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 195, says: "It does not appear to be a violent construction of the constitution of the United States, and is certainly a convenient one to consider the power of the state as existing over such cases as the law of the Union may not reach. * * * It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with partial acts of the state." See, also, Com. v. O'Hara [6 Phila. 402]; Day v. Bardwell, 97 Mass. 246; Van Nostrand v. Carr [30 Ind. 128]; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Ex parte Eames [Case No. 4,237]; Larrabee v. Talbott, 5 Gill, 426. The Bank of Louisiana is, according to the agreed statement of facts, an insolvent moneyed corporation. Such a corporate body falls within the purview of the general bankrupt law of the United States and according to the authorities cited, a state law applicable to a like case is in effect suspended by the law of congress.

I am of opinion, therefore, that on the tak-

ing effect of the general bankrupt act on June 1, 1867, the law of the state of Louisiana, approved March 14, 1842, providing for the liquidation of banks, was suspended; that the state courts had no jurisdiction to proceed under it; that the proceedings of the Sixth district court under the state law against the Bank of Louisiana were unauthorized, coram non judice, null and void. Against this view it is urged that a state alone has power to forfeit the charter of a corporation created by itself; that the general bankrupt law does not provide for the forfeiture of the charter or the dissolution of insolvent corporations; that therefore that part of the state law of 1842, which makes the provision for such forfeiture, is not suspended by the bankrupt law, but left in full force, and the state court under that provision of the law having forfeited the charter of the bank, there is no corporate person in esse, for the bankrupt law to operate on. This argument may be fairly reduced to this proposition; that although the national courts have exclusive jurisdiction in bankruptcy of insolvent moneyed corporations, yet under the device and pretext of forfeiting the charters of the banks, the state courts may oust the jurisdiction of the federal court, assume jurisdiction themselves and give to a state law the effect of suspending or repealing pro hac vice an act of congress expressly authorized by the constitution. This cannot be allowed. No mode of proceeding authorized by a state law can be permitted to have this effect. If the forfeiture under the state law of the charter of the bank raises an obstacle to the jurisdiction of the federal courts, then the clause authorizing the forfeiture of the charter is itself suspended by the federal law. To hold otherwise is to allow the states, by a particular form of legislation, to override a law of congress on a subject over which congress by the constitution has supreme power.

Under the state law of 1842, the courts are not authorized to forfeit the charters of the insolvent banks and there stop. They are required to proceed by the appointment of commissioners to the liquidation of the affairs of the bank; in effect to administer a bankrupt law of the state. Is it possible that by so short and simple a method the state courts can wrest from the federal courts a jurisdiction conferred exclusively on them? I do not undertake to decide what effect the decree of the Sixth district court forfeiting the charter of the bank may have as between the state and the bank, but I hold that the state court had no power or jurisdiction to render a decree which could take from the federal courts a power and jurisdiction given them by act of congress; that for all the purposes of the bankrupt act, and the liquidation of its affairs thereunder, the Bank of Louisiana still exists as a corporate body and may be proceeded against as such in bankruptcy. A corporation may still exist for the purpose of liquidation although its charter may have been surrendered or forfeited. In Commercial Bank v. Villavaso, 6 La. Ann. 542, it was held that the fact that the Commercial Bank had gone into liquidation under the act of March 14, 1842, was no reason why the commissioners appointed to liquidate its affairs should not use the corporate name of the bank in collecting its assets by judicial proceedings.

It results from these views that the Sixth district court had no power to appoint commissioners in liquidation for the Bank of Louisiana; that the attempt to appoint such commissioners is a void act; that the commissioners named by the court do not represent the bank; that they are without right or authority to interfere in their proceedings; that they are not aggrieved by the adjudication of the district court of the United States for the district of Louisiana, and that for these reasons, if no other, their petition for review must be dismissed.

Without further prolonging this opinion, I hold upon the other questions raised in the case: 1. That the circuit judge has territorial jurisdiction to hear and determine this petition of review in chambers at any place within the Fifth judicial circuit. 2. That the adjudication in bankruptcy made by the United States district court may be reviewed by petition of review addressed to the circuit court or any justice thereof. 3. That the judgment of the United States district court adjudging the Bank of Louisiana a bankrupt is sustained by the admitted facts in this case, and ought not to be disturbed.

[It is therefore ordered, adjudged, and decreed that the petition of review filed in this court on the 22d day of January, 1870, by Charles E. Willoz, Philip H. Morgan, and Henry Bezon, as commissioners of the Bank of Louisiana, in the cases of John Thornhill et al. v. Bank of Louisiana, and Mrs. S. Williams v. Bank of Louisiana, be, and the same is hereby, dismissed out of this court, at their costs; that the judgment of the United States district court for the district of Louisiana, rendered on the 11th day of January, 1870, whereby, on the hearing, of the cases aforesaid, the Bank of Louisiana was adjudged a bankrupt, be affirmed; that the order heretofore made that all further proceedings in said district court be suspended, and the marshal enjoined from taking any action under the judgment rendered by the said United States district court in said suits until the further order of this court, be, and the same is hereby, rescinded and revoked; and that the clerk of the circuit court of the United States for the Fifth judicial circuit and district of Louisiana enter this order and decree upon the minutes of said court, and certify the same to the clerk of the United States district court for the district of Louisiana.] [2]

[NOTE. Application was immediately made by the commissioners for an appeal to the su-

[2] [From 5 N. B. R. 367.]

preme court, which was refused by the circuit judge, but was subsequently granted by one of the associated justices of the supreme court, more than 10 days, however, from the date of the decree of the circuit court. It was contended that the appeal, as subsequently allowed, operated as a supersedeas from the date of the first application, and a decree was made by the circuit court that all orders in this cause subsequent to the 21st of January, 1870, be vacated and annulled. Case No. 13,991. After the appeal was filed in the supreme court, the appellees filed a motion to dismiss the same for the want of jurisdiction. The motion was granted. 11 Wall. (78 U. S.) 65.]

Case No. 13,993.

THORNHILL et al. v. LINK.

[8 N. B. R. 521.] [1]

District Court, S. D. Mississippi. 1873.

BANKRUPTCY — TRANSFER OF PROPERTY — SIX MONTHS' LIMITATION—RECORD—EFFECT OF.

Where a deed is made by A. to B., over six months prior to commencement of proceedings in bankruptcy, but not recorded until within the six months, and the local law of the state is, such deed "shall take effect as to subsequent purchasers and as to all creditors, only from the time of record," *held*, this is a transfer of property within six months, within the intent and meaning of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Haskill v. Frye, Case No. 6,195.]

In bankruptcy.

HILL, District Judge. The acts of bankruptcy charged are:

First. That the defendant, being insolvent and in contemplation of insolvency, fraudulently conveyed a portion of his real estate to his wife, and the remainder to his brother-in-law, to prevent, &c., his creditors collecting their debts, and to withdraw the same from being disposed of under the bankrupt law; and,

Second. That he suffered his property to be seized and taken upon attachment by some of his creditors with intent to give them a preference over petitioners and other creditors. Petitioners allege the debt due them amounts to the sum of one thousand seven hundred dollars, for goods and merchandise sold him and for money advanced. The defendant, by his answer, denies the indebtedness charged as due, and owing at the time of the filing of the petition, admits that it once existed, but insists that it was discharged by the transfer of a stock of goods; admits the transfer to his wife and brother-in-law, but denies the intention and fraud charged, and insists it was done in good faith for a valuable consideration, and that the transfers were made more than six months before the filing of the petition; admits that a portion of his goods were taken by attachment, but insists that it was not done by his consent or sufferance. Upon these issues a large volume of proof has been taken and considered.

The first question to be determined is a jurisdictional one, for if no debt was due the petitioners they have no standing in court and the proceeding must be dismissed. The proof shows the defendant, when the liability was contracted, represented himself as being a planter of means, and promised to discharge the debt promptly by the shipment of cotton; that he also had a store in Yazoo city; that he failed to meet the debts as they fell due, a portion of which consisted in acceptances for goods purchased from other New Orleans merchants; that petitioners pressed him for payment, when he stated that the land upon which he lived belonged to his wife and brother-in-law; that his only means of payment were his goods and merchandise; that he only owed to his Memphis merchants about five hundred dollars for clothing, which he would return to them in clothing out of the store, having ample means to satisfy petitioners' debt. Petitioners sent an agent to examine the stock and receive it in payment, if found to be as represented. The proof further shows that before the agent arrived in Yazoo city, the defendant had disposed of to his Memphis creditors eight hundred dollars worth of the stock, and had also disposed of six hundred dollars worth of the same to his landlord, in payment of an indebtedness to him, leaving a remnant of a stock greatly less in value than petitioners' debt, if sold for cash. The testimony of the agent is; that it was not worth three hundred dollars in cash; other testimony places the estimate much higher, but it is clear that the agreement to take the goods was made upon the representation that the petitioners were to have as much of the stock of goods as was sufficient to pay their demands. Under this proof the petitioners were not bound to take the remnant of the stock in payment, so that upon the first proposition it must be held that the petitioners' demand is not satisfied.

The next question is, was the conveyance made to defendant's wife and brother-in-law made more than six months before the filing of petitioners' petition? If so, then it would have the effect of barring this alleged act of bankruptcy.

Upon this branch of the inquiry it is only necessary to consider the conveyance to Mrs. Link, for if that was not barred, and was an act of bankruptcy, it matters not whether there were other acts done for which defendant may be declared a bankrupt. The conveyance bears date, March 2d, 1871, but was not acknowledged or filed for registration until the 11th of June thereafter, nor is there any proof of its prior delivery to Mrs Link, consequently, it must be considered as not made until the 11th of June, 1871. The petition was filed on the 9th of November following, less than six months afterwards. But if a prior delivery to Mrs. Link was proven, still, under the provisions of the statutes of the state, it could not take effect until it was filed for registration, so far as the

[1] [Reprinted by permission.]

rights of creditors are concerned. By section 4, art. 23, c. 36, p. 310, of the Revised Code of 1837, and adopted by the Code of 1871, it is provided "that every conveyance, &c., which shall be acknowledged, &c., according to law, and delivered to the clerk of the proper county to be recorded, within three months after the execution, shall take effect and be valid after the date of its delivery. * * * When not delivered to the proper clerk, within three months after execution, to be recorded, shall take effect as to subsequent purchasers for a valuable consideration without notice, and as to all creditors, only from the time when delivered to the clerk to be recorded." The conveyance claimed to have been executed to Mrs. Link on the 2d of March was not delivered to the clerk for record until the 11th of June, more than three months thereafter. Therefore, as to petitioners and other creditors, can only take effect on the 11th of June, less than six months before the commencement of proceedings in this cause. It may be a grave question, whether the six months' limitation provided in the bankrupt law will apply to any act, not in some way made public, so as to give notice to all creditors, and whether it will apply to any conveyance required to be recorded until it is filed for record. But from the conclusion to which I have arrived, this question is not necessary to be considered in this case, for the reason that the want of proof of delivery, and that more than three months had elapsed after the date of the deed before its delivery to the clerk, it can only take effect from that time, and the limitation does not apply.

The next question is, was this conveyance valid under the provisions of the bankrupt law. There can be no doubt of the defendant's commercial insolvency; he was a merchant unable to pay his commercial liabilities as they fell due in the course of business, and, admitting that he was indebted to his wife, the effect of this conveyance was to give her a preference over his other creditors, and it is evident that it was made with the intention to place the land out of the reach of his creditors. It is only claimed that he owed his wife eight hundred dollars. The whole tract was purchased by him at eight thousand dollars; three-fourths of the purchase money belonged to him; the consideration stated in the deed as having been paid him by his wife was five thousand dollars. The consideration stated in his deed to his brother-in-law was four thousand dollars, making, in all, nine thousand dollars, when the only amounts claimed to have been paid him by his brother-in-law is one thousand seven hundred dollars, and from his wife, eight hundred dollars, in all, two thousand five hundred dollars, not more than the amount due to the parties holding the other note; the land having been sold to pay four notes, three of which were owned by the defendant, and all amounting to largely over the eight thousand dollars for which defendant purchased the land. Both these transfers were made when petitioners and other creditors were pressing defendant for payment, some of whom took payment in goods at fifty cents on the dollar; under these circumstances, to hold that this attempted transfer was not an act of bankruptcy, would be to ignore the bankrupt act. Having come to this conclusion, the other alleged act of bankruptcy need not be considered.

A decree declaring the defendant a bankrupt for the attempted conveyance to his wife, as stated, will be entered.

THORN, The THOMAS P. See Case No. 13,927.

Case No. 13,994.

In re THORNTON.

[2 N. B. R. 189 (Quarto, 68);[1] 8 Am. Law Reg. (N. S.) 42.]

District Court, E. D. North Carolina. 1868.

BANKRUPTCY—EXEMPTIONS—REAL ESTATE.

Real estate cannot be set apart to a bankrupt as exempt property under the head of "articles or necessaries." Money can be allowed by the assignee, when the exigencies of the bankrupt seem to require it, for the temporary subsistence of his family.

[Cited in Re Hay, Case No. 6,253; Re Steele, Id. 13,346.]

The following question arose and was stated and agreed to by John W. Hinsdale, Esq., attorney for Hess, Rogers & Chambers, creditors of said bankrupt, and B. & T. C. Fuller, Esqs., attorneys for the bankrupt, viz.: "Should an assignee in bankruptcy, in case there is a deficiency of personal property, allot to the bankrupt an exemption in real estate under section fourteen of the bankrupt act of 1867? In other words, does the bankrupt act give to an assignee the discretionary powers of assigning to the bankrupt real estate to make up deficiency where he (the assignee) is of opinion that the bankrupt's exemption under said section fourteen ought to amount to five hundred dollars, and then is not that amount of personal property belonging to the estate over and above the articles specifically exempted under sections seven and eight, chapter forty-five, Revised Code of North Carolina?"

The creditors, through their attorney, John W. Hinsdale, insist—

(1) The term "necessary" is used principally in the laws relating to infants and femme coverts. It is always defined as personalty and never including real estate. Smith, Cont. 216, and note in reference to; Tupper v. Caldwell, 12 Metc. [Mass.] 563. An infant can contract for necessaries, but however necessary land might be to him, the purchase of land by him would not be

[1] [Reprinted from 2 N. B. R. 189 (Quarto, 68), by permission.]

binding. So in case of femme covert, who might be in the greatest need of a home, a sale of house and lot to her would not bind her husband. Freeman v. Bridger, 4 Jones (N. C.) 1; Seaton v. Benedict, 2 Smith, Lead. Cas. [p. 431; Tyler, Inf. 105, 112, 117, 120, 356, 358].[2]

(2) That this is the proper time to take exceptions, and solicit the opinion of the court. Bankrupt Act, § 14, general clause 50 (Rice's Manual); General Order in Bankruptcy, rule 19.

John W. Hinsdale, for creditors.
B. & T. C. Fuller, for bankrupt.

BROOKS, District Judge. By the certificate of Wm. A. Guthrie, register, of the 24th July, 1868, this question is presented: Can real estate be set apart by an assignee to a bankrupt in case of a deficiency in other property and effects? To answer, the exemption provided for by the law, I have examined with care the authorities cited by the counsel representing the creditors, who except to the report of the assignee. And I have also read with interest the arguments filed by the attorney for the bankrupt. This question has often arisen and given rise to animated discussion in my presence, but is now for the first time presented under the provisions of the law for my decision. I am well satisfied that a fair and proper construction of the language used in that part of the bankrupt act which relates to exempting as well as the true spirit and objects of the law will not justify or authorize the action of the assignee in this case. The term "other articles and necessaries" as used in the act [of 1867 (14 Stat. 517)], cannot be so construed as to embrace land without doing violence to every meaning heretofore allowed those terms. It is quite clear, I think, if among the property of the bankrupt, none or not enough of the articles specifically mentioned in the act to be exempted, be found there, the assignee may report as exempted other "articles and necessaries" to make up the amount required, or the deficiency (as the case may be,) in the opinion of the assignee. The whole not to exceed, under any circumstances, the sum of five hundred dollars.

The suggestion of the counsel for the bankrupt would have much weight if it was a matter of discretion, but the court can no sooner award an article or kind of property not properly embraced within the terms used according to a fair construction, than it could exceed the sum prescribed. The exemption provided for by the bankrupt act originated from the same spirit that prompted the enactment of our legislative provisions in favor of widows of intestates, awarding these provisions for their temporary support, and as that law restricts the commissioners in the kind or species of property they shall award, so does the bankruptcy act restrict the assignee as to the kind of property he shall exempt. Now it often occurs that this all important purpose of the law would be defeated if under no circumstances money could be exempted to a bankrupt. Yet from the language of the law, if money could not be construed to be an article or a necessary it would be quite clear, I think, that money could not be allowed. But it is as clear that money may be allowed, for it not unfrequently occurs that money is quite as necessary to the temporary subsistence of a bankrupt and his family, as any article that can be mentioned. As the widow of an intestate, upon the granting of administration, is presumed to be entirely destitute of such articles and provisions as are necessary for her support, so the bankruptcy act presumes that every man who has been adjudged a bankrupt has sworn truly and has surrendered all his property and estate. Then, if this be correct, he is alike destitute. Now suppose the bankrupt had been a merchant, or banker, and has surrendered a large estate in "choses in action" and money, but not having been a housekeeper, but from choice, from motives of economy or otherwise, he and his family, consisting of a wife and children, have been inmates of a boarding house. He does not own a bed or a chair, or any articles of provision, consequently there is nothing of the kind in his schedule; surely it could not be successfully contended that some money would not be necessary for the temporary subsistence of such a family. Under such circumstances money may be exempted.

The assignee must advertise the estate mentioned in his report as exempted, and sell the same to the highest bidder and apply the proceeds as the law directs.

[2] [From 8 Am. Law Reg. (N. S.) 42.]

Case No. 13,995.

The THORNTON.

[2 Ben. 429.] [1]

District Court, S. D. New York. May, 1868.

COLLISION—IN A DOCK — VESSEL HAULING OUT — LINES.

Where a schooner, coming into a slip, was made fast by lines to a ship, by the permission of those in charge of the ship, and thereafter the ship desired to leave the slip, and those in charge of the schooner were requested to cast off the lines, and, all parties supposing that they were cast off, the ship was hauled out by a tug, and, in being hauled out, came in contact with and injured the schooner, which collision the schooner claimed to have been caused by the ship's being allowed to fall upon the schooner with the tide, and the ship claimed to have been caused by a line which should have been cast off but was not, and which pulled the schooner towards the ship: *Held*, that, in either case, the ship was liable for the collision. It was the duty of the moving

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

vessel to be certain that all the lines were unfastened before she began to move.

In admiralty.

W. Q. Morton and J. K. Hill, for libellants.
Beebe, Dean & Donohue, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision which occurred in the harbor of New York, between the schooner James Bolton and the ship Thornton, on the 26th of January, 1867, about 10 o'clock, a. m., in the slip between piers 26 and 27 East river. The schooner came into the slip on the evening before, and, by the permission of those in charge of the ship, the ship being then moored to the lower side of pier 27, with her bow headed to the shore, was fastened by two lines to the port side of the ship. The next morning, the ship being about to start to go to sea, those in charge of her requested the persons on board of the schooner to cast off the lines which fastened the schooner to the ship, and which lines belonged to the schooner. The evidence is, that the persons in charge of the ship, as well as those in charge of the schooner, supposed that all lines fastening the schooner to the ship were removed before the ship started. She started, pulled out backwards by a steam tug. The tide was flood, with running ice. The schooner lay angling towards the ship, the bow of the schooner towards the bow of the ship, and the bow of the schooner nearer to the bow of the ship than the stern of the schooner was to the ship, there being a space of several feet between the bow of the schooner and the ship. The port side of the schooner was fastened to vessels on that side of her. The ship, as she went out, came into collision with the schooner and damaged her seriously. The claim on the part of the schooner is, that the flood tide carried the stern of the ship up and forced her bow down and away from pier 27 and against the schooner, and caused the collision, and that there was room enough for her to have gone out straight without touching the schooner, if she had been properly managed, and that there was negligence and carelessness in the manner in which she was attached by a hawser to the tug, and that thereby her bow was permitted to swing down against the schooner. On the part of the ship it is claimed that the ship went out parallel with pier 27, and that her bow did not fall off against the schooner, but that, after she began to move, the bow of the schooner was pulled towards the ship, and it was then discovered that a line was left fastened from the starboard side of the schooner to the port quarter of the ship, which pulled the schooner around, so as to cause the collision and do the damage, and that the collision was the fault of those in charge of the schooner, in carelessly permitting the line to remain fastened.

There is much conflicting testimony in regard to whether a line was left fastened or not from the schooner to the ship when the ship started, and as to whether the ship moved against the schooner or pulled the schooner by the line against the ship. But, in the view I take of the case, it is not important to reconcile or solve this conflict, for, in any aspect of the case, I think the collision was wholly the fault of the ship. The schooner was moored and motionless. The ship was moving. It was the duty of the ship not to collide with the schooner. If there was no line fastened from the schooner to the ship, then the ship must have fallen off from pier 27 and moved against the schooner, and it was negligence in her to do so, and she must bear the consequences. If there was a line fastened, as that line had been so fastened by the consent and permission and with the knowledge of those in charge of the ship, it was their duty to assure themselves, beyond mistake, that the line was unfastened before they moved the ship, and it was negligence in them to move the ship with such line fastened. As between the two vessels, under the circumstances, the duty of seeing that the line was unfastened rested wholly on the ship. If the schooner had attempted to move out of the slip, the ship remaining at rest, it would then have been the duty of those on board of the schooner to have seen that the line was unfastened, and the schooner would have been solely responsible for all consequences to herself and to the ship of her negligently moving with the line unfastened.

There must be a decree against the ship for the damages caused by the collision, with a reference to a commissioner to ascertain and report the damages.

THORNTON (BEEDING v.). See Case No. 1,228.

THORNTON (BLODGET v.). See Case No. 1,554.

Case No. 13,996.

THORNTON et al. v. CALDWELL.

[1 Cranch, C. C. 524.] [1]

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

EVIDENCE — MEMORANDA — DEMAND BY NOTARY — NOTARIAL BOOK.

If the notary does not recollect the fact of making a demand, &c., but produces his notarial book in which the fact is stated, and testifies that he made the entry in his book at the time, and is certain, from those memoranda that he did make the demand as there stated—such evidence is admissible to the jury.

Assumpsit [by Thornton and White, commissioners of the city of Washington] against

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

[Caldwell, administrator of Scott] the indorser of a promissory note payable 4th February, 1801, drawn by U. Forrest for six thousand two hundred and sixty-nine dollars and ninety-two cents.

Samuel Hanson, a notary-public, was sworn for the plaintiffs.

Mr. Jones, for the plaintiff, asked the witness whether he had the note and called on General F. for payment on the 9th of February, 1801. The witness said he had no recollection of it, but he made a note of it in his register of protests, and indorsed on the note the words, "Protest, 1.70," which he produced, and said he had no doubt of it, but he could not speak from his memory; that his memory was not refreshed by the book, for he had no recollection of the fact, but he had no doubt of it. He was certain, from those memorandums, that he did demand the payment as there stated. The note was only noted for non-payment—never actually protested—that is, the protest was never drawn out in form.

Mr. Jones contended that the noting in the book is as much an official act of the notary as the protest would have been, and is as much evidence of the fact of the demand: it is the best evidence. The witness means that he was in the habit of entering there all notes by him protested, the time of demand and the answer given to the demand. That he never made an entry in the book which was not true.

P. B. Key and Mr. Caldwell, contra, cited Chit. 91. Noting is not sufficient; there must be a protest, if protesting be necessary. The notary is a mere agent of the plaintiff as to giving of notice to the defendant. His official duty only extends to protesting according to the law merchant. His duty at all events did not extend beyond demanding payment from Forrest the maker, and protesting it for non-payment.

THE COURT (having some doubts) admitted the testimony as competent evidence to the jury, not because the notary's book had any peculiar authority or validity; but because it appeared to be the best evidence which under such circumstances could be expected.

Case No. 13,997.

THORNTON v. CHAPMAN.

[2 Cranch, C. C. 244.] [1]

Circuit Court, District of Columbia. May Term, 1821.

ARBITRATION—NOTICE TO PARTIES—UMPIRE.

An umpire must give notice to the parties, and to the arbitrators of the time and place of his proceeding to act upon the subject submitted.

Debt [by Nicholas Thornton against Charles T. Chapman] upon the award of an umpire.

Mr. Taylor, for the defendant, objected at the trial, that the umpire had given no notice to the defendant or to the arbitrators of the time and place of his proceeding to act upon the matter submitted.

THE COURT (THRUSTON, Circuit Judge, absent,) was of opinion, and instructed the jury, that the award would not support the plaintiff's action if they should be of opinion from the evidence that the defendant had no notice, &c. Non pros.

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

Case No. 13,998.

THORNTON v. DAVIS.

[4 Cranch, C. C. 500.] [1]

Circuit Court, District of Columbia. March Term, 1835.

INJUNCTION — VIOLATION — CONTEMPT — EVIDENCE TO CONTRADICT AFFIDAVIT—MISNOMER—PETITION FOR FREEDOM.

1. If a petition for freedom be filed, and a bill for an injunction to restrain the master from removing the petitioner out of the jurisdiction of the court, the injunction may be granted on the affidavit of the petitioner; and if the injunction be not obeyed, an attachment may issue upon a proper affidavit; and, if the party be taken upon the attachment, and brought into court, he will not be discharged until he has given security, as required by the rules and practice of the court that the petitioner shall be permitted to attend the trial, &c.

[Cited in U. S. v. Anon., 21 Fed. 767, 768.]

2. The court, upon an attachment of contempt, by disobeying an injunction, will not hear witnesses to contradict the affidavit, nor grant a rule to show cause.

3. The court will not quash an attachment on account of a misnomer in the injunction, nor receive a plea in abatement.

Petition [by negro John Thornton] for freedom.

Upon filing the petition, and a bill for an injunction, the chief justice had, in vacation, granted an injunction to restrain the defendant from removing the petitioner from the jurisdiction of the court until further order.

W. L. Brent now moved for an attachment against Orrine Davis, for disobeying the injunction, and removing the petitioner, upon an affidavit stating the service and contemptuous language used by the defendant, on the service of the injunction, and his determination to remove the petitioner, if he could find him, and an offer of $75 if any one would find him; and also stating the belief of the affiant that he has been removed; and that the defendant admitted that he had removed him; and that the defendant was not a resident of the District of Columbia, and was about to leave it.

Mr. Coxe and Mr. Dandridge objected, and contended that the practice was to issue, first, a rule to show cause, and offered to examine witnesses to contradict the affidavit.

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

But THE COURT (THRUSTON, Circuit Judge, absent,) refused to hear them; and, as the defendant was a non-resident, and about to leave the District, refused to grant a rule to show cause, but issued an attachment returnable immediately, it being a case of disobedience of the process of this court, as a court of chancery, in which case it is not usual to issue a previous rule to show cause.

Mr. H. B. Robinson, and Mr. Madison Jeffers, two of the constables of this county, having been, in argument, charged by Mr. Brent with assisting the defendant in disobeying the injunction, were permitted to speak in their own justification, and, among other things, stated facts implicating the purity of the professional character of Mr. Giberson, one of the counsel of the petitioner in this cause, intimating that he had consented to take $25 for discovering where the petitioner was, so that he might be seized by the constables who were trying to catch him to deliver him up to his master, so that he might carry him away out of the jurisdiction of this court, in violation of the injunction.

Whereupon Mr. Key, attorney for the United States, said that, at the suggestion of several members of the bar, he thought it due to them and to the court, to request the court to take judicial notice of the matter; and, with this view, stated the charge in writing, and moved for a rule on Mr. Giberson to show cause on Thursday next, why he should not be dismissed from the bar, or be otherwise dealt with as to the court should seem proper.

The attachment against Orrine Davis was returned, and the defendant appeared.

Mr. Coxe, for defendant, moved to quash the attachment, on the ground of misnomer, and the injunction, because granted on the affidavit of the petitioner. The name in the injunction is Irrine Davis, not Orrine Davis, which is the name in the attachment, and is his true name.

Mr. Coxe, as to the misnomer, cited Wilks v. Lorck, 2 Taunt. 399; Rex v. Shakespeare, 10 East, 83; Petersd. 654, "Misnomer"; 1 Chit. Pl. 280.

Mr. W. L. Brent, contra. It is the usual course to grant an injunction upon the affidavit of the petitioner for freedom.

Mr. Coxe said, in reply, that the authority of the court to issue an injunction in such a case, upon such an affidavit, is seriously doubted; and that doubt has been suggested from the bench. A colored man is, prima facie, a slave, who cannot testify in any case.

THE COURT (THRUSTON, Circuit Judge, absent,) gave no opinion as to the effect of the misnomer, nor upon the validity of an injunction granted upon the affidavit of the petitioner, a colored man; but said, that as the defendant had not denied that he removed the negro after the service of the injunction, there was a technical contempt, although he might have had no intention to treat the process of the court with contempt. And as he is now present in court, and has not obeyed the subpœna to answer the petition for freedom filed by the negro, by appearing and entering into the usual recognizance to produce the petitioner here at the trial, &c.; the court would not discharge him from the attachment until he should have given the usual security by way of recognizance.

Mr. Dandridge, for the defendant, offered a plea of misnomer in abatement.

THE COURT, however, (THRUSTON, Circuit Judge, absent,) rejected it, for the following reasons: The proceeding by petition for freedom is a summary proceeding; it has little or no analogy to an action at common law, and is not subject to the technical rules of pleading. It is a petition by a person prima facie incompetent to maintain an action at law. It is framed in the simplest terms; complaining that the petitioner is a freeman, but is held in slavery by the person named, and praying that he may be summoned to answer the petition. The trial of the fact as well as the law is to be by the court, unless either party should apply to the court for the benefit of a trial by jury; in which case the court is to charge the attending jury to determine each and all of the allegations, contained in the petition, which may be controverted; and either party may challenge twelve of the jurors peremptorily, and may take bills of exception and appeal as to matter of law. Here is no original writ necessary to give jurisdiction to the court, (as in England,) and which is the subject of abatement; nor is there any technical declaration which can vary from the original writ, and be the cause of its abatement, or the subject of special pleading. There can be no personal judgment against the respondent, the judgment of the court only establishes a fact; namely, the freedom or the slavery of the petitioner. If the right person be summoned, which is admitted in the plea, it is immaterial by what name he is called in the summons. The issue upon a petition for freedom is upon the mere right, and is as simple as it is in a writ of right; and the court will not suffer the merits of the case to be smothered in the technicalities of special pleading in the one case, any more than in the other.

The respondent can only give a general denial to the allegations of the petition, or disclaim all title to the petitioner, or deny the jurisdiction of the court. But if the respondent had a right to put in a plea of misnomer in abatement, the plea now offered would be bad on demurrer, for the following reasons:

1. Because there is no original writ to be abated; and when, in a plea in abatement, the defendant prays judgment of the writ, no other writ is intended than the original writ issuing out of chancery in the name of the king, (teste meipso,) which is the only

foundation of the authority of the court to take cognizance of the cause.

2. Because it commences with praying judgment of the writ, and concludes to the jurisdiction of the court; when the matter of the plea, if true, does not oust the court of its jurisdiction, but is only an excuse for the defendant's not answering to that writ.

3. Because it does not conclude with any prayer for judgment.

In dilatory pleas the greatest accuracy is required in framing them; and they should be certain to every intent. 1 Chit. 444, 445.

THE COURT, therefore, refuses to receive the plea.

1. Because the proceedings in the cause are summary.

2. Because no personal judgment can be rendered against the respondent.

3. Because the plea, if received, would be bad upon demurrer.

THORNTON (LEE v.). See Case No. 8,203.

THORNTON (MADDOX v.). See Case No. 8,935.

Case No. 13,999.

THORNTON et al. v. O'NEALE.

[1 Cranch, C. C. 269.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.[2]

MUNICIPAL CORPORATIONS—PUBLIC LOTS IN WASHINGTON—RESALE—CHARGE TO PURCHASER.

Under the act of Maryland of 1793, c. 58, § 2 [Laws 1791–98], the commissioners of the city of Washington had a right to resell the public lots as often as a purchaser should fail to pay for them, and charge each preceding purchaser with the loss upon the resale.

Assumpsit, against the maker of a promissory note, indorsed by Bazil Wood, as surety, and given to the plaintiffs [Thornton & White, commissioners of the city of Washington], to secure the purchase-money of lots No. 1 and 2, in the square No. 107, in the city of Washington, dated August 6, 1800. The lots had been purchased of the commissioners by Morris & Greenleaf on the 24th of December, 1793, among many others, amounting in the whole to 6000 lots; but having failed to pay the whole of the purchase-money, these two lots were sold again by the commissioners, under the act of assembly of Maryland, 1793, c. 58, § 2, for the default of Morris & Greenleaf. The defendant [William O'Neale] became the purchaser at the price of 216 dollars, and gave his note therefor on the 6th of August, 1800; the amount then due from Morris & Greenleaf for those two lots being 71 dollars and twenty-four cents. The act of Maryland, 1793, c. 58, § 2, under which this sale was made, is in these words: "That on sales of lots, in the said city, by the said commissioners, or any two of them, under terms or conditions of payment being made therefor at any day or days after such contract entered into, if any sum of the purchase-money or interest shall not be paid for the space of thirty days after the same ought to be paid, the commissioners, or any two of them, may sell the same lots at public vendue, in the city of Washington, at any time after sixty days' notice of such sale, in some of the public newspapers of Georgetown and Baltimore town, and retain in their hands sufficient of the money produced by such new sale to satisfy all principal and interest due on the first contract, together with the expenses of the advertisement and sale; and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the said second sale; and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns." These powers and duties of the commissioners of the city of Washington were afterwards by an act of congress transferred to a superintendent, and the act of congress of 1st May, 1802, c. 41, § 6 (2 Stat. 176), directs the superintendent to sell all the lots which were sold before the 6th of May, 1796, "and which the commissioners are authorized to resell in consequence of a failure on the part of the purchasers to comply with their contracts." The defendant had failed to comply with his contract for the purchase of these two lots, and the superintendent sold them to Andrew Ross on the 2d of September, 1802, for eighty dollars, and at the request of Ross conveyed them to James Moore on the 17th of September, 1802, having received the purchase-money, namely, 80 dollars, which the superintendent passed to the credit of Morris & Greenleaf, on account of their purchase of the six thousand lots, and then brought this suit in the name of the former commissioners, to whom the note was payable, intending to recover from the defendant the difference between the amount which he agreed to pay for the lots, and the price for which they were sold to Ross. The deed from the superintendent to Moore stated the default to be in Morris & Greenleaf, in not paying for the six thousand lots, and says nothing of the sale to the defendant O'Neale.

Upon this state of facts, Mr. Morsell, Mr. Jones, and P. B. Key, for defendant, prayed the court to instruct the jury, that the plaintiffs could not recover upon this note. 1. That the commissioners had an election to take their remedy in personam, or in rem, but could not pursue both; and that by the sale of the lots they made their election, and abandoned their remedy against the person. 2. That the superintendent had no right to sell to Ross; but having done so, and conveyed away the title, they had abandoned the con-

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

[2] [Reversed in 6 Cranch (10 U. S.) 53.]

tract with O'Neale, and had treated it as a nullity. 3. That the sale to O'Neale was conditional, with power in the commissioners to resell and vacate the contract. 4. That the contract was void by the statute of frauds, because there was no note, nor memorandum of the agreement in writing, and therefore there was no consideration for the note.

1. The commissioners had an election of remedies. When a man has an election he cannot pursue both. If a mortgagee brings ejectment and recovers possession of the land, he cannot afterwards sue for the debt. So, if a landlord distrain for rent, he cannot have an action of debt. So, if a person having a rent charge, distrain, he cannot have a writ of annuity. So, if a man brings his action at common law, he waives his remedy by statute. 2 Inst. 200. 2d. The superintendent had no right to sell to Ross. A special authority, in derogation of the common law, must be construed strictly. The superintendent had only authority, by the act of 1 May, 1802, to sell lots which were sold before the 6th of May, 1796, "and which the commissioners were authorized by law to resell in consequence of a failure on the part of the purchasers to comply with their contracts." The only authority which the commissioners had to resell lots for the default of the first purchaser, was under the act of Maryland, 1793, c. 58, § 2. That act only authorizes one resale of the same lot, and the proceeds of such "new sale" are to satisfy the principal and interest due on the "first contract," and the "original purchaser" is to receive the surplus, if there should be any, on the "second sale," and the lots resold are to be free of all claim, legal or equitable, of the "first purchaser." The legislature intended that the second sale should be for cash. The act does not authorize them to sell on credit, but if it does, the whole proceeds of the third sale are to go to the credit of the first purchaser, so that the intermediate purchaser is to derive no benefit from the enhanced price. With what justice, then, can he be made responsible for the loss on the third sale? The commissioners cannot withdraw the consideration and yet hold the defendant to the contract. They cannot vacate the contract as to themselves, and yet hold the defendant bound. 3d. The commissioners themselves have considered and treated it as a conditional sale, and as having a right to vacate it if the purchase-money should not be punctually paid; and they cannot now deny it. 4th. It is void by the statute of frauds. The memorandum by the clerk of the commissioners, who acted as auctioneer, is not such a note in writing as the statute requires. It must be such a writing as will bind the party. It must be delivered. If it was not such a writing as the plaintiffs were bound to perform, it cannot bind the defendant. 1 Bac. Abr. 115, tit. "Annuity," C, "St. Frauds"; Whitchurch v. Bevis, 2 Brown, Ch. 559; Hawkins v. Holmes, 1 P. Wms. 770, 771; 7 Bac. Abr. (Gwillim) tit. "Agreement"; Cooke v. Tombs, Anstr. 420. Giving the note for the purchase-money was not such a part performance as will take the case out of the statute of frauds. 1 Bac. Abr. 121 tit. "Agreement," C.

Mr. Mason, contra. 1. The statute of frauds does not affect the consideration of the note. The receiving of the notes was in part execution of the contract. The advertisement of the terms of sale was signed by the commissioners. The lots were sold at auction, and the price of the lots, and the name of O'Neale as the purchaser, were entered in the sales-book by the clerk of the commissioners. 2. The commissioners were public agents with delegated powers. Their acts, within those powers, were valid. But if they exceeded their powers, their acts are void, and the public are not bound by them. The public are not estopped by their admissions or concessions or constructions. Their disposition of the proceeds of the sale cannot affect their right to sell. Their power extended to all sales on credit, past, present, or future. They had an unquestionable right to sell the lots to O'Neale. The contract with him was valid. There was a good consideration for the note when it was given. The equity of Morris & Greenleaf was gone by the sale, even before the money was paid. The commissioners were not bound to sell for cash; nor to give credit to Morris & Greenleaf for the amount of the sales until actually received by them. Morris & Greenleaf lost their equitable title to the lots, but in lieu thereof, were entitled to the surplus arising upon the second sale. The commissioners held it as their trustees, and could not release O'Neale from his bargain, but were bound to enforce it for the benefit of Morris & Greenleaf.

The act of Maryland, 1793, c. 58, § 2, did not give any new security. It only hastened the remedy, by substituting a resale for the ordinary decree in chancery for the sale of the land, when the purchaser has failed to pay the purchase-money; and under such a decree, the trustee would have no power to rescind his sale, but would be bound to enforce it for the benefit of the first vendee. It is true that if a mortgagee forecloses the mortgage, and obtains possession, it is satisfaction, but not if the decree be for the sale; for in that case the mortgagor remains liable for the deficit, and is entitled to the surplus. The act does not limit the commissioners to one of two remedies. They may pursue both until they obtain satisfaction. It did not mean to deprive them of any benefit which they had before. If the commissioners had no authority to sell the lots to Ross, the sale to him was void, and O'Neale may still compel the commissioners to convey them to him. Morris & Greenleaf had a right to the surplus arising on the sale to O'Neale, and O'Neale would have a right to the surplus beyond the amount due from him, if any had arisen upon the sale to Ross. Being entitled to the surplus, if any, he must submit to the loss.

THE COURT refused to give the instruction prayed by the defendant's counsel.

CRANCH, Circuit Judge, contra. O'Neale would not have been entitled to the surplus, if there had been any, on the sale to Ross, and therefore ought not to be liable for the deficit. That is, as he would not have been entitled to the difference between what he agreed to pay to the commissioners for the lots, and what they would have received from Ross, if they had sold to Ross for a greater sum than O'Neale had agreed to give; the plaintiffs have no right to charge the defendant with the difference in the present case. The counsel for the plaintiffs has contended that O'Neale would have been entitled to the surplus, if any, and therefore he is liable for the deficit. If O'Neale would have been so entitled, the case would stand thus: Suppose the 1st sale to Morris & Greenleaf was for $100, the sale to O'Neale for $50, the sale to Ross for $150, which last sum the plaintiffs have received, what then would be the rights of the parties? O'Neale would be entitled to receive $100, and the act of 1793 says the commissioners shall retain the amount due from the first purchaser, Morris & Greenleaf, $100; which make $200. But the whole sum is only $150, which shows it to be impossible that such should be the rights of the parties. Then the right of O'Neale or of the commissioners must be withdrawn. But the right of the commissioners to retain $100 due from Morris & Greenleaf, is supported by the express words of the act of 1793. The right of O'Neale is only supported by implication and analogy. The impossibility that both rights can exist at the same time, totally destroys that implication. The right of O'Neale to the surplus, therefore, cannot exist; it must yield to the superior right of the commissioners. The ground, therefore, on which the plaintiffs' counsel relies, is gone.

The question then, is, whether the plaintiffs can recover on the notes, if O'Neale would not have been entitled to the surplus, if there had been any, on the sale to Ross? The notes were given for the purchase of lots, which lots the plaintiffs have sold to others since the notes became payable. It is true the notes were originally given on a valuable consideration, viz., the plaintiffs' promise to convey the lots on payment of the money. After the default of the defendant in not paying the notes, the plaintiffs were no longer bound to convey the lots; they had then a right to disaffirm the agreement, and the defendant, on tendering the money after the day of payment, could not recover damages at law against the plaintiffs for not conveying the lots. The plaintiffs had a right to release the defendant from the contract. Have they done so? If they have not at law, they clearly have in equity. If O'Neale is not entitled to the benefit of the sale to Ross, and the plaintiffs are entitled to recover upon the notes, they are entitled to recover the whole sum. But if they should recover judgment at law, the defendant would enjoin the judgment in equity; and upon showing that the plaintiffs at law had sold the property to another and received its value, equity would decree that the money arising from the sale, should go in discharge of the notes. The sale by the plaintiffs to Ross, was either in affirmance or in disaffirmance of their sale to the defendant. If it was in affirmance, then the sale to Ross was at the risk and for the benefit of the defendant. And if the sale in this case was at the risk of the defendant, it would have been for his benefit, if the sale had produced more than his notes. The principle must be the same in both cases. There can be no middle principle which can make him liable for the loss, and not give him the chance of gain. If there had been a surplus on the sale to Ross, there is no principle by which the defendant could be credited for no more than the amount of his notes. But I have shown that the defendant could not by law receive the benefit of the sale to Ross. Hence the sale to Ross cannot be considered as in affirmance of the contract with the defendant. It must, therefore, be in disaffirmance of that contract. But the plaintiffs must be consistent throughout. They cannot disaffirm for the purpose of selling the lots to Ross, and at the same time affirm it by holding the defendant liable on his notes. The resale, authorized by the act of 1793, is in affirmance of the contract of sale to the first purchaser. The lots are resold, not as the property of the commissioners, but of the first purchaser. So on a bill in chancery by a vendor of land, praying for a sale of the land to satisfy the purchase-money due from the vendee to the vendor, such a decree and such a sale are made in affirmance of the first contract; and the land is sold under the decree, not as the land of the vendor, (the complainant in equity,) but of the vendee. Such decrees are grounded on the idea that the vendor has a specific lien only on the land, like a mortgage, and that the vendee is entitled to the benefit of the increased value of the thing sold, if its value has increased, and liable for its depreciation, if its value has been diminished. It is founded on the principle, that by the contract, the right to the land is transferred to the vendee, and the right to the purchase-money to the vendor. Hence it was just and equitable, that, on the resale by the commissioners, (which by the act of 1793 is substituted for a resale under a decree in chancery,) the surplus, after retaining the amount of the first purchase-money, should be paid over to the first purchaser.

It is important to bear in mind, that when the commissioners resell a lot under that act of assembly, they do not sell it as their

own property, but as the property of the first purchaser. They act as his agents or trustees, and not in their own right. But the act of assembly was made for the sole benefit of the commissioners, as agents of the public, and to enable them to collect the public money. It was not intended to apply to sales made by individuals; it meant to embrace those sales only which the commissioners should make as agents for the public, and not those which they might make as the agents or trustees of an individual. The act of assembly operates merely as a statutory decree for the resale of all lots sold by them as agents for the public, upon default being made by the first purchaser, and it is only for his default, and to satisfy his debt to the public. The commissioners, for this purpose, stand in the place of a trustee appointed to sell under a decree in chancery. The act of assembly does not say whether the resale shall be for cash, or on credit; nor does it expressly leave that matter to the discretion of the commissioners. But as the object of the act is to raise money from the resale of the lots, and as the act does not authorize a resale, but for the default, and as the property of the first purchaser, it is a fair inference, that they were obliged to sell for cash; or, that if they resold on credit, the resale was to be considered void, unless the money was duly paid, according to the terms of such resale.

The act authorized them to sell only the property of the first purchaser. Upon the fault of the second purchaser, the commissioners could not sell to a third purchaser without considering the second sale as void; because, as they were only authorized to sell the right of the first purchaser, and as they had once sold that, there was nothing left for them to sell while the second sale remained valid. Again, the parties to the second sale had certainly a right by mutual assent to dissolve the contract. The commissioners have given the most unequivocal evidence of such assent on their part, because they have done that act which they could not lawfully do while that contract remained in force. They have sold and conveyed to another the very subject-matter of the contract. No written instrument, no solemn specialty, could more clearly demonstrate its dissolution. The assent of the defendant to the same dissolution was evidenced (prior to that of the commissioners) by his refusal to pay the notes. By that act he waived the contract, and at law could never insist upon its performance. His assent is further testified by the present defence which he now sets up.

The commissioners, having no right to sell for the default of O'Neale, and having no right to sell the lots as the property of O'Neale, but having sold for the default of Morris & Greenleaf, and as their property, (for whose default and as whose property only they were authorized by the act to sell) have completely disaffirmed the contract with O'Neale; and, having done so, they must act consistently throughout: the disaffirmance goes back to the inception of the contract, and prevents them from saying there was any consideration for the notes at the time they were given.

Verdict and judgment for the plaintiffs.

Reversed by the supreme court of the United States. 6 Cranch [10 U. S.] 53.

Case No. 14,000.

THORNTON v. STODDERT.

[1 Cranch, C. C. 534.] [1]

Circuit Court, District of Columbia. June 12, 1809.

WITNESS—COMPETENCY—EVIDENCE — MEMORANDA —NOTES—DEMAND OF PAYMENT—WHEN TO BE MADE—NOTICE.

1. The superintendent of the city of Washington, was a competent witness in an action brought in the name of the former commissioners, although all their rights and duties had devolved on him by force of the statute.

2. If a notary-public produces his register of protests, containing a memorandum of the demand, &c., and testifies that he is sure that the entry is correct, that he made it at the time and that it has not been altered, such evidence is admissible to prove the demand, although the notary had otherwise, no recollection of the fact.

3. If Saturday be the last day of grace, a demand of payment on Monday, is too late to charge the indorser. Subsequent acknowledgment and promises made under an ignorance of the fact of such neglect of demand, or of the law arising upon such neglect, are not obligatory.

4. The court refused to repeat the instructions given in O'Neale's Case.

5. If the defendant indorsed as surety as to any part of the amount of the note, he was entitled to strict notice. If he was jointly interested with the maker in the property for the protection of which the note was given, he was not entitled to notice.

Assumpsit [by Thornton, surviving commissioner, against Stoddert] upon an indorsement of a promissory note drawn by U. Forrest, for $16,407, due 4–7th of February, 1801, dated 6th of August, 1800. The writ issued 23d of April, 1803.

Mr. Jones, for plaintiff, offered Mr. Thomas Munroe, as a witness.

Mr. Morsell and Mr. C. Lee, objected: That all the rights of Thornton, and the other commissioners of the city of Washington, vested in Mr. Munroe, by the act of congress of May 1, 1802 (2 Stat. 181), under which he was appointed superintendent. He is bound for the costs, as much as an administrator. This cause is to be considered as if Mr. Munroe was the nominal plaintiff.

THE COURT stopped Mr. Jones, in reply, being of opinion that no interest was disclosed in Mr. Munroe. The only objection which could have been made would be the

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

technical objection that he was plaintiff, (if that had been the case.) But as he is not plaintiff, we can see no interest whatever that can exclude him from being a witness.

Samuel Hanson, a notary-public, being called, produced a book which he called a register of protests, in which was an entry of his having called on Forrest upon the 9th of February, for payment, and testified that he was sure that the entry was correct; that it was made at the time in his handwriting, and had not been altered; but he had otherwise no recollection of the fact.

THE COURT admitted his testimony as competent to prove the fact of the demand. Bill of exceptions taken.

THE COURT decided that as the 7th of February was the last day of grace, and the 8th was Sunday, payment of the note ought to have been demanded of Forrest on the 7th, and a demand on the 9th, was too late, all the parties living in the same town.

THE COURT also decided that any subsequent acknowledgments or promises made by the defendant under an ignorance of the fact of such neglect of demand or of the law arising upon such neglect, were not obligatory.

THE COURT also decided that, they would not reconsider now the questions of law, decided in the case of O'Neale now before the supreme court, and refused to give the like instructions as in that case.

THE COURT, (Monday, June 12th, DUCKETT, Circuit Judge, absent,) was of opinion, that if the defendant indorsed the note as surety for Forrest, as to any part of the amount of the note, he was entitled to strict notice as indorser, although he was interested separately in part of the note, and that the plaintiff could not recover unless he proved a demand on U. Forrest before the 9th of February.

But if the defendant was jointly interested with Forrest, in the property, to relieve which from forfeiture the note was given, then the defendant was not entitled to notice, being as much the principal debtor as U. Forrest.

THORNTON (WALLIS v.). See Case No. 17,111.

Case No. 14,001.

THORNTON v. WASHINGTON.

[3 Cranch, C. C. 212.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

JUSTICE OF PEACE — APPEAL — DISTRICT OF COLUMBIA.

No appeal lies from the judgment of a justice of the peace, unless the "debt or demand" exceed the sum of five dollars.

Appeal from the judgment of a justice of the peace for a penalty of five dollars, for not registering a dog, according to the by-law of the corporation of Washington, of 1st of April, 1820. Burch, Dig. p. 83, § 20.

The appeal was dismissed by THE COURT without costs, (nem. con.) no appeal being given by the seventh section of the act of congress [2 Stat. 239], unless "the debt or demand doth exceed the sum of five dollars."

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

THORNTON (WITHERS v.). See Case No. 17,918.

Case No. 14,002.

In re THORP.

[2 Ware (Dav. 290) 294; [1] 4 N. Y. Leg. Obs. 377.]

District Court, D. Maine. June 12, 1846.

BANKRUPTCY—FUNDS IN ASSIGNEE'S HANDS—INTEREST—WHEN CHARGEABLE—PROFITS.

1. The principles on which courts of equity charge trustees, assignees, and executors with interest on trust money in their hands, are, that they have either used it in their own business, or improperly neglected to invest it.

2. Where there has been gross neglect, the court will sometimes make annual rests and charge them with compound interest.

3. If the trustee use trust money in trade, it is a breach of trust, and he will be charged with all the profit he has made, but if there has been any loss, that must be borne by himself.

[Cited in Re Newcomb, 32 Fed. 828.]

4. Under the bankrupt law [of 1841 (5 Stat. 440)], assignees are chargeable with interest on all money which they have collected, if not paid into the registry within sixty days after it is received.

In this case, objections were made by True, the only creditor who had proved a debt, to the allowance of some of the charges of the assignee for his personal services; and he also asked, in his petition, that the assignee might be charged with interest on the amount in his hands, from the time that the money was received until it was paid into the registry. The case was submitted, without argument, on the statement of the assignee.

WARE, District Judge. The objections of the creditor to the charges of the assignee, I feel no difficulty in overruling. It appears, from his statement, that he had considerable difficulty in disposing of the property. He obtained an authority, in the first instance, to sell by auction. But having reason to believe that a combination was formed between the bankrupt and his neighbors, to prevent competition at the sale, for the purpose of allowing the property to go back to the bankrupt at a nominal price, he applied to the court and obtained authority to sell at private sale. Under this authority, he sold the property, which was a small piece of land and all the assets of the bankrupt, for 75 dollars, which was believed to be a fair price. The assignee appears to have act-

[1] [Reported by Edward H. Daveis, Esq.]

ed with prudence and good judgment, and for the best interest of the creditors, and his charges are moderate and not at all beyond what are allowed in such cases. He received the money in April, 1844, and deposited it in January, 1846. By the 9th section of the bankrupt law, the assignee is required to pay into the registry all assets received in money, within sixty days after they come into his hands. In this case, the assignee retained it about a year and a half, after the law required him to deposit it in court. For this time, the creditor contends that he ought to pay interest. But the creditors can equitably demand interest only on the sum to be distributed, after deducting the charges of administration. These amount to $42.45, leaving but $32.95 for distribution. The assignee makes no objection to being charged with interest, although he offers as an excuse for not depositing the money, the smallness of the sum and his expectation that more property might come into his hands, and that he delayed paying the money over in order to make, of so small a sum, but a single deposit.

The principles, on which courts of equity charge assignees in bankruptcy, executors, and other trustees with interest on money collected and retained in their hands after it ought to be paid over or invested, are perhaps as well settled as any rules in equity jurisprudence. The general result of all the cases is stated by the master of the rolls, in Rocke v. Hart, 11 Ves. 58, to be that they are charged with interest on two grounds, either that they have made use of the money themselves or neglected to invest it for the benefit of the estate. For a simple neglect to pay over or invest the money, when that is part of their duty, the practice of the court of chancery in England is, to charge them with interest at the rate of four per cent. But if they use the money in their own business, they are charged interest at five per cent. And if they mix the trust-money with their own, as by depositing it to their own credit with a banker, they are presumed to use it in their trade or business. Treves v. Townshend, 1 Brown, Ch. 384; Newton v. Bennet, Id. 361. Where there has been gross negligence, and the money has been kept by the trustee for a long time, the court, in taking the account, will direct annual or semi-annual rests to be made, carrying the interest into the principal and making compound interest. Raphael v. Boehm, 11 Ves. 92; same case, 13 Ves. 407. These rules have been adopted and steadily acted upon by the courts of this country. The general principle on which the court acts is, that the trustee shall not be allowed to make a profit out of the trust property for his own benefit. If he uses the trust-money in his own business or trade, it is a breach of trust, and he is held to account for all the profit he has made by the use of the money, but if, in this misappropriation of the trust fund to his own use, there is a loss, it must be borne by himself. The rule of the court may appear to have something of rigor and severity in it. but it is firmly upheld in practice. All the profit, as far as the trust money can be followed, shall go to the cestui que trust or equitable owner, but all the risk of loss is imposed on the trustee as a penalty for the violation of his duty. 2 Story, Eq. Jur. §§ 1277, 1278; Schieffelin v. Stewart, 1 Johns. Ch. 620; Dunscomb v. Dunscomb's Ex'rs, Id. 508. The object of this strictness is, to secure a faithful administration of the trust by removing from the trustee all temptations to a departure from his duty, as well as to do justice to the cestui que trust.

The rules adopted by the courts of equity on this subject substantially agree with the decisions of the Roman law from which they were perhaps borrowed. By that law, a tutor was allowed six months to invest the money of his pupil or ward, which he received at the time of his appointment; and if not invested in the purchase of land, or loaned within that time, he was charged with interest for simple neglect. Dig. 26, 7, 15. But for money which he afterwards collected in the administration of the trust, he was allowed but two months. Id. 26, 7, 7, § 11. If he applied the money to his own use, he was not charged merely with the customary interest of the place ex more regionis, but was held to pay gravissimas seu legitimas usuras, a higher rate of interest by way of penalty for a breach of trust, as a court of equity will charge a trustee with compound interest under the like circumstances. Id. 26, 7, 7, § 10; Voet. ad Pand. 26, 7, 9. Such a coincidence on a particular subject between two highly cultivated systems of jurisprudence, whether the decisions of one were borrowed from the other, or the courts of both were led to the same conclusions by independent reasoning, serves but to show that the doctrines are founded in natural justice and in a wise policy.

In the present case, I am fully satisfied that the assignee acted with conscientious fidelity in administering on the estate, and made the most that he could out of it for the benefit of the creditors. The amount, with which he is on any principle chargeable, is but a trifle, but the principle involved is important. The law requires the assignee to pay into the registry all money within two months after it is received, giving the same time to pay over money which a Roman tutor was allowed to reinvest money that he had collected. It does not add in default of paying within the time that he shall be charged with interest. But having fixed the time for paying or depositing the money, the law of equity comes in and says that, if not paid at the time, the assignee shall be chargeable with interest, if he has not a reasonable excuse for not complying with the order of the statute. When the sum is small, or the assignee is prevented by the distance

of his residence from the court, or other causes, from depositing money punctually, the rule is not so rigorous but that a reasonable indulgence may be allowed as to the time. In the present case interest will be charged for one year and a half.

Case No. 14,003.

THORP et al. v. The DEFENDER.

[1 Bond, 397.] [1]

District Court, S. D. Ohio. Oct. Term, 1860.

COLLISION—RIVER NAVIGATION—RULES—ASCENDING AND DESCENDING BOATS—CROSSING CHANNEL—DAMAGES.

1. The second rule of navigation adopted by the board of supervising inspectors, under the steamboat law of 1852 [10 Stat. 61], giving an ascending boat the right to choose the side she prefers to take, when meeting a down boat, must have a reasonable construction, and can not be understood as giving the up-stream boat a right under all circumstances of choosing her line of navigation.

[Cited in The Marshall, 12 Fed. 922.]

2. If an ascending boat is coming up on one shore, and a down boat is seen above on the opposite side, the river being wide, with an ample depth of water in the intervening distance between the boats, and the up-stream boat is not required for business purposes to make a crossing, she ought by one sound of the whistle to signify her purpose of keeping up the same side. She has no right unnecessarily or capriciously to require the descending boat to change her course.

3. It is a sound rule of navigation applicable to the western rivers, recognized by courts exercising admiralty jurisdiction, that an ascending boat should not cross a channel when a descending boat is so near that it would be possible for a collision to occur.

4. A descending boat has a right to the channel of the river, and, while in her proper place, it is the duty of the ascending boat so to regulate her movements as to keep out of the way.

5. It is a great error, and one which must always incur hazard of a collision, for an ascending boat to attempt to cross the bow or in front of the descending boat unless the distance between them is such as to exclude the possibility of their coming in contact.

6. An up-stream boat, wishing to cross a channel when a boat is coming down, must either slacken her speed or stop altogether until the down boat has passed, and this rule is not affected by the fact that the signals between the boats give the ascending boat the choice of sides; for it is a paramount rule of navigation that, if possible, collisions must be avoided, and an error by one boat will not justify another in running into her unless it was unavoidable.

7. If a mutual fault occasions a collision, the damages for the injury must be divided between the boats; but if the fault was wholly on one side, the culpable boat must bear the entire loss.

[This was a libel by Oliver P. Thorp and others against the steamboat Defender.]

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT. This suit is prosecuted by the libellants, as owners of the steamboat William Baird, to recover damages for injuries resulting from a collision with the steamboat Defender, which occurred on the Mississippi river some sixty miles above Vicksburg, about twelve o'clock, in the night of November 4, 1856. The case made in the libel is, in brief, that the Baird, properly manned and equipped as a freight and passenger boat, was proceeding on a trip from New Orleans to St. Louis, and when near what is called the Tennessee landing, steering up the Mississippi shore, the pilot was about to make the usual crossing to the Louisiana shore, when he discovered the Defender about one mile above, coming down near the Louisiana side, and about to cross from that side to the opposite shore; that on seeing the descending boat, the pilot of the Baird sounded two blasts of the whistle as a signal that he wished to take the larboard side in passing the Defender, and that the pilot of the latter boat thereupon sounded his whistle twice, to indicate his acceptance of the Baird's signal; that the Baird, in accordance with the signals, was immediately pointed across toward the Louisiana shore, and in her efforts to get to the larboard, was running nearly square across the river; that the Defender pursued the proper course of a down boat, under the signals which had passed, until she came within a short distance of the Baird, and then straightened down stream, and came "head on" against the starboard quarter of the Baird, striking her about the middle of the boilers, displacing the boilers, breaking the connection steam-pipes, carrying away the starboard guard, and crushing in some of the planks of the hull, thereby causing the water to flow in rapidly, and endangering both the boat and cargo, and making it necessary to throw overboard a large quantity of salt and lumber, which were a part of her cargo.

The libel contains the usual averment that the collision resulted solely from the mismanagement and fault of those in charge of the Defender, and the libellants claim full damages for the loss of, and injuries to, the cargo, for the costs of repairing the injuries sustained, and for the detention of the boat while the repairs were in progress.

The answer of the respondents sets forth that the pilots of the Defender, the boat being near the Louisiana shore, at a point called Pecan Grove, saw the Baird coming up on the Mississippi side, and when nearly opposite Benhampton two whistles were heard from the Baird, indicating the wish of the pilot to pass up on the larboard side; that the signal, though unusual and not according to the proper course of navigation, was accepted by the pilot of the Defender, and responded to by two whistles; that he immediately pointed his boat toward the Mississippi shore, intending to make a long crossing, and heading to a point a short distance above Benhampton, thus leaving ample room for the

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

Baird to pass up on the Louisiana side, for which she had signaled; that in violation of her signal the Baird continued some distance up the Mississippi side, and when within one hundred yards of the Defender, suddenly changed her course to the larboard and ran nearly square across toward the Louisiana shore, and directly across the bow of the descending boat; that the Defender, being near the middle of the river, quartering toward the Mississippi shore, with her starboard bow struck the starboard quarter of the Baird, near the middle of the boilers, thereby giving a glancing blow, quartering aft in its course.

The respondents also aver that the Defender, after accepting the signal of the Baird, pursued the proper line of navigation, without any material change of direction; and that the sole cause of the collision was the sudden change of the Baird to the larboard, and her attempt to cross the bow of the Defender, when the boats were so near. The answer further avers, that the collision occurred just below the Tennessee landing, about one-third of the way from the Mississippi shore, and that it resulted solely from the fault of the Baird.

The answer also alleges that the Defender suffered damage to a small amount, for which the respondents claim compensation. And they also assert a claim for salvage service rendered the Baird, in saving the boat and cargo from entire loss.

The merits of this controversy obviously lie within a narrow compass. The parties agree in their statements of some of the facts involved in this collision. But as to the course and position of the boats previous to and at the time of the accident, their theories are in direct conflict, and both can not be sustained. The libellants contend that the Defender did not run in accordance with the signal given and accepted. They insist that, instead of crossing to the Mississippi shore, she kept near the middle of the river, and when within a hundred yards of the Baird, wrongfully changed her direction, and steered, head on, toward the Baird, and ran into her as she was crossing to the Louisiana side. On the other hand, the respondents insist that, in obedience to the signal, their boat, at the time of the collision, was passing down nearer the Mississippi than the Louisiana shore, slightly quartering toward the Mississippi side, in the usual and proper place for a descending boat, and that the Baird, in plain violation of an established rule of navigation, when the boats were from one hundred to two hundred yards apart, attempted to make a straight crossing directly across the bow of the Defender, and that by reason of this movement the Defender unavoidably, and without any fault on her part, came in contact with her.

As to some of the facts involved in this controversy there is no conflict, either in the statement of the parties or the evidence adduced. There is no dispute as to the signals which passed between the boats, nor is there any disagreement in the evidence, that the Baird was coming up, near the Mississippi side, when the Defender was first seen, about a mile above, near what the witnesses call a false point on the Louisiana shore. Nor is there any question that the river was wide the whole distance between the boats when the signals passed. It is equally certain there was sufficient depth of water for either boat, from shore to shore. It was about twelve o'clock at night, but not so dark as to prevent a boat from being distinctly seen a mile distant, or to render navigation difficult or dangerous.

In reference to these general facts, it is very obvious that the collision could not have occurred without fault of one or both boats. And the question presented is, which boat is to be held responsible for the injury and loss resulting from the collision. The respondents insist that the first error or fault was committed by the Baird in signaling for the larboard or Louisiana shore. And the preponderance of the proof as to the proper and usual way of navigating the river at that point sustains this view. There is no evidence that the Baird had any business call to the opposite shore, and no reason is perceived why she could not have kept up the Mississippi side, at least until the descending boat had passed. There was sufficient water along that shore, nor does it appear that there was any difficulty in pursuing that course. It would seem, therefore, that the pilot of the Baird erred in signaling for the larboard side. But it is insisted by the libellants that, by rule 2 of the rules of navigation adopted by the board of supervising inspectors under the steamboat law of 1852, it is the right of the ascending boat to choose the side she prefers to take when meeting a down boat. That rule provides that the pilot of the ascending boat shall, by one sound of the whistle, indicate his wish to keep to the starboard of the descending boat, and if he whistles for the larboard or left side, he is required to give two sounds of the whistle. And the descending boat is required to respond promptly by corresponding signals to signify the assent of the pilot to the signal from the other boat; and both boats are then to be steered in accordance with the signals. This rule must have a reasonable construction. It can not be understood as giving the up-stream boat a right, under all circumstances, of choosing her line of navigation. If the ascending boat is coming up on one shore, and a down boat is seen above on the opposite side, if the river is wide, with an ample depth of water in the intervening distance between the boats, and the up-stream boat is not required for business purposes to make a crossing, she ought, by one sound of the whistle, to signify her purpose of keeping up the same side. She has

no right, unnecessarily or capriciously, to require the descending boat to change her course. The object of this rule, and all other rules of navigation, is to avoid collisions. But it is obvious that the danger of collisions would be greatly increased if either boat, in the circumstances supposed, could by signals require the other boat to cross the river, and thus materially change her direction. There could be no possible danger of coming together if each kept on the course she was steering until they had passed each other. It would seem clear, therefore, that the Baird was wrong in claiming the larboard or Louisiana shore in ascending the river. But it is contended by the libellants, that if the signal of the Baird was erroneous, yet, as it was recognized and accepted by the pilot of the Defender, it can not be imputed to the former boat as a fault. I can, however, see no ground for holding that the acceptance of an erroneous signal, if injury results from such signal without any fault on the part of the boat which receives it, can exonerate the boat which gives it. In this case it was not a fault in the Defender that she signified her willingness that the Baird should have the choice of sides. It was not an admission that she had, under the circumstances of the case, a right to choose the larboard side; and the acceptance of the wrong signal only laid the obligation upon the Defender to obey it in good faith, and that the boat should be skillfully steered in accordance with it. If thus acting, and without fault in her navigation, the Defender came in contact with the Baird, and inflicted an injury on her which can be traced to the erroneous signal given by that boat, there is no ground on which she can be held responsible for it.

But there is no necessity to discuss, or to decide upon the effect of the erroneous signal by the Baird. There is another aspect of the case, that seems decisive of the question of fault, as between these boats. It is clear from the evidence that the Baird was not steered in accordance with the signal given and accepted, and that her course was in direct violation of a well-settled and imperative rule of navigation. It was clearly the duty of her pilot, under the signal he had given, if the distance between the boats was such as to have rendered a crossing practicable without danger of collision, to have passed at once to the larboard side. Instead of this, the weight of evidence clearly shows that, for some time after the signals passed, she kept up the Mississippi shore, quartering toward the Louisiana side, until the Defender was not exceeding two hundred yards above her, when she suddenly changed her course more to the larboard, and was, according to the evidence, on both sides, nearly square across the river, just preceding and at the time the boats came together. This fact is averred in the libel, and is amply sustained by the evidence. It is equally certain, that the Defender, from the time she accepted the signal of the Baird, was steered, without any material deviation, on a line obliquely tending toward the Mississippi shore, and had progressed, at least, to the middle of the river, and, as many of the witnesses testify, was at the time of the collision nearer the Mississippi than the Louisiana shore. In this position of the two boats, a more palpable error can not well be conceived of, than that committed by the Baird, in attempting to pass in front of, or across the bow of the Defender. It would seem that when this attempt was made, the boats were not more than one hundred or one hundred and fifty yards apart, and a collision would be the inevitable result of attempting to cross before the descending boat. At the time this occurrence took place, there was an express rule adopted by the board of supervising inspectors, which prohibited such a course. That rule declared, that "it shall not be lawful for an ascending boat to cross a channel when a descending boat is so near that it would be possible for a collision to ensue therefrom." If such a rule had not received the sanction of the board of supervising inspectors, there can be no question that it must be recognized, by courts exercising admiralty jurisdiction, as a sound rule of navigation, applicable to the Western rivers. It is well settled that a descending boat has a right to the channel of the river, and that while in her proper place, it is the duty of the ascending boat so to regulate her movements as to keep out of the way. And it is very obvious that it is a great error, and one which must always incur the hazard of a collision, for the ascending boat to attempt to cross the bow, or in front of the descending boat, unless the distance between them is such as to exclude the possibility of their coming in contact. This rule of navigation has its foundation in good sense. Experience proves that in the navigation of the Western waters, great errors are often made in estimating distances, more especially at night or in bad weather. As a rule of prudence, therefore, the up-stream boat, wishing to cross a channel when a boat is coming down, must either slacken her speed, or stop altogether until the down boat has passed. And this rule is not affected by the fact that the signals between the boats give the ascending boat the choice of sides. It is a paramount rule of navigation that, if possible, collisions must be avoided, and an error by one boat will not justify another in running into her, unless it was unavoidable.

That the Defender was in the right place for a descending boat, at the time of the collision, near the middle of the river her head pointed toward the Mississippi shore, and that the Baird was running nearly at a right angle with the Louisiana shore, is not only proved by the witnesses who testify as to the course and position of the two boats,

but is conclusively established by a controlling fact in the case, which does not admit of doubt or controversy. The fact referred to is, that the blow received by the Baird was upon her starboard quarter, opposite the boilers, and raked aft for the distance of about twenty feet. Now, the theory of the libellants is—and such are the averments in the libel—that the Defender, after the signals, was steered correctly, until near the Baird, when she changed to the starboard, and came "head on" against the starboard side of the latter boat. Upon this theory, the Defender would have struck the Baird either at a right angle, or quartering in the direction of her bow. But, as before stated, the Defender came obliquely against the Baird, inflicting a glancing blow, raking toward the stern. The evidence most satisfactorily proves that this was the character of the blow. The carpenters on both boats so describe it in their depositions, and in the diagrams which they annex. And this fixes the position of the boats, at the time of the collision, with all the certainty of mathematical proof.

Upon the whole, the following conclusions are satisfactorily attained in regard to this collision: 1. That the Baird did not, in accordance with her signal, attempt an immediate crossing to the Louisiana shore, but kept up some distance near the Mississippi side, and was then turned nearly square across the river, and was in that position when the boats came together; 2. That the pilot of the Baird was greatly in fault in thus attempting to cross the bow of the descending boat; 3. That this error was the direct cause of the collision.

It remains only to inquire whether there was any fault on the part of the Defender, justifying a decree for a division of damage resulting from the collision. It is well settled, that if there was mutual fault, the damages for the injury must be divided between the boats; but if the fault was wholly on one side, the culpable boat must bear the entire loss. In my judgment there is no ground for such a division in the present case. The weight of the evidence shows clearly there was no fault in the management of the Defender. As to her course, the following propositions are sustained with reasonable certainty: 1. That the Defender, when the signal of the Baird for the larboard side was given and accepted, was descending nearest the Louisiana side, and that in accordance with the signal her course was immediately changed toward the Mississippi shore; 2. That being thus steered, without any material variation in her course, she had reached the middle of the river, and was probably nearer the Mississippi than the Louisiana side when the collision happened, thus leaving ample room for the Baird to pass to larboard, according to her signal; 3. That when the Baird turned suddenly to the larboard, attempting to cross in front of the Defender, the latter boat seeing the danger of a collision, did all she could to avoid it, in stopping and backing as soon as possible.

In their answers, the respondents have set up a claim for compensation for a salvage service in the aid rendered in saving the Baird and her cargo. There can be no doubt that the conduct of those in charge of the Defender after the collision was highly praiseworthy. They rendered prompt and efficient service to the injured boat, but they did no more than they were required to do by the obvious dictates of duty. And neither the boat nor cargo, or the persons on board the Defender, were in peril as the result of their interposition. Nor is it certain that the Baird or her cargo would have been lost, if no aid had been afforded by the Defender. But, without going further into the consideration of the salvage claim, I am quite clear in the conclusion that it ought not to be allowed.

The respondents also claim a decree for the injury sustained by the Defender from the collision. It appears from the evidence that she was slightly injured, and that the expense of repairing her was from fifty to one hundred dollars. Probably, under all the circumstances of the case, the lowest sum named would be an adequate compensation for the injury, and a decree for fifty dollars may be entered in favor of the respondents.

Case No. 14,004.

THORP et al. v. HAMMOND et al.

[N. Y. Times, July 1, 1863.]

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

COLLISION — LIABILITY OF PART OWNER ACTING AS MASTER.

[A suit brought against a part owner of a vessel, who is a charterer and the owner for the voyage, although acting in the capacity of master, is barred by the act of March 3, 1851 (9 Stat. 636), which exempts owners of vessels from personal liability for damages arising out of a collision.]

In admiralty.

Mr. Benedict, for libelants.

Mr. Huntly, for respondents.

SHIPMAN, District Judge. The libelants, owners of the schooner Brothers, have brought this suit in personam against the respondents, Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillet, Brewster Terry, Charles Price, Alfred Price, and Hiram Sell, owners of the schooner R. H. Huntly, to recover damages suffered by the former in a collision with the latter off the Jersey shore, in February, 1860. The libel alleges unskillfulness and neglect in the management of the Huntly as the cause of the collision. Samuel S. Hammond, the captain of the Huntly, was on

board and had charge of her at the time of the collision. He was a part owner. I think it is shown by the proofs that he had the exclusive possession and control of the Huntly, and that he manned, victualed, and navigated her at his own expense. Such being the case, he must be deemed a charterer,[1] within the meaning of the act of congress approved March 3, 1851, which exempts the owners from personal liability, and leaves the injured party to seek his remedy, against the colliding vessel, and those who carelessly and unskillfully handled her. Samuel S. Hammond, her captain, is sued merely as a part owner, and not as the charterer, wrongdoer, or active cause of the disaster. His liability is placed by the libel on the same ground as that of the other owners, and the suit must therefore succeed or fail as to all the respondents. I think the statute a bar to the suit in this form. Let a decree be entered accordingly, dismissing the libel, with costs.

Case No. 14,005.

THORP et al. v. LAWRENCE.

[1 Blatchf. 351.] [2]

Circuit Court, S. D. New York. Oct. Term, 1848.

CUSTOMS DUTIES—GOATS' HAIR PLUSH—MANUFACTURE OF COTTON.

Goats'-hair plush or mohair plush, although composed partly of cotton, falls within the eighth subdivision of section 1 of the tariff act of August 30, 1842 (5 Stat. 549), as a manufacture of "goats-hair or mohair," and is chargeable with a duty of only 20 per cent. ad valorem, and is not subject to a duty of 30 per cent. under the second subdivision of section 2, as a manufacture "of which cotton shall be a component part."

This was an action to recover back the difference between 20 per cent. ad valorem, and 30 per cent., which latter rate was exacted by the defendant [Cornelius W. Lawrence], as collector of the port of New-York, for duties on certain goods imported by the plaintiffs [Andrew Thorp and others], into that port and which they claimed were liable to a duty of only 20 per cent. The duty of 30 per cent. was charged under the second subdivision of section 2 of the act of August 30, 1842 (5 Stat. 549), which imposed that rate on "all manufactures of cotton, or of which cotton shall be a component part, not otherwise specified." The plaintiffs insisted that the article was chargeable, under the eighth subdivision of section 1 of that act, which imposed a duty of 20 per cent. "on camlets, blankets, coatings, and all other manufactures of goats'-hair or mohair." The goods were entered at the custom-house under the denomination of "plush," and, in the invoice exhibited at the time of the entry, were called, "crimson, blue, and violet Utrecht." They were returned by the government appraisers as composed of cotton, linen, and goats'-hair or mohair, the hair of the goat being known in commerce as mohair. It was proved on the trial, by importers and venders of the article and by cabinet-makers who had occasion to use it in their business, that goods of the same description in all respects had been imported exclusively into the United States prior to the passage of the act of 1842; and that before and since that time the goods were known in trade and commerce, under the name of "goats'-hair plush" or "mohair plush," though they were always composed in part of linen, cotton, or worsted. It was also proved, by the same witnesses, that they had never known any article of commerce to be imported into the United States, prior to the act of 1842 or since that time, composed entirely of goats'-hair or mohair; and several of them who had dealt in camlets and mohair coatings, proved that those goods, as imported into the United States prior to 1842, were always composed in part of worsted. It was also proved, by witnesses familiar with the manufacturing of goats'-hair plush or mohair plush, and who had witnessed the process, that, from the peculiar nature of the mohair, it could not be made into a fabric without a combination with some other material; but the warp must be of cotton, linen, or worsted, while the surface or pile, as it was called, was of mohair; that they never knew of an article being made of mohair exclusively, nor did they believe such an article could be made; and that the value of the cotton or other material other than mohair in the article in question was about ten cents per yard, while the value of the mohair was from two dollars and fifty cents to three dollars and fifty cents per yard.

The court instructed the jury, that, if the article in question, though containing cotton or some other material than mohair, was known in trade and commerce, prior to the act of 1842, under the name of "goats'-hair plush" or "mohair plush," and, especially, if there was no manufactured article of commerce, or fabric, composed entirely of goats'-hair or mohair, known or imported into or used in the country before that time, then upon the true construction of the act of 1842, the plaintiffs would be entitled to recover.

The jury found a verdict for the plaintiffs, and, also, specially, under the advice of the court: 1st. That the article in question was known in trade, prior to the act of 1842, as "goats'-hair plush" or "mohair plush," and

[1] [Sec. 5. "And be it further enacted, that the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof."]

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

was composed sometimes of goats' hair and linen, and sometimes, as in this case, of goats'-hair and cotton; 2nd. That there was an article known in trade prior to the above date, as "camlets" and "mohair coatings," composed of goats'-hair and worsted, and exclusively imported into and used in this country; 3rd. That there was no manufactured article of commerce, or fabric, composed entirely of goats'-hair or mohair, imported into this country or used here prior to the above date or since. The defendant now moved for a new trial.

Francis B. Cutting, for plaintiffs.
Benjamin F. Butler, Dist. Atty., for defendant.

NELSON, Circuit Justice. The jury having found that the article in question was known in commerce, prior to the act of August 30th, 1842, and since, under the denomination of "goats'-hair plush" or "mohair plush," although composed partly of cotton, a duty of 30 per cent. ad valorem was not properly chargeable on it. The act provides for that rate of duty on "all manufactures of cotton, or of which cotton shall be a component part, not otherwise specified." The article, under the finding of the jury, falls within the exception. It is specified in the eighth subdivision of the first section of the act, and the rate of duty is fixed at twenty instead of thirty per cent. as follows: "On camlets, blankets, coatings, and all other manufactures of goats'-hair or mohair, twenty per centum ad valorem." In a commercial sense, and as known to the trade, the article is a manufacture of goats'-hair or mohair, within the meaning of this subdivision. If not, the clause is wholly without meaning, and was enacted without reference to any known article or manufacture in the commercial world; as it was abundantly proved, and was so found by the jury, that, in every manufacture of goats'-hair or mohair, there is necessarily a component part of some other material, such as linen, worsted, or cotton.

This view is confirmed by a reference to the article of "camlets" and "coatings," particularly specified in the same subdivision. These are composed of goats'-hair and worsted, and would fall within the second subdivision of the first section, being composed partly of wool, were they not enumerated in the eighth subdivision. The clause "all other manufactures of goats'-hair or mohair," following this enumeration in the subdivision, was intended to embrace, in general terms, fabrics or manufactures composed of similar materials and partaking of like qualities with those particularly enumerated. The one in question, upon the finding of the jury, comes directly within the description, and is, therefore, chargeable with a like duty. New trial denied.

Case No. 14,006.

THORP v. ORR.

[2 Cranch, C. C. 335.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

DEPOSITION—RETURN—PROPER DIRECTION—SEALING—EVIDENCE—ACCOUNTS—COPY.

1. It is no valid objection to a deposition taken under the act of congress [1 Stat. 73] that its envelope is not directed to "the court," if it be directed to "the judges" of the court.

2. It is sufficient evidence that the deposition was "sealed up" by the magistrate, if the envelope is sealed, and the name of the magistrate written across the seal.

3. It is not competent for the plaintiff to give parol evidence that the defendant saw and acknowledged the balance stated in the plaintiff's ledger, without producing the ledger itself; a copy of the account is not competent evidence.

Mr. Key, for defendant, objected to a deposition taken under the judiciary act, that it was not directed to this court; it was directed "To the Judges of the Circuit Court for the District of Columbia, Washington City." He also objected that it did not appear that it was sealed up by the judge who took it. He also certified that he intended to seal it up. The envelope was sealed with two seals, and the name of the judge written over each seal.

THE COURT (THRUSTON, Circuit Judge, absent), overruled both objections. The deposition stated that the deponent showed the plaintiff's ledger to the defendant, (the balance being $107.) who acknowledged " to be correct. It stated also that the paper annexed to the deposition, was a true copy of that account, and that the deponent afterwards showed the balance, being $107, to the defendant, who promised to pay it.

THE COURT (THRUSTON, Circuit Judge, absent), rejected that part of the deposition.

Non-pros. Mr. Lear, for the plaintiff.

Case No. 14,007.

THORPE et al. v. SIMMONS.

[2 Cranch, C. C. 195.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

DEPOSITION—REQUISITES—MAGISTRATE'S CERTIFICATE.

In taking ex parte depositions under the act of congress, the requisites of the act must be strictly pursued.

[Suit by Thorpe & Burton against William Simmons.]

THE COURT (nem. con.) rejected a deposition taken under the act of congress of 1789 (1 Stat. 73), because the magistrate certified that the form (not "the same" which are words of the act), was reduced to writing by him, and signed by the witness.

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

THORPE (UNITED STATES v.). See Case No. 16,494.

Case No.14,008.

THRALL v. CRAMPTON.

[9 Ben. 218,[1] 16 N. B. R. 261.]

District Court, D. Vermont. Sept. 18, 1877.

EQUITY—PARTNERSHIP IN REAL ESTATE—BANKRUPTCY OF INDIVIDUAL PARTNER.

1. Three parties bought real estate to sell again, sold some lots and built on others, incurring debts therefor, and then two of them bought out the third and took the ownership of the property for the same purpose. Thereafter C., one of the two, having gone into bankruptcy, T., the other, applied to the court for relief, and adjustment of rights in the property, as between him and the assignee of the bankrupt: *Held*, that this was a partnership adventure, and the orator and the assignee of the bankrupt held the same title, subject to the same rights and liabilities;

2. It was necessary to adjust the partnership dealings up to the time of the bankruptcy of C., and ascertain the exact interest of each at that time in the real estate;

3. T. would be protected as to the debts for which he was liable under the partnership, as against creditors of the bankrupt individually.

[This was a suit in bankruptcy by George C. Thrall against John W. Crampton, assignee.]

Prout, Simons & Walker, for plaintiff.

J. C. Baker, for defendant.

WHEELER, District Judge. This cause has been heard upon bill, answer, replication and examination of witnesses orally, by mutual consent of the parties in court. From the pleadings and proofs it is found as matter of fact that the orator, the bankrupt and one Goodnow, under an agreement to furnish the outlay and share in the profit and loss equally, purchased and had conveyed to them a parcel of real estate, which included the land now immediately in controversy, for the purpose of dividing it up into lots and selling them to make gain; that they did sell some lots, and built the block in question on another, out of common funds, and rented the block for their common advantage; that the orator and the bankrupt, with common funds, and at their equal expense, bought out the interest of Goodnow, and have continued the ownership of the property for this common purpose, to the time of the commencement of the proceedings in bankruptcy; and at that time they owed joint debts on account of this business to a considerable amount, which the orator is still holden to pay, one of which is secured by mortgage on the property, and the rest of which have been proved against the estate of the bankrupt in the hands of the assignee. On a settlement of the joint dealings in respect to these transactions and this property, there would be a considerable balance due from the bankrupt to the orator. This controversy is wholly as to the rights respectively of the orator and the assignee in the real estate left, and the relief they are entitled to in respect to it in this proceeding. And here the assignee holds legally and equitably the precise rights of the bankrupt, and the orator is entitled to the same rights and relief in respect to them as against the assignee, that he would have been entitled to, as against the bankrupt, if this controversy had arisen between him and the bankrupt. Mitchell v. Winslow [Case No. 9,673]. And here again these rights are to be determined wholly upon the relations of the orator and the bankrupt as between themselves, and not with any reference to rights of others, to deal with them in view of what their relations to each other were, or were held out to be.

In this aspect, if the dealings had been with personalty, as they were with this reality, there could have been no fair question but that this common sharing of outlay, profit and loss, would have made them partners in fact. Colly. Partn. § 3. This real estate could not be bought, handled, sold and conveyed by all of those engaged in the adventure, or a part of them for all, so readily nor with so much freedom as mere personal chattels could. But when the business was properly transacted, according to the requirements of the law, in respect to the property dealt in, the rights of those engaged in the result were the same as they would have been in the result of similar transactions in personalty. Thus there could be a partnership in dealing in real estate, although the transaction in that property would not be carried out by conveyance of one or a part of several for all, but the conveyances would have to be by all the owners in person or by written power of attorney, according to the statute of frauds and the requirements of the registry system. Colly. Partn. § 3; Dudley v. Littlefield, 21 Me. 418; Dyer v. Clark, 5 Metc. [Mass.] 562; Rice v. Barnard, 20 Vt. 479.

The result is that this was a partnership adventure, and the orator and the bankrupt, at the time of the commencement of the proceedings in bankruptcy, held the title to this real estate, subject to such rights and liabilities as would accrue to or against each in respect to it on account of that relation; and the orator and the assignee still hold the same title, subject to the same rights and the same liabilities. There is no question but that in an action of ejectment or other proceeding at law under the same circumstances, each would hold an undivided moiety of the estate. Blake v. Nutter, 19 Me. 16; Goodwin v. Richardson, 11 Mass. 469. But in equity, as regards real as well as personal estate, those who purchase and pay for it are considered to be the true owners, and in cases when it is purchased by a part-

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

nership, and paid for out of the partnership funds, the partnership is the true owner. And in this respect the partnership represents the partners, according to their respective interests in it, and they are the real owners of the estate, in proportion to those interests. The interest of each partner in the partnership assets is what his share would be on an adjustment of the whole partnership dealings, and if, on such adjustment, one's share should be greater or less than according to his share originally, he would be by so much the greater or lesser real owner in the partnership property, whether real or personal. Sigourney v. Munn, 7 Conn. 11; Pierce v. Trigg, 10 Leigh, 406; Dyer v. Clark, 5 Metc. [Mass.] 562; Lake v. Craddock, 3 P. Wms. 158. In such cases, whoever holds the legal estate and in whatever proportions, a trust results in equity in favor of the real and true owners, according to their actual interests; and this is not contrary to the statute of fraud (Colly. Partn. § 3), nor contrary to the statute of Vermont regulating conveyances of real estate, which saves expressly such trusts as may arise or result by implication of law out of the provision that trusts in lands generally shall be declared in writing (Gen. St. 450, § 22). Therefore in order to ascertain what the respective rights of the orator and the bankrupt were in a court of equity at the time of the commencement of the proceedings in bankruptcy, it would be necessary to adjust their partnership dealings to that time, and ascertain the exact interest of each.

But there are partnership debts still outstanding on which the orator is liable, and his just rights in respect to the property would not all be saved without securing to him a lien or charge upon the property till they are paid, and to indemnify him in case he is compelled to pay them. That the orator has such a lien is well settled. Colly. Partn. § 135. This lien of the partner is carried to such an extent and is so well defined, that through it a right to the partnership creditors to have their debts satisfied out of the partnership property before those of separate creditors can be, is wrought out. Bardwell v. Perry, 19 Vt. 292. This right cannot be saved either to the partner himself or to the partnership creditors, through liens, in proceedings strictly at law; but there the right of each partner must stand according to his aliquot proportion for want of proper means to take and state the account, and of power and methods to give the appropriate relief. In equity no such difficulties stand in the way, and now in England and by the great current of authority in this country this right of each partner is guarded and preserved in proceedings in equity wherever it is necessary in cases of insolvency or bankruptcy or death of the other partners. Darby v. Darby, 3 Drew. 495; Colly. Partn. § 153; 3 Kent, Comm. 139; Hoxie v. Carr [Case No. 6,802]; Dyer v. Clark, 5 Metc. [Mass.] 562; Pierce v. Trigg, 10 Leigh, 406; Washburn v. Bank of Bellows Falls, 19 Vt. 278. Decree for orator, to be drawn according to these views.

THREE BALES OF CLOTH (UNITED STATES v.). See Case No. 16,495.

Case No. 14,009.

The THREE BROTHERS.

[1 Gall. 142.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

SHIPPING—COASTING AND FISHING ACT—"FOREIGN VOYAGE"—FISHING VOYAGE.

A "foreign voyage," within the meaning of the 8th section of the coasting and fishing act, 18th February, 1793, c. 8 [1 Stat. 308], where a vessel departs from the United States for a foreign port with an intent there to engage in trade; and not merely a voyage to a foreign port within the usual voyage of vessels licensed for the fisheries.

[Cited in The Swallow, Case No. 13,666; The Nymph, Id. 10,388; Taber v. U. S., Id. 13,722; The Willie G., Id. 17,762; The Ocean Bride, Id. 10,404; The Ocean Spray, Id. 10,412.]

[See The Atlantic, Case No. 621.]

[Cited in Simpson v. Story, 145 Mass. 499, 14 N. E. 642.]

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

G. Blake, for the United States.

W. Prescott, for claimant.

STORY, Circuit Justice. The information alleges various offences, but I need not state any but that which is alleged in the first count, because at the argument all others were abandoned. The offence charged in the first count is, that the schooner was a vessel of the United States, licensed for the fisheries, and that, while her license was in force, she proceeded on a foreign voyage, contrary to the 8th section of the coasting act, 18th February, 1793, c. 8 (2 Laws [Folwell's Ed.] 168 [1 Stat. 308]).

It appears in evidence, that the claimant [Henry Story], is the owner of the schooner, which was duly licensed for the fisheries, and in the spring of 1809 was chartered to one Michael Fitzpatrick, for a fishing voyage, to the Labrador shore; and that whatever irregularity was practised in the voyage, was without the privity or consent of the claimant. On the 25th of June, 1809, the schooner sailed from Boston, on her voyage; and on the 1st of October, she returned with a cargo of fish, which consisted of about 58,000 fish caught by the crew, and about fifty quintals of dry codfish, which had been purchased by Fitzpatrick, of one Thomas Lander; and eight barrels of mackerel, and eight barrels or salmon, which had been also purchased by Fitz-

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

patrick, but of whom is uncertain: they were not however caught by or purchased of the crew of the schooner. These articles, (which altogether were of less value than $400) were taken on board at Cyrus Harbor, on the Labrador shore, to which place vessels employed in the fisheries usually resort in the course of their voyages, and were afterwards landed at Boston, on the return voyage.

The only question is, as to what is a proceeding on a foreign voyage within the true intent and meaning of the section aforesaid. Now it is very clear, upon the slightest inspection of the act, that the mere proceeding to a foreign port, if within the customary range of a fishing voyage, can never be deemed a breach of the act. When the legislature provide for the employment of vessels in the fisheries, it must be presumed that they are acquainted with the nature of the service, and and the usual course of the voyage. To suppose that they would grant a license to pursue the fisheries, and yet deny the means by which the employment is to be effected, would be absurd. Now it is notorious, that the fisheries are usually carried on, on the Labrador coast, and other waters and banks belonging to Great Britain, near the shores of Newfoundland. The right of American citizens to this trade is secured by the solemn stipulations of the treaty of peace, 1783, art. 3. Therefore, though every vessel employed in such trade should proceed to such foreign shores and waters, yet it manifestly could not be considered a foreign voyage, within the act, if the intention were bona fide to pursue the fisheries. Now it is admitted, that this vessel was bona fide engaged in the fisheries, and that she was at Cyrus Harbor according to the accustomed course of the voyage. This therefore furnishes no evidence of a foreign voyage within the act.

But it is said, that the purchase of these articles at Cyrus Harbor was an employment in a trade not authorized by the license, and therefore as to this, the voyage must be considered a "foreign voyage." But in my judgment, the foreign voyage intended by the act is where the vessel departs from the United States for a foreign port with an intent there to engage in trade, and without an intent to seek employment in the fisheries. This construction is fortified by the 21st section of the same act, which prohibits a vessel really engaged in the fisheries from touching or trading at a foreign port, without a permit for the purpose; and by the 32d section, which prohibits, under the penalty of forfeiture, any licensed vessel from being employed in any other trade than that for which she is licensed. Perhaps it is not easy to reconcile all the provisions of the act together; but it seems to me that the 8th section points to a foreign voyage, where there is no intent to pursue the fisheries; the 21st section to voyages where the vessel is engaged in the fisheries, and afterwards proceeds and trades with her cargo at a foreign port; and the 32d section, with a sweeping effect to all manner of trading beyond the authority of the license. In some cases these sections may be cumulative, and perhaps cannot otherwise be completely reconciled.

Upon principle, as well as upon the authority of the case of U. S. v. The Active (in the supreme court) 7 Cranch [11 U. S.] 100, I am satisfied that the purchase and taking on board of the fish, &c. at Cyrus Harbor, was a trading within the 32d section; but as there is no count founded on that section, the forfeiture cannot in this suit be adjudged. The opinion of the court below agrees with mine, as to the construction of the law, so far as that opinion goes; but the want of a proper count, as a foundation of the judgment, does not seem to have attracted its attention.

Decree of the district court reversed, reasonable cause of seizure certified.

THREE CASES (UNITED STATES v.). See Case No. 16,496.

THREE CASES OF TOYS (UNITED STATES v.) See Case No. 16,499.

THREE HORSES (UNITED STATES v.). See Case No. 16,500.

THREE HUNDRED AND EIGHT CADDIES OF TOBACCO (UNITED STATES v.). See Case No. 16,501.

Case No. 14,010.

THREE HUNDRED AND EIGHTEEN AND ONE-HALF TONS OF COAL.

[14 Blatchf. 453;[1] 4 Law & Eq. Rep. 105; 44 Conn. 548.]

Circuit Court, D. Connecticut. May 20, 1878.

CARRIERS—IMPOSING CONDITIONS IN RECEIPT OF FREIGHT—REASONABLENESS.

The New Haven and Northampton Company, a railroad corporation, owning a dock at New Haven, refused to receive coal on its cars, on said dock, from a canal-boat lying thereat, unless the master of the canal-boat would employ shovellers designated by the company, at a price fixed by the company, which was intended to be, and generally was, the ordinary market price, to shovel the coal on board of the canal-boat into tubs belonging to the company, which tubs were then to be hoisted, by means of a derrick on the dock, so that the coal could be dumped into such cars. The canal-boat paid ten cents per ton to the company for the use of the tubs and machinery: *Held*, that the requirement of the company was not a reasonable one and could not be enforced.

This was an appeal from a decree of the district court in a suit in rem, in admiralty.

The decision of the district court (SHIPMAN, District Judge), was as follows:

"The New Haven and Northampton Company is a railroad corporation duly incorporated by the legislature of the state of Connecticut, and owning and operating a line

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

of railroad, for the transportation of persons and goods, from New Haven, Connecticut, to Northampton, Massachusetts. Said corporation is a common carrier, and a considerable portion of its regular business is the transportation of coal from New Haven to the various places upon the line of its railroad. This coal is brought from different coal ports to the port of New Haven, in coal barges, or in coal vessels, and is delivered to said railroad company upon its dock in said city, commonly called the 'Canal Dock.' About 140,000 tons of coal are annually received at this dock. By the universal custom of the port of New Haven, which custom was known, understood and assented to by the libellants, and in conformity with which custom the contract evidenced by the bill of lading hereafter recited was entered into by them, coal consigned to a railroad company, or to consignees upon the line of a railroad company, and which coal is to be transported by the railroad company, as an intermediate carrier, must be delivered to said company in its coal cars, unless some other place of delivery is expressed in the bill of lading. The said New Haven and Northampton Company, for the convenient, speedy and economical delivery of said coal, has erected upon the canal dock derricks furnished with buckets or tubs, which derricks and buckets are operated by steam power. The buckets, being lowered upon the deck of a coal barge lying alongside of the dock, are filled with coal by shovellers upon the vessel, who are paid by the owners of the barge, and the buckets are moved by steam power over the coal car, and the contents are dumped into the car. For the use of this machinery and these appliances, the railroad company receives ten cents per ton from the barge owner. This method of delivery is the ordinary one, and is the method which the railroad company has provided, both for its own accommodation and for that of the barge owners. In the present condition of the wharf, which is traversed on one side with railroad tracks, which are being occupied with cars and engines, the only practicable method of delivery, and the only practicable place from which delivery can be made, is under the derricks. The duty of the shovellers is swiftly to fill the buckets from the vessel. Prior to September 4th, 1871, the shovellers were always selected by the captains of the barges, and were paid directly by them. On that day said railroad company established the following rule, printed copies of which were posted conspicuously upon the wharf: 'New Haven and Northampton Company. Special notice. All coal vessels discharging at the dock of the New Haven and Northampton Company will be under control of the dock-master from time of arrival till discharged, and he will furnish men to discharge their cargoes. Chas. N. Yeamans, Vice-Pres't and Supt. M. C. Parker, Gen. Freight Agt.' Under this notice, the railroad company has claimed the exclusive right to furnish, at the regular price, shovellers to discharge coal cargoes, and to refuse to receive coal unless these shovellers, so furnished at such regular price, were employed by the barge captains; and, if this latter rule is not embraced in the notice, there has been such a rule, in addition to the notice, well understood by the owners of barges generally, and by the libellants. The libellants have known that the railroad company would not allow coal to be discharged at their wharf, except by shovellers whom they selected and furnished to the captains. The company has derived no pecuniary benefit from furnishing the shovellers, who were paid nothing except for shovelling, and who performed no service for the company. They were paid from September 4th, 1871, to the date hereafter mentioned, uniformly ten cents per ton, which sum was paid by the captains of the barges to the dock-master, with the amount of the bill for hoisting and dumping, and by him paid to the shovellers. This rule was adopted by the company because they deemed its adoption to be a convenience and benefit to the freighting public. Previous to the time of its adoption, a strike had occurred among the shovellers, and delays had occurred arising from the shovellers absenting themselves, or deserting after they had been hired. Since the adoption of the rule, delivery of coal has been more rapidly conducted, and fewer delays have occurred. The consignees of coal deem the rule a reasonable one. From September 4th, 1871, until a short time prior to April 22d, 1876, the uniform price for shovelling, in New Haven, had been ten cents per ton. In the spring of that year, this price began to break, and coal was shovelled at other wharves at eight cents per ton, and good shovellers could easily be obtained at that price. The general and customary price in New Haven had not, however, then dropped to eight cents, and had not been lowered at the canal dock. The officers of the railroad company were not aware of this breakage in the market. The Derby Railroad Company has a similar rule. The New York, New Haven and Hartford Railroad Company, which receives about 250,000 tons of coal annually at its wharf, does not have such a rule. All the companies have similar facilities for hoisting and dumping, for the use of which compensation is paid by the barge owners. No question is made in regard to the reasonableness of requiring this compensation. On April 19th, 1876, the libellants, who are the owners of the barge Joseph Wilkins, received on board said boat, at Brooklyn, N. Y., 318½ tons of coal, for delivery to the Glasgow Company, at the canal dock in New Haven. The agreed rate of freight was sixty cents per ton. The Glasgow Company is a manufacturing corporation at South Hadley Falls, in Massachusetts, a place upon the line of said

railroad. Said coal was to be delivered to said railroad company, as an intermediate carrier, and was by said company to be then carried and delivered to the owners. A bill of lading, of which the following is a copy, was signed by the captain of the Wilkins: 'New York & Eastern Department, North 8th, 9th & 10th St. wharves, Brooklyn, E. D., April 19, 1876. Received, in good order, from the Philadelphia & Reading Coal & Iron Co., on board the Bt. Joseph Wilkins, whereof I am master, 318½ tons of coal, (2240 pounds each,) which I agree to deliver to Glasgow Co., Canal Dock, New Haven, danger of the seas excepted, they paying freight for the same, at the rate of 60 cts. per ton. No. 491. Advanced to captain, $9 55, for "trimming." No. of tons, 318½. Freight, per ton, 60 cts. C. F. Smith.' The libellants were aware of said rule of the railroad company in regard to shovellers, and were also aware that shovelling could be hired at eight cents per ton. Said barge arrived at the canal dock on April 22d, 1876, and the agent of the libellants informed the railroad company of its arrival, and his readiness to deliver the coal. He also said that he should employ his own shovellers, unless the railroad company would furnish laborers at eight cents per ton. He was willing to employ the shovellers whom the company might furnish, if they would furnish at eight cents. The boat was placed under the derrick designated by the company. The libellants' agent hired his shovellers at eight cents, and was ready, and offered, to enter upon the discharge and delivery of the coal, into the coal cars of the company, upon its wharf. The company refused to put on steam, or to receive the coal at that place, unless the barge employed its shovellers at ten cents per ton. The barge was removed to another point, so as to accommodate an incoming barge, and, after various interviews between the libellants' agent and one of the libellants, with the proper officers of the company, and a delay until May 1st, 1876, the stipulation mentioned in the 12th article of the libel and the 12th article of the answer was entered into, and the vessel was discharged on May 2d, 1876. Five days are allowed for discharging a 300 ton coal vessel in New Haven. The ordinary demurrage for coal vessels is six cents per ton. The said rule of the company is an unnecessary one in the present condition of the coal traffic in the port of New Haven. I find that the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 11th and 12th articles of said libel, and the 5th and 12th articles of the answer, are true. The amount of freight upon said coal, less the amount which was paid, is $171 55.

"In the above finding, I have omitted to enter into the details of various conversations between said parties, or the details in regard to the removal of the barge from one point to another, believing the same not to be necessary to the decision of the point in issue between the parties, which is the validity and reasonableness of the rule of the railroad company, which requires that coal should be unladen from vessels lying at its wharf, by shovellers selected and furnished by the company at the ordinary price which is paid for the same service at other wharves in the harbor. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event, the contract of affreightment was complied with by the libellants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the canal dock. It is admitted that the company, upon notification that the coal was ready to be discharged, replied that said cargo might be forthwith discharged, and would be received by it for the defendants. The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used (Croucher v. Wilder, 98 Mass. 322); but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported, in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. 'Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. * * * As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action.' 2 Kent, Comm. 599. A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable

times, for which he has accommodation. Crouch v. London & N. W. Ry. Co., 14 C. B. 255. The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries 'for all people indifferently.' But, while admitting this duty, the company has declared, that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner—you shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier, for which he is responsible, and should be in his own control. Beadell v. Eastern Counties R. Co., 2 C. B. (N. S.) 509. It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company, as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery.

"It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

"It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company, which is generally paid by others for the same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates determined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor. As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. 'Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage.' Wordin v. Bemis, 32 Conn. 268.

"The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less $19 55, the amount paid, to wit, the sum of $171 55, and for damages in the nature of demurrage, for a detention for six days, being $114 66."

Simeon E. Baldwin and William K. Townsend, for libellants.

Johnson T. Platt, for claimants.

BLATCHFORD, Circuit Judge. The decision of this case in the district court was placed upon the ground, that the New Haven and Northampton Company, as a common

carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place it there, shovellers designated by the company, and pay such shovellers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the district court ignored the status of the company as a wharf-owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, &c., is the use of the wharf; that all which the company did, was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shovelled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptation of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., canal dock, New Haven"—the Glasgow Company being a mill owner at a place on the line of the railroad company, and the latter company being the owner of the canal dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks—the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on, the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovellers, in any relation between the company as a wharf-owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the district judge, in his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable, it would have been reasonable. It might, indeed, have been reasonable without being necessary. But, to be reasonable, it must be reasonable as respects both parties. In the present case, the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal, for shovelling into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

THREE HUNDRED AND FIFTY-SEVEN BALES OF COTTON (MATTINGLY v.). See Case No. 9,294.

THREE HUNDRED AND FORTY PIGS OF COPPER (BEARSE v.). See Case No. 1,193.

THREE HUNDRED AND NINETY-SIX BARRELS DISTILLED SPIRITS (UNITED STATES v.). See Cases Nos. 16,502–16,504.

Case No. 14,011.

THREE HUNDRED AND NINETY-THREE TONS OF GUANO.

[6 Ben. 533.] [1]

District Court, S. D. New York. May, 1873.

CHARTER-PARTY—DEMURRAGE—MASTER'S REFUSAL TO SIGN BILLS OF LADING.

1. The owners of a vessel filed a libel against a cargo of guano, which had been brought in her, from Surrano Cay to New York, under a charter-party, to recover for demurrage in loading her and in discharging, and to recover passage money, agreed in the charter to be paid by the charterer. Detention of the vessel in loading beyond the specified time was admitted, but the charterer claimed that it was caused by the master of the vessel, in that he, without cause, when she was partly loaded, changed the place of anchorage of the vessel to a greater distance from the spot where her cargo of guano was being loaded. On the arrival of the vessel in New York, the master refused, for several days, to sign bills of lading for the cargo, because the charterer would not admit the claim for demurrage in loading. The charterer also refused to pay the passage money, on the ground that the fare was so bad as to constitute a breach of the contract: *Held*, that, on the evidence, the master was entitled to the presumption that he knew best where his vessel should anchor, and that his moving of his vessel was not, therefore, a defence to the claim for demurrage in loading.

[2. Cited in Johanssen v. The Eloina, 4 Fed. 575, as a case in which demurrage was allowed without interest.]

3. The master was not justified in refusing to sign the bills of lading, and the owners could not, therefore, claim demurrage during the time of such refusal.

4. On the evidence, the fare was sufficient to entitle the owners to the passage money.

In admiralty.

Beebe, Donohue & Cooke, for libellants.

Kobbe & Fowler, for claimant.

BENEDICT, District Judge. The demand in this case is for a balance due to the own-

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

ers of the bark Nicaragua, upon a charter of her for a voyage from New York to Surrano Cay and back. The balance claimed to be unpaid consists of three items. One item is for a balance of demurrage for detention while loading in Surrano Cay. A detention of four days, unpaid for, is not disputed; but it is insisted that this delay was caused by the wrongful acts of the master, in that, while the vessel was being loaded, he changed her place of anchorage, and, without cause, removed her a quarter of a mile further from the shore, whereby the loading of the guano, which composed the cargo, was retarded for four days.

I cannot find that this defence is supported by sufficient evidence. The master says that he changed his anchorage for the safety of his vessel. No particular place of anchorage was agreed upon in the charter-party; and it cannot be said, upon the proofs, that the vessel was at any time anchored at an unfit place, considering the nature of the harbor. There is no evidence that the object of the removal was to delay the loading, and the master is entitled to the presumption that he best knew where his vessel should anchor. The libellants must, therefore, be held entitled to the four days' demurrage in dispute for detention in Surrano Cay.

Another item of the libellants' demand arises out of a provision in the charter, that the charterer should go as passenger in the cabin, paying one dollar per day as long as he might be on board. To this the defence is, that the fare furnished to the charterer was so wretched and bad, as to constitute a breach of the contract to convey him as a cabin passenger. This defence also fails upon the proofs. The fare, doubtless, was not of the best, but one must not scrutinize too closely the bill of fare of a vessel freighting guano from the Caribbean sea. Upon the evidence, I judge the fare to have been sufficient to entitle the libellant to the dollar a day which the charter-party provides for.

Another part of the libellants' claim arises out of delay in discharging the cargo in New York. It appears by the evidence, that the master refused, in Surrano Cay, to sign a bill of lading for the cargo on board, and again refused after the arrival of the vessel in New York, because the charterer refused to assent to the demurrage charged by the ship in Surrano Cay. Some days were lost in New York in the effort to adjust this claim for demurrage, and it was not until after the 19th of June, which was Saturday, that any bills of lading were delivered to the charterer. During this time it was impossible for the consignee to enter his cargo at the custom house, and obtain a permit to discharge it, because he had been unable to procure a bill of lading. The claim of the master that the demurrage should be agreed to before the bill of lading was signed had no foundation in law. The master was bound to sign the bill of lading, without reference to his claim for demurrage, and so long as he wrongfully withheld from the consignee the bill of lading, which was necessary to enable him to enter the cargo, and to obtain a permit to discharge it, the discharge was prevented by the master of the ship, and for that delay he cannot hold the charterer liable. Monday, the 21st of October, was the first day that the consignee could obtain his permit, owing to the refusal of the master to deliver the bills of lading; and from that time his obligation to receive the cargo must date.

According to this view, the libellants are only entitled to five days' demurrage in New York, instead of the twelve days which they sue for. The libellants are, therefore, entitled to receive $160 for four days' detention in Surrano Cay, $200 for five days' detention in New York, $141 from Mr. Wachschlager, passenger; and he is also entitled to $16 for moving the vessel, and $10 paid for towage, making in all $527.

Let a decree be entered for this amount.

THREE HUNDRED AND SEVENTY-TWO PIPES DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,505.

THREE HUNDRED AND THIRTY-SEVEN CASES OF WINE (UNITED STATES v.). See Case No. 16,506.

THREE HUNDRED BALES OF WOOL (UNITED STATES v.). See Case No. 16,508.

THREE HUNDRED BARRELS OF ALCOHOL (UNITED STATES v.). See Case No. 16,509.

THREE HUNDRED BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 16,510.

THREE HUNDRED CASKS OF JUNIPER CORDIAL (UNITED STATES v.). See Case No. 16,511.

THREE PARCELS OF EMBROIDERY (UNITED STATES v.). See Case No. 16,512.

THREE PUNCHEONS OF RUM. See Case No. 10,548.

THREE RAILROAD CARS (UNITED STATES v.). See Case No. 16,513.

THREE THOUSAND BASKETS OF CHAMPAGNE (UNITED STATES v.). See Case No. 16,514

Case No. 14,012.

THREE THOUSAND ONE HUNDRED AND NINE CASES OF CHAMPAGNE.

[1 Ben 241.] [1]

District Court, S. D. New York. June, 1867.

CUSTOMS DUTIES — UNDERVALUATION — MARKET VALUE—PLACE OF MANUFACTURE—INTENT TO DEFRAUD THE REVENUE—EVIDENCE.

1. Where wines imported into this country, from Rheims, in France, were claimed to be forfeited to the government for alleged fraudulent undervaluation in the invoices: *held*, that the

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

"place" where the goods were procured or manufactured, as specified in the first section of the act of March 3, 1863 [12 Stat. 737], was not Rheims but France.

2. The "actual market value" spoken of in the statute, is the price which the owner or producer of the goods is willing to receive for them, if they are sold in the ordinary course of trade —the price which a purchaser must pay to get them.

3. If the claimants held these wines for sale at Rheims and in France, and named the prices at which they would sell them, and below which they would not sell them, then, in judgment of law, there was a market for the wines there, and the market price was the price so fixed by the claimants.

4. It would not do to say that there was no market value for this wine, because just the special wine in these bottles, so dosed and prepared, was not sold in Rheims; but that if wine, the same in all substantial particulars as to grade, quality, and body and marketable worth, appreciation and value, as this wine was, was sold in the market at Rheims, then there was a market value for this wine.

5. If the claimants, thinking that a certain letter to them contained a regular mercantile proposition, in answer fixed certain prices as the lowest cash prices, for export, for their wines in quantities, and the wines referred to were in substance the same as the wines in suit, the jury might infer that the claimants would have sold the same wines to any one at those prices, and that those prices were the market value.

6. If there was such market value for the wines, and the invoices were knowingly made at a lower rate, the wines should be forfeited.

[Cited in U. S v Doherty, 27 Fed. 736.]

7. If the invoices were made up with an intent, by false valuation, to evade or defraud the revenue, a similar result should follow.

8. Where probable cause is shown by the prosecution in such a case, which probable cause is to be judged of by the court, the burden is on the claimant to show his innocence.

9. Where invoices purporting to have been signed by one of the claimants, showing the consul's certificate attached that the subscriber was what he represented himself to be, had passed in due course of business through the hands of a deputy collector, he was competent to prove the signature upon certain invoices to be that of the claimants, though he had never seen them write.

10. The appraisement in court of the goods for the purposes of bonding was not evidence of market value.

11. Evidence of isolated transactions in similar wines in New York was not competent evidence on the question of market value.

12. Letters of other wine manufacturers than the claimants, as to their own wines, were admissible as evidence on the question of market value, provided the wines were substantially of the same grade and quality as those in suit.

This was one of several actions brought in behalf of the government to forfeit quantities of champagne wine, imported into this country by several manufacturers of it in France. The claimants in this case were [Alexandre] de St. Marceaux & Co., of Rheims. The libel of information alleged undervaluation in the invoices as ground of forfeiture, under the fourth section of the act of May 28, 1830 (4 Stat. 410), and the first section of the act of March 3, 1863 (12 Stat. 737). These wines had been imported into this country by the same men for years, during which time there had been several examinations at the custom house as to the correctness of the values stated in the invoices. The values stated in the invoices in question were the same as had been for several years passed at the custom house as correct for the same articles. The treasury department having sent agents over to France to inquire into the wine trade, received information which led to these seizures, and similar seizures were made in New Orleans, San Francisco, and Boston. The result of the San Francisco cases will be found reported in 3 Wall. [70 U. S.] 114. The testimony in the case was very voluminous, the case having occupied about three weeks in the trial. The judge has stated in his charge all of it that is material to the understanding of the case. In the course of the trial, the government called the deputy collector at New York, before whom the oaths were taken on the importations in question, and, having first proved by him the invoices in question, and that he recognized a similarity in the signature of the claimants on all of the invoices which had come before him, but that he had never seen any of them write, offered to prove by the witness that certain invoices, not of the goods in question, were signed by these claimants.

Mr. Evarts, in behalf of the government, cited the following authorities in favor of the admission of the evidence: Van Wyck v. McIntosh, 14 N. Y. 442; Doe v. Newton, 5 Adol. & E. 514; 2 Phil. Ev. 601, 615; Johnson v. Daverne, 19 Johns. 135; Jackson v. Murray, 7 Johns. 5; Titford v. Knott, 2 Johns. Cas. 214; 1 Greenl. Ev. §§ 577, 578; Brigham v. Peters, 1 Gray, 145; Amherst Bank v. Root, 2 Metc. (Mass.) 532. The court said that the case could not be distinguished from that in 2 Metcalf; that there was on the invoice a declaration in French, beginning: "I, the subscriber, declare that I am a member of the firm of de St. Marceaux & Co.," which went on to speak of the wines, and then there followed the certificate of the consul that the invoice was produced to him by the subscriber, and that he was the person he represented himself to be; and that, as this matter came before the witness in an official capacity in the custom house, the case came within the rule in 2 Metcalf, and the testimony was admissible. The claimants, on the trial, offered in evidence the appraisement filed in the case by appraisers appointed to appraise the goods for the purpose of bonding them, but, being objected to by the government, it was rejected by the court. The claimants called a witness who had purchased some of the wines of de St. Marceaux & Co. from their agent in New York at about the time in question (1864), and proposed to prove the transaction as evidence of market value, but the evidence, under the objection of the government, was excluded by the court.

The government offered in evidence certain letters from other manufacturers of wine tending to show the real value of their wines. The claimants objected to the evidence, and, in support of its admissibility, Mr. Evarts cited the Clicquot Case, 3 Wall. [70 U. S.] 114. The court held that the letters were competent under the ruling in that case, leaving it to the jury to consider whether the wines referred to in the letters were substantially of the same quality and grade as the wines under seizure.

Wm. M. Evarts, G. P. Lowrey, and W. G. Choate, for the government.

Webster & Craig, for claimants.

BLATCHFORD, District Judge (charging the jury). This case, as you have seen from the time occupied in the examination of witnesses and the discussion by counsel, and the principles involved in it, is one of very great importance to the parties to the suit and to the government. It has an important bearing also, as you have seen, in reference to other cases, the principles involved in this case applying to a large number of other cases which are upon the docket of this court. You have given a patient and attentive hearing to the evidence and to the arguments of counsel, and now you are to discharge the final and important duty of giving your verdict, if you are able to arrive at a verdict, under the charge of the court.

On the one hand, the government claims that this case is one of a systematic undervaluation in the invoices by the manufacturers of these wines—an intentional and willful undervaluation, resorted to, as is claimed by the government, because of the ad valorem system of duties which prevailed at the time in reference to champagne wines; and resorted to with full knowledge, as is claimed by the government, of what the law required, and of what values ought to be stated in the invoices. On the other hand, it is claimed by Mr. de St. Marceaux and his firm that there was no market for these wines at Rheims, and therefore no market value for them there; that the wines are not sold at Rheims by de St. Marceaux & Co. for export; and that, there being no market value for them at the place of their manufacture, their value, for the purpose of duty, must be arrived at by taking the cost of manufacture and adding to it a sum for the manufacturer's profit. This, they claim, has been fairly done by de St. Marceaux & Co. in this case.

These are the antagonistic positions assumed. You will perceive, therefore, that if, in the course of your inquiries, you shall arrive at the conclusion that there was a market value for the wines in these 3,109 cases in the principal markets of France, and that such market value was above the invoice value stated in these three invoices, you can dismiss all question as to the cost of manufacture, or the cost of the wines, leaving then only one further question for consideration—whether such undervaluation by de St. Marceaux & Co. was made knowingly or not.

With this general view of the case, we approach the consideration of the particular questions involved in it. The libel of information, which is equivalent to a declaration in an ordinary action, is founded upon two statutes of the United States. One is the fourth section of the act of May 28, 1830, which provides, so far as it applies to the present case, that if an invoice be made up with an intent, by a false valuation, or false extension, or otherwise, to evade or defraud the revenue, the goods contained in the entry made on such invoice shall be forfeited to the United States. The other statute counted upon is the first section of the act of March 3, 1863, which provides, that if any owner of any merchandise shall knowingly make, or attempt to make, any entry thereof by means of any false invoice, or of any invoice which shall not contain a true statement of all the particulars required by that section, the merchandise shall be forfeited.

Now, under this last section, the first inquiry is, what are the particulars that are required to be stated in the invoice? Those particulars, so far as they apply to the present case, are the particulars required by the first section of the act of March 3, 1863, in reference to merchandise subject to ad valorem duties—that is, duties calculated at a percentage upon a written or fixed value set down by the merchant, and not a duty of so much per pound, or so much per gallon, by weight or measure. The requirements of the statute in regard to these particulars are as follows: If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. On the other hand, if the merchandise is obtained by purchase, the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon. These two provisions are very plain and simple, and need to be impressed firmly upon your memory. If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. But if the merchandise was obtained by purchase, then the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon. Now, in these provisions of law which I have just stated and repeated, placed side by side in the same section of the statute, you will see a policy which commends itself at once to the good

sense of every citizen. That policy is this: Every ad valorem system of revenue must be made, as far as possible, uniform in its operation, or it will be oppressive and unjust. Merchandise, as a matter of course, will be shipped to this country by the man who manufactures it, and like merchandise will be shipped here by the man who purchases it. If the manufacturer is allowed to invoice his merchandise at what it costs him to make it, and the purchaser is compelled to invoice his goods at what it costs him to buy them, inasmuch as the latter must pay for the goods not only what it costs the manufacturer to make them, but the profit of the manufacturer in addition, an unfair discrimination is made against the purchaser, enabling the manufacturer to undersell him in the market here, and in the end surely drive him out. That is a principle which is easy to be understood, and commends itself to the good sense of every one. Hence the rule referred to, which was adopted in previous laws to this of 1863, and which finds its expression in the language I have cited from the act of 1863. In the case of a purchaser of goods, the cost to him to buy the goods abroad is assumed, as a general rule, by the law, to indicate the actual market value of what he buys, it being presumed that he buys at the ordinary actual market value; and, to put the purchaser upon the same footing with the manufacturer, and to enable the government to collect substantially the same amount of duty, at the same ad valorem rate, on the same quantity of the same description of merchandise, whether shipped here for account of the purchaser of it, or for account of its manufacturer, the law requires the manufacturer to invoice his goods at their actual market value in the principal markets of the country where they were manufactured, no matter what they cost, no matter whether they cost more or less than such actual market value—in substance and effect, to invoice them at what the other man, the purchaser, would have to pay for them and invoice them at. That is the law, and it is perfectly plain and easy to be understood. The manufacturer cannot, under this law, take the cost to him to make the goods and add an assumed sum to that cost, and arbitrarily call that the market value which the law refers to. He may, to be sure, adopt such a course, but, if he does adopt it, he takes the risk of its being shown that the sum so fixed by him, no matter how he arrived at it, is less than the actual market value. In this case, the law presumes that de St. Marceaux and his house, the importers of these wines, knew the requirements of our law, and imposes upon them the obligation of knowing them, if they seek to avail themselves, under these requirements, of the privilege of entering merchandise which the law confers. But in this case you have something more than the presumption of law. In these invoices (and they are all alike) there is a declaration attached to each, in the French language, made by Mr. de St. Marceaux, in which he states that the values set forth in the invoices are, as the French express it, the "veritable prix courant." The translation produced makes that to be "veritable" (actual) "courant" (market) "prix" (value)—actual market value—veritable or true current price, to be more literal. Every one can see that "current price" and "market value" are synonymous words. We have, in common speech, the word "price-current" in our language. What is a price-current but a statement or list of current prices, which are the market values of the merchandise stated in the list? We, therefore, have Mr. de St. Marceaux declaring that the prices stated in these invoices are the veritable current prices, or actual market values of the wines. The very language of the statute is adopted in these declarations and translated into French, Mr. de St. Marceaux's own language, and the meaning could not be misunderstood by him. At the side of each of these declarations (the declaration proper being in French) is an English memorandum in these words: "Declaration where goods, wares, and merchandise have not been purchased." Now, this circumstance must have struck your observation at once, in reference to these declarations, that Mr. de St. Marceaux, after making a declaration in French (his own language, as to the meaning of which he could not be mistaken), stating that the prices in the annexed invoice are the "veritable prix courant," the veritable current price, the actual market value of his wines at the time and place when and where the same were procured or manufactured (because the literal translation of the French is the exact language of our statute)—that M. de St. Marceaux, after making that declaration, now comes into court, and by his witnesses and counsel claims that these wines have no market value at Rheims, and that the invoices are made up on a different basis from that market value. What that different basis may be is of no consequence. The position assumed is that there is no market value at Rheims because there is no market there. Nevertheless, notwithstanding this, and although you may find there was a market value in France for these wines of de St. Marceaux, still, if the prices stated by de St. Marceaux, in his invoices, according to his declarations as to the market values, were, in point of fact, as high as the actual market values which you may find to be proved by the evidence, then, of course, the defence will have been made out.

There is one expression in the first section of the act of 1863 which requires an observation, and that is the word "place"—"the actual market value at the time and place when and where the same were procured or manufactured." The supreme court of the United States, in the case of Madame Clic-

quot's Champagne, in 3 Wall., have settled the law in regard to the meaning of the word "place," as used in that sentence, to be, that it has a meaning as extensive as the country of the manufacturer of these wines; that it does not mean Rheims, but France, the country where the wine are procured or manufactured; and that the standard to be applied under the law is the actual market value of the wines in the principal markets of France. In that case, the district court in California had limited the meaning of the word "place," in the act, to Rheims, the spot, the precise locality, where the wines were manufactured.

With these observations we are brought to consider the meaning of the words "actual market value," as used in the statute. And here also we have the authority of the supreme court to guide us, for, in the case of Madame Clicquot's Champagne, the district court in California, on the trial of the seizure case there of her wines, gave a very clear exposition of the meaning of the words "actual market value;" and the supreme court, in their opinion, say, that the charge of the learned judge in California embraced all the points in the case, and is satisfactory to the supreme court, and they concur in it. I have been furnished with a verbatim report of it. Now, what is the meaning of the words "actual market value?" The market value of goods is the price at which the owner of them, or the producer of them, holds them for sale—the price at which they are freely offered in the market—such prices as he is willing to receive if the goods are sold in the ordinary course of trade. This is common sense and reason. It is the popular meaning of the words, and it is their legal meaning; and we are brought around again, in this way, to the reason I before stated to you for the rule prescribed by the first section of the act of 1863, that this actual market value, to be stated by the manufacturer of the goods, is to be, and is intended to be, and is, the price which a purchaser must pay to get the goods. That is the actual market value, and nothing else is. In the present case, the government claims that the evidence shows that de St. Marceaux's house itself holds these wines for sale at Rheims and in France, has them on sale there, offers them freely for sale there, at prices fixed by the house of de St. Marceaux & Co., and, when applied to at Rheims, voluntarily names the prices for which it is willing to sell them in the ordinary course of trade, and below which it refuses to sell them in the ordinary course of trade. If this claim on the part of the government is true—if it be a fact that de St. Marceaux does so hold these wines for sale, and offers them for sale, and names the prices for which he is willing to sell them, and below which he will not sell them—if you shall find this to be true—then there is, in judgment of law, a market for the wines in France, and a market price for them there, and a market value for them there, and such market price and market value is the price so fixed by de St. Marceaux, and so voluntarily named by de St. Marceaux.

Before going into the evidence on that subject as to whether there is or is not such a market value, I ought to make a remark upon one point. It will not do to say that there is no market value for these 3,109 cases at Rheims because the 3,109 cases were not themselves sold or to be sold at Rheims, but were to be sold in the United States. Nor will it do to say that there is no market value for these 3,109 cases, or for the wines in them, at Rheims, because just the special wine in the bottles in these cases, so dosed and prepared as this wine was, is not sold at Rheims. This would be trifling with the good sense of the law. You have heard the testimony on both sides, of the makers and dealers, of the brokers at Rheims, of Mr. Heidelberger, Mr. Weiland, Mr. Marshall, and others, and you will be able to judge—and it is for you exclusively to judge—whether wine, in all substantial particulars, as to grade, quality, and body and marketable worth, appreciation, and value, the same as the wine in these 3,109 cases, is or is not in the market and on sale at Rheims and in France. If it is, if there is a price which a purchaser must pay there for such wine, in order to get it in the quantities stated in these three invoices, then there is a market value for it there within the statute. The values stated in these three invoices, per case, are as follows all at Havre: For Carte Noir, quarts, 30 francs 50 centimes; for pints of the same, 33 francs 50 centimes; for Carte Blanche, quarts, 30 francs 50 centimes; for pints of the same, 33 francs 50 centimes; for Red Lac, pints, 34 francs 50 centimes, there being no quarts of Red Lac in the invoices; for the Royal St. Marceaux, quarts, 36 francs, and for pints of the same, 39 francs. That comprehends all the descriptions of wine in these invoices. These prices you will bear in mind, and I doubt not they are impressed on your memory sufficiently.

I will now refer to some of the evidence. In the first place, there is the evidence of Mr. Marshall. Who and what Mr. Marshall is, and the general credit you will give to his testimony, in view of his examination and cross-examination, I shall leave entirely to you, without any comment, merely stating, as I understand it, some of the salient facts, as bearing on the case, that are testified to by him. He procured in London certain prices current, and especially a price current from Groves & Co., the agents of de St. Marceaux there, and he had certain dealings, which I shall speak of hereafter, with Groves & Co., in reference to some wines of de St. Marceaux, and he names certain prices as stated to him by Groves & Co., and by the agents in London of other houses at Rheims, as the prices of these champagne wines in France

for export—the prices free on board at Havre. If you shall believe his evidence, then the prices which he states are to be taken into consideration by you as evidence of the market values in France of the wines he speaks of, whatever such wines may be, leaving only the question whether those wines are substantially the same as the wines in these 3,109 cases. Mr. Marshall says there are but three grades of champagne wine made as shipping wines, to export, by these manufacturers at Rheims, and on which they put their brand; that no matter how many different labels or brands or marks appear on them, there are but three grades of shipping wines, to export, on which they put their brand; that all the manufacturers there maintain substantially the same relations or proportions between the three grades which they make; and that they all make but three grades. He also says that a taster, and he himself, can tell by his taste, without seeing cork or label or brand, to which one of these three grades any particular wine that he may taste belongs; and that then, if that wine has a brand or label or mark upon it, so that he can become possessed of all the adventitious circumstances that give it a price or value in the market, he can tell, within four francs a case, the market value of that wine.

The bearing of this evidence, in connection with other evidence in the case given subsequently, is merely for the purpose of showing how many grades and qualities there are in fact of these wines, and especially of this de St. Marceaux wine, with a view of arriving at this question of actual market value; and, in that same connection, you will recollect the letter of de St. Marceaux & Co. to Leuchtenrath, in which they say to Leuchtenrath that they sell only three kinds; and they give in that letter the prices of three different grades or qualities, in that respect corresponding with the testimony of Marshall. In regard to these de St. Marceaux wines (for in what I have to say I shall confine myself solely to them) Marshall says, that the de St. Marceaux grade No. 3, or the lowest grade of the three, is worth 45 francs a case of a dozen quarts free on board at Havre; that that is the price, and that all these prices are the prices, for the last five or ten years in London, during which there has been no variation in the prices of the champagne of de St. Marceaux, or of any other brand, in London; that the lowest grade, No. 3, is 45 francs a case of a dozen quarts free on board at Havre, No. 2, 52 francs a case, and No. 1, 60 francs a case, including package and all expenses of putting on board the ship. On that same subject you will bear in mind the letter of de St. Marceaux and Co. to Leuchtenrath, in which they name three kinds and three prices: "Carte Blanche," 45 francs a case, or 3 francs 75 centimes a bottle—the same price that Marshall names for No. 3, or the lowest grade of the wine he speaks of. The second price stated by de St. Marceaux & Co. in their letter to Leuchtenrath, is for "Champagne Imperial," which is 48 francs. Marshall's second was 52 francs. The third price mentioned by de St. Marceaux & Co. in their letter to Leuchtenrath, is 60 francs, for "Royal." Marshall's price was 60 francs for No. 1, which I understand to be "Royal." These prices stated by de St. Marceaux & Co. to Leuchtenrath are prices for the wine taken in the cellar at Rheims, packing not included. Mr. Marshall produces five price-currents, which he obtained in London from the agents of the makers in Rheims, or parties who, he says, were the agents. You heard the testimony of Weiland in regard to the dealings of the house of Piper, Heidsieck & Co. with Newton, and of Heidelberger in regard to the dealings of de St. Marceaux & Co. with Groves & Co. I will, for the purpose of this trial, call these persons agents, as Mr. Marshall understood them to be in his dealings with them. He obtained one price-current from Groves & Co., and says that when he got that, in October, 1866—(and this testimony must be taken in connection with his other testimony, that there has been no variation within the last five or ten years, in London, in the prices of any champagne)—that when he got this price-current from Groves & Co., in October, 1866, he bought from Groves & Co. some "Royal" at 48 shillings, or 60 francs a case, less 5 per cent. discount, which was net 57 francs; that he also bought from Groves & Co., at that time, some second quality of de St. Marceaux's wine at 36 shillings a case, or 45 francs, less 5 per cent. discount, which was net 42¾ francs; that Groves told him at the time that these were the lowest prices in bond, duty not paid, in London; that Groves would have sold it to any one in the trade at that price; and that he, Marshall, was in the trade, and Groves knew it, and sold the wine to him as to one in the trade, although in fact he bought the samples, two cases of one kind, I. think, and perhaps about the same quantity of the other, as samples for the United States government. The 36-shilling or 45-franc wine, "second quality Ay" of de St. Marceaux wine, which Marshall bought, is, he says, the lowest wine that de St. Marceaux puts his brand on; and that, you will recollect, corresponded with the price stated by de St. Marceaux in his letter to Leuchtenrath for the lowest of the three grades named there—that is, 45 francs for "Carte Blanche." As to these prices of de St. Marceaux's wine in bond in London, without any English customs duty added, it is for you to judge whether these prices are or are not substantially the prices of the same wines free on board at Havre, that is, the lowest prices of them in France; and also whether these wines are substantially the same as the wines in the 3,109 cases in suit, and whether these prices have varied since the spring of 1864. In this connection Marshall says, that when he bought this wine from

Groves in the fall of 1866, he told Groves he was going to buy largely for shipping, and wanted a few cases for samples, and that Groves named his lowest prices for the wines in quantities, and gave him the samples at these prices. In regard to the other price-currents which Marshall obtained in London—namely, those from the agents of Piper, Heidsieck & Co., of Jules Mumm & Co., of Charles Heidsieck & Co., and of Moet & Chandon, and to the prices stated in those price-currents—I shall not refer to them particularly, leaving you to judge, from your recollection, whether they do or do not go to show, under the law as explained to you, that there was a market value for all these wines, and especially for this de St. Marceaux wine, in France in the spring of 1864. That is the only bearing of the evidence, and it is not to be considered in the case as applicable to any other points. There are also some price-currents of de St. Marceaux & Co. annexed to Heidelberger's deposition, two of Paris agents, and two of de St. Marceaux's house at Rheims, giving the price per bottle at Rheims, packing not included, and putting de St. Marceaux's Carte Blanche at 48 francs a case, and another kind at 60 francs a case. In regard to these price-currents, you will take into consideration the testimony of Heidelberger, who says they were mere puffing advertisements, and do not amount to anything. It is for you to judge. But, whatever these price-currents of the house of de St. Marceaux & Co. annexed to Heidelberger's deposition show as to the prices in fact—whether the prices are or are not puffing prices, or prices that are not reliable as prices for the wine in quantities—they undoubtedly show this, that the Carte Blanche wine named in them (and whether that wine is of the same grade and quality as the Carte Blanche in these 3,109 cases is for you to judge), and the other wines named in them are held by de St. Marceaux & Co. on sale at Rheims, deliverable there, and to be paid for there, and in the market there, at some market value or other fixed by de St. Marceaux & Co. themselves.

Then you have the testimony of the five brokers, and of the one ex-broker, who state that they know nothing in regard to sales of these prepared wines at Rheims; but that, without doubt, the prepared wines are sold at wholesale at Rheims in transactions which are private, not being made through brokers, and therefore not public, but made through correspondence, the sales of each house being known only to itself and to the persons who purchase from it.

Then you have the letter of de St. Marceaux & Co. to Leuchtenrath, brought out by the letter from Leuchtenrath to them. Leuchtenrath's letter is dated the 4th of November, 1863. In that letter, you will recollect, he asks the house of de St. Marceaux & Co. for the lowest price of their wines for cash, for export, and for considerable orders. That was the inquiry that brought out the answer that was made, and, in due course, three days afterward, that letter was replied to. On the 7th of November, 1863, they acknowledge the receipt of his letter and reply to it. They state, in substance, that de St. Marceaux & Co. make wines of only the very first quality, and sell only three kinds—"Carte Blanche" at 3 francs 75 centimes per bottle, "Champagne Imperial" at 4 francs per bottle, and "Royal St. Marceaux" at 5 francs per bottle, taken in the cellar, packing and all other costs at the charge of the buyer; half bottles, or pints, of the various kinds, 50 centimes more; the price to be payable in six months, or, if cash, then 3 per cent. discount; and that, if the orders should be considerable, and should be payable in cash, they would allow 10 per cent. more as commission to the purchaser. That is the letter, and all there is in it of any importance in the case.

Now, the law, as applicable to a letter of this kind, is this: If the house of de St. Marceaux & Co. thought that this was a regular mercantile proposition, and that Leuchtenrath was a general commission merchant, and if the house of de St. Marceaux & Co. answered this letter voluntarily, and fixed certain prices as the lowest cash prices for export for the wines in considerable quantities, and if the wines, referred to by de St. Marceaux & Co. in the letter, were in substance the same as the wines in the 3,109 cases in suit, then you are at liberty to infer that de St. Marceaux & Co. would have sold the same wines to anybody at the prices named, and also to infer that there was a market value for the wines, thus made and fixed by de St. Marceaux's house itself, and that such market value is the price thus fixed. There are other letters introduced into this case from other houses, some to Leuchtenrath, and some to a man by the name of Hill, in London. The same remarks are applicable to the letters from these other houses, and to the prices named in them for the wines named, that I have applied to the wines and the prices in the price-currents obtained by Marshall in London for other wines than those of de St. Marceaux & Co.

As to this letter of de St. Marceaux & Co. to Leuchenrath, and as to the purchase by Marshall, as samples for the United States, of their wines from Groves & Co., no possible prejudice can attach to this mode of obtaining the information sought for, or to the officers of the United States for resorting to this mode. If Groves supposed he was selling to a regular purchaser, and named his lowest price for considerable quantities, and if de St. Marceaux supposed he was dealing with a regular customer in the ordinary way of trade, and named his lowest prices for cash, for export, for considerable quantities, it does not detract a particle from the value of the evidence, as evidence, that in fact Marshall was buying, and Leuchtenrath was writing, to obtain evidence to be used for the United States; because the test to be applied is the

state of mind of the seller to Marshall, and of the writer to Leuchenrath. As to the prices in the letter to Leuchtenrath, deducting discount and adding packing, to get at the prices at Rheims, the government claims that the prices stated by de St. Marceaux & Co. in their letter to Leuchtenrath as the prices at Rheims, make the following net prices which the purchaser would have to pay to get these wines for export, in considerable quantities, in the market in France, and that he could not get them for less; that is, 41 francs 45 centimes for "Carte Blanche," 44 francs 6 centimes for "Champagne Imperial," and 54 francs 54 centimes for "Royal St. Marceaux." If you should find that these prices, or any other prices which you may arrive at from the evidence, were the prices which any persons wishing to buy the wines would have had to pay for them in France, and that these prices were fixed by de St. Marceaux & Co., and that the wines are substantially the same as the wines in suit, and that the prices remained the same in the spring of 1864 that they were in November, 1863, when this letter was written to Leuchtenrath, then, in judgment of law, there was a market value at Rheims and in France for the wines in suit in the spring of 1864, and such market value was the prices so fixed by de St. Marceaux & Co. and nothing else. The government also refers to Heidelberger's testimony, which you will recollect, and upon which I shall not comment, except to refer you to it, in regard to invoices made by the house of de St. Marceaux & Co. at Rheims, to purchasers of wine there, at prices running from 3 francs 25 centimes and 3 francs 50 centimes per bottle to 5 francs per bottle. The government claims that Heidelberger testified that that wine was the same kind of wine as the "Carte Blanche" that he sends to the United States. The price of 3 francs 25 centimes a bottle would be 39 francs a dozen, 3 francs 50 centimes a bottle would be 42 francs a dozen, and 5 francs a bottle would be 60 francs a dozen, because it was not in cases, but was in bottles unpacked, and the cost of packing, which is testified to be 2 francs 16 centimes a dozen, is to be added, for the wine must be put in cases to be exported, and that expense is a portion of the dutiable value. The government claims that the testimony of Heidelberger shows the fixing by the house of de St. Marceaux & Co. itself of a market value for the wines in suit, and at a higher rate than the invoices.

Then you have the evidence on the part of the claimants in this case. You recollect the depositions of a large number of witnesses in France, the deposition of Heidelberger, the testimony of Weiland, and the depositions of the five brokers and the one ex-broker. Upon that subject I will refer to the charge of the court in the case in California, which was approved by the supreme court, and will read an extract from it: "On the part of the claimants, gentlemen, a large number of witnesses, most respectable, apparently, from their official positions" (witnesses like these brokers, about whom we have heard, as to their positions, qualifications, and character,) "have testified that there is no market value for this wine at Rheims. It is for you to say whether they are not totally mistaken, or, if they are not wholly mistaken, whether their mistake has not arisen from a misconception of what is the market value of wines. It is for you to say whether they mean anything more than that the manufacturers do not, at Rheims, deal in each other's wines." And I refer you to the language of one or two of the brokers in this case, as I recollect it, where they state that there are no brokers or commission-merchants who deal at Rheims in these wines. "The statement made by them that there is no market value for champagne at Rheims must be taken by you with the explanations and qualifications with which it is given. It must be taken in connection with the rest of their evidence, showing in what sense they mean to say that there is no market value for these wines in the champagne district. It must be taken also in connection with the testimony offered by the United States to show that there is a market value for these wines; that is to say, that these wines are held at and can be obtained by anybody for certain determinate rates, below which they cannot be obtained."

Now, gentlemen, if, on all the testimony, you shall find that there was an actual market value in France for the wines in suit, then it was the duty of de St. Marceaux's house to put that value in the invoices. And the next question for inquiry is, have they done so? If you shall find that there was such actual market value, you will probably not have much difficulty in determining the question as to whether the invoice value is above or below such market value. If you shall find that it is below, then you must determine whether the undervaluation was intentional and done knowingly, or whether it was done unintentionally and ignorantly. If, in making out the invoices and asserting in the declarations annexed and required by the statute, that the prices stated in the invoices were the actual market value, the "veritable prix courant" of the wines in Rheims or in France, de St. Marceaux, who made the declarations in the invoices, knew better, then he did it knowingly; and if you believe that he knew that the invoices did not state as high a value as the actual market value, then the wines must be forfeited.

A good deal has been said in this case by counsel in regard to the manner and time and circumstances under which these wines were seized, and the persons by whom they were seized. That is something with which neither you nor the court have anything to do in this case. The government has adopted the seizure, and is in court upholding and maintaining it. It is of no consequence how it was made, or when it was made, or from what motive it was made, if the facts and the law

require the forfeiture of the goods. There is but one other rule of law to which I think it necessary to call your attention, and that is this: In a case like this, where probable cause is shown for the prosecution, and which probable cause is to be judged of by the court, the burden of proof is thrown on the claimant to dispel the suspicion and explain the circumstances which seem to render it probable that there has been a knowing undervaluation. The government having in this case, in the first instance, as decided by the court, established probable cause, it is for the claimants to show their innocence, and dispel and clear up the suspicion which the government in the beginning raised against them; and, under this rule, it is for you to say whether the claimants have made out their defence, and have shown that these wines were invoiced at their actual market value in the principal markets of France at the time they were manufactured. If they have not shown that, you will find for the United States; and if they have shown that, you will find for the claimants.

I have said everything that I deem it necessary to say in regard to the facts or the law of this case, and all propositions made on either side to the court to charge the jury, which are not embraced or covered affirmatively or negatively by the charge as given, will be considered as refused. You will give to this case, gentlemen, I doubt not, a patient and careful consideration, with an earnest desire to arrive at a just conclusion, and I commit it to you entirely satisfied that you will do so.

Mr. Webster.—If the court please, in the last proposition but one stated by the court there was an omission in regard to the statutory knowledge or intent. I think the general direction of this part of your honor's charge on that point was, that if the jury found that the goods were undervalued, they were to find for the government. There was no condition annexed in regard to guilty knowledge or intent.

Mr. Evarts.—When your honor was passing upon the question of probable cause and the burden of proof, you did not repeat, my learned friend thinks, the condition of knowledge in which the undervaluation was made.

THE COURT.—Of course, gentlemen, you will understand that even if you find that these goods were undervalued—that is, if they were valued in the invoices at less than the actual market value—you still must find, in order to forfeit the goods, that this was done knowingly by the house of de St. Marceaux & Co.

Mr. Webster.—There are two counts in the information, one under the fourth section of the act of 1830, and one under the first section of the act of 1863. The fourth section of the act of 1830 refers to "intent" to evade the duty.

THE COURT.—Of course, from what I have said, you will understand that the word "knowingly" occurs in the statute of 1863, and applies to that statute, and that under the count founded upon that statute you must find that the undervaluation was made knowingly by de St. Marceaux & Co. There is a count under the fourth section of the act of 1830. Under that section you must find, in order to find against the claimants and in favor of the government, that the invoice was made up with an intent, by false valuation or extension or otherwise, to evade or defraud the revenue; and under that section, unless you find that, the goods cannot be forfeited. But you can find for the government under either statute, or under either count of the libel. You may find under the law of 1830, or under the law of 1863. If you find against the claimants under either one, the goods are to be forfeited.

The jury failed to agree upon a verdict, and the case was compromised without a second trial.

THREE TONS OF COAL (UNITED STATES v.). See Case No. 16,515.

THRELKELD (CLARKE v.). See Case No. 2,865.

THRELKELD (WILLIAMS v.). See Case No. 17,741.

THROCKMORTON (UNITED STATES v.). See Case No. 16,516.

THROGMORTON (STOCKTON v.). See Case No. 13,463.

Case No. 14,013.

THRUSTON v. MUSTIN.

[3 Cranch, C. C. 335.] [1]

Circuit Court, District of Columbia. Oct., 1828.

WASTE — CUTTING WOOD — EQUITY — DISCOVERY — STATUTE OF GLOUCESTER.

1. A tenant for 99 years, renewable forever, with leave to purchase the reversion at a stipulated price, is liable to be restrained by injunction from cutting and selling young and green wood, where the wood constitutes the principal value of the land.

2. The statute of Gloucester, which gives the forfeiture of the thing wasted, and treble damages, is in force in the county of Washington, D. C., and the defendant in equity is not bound to discover the waste, unless the plaintiff in his bill expressly waives the forfeiture and penalty.

Bill in equity to stay waste, filed 15th December, 1827.

The bill states that the plaintiff [Buckner Thruston], on the 3d of November, 1825, demised to the defendant [Thomas Mustin] a farm called "Pleasant Hills," in Washington county, for 99 years, renewable forever, at $200 per annum, with the privilege in the defendant to purchase the fee-simple at $40 per acre. That the defendant took possession

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

on the 10th of January, 1826, and continues to reside thereon, "and has committed great waste on the said farm in cutting down the young and green wood thereon, and is now cutting down the same, and selling it in Georgetown;" "that the principal, or a material part of the value of the said farm consists in the wood, (the land being poor and unproductive,) as well for fencing and fuel as for ornament." That in leasing the land to the defendant, the plaintiff, from the apparent circumstances and ostensible property of the defendant, trusted in his ability and integrity to comply with the contract; but has since heard that the defendant is embarrassed in his circumstances; and the plaintiff "is in imminent danger of great loss by reason of the said waste," against which he has no security. That the plaintiff believes the defendant to be unable to purchase the fee-simple, and never intended to do so if able, and that his embarrassment existed at the time of the contract, "and was therefore guilty of a fraud towards the plaintiff, as well as by concealing the state of his affairs." The bill prays for an injunction prohibiting the defendant "from cutting and selling the said wood, and from committing any other unreasonable waste on the said farm by cutting of wood or otherwise," and for general relief. To this bill the defendant demurs, because the plaintiff has not by his bill made such a case as entitles him in a court of equity to any discovery or relief. And as to so much of the bill as seeks a discovery of the cutting and selling the young and green wood on the said farm, the defendant demurs, because if the estate of the defendant is not such as to entitle him to cut and sell the wood, the defendant may be made liable at law to a forfeiture which the plaintiff has not offered to waive. And as to so much of the bill as seeks a discovery of the defendant's intention and ability to purchase the fee-simple, and his pecuniary circumstances, &c. the defendant demurs, because such discovery would be impertinent, and would not entitle the plaintiff to any relief. And as to the charge of cutting and waste, and the discovery thereof, he demurs because the waste is not set forth with sufficient certainty, so that the court can judge whether the cutting &c. be waste, and because the allegations are not sufficiently substantiated by affidavit, the certificate of the clerk being only that the bill "was sworn to" in open court.

R. S. Coxe, for defendant.

1st. There is no equity in the bill. The only fact alleged, is the cutting and selling some small wood. Waste is technical. The cutting must be of timber. The bill does not charge the cutting of timber; but only "young and green wood." The plaintiff made his bargain without requiring security, and this court cannot make a bargain for him. There is no allegation that the rent has not been punctually paid. The defendant is not bound to answer any interrogatory not founded on some allegation in the bill. This court cannot compel the defendant to give security which he has not stipulated to give. No relief can be granted upon the discovery asked for.

2d. If the defendant has committed waste, the estate is forfeited; and the defendant cannot be compelled to answer to that which might subject him to a forfeiture or penalty (U. S. v. Saline Bank of Virginia, 1 Pet. [26 U. S.] 100), unless the plaintiff expressly waive the forfeiture (Botelor v. Allington, 3 Atk. 457).

3d. The defendant, under a lease for 99 years, renewable forever, with leave to purchase the reversion at a certain price, is not impeachable for waste. He has a right to continue the estate forever, and to prevent the plaintiff from ever enjoying the reversion. The cutting, therefore, cannot injure the reversion.

Mr. Redin, contra.

There is a sufficient averment of waste. The cutting of young and green wood for sale is waste, when the wood constitutes the principal value of the estate. Downshire v. Sandys, 6 Ves. 108. There the injunction was to prevent cutting of "saplings not proper to be felled." And in Strathmore v. Bowes, 2 Brown, Ch. 89, the injunction was extended to "young saplings and trees not fit to be cut." Like injunctions were likewise granted in Chamberlyne v. Dummer, 1 Brown, Ch. 166, and in Obrien v. Obrien [Amb. 107, 108], there cited. Underwood cut at unseasonable times, or destroying the germs, is also waste. Co. Litt. 53a; Burges v. Lamb, 16 Ves. 175; Jackson v. Brownson, 7 Johns. 231. Cutting wood for sale is also waste. Co. Litt. 53b; Gower v. Eyre, Coop. t. Eld. 156; Attorney-General v. Lord Stawell, Anst. 601; 2 Hayw. (N. C.) 110, 339. It is waste to cut lightwood to make tar in North Carolina. This tenant is impeachable for waste. The reversion is in the plaintiff, and he has sufficient interest in it to authorize him to prevent waste. The relation of landlord and tenant still continues between the plaintiff and the defendant, notwithstanding the covenant to renew at the end of ninety-nine years, forever. By the common law the tenant must not commit waste. That law is in force here. The case of Calvert v. Gason, 2 Schoales & L. 560, was adjudged upon the custom of the place; and the chancellor (Redesdale) states the English law to be otherwise. The doctrine upon which that case was decided, namely, that tenant for life renewable forever, is not impeachable for waste, is peculiar to Ireland. Eden, Inj. 175. Even in case of vendor and vendee, upon an executory contract, the vendee will be restrained from waste until the purchase-mon-

ey be paid. So in the case of mortgagor and mortgagee. The whole estate, wood as well as land, is bound for the debt. Eden, Inj. 116. It was not necessary to set forth the number, kind, and size of the trees cut. The affidavit goes to all the facts charged in the bill, and is sufficient foundation for the injunction. Eden, Inj. 324. The forfeiture is waived by the plaintiff's bringing this bill; and if he should proceed at law for the forfeiture, or for the penalty, this court would restrain him by injunction; and it could do no more if the plaintiff had, by his bill, expressly waived the penalty. An implied waiver is sufficient. Wools v. Walley, Anstr. 100. A waiver in equity is no bar at law; it is only a ground for injunction. The want of a waiver is no ground of demurrer. The defendant is bound to answer; and may restrain the plaintiff by injunction from proceeding at law for the forfeiture. Eden, Inj. 329; and Dodge v. Dickins, in this court [unreported].

Mr. Jones, on the same side. It is true this bill is not ancillary to a suit at law. It is a case for the original jurisdiction of this court as a court of equity. It is to prevent irreparable injury, and goes for ultimate relief. Cutting wood for sale is waste. The property itself is the security of the lessor, whether he be considered as lessor, or as vendor, and the tenant or vendee has no right to diminish it. If the plaintiff has been deceived as to the pecuniary ability of the vendee to pay, or if the security should turn out bad, a court of equity will restrain waste. The demurrer is to the discovery only, because there is no express waiver of the forfeiture; but that is not a demurrer to the relief, which the facts if discovered or proved would authorize.

Mr. Coxe, in reply. If the principal or only value of the land is in its wood, it is not waste to cut and sell wood. How else is he to pay his rent? It is not waste to cut wood. Jackson v. Brownson, 7 Johns. 231. No specific act of waste is stated in the bill. It is not stated to be "not of a growth fit to be cut;" "nor saplings not proper to be felled;" nor "young timber;" nor "immature timber," as in the cases cited. Timber must be such as is fit for building. The case in Schoales & L. was not decided upon a local custom; but it was said that tenancies of that kind, namely, for life renewable forever, were peculiar to Ireland; but the same construction would be given to the same kind of estate in England. The chancellor speaks of "the local nature of that tenure." Hyde v. Skinner, 2 P. Wms. 196; 2 Cox, Ch. 174. In this country such leases are not discouraged. The relation of vendor and vendee does exist in this case. It is optional with the defendant. Here is no complaint of irreparable injury. The defendant had a right to sell wood to raise the purchase-money. The defendant must demur to such part of the bill as he thinks himself not bound to answer; he cannot avail himself of the objection upon exception. If he submits to answer, he must answer fully.

[Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.]

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, not sitting).

The first demurrer is to the whole bill, both as to discovery and relief. Upon that demurrer the question is, whether the bill states a case proper for the intervention of a court of equity. It is admitted that a court of equity has jurisdiction to stay waste. Does the present bill aver waste? Waste is an act done to the injury of the inheritance: Is the cutting and selling of young and green wood such an act?

The bill calls it waste; and avers that the plaintiff is in imminent danger of great loss by reason of such waste; and that the principal value of the farm consists in the wood. These averments, taken together, seem to me to amount to an allegation that the cutting and selling of such young and green wood was an injury to the inheritance; and was, therefore, such waste as it would be proper in a court of equity to restrain. But it is said that in such a lease, renewable forever, and with a right to purchase the reversion, the relation of landlord and tenant does not exist, inasmuch as it is in the power of the defendant to prevent the plaintiff and his heirs from ever enjoying the reversion But, until the defendant has actually purchased the reversion, it remains in the plaintiff, and the relation of landlord and tenant still subsists in full force. The plaintiff, therefore, is entitled to relief. Is he also entitled to a discovery of the waste? It is said that a court of equity will not compel a discovery of that which might subject the defendant to a forfeiture; and that the plaintiff may, in an action of waste, under the statute of Gloucester, have a judgment of forfeiture of the estate against the defendant, and treble damages. That the plaintiff has not waived nor offered to waive that forfeiture, and therefore a court of equity will not compel the defendant to discover the waste. The statute of Gloucester (6 Ed. I. c. 5), which gives the forfeiture of the thing wasted, and treble damages, is believed to have been "by experience found applicable to the local and other circumstances of the inhabitants of Maryland," and to have been adopted by the constitution and bill of rights of that state, and consequently to have become the law of this part of the district, by virtue of the act of congress of the 27th of February. 1801 (1 Stat. 103). That statute is stated, in Chancellor Kilty's report to the legislature of Maryland (page 211), to have

been extended, in practice, to that state. I am, therefore, of opinion that, if the defendant has committed waste, he is liable to the forfeiture of the thing wasted, and the treble damages.

The plaintiff has not, in his bill, expressly waived the forfeiture or the penalty. Is the defendant, then, bound to answer to the allegation of waste? Upon this point the case of Boteler v. Allington, 3 Atk. 457, was cited by the counsel of the defendant; in which case Lord Chancellor Hardwicke says: "There are two matters in question; one upon the demurrer as to the discovery of the acceptance of the second living; and as to that, I am of opinion that the plaintiff had a right to demur; not because it is of consequence to the plaintiff, for the fact of which he seeks a discovery may very easily be ascertained by the bishop's register, but for the sake of a rule of the court, that a defendant is not obliged, by a discovery, to subject himself to a forfeiture, or any thing in the nature of a forfeiture; and therefore in all bills to stay waste, a plaintiff is not entitled to a discovery, unless he waives the penalty, which is treble damages by the statute of Gloucester." See, also, Mitf. Eq. Pl. (3d Ed.) pp. 157, 158, 161, and Coop. Eq. Pl. 205, 207. To this it is answered, that the forfeiture is in fact waived by the bringing of this bill. That the offer to waive would have been no bar at law to the action for the treble damages. That it would only have been a ground for an injunction to restrain the plaintiff from enforcing the penalty; and that the filing of this bill is equally a ground for an injunction; and that the defendant is now quite as safe against the penalty as he would have been if the plaintiff had expressly offered to waive it. In support of this position, the counsel for the plaintiff cited the case of Wools v. Walley, Anstr. 100, where, upon a bill for the single value of tithes, it was holden that it was not necessary for the plaintiff expressly to waive the treble value. I have not read that case, (not having the book), but, as I understood it when read at the bar, the question did not arise upon demurrer to the discovery, but upon exception to the answer of the defendant, who had omitted to make the discovery sought by the bill, relying upon the general rule, that he was not bound to discover that which would subject him to a penalty. The court, however, adjudged the answer to be insufficient, and compelled the discovery. This decision might have been upon the principle, at that time generally admitted, that if a defendant answer at all he must answer fully. There has been no case cited in which a demurrer, to the discovery of matter leading to a legal forfeiture or penalty, has been overruled, unless the plaintiff expressly waive that forfeiture or penalty. I am, therefore, of opinion that the defendant in this case is not bound to answer the allegation of waste.

Case No. 14,014.

THURBER v. The FANNIE.

[8 Ben. 429.] [1]

District Court, E. D. New York. May, 1876.

SHIPPING—POSSESSION—JURISDICTION—MARITIME TORT—ABSENCE OF BILL OF SALE—ENROLLMENT—COSTS.

1. A. E. S. being the owner of a sloop, which had never been enrolled or registered, sold her to T. Part of the purchase money was paid; and it was agreed that A. E. S., who had no bill of sale for the sloop, should procure one from her former owner, and should then give one to T., who should then give him a mortgage on her for $200. T. took possession of the sloop and ran her for nearly a year, during which time she was repaired and altered under the direction of T. by A. E. S., who was a ship-builder, materials belonging to T. being put into her. A. E. S. obtained his bill of sale but never tendered one to T., nor demanded the mortgage. Nearly a year after the sale, A. E. S. forcibly took possession of the sloop while on navigable waters, and thereafter sold her to H. who put A. S. in charge of her, as master. T. filed a libel to recover possession: *Held*, that the court had jurisdiction of the action, although T. had no bill of sale.

[Cited in Wenberg v. A Cargo of Mineral Phosphate, 15 Fed. 287; Haller v. Fox, 51 Fed. 299.]

2. That the sale by A. E. S. to T. was not conditional, but, if it were, the condition had been waived by the acts of the parties.

3. That, as the vessel was never enrolled or registered, the provisions of § 4192 of the Revised Statutes of the United States were not applicable.

4. That the forcible taking possession of the vessel by A. E. S. was a maritime tort, and gave him no title and that, having none himself, he could convey none to H.

5. That one mode of redressing the tort committed by A. E. S. was to reinstate the libellant in the possession of his vessel; and that, therefore, the subject of the action was maritime, and none the less so, because A. E. S. had passed the property to a third party.

6. That, if the question were simply one of title, the jurisdiction of the admiralty would still attach.

7. That the libellant must therefore have a decree for the possession of the vessel, with costs against H. alone and that, as no decree for damages was asked against A. E. S., and he was not in possession of the vessel at the time, the libel, as against him, would be dismissed without costs.

The case of The John Jay, 17 How. [58 U. S.] 399, distinguished. But see the case of Hill v. The Amelia [Case No. 6,487], which was affirmed by the circuit court [see Case No. 275].

[Cited in The Daisy, 29 Fed. 301.]

In admiralty.

Beebe, Wilcox & Hobbs, for libelant.

R. H. Huntley, for respondents.

BENEDICT, District Judge. This is a cause of possession. The libel avers that in April, 1875, the libellant, James E. Thurber,

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

being then in the peaceful possession of the sloop Fannie as the sole owner thereof, one Alonzo E. Smith, accompanied by others, armed with pistols, on the navigable waters of the United States, and within the admiralty and maritime jurisdiction of the United States, forcibly and wrongfully took said vessel from the libellant, and now wrongfully detains the same by the defendant, Alfred Smith, acting under his directions. Process having been issued, citing the said Alonzo E. Smith and Alfred Smith to appear and answer the said libel, and also directing the seizure of said vessel, and that all persons interested therein be cited to appear, Alonzo E. Smith appeared and made answer, denying the averments of the libel, and setting forth that, about the first day of September, 1873, he was the owner of that vessel and in possession thereof and continued in possession and ownership thereof until the 8th day of June, 1875, when he sold the vessel to one Henry Herrman. In addition, Smith sets forth certain facts in respect to an agreement with the libellant for a sale of the vessel to the libellant, which agreement he avers was not performed by the libellant. He also avers that he was in possession of the paper title of the vessel, and, never having delivered the same, he was, as he claims, entitled to the actual possession of her, and therefore he retook the possession of said vessel from the libellant, and thereafter, in good faith, and after his said possession had been acquiesced in, he sold and delivered her with the paper title to Henry Herrman, who thereupon took possession thereof; which said sale and delivery, as averred, was known to the libellant, and acquiesced in by him. Alfred Smith also appeared and made answer, denying all the averments of the libel, except the fact that he was in possession of the vessel, and averred that he was master in charge thereof, under the employment of Henry Herrman. Henry Herrman also intervened for his interest in said vessel, and filed a claim thereto and an answer, in which he sets up that he is the only true and lawful owner of the vessel by purchase from Alonzo E. Smith, then the owner and in possession of the said vessel, which purchase, the claimant avers, was in good faith without any knowledge that the libellant pretended to claim any interest in the vessel. He also avers that the libellant knew of and acquiesced in the possession of said vessel by said Alonzo E. Smith.

The cause coming on to be heard upon these pleadings, a sale and delivery of the vessel by Alonzo E. Smith to the libellant on June 8th, 1874, was duly proved. It was also proved that, on April 6th, 1875, Alonzo E. Smith, by force, deprived the libellant of the possession of the vessel, and that such act was committed upon navigable waters of the United States and within the jurisdiction of this court. The forcible seizure of the vessel is not disputed by the defendants; but it is contended that the sale to the libellant was conditioned upon the libellant's giving to Smith a mortgage upon the vessel to secure two hundred dollars, an unpaid balance of the purchase money, which condition not having been performed, Smith had a lawful right to retake the vessel, as he did, and to convey her to Herrman, as he did. In respect to the terms of the agreement of sale made between Smith and the libellant there is little room for doubt, and the acts of the parties in connection with such agreement are made clear by the evidence. If it can be held upon the evidence, which I do not say, that the execution of a mortgage for $200 was, by the agreement, made a condition of the sale, it is evident that such condition was waived by the unconditional delivery made of the vessel, and the permitting her to be held and used by the purchaser without objection for a long time after the period at which the mortgage was to become due. Not only was the vessel passed into the possession of the libellant without condition, but she was afterwards and while in his possession, under his direction, not only repaired but altered by the defendant, Alonzo E. Smith, who was a ship-builder, and materials furnished by the libellant were put into her by Smith. After such dealing with the vessel and permitting the libellant to sail the vessel for nearly a year, it is not open to Smith to say that the sale was upon condition and that no title passed to the libellant. The fact that no formal bill of sale was given to the libellant has been relied on, to show that it was not intended that the title to the vessel should pass to the libellant. The absence of the bill of sale is however explained by the other fact, as to which there is no dispute, that when the vessel was delivered to the libellant by Smith, Smith himself had no bill of sale and agreed to procure one.

The vessel had been used as a yacht and had not, so far as appears, ever been registered or enrolled, but the intention of the libellant to use her in the coasting trade was known to Smith. For that purpose it would be necessary to have her licensed, and it was therefore made a part of the agreement that Smith should procure a bill of sale to himself from her former owner, and thereafter give a bill of sale to the libellant, who was then to execute a mortgage back for two hundred dollars. Failure to deliver a bill of sale is thus explained, and affords no proof of an intention that the title to the property was to remain in Smith.

As matter of law, therefore, I am of the opinion that the sale and delivery of this vessel to the libellant was unqualified, and the libellant thereby became the sole and only owner thereof. But, if the sale were conditional, the only condition was that the libellant should give a mortgage for $200, upon receiving a bill of sale from Smith, and there

is no evidence of any tender of a bill of sale by Smith. It is proved that the libellant demanded a bill of sale, and that Smith gave, as an excuse for not giving it, that he had not yet obtained his bill of sale from the former owner. It is also in proof that, some months after the sale to the libellant, Smith did obtain a bill of sale from the former owner of the vessel; but it cannot be pretended that the evidence shows any tender of a bill of sale to the libellant. If therefore the condition stated was still in force as part of the agreement, it gave Smith no right to demand possession of the property, the purchase money of which had been more than half paid, without previously tendering his bill of sale and thereupon demanding the mortgage. In any aspect of the case, therefore, the act of Smith, in taking forcible possession of the vessel as he did, must be deemed tortious, from which he could derive no benefit and by which he derived no right or title in the vessel. Smith then having no title to convey, Herrman obtained no title by his purchase from Smith, and therefore stands in the position of one without right or title withholding the possession of the vessel from her owner.

It has been contended that the libellant cannot maintain an action in the court of admiralty because he has no bill of sale; and in support of this position reference is made to the following authorities: 3 Kent, Comm. pp. 130, 131; Metcalf v. Taylor, 36 Me. 28; Potter v. Irish, 10 Gray, 416; Veazie v. Somerby, 5 Allen, 280; Chadbourn v. Duncan, 36 Me. 89. But I do not find these cases sufficient to justify a refusal of relief in a case like this.

In this case a contract of sale accompanied with delivery is clearly proved, and there is a writing proved executed by Smith the vendor and by him delivered to the vendee, which is in the form of a receipt for $100, but which states that the $100 is the first payment on the sloop Fannie. Moreover it was part of the contract that a bill of sale should be delivered, which delivery was delayed until the vendor, who at the time had no bill of sale, should procure one. This is not then a case where there has been an attempt to dispense with the well known and ordinary instrument, which is looked to by courts of admiralty as evidence of title. On the contrary, such an instrument was provided for, and its absence is owing to the failure of the vendor to make and deliver it as agreed. The cash portion of the purchase money having been received by the vendor, and the absence of a bill of sale having arisen from the fact that he was not in a condition to give one, it does not lie in the mouth of the vendor to object by reason of its non-production. In Ohl v. Eagle Ins. Co. [Case No. 10,473], where great stress is laid upon the necessity of a bill of sale, the case of Kenny v. Clarkson, 1 Johns. 385, which is like this case in many respects, is said to be distinguishable. Nor do I consider the objection valid in the mouth of Herrman, the claimant. In the case of The Taranto [Case No. 13,751], which was an action for possession, the libellant recovered although without a bill of sale. The absence of a bill of sale is certainly a fact to be explained; but when explained and the fact of ownership clearly proved, I see no sound reason why a court of equity should as an arbitrary rule require in all cases a formal bill of sale. I am not inclined to be the first one to hold that a bona fide owner and possessor of a ship, although without a formal bill of sale, having been forcibly dispossessed of his vessel by a tort-feasor, is remediless in a court of admiralty, because he has no bill of sale. See 1 Pars. Shipp. p. 57, and cases there commented on.

Again it is contended that a fatal objection to this action arises out of the provision of the act of 1850 [9 Stat. 440], now section 4192 of the United States Revised Statutes, inasmuch as no conveyance of the vessel to the libellant has been recorded at the custom house and there is a failure to show actual notice to Herrman, the claimant.

The answer to this objection is that the statute only applies to vessels which are registered or enrolled, while it does not appear that this vessel was either registered or enrolled. The object of the statute is to enable persons intending to purchase a registered or enrolled vessel to ascertain what conveyances have been made, by an examination in the office of the collector of customs where the vessel is enrolled or registered. In regard to this vessel there was no such custom house, and the claimant could not have been led to rely upon any record of transfer in any such office. In fact, his own bill of sale gave him notice that she was not enrolled or registered, and he was thereby put to rely upon enquiries, to be made elsewhere than in any custom house, for information as to what transfers had been made and what was the nature of the title he was taking.

I have not considered the other points which have been seriously argued in the defense of this action, except that of the jurisdiction of the admiralty to grant the relief prayed. The jurisdiction of the admiralty is denied upon the authority of the case of The John Jay, 17 How. [58 U. S.] 399 But the case of The John Jay simply decides that the court had no jurisdiction of that cause, because the contract on which the action was brought was not a maritime contract. The expression in the opinion that courts of admiralty have "never entertained jurisdiction by a possessory action to try the title, or a right to the possession of a ship," must be considered as relating to cases of mortgage alone. No such sweeping effect, as is here claimed for it, has ever been given to the decision in the case of The John Jay, and I do not consider the authority of that case as extending to a case like this. Here a maritime trespass has been committed by the defendant, Alonzo E. Smith,

of which a court of admiralty may take cognizance. The Commerce, 1 Black [66 U. S.] 579; New Jersey Steam Nav. Co. v. Merchants' Bank (Woodbury, J.) 6 How. [47 U. S.] 432; Manro v. Almeida, 10 Wheat. [23 U. S.] 486. One method of remedy for that wrong is to reinstate the libellant in the possession of his boat. The matter is maritime in all its aspects, and none the less so because, before serving process, the wrong doer passed the property over to a third party, who is thereby enabled to set up a title derived from such wrong doer. The subject matter may therefore well be held to be something more than the mere title to the vessel. But, if it were only a question of title, the jurisdiction would still attach, for the admiralty has jurisdiction of petitory as well as possessory actions, and has often been called upon to adjudicate upon the title to ships. The Tilton [Case No. 14,054]; The Watchman [Id. 17,251]; Blanchard v. The Martha Washington [Id. 1,513]; 2 Pars. Shipp. 186, 187.

I am therefore of the opinion that this court has jurisdiction of the action, and that it is in duty bound to decree the possession of the vessel to the libellant. As it appears that Alonzo E. Smith was not in possession of the vessel at the time of filing the libel, and as no decree for damages is asked against him, the libel as to him will be dismissed but without costs. In regard to the defendant, Alfred Smith, as it appears that he holds possession of the vessel only in the capacity of master, appointed by the claimant, Herrman, the libel is sustained as against him but without costs.

In regard to the vessel and the claimant, Herrman, the decree will be in favor of the libellant that he recover the possession of the vessel and also his costs to be taxed.

THULE, The (BODIN v.). See Case No. 1,595.

THURBER (VAN KLEECK v.). See Case No. 16,861.

THURBER, The F. B. See Case No. 17,355.

Case No. 14,015.

THURN et al. v. UNITED STATES.

[1 Hoff. Land Cas. 298.] [1]

District Court, N. D. California. Dec. Term, 1857.

MEXICAN LAND GRANT — COCLAIMANTS — RIGHTS INTER SESE—AGAINST UNITED STATES.

Where one of two persons to whom a grant was made has exhibited a deed from his cograntee, and obtained a confirmation of his claim to the whole tract, the cograntee who has presented his separate claim for his half, and who denies the execution of the deed, is entitled to a confirmation as against the United States, and the rights of the parties inter sese will be left to be determined by the ordinary tribunals.

Claim for one-half of a square league of land in Santa Clara county, rejected by the board, and appealed by the claimants [Cipriano Thurn and others].

E. R. Carpentier, for appellants.

P. Della Torre, U. S. Atty., for the United States.

HOFFMAN, District Judge. In this case the genuineness of the grant, the regularity of the proceedings, and the fulfillment by the grantees of all the conditions are established by abundant proofs, and admitted on the part of the United States. The proceedings, up to the issuance of a final title and including an approval of the grant by the departmental assembly, were conducted in strict conformity to the regulations of 1828; and on the eleventh of June, 1834, the final documento required by those regulations was issued to the applicants, Maximo Martinez and Domingo Peralta. The present claim is by the representatives of the latter, and is for one-half of the rancho. Maximo Martinez has also presented his claim, which, however, embraced the whole rancho. To establish his title to the share of his cograntee, he gave in evidence an alleged conveyance, dated May 19th, 1834, from Peralta to himself. As this conveyance seemed prima facie to show the whole title to be in Martinez, the claim to the whole was confirmed to him by the board and by this court. Domingo Peralta now presents his claim, and would clearly be entitled to a confirmation of one-half of the land, had not the United States put in evidence the conveyance alleged to have been made by him to Martinez as above stated. Many objections to this document were urged on the part of the claimant; both its genuineness and supposed legal effect were strenuously denied. The district attorney declined to argue the questions discussed by claimants, observing that the controversy was one in which the United States had not the slightest interest; the grant was unquestionably valid, and the land had already been confirmed to Martinez, the appeal in whose case had been dismissed by order of the attorney general. He further observed, that no decision of this court could in any way determine private rights in the parties to land admitted not to belong to the United States, and to which the full legal and equitable title was already vested in private individuals. The district attorney was understood to say that he interposed no objection to a confirmation to the present claimant, if the court was of opinion that such a decree should be entered. It has heretofore been decided by the board and this court that third persons have no right to intervene in these proceedings to ascertain whether land

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

claimed under titles derived from the former government is public or private land. As the decree of this court and the patent issued under it cannot affect the rights of any parties, except the United States and the claimants, it seemed manifestly improper to allow an inquiry, instituted to ascertain the rights of the United States, and to determine what was private and what public land, to be controverted into a complicated series of cross ejectments between various private claimants, and this, where the decision of the court could not in any event decide the rights litigated before it. The only course, therefore, to be adopted was to confirm to the claimant whenever he, by a deraignment of the title primâ facie regular, showed himself to be the owner of a valid grant. This mode of proceeding involved, it is true, the apparent anomaly of confirming in some cases the same land to different persons claiming under the same original grant. But as each suit was separate, and as the court could not enter into question of adverse private rights, this anomaly was not to be avoided. Had the present claimant been permitted to intervene in the case of Martinez, he perhaps might have shown, as he claims to have done in this case, that the alleged conveyance to Martinez was fabricated or inoperative. As he was not permitted to do so, it seems equally improper to allow that conveyance to be introduced into this case, nominally on the part of the United States, but really on the part of Martinez, to defeat the claim of Peralta to a confirmation, which if it were not for that conveyance he would be clearly entitled to. Besides, if the validity of that conveyance is to be passed upon by this court, Martinez should be heard, and allowed to introduce testimony. The district attorney has neither any interest or power to represent him. To the United States it is indifferent whether the land belongs to both the original grantees, or to Martinez alone. To refuse to confirm this claim, is a recognition of the validity of a conveyance which may be liable to grave objections. But to confirm the claim, is merely to give to the claimant a right to a deed from the United States, relinquishing and quit-claiming any supposed title they might have been deemed to possess, and the reception of which merely puts the claimant on an equal footing with his adversary, and enables both to contest with equal evidence of title from the United States their adverse rights before the ordinary tribunals.

I think that the only course to be adopted is to confirm this claim, and to leave the question of ownership inter partes to be litigated before the tribunals having jurisdiction over the subject matter of the controversy. A decree must be entered accordingly.

THURSTON (JAMES v.). See Case No. 7,186.

Case No. 14,016.

THURSTON v. KOCH.

[4 Dall. 348; Append. XXXII.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1805.

MARINE INSURANCE—DOUBLE INSURANCE.

[In cases of double insurance the insurers are liable ratably for the amount of the loss, and not according to priority of contract; and one who has paid the whole loss can compel the others to contribute their proportion.]

At law.

This cause came before the court on the following case, stated by the counsel, Mr. Condy, for the plaintiff, and Mr. Ingersoll, for the defendant.

"On the 13th of October, 1796, William I. Vredenburgh, of the city of New York, merchant, caused himself to be insured, at the city of New York, in a certain policy of insurance, which was subscribed by the plaintiff in the sum of $14,500, upon any kind of goods and merchandize, laden or to be laden, on board the brigantine Nancy, Captain King master, lost or not lost, at and from any port or ports in the West Indies, and at and from thence to New York, and there safely landed, beginning the adventure upon the said goods and merchandizes, from the lading thereof on board the said vessel at the West Indies. On the 17th of October, 1796, the said William I. Vredenburgh, by Jacob Sperry & Co., his agents, caused himself to be insured, at the city of Philadelphia, in a certain other policy of insurance, which was subscribed by the defendant, in the sum of 1,300 dollars, with other underwriters, in the whole amounting to 12,000 dollars, upon all kinds of lawful goods and merchandizes, lost or not lost, laden or to be laden, on board the said brigantine Nancy, at and from Cape Nichola Mole, to any ports and places in the West Indies, to trade at and from either of them to New York, beginning the adventure from and immediately following the loading thereof on board the said brigantine at Cape Nichola Mole, and so to continue until safely landed at any ports and places in the West Indies, and at New York aforesaid. The premium demanded upon this policy was ten per cent.; and was duly paid by the said Jacob Sperry & Co. on behalf of the said William I. Vredenburgh, to the defendant and the other underwriters upon this policy. On the 20th of October, 1796, the said William I. Vredenburgh caused himself to be insured at the city of New York in a certain other policy of insurance, which was subscribed by the New York Insurance Company for the sum of 2,200 dollars, upon all kinds of lawful goods and merchandizes, lost or not lost, laden or to be laden, on board the said brigantine Nancy, at and from any port or ports in the West Indies to New York, be-

[1] [Reported by A. J. Dallas, Esq.]

ginning the adventure from the loading thereof on board the said brigantine, at any port or ports in the West Indies, and so to continue until safely landed at New York, &c. On the 12th day of September, 1796, the said brigantine Nancy, with the said goods and merchandizes so laden on board, and insured and covered by the said policies as aforesaid, sailed from Cape Nichola Mole, in the West Indies, for St. Marks, likewise in the West Indies, and in the prosecution of the said voyage, from Cape Nichola Mole to St. Marks aforesaid, with her cargo, including the said goods and merchandizes, so insured as aforesaid, was captured by a French privateer and condemned; by which capture the said goods and merchandizes were wholly lost to the insured. Upon this, suits were brought into the supreme court of the state of New York, against the plaintiff, upon the policy by him subscribed, and against the New York Insurance Company, on the policy by them subscribed, in which suits the insured, the said William I. Vredenburgh, recovered as for a total loss. The amount paid by the plaintiff (after the usual deductions) for the loss, was 12,740 dollars, with 1,783 dollars and 60 cents interest, and 418 dollars and 32 cents costs. He has, likewise, paid, to the said assured, 1,083 dollars and 60 cents, being the amount of the premium upon the policy subscribed by the defendants (after the deductions allowed in the case of a returned premium), as a consideration for the assignment of the said policy to the plaintiff. The New York Insurance Company have paid to the assured 2,156 dollars, being the amount of their policy (after the usual deduction in case of loss), with 301 dollars 84 cents interest. The several sums so paid have completely satisfied the loss, with all the interest and costs.

"Question for the opinion of the court. Is the defendant (one of the underwriters on the Philadelphia policy of the 17th of October, 1796) liable to make any, and, if any, what contribution to the plaintiff, upon the loss so paid as aforesaid by him? Or, in other words, is the defendant liable to pay more than the amount of the loss, beyond the sum previously insured? If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff, in such sum as, upon the principles established by the court, shall be found due. But if the court shall be of opinion in the negative, then judgment shall be entered for the defendant."

After argument, the opinion of the court was delivered by the presiding judge in the following terms:

PATERSON, Circuit Justice. The case before the court is that of a double insurance, and the question is, whether the insurers shall contribute rateably, or shall pay according to priority of contract, until the insured be satisfied to the amount of his loss. The law on this subject is different in different nations of Europe, owing to the diversity of local ordinances, which have been made to regulate commercial transactions. By the ordinance of one country, the contract is declared to be void, and a forfeiture superadded; whereas, by the ordinance of other countries, the contract is merely void, without any forfeiture. By the ordinance of Spain, if a policy be signed on the same day by several persons, the first signer becomes first responsible, and so on until the insured receive full satisfaction to the value of his loss; the posterior insurers being liable only for the deficiency, and that, too, according to the order of priority. But in such case, by the ordinance of France, the several insurers, on the same day, shall contribute rateably to make up the loss; whereas, by the same ordinance, if the policies bear date on different days, the rate of contribution is rejected, and that of priority established; or, in other words, if the first policy absorb the loss, or amount to the value of the goods insured, the posterior insurers are not liable, but shall withdraw their insurances, after retaining a certain percentage. The solvency of the first insurer to the full value being assumed, the ordinance is predicated on the principle that there remains no property to be insured, and, of course, no risk to be run. But suppose the solvency of the first insurer should become doubtful, what course is to be pursued? As this is a risk, it ought to be provided against; and, accordingly, we find that some of these ordinances have declared that such insurer's solvability may be insured. It is obvious that this is a point of great delicacy; for, by questioning the solvency of a merchant, you wound his credit, and, perhaps, cast him into a state of bankruptcy. Most, if not all, of these ordinances are of ancient date, and were calculated for the then existing state of commerce in the several countries which formed them. It is, however, evident, that the law merchant varies in different nations, and even in the same nation at different times. The course of trade, local circumstances, commercial interests and national policy, induce to some variation of the rule. The law in this particular, as it was understood and practiced in England, prior to, and at the commencement of, our Revolution, was different from the rule which prevailed in France, Spain, and other countries, under their local ordinances. A double insurance is, where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances, upon the same ship or goods. In such case the risk must be the same. This kind of insurance is agreeable to the practise and law of England, and is considered as being founded in utility, convenience, and policy. In the case

of Goden v. London Assur. Co., 1 Burrows, 492, in February, 1758, Lord Mansfield, in delivering the opinion of the court, expressed himself as follows: "As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, 'that a man should not recover more than he had lost.' Insurance was considered as an indemnity only, in case of a loss; and therefore, the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured. No particular cases are to be found upon this head; or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance for the same thing, in such a manner that he can clearly recover against several insurers, in distinct policies, a double satisfaction, the law certainly says, 'that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it.' And if the same man really, and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them, in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole."

In the case of Newby v. Reed, 1 W. Bl. 416, at sittings after term, in 1763, the same doctrine is laid down, agreed to, and confirmed. For "it was ruled by Lord Mansfield, chief justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions, yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the insurers." These cases have never been contradicted, and must be decisive on the subject. The law, as stated in the above adjudications, is recognized by Park and Miller, two recent and respectable writers on marine insurances. Such being the law of England as to double insurances, before and at the commencement of our Revolution, it was also the law of this country and is so now. It is of authoritative force, and must govern the present case. Besides, if the court were at liberty to elect a rule, I should adopt the English regulation, which divides the loss rateably among the insurers. It is the most convenient, equal, and consonant to natural justice, and has been practiced upon, nearly half a century, by the first commercial nation in the world. I am not clear that the practice of France is not in conformity with this rule, for it is probable that they open but one policy, bearing the same date, though signed at different times, or different policies of the same date; in either of which cases, by the French ordinance, the insurers contribute rateably to satisfy the loss sustained by the insured. If so, it is precisely the English and American rule. Equality is equity. This maxim is particularly applicable to commercial transactions; and therefore, the rule of contribution ought to be favoured. The pressure, instead of crushing an individual, will be sustained by several, and be light. The result is, that the defendant must contribute rateably to make up the loss of the insured. Judgment for plaintiff.

The following opinion of the district judge was delivered at large, and a copy was furnished for publication by Mr. Condy:

PETERS, District Judge. The point in this cause is, whether in a case of double insurance, the policies are to be taken according to priority; that is, whether the second is answerable before the first is exhausted, if the loss is greater than the sum covered by the first? And if the loss is fully covered by the first, whether, if it be paid by the insurers on the first, they can oblige those on the second to contribute, pro rata? To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform, and generally received, law-merchant. The custom, or practice, of one state differing, perhaps, from that of another, must yield to general and established principles.

There is, however, no custom of merchants, in this, or any other, district of the United States, stated in the case, and we cannot travel out of the statement, in giving our judgment.

I mention as an extraneous fact, of which I have been informed by persons intelligent in business of insurance, that the rule in New York, where they followed the British practice for a great length of time, was variant from that they now use. The custom in Philadelphia, has been, for a long course of years, to settle losses, where there are double insurances, according to priority of policy in date, without regard to time of individual signature; that is, not to call on the second set of underwriters, if those on the first policy were competent, or had paid the amount of subscription, or loss. In this event, those on the second policy return the premium, retaining one half per cent. If this be so, and I have no reason to doubt, it is one of the very few subjects, in which I have been able to discover a decided and

universal custom of merchants here. It may have originated, when the British rule was more similar to that of many other nations, than it is now, and was at the time of our Revolution. It appears to me, that the custom here is agreeable to the general maritime custom and law of Europe, in this particular. The authorities produced in this cause, on the part of the defendant, warrant me, in this opinion. All the European nations, it is true, do not agree. There may not in every detail, be an exact conformity among any considerable number. But, I conceive, that where the greater number of particular laws are coincident in a general principle, this will establish what is called, general law. In the point before us, there are exceptions in the laws of Spain, and those of England, to what seems to be the general principle and rule, among other trading nations. And the arrangements of those two countries, differ from each other. The law, or custom of merchants in England, was, formerly, more agreeable to the general custom and maritime law of other nations, than it has been decided, in later times to be. It is contended, that the British authorities, do not shew direct decisions of their courts, on this point; yet, they are sufficient to satisfy me, of what the law there is. It appears to me to be clearly settled, as law, in England, that in cases of double insurances, if all the policies cover the same risques, there shall be a rateable contribution. It was so settled at the period of our independence. It was their law-merchant, which, being part of the common law, was binding on us; and is now engrafted into our maritime code. The cases, before our declaration of independence, clearly shew, that the law was then so settled. And in cases since that declaration, it is recognised and agreed to be the law. Our insurances in that country being still considerable, the rule is yet useful on that account, among others. In France, agreeably to an ordinance of Lewis XIV., the first policy is to be exhausted, before the second operates, if dated at different times. But different policies, of the same date, are considered as one, and there is a rateable contribution. In Spain, the date and time of individual subscriptions are attended to, and insurers are called on, according to priority of subscription, even on the same policy. I have had frequent occasions to recur to Spanish regulations. There is, in most of the Spanish maritime laws and customs, a peculiarity which creates an exception, rather than a rule, on many general principles. I cannot see, that it will be materially disadvantageous to commerce, to settle this question, in either way, contended for in this cause. It is of most importance, that the point should be clearly decided and settled in one or the other way; that merchants may know, and accommodate their affairs to the decision. This court can, at least, commence the means of final decision. I believe with Professor Smith, in his "Wealth of Nations," cited in this cause, that distributing the burthen of losses, among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce. The wisdom and experience of the British nation, grown out of their more modern and extended state of commerce, have given additional value to this opinion. Whatever respect (and it is not slight), I may entertain for the laws of other nations, I deem myself bound to follow, what was the established law and custom of merchants in England, at the time of our becoming an independent nation; not because it was the law merely of that country; but because, it was, and is, our law. There is sufficient evidence in my mind, in the cases produced out of the British books, to this point, to satisfy me of the law and custom there established on this question. I, therefore, conclude, according to the case of Newby v. Reed, 1 Wm. Bl. 416, that "the insured may recover the whole sum; and leave the insurer to recover a rateable proportion, from other insurers, on a double policy," and the insured may elect which set of insurers, or which of the individuals, he will sue, for the amount of actual loss; beyond which he cannot recover, as he can have but one satisfaction.

On the point stated (the details of which merchants can best adjust), I am of opinion, that the defendant is liable to pay to the plaintiff a contribution, upon the loss paid by him, as stated. This contribution must be made by all the insurers, on all the policies rateably, as their respective subscriptions bear a proportion to each other, and all of them to the actual loss. The defendant of course, must pay to the plaintiff his rateable proportion, on these principles, according to the amount of his subscription.

Case No. 14,017.

THURSTON et al. v. The MAGNOLIA.

[1 Bond, 92.] [1]

District Court, S. D. Ohio. Oct. Term, 1856.

PRINCIPAL AND AGENT — POWER TO SELL — CONFIRMATION—SALE ON CREDIT—PRIOR SUIT PENDING—ADMIRALTY JURISDICTION—PROCEEDS.

1. A letter from a part owner of a steamboat requesting the person addressed to advertise the interest of the writer for sale, and in thus advertising to act as his agent, confers no authority to sell, and a sale under it is a nullity.

2. If such part owner, with a knowledge of the terms of the sale, and with due deliberation adopts and affirms it, it is obligatory on him to the extent of his interest, and he can not afterward disaffirm the ratification.

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

3. A power of attorney is not operative till received and accepted by the agent, and a power to sell for cash does not authorize a sale on credit.

4. The pendency of a proceeding in replevin, in a state court, by which a party claiming to be a part owner of a steamboat has obtained the possession of the boat, does not affect the jurisdiction of a court of admiralty in a proceeding by libel, in which all the parties in interest are before it.

5. A plea of a prior suit pending is not sustainable, without the averment and proof that the cases are between the same parties and for the same cause of action.

6. The proceeds of the sale of a boat will be ordered to be brought into the registry of the court, to be apportioned among the parties according to their respective interests, as found and adjudged by the court.

In admiralty.

Lincoln, Smith & Warnock, for libellants.
Ketchum & Headington, for respondent.

OPINION OF THE COURT. The libellants aver that they are the owners of the steamboat Magnolia, in the proportions following: John Thurston has an interest of three-eighths; William B. Sutton, James Sutton, and Samuel L. Griffith, by the name of Sutton, Griffith & Co., have also an interest of three-eighths, and Levi Chapman and Edward C. Carter of one-eighth each. They allege that they are legally entitled to the possession of said boat, and that it is wrongfully withheld from them by one Donald Campbell, claiming the interests held by said Thurston, and said Sutton, Griffith & Co., through a sale made by Smith & Graham, of Cincinnati, as the agents of the last-named parties, to B. S. Scudder, and a sale and transfer by Scudder to said Campbell. It is further averred that Smith & Graham acted wholly without authority in the sale of the boat, and that the sale was therefore void, and that as to the interests of said Chapman and Carter, the said Campbell has no claim of title. A decree is asked for, adjudging the title to be in the libellants, according to the claim asserted by them, and for the delivery of the possession of the boat, and also for an account of the freight carried by the boat while in the possession of Campbell. Campbell has filed his answer, setting up a title to three-fourths of the boat, acquired through the sale by Smith and Graham to Scudder, as the agents of Thurston, and Sutton, Griffith & Co., and a sale and transfer by Scudder to him. And he avers, that having thus become the owner of said interest of three-fourths, and being entitled to the possession and control of the boat, he requested of said Chapman and Carter, then being in charge of said boat, at the wharf in Cincinnati, to deliver it to him; and upon their refusal to give him possession, he applied for and obtained a writ of replevin from the superior court of Cincinnati, in accordance with the statute of Ohio, by virtue of which the boat was delivered to him, and remained under his control until arrested by process in this case. The answer avers that the said sale was valid and legal, as being made by Smith & Graham, as the authorized agents of the parties before named; and, that if there was any defect in their authority to act as such agents, the sale has been since ratified and affirmed.

The first inquiry in the case is, whether Smith & Graham were the authorized agents of Thurston, and Sutton, Griffith & Co., and as such could make a valid sale of their interests. The facts in evidence, bearing upon the question of the authority of Smith & Graham, as agents, may be briefly stated as follows. The Magnolia being owned by the parties, and in the proportions stated in the libel, had been employed in the spring and early part of the summer of 1855, in the navigation of the Arkansas river, under the command of said Thurston as master. He had left the boat temporarily in charge of Chapman, who, as it seems from the evidence, without the knowledge of Thurston, brought it to Cincinnati. On July 12th, Thurston wrote to Smith & Graham, from Pine Bluffs, on the Arkansas river, complaining that Chapman had improperly withdrawn the boat from that trade, and notifying them that he, Thurston, was the master and had the control of an interest of three-fourths. He also informs Smith & Graham that he will be in Cincinnati in about a month from the date of the letter, and requests them, in the meantime, to give notice to the public, through one of the city papers, that Chapman had no authority to sell or otherwise dispose of the boat. In a postscript to the letter, he says, "please advertise three-fourths of the steamboat Magnolia for sale." And in a second postscript he adds, "in advertising the boat you will please be my agent. If any wish to purchase, let them inquire of you. The price for the three-fourths is $8,000." Under the authority, supposed to be contained in this letter, Smith & Graham, as the agents of Thurston and Sutton, Griffith & Co., advertised their interests for sale; and, on July 30, 1855, sold it to B. S. Scudder for eight thousand dollars. One-third of this sum was paid in hand, and the balance was divided into three equal payments, for which Scudder's notes, at three, six, and nine months, were given. Smith & Graham executed a bill of sale for the boat to Scudder, and on the day after the sale, by some arrangement between Scudder and the said Donald Campbell, Scudder sold and transferred his interest to Campbell. It would seem inferable, though the fact does not clearly appear from the testimony, that Campbell furnished the amount of the cash payment. It is admitted that Scudder was insolvent at the time, but Campbell procured indorsers on the notes for the deferred payments, which made them safe.

These are all the facts connected with the sale which it is now necessary to notice.

And it seems to be a clear proposition, that the sale by Smith & Graham was altogether unauthorized, and is therefore void. As to the interest of three-eighths, owned by Sutton, Griffith & Co., it is clear, beyond all question, there was no authority to sell. They had not constituted Thurston as their agent; and, if they had so authorized him, he had no right to delegate that power to other persons. But there is no ground for the legal inference, in reference to Thurston's interest, that Smith & Graham were his agents for the purposes of a sale. In his letter he merely authorizes them to advertise the boat for sale, and give information as to the price asked for the interest of three-fourths. His statement that he expected to be at Cincinnati in one month, negatives the presumption of an intention to confer a power of sale, and warrants the inference of an intention to be personally present at and superintend the sale. And further, there is a strong reason for this conclusion in the fact that he gives no direction as to the terms of sale. It is not supposable that, in a transaction involving so large an amount, he would have intrusted Smith & Graham with authority to sell without some instructions as to the terms. It is evident, moreover, from the conduct both of the agents and the purchaser, that they did not regard the sale as a valid one. The instrument, purporting to be a bill of sale of the boat by Scudder to Campbell, shows, upon its face, that the parties supposed it doubtful whether the sale could be sustained.

But, it is insisted by the respondent, that if the sale was void, on the ground stated, it was subsequently ratified and affirmed by Thurston, and thus became valid. If this ground is sustainable, it can only apply to the interest of three-eighths owned by Thurston. As before remarked, there is no proof showing that Thurston was the agent of Sutton, Griffith & Co.; and it is clear that no ratification of the sale by him could affect their rights. The only question, therefore, is, whether there was such a ratification by Thurston as to render the sale of his interest obligatory on him. Three witnesses state the facts which, it is insisted, show a ratification of the sale by Thurston. The witness Rhodes says that Thurston came to Cincinnati, some time after the sale, and was at the business place of Smith & Graham the next morning after his arrival, and that all the facts relating to the sale were fully and truly made known to him. He was then asked if he was satisfied with the sale, to which question he replied, "how could I be otherwise when I have got all I asked." The same witness states that, an hour or so after the conversation referred to, he heard Thurston inquire of Smith & Graham whether the notes taken for the deferred payments in the sale of the boat could be discounted. To which Graham replied that he could not say certainly, but he was satisfied the parties to the notes were good, and he thought they could be discounted. Thurston then remarked, that he "would be willing to stand a liberal shave to have the matter closed." The witnesses Yarrington and Scudder state, that at different times each heard Thurston express himself satisfied with the sale.

These facts show conclusively a ratification of the sale, which makes it binding on Thurston, in the absence of proof impeaching its validity. It is insisted, by the proctors for the libellants, that the acts of Thurston, in affirmance of the sale, were without due deliberation, and without a knowledge of the facts and the law necessary to a proper understanding of his rights. And they have proved that shortly after the ratification of the sale, Thurston applied to counsel for advice, who gave the opinion that Smith & Graham had no authority to sell, and that, consequently, the sale was a nullity. Thurston thereupon repudiated the sale, and the present libel was filed with a view to a legal adjudication of the rights of the parties.

There is nothing in the evidence proving that any undue means were used to induce Thurston to affirm the sale. All the facts were correctly stated to him. The interest of three-fourths in the boat, which he claimed to control, sold for the full amount stated in his letter to Smith & Graham as the price asked for it. It is also clearly proved that the indorsers of the notes for the deferred payments were responsible persons, and that there could be no doubt the notes would be paid at maturity. These facts were all stated to and known by Thurston; and there would seem to be no reason for the conclusion that he acted in ignorance, either of the facts or of his rights, or that he ratified the sale with undue haste. He could undoubtedly have insisted upon the invalidity of the sale, for the reasons that Smith & Graham were not empowered to sell; or if they had authority to sell, that they had exceeded their powers in selling on credit in part. But no such exceptions were taken, and he chose to assent to the sale; and having assented, he could not afterward revoke such assent. It is true it does not appear that the cash payment, or the notes taken, were tendered to him; but there is no proof showing a request by Thurston for the payment of the money, or the delivery of the notes to him. All the facts of the case warrant the conclusion that the proceeds of the sale would have been put into his hands, without objection, if he had not subsequently repudiated the ratification. And in the decree to be entered in this case, it will be the duty of the court to provide, that, to the extent of his interest as an owner of the boat, his right to the proceeds of sale shall be fully secured.

It results from the views stated, that Thurston, by his assent to the sale, is divested of his interest of three-eighths in the boat, and that said interest is vested in Campbell. But, as before intimated, the right of Sutton,

Griffith & Co. to three-eighths of the boat is not affected by the sale to Scudder, or the ratification by Thurston. Although it appears that Sutton, Griffith & Co. made out and forwarded by mail a written power to Thurston to sell their interest in the boat, it never came to his possession, and was not, therefore, an operative power. It is also in proof that the power of attorney intended for Thurston authorized a sale for cash. Thurston could neither sell, as the agent of Sutton, Griffith & Co., on credit, nor could he adopt or ratify a sale so made, which would be obligatory on them. Their interest in the boat still vests in them, and the court will so find in the decree to be entered.

There is another point requiring a brief notice. The respondent, in his answer, sets up, in the nature of a plea to the jurisdiction of this court, the pendency of the proceeding in replevin in the superior court of Cincinnati. I do not propose to examine or decide whether it is competent for a state court to supersede or defeat the admiralty jurisdiction of a court of the Union, in any case within the scope of its power. It is sufficient, for the point now presented, to remark, that if it is apparent, from the facts before the court, that Campbell had no title to the boat, or any interest in it, at the time he sued out the writ of replevin, the proceeding may be regarded as a nullity. The writ was sued out on the 5th of August, a few days after the sale by Smith & Graham to Scudder, on the ex parte affidavit of Campbell, that he was then the legal owner of an interest of three-fourths in the boat, and, as such owner, was entitled to its control and custody, which he alleged was wrongfully withheld from him by the persons in possession. Upon such oath the writ issues of course, and is the mere ministerial act of the clerk, without any judicial action in the case. Now, in point of fact, at the time the writ issued, Campbell had no claim to any interest in the boat, and could have no pretense of right to its possession. The sale on the 30th of July was clearly a nullity, and only became effective as to the three-eighths owned by Thurston, by his adoption and ratification of the act, which took place on the 7th of September. Till then, Campbell had no pretense of claim; and the obtainment of the writ of replevin, under such circumstances, was an abuse of the process of the state court. In addition to this, it may be remarked, that upon the supposition that he was a part owner of the boat, the current of authorities is strongly against his right to obtain possession by resorting to a writ of replevin.

But apart from the considerations stated, the objection to the jurisdiction of this court, on the ground of prior suit pending, must be overruled. Such a plea in no case is available, without the averment and proof that the prior suit is for the same cause of action, and between the same parties as that in which the plea is urged. There is no identity between the two cases on either ground. In the replevin suit, the sole object was the possession of the boat; whereas, in this, the rights and interests of all the parties are directly in issue; in the former, Campbell was the sole plaintiff, and Chapman and Carter the only defendants; in this, all the original owners of the boat are libellants, and Campbell the respondent.

A decree will be entered adjudging Sutton, Griffith & Co. to be the owners of three-eighths of the boat; Donald Campbell, three-eighths; Levi Chapman, one-eighth, and Edward C. Carter, one-eighth; and possession will be given accordingly. The cash payment for the boat, together with the notes given, will be brought into the registry, to be disposed of hereafter by the order of the court, in accordance with this opinion. As to the profits made by the boat while Campbell had possession, unless the parties agree as to the amount, a reference to a commissioner will be necessary.

THURSTON (MARSHALL v.). See Case No. 9,132.

Case No. 14,018.

THURSTON v. MARTIN.

[5 Mason, 497.] [1]

Circuit Court, D. Rhode Island. June Term, 1830.

FALSE IMPRISONMENT — IMPRISONMENT FOR NON-PAYMENT OF TAXES—LIABILITY THEREFOR—NEW TRIAL—EXCESSIVE DAMAGES.

1. Trespass lies against a collector of taxes, for imprisoning a party who is taxed as an inhabitant of a town, if he is not an inhabitant; for the assessors have no right to tax a person not an inhabitant; and if they do, it is an excess of jurisdiction.

[Cited in Brown v. Mason, 40 Vt. 160. Disapproved in Nowell v. Tripp, 61 Me. 429. Cited in Wall v. Trumbull, 16 Mich. 251.]

2. A new trial will not be granted on account of excessive damages, unless the jury have mistaken the principles of law, which ought to regulate damages, or have been guilty of some gross error, which shows an improper feeling or bias on their part.

[Cited in Allen v. Blunt, Case No. 217; Alsop v. Commercial Ins. Co., Id. 262; Wiggin v. Coffin, Id. 17,624; Ward v. Richmond & D. R. Co., 43 Fed. 424.]

[Cited in Pegram v. Stortz, 31 W. Va. 252, 6 S. E. 503; Skottowe v. Oregon S. L. & U. N. Ry. Co. (Or.) 30 Pac. 228.]

This was an action of trespass for false imprisonment, brought [by Joseph Thurston] against the defendant [Joseph Martin], who was collector of taxes for the town of Newport, R. I. The defendant pleaded not guilty, with leave to give special matter in evidence. At the trial it was proved, that the defendant had arrested and imprisoned the plaintiff for the non-payment of a town tax, assessed on him for the year 1827, and that he was discharged upon payment of the tax. The real controversy at the trial turned up-

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

on the point, whether the plaintiff was an inhabitant of Newport, and so liable to be assessed for taxes there. It appeared in evidence, that the plaintiff was born in Newport, and had lived there until the year 1815 or 1816, and that his mother still resides there. In 1815 or 1816, being then of age, he went to reside as a trader at Georgetown, South Carolina, and from that time to the time of the suit he had continued his occupation there. He usually went to Georgetown every autumn in October, and remained there until June, and kept a store or shop of goods there, and performed such patrole and other duty as was required of him there, and paid taxes there. The sickly season coming on in June, he came northward every year at that time, and usually passed his summers and autumn until October at Newport, making purchases at the northward, principally for sale at Georgetown. It is usual for the inhabitants, during the sickly season, to leave Georgetown for the North, and return back in the manner the plaintiff did. The plaintiff is a single man, and has no family. Several of the inhabitants of Newport are in the habit of keeping shops of goods in Georgetown, and going there in the autumn and returning in June, at the time when the sickly season comes on, and of paying taxes at Georgetown. Some of these have families at Newport, and consider it as their home. The plaintiff was first taxed in Newport, after his removal in 1816. For one or two years the tax, being small, was paid by the plaintiff. He afterwards objected; and in some years the tax was remitted, and in some years he was not taxed. He resisted payment of taxes for several years before 1827, and refused performance of military duty as an inhabitant of Newport; and being sued for a militia fine was successful in his defence, setting up his non-inhabitancy as a defence. From the time of his first removal to Georgetown in 1815 or 1816, he never acted in any public business as an inhabitant of Newport; and for the last ten years he had constantly spoken of himself in public and private, as an inhabitant of Georgetown. These were the principal facts upon which the question of domicil turned at the trial.

THE COURT instructed the jury, that if upon the whole facts they were of opinion, that the domicil of the plaintiff was at Georgetown, he was entitled to recover in this form of action, and such damages should be given as the jury thought a fair compensation for the loss and injury to the plaintiff; but it was not a case for vindictive damages. The jury found a verdict for the plaintiff for $505.

Hazard & Randolph, for defendant, moved for a new trial. (1) Because the damages were excessive; (2) because trespass could not lie against the defendant, who was a mere ministerial officer in collecting the tax.

Pearce & Turner, è contra, for plaintiff.

The authorities and reasoning of the counsel are fully stated in the opinion of the court, and it is unnecessary to repeat them.

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

STORY, Circuit Justice. The motion for a new trial is founded upon two grounds: first, of excessive damages; and secondly, that an action of trespass does not lie against the defendant, who is a mere ministerial officer, for collecting the tax.

The first question may be disposed of in a few words. The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied, if the amount had been less. The charge of the court directed the jury, if they found for the plaintiff, not to give vindictive damages; but to give (if the jury thought proper) such a compensation as would indemnify the plaintiff for the necessary expenses incurred in the suit, beyond what he would receive in the shape of costs. The jury were, however, left at liberty to consider all the circumstances of the case, which might, in their opinion, enhance the right to damages, such as the arrest and imprisonment. It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. The court in setting aside a verdict for excessive damages, should clearly see, that they are excessive; that there has been a gross error; that there has been a mistake of the principles, upon which the damages have been estimated; or some improper motives, or feelings, or bias, which has influeneed the minds of the jury. If the verdict be not subjected to some such imputations, it is not the practice of the court to disturb the verdict. It is an exercise of sound discretion, which in some degree interferes with the conclusiveness of verdicts, and ought not to be resorted to except in clear cases. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict, as the jury found it. The doctrine of adjudged cases seems to me to support this view of the matter, and it instructs us to be very slow in listening to applications of this sort. Now, I cannot say, judicially speaking, that the damages, taking all the circumstances together, are excessive, though they are larger than I should have given. The arrest and imprisonment, and the nature of the contest between the town and the plaintiff, as to the right to tax him, compelled him, after other efforts were exhausted, to resort for a vindication of his rights to a suit. He had been harassed from year to year by taxes, and no disposition, notwithstanding a long

continued struggle on his part to resist them, was evinced by the assessors, to relieve him from the burthen. The jury probably looked to this, and deemed the suit absolutely indispensable, and at the same time very onerous upon the party. Under these circumstances, I am not disposed to interfere with the verdict.

The other is a question of more importance. The general principle to be extracted from the authorities is this,—Where a mere mere ministerial officer acts under the authority of a court, or other board or tribunal, of a limited jurisdiction, there if the act be beyond their jurisdiction, he is, or may be, liable in trespass. But where there is jurisdiction over the person and the subject matter, there he is not liable for any irregularity or mistake in the exercise of that jurisdiction. This was so decided upon full consideration in the Case of the Marshalsea, 10 Coke, 68b. 76. In that case (which was trespass), a writ of execution had issued against the plaintiff, as bail, in a suit decided in the court of the Marshalsea, upon which he was arrested and imprisoned. The defendants pleaded the judgment and execution in their defence, and the plaintiff replied, that neither the plaintiff nor the defendant in the original suit were servants of the king. And upon demurrer it was holden a good replication, and that trespass well lay against the defendants. The doctrine of this case has never been departed from, though there may have been in some few cases a misapplication of it. Com. Dig. "Imprisonment," H. 8, H. 9; Id. "Pleader," 3, M. 23, 24. See, also, Hill v. Bateman, 2 Strange, 711; Shergold v. Holloway, 2 Strange, 1002; Papillon v. Buckner, Hardr. 478; Terry v. Huntington, Id. 480; Perkins v. Proctor, 2 Wils. 382; Brown v. Compton, 8 Term R. 424; 1 Chit. Pl. 183.

In relation to taxes, where a party has been illegally assessed, there are other authorities directly in point to establish that trespass lies. If the person taxed, or the subject matter of taxation, be not within the authority of the officers, who make the assessment, all subsequent proceedings by mere ministerial officers, under a warrant to enforce the tax, are deemed utterly void, the original assessment being coram non judice. The case of Nichols v. Walker, Cro. Car. 394, was trespass brought by an inhabitant of one parish, who was rated in another, not being liable to be rated there. The rate was allowed by two justices of the peace, in the manner prescribed by law; and upon a warrant by three justices, the goods of the plaintiff were distrained, and sold to pay the rate. Upon an exception taken, that trespass did not lie against the defendants, who were mere ministerial officers, acting under the warrant, the court held, that the action was well brought, for the rate being unduly taxed, the warrant of the justices for the levy thereof will not excuse, for the justices have but a particular jurisdiction, to make warrant to relieve rates well assessed, and so the plaintiff had judgment. This case was fully recognised as sound law in Perkins v. Proctor, 2 Wils. 382, 384, where the whole subject was most elaborately considered; and the cases of Harrison v. Bulcock, 1 H. Bl. 68; Williams v. Pritchard, 4 Term R. 2; Mayor v. Knowler, 4 Taunt. 635; Lord Amherst v. Lord Sommers, 2 Term R. 372,—silently proceed upon the admission of its correctness.

Thus far as to the English cases. In America the question has also been discussed. In Martin v. Mansfield, 3 Mass. 419, 427, the reporter states, that the court strongly inclined, that trespass would not lie against a collector of taxes, where the party was not liable to be taxed. But I, having been counsel in the cause, have reason to know, that the reporter states the point too strongly. The court did so incline until authorities were cited, which shook their opinion; but the assessors being responsible, it was thought unnecessary to argue the question of the liability of the collector, and his name was struck out by consent. In my own copy of the Reports, I find the following memorandum made in March, 1809, upon page 427,—"This is too strongly stated. At first, the court did so incline, but upon Story's citing several authorities, the opinion was shaken. But as the court intimated a clear opinion upon the general question in favour of the plaintiff, recommended, to save time, by waiving the present incidental question, the parties consented to strike out the name of the collector." In later cases, however, the correctness of the English doctrine has been recognised. The general principle was acted on in Albee v. Ward, 8 Mass. 79, and it was largely commented on in Colman v. Anderson, 10 Mass. 105, 119. See, also, Dillingham v. Snow, 5 Mass. 547, 559; Gage v. Currier, 4 Pick. 399; Inglee v. Bosworth, 5 Pick. 498. In New York, the same question has undergone several adjudications. In Henderson v. Brown, 1 Caines, 92, the whole court admitted the soundness of the doctrine, that if the assessment were made upon a subject matter, not within the jurisdiction of the assessors, the whole proceedings by the collector were void under his warrant. But a majority of the court in that case thought, that the property was liable to the assessment, though described in an improper manner. In Suydam v. Keys, 13 Johns. 444, the question arose in a form substantially like that now before the court. Certain persons, not being inhabitants, were assessed for a school tax, which by law could be assessed only upon inhabitants. The collector (against whom the suit was brought) had taken and sold the plaintiff's goods to pay the same. The court held, that the action (trover) well lay against the defendant, because the plaintiffs were not taxable in any degree, nor under any modification. See, also, Wood v. Peake, 8 Johns. 69; Warner v. Shed, 10 Johns. 140; Smith v. Shaw, 12 Johns. 257. And in Cable v. Cooper, 15 Johns. 152, 157, the court

held, "that every tribunal, proceeding under special and limited powers, decides at its peril; and hence it is, that process issuing from a court not having jurisdiction, is no protection to the court, to the attorney, or the party, nor even to a ministerial officer, who innocently executes." A doctrine equally conclusive was held by the supreme court of the United States, in Wise v. Withers, 3 Cranch [7 U. S.] 331, where it was decided, that trespass lay against a collector of militia fines, for taking the goods of the plaintiff to satisfy a fine imposed upon him by a court martial for nonperformance of militia duty, and for which the collector had a warrant from the court, the plaintiff, as a justice of the peace, not being liable to militia duty. The court said, that the decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers. The only authority against this general current of opinion that I have met with, is, the case of Beach v. Furman, 9 Johns. R. 229. But that case, if it can be sustained as law, which may admit of question, proceeded upon the ground, that the parties acted under the authority of a person, who had jurisdiction in the case, and it admits, that if there were no jurisdiction, all the parties would be trespassers. Looking therefore to the authorities, and to the principles upon which those authorities are founded, it appears to me very clear, that an action of trespass lies in the present case, unless there is something in the statute of Rhode Island, on the subject of taxes, which ought to vary the rule. Upon looking into that statute (Dig. 1822, p. 310), I cannot perceive any thing that ought to vary the general rule. The assessors are to assess and apportion the taxes upon the inhabitants of the town, or the rateable estates within the same. They have no authority to assess any person not being an inhabitant, and the jury have found, that the plaintiff was not an inhabitant at the time of the present assessment, or liable to any assessment. The assessment being made, they are to send a true bill or list thereof, to the town clerk, who is to deliver a true copy thereof to the town treasurer, who is to make out his warrant to the collectors of taxes to collect the same. The general course of the provisions on this subject, does not, in substance, differ from that of the other New England states. But the material consideration is, that the power of the assessors is limited and special. It is confined to inhabitants and rateable estates within the town. It follows, that if they assess persons not inhabitants, or estates not within the town, their jurisdiction is exceeded, and the proceedings, as to such persons and estates, are utterly void. If so, no justification can arise to any collector upon proceedings utterly void. The foundation failing, the superstructure must fall with it.

Upon the whole, I am of opinion, that the motion for a new trial ought to be overruled. The district judge concurs in this opinion, and the motion for a new trial is, therefore, overruled, and judgment must be entered for the plaintiff according to the verdict.

Case No. 14,019.

THURSTON v. UNION PAC. R. CO.

[4 Dill. 321; 22 Int. Rev. Rec. 251; 8 Chi. Leg. News, 323; 13 Alb. Law J. 393.] [1]

Circuit Court, D. Nebraska. 1877.

CARRIERS — EXPULSION OF GAMBLERS FROM RAILWAY TRAINS.

Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocation, may be excluded.

[Cited in brief in Chicago & A. R. Co. v. Pillsbury, 123 Ill. 20, 14 N. E. 22. Cited in Lemont v. Washington & G. R. Co., 1 Mackey, 180.]

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased, for ninety cents, from the company, a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked $5,000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler—a "monteman," so-called—and was then engaged in traveling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains? Upon this point the charge of the court is given below.

John I. Redick, for plaintiff.

Mr. Poppleton and Mr. Wakely, for defendant.

DUNDY, District Judge. The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons in-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 13 Alb. Law J. 393, contains only a partial report.]

fected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract, by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money. Judgment on verdict.

Case No. 14,019a.

THWING v. DUNCAN.

[Nowhere reported; opinion not now accessible.]

THWING (GREAT WESTERN INS. CO. v.). See Case No. 5,738.

Case No. 14,020.

TIBBATTS v. TIBBATTS.

[6 McLean, 80.] [1]

Circuit Court, D. Ohio. April Term, 1854.

EQUITY—RESCISSION OF CONTRACT—ABANDONMENT—HUSBAND AND WIFE.

1. Tibbatts and wife entered into a contract with defendant, by which he was put in possession of a large farm, containing stock of various kinds to be managed by him, one third of the profits to be his, the other two thirds to be paid to the other party. Soon after entering into the possession, he, Tibbatts, sold the stock on the farm, and the implements of agriculture, and leased the farm, reserving to himself the homestead and a small part of the ground. The defendant became insolvent and unable to pay the money he had received on the sale of the property. The court *held*, that this was an entire abandonment of the contract, and that the wife of Tibbatts, who owned the land, might claim the possession of it. By the contract, Leo Tibbatts, was to have the sole management of the farm, &c., which was a special trust and confidence, he could not transfer to another. Any modification of the written contract Tibbatts may have made to the injury of his wife, and to which she gave no consent, did not bind her after his death.

[Cited in Irwin v. Bidwell, 72 Pa. St. 251; Schofield v. Jones (Ga.) 11 S. E. 1034.]

2. The contract was decreed to be cancelled and the possession of the premises to be restored to the complainant.

In equity.

Swayne & Gwynne, for complainants.

Mr. Andrews, for defendant.

OPINION OF THE COURT. This is a bill in chancery praying, for the reasons stated, that a certain lease or contract in relation to the occupancy and management of a certain farm, by the defendant, should be set aside, and the possession of the same decreed to the complainant. The contract was entered into between John W. Tibbatts, and Ann Tibbatts, his wife, on the 2d day of August, 1851, with Leo Tibbatts, the defendant. They leased unto Leo Tibbatts until the first day of March, 1862, a certain tract of land or stock farm, situated and lying in the county of Union, and state of Ohio, containing between eleven and twelve hundred acres; and in consideration of the covenants hereinafter made and expressed on the part of the said Leo, covenant and bind themselves, their heirs, executors, administrators and assigns, that the said Leo shall hold, use and occupy, the said farm and tract of land, for and during the term aforesaid without let or hindrance, under the following covenant and condition, viz:—"the said Leo is to pay no rents during the term of this lease. Second, he is to manage and conduct the business and operations of said farm, in accordance with his own judgment, without being subject to the dictation or direction of any one else. Third, the stock, implements of husbandry, and other utensils appertaining to farming purposes, now on said farm, are to be fairly valued by disinterested persons, chosen mutually by the parties interested in this agreement, and at the end or termination of this lease, are to be accounted back in equal value. Fourth, Leo is to have one third, and John W. Tibbatts and Ann Tibbatts, two thirds of the net profits that may be made or accrue by the same. Fifth, the current expenses of the farm and the cattle too, are to be paid out of the general stock

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

funds of the concern. But the real estate tax of the farm is to be paid by John W. Tibbatts. Sixth, on any advances made by either of the parties to this lease, the concern is to allow an interest at the rate of six per cent. per annum. Seventh, the said Leo is to keep correct and regular book accounts of all the transactions of the farm; accounts of the receipts and expenditures of the same, which are at any time, whenever desired to be subject to the inspection of John W. Tibbatts, and Ann, his wife. Eighth, in case of the death of Leo Tibbatts, during the term of this lease, John W. Tibbatts and Ann, his wife, are to have peaceable possession of the premises."

The character of the above paper is a controverted point, by the counsel in the case. On the part of the plaintiff's counsel, it is argued, that the agreement is an article of copartnership, while on the other side, it is insisted that it is a lease. It is a matter of some nicety to draw the line between the agency and a copartnership. A stipulated sum to be paid out of the profits of the partnership, would not constitute, technically, an individual a partner, although his agreement would bring him substantially within some of the leading principles which constitute a partnership. It is not necessary to constitute a partnership, that each individual should contribute to the capital equally, or indeed that a partner should advance any portion of the capital. He may agree to contribute his labor in the management of the concern, which is sufficient to make him a partner, if he be a sharer in the profits and loss. "Partnership," says Fourier, "is formed by a contract, by which one person or partnership agrees to furnish another person or partnership, to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in proportion determined by the contract, and of being liable to losses and expenses, to the amount furnished, and no more." This definition covers the contract before us. Tibbatts and wife furnished the farm, the stock and farming utensils, and Leo Tibbatts is to manage the farm and pay to Tibbatts and wife two thirds of the profits. And books are to be kept of the farming transactions, which are to be open to the inspection of the other party. The stock is to be valued, and on the termination of the contract, it is to be accounted for in value, and peaceable possession of the land is to be given up. Here the distribution is to be made of the profits, which subject all the parties to loss, as there can be no distribution, if there be no profits. If advances be made by either party, he is to receive from the concern, six per cent. on such advances. The current expense of the farm was to be paid by Leo, and the tax on the cattle. The tax on the land, Tibbatts and his wife were to pay. Leo was to manage the farm according to his own judgment, and not under the dictation of Tibbatts and wife. This would be a singular provision in a lease for eleven years; but if a partnership was intended, it would be a very proper and necessary stipulation in behalf of Leo, whose labor and skill were secured, for the management of the farm.

An agreement to lease improved ground, for a certain part of the product is common, and in such a case the lessor receives only his proportion of the profits. But under such a contract the lessee would be bound to use reasonable diligence in planting or sowing his crop; but there would be no such liability under the above contract; as Leo Tibbatts was to exercise his own judgment, and not act under the dictation of Tibbatts and wife. Here was a trust and confidence reposed in Leo, which he could not transfer to any other person. And this is not affected by the fact that Leo might be less competent than any one he might substitute in his place. But this contract did not relate to the management of the farm only, but included a large amount of live stock of various descriptions. These constituted a part of the capital furnished, and from which a profit was expected, as well as from the culture of the land. Indeed, it may be supposed, that the products of the fields, whether of pasturage or grains, would be used in feeding the stock and preparing it for market. This whole operation is different from an ordinary lease of ground, whether the rent be paid by a part of the product or in money. It is stipulated in the contract, that no rent should be paid. John W. Tibbatts was a lawyer, and could not but have known the significance of this provision. At the close of the contract, the farming utensils and the stock, in the language used, "are to be accounted back in equal value." A suggestion is made that a feme covert cannot form a copartnership. There can be no doubt, that with her husband she may enter into a partnership, as stipulated in the above contract—she having an interest in the capital.

Looking at the nature of the above contract and the language used by the parties, there is less difficulty in considering it a partnership agreement, than a mere lease for the term specified, paying rent. It provides, that in the event of the death of Leo Tibbatts, the contract should terminate. This is an unusual provision in a lease, but the principle applies to all cases of partnership, whether stipulated in the agreement or not. But let us consider the contract in this case as a lease, and see what must be the legal result from the facts. The intention of the parties is shown to be, from the language of this instrument, to derive a profit from the farm, not by the ordinary culture of grains, but as a stock farm. The contract was signed the 2d day of August, 1851, and about the 1st of May, 1852, Leo Tibbatts made, to

Eliphas Burnham, assessor, under oath, a return of the following stock, and its estimated value. Ten horses, seventy cattle, seven mules and asses, three hundred sheep, seventy five hogs, making an aggregate value of nineteen hundred dollars. It is evident from the amount of stock on the farm, the parties looked to that as the principal source of profit, although the contract contains no special provision on the subject; this view is strengthened from the fact that in the agreement the farm is called a stock farm, and that there is no stipulation in it, that Tibbatts and wife should be paid their proportion of the profits of the farm in agricultural products, or in the increase of the stock; the inference therefore is, that the distribution of the profits should be in money. It appears, too, from the depositions of persons residing in the neighborhood of the farm, that stock raising is the business of those who own large farms. This enables the farmers to realize a larger profit from their farms, with less labor, than any other kind of culture. And this farm is spoken of, as well adapted for a stock farm. James Taylor, son of the ancestor of complainant and the brother of Mrs. Tibbatts, says, that this farm was managed on the shares for his father for some years before his death, and that it yielded to him, as he thinks, about a thousand dollars per annum. Leo Tibbatts, it appears, took possession of the farm in August, 1851, and during the ensuing spring he commenced selling the stock on the farm. In July, 1852, John W. Tibbatts died, and Leo continued the sales of the stock until all was disposed of. To Daniel Watson he sold stock to the amount of seventeen hundred dollars, and the residue he sold to other persons. In the year 1853 the assessor's return shows that Leo had but one horse, valued at twenty five dollars. In 1853, Leo Tibbatts rented the farm, reserving the dwelling house and grounds around it, &c., to Daniel Watson, for seven hundred dollars, and for the year 1854 for one thousand dollars, the payment of which is acknowledged. This lease expires on the 1st of March, 1855. No rent has been paid or offered to be paid to John W. Tibbatts in his life time, nor to his widow, since his decease. And it is alleged in the bill, that Leo Tibbatts is insolvent, and utterly unable to carry on the farm under the contract.

On the above facts the complainant's counsel contend, that Leo Tibbatts has abandoned the contract, and that the consideration on which it was entered into, has failed. Several excuses are set up in the answer, for the sale of the stock, &c., and proof has been introduced to sustain the answer. It is alleged, that the stock was poor, and not such as would be most profitable on the farm, and that it was sold with the consent of John W. Tibbatts. And in regard to the money received from the stock, it is stated, that it was applied in part payment of a debt due by the estate of John W. Tibbatts to Leo, the defendant, for personal services, and otherwise, amounting to the sum of $6,383.56; in which account certain credits are entered, amounting to the sum of $4,420.31, leaving a balance due to Leo of $1,963.25. In this account credit is given for the stock on the farm, sold to Watson and other persons. It is averred, that the object in selling the stock, was to replace it by stock of a better quality, which would be more profitable to the parties concerned. Another reason assigned is, that in April, 1853, the complainant commenced an action of ejectment to recover possession of the farm; and that the prosecution of that suit, rendered it necessary for him to lease the farm to Watson, as the best disposition that could be made of it, for the parties interested. And defendant avers it to be his intention to carry out the contract, and proposes to give security for the payment of any rent that has accrued, or that may become due, which the court may order.

In his will, the father of the complainant, gave the farm in question to his daughter, Ann W. Tibbatts, "to have and to hold the same during her natural life, and to enjoy the rents and profits thereof for her separate, sole and exclusive use and benefit, and for the use and benefit of no other person." In this devise it is clear that the testator intended to vest this land in his daughter exclusively, and not subject to the will or control of her husband. But it may be admitted that uniting with her husband as she did, in the written contract respecting this stock farm, it may be treated as a valid instrument; whether it be denominated an article of copartnership or a lease. But a court, in considering the agreement as the one or the other of these instruments, cannot disregard the parties to it, and the circumstances under which it was made. Whilst the wife of Tibbatts should be considered bound to the full extent of the instrument, her interests should be protected, from any arrangement beyond the written agreement, which her husband may have made with his brother, to her injury. Her obligations so far as they exist, arise out of the written contract. The contract was made in relation to the farm and the stock as they existed at the time. And it was in reference to this state of things, that the complainant was induced to sign the agreement. In it nothing was said as to selling the stock, to purchase other and better stock. Nothing is said in the contract in regard to such a sale or purchase, or how the funds were to be procured. From the circumstances of the parties and their relation to each other, there is nothing from which such a presumption can arise. The contract embraced the stock, the farming utensils and the land. Besides, if the object in selling the stock, as alleged by the defendant, was, to supply its place by purchasing better stock, why were not the pro-

ceeds of the sale so applied? But not only the stock was sold, but the farming implements also, which seem to have been limited, as the sum for which they sold was set down at thirty dollars. The farm also was leased by the defendant for two years as above stated. These acts by him evinced a determination, as it would seem, rather to profit by the possession he had, than in good faith to carry out the contract. He was bound not to assign the indenture without the consent of Tibbatts and wife in writing. It is probable that the land was leased in consequence of the step taken by the complainant to get possession of the premises. In the lease for 1854 it is stated, that the rent was paid. This is rather an extraordinary circumstance, as it is not supposed to be usual to pay a money rent in advance.

In regard to the amount presented against the estate of John W. Tibbatts, which not only covers the proceeds of the sale of the stock, but leaves a large balance due to the defendant, it is singular that it was never presented to the administrator of Tibbatts, though public notice was given to all who had claims on the estate to present them for adjustment. Tibbatts had been dead some two or three years before this account seems to have been made out, and the administrator had no knowledge of it. It is proved, that Leo Tibbatts was some years in the service of his brother as clerk, at a thousand dollars a year, but it is hardly probable that he could have had no occasion to call for his salary during that time, for the support of himself and family. Some of the witnesses, well acquainted with the defendant at Newport, when these services were rendered, are under the impression, that the defendant was largely indebted to his brother. This account it seems was never known to the administrator of Tibbatts until the present emergency, which is a circumstance suggestive of doubts as to its validity. But however this may be, the question of law, arising on the facts is not affected by it. By selling the stock and leasing the ground, the defendant has not only disregarded the contract, but has disabled himself from carrying it into effect. The lessee of the defendant of course must receive compensation for his labor and care, so that the rent paid by him to the defendant, should be paid to the complainant. On what principle, under the facts, could the defendant claim a part of this rent? He was entitled to but one third of the profits and those or a greater proportion, are paid to Watson, who has been substituted by the defendant for himself. If the husband consented to the sale of the stock, it was to the prejudice of his wife; and after his decease, the contract having been materially altered, she was under no obligation to continue it. To make the farm a stock farm, as it was when the defendant entered into the possession of it, a large outlay would be required, which the complainant may not be able to afford, and which is foreign to the contract and to the understanding of the parties.

Under the circumstances, I think the defendant has utterly disregarded the contract and abandoned it, and the proposal to give security cannot avail him, as he has forfeited the confidence of the complainant by an entire disregard of the obligations of the contract, and of her interests in particular. If the contract constituted a partnership, the death of John W. Tibbatts dissolved it; and if the contract be considered a lease, the sale of the personal property, and the leasing of the farm, and the inability of the defendant to restore the farm to its former condition, by which means only the profit contemplated by the complainant can be realized, releases her from obligation to continue the defendant in possession of the premises. The court will therefore decree that the contract shall be delivered up and cancelled, and that the defendant relinquish the possession of the premises on the first day of March next, and on failure to do so, that a writ of possession shall be issued to the marshal, commanding him to turn the defendant out, and put the complainant into the possession. And in the mean time, the defendant is enjoined from committing any waste or injury to the farm, or any part of the improvement or timber on the same. And an account was ordered.

Case No. 14,021.

TIBBETTS v. The ARCTURUS.

[Nowhere reported; opinion not now accessible.]

Case No. 14,022.

TIBBS et al. v. PARROTT.

[1 Cranch, C. C. 177.] [1]

Circuit Court, District of Columbia. July Term, 1804.

PLEADING AT LAW—AMENDMENT—INSERTING INDIVIDUAL NAMES.

When an action is brought in the name of a mercantile firm, the court will suffer the declaration to be amended by inserting the names of the several persons who compose the firm.

[Cited in Addison v. Duckett, Case No. 77; Georgetown v. Beatty, Id. 5,344.]

Mr. Swann, for plaintiffs, moved to amend the declaration by specifying the names of the company.

Mr. Mason asked if there was any thing to amend by, and cited the cases of Nicholls v. Harrison, decided at December term, 1802 (not reported), which was a refusal by the court (Marshall, Chief Judge, and Cranch, Circuit Judge, against the opinion of Kilty,

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

Chief Judge), to allow covenant to be changed to case, or case to covenant.

THE COURT (nem. con.) allowed Mr. Swann to amend, it being a different amendment from the one mentioned by Mr. Mason, and not changing the cause of action; but THE COURT expressed an unwillingness to extend the rule further than it had been.

[For subsequent proceedings, see Case No. 14,023.]

Case No. 14,023.

TIBBS et al. v. PARROTT.

[1 Cranch, C. C. 313.] [1]

Circuit Court, District of Columbia. June Term, 1806.

PLEADING AT LAW—PROOF OF PARTNERSHIP.

In an action for goods sold by Tibbs & Company, the plaintiffs must prove themselves to be the firm of Tibbs & Company.

[Cited in Addison v. Duckett, Case No. 77; Woodward v. Sutton, Id. 18,009.]

Assumpsit for goods sold and delivered. [For former proceedings, see Case No. 14,022.] On the trial of the issue of non assumpsit, Mr. Mason, for defendant, moved the court to instruct the jury that they must be satisfied that the contract was made with the plaintiffs, William P. Tibbs and Thomas Blanc. The deposition of the only witness on the part of the plaintiffs, says the goods were sold for and on account of William P. Tibbs and Company.

Mr. Jones, for plaintiffs, contended that it is not necessary for the plaintiffs to prove themselves to be partners, unless upon a plea in abatement.

THE COURT stopped Mr. Mason in reply, and said the law is too plain to require further argument. The plaintiffs must satisfy the jury that the contract was made between the plaintiffs and defendant. The deposition having only stated that the goods were sold by William P. Tibbs & Company, the jury must be satisfied by evidence that the house of William P. Tibbs & Company, consists of the plaintiffs, William P. Tibbs and Thomas Blanc. The plaintiffs took a bill of exceptions.

Verdict for defendant. New trial granted, on the ground of surprise, that the court should require such evidence. See the case of Woodward v. Sutton [Case No. 18,009], at Alexandria, November term, 1806.

TIBER, The (McCORD v.). See Case No. 8,715.

TICKNOR (PARET v.). See Case No. 10,711.

TIDDEMAN (JELLY v.). See Case No. 7,256a.

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

Case No. 14,024.

TIDMARSH v. WASHINGTON FIRE & MARINE INS. CO.

[4 Mason, 439.] [1]

Circuit Court, D. Massachusetts. Oct Term, 1827.

MARINE INSURANCE — BURDEN OF PROOF — SEAWORTHINESS—EQUIPMENT—REPRESENTATIONS.

1. In a writ on a policy of insurance, where the underwriters set up the defence, of misrepresentation, negligent navigation, deviation, and unseaworthiness, the onus probandi of the three former rests on the underwriters; but seaworthiness is to be proved by the assured, for it is a condition precedent.

[Cited in Hazard v. New England Marine Ins. Co., 8 Pet. (33 U. S.) 580; Lunt v. Boston Marine Ins. Co., 6 Fed. 568; Premuda v. Goepel, 23 Fed. 413.]

[Cited in American Ins. Co. v. Bryan, 26 Wend. 582; Slocovich v. Orient Mut. Ins. Co., 108 N. Y. 66, 14 N. E. 802.]

2. What is the proper rule as to seaworthiness. In what cases it is to be measured by the standard in the ports of the country to which the vessel belongs.

[Quoted in The Titania, 19 Fed. 106.]

[Cited in Cobb v. New England Mut. Marine Ins. Co., 6 Gray, 200.]

3. What equipments are generally necessary to constitute seaworthiness.

4. If a party makes a representation on the information of others, and states it, not as known to him, but merely as information, the representation is not falsified, so as to avoid the insurance, if the fact is not so, but the party has given his information truly.

[Cited in Clark v. Manufacturers' Ins. Co., 8 How. (49 U. S.) 249.]

[5. Cited in Bailey v. Hope Ins. Co., 56 Me. 479, to the point that contracts of marine insurance, wherever made, are supposed to be made with reference to the usages of the place to which the ship belongs.]

Assumpsit [by James H. Tidmarsh] on a policy of insurance, dated the 13th of October, 1826, of "$1000 on property on board schooner Emily, at and from Bahia to Halifax," by P. R. Dalton for James H. Tidmarsh. The declaration averred a total loss by perils of the sea and shipwreck on the 23d of November, 1826. Plea, the general issue. At the trial there was no question as to the proprietary interest of the plaintiff, nor as to the totality of the loss, the vessel having been shipwrecked, near Sambro lighthouse, in going into Halifax on the homeward voyage, nor as to the preliminary proofs of loss having been duly made. The defence turned principally upon questions of fact, which were very much discussed upon the testimony. The following points were made by Webster and Curtis for the defendant, and were replied to by Welsh for the plaintiff: 1. That the vessel was not seaworthy, at the time of her departure from Bahia, by reason of the badness and insufficiency of her sails and windlass. 2. That there was a misrepresentation in a letter, written by the plaintiff in January, 1826,

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

which was shown to the underwriters, when the policy was underwritten, and contained a description of the vessel, asserting, among other things, "that all her outfit is new, except three chain cables and three second hand anchors;" that she "is said to sail uncommonly fast," and "is particularly adapted to the Brazil coast." All of which statements were alleged to be untrue. 3. That the loss was occasioned by negligent navigation on the part of the master, first, in sailing from Prospect Bay, in Nova Scotia (into which place he had put for safety), without having two anchors on board, which might have been procured from Halifax, and, secondly, by improper conduct in the course and sailing of the ship, after he left that place, on the voyage for Halifax. 4. That there was a deviation by unnecessary delay, in Chester Bay (Nova Scotia), into which the vessel put, from unfavourable winds, after she left Prospect Bay.

STORY, Circuit Justice, in summing up the facts to the jury, said: There being a great conflict of opinion on the testimony upon some of the questions made at the bar, it may be necessary to consider upon whom the burthen of proof lies, for that may naturally influence your verdict. If, upon the whole evidence, the case hangs in great doubt upon any point, then the party, whose duty it is to satisfy your minds beyond a reasonable doubt on that point, having failed to establish it, must, to that extent, surrender his right to a verdict. Now, upon the three points of misrepresentation, negligent navigation, and deviation, my opinion is, that the burthen of proof rests on the defendant. Each of them constitutes a substantial ground of defence, in respect to which the plaintiff is not to prove the negative, but the defendant is required to establish the affirmative. So far indeed as the plaintiff's own proofs let in or assist such a defence, they are fairly before the jury to weigh as far as they may; but beyond these the defendant must satisfy your remaining doubts, or the defence miscarries. In respect, however, to the point of seaworthiness a very different principle prevails. There the burthen of proof rests on the plaintiff himself, for the existence of seaworthiness at the commencement of the voyage is a condition precedent, implied by the law, to the attaching of the policy. Unless therefore the vessel be seaworthy at the commencement of the voyage, the underwriter is never bound, for the contract has never attached itself to the risk.

Much argument has been employed at the bar upon the question of the nature and extent of seaworthiness. It has been properly remarked, that the standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation. In many ports, sails and other equipments would now be deemed essential, which at an earlier period were not customary on the same voyages. There is also, as the testimony abundantly shows, a considerable diversity of opinion, among nautical and commercial men, as to what equipments are, or are not, necessary. Many prudent and cautious owners supply their vessels with spare sails and a proportionate quantity of spare rigging; others do not do so, from a desire to economise, or from a different estimate of the chances of injury or loss during the same voyage. Of course, different men may well therefore come to different conclusions from the same premises, on a point like this, from their own habits of life, and the general custom of the place to which they belong. But I think I may say, that it would not be a just or safe rule in all cases to take that standard of seaworthiness, exclusively, which prevails in the port or country, where the insurance is made. In the present case the insurance is made in Boston, upon a British vessel belonging to the port of Halifax in Nova Scotia. If the Boston standard of seaworthiness should essentially differ from that in Halifax, in respect to equipments for a South American voyage of this sort, it would be pressing the argument very far to assert, that the vessel must rise to the Boston standard before the policy could attach. It seems to me, that where a policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to equipments of vessels of that class, for the voyage on which she is destined. He must be presumed to underwrite upon the ground, that the vessel shall be seaworthy in her equipments, according to the general custom of the port, or at least of the country, to which she belongs. It would be strange, that an insurance upon a Dutch, French, or Russian ship, should be void, because she wanted sails, which, however common in our navigation, never constituted a part of the marine equipments of those countries. We might as well require, that their sails and rigging should be of the same form, size, and dimensions, or manufactured of precisely the same materials as ours. In short, the true point of view, in which the present case is to be examined, is this, was the Emily equipped for the voyage in such a manner, as vessels of her class are usually equipped in the province of Nova Scotia, and port of Halifax, for like voyages, so as to be there deemed fully seaworthy for the voyage, and sufficient for all the usual risks? If so, the plaintiff, on this point, is entitled to a verdict. Of course, the question of seaworthiness must be, in some respects, the same in all countries. Cables and anchors, and proper rigging and sails, to meet the ordinary exigencies of the voyage, must be, in every country, put on board for common safety.

Upon the point of misrepresentation there is one other consideration, which requires attention. Where a letter contains a representation of facts not known to the party, but from the information of others, and so the letter states the facts, or it is a necessary inference from the nature of them, then the representation is not falsified by the mere proof, that the facts are not so, if the party communicating the facts did receive such information, and bonâ fide confided in it. He undertakes there, not for the truth of the facts, but for the truth of his information.

Verdict for the defendant.

TIEMANN (MASURY v.). See Case No. 9,271.

Case No. 14,025.

TIERNAN v. ANDREWS.

[4 Wash. C. C. 474.] [1]

Circuit Court, E. D. Pennsylvania. Oct Term, 1824.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO CREATE DEBT—SURETYSHIP.

Money paid on account of suretyship for an agent, in a matter where he is acting for his principal, and within the scope of his authority, creates a debt against the principal.

Rule on plaintiff [Luke Tiernan] to show his cause of action, and why the defendant [Robert Andrews] should not be discharged on common bail.

Peters, for plaintiff, showed cause, by reading the plaintiff's affidavit, which states, that the defendant is justly indebted to him in the sum of $5,500, for so much money paid for his use, at the request of John Andrews, the defendant's agent. That, in the year 1812, the defendant, living at Bourdeaux, wrote a letter by his brother John, addressed to plaintiff's house in Baltimore, requesting their services in his favor, and introducing him as his general agent. That John resided for some time in Baltimore, and acted as the known agent of defendant. In October, 1812, the said John Andrews, in his own name, but in fact, as defendant's agent, contracted with W. and J. Bosley for the sale of an imperial license to import a cargo of colonial produce into France, the said license being the defendant's property, and the money received for the sale of it being paid to the said John Andrews, for the use of the defendant. In the contract, certain things were agreed to be done by the defendant, relating to the business to be carried on under the license. The Bosleys made use of the license, but being dissatisfied with the defendant's conduct in the transaction, they brought a suit against John Andrews, for whom plaintiff became bail, knowing of his being the defendant's agent. Judgment being recovered against him, he appealed, and the plaintiff, at his request, became his surety, to pay whatever sum should be recovered of him on such appeal. Judgment on the appeal was rendered against him for $5,161, being the damages the plaintiffs had sustained by the breach of contract assigned. Proceedings being instituted against the deponent, as surety aforesaid, he paid the amount to the Bosleys in 1822, with costs. That a letter, dated the 27th of April, 1822, was written by defendant to said John Andrews, on the subject of the suit, in which he expresses his surprise that a judgment should be rendered against him, "a mere simple agent, who sold them my imperial license for a given sum, with a stipulation that they should consign me a vessel and cargo, on which I should receive two and a half per cent. on sales, and the same on returns. For your government, I send you a copy of the agreement."

J. Sergeant, for defendant, insisted, that John Andrews, for whom plaintiff became bail, and paid the money, was alone liable to him; although the defendant might, in his turn, be answerable to John Andrews, but that he was not so to the plaintiff.

WASHINGTON, Circuit Justice. Upon the affidavit of the plaintiff, and the letters from the defendant to John Andrews, as well as the introductory letter to the plaintiff's house, it appears that the imperial license was the property of the defendant, and was sold to the Bosleys by his agent John Andrews, for the use and benefit of the defendant. It was therefore a sale made by the defendant, and the contract, for the breach of which the recovery was had, was his contract, and the sum recovered became a debt for which he was answerable, and for which he might have been sued. Although the agent was also liable, the person dealing with him having his choice of remedy against the agent or the principal. If John Andrews had paid the judgment, the defendant would have been liable in an action for money paid and advanced at the suit of John Andrews. That having been paid by the plaintiff, the legal result is the same, and he has a cause of action to recover the amount so paid against the defendant.

The rule must be discharged.

[See Case No. 14,026.]

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

Case No. 14,026.

TIERNAN v. ANDREWS.

[4 Wash. C. C. 564.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

PRINCIPAL AND AGENT — MONEY PAID TO USE OF PRINCIPAL—JUDGMENT—SURETY.

1. A, of France, appoints B his general agent in the United States, and authorises him, amongst other things, to dispose of an imperial license, and to reserve to A the consignments of the cargoes shipped under it by the purchaser. A shipment is made by D (who bought the license under an agreement stipulating the commissions to be received by A) to A, between whom a dispute afterwards arose as to the construction of the agreement, which resulted in a suit by D against B, for a breach of the agreement by A. The plaintiff became bail for B, and surety in an injunction and appeal bond, and was finally bound to pay the sum which D had recovered against B; for which this suit "for money paid and advanced," was brought against A, the principal. The plaintiff is entitled to recover. It is immaterial whether the judgment against B was just or unjust, or was obtained by the neglect or fault of B.

2. When the principal is liable upon a sale to an agent, and when not.

This was an action of assumpsit [by Luke Tiernan against Robert Andrews] for money laid out, and advanced for the defendant at his request.

Peters & Chauncey, for plaintiff.

Sergeant & Binney, for defendant.

WASHINGTON, Circuit Justice. Sometime about the latter end of the year 1811, or beginning of 1812, John Andrews, brother of the defendant, made his appearance in Baltimore, with a power of attorney from the defendant, constituting him his general agent and attorney in the United States, with very extensive powers; and also letters of introduction to sundry merchants of that city, and amongst others, to Luke Tiernan & Co. of which firm the plaintiff was a member; announcing to them that the said Andrews was appointed by the writer his general agent in the United States, and requesting their kind services to him when necessary. On the 16th of April, 1812, the defendant wrote to his brother, and directed him to apply to L. Tiernan & Co. for an imperial license in their possession, the property of the writer, which he was to sell for not less than $1,500, and also to secure to him the consignment of the cargoes which might be shipped under its sanction, and intimating a wish that it might be disposed of to William and James Bosley, for at least one-half. On the 2d of October in the same year, John Andrews entered into a contract under seal with William and James Bosley, by which, in consideration of the sum of $1800, and of a commission of two and a half per cent. on the gross sales, and the same on the returns, he sold him the said imperial license in the name of Robert Andrews; on the arrival of the vessel in France, Mr. R. Andrews to do the business of said vessel, and to charge five per cent. commission on the gross sales, and two and a half per cent. on returns; the two and a half per cent. on gross sales which he is to charge above his commissions, the said Robert Andrews to credit and pay over to said William and James Bosley. This instrument was signed and sealed by John Andrews, in his own name. The $1800 received by John Andrews by the sale of the above permit, was afterwards placed by the defendant to his debit in account. On the 10th of the month last mentioned, John Andrews wrote to his brother, and informed him of the contract, enclosing at the same time a copy of it, and stating to him that a valuable cargo in the Ned would be shipped to him by the Bosleys. James Bosley, one of the members of this house, accompanied the cargo in the Ned to Bordeaux, the place of the defendant's residence; and it would appear by a letter from the defendant to John Andrews of the 13th of March, 1813, that a difference had arisen between those parties respecting the construction of the contract; the defendant contending that he was entitled to charge a commission on the freight of the Ned collected by him, and Bosley insisting that this was a part of the business of the vessel, which he was bound by the contract to do, and for which no compensation was provided. After some correspondence, however, between the parties, this claim was given up by the defendant, which he announced to the Bosleys in July, 1813.

In September, 1813, the Bosleys brought an action of covenant upon the contract, and the breach laid in the declaration was, the refusal of Robert Andrews to pay over to or to credit the plaintiffs in that suit, the two and a half per cent. on the gross sales of the cargo by the Ned. In that action the present plaintiff became special bail for John Andrews, and on the 9th of May, 1815, during the absence of John Andrews from the United States, judgment was confessed by his attorney for the sum of $3547, under an agreement that it should be credited with any payments which might be made to appear to the satisfaction of a Mr. Brown, within four months thereafter. Upon the return of John Andrews in the November following, he was served with an execution, and for the purpose of superseding the judgment for six months, in order to get time to apply for an injunction, the plaintiff, together with Mr. Owen, became, at the request of John Andrews, his sureties, and, together with John Andrews, confessed judgment before a magistrate for the above sum of $3547. This mode of proceeding appears to be in conformity with the laws of Maryland, where the said judgment was obtained. In pursuance of the plan thus adopted by John Andrews, for having the merits of this judgment inquired into in the court of chancery, an injunction was applied

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

for and granted in June, 1816, the plaintiff entering himself a surety in the injunction bond. After sundry proceedings in that court, a commission to Bordeaux, a reference to the auditor of the accounts between Robert Andrews and the Bosleys, and a report thereon; the injunction was dissolved, and the bill dismissed in February, 1822. This was followed by an execution, which was levied on the plaintiff's property; and which was returned satisfied by him.

The only question of law upon these facts is, whether the money so paid by the plaintiff, was money laid out and advanced for the defendant, and at his request? That it was paid to satisfy a debt due by the defendant, is undeniable. The permit sold by John Andrews to the Bosleys was the property of the defendant, was sold by his orders, and he received the fruits of it, not only the $1800 which were paid, but the consignments which constituted a part of the consideration. The suit against John Andrews was founded on the contract entered into for the sale of that property, and the ground of the action against John Andrews was the non-payment by the defendant of the two and a half per cent. on the gross sales, or his refusal to give the Bosleys credit for them. The debt recovered therefore in that action, and paid by the plaintiff, was the defendant's debt, and by such payment the defendant was discharged from the claim of the Bosleys. If any further evidence of this fact were necessary, the defendant's letters, hereafter to be noticed, acknowledging himself to be the real party interested in the suit, would abundantly supply it. Not only was this money paid by the plaintiff for the use of the defendant, but, if there were nothing else in the case but what has been stated, it would unquestionably have been paid at the request of the defendant; because it was at the request of his agent that the plaintiff was brought into the predicament of being compelled by legal process to pay it; and it is quite immaterial whether his being in this predicament was communicated or not by the plaintiff, or by John Andrews, to the defendant, since John Andrews had undeniably the power, and it was a part of the duty he owed to his principal, to take all legal means to enable him to defend his rights, and to obtain bail or sureties, if necessary, for that purpose. If all this be so, this action might clearly be maintained on the above evidence; unless the defendant's counsel have succeeded in proving, that where an agent contracts in his own name, and the principal is known at the time to the person with whom he contracts, an action will not lie against the principal. The cases relied on to establish the proposition are the following: Schmaling v. Tomlinson, 1 Marsh. 500, where it is held, that if A, on the recommendation of his agent, employs B to do a particular piece of business, and B, without A's knowledge, employs C to do it, there is no privity between A and C, and consequently C cannot maintain an action against A to recover compensation for his services, though he had not paid over the money to B. This is the case of a limited, special agency, where the confidence of the principal was given to a person of his own choice, to do a particular business, without his being entrusted with a power, express or implied, to entrust the business to a sub-agent, or in any manner to delegate his trust to another. C then was the agent of B, but not of A, and consequently there was no privity between A and C. This is altogether unlike the present case, since John Andrews had a power to contract with the plaintiff to become his surety, to enable him to vindicate, in a court of justice, the rights of his principal. The case of Cartwright v. Hately [3 Brown, Ch. 238] is in principle the same as the above. The principle decided in the case of Paterson v. Grandasequi, 15 East, 62, is, that where a sale is made to an agent, whose principal is known to the seller at the time, and yet the seller elects to give credit to the agent, he must be taken to abandon his recourse against the principal, and can not afterwards charge him. But if the principal be unknown to the vendor at the time of sale; when the principal is discovered, he, or the agent may be sued at the election of the vendor, unless the usage of the trade confines the claim to the agent. Without stopping to examine this case, for the purpose of expressing our approbation or disapprobation of the principle on which it is founded, it may be sufficient to observe that it might have applied, had this been an action of the Bosleys against the defendant, but that it is totally inapplicable to the case of a surety, who becomes so, at the request of a general agent, to enable him to defend a suit which substantially concerns his principal, although he is the nominal agent. Where, in such a case, can we discover that election to give credit to the agent, which can be construed into a waiver of his recourse against the principal? If he become a surety at all, it could be only for the agent, the nominal defendant, although eventually it was to benefit the principal. Upon the facts stated then, there seems to be no ground for saying that this action cannot be maintained against the principal.

But it is insisted that after the 7th of January, 1815, when John Andrews executed a letter of substitution to Luke Tiernan, vesting in him all his powers as the defendant's attorney (which he had power to do), the agency of John Andrews ceased, and that from that period, he had no authority to enter into any collateral or other contract which could create a privity between the defendant and the plaintiff as surety, although in a case in which the defendant was interested. Without stopping to inquire in the effect of this substitution upon the power of attorney, under the particular circumstances which attended that transaction, I shall consider the case as if the power of attorney were at an end from the 7th of January, 1815. How will the case then stand? In the first place, we have the

letter of introduction from the defendant to Luke Tiernan & Co. informing them that John Andrews would act as his general agent in the United States, and requesting in his favour their kind services. In the next place, the special order of the defendant to this agent, thus announced, to apply to those gentlemen for the imperial permit, and to dispose of the same on certain terms, which order was complied with. After this, we have repeated recognitions by the defendant, of John Andrews's agency in this particular transaction, accompanied by orders to attend to the suit, and to defend the interest of the defendant. On the 22d of November, 1815, John Andrews wrote to his brother, informing him that his account current had been received, but too late for the purpose for which it had been wanted. That the Bosleys had obtained judgment for $3500, the amount they claimed, "and which they established on an account signed by you, in which no credit was given for the two and a half per cent. on the gross amount of sales or on the freight; so that I was taken in execution, and was obliged to supersede the judgment, and before this expires, I must apply for an injunction." Now this letter apprized the defendant of the step which had been taken, and that which was to be taken, neither of which could be effected without finding sureties. In answer to the above letter, the defendant wrote to his brother on the 3d of January, 1816, stating that he had a better opinion of the Bosleys than to suppose that they would suppress the letter and account current which he had sent them. It then proceeds: "I owe them only about four hundred francs. Do see to this, and that the affairs be not neglected by those you employ, so that I may be compelled to pay a swindler money which I shall be compelled eventually to regain after a long process, or lose by some want of form." On the 24th of February, 1816, the defendant again writes, "See that your friends in Baltimore do not permit the Bosleys to jockey me out of my money." On the 24th of August, 1817, John Andrews, by letter, informed the defendant that a commission had gone to Bordeaux to take his deposition on Bosleys' suit, and that to render it available, he inclosed him a release. On the 9th of July, 1821, the defendant wrote as follows to John Andrews: "I have forgotten on what ground the Bosleys have attacked you for me. An agent can not be pursued for his principal. I regret that you have committed yourself so as to give them a hold on you." On the 25th of February, 1822, John Andrews wrote to his brother, that an execution on the judgment against himself, Luke Tiernan, and Mr. Owen his sureties, at Bosleys' suit, had been levied on the property of Mr. Tiernan, who had satisfied the same. And on the 27th of April in the same year, the defendant wrote to John Andrews as follows: "I can not conceive how the Bosleys could obtain judgment against you, a mere simple agent who sold my imperial license to them." Now after these repeated recognitions of the agency of John Andrews, and that the subject in litigation concerned him, the principal, and him only, I am quite at a loss to conceive upon what ground it can be said that the money paid by the plaintiff, and for which this action is brought, was not money advanced for his use, and at his request.

All that remains is to notice one or two objections which were relied upon by the defendant's counsel. The first was, that this was not a debt due by the defendant, because, in truth, he owed the Bosleys nothing, and this would have been made to appear, if, instead of a confession of a judgment, a trial had taken place. It is alleged, and the effort of the counsel was to satisfy this jury, that the loss now sought to be visited on the defendant, was produced by the neglect of John Andrews, and the mismanagement of the counsel he employed. Now admitting all this to be true, it may well follow that those against whom these charges are made may be answerable to the defendant for the consequences resulting from their alleged misconduct. But what has the plaintiff, a mere surety, neither agent nor counsel, to do with this? To him, it is of no consequence whether the judgment was just or unjust. It was the sentence of a court of acknowledged jurisdiction, and he was compelled to satisfy it. The remaining objection was, that by permitting the plaintiff to step over the head of John Andrews and attack the defendant, the latter is deprived of the opportunity of setting up those defences which he might be able to oppose to John Andrews; if, after a recovery against him by the plaintiff, he should seek for indemnity by such agent, the defendant. But there is nothing real in this objection. If John Andrews be the debtor of the defendant, or if he has by an unfaithful execution of the trust reposed in him, rendered himself liable for damages, the defendant may, in either or both cases, seek his redress against John Andrews. But no good reason can be assigned why the plaintiff may not have his remedy at once against the person whose debt he has been compelled to discharge.

Verdict for plaintiff.

[See Case No 14,025.]

Case No. 14,027.

TIERNAN v. WOODRUFF.

[5 McLean, 135.] [1]

Circuit Court, D. Michigan. June Term, 1850.

PLEADING AT LAW — AMENDMENT — MOTION TO STRIKE OUT—NEW CAUSE OF ACTION.

1. Amendments are granted to promote justice. In this respect the powers of the court are adequate, and they are liberally exercised.

[Cited in brief in Lycoming Fire Ins. Co. v. Billings, 61 Vt. 310, 17 Atl. 715; Chicago

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

Planing Mill Co. v. Merchants' Nat. Bank, 97 Ill. 298. Cited in Adams v. Main, 3 Ind. App. 240, 29 N. E. 792.]

2. It is not a sufficient cause to strike out an amendment, because it introduces a new cause of action, embraced by the suit.

[Cited in U. S. v. One Hundred and Twenty-Three Casks Distilled Spirits, Case No. 15,943; Tilton v. Cofield, 93 U. S. 166; U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 150; Chamberlain v. Mensing, 51 Fed. 511.]

[This was an action of assumpsit by Tiernan's executors against James Woodruff.]

Mr. Hand, for plaintiff.

Mr. Frazer, for defendant.

WILKINS, District Judge. The action in this case was commenced at June term, 1847, and the declaration filed on the 2d of August following. The defendant having plead in abatement, his plea was demurred to, and judgment sustaining the demurrer, and ordering defendant to answer over, was entered on the 5th of September, 1848, being in the June term of that year. At the same time, leave was given to the plaintiff to amend his declaration, and, by a subsequent record entry of the 22d of January, 1849, it appears that an amended narr. was filed. The motion now under consideration is to strike the amended declaration from the files; or that the new count be struck out, because it contains a new substantive cause of action not counted on in the original declaration.

The only declaration now on the files, contains three special counts, and the usual money counts in the following order: First. A special count setting forth a promissory note for $800, dated 24th June, 1841, and payable in 12 months. Secondly. Another special count on another promissory note of the same date with the former, for $2,500, payable in 3 years. Then follow the counts for money lent and advanced to defendant; for money paid out and expended for the use of the defendant; for money had and received for the use of the defendant; and then, that defendant had accounted, and a balance in arrear was found to be due by him to the testator, which he had promised and neglected to pay. After this, on another sheet of paper, which was appended to that containing the prior counts, is a 3d special count on another promissory note for the sum of $2,500, of the same date with the two first notes, and of the same character as to parties, but payable in two years after its date. Rule No. 39 of the rules governing the practice of this court, is not applicable to the determination of the question now raised, inasmuch as leave was obtained by the special order of the court, and that rule only applies to amendments of course, and at any time, in or out of term, under its specified restrictions. But the plaintiff's counsel in resisting this motion, contends that the defendant has not laid a proper foundation, forasmuch as it is not made to appear what amendments have been made, and that the court cannot determine from inspection, which of the counts is the amended count.

The declaration on file has two clerical indorsements; the first is August the 2nd, 1847, stating in general terms that the paper was then placed on file, and the other, in the following language: "Amended narr., filed January 22nd, 1849," which circumstance, connected with the order in which the counts are arranged, clearly shows, and enables the court to determine, that the last special count was the amended count, attached by the counsel to the original declaration.

It is urged by the defendant in support of his motion to strike out this last count, that it is not competent, by way of amendment, to introduce a new substantive cause of action. Before considering this objection, let us look at the facts presented by the record. The plaintiff originally declared in assumpsit on two promissory notes, drawn by Theodore Romeyn for different amounts, maturing at different periods, and added the usual money counts, answering a general indebtment by the defendant. He plead in abatement, and plaintiff demurring thereto, no further action was had until after judgment on demurrer. On the rendition of that judgment, the plaintiff applied to the court and obtained permission to amend his declaration. This was on the 5th of September, 1848, the June term being still in session, and only one term having elapsed since the commencement of the suit. The discussion of the demurrer disclosed no error of form, to be rectified by amendment, the plea demurred to, being in substance to the writ; and the plaintiff did not amend as to matter of form, but superadded the last count, setting forth another promissory note, of the same date with the others, being between the same parties, and evidently part of the same original transaction and indebtment. The last note maturing two years after date, was consequently within the statute of limitations at the time, when leave was obtained to amend, and when the amended narr. was filed.

The summary of these facts, thus presented by the record, is this: An indebtment on the part of the defendant in June, 1841, to the testator of the plaintiff, in the amount of these three notes, for which they were then given, payable at 1, 2, and 3 years; the institution of suit in this court on the first and last notes at June term, 1847; the 2d note from some cause not presented by the files, omitted in the declaration of the plaintiff, and, that subsequently, on leave obtained before the lapse of two terms; the 2d note maturing at two years, is introduced by a new count into the declaration, as part of the plaintiff's original cause of action; that, at the time the said leave was obtained, a separate suit could have been brought on this 2d note, but that now, if this motion suc-

ceeds, the note is outlawed. Best, Chief Justice, observes, in Taylor v. Lyon, 5 Bing. 333, that "questions for amendment, are questions for the discussion of the court, which, on such occasions is to be exercised as to do justice between the parties." And, Park, Justice, in the same case, says: "Amendments are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is: 'Will any injustice be done by what is proposed?' and, if not, the amendment is allowed." This is nothing more and nothing less in principle, than what was ruled more than a century before, in Bearecroft v. Hundreds of Burnham & Stone, 3 Lev. 347; and Executors of Duke of Marlborough v. Widmore, 2 Strange, 890. Had not the amendments been allowed as proposed in these cases, the statute of limitations would have operated as a bar. and manifest injustice would have been done the plaintiffs. In the first case, the plaintiff's servant had been robbed, and an amendment was permitted, after issue joined, and the trial ready at bar, changing the form of the action and the character of the fact on which it was based, as the prior proceeding was for the robbery, and on the oath of the master. The case in Strange originally averred a promise to the testator in his life time, which was barred, and the declaration was amended by a new count laying the promise to have been made to the executors since his decease. But the principle governing both cases, is that contained in Taylor v. Lyon: Will the proposed amendment work injustice? if not, it should be allowed. In Aylwin v. Todd, 27 E. C. L. 591, the original action was in covenant on a charter party. The breach assigned was, that the defendant had failed to pay the sum agreed upon, notwithstanding the plaintiff had performed his part of the agreement. The plea was non est factum, denying the covenant. After the lapse of several years, (the proceedings at law having been enjoined in chancery by defendant,) the plaintiff was permitted to amend the original declaration by substituting therefor an entirely new count, changing the form of action, declaring for freight, and not upon the covenants of the charter party. The court placing its judgment on the ground of the peculiar circumstances of the case, and allowing the defendant to plead de novo.

These cases show the extent to which the English courts have gone, and the principle by which they have been guided, namely, to prevent injustice being done to either party, by allowing or refusing amendments; that they considered the power discretionary with the court, and to be exercised according to the peculiar circumstances of each case. Tidd, in his elementary treatise, collating the cases, seems to lay down the rule, that a new count should not be added after the 2d term, because, by the prevailing practice in the English courts of common law, the plaintiff was compelled to declare before the end of the 2d term, or else be non-suited. And this rule of practice was not permitted to apply to that class of amendments which merely varied the manner of stating the cause of action, but was confined to new counts for a different or a new substantive cause of action. 2 Tidd. Prac. 754. The opinion of Lord Kenyon in the case of Maddoc v. Hammet, 7 Term R. 55, referred to by Mr. Justice Whipple in 1 Doug. 444, does not modify the rule, or question the discretionary power of the court, but places the amendment on the ground that in the penal action for usury, a new substantive cause of action would not be permitted to be introduced by way of amendment.

The most reliable American cases seem to me to consider amendments at any stage within the discretion of the court, and to be governed by the same principle of doing justice, even to the extent of permitting a new cause of action to be introduced after plea by the addition of a new count to the declaration. The rule is so declared in 1 Dunl. 294, which cites 2 Johns. 206, in which the amendment proposed was refused on the ground of the unreasonable conduct of the plaintiff, in delaying his proceeding; but the court recognise the rule as contained in the English cases. In Smith v. Barker [Case No. 13,013], in the circuit court of the United States, the contract declared on was for building a ship, yet, the declaration was permitted to be amended while the case was before the jury, so as to exhibit the cause of action to be "the finishing of a ship"; Livingston, Justice, declaring that the party might so amend at any stage of the proceedings. In the case of The Harmony [Id. 6,082], Mr. Justice Story observes: That upon examination he did not find that an amendment, introductive of a new cause of action, was objectionable at common law, but that such had been allowed under particular circumstances; and that the fact that the statute of limitations would run against such new cause of action, was a circumstance presenting a strong reason for permitting such amendment. He refused the amendment proposed in that case, not because the court possessed not the discretionary power, but, because the statute of limitations "had run against the recovery of the forfeiture," and by allowing the amendment it would be introductive of a new substantive offense, as the cause of the original information was outlawed. In some of the states there are statutory provisions conferring the right upon parties to amend their pleadings on or before trial, and the courts have no discretion to refuse. Such is the case in Pennsylvania. The statute of 1806, commonly called the "Arbitration Law" of that state, forbids that the plaintiff shall be non-suited for any infor-

mality in any declaration, and confers upon him the right to amend at any time before the cause is committed to the jury. Purd. Dig. 411. In Maryland, amendments may be made before the verdict, so as to bring the matter in controversy between the parties fairly to trial. 4 Griffith, 951. And in Massachusetts, a similar provision exists, by the statute of 1784. These statutory enactments explain the decisions in those states, which would seem to deny the discretionary power of amendment introductive of a new and kindred cause of action. Mr. Justice Tilhman, in 2 Serg. & R. 3, places the decision of the court on the construction of the statute, "the object of which was the attainment of substantial justice, unembarrassed by form," and declares that under its provisions, an entirely new cause of action shall not be introduced under pretence of amendment,—that is, in an action of slander, the plaintiff shall not introduce a new count for trover or malicious prosecution; or, in debt or covenant, he shall not amend by changing his action into assumpsit on promises. But, even under the statute, the party might, as a matter of right, provided he adhered to the original cause of action, add a new count, substantially different from the original declaration. Mr. Justice Duncan, in 8 Serg. & R. 287, likewise confines the decision of the court expressly to the construction of the statute, and, as Ebersoll v. Krug, 5 Bin. 51, and Cunningham v. Day, 2 Serg. & R. 1, had been referred to in the argument, he follows in the path of those cases, and admits the amendment, because it was not the substitution of a new cause of controversy for the original declaration and was therefore one of the cases provided for in the statute. Such was also the case of Shock v. McChesney, 4 Yeates, 507, where, in slander, the court would not permit an amendment adding a new count for a malicious prosecution, such amendments not being within the provisions of the act of 1806 [Laws Pa. 1805-06, p. 563].

The application in these cases was not to the discretion of the court, under peculiar circumstances, showing that great injustice would be done by a refusal, and asking a boon, under the power conferred upon the court by the common law; but the amendments were demanded as matter of right; and it is error in the inferior courts in Pennsylvania to refuse such statutory amendments, so as to make the declaration conform to the evidence which has been introduced on the trial, and this because the statute conferred the right. Hence the courts in that state have, in the cases cited, based their decisions on the strict construction of the state statute, and employed the language used in this motion, "that a new substantive cause of action cannot be introduced by way of amendment." The question was not, as in 5 Bing.: "Will any injustice be done by what is proposed?" But are we bound by our statute to permit the plaintiff by amendment to institute a new, and an entirely different suit from that set forth in his original declaration? In the same light do I view the cases of Haynes v. Morgan, 3 Mass. 208; Vancleef v. Therasson, 3 Pick. 12; Ball v. Claflin, 5 Pick. 304; Heridia v. Ayres, 12 Pick. 334. But in Gay v. Homer, 13 Pick. 535, the court permitted, in an action for slander, new counts showing other species of slander, than that contained in the original narr., on the principle that the injury complained of affected the plaintiff's reputation, and therefore any new slander might be added, as it was the same cause of action, namely, an injury to plaintiff's reputation, as that contained in the original counts. Both Chief Justice Parsons and Chief Justice Parker in their opinions in the cases cited, give a construction of the statute of Massachusetts, the latter observing in the case in 5 Pick. that "The new count offered under leave to amend, must be consistent with the former counts," (that is) "of kindred character subject to the same plea, and such as might have been originally joined with the others." And such must be the character of the amendment at common law, although Tindal, Chief Justice, in Aylwin v. Todd, allowed the entire change of the pleadings, substituting a different cause and a different form of action, and a different defense, from that on which issue had been originally joined.

From a careful, and I may say a laborious consideration of the cases both in England and in this country, and from a solicitude to avoid, if possible, any innovation upon the settled practice of the courts, I have arrived at the conclusion, that it is competent at common law to amend the declaration by a new count, introductive of a new cause of action, provided such amendment corresponds in character with the original count, is a kindred cause, admitting the same pleading and defense, and might have been included within the declaration originally filed, and especially where such cause is outlawed by the statute. I cannot perceive the injustice to the defendant by an adherence to this principle. The case under consideration illustrated its propriety. The original cause of action was the indebtment of the defendant to the testator of the plaintiff in June, 1841. The evidence of that indebtment consisted in three promissory notes, then given on time. Action is brought on two of them in this court. In the progress of the cause, and before the end of the 2d term, an amended count, declaring on the promissory note, is by leave of the court, superadded to the original declaration, and this, when a distinct suit might have been instituted upon it, as not then precluded by the statute of limitations. Where then is the injustice to the defendant, by not introducing it in this suit? Every legal defense is still open to him.

If it be not his contract, or if it has been paid, or, if time was given to the drawer, or, if he was released in any way by the conduct of the holder, all these circumstances of defense are still available—on the new as on the old counts. His plea of the general issue is not affected by the amendment; it may stand, or he may plead the same de novo, as applicable now to all the notes. Had distinct and separate suits been brought upon the three notes, the court, on application, would have directed their consolidation into one, to prevent accumulation of costs, and because they were of kindred character, between the same parties, for the same indebtment, and admitted of the same pleading. For the promissory note of itself is not the cause of action; it is but the evidence of a promise, and a promise to pay a previous indebtment the failure to fulfil which gives the right to sue. Where then the injustice in allowing the amendment? Is the defendant taken by surprise? if so, the court will see that that circumstance does not impair his defense. Is he deprived of any legitimate defense? No. Does the amendment change the character of the action? No. Wherefore then strike it out? Because, it is argued, it introduces a new substantive cause of action. Suppose it does. It is not adding a count in covenant to a declaration in assumpsit. It is not building trover upon slander, so abhorrent to the judicial taste of Mr. Justice Tilhman, in Cunningham v. Day. It is not, as in Aylwin v. Todd, changing an action of covenant into a quantum meruit for work and labor done, and extinguishing the entire pleading ab initio; it is not, as in Strange, substituting a different promise, or, as in Leving, altering the very foundation of the action; it is not, as in 1 Douglass, adding a count for money had and received to a declaration in debt for the recovery of a penalty for money. It is not a count for a fresh indebtment, accruing since the bringing of the action; but a count on one of the special promises of the defendant to pay the debt existing before the commencement of the suit, the withholding the payment of which debt, is in fact the cause of action, and consequently the new count is in strictness and in truth, not introductive of a new substantive cause of action.

I am not disposed to overturn decisions, although I will not permit even a sacred regard for stare decisis, to lead me to overlook the justice of the case. And when I cannot discover what injustice is done to the defendant, and clearly see that injustice will be done to the plaintiff, by striking out the new count, I cannot, I will not hesitate. "Fiat justitia"—even if the judicial firmament of ages should totter and fall. If the question was exactly such as that raised before the supreme court of the state, I should be inclined to pause, from a just regard to the learning and integrity of that high judicial tribunal. But such is not the case. There, the attempt was to change an action originally brought to recover a penalty under the statute of usury, into an ordinary common law action for money had and received; there, in the language of Chief Justice Whipple, "the plaintiffs sought to abandon their original cause of action, and substitute another, differing from it in form, substance, and fact." Here, the amendment has not changed either the form of the action, the substance of the controversy, or the character of the facts. All these incidents of suit remain as they were, when the declaration was first exhibited and filed. It was in assumpsit; it continues in assumpsit. Plaintiff declared on promissory notes, —the amount is on a promissory note,— same parties,—and same complaint; the original special counts still remain, and all that is superadded, is another special count of the same character and language as the first, and based upon the same original indebtment. Under these circumstances, therefore, "to strike the amended count from the files" would be doing great injustice to the plaintiff, and permitting the avoidance of a contract on the sole ground of technical exception.

The motion refused.

[See Case No. 14,028.]

Case No. 14,028.

TIERNAN v. WOODRUFF.

[5 McLean, 350.] [1]

Circuit Court, D. Michigan. June Term, 1852.

PRINCIPAL AND SURETY — INDORSER — EXTENDING TIME TO PRINCIPAL—BANKRUPTCY—EFFECT OF.

1. A bankrupt procured from his creditor, two months' time, within which the right to bring suit was suspended, for a valuable consideration; which was set up by the indorser, as a discharge from his indorsement. In an ordinary case, this would be a discharge to the indorser.

[Cited in brief in Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85, 10 N. E. 484.]

2. It deprives the indorser of a right to pay the debt, and sue his principal.

3. Our bankrupt law discharged the bankrupt from all liability on the instrument—as against the indorser as well as the payee of the note.

4. The only remedy of the indorser was to present his future liability against the estate of the bankrupt. This being the case, the right of the indorser was, in no respect. prejudiced by the time given. The rule of law, therefore, does not apply in such a case.

[Distinguished in Post v. Losey, 111 Ind. 81, 12 N. E. 121.]

5. The indorser, on the notes of the bankrupt, is not discharged by the time given.

[This was an action of assumpsit by Tiernan's executors against James Woodruff.]

Mr. Hand, for plaintiffs.

Mr. Fraser, for defendant.

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

OPINION OF THE COURT. This is an action on several promissory notes given by Theodore Romeyn, to the plaintiffs' testator, indorsed by the defendant. The plea sets up in defense that time was given by the plaintiffs to Romeyn. To this plea the plaintiffs replied, that at and before the alleged time was given, Romeyn was a discharged bankrupt; that the debt was proveable against his estate. Averments were added covering all the exceptions in the statute, under which it is permitted to go behind the certificate. To this replication the defendant demurred. Joinder in demurrer, &c.

On the part of the defendant it is contended, that under the authorities the defendant is discharged. It appears from one of the pleas, that he was an accommodation indorser, and this is not denied by the pleadings. It appears that after the maturity of the note, the plaintiffs entered into a sealed agreement with Romeyn, the maker, without the knowledge or consent of the indorser, and for a good consideration, to wit, a proposal for settlement made by Romeyn, and also of five dollars paid to the plaintiffs, the receipt thereof was acknowledged, the plaintiffs would not for the space of two months from the date, commence any proceeding in law or in equity or otherwise against the said Romeyn, upon all or either of the four promissory notes therein mentioned, nor sue him upon the same or either of them, &c. Great care seems to have been taken, in drawing this agreement, to cover the entire ground necessary for the discharge of the indorser. It was under seal, for the valuable consideration of five dollars paid, and suspending suit on each of the notes, &c There is certainly no want of skill shown in drawing this agreement, and no objection can be made to it for want of form or substance. It would serve for a safe precedent in all such cases.

For the defendant it is argued that the bankruptcy of the principal cannot affect the question of law. That although the discharge takes away the legal remedy against the bankrupt, yet this exists only where he avails himself of his right. It is a mere personal privilege, which no one can set up but himself; and if not set up, judgment may be rendered against him. Also that the moral obligation on the debtor to pay still continues, and the cause of action still remains, so that it is not necessary to declare specially on a new promise to pay. That the legal effect of our bankrupt act, is the same as the English act. The provisions of both acts are substantially the same, and the English decisions are applicable here. A new promise would be binding under the English act. Chit. Cont. 190, 191; 13 Mees. & W. 34, 769; 8 Mass. 128; 5 Barnard, 369; 11 Barnard, 17, 369; 28 Me. 550; 9 B. Mon. 45; Cowp. 448. The theory of law is, that the surety cannot be prejudiced by such an agreement. He may be benefited, and yet, if time be given to the principal the surety is discharged. The case don't turn upon the fact of inconvenience or injury, but giving time for a valuable consideration, is presumed to prejudice the surety. Giving time for a day discharges the surety. 5 Pet. Cond. R. 728; U. S. v. Hillegas [Case No. 15,366]; U. S. v. Tillotson [Id. 16,524]; 7 Hill, 250.

On the other side it is urged, in the language of the supreme court of the United States ([U. S. v. Hodge] 6 How. [47 U. S.] 283): "The principle on which sureties are released, is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured." The contract for delay to effect the discharge of the indorser, must affect the rights of the indorser, or prejudice him. McLemore v. Powell, 12 Wheat. [25 U. S.] 554. In King v. Baldwin, 2 Johns. Ch. 559, Chancellor Kent says: "On paying the debt he (the surety) is entitled to the creditor's place by substitution, and if the creditor, by agreement with the principal debtor, without the sureties' consent, has disabled himself from suing when he would otherwise be entitled to sue, under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. [Bank of U. S. v. Hatch] 6 Pet. [31 U. S.] 250; s. c. [Case No. 918].

Our bankrupt law [of 1841 (5 Stat. 440)] is different from the bankrupt law of England. The latter operates by way of personal exemption from debts provable. 2 Bl. Comm. 473; 2 Maule & S. 23; 2 Com. Dig. 157; 1 Steph. N. P 689; 1 Barn. & Adol. 54; St. 37 Eliz. c. 7; 4 & 5 Anne, c. 17; 6 Geo. IV. c. 16. But our bankrupt law extinguishes the debt of the bankrupt, even against his indorser. In Mace v. Wills, 7 How. [48 U. S.] 275, the supreme court say: "The fourth section of the bankrupt law provides that a discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts," &c. And under the fifth section, "All creditors, whose debts are not due and payable until a future day, indorsers, &c., shall be permitted to come in and prove such debts or claims under this act," &c. And a person who neglects so to prove a liability, cannot afterward recover the amount from the bankrupt. So the court held in the above case.

In the case before us, Romeyn, the bankrupt, procured from the plaintiffs a suspension of their right to sue for two months. This agreement, being founded on a valuable consideration, was a valid contract. The indorser within that period could not pay the debt, and sue Romeyn. This, in law, prejudiced the rights of the indorser. But Romeyn was a bankrupt, what remedy was there for the indorser against the bankrupt? There was no remedy but to present his demand against the estate of the bankrupt, be-

fore it was due, under the 5th section of the bankrupt law He has no recourse, at any time, against the bankrupt, if the proceedings were regular under which he was discharged, as alleged in the pleading, and not contradicted. The time given to Romeyn, under these circumstances, by no possible means, could have operated to the prejudice of the defendant. The settled rule of law, therefore, as to the effect of giving time to the principal debtor, does not and cannot apply in this case. After the extension complained of, as well as before it, the indorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy, which, under the circumstances, the law gave him.

The demurrer to the replication is overruled, and judgment for the plaintiffs.

TIERNEY (UNITED STATES v.). See Case No. 16,517.

Case No. 14,029.

In re TIFFT.

[17 N. B. R. 502.] [1]

District Court, E. D. New York. April 11, 1878.

BANKRUPTCY — COMPOSITION MEETING — EXAMINATION OF BANKRUPT — EXCUSE FOR NOT ATTENDING — RE-EXAMINATION OF CLAIMS.

1. At an adjourned meeting in composition proceedings, the debtor failed to attend, assigning as a reason that he had already been subjected to an exhaustive examination, that his business was largely a summer business, and at that time required his personal attendance in order to meet the terms of the composition, if accepted. The creditors, by a vote more than sufficient to pass the resolution of composition, resolved that the cause assigned was satisfactory to the meeting. *Held*, that the vote of such a proportion of creditors is sufficient to terminate the examination of the debtor so far as the meeting is concerned.

2. The "other cause" to be assigned by the debtor as a reason for his absence from the meeting is only required to be such as shall be "satisfactory to the meeting."

3. Creditors are in no position to ask the register to permit a re-examination of claims until a petition for such re-examination has been filed in compliance with the provisions of general order 34.

[In the matter of Alanson H. Tifft, a bankrupt. For prior proceedings in this litigation, see Cases Nos. 14,030, 14,031, and 14,036.]

Charles Harris Phelps, for Joseph Scheider & Co.

A. C. Aubery, for bankrupt.

BENEDICT, District Judge. In this case, upon a proceeding for composition, the meeting of creditors was continued on several days, at which time the bankrupt was examined on behalf of one or more of the creditors. Another creditor desiring to examine the bankrupt, who was then absent, the creditors proceeded to consider whether the bankrupt was prevented from attending the meeting by a satisfactory cause. The only cause assigned for the absence of the bankrupt was that stated in a communication made in writing to the meeting by the bankrupt, that he had been already subjected to an exhaustive examination, that his business was largely a summer trade and at that time required his personal attendance in order to meet the terms of his composition, if accepted. The creditors, by a vote of seventy-six to one in number, and fifty-two thousand two hundred and ninety-two dollars and ninety-two cents to three hundred and ninety-six dollars and eighty-five cents in value, resolved that the cause assigned by the bankrupt, which prevented his attendance, was satisfactory to the meeting.

The question is now raised as to the validity of this action on the part of the creditors. On the part of the creditors it is contended that the facts stated by the bankrupt as a reason for his absence do not amount to a prevention of attendance and raised no question for the determination of the meeting, and further that a unanimous vote was necessary to terminate the examination of the bankrupt. The language of the statute is broad, and seems intended to confer upon the meeting of creditors jurisdiction to determine the course to be taken by the meeting in case of absence of the debtor. The general words "other cause" are made subject to no other limitation except that expressed by the words "satisfactory to the meeting." The absence of the debtor from the meeting is the fact that confers jurisdiction on the meeting to pass upon the cause of his absence, and it is left to the meeting to say whether the debtor is prevented from attending by a satisfactory cause. As this power is conferred upon the "meeting" it can be exercised by the meeting as such; ordinarily this would mean a majority of those composing the meeting, but I am not prepared to say that, considering the provisions and object of the statute, it may not be proper to hold that action of the meeting which in effect terminates all further inquiry should be taken by the same number and proportion of creditors as is required to pass and confirm the resolution. But that question does not arise in this case because here the action of the meeting was taken by a vote more than sufficient to pass and confirm the resolution for composition. All that is necessary to decide here, is whether the vote of such a proportion of the creditors is sufficient to terminate the examination of the debtor so far as the meeting is concerned, and my conclusion is that it is sufficient. The remedy for any wrong resulting from such action of the meeting, will doubtless be found in the provision that requires the court to be satisfied that the resolution for composition is for the best interest of all concerned.

[1] [Reprinted by permission.]

A question is made as to the action of the register in declining to permit a re-examination of certain claims to be entered into at the meeting of creditors called for composition. As I understand it, the creditors seeking such re-examination were in no position to ask such action of the register, there having been no petition for re-examination filed in compliance with the provisions of general order 34.

[For subsequent proceedings in this litigation, see Cases Nos. 14,033–14,035, and 11 Fed. 463.]

Case No. 14,030.

In re TIFFT.

[17 N. B. R. 550.] [1]

District Court, E. D. New York. April 3, 1878.

BANKRUPTCY—EXAMINATION OF BANKRUPT—PRIORITY—POWER OF ATTORNEY—REGISTER'S RULINGS—FEES.

1. At an adjourned composition meeting, after waiting a reasonable length of time, the register allowed a creditor to continue his examination of the debtor, which had been taken at regularly adjourned meetings. Subsequently the attorney for another creditor appeared and asked permission to continue an examination which had previously been closed, and that all the testimony taken at such meeting be stricken out, which was denied. It appearing that his power of attorney had been revoked, he then asked permission to go on with the examination in behalf of another creditor, which was also denied. *Held*, that the register was right in refusing to suspend the examination then pending. No other creditor was entitled to priority at that time.

2. The attorney asked permission to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained, which was refused. *Held*, no error.

3. The register refused to suspend the examination then pending until the questions certified by him could be decided. *Held*, no error.

4. The register is entitled to require that his lawful fees, for conducting the inquiry instituted by the creditor, should be paid or secured before entering thereon.

5. The register is also entitled to one dollar for his certificate.

[In the matter of Alanson H. Tifft, a bankrupt.]

By D. C. WINSLOW, Register:

This is an adjourned composition meeting for the purpose of examining the bankrupt, appointed to be held at 11 o'clock a. m. Mr. A. C. Aubrey was present as counsel for the debtor; Mr. Louis Henry as a creditor. Mr. C. H. Phelps does not appear at 11:20. Mr. Henry calls the debtor for further examination. Mr. Aubrey objects upon various grounds, among others that "a creditor desiring such examination must pay the register's fees for such examination." Register rules that his fees for such examination must be paid or secured, at the rate of $5 per day and twenty cents a folio for such examination. Mr. Henry excepts, and tenders $10 as security.

Mr. Phelps having appeared, asks to continue the examination of the bankrupt closed by me on March 11th, and moves that the proceedings thus far taken this morning at the instance of Mr. Henry be stricken out. Motion denied.

Mr. Phelps is asked by Mr. Aubrey for whom he appears. Mr. Phelps says for the Enterprise Manufacturing Company.

Mr. Aubrey presents power of attorney to Wm. Berri and others in behalf of the Enterprise Manufacturing Company of Pennsylvania, and revoking all previous powers. Mr. Phelps objects to the sufficiency of the acknowledgment, and that it had been corruptly obtained. Register rules the acknowledgment sufficient, and files the power of attorney.

Mr. Phelps asks to be allowed to examine the bankrupt as to the manner of obtaining the revocation of the power of attorney and the obtaining a new one. Register denies the permission for the present. Mr. Phelps excepts to the ruling, and then asks permission to go on with the examination of the bankrupt on behalf of the Brooklyn Brass & Copper Company. Register says he will allow him to go on at the proper time, but that the time now belongs to Mr. Henry.

Mr. Phelps objects to Mr. Henry's deposit as security for costs of examination, and also to the register requiring such a deposit, and also objects to paying the fee of $1 required of him by the register for this certificate, and pays it under protest.

The questions then to be submitted for the decision of the judge are:

I. Had Mr. Phelps priority under the circumstances in the examination of the debtor? A provision of the composition act is that "the debtor shall be present at the meeting and answer any inquiries made of him." Having waited twenty minutes after the appointed time for the meeting, and a number of creditors being present besides Mr. Henry, I saw no reason why the examination, which he had taken on the 12th, 13th and 14th insts., at regularly adjourned composition meetings, should not be continued, and it was not until after he had entered upon the examination of to-day that Mr. Phelps appeared and claimed priority. In point of fact, the creditor for whom Mr. Phelps had examined the debtor thus far had revoked his authority, and Mr. Phelps, if continuing the examination at all, must do it on behalf of some other creditor.

II. Was the register right in denying an examination of the debtor, as to the manner of obtaining the revocation of the power of attorney from the Enterprise Manufacturing Company to Mr. Phelps, and the execution of a new power of attorney to Mr. Berri and others? I do not think that those questions were proper subjects of inquiry at that time. Mr. Henry had entered upon the examination of the debtor, and I saw no reason for interrupting him for such a purpose.

III. Mr. Phelps demanded to examine the

[1] [Reprinted by permission.]

bankrupt on behalf of the Brooklyn Brass and Copper Company, which was also denied for the reason that, in my opinion, Mr. Henry had precedence.

IV. Mr. Phelps objected to the register's requiring a deposit as security for the costs for the examination of the debtor by Mr. Henry. The real objection of Mr. Phelps probably was to the precedent made by Mr. Henry, which might be urged against him hereafter. I think section 5008 is full authority for the course pursued by me. General order 29 is even more explicit. It provides that "the fees of the register shall be paid or secured in all cases before he shall be compelled to perform the duties required of him, by the parties requiring such services." It is for the examination of the debtors by the creditor that the fees were required, and not for the general purposes of the composition proceedings. I think the payment of these fees will operate as a wholesome restraint upon these examinations.

V. Mr. Phelps also objected to the payment of one dollar for this certificate. If he is entitled to this certificate at all, the fee bill clearly provides for the payment of one dollar for it.

VI. Mr. Phelps asked for a suspension of the examination by Mr. Henry, until the questions here certified could be decided. If this practice were tolerated, no proceedings in bankruptcy, however simple, could ever be brought to a close against the wishes of ingenious counsel.

March 22, 1878.

[For prior proceedings in this litigation, see Case No. 14,036.]

A. C. Aubrey, for bankrupt.

C. H. Phelps, for Joseph Scheider & Co.

BENEDICT, District Judge. I am of the opinion that the register was right in declining to suspend the examination then pending. No other creditor was at that time entitled to a priority. The register was also right in declining to allow an examination to be entered into, as to the circumstances under which the authority of the attorney claiming to examine the bankrupt had been revoked. The register was entitled to require that his lawful fees, for conducting the inquiry instituted by the creditor should be paid or secured. The statute, as well as general order 29, give him that right. Whether, where the proceeding is a meeting of creditors to consider a proposition for composition, and the inquiry is instituted by one of the creditors, the expense of such inquiry should be borne by the bankrupt, or the creditor, may not be entirely clear, I incline to the opinion that such fees are chargeable, in the first instance, to the creditor propounding the inquiry. In this case, therefore, the register was right in declining to continue the inquiry unless his fees were paid or secured by the creditor. The fee of one dollar for the certificate is correct. Such fee is plainly provided for in the fee bill. The register was correct in refusing to suspend the inquiry instituted by another party, pending the decision of the court of the question presented by this certificate.

[For subsequent proceedings in this litigation, see Cases Nos. 14,029, 14,031–14,035, and 11 Fed. 463.]

Case No. 14,031.

In re TIFFT.

[18 N. B. R. 78.] [1]

District Court, E. D. New York. April 7, 1878.

BANKRUPTCY — ADJUDICATION — ATTACHMENT IN STATE COURT—INJUNCTION.

1. The debtor filed a voluntary petition in bankruptcy, but objected to being adjudged bankrupt thereon, and no adjudication has ever been made. At the time of filing such petition he also filed a petition for composition. The first meeting of creditors has been held, and the resolution of composition adopted and confirmed by the requisite number of creditors. Prior to the conclusion of such meeting, an opposing creditor commenced an action to recover a provable debt described in the debtor's statement, and levied an attachment upon his goods. On application for an injunction to restrain proceedings in such action, pending the proceedings in composition, *held*, that the debtor is in no position to appeal to the court for protection, so long as he objects to being a bankrupt and declines to surrender himself to the court.

2. Semble, that, if the second hearing had been had, and the resolution directed to be recorded, the case would be different.

[In the matter of Alanson H. Tifft, a bankrupt See Cases Nos. 14,030 and 14,036.]

Charles Harris Phelps, for creditor.

A. H. Aubrey, for bankrupt.

BENEDICT, District Judge. This proceeding comes before the court upon the application of a petitioner in bankruptcy for protection and for an injunction to restrain proceedings in an action at law that has been commenced against him. In February last the petitioner filed his voluntary petition, but, as it appears, made objection before the register to being adjudged bankrupt therein. Accordingly, the register made no adjudication, and neither the petitioner nor any creditor having made application to the court therefor, no adjudication has ever been made. At the same time with his petition in bankruptcy, the petitioner filed also a petition for composition. The proceeding for composition is instituted in good faith by the debtor, and seems to have the approval of a greater part of his creditors. It has, however, been strongly opposed by some creditors, and at the time of giving notice of the present application, the first meeting of creditors had not been concluded; when the application came on to be heard it was made to appear that the meeting of creditors had been closed, and the resolution of composition adopted by the

[1] [Reprinted by permission.]

requisite number of creditors. The proceedings at the meeting and the propriety of the action of the creditors have been challenged by a single creditor, and doubtless will form the subject of future opposition to the recording of the resolution. This single creditor on the 11th inst., and prior to the passage of the resolution for composition, commenced an action at law against the petitioner to recover a provable debt described in the debtor's statement presented to the creditors at the composition meeting, and levied an attachment upon the goods of the petitioner. The petitioner thereupon made the present application to the court for an injunction to restrain the proceeding at law, pending the proceeding in composition.

On the part of the petitioner it is contended that in all cases where a composition proceeding is pending, the debtor is entitled to be protected by the bankrupt court, and reference is made to In re Hinsdale [Case No. 6,526], as authority for the position. On the part of the attaching creditor it is contended that the power to restrain actions at law against a voluntary bankrupt is conferred by section 5106, and that section 5106 has no application here, inasmuch as there having been no adjudication upon the petition in bankruptcy, the debtor is not a bankrupt, within the meaning of the section. I agree with the attaching creditor in his construction of section 5106. The debtor is not a bankrupt, within the meaning of that section. The section contemplated an adjudication and a consequent surrender of the bankrupt for the examination and disclosure in reference to his property before the protection of the court can be sought. It is with this understanding of the effect of section 5106 that general order No. 5 is framed. If the power exists to protect the petitioner, he not being as yet adjudged a bankrupt, it must be derived by implication from the provisions in respect to composition. In Re Hinsdale [supra], an involuntary case, where no adjudication had been made, it was said that the court had the undoubted right to protect the debtor from being harassed with suits, pending proceedings for composition, and in Alsberg's Case [Case No. 260], cited by Blum. Bankr. p. 36. But see In re Howes [Case No. 6,787], a voluntary case, where proceedings for composition had been commenced without an adjudication, it was said to be improper to make an adjudication in such a case unless upon the request of the debtor.

An expression of my views upon the questions decided in these two cases is not called for by the facts of this case. Neither of those cases furnishes authority for the position that protection from suits is a matter of right in a case like this. Here the petitioner has filed a petition asking to be adjudged a bankrupt, but at the same time so conducted his proceedings—whether properly or not, I do not say—that the result is that he has not been adjudged a bankrupt, and his property remains in his own possession and under his own control. His position is different from that in Hinsdale's Case, because there the debtor was denying any act of bankruptcy. If, according to the decision in Alsberg's Case, the petitioner was entitled to file his voluntary petition, and be adjudged a bankrupt or not, at his option, and if, according to the decision in Hinsdale's Case, he may be protected, although not adjudged a bankrupt, it does not follow that the petitioner is entitled to protection as a matter of right. In my opinion, this being a voluntary case, the petitioner is in no position to appeal to this court for protection until he is adjudged a bankrupt, and has surrendered himself for full examination and disclosure in reference to his property and affairs. I can hardly believe that it was the intention of the statute to make the adjudication dependent upon the option of the debtor who has filed his voluntary petition; but if such be the law, I see no reason why, when, as in this instance, the debtor has exercised his option adversely to an adjudication, the court can be expected to protect him. So long as he objects to being a bankrupt, and declines to surrender himself to the court, he has no ground upon which to seek the protection of the court. I have thus far considered this motion in the light of the facts as they stood when the suit at law was commenced. Since that time, as before stated, the meeting of creditors in the composition proceedings has come to a close, and the resolution of composition has been adopted and confirmed by the requisite number of creditors. But I do not see that this fact should affect the decision of this motion. If the second hearing had been had and the resolution directed to be recorded, the case would, perhaps, be varied; but it is entirely possible that a serious contest may arise before the resolution shall become effective. It may be months before the final termination of the composition proceedings, and the result of the contest cannot be foreseen It is much in a debtor who, although he has committed an act of bankruptcy by filing a voluntary petition, has prevented an adjudication from being made, to ask the court to give him the protection afforded to a bankrupt during the future progress of such a contest with his creditors. Application denied.

[For subsequent proceedings in this litigation, see Cases Nos. 14,029, 14,032–14,035, and 11 Fed. 463.]

Case No. 14,032.

In re TIFFT.

[18 N. B. R. 177.] [1]

District Court, E. D. New York. April 23, 1878.

BANKRUPTCY—COMPOSITION—EXAMINATION OF BANKRUPT.

Where a resolution of composition has been adopted and confirmed by the requisite number of creditors, the right of a creditor to examine the bankrupt under section 5086, Rev. St., is suspended.

[In the matter of Alanson H. Tifft, a bankrupt. See Cases Nos. 14,029–14,031, and 14,036.]

A. C. Aubrey, for bankrupt.
C. H. Phelps, for creditor.

BENEDICT, District Judge. This is an application on behalf of a creditor who has proved a debt for an examination of the bankrupt, in pursuance of the provisions of Rev. St. § 5086. On the part of the bankrupt the application is opposed, upon the ground that composition proceedings have been instituted and have progressed as far as the second hearing, the resolution of composition having been adopted and confirmed by the requisite number of the creditors.

I am of the opinion that the pendency of the composition proceedings in their present condition is sufficient to suspend the creditor's right to examine the bankrupt by virtue of section 5086. If the composition proceedings terminate in a valid composition, any examination of the bankrupt now had would avail nothing. If the composition fails, the examination of the bankrupt can be had with equal effect as if now had. The application must therefore be denied.

[For subsequent proceedings in this litigation, see Cases Nos. 14,033–14,035, and 11 Fed. 463.]

Case No. 14,033.

In re TIFFT.

[18 N. B. R. 227.] [1]

District Court, E. D. New York. May 20, 1878.

BANKRUPTCY — COMPOSITION — EXAMINATION OF BANKRUPT—PAYMENT OF FEES—SCHEDULE.

1. A refusal by the register to proceed further with the examination of the debtor without payment of his fees, or security, full opportunity having been given to make such payment or deposit security before the closing of the examination, affords no ground upon which a creditor can base an opposition to the recording of a resolution of composition.

2. So long as the inventory is produced before the register and at all times made accessible to the creditor for the purpose of examining it or the bankrupt in respect to it, the creditor is not prejudiced by a refusal of permission to take a copy thereof.

[In the matter of Alanson H. Tifft, a bankrupt. See Cases Nos. 14,036, 14,030, 14,031, and 14,029.]

[1] [Reprinted by permission.]

A. C. Aubrey, for bankrupt.
C. H. Phelps, for opposing creditor.

BENEDICT, District Judge. This case comes before the court upon a motion to record a composition resolution. It is founded upon the report of the register of the proceedings of the meeting of creditors in composition, by which it appears that the resolution was duly passed and confirmed by the requisite number of creditors. To this report is attached the examination of the bankrupt had at such meeting at the instance of certain creditors, and also a further examination of the bankrupt subsequently directed by the court to be had at the instance of an opposing creditor, who claimed that his right to put inquiries to the bankrupt had been abridged by the action of the meeting of creditors in excusing the bankrupt from further attendance at such meeting.

Objection to the recording of the composition is now made by the creditor referred to upon two grounds: one that he has been improperly deprived of the right to examine the bankrupt in accordance with the order of the court, by the refusal of the register, during such examination of the bankrupt, to proceed further without payment or security for his fees for such examination. It has previously been decided by the court in this same proceeding that the expense of an examination of the bankrupt on composition proceedings must be borne in the first instance by the creditor making the inquiry. It was therefore incumbent upon this creditor to comply with the direction of the court in regard to such expense, and the refusal of the register to proceed further without payment of his fees or security, full opportunity having been given to make such payment or deposit security before the closing of the examination, affords no ground upon which the creditor can base an opposition to the recording of the composition resolution.

The second ground of objection is that the register erroneously ruled that the opposing creditor was not entitled to take a copy of an invoice book, produced by the bankrupt, and purporting to show the amount, description, and value of his assets, by which ruling it is insisted the creditor was prevented from ascertaining for his own information and from showing to the court the true amount and value of the property now possessed by the bankrupt. The report of the ruling objected to shows that the counsel for the opposing creditor desired to copy the inventory for the purpose of appraising the goods mentioned therein. The register ruled that the bankrupt might be examined touching the goods, and the creditor might use the inventory upon the examination, but refused permission to take a copy of the inventory. This ruling was objected to at the time, but no certificate was asked for, and the question is now first raised before the court upon

this motion. It was the duty of the creditor to have brought the question before the court by a certificate, and not to have waited until the examination has been closed, and the case is before the court upon a motion to record the resolution. In the second place, so long as the inventory was produced before the register, and at all times made accessible to the creditor for the purpose of examining it or the bankrupt in respect to it, I see no prejudice to the creditor by the refusal of permission to take a copy.

My conclusion, therefore, is that no valid objection has been taken to the recording of the composition. The composition sought to be effected was one proposed after a full examination of the bankrupt's affairs by a committee of the creditors, and in accordance with the views of the great mass of creditors, but a single creditor opposing. The voluminous testimony taken fails to furnish any reason for doubting that it is for the best interest of all concerned that the composition be carried out. The order will therefore pass directing that the resolutions be recorded.

[For subsequent proceedings in this litigation, see Cases Nos. 14,034, 14,035, and 11 Fed. 463.]

Case No. 14,034.

In re TIFFT.

[19 N. B. R. 201.] [1]

District Court, S. D. New York. May 2, 1879.

BANKRUPTCY—JURISDICTION—SUMMARY RELIEF—ATTACHMENT IN STATE COURT—INJUNCTION—DISTRICTS.

1. Any district court in the United States may, in the exercise of its ancillary jurisdiction, and in aid of the court in which the proceedings are pending, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court in bankruptcy, as to persons or property within the district, if the relief sought is such as the court in which the proceedings are pending would grant if the persons or property to be affected were within reach of the process of that court, provided that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.

2. After the filing of a petition in bankruptcy no creditor can acquire a lien by attachment, judgment, and levy, or otherwise, on the property of the debtor which belonged to him at the time of the filing of the petition. The commencement and pendency of composition proceedings make no difference in this respect, and give the creditor no right to obtain a lien which he would not otherwise have had.

3. The bankrupt, on February 11, 1878, filed a voluntary petition, and also a petition in composition in the United States district court for the Eastern district of New York. The composition was duly accepted, and was confirmed and ordered to be recorded on May 21, 1878. The bankrupt was adjudicated April 18, 1878, but no assignee was appointed. After the petition was filed, a creditor residing in the Eastern district of New York, whose name and address and the amount of whose debt appeared on the schedule, commenced an action against the bankrupt, and caused an attachment to be issued to the sheriff of the city and county of New York, who thereupon attached certain goods in the store of the bankrupt. Judgment was rendered in said action in favor of the creditor on the 18th of April, 1878, and an execution was on the same day issued to said sheriff, who levied on the goods attached. On an application for an injunction to stay the sale, *held*, that the creditor acquired no lien on the property by his attachment, judgment, and levy; that the case was clearly one in which the court of the Eastern district would stay proceedings if the officer were within that district; that, while this court could not restrain the creditor, because it was a resident, and within reach of the process of the court of the Eastern district, yet an injunction staying the proceedings of the sheriff until the question of the bankrupt's discharge shall be determined was within the power of the court, and should be granted.

[In the matter of Alanson H. Tifft, a bankrupt. For prior proceedings in this litigation, see Cases Nos. 14,029–14,033, 14,035, and 14,036.]

H. E. Davies and C. H. Phelps, for creditor.

A. C. Aubrey and L. Henry, for bankrupt.

CHOATE, District Judge. This is a petition of Alanson H. Tifft, who has filed a voluntary petition in bankruptcy in the Eastern district of New York, asking an injunction against the sheriff of the county of New York to restrain the sale on execution of certain property of the bankrupt on which the sheriff has made a levy, and for other relief. The petition in bankruptcy was filed February 11, 1878. On the same day the debtor filed a petition in composition, and thereupon a meeting of creditors was called, in pursuance of the statute, to consider the same. The composition proposed was 33⅓ per cent., for which notes were to be given, payable in six, nine, twelve, fifteen, and eighteen months. The proposed composition was duly accepted by the creditors, and was confirmed by the court, and ordered to be recorded May 21, 1878. Among the creditors whose names and addresses and the amount of whose debt were mentioned in the schedule produced at said meeting was the Iron Clad Manufacturing Company, a corporation organized under the laws of New York, and having its principle office or place of business in the city of Brooklyn, in the Eastern district of New York. The petitioner was adjudicated a bankrupt April 18, 1878. No assignee has been appointed. On the 10th of April, 1878, the Iron Clad Manufacturing Company commenced an action in the marine court of the city of New York against the bankrupt, procured a warrant of attachment therein, and under the warrant the sheriff of the county of New York attached certain goods of the bankrupt in the store at which he transacted his business. On the 18th of April the corporation recovered judgment in said action for eight hundred and seventeen dollars and ninety-three cents. An execu-

[1] [Reprinted by permission.]

tion was on the same day issued thereon, and the sheriff made a levy on the same goods. No sale has yet been made under the execution. The relief asked in the petition is that the corporation and the sheriff be enjoined from enforcing the execution or judgment, or from removing, disposing of, or in any manner interfering with the property so levied on, or any other property belonging to the said petitioner, until the question of his composition or discharge shall be lawfully determined, and until the further order of this court, and for such other or further order or relief as the court shall deem equitable or proper. It appears by affidavit put in by respondent that the corporation violated no injunction of the bankrupt court in entering its judgment and issuing execution, and making its levy thereunder, and that the levy was made before the order of adjudication was entered on the 18th day of April.

I think it must be regarded now as settled by authority that the district courts of the United States can exercise the jurisdiction conferred upon them by the law, not only in the district where the original petition is filed, but in any district, when the exercise of such jurisdiction is essential to the complete and full execution of the bankrupt law, of 1867 [14 Stat. 517], and when the power of the court in which the original petition is filed fails because the persons or property against whom the relief to which a party is entitled is sought are beyond the limits of the district, and so cannot be reached by its process. While the particular applications of this principle have generally been on proceedings to collect or receive assets, yet the reasoning of the court is not limited to that single matter, but extends to all other proper relief. The theory of the decisions is that congress intended to provide ample machinery for the administration of the law throughout the United States. Sherman v. Bingham [Case No. 12,762]; Lathrop v. Drake, 91 U. S. 516. See, also, M'Gehee v. Hentz [Case No. 8,794]. When, therefore, by an amendment of the bankrupt law, the provisions relative to composition were adopted, the same power and jurisdiction of the district courts throughout the United States attached to these new proceedings; for they are in every sense proceedings in bankruptcy as truly as the proceedings theretofore allowed and prescribed by the bankrupt law. This court may, therefore, in the exercise of this ancillary jurisdiction, and in aid of the district court of the Eastern district, as to persons and property within this district, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court of bankruptcy in a case pending in the Eastern district, if the relief sought is such as that court would grant if the persons or property to be effected were within the reach of the process of that court; provided, of course, that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.

The questions therefore to be determined are whether the bankrupt would be entitled to the relief sought if the persons and property against which it is sought were in the Eastern district, and whether the district court in the Eastern district is unable to reach the same effectually by its own process.

As regards all relief sought against the creditor, the Iron Clad Manufacturing Company, the prayer of the petitioner must be denied, because upon the petition it appears that this corporation has its principal place of business in the Eastern district, and, in the absence of any averment or proof to the contrary, it must be presumed that the proper officers through whom the coercive power of the court must be exercised are within the reach of its process.

It is, I think, beyond dispute that, on the admitted facts in this case, the Iron Clad Manufacturing Company is bound by the composition, and that it did not, and could not, by the alleged attachment and levy on the bankrupt's property, obtain any lien thereon. The statute declares that "the provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." The same section provides "that, in all cases in bankruptcy now pending by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting, etc., resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor"; and further, that the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way, and creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

It seems to me too plain for argument that the creditors referred to as those who may meet and accept the composition are the same class of persons who in the bankrupt law are designated as the creditors who have the right to prove their debts and share in the estate of the bankrupt if administered through an assignee under the direction of the bankrupt court,—namely, those who are creditors at the time of the filing of the petition in bankruptcy,—and that the secured creditors here referred to are creditors who at

that point of time held security by mortgage, pledge, or other valid lien on the estate, real or personal, of the bankrupt; and that no creditor not then having such security can, either by the voluntary act of the bankrupt, or through attachment or levy, acquire any lien on the estate of the bankrupt, so as to be, within the meaning of this section, a secured creditor for the purposes of the composition. It is insisted, on behalf of this creditor, that, even after a voluntary petition in bankruptcy is filed, the title to the property still is in the bankrupt; that neither the filing of the petition nor the pendency, if no assignee is appointed, of the composition proceedings takes away the right of the creditor to sue the bankrupt and attach his property; that, unless restrained by injunction, a creditor so suing and attaching and levying becomes a secured creditor if his attachment or levy is made before the composition resolutions have any validity, which by the act is not till they are confirmed and recorded, and therefore, being a secured creditor, he need not, and is not at liberty to, take part in the meeting, nor bound thereby; that the composition does not, like an assignment, relate back to the time of the filing of the original petition in bankruptcy, but by the express provisions of the composition section has no validity till accepted and confirmed by the court. It is further argued that this debtor, although he filed his petition as a bankrupt, did not procure an order of adjudication thereon till April 18th, after this levy was made, and therefore was not entitled to an injunction against his creditors to stay their suits, as it has been determined in this case, and hence it is argued that the creditor had a perfect legal right, by his diligence in suing, to get this security by attachment and levy on the bankrupt's property.

It is true that it has been held that the filing of a voluntary petition in bankruptcy does not divest the bankrupt of the title to his property. Hampton v. Rouse [22 Wall. (89 U. S.) 263]. It has been also held in this case that, while a voluntary bankrupt declines to be adjudicated, he is not in a position to ask the protection of the court against suits by his creditors. In re Tifft [Case No. 14,031]. But there is nothing in these cases, or in any other cited by the learned counsel, which holds or gives any support to the position here taken that, after the filing of a voluntary petition, a creditor who was such at the time of the filing of the petition can acquire any lien or security whatever by attachment, judgment, and levy, or otherwise, in the property of the debtor, which belonged to him at the time of the filing of the petition. If there is one thing certain in the construction of the bankrupt law, it is that no such lien can be acquired. The law carefully preserves all existing liens,—that is, existing at the time of the commencement of the bankruptcy proceedings,—excepting only attachments made within four months before that time. This very exception shows conclusively that it was not intended that any creditor should acquire any lien by an attachment after that time, and if it be said that it is not so expressly provided in the bankrupt law, the answer is that it is so unmistakably to be implied from its terms that an express prohibition was wholly unnecessary. The obvious purpose of the law was to liquidate the debts of the bankrupt as of that point of time, and distribute all his property as it then was, subject to existing liens other than attachments of less than four months, equally among all his unsecured creditors, according to the amounts then due to them, respectively. While the title to the property is not divested until appointment of an assignee and a formal assignment to him, the bankrupt becomes at once disqualified to deal with his estate. It passes in his hands, unless taken from him by the court by warrant, or through a receiver, under the immediate protection of the bankrupt court, and the interests of creditors as cestuis que trust at once attach to it, and his control over it is restricted to acts done as trustee for the creditors, and those of a very limited character and extent. In re Vogel [Case No. 16,983]. While the personal exemption of the bankrupt from suits may depend upon his being an adjudicated bankrupt, the exemption of his property from any newly accruing rights of creditors by way of security, and the power and duty of the court to distribute it among the creditors, are the very fundamental principles of the act. The distinction is very plain between the personal exemption of the debtor from suits and the exemption of the estate from further liens. The cases of Wilson v. City Bank, 17 Wall. [84 U. S.] 473, and Clark v. Iselin, 21 Wall. [88 U. S.] 360, cited for the creditor, have no bearing on the question at all. Those decisions relate exclusively to liens existing before the commencement of bankruptcy proceedings. The same is true of In re Clapp [Case No. 2,785], and In re Shields [Id. 12,784]. They have no bearing on this case whatever. The case of Johnson v. Bishop [Id. 7,373], also has no bearing on this question. In that case the defendant, a sheriff, had attached property of a debtor. The debtor afterwards filed his petition in bankruptcy. The assignee in bankruptcy, being appointed, brought an action of detinue in the district court of the United States for the goods attached. That court dismissed the suit for want of jurisdiction, and the case came up before the circuit court on review. The question discussed was whether such an action would be based on or necessarily require the taking of the property from the possession of the sheriff by the marshal, and it was held that the action would not lie. It will be seen that the question did not nor could arise, whether a valid attachment could be made after the filing of a voluntary petition in bankruptcy.

The commencement and pending of composition proceedings make no difference in this respect, and give the creditor no right to obtain a lien which he would not have otherwise had. The statute allows these proceedings for composition, whether there has been an adjudication or not. It is said that this power to bind a dissenting minority being in derogation of common right, the statute giving the power should be strictly construed, and no doubt this suggestion, properly applied, has some force; but the composition statute is engrafted upon the bankrupt law as an amendment, and must have a fair and reasonable construction as constituting a part of a single system of law. It cannot surely be held that the mere fact that composition proceedings are instituted, which are expressly stated in the act to be of no validity till they are completed by acceptance or compromise, throws open the property of the bankrupt meanwhile to a race of diligence as between the very creditors who, if the composition is accepted, will be bound thereby. This would be a construction which would subvert the very purpose for which the composition is allowed, and defeat its intended equal distribution of a stipulated percentage among the creditors named in the schedule. The composition proceedings, therefore, instead of furnishing a reason which did not exist before for allowing an attachment after the filing of the petition, furnish a new ground for holding that no such attachment was intended to be allowed. It has been recently held by Judge Woods that, even after the confirmation of a composition, and the debtor's failure to comply with its terms, the court has power under Rev. St. § 2806, to stay suits of creditors. In re Bayly [Case No. 1,144]. The reasoning of that case is conclusive that the pendency of composition proceedings does not enlarge the rights of creditors to acquire liens on the debtor's property after the filing of a voluntary petition. The right that a creditor not bound by the composition may have after the confirmation of the composition, from the benefits of which he is excluded, either in the way of carrying on his suit, or reaching property which the resolutions of composition have remanded to the uncontrolled custody and disposal of the bankrupt, is not now in question. The position of such a creditor may be such that, by the common action of his debtor and the other creditors, new rights in this respect arise, but we have now to do with a creditor who is bound by the composition. As to him there can be no doubt that the proceeding in bankruptcy is still pending, so long as the composition is not paid, or upon the failure of the composition, till the question of the bankrupt's discharge has been determined. In re Bayley, ubi supra.

It is entirely clear, therefore, that the Iron Clad Manufacturing Company could not acquire any lien by its attachment and levy, and that, as against it, the court is bound to enforce the compromise by all orders it can lawfully make for that purpose; that, under the power of the court to stay proceedings in suits brought by creditors pending the determination of the question of the bankrupt's discharge, now that the bankrupt has been adjudicated, the court can stay the corporation and the sheriff from proceeding further under the execution.

It appears by the petition, and is not denied, that the sheriff has withdrawn his keeper. There is no need, therefore, of any proceeding to take the goods from the sheriff, nor to decide the question whether, so far as the sheriff is concerned, this could be done otherwise than by a proper action in the state court, or by some proceeding in the suit on which the execution issued; nor would it be proper for the court to express any opinion as to the relief which the bankrupt may have against this creditor in the Eastern district of New York, if any, by way of compelling them to release this pretended security, in order to enable the bankrupt to carry out his composition. An injunction staying the sheriff from any further proceeding under his execution, which is plainly within the power given to the court under Rev. St. § 5196, will effectually prevent the recapture of the goods. They are now in the possession of the bankrupt, subject to no lien, and by favor of this creditor.

The only remaining question is whether this relief could be granted by the district court of the Eastern district. In the case of In re Hirsch [Case No. 6,529], it was held to be a matter of serious doubt whether an injunction, even as against a creditor who is a party to the proceeding, could be effectually issued and served out of the district. In the case of In re Richardson [Id. 11,774], while this doubt was recognized, it was held that a district court in a district other than that in which the original petition was filed had no ancillary jurisdiction to issue an injunction staying the proceedings of creditors within its jurisdiction, and beyond the jurisdiction of the court in which the original petition was filed; and it was suggested that, as against suits thus carried on out of the reach of the district court in which the original petition was filed, the bankrupt and the other creditors who may suffer thereby are practically remediless. The case of Markson v. Heaney [Case No. 9,098], approves the views expressed in In re Richardson, and recognizes the same possible failure of justice, unless there should be an amendment of the bankrupt law, from the inability to extend the process of the court beyond the limits of the district. This whole subject, however, was carefully reviewed in Sherman v. Bingham (ubi supra), and, while the opinion was expressed that process of each court is limited to the territory of its particular district it was distinctly held that all other district courts throughout the United

States have ancillary jurisdiction in the same cases sitting in bankruptcy within their respective districts. Thus, it is said: "Judges of the district court must sit, undoubtedly, in the respective districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases is restricted to the territorial limits of the district; but the language of the first section of the bankrupt act, describing the jurisdiction of the district courts sitting as courts of bankruptcy, is that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy; showing, unquestionably, that they can only sit and exercise jurisdiction in their own districts. But the limitation that the proceedings in bankruptcy must in all cases be pending in that district is not found in that clause of the first section of the act," and, apparently referring to the cases cited above of In re Richardson and Markson v. Heany [supra], the court further says: "Contrary decisions have been made by several of the district judges, and in one case by a circuit judge; but it must suffice to remark, in respect to those decisions, that the reasons assigned in support of the conclusions do not appear to be satisfactory. They assume, what is not correct, that the jurisdiction of the district court is confined to the district in which the proceedings shall be pending. Such an expression is contained in the first clause of the second section of the act, which describes the revisory power of the circuit courts, but it is not contained at all in the first section of the act, and courts of justice have no rigat to enact such an amendment."

This case and its approval by the supreme court of the United States must be taken, therefore, to have set at rest the doubts that before existed on these points, and it is sufficient authority for the position—First, that the court of the Eastern district cannot effectually enjoin the sheriff of the county of New York, because the process by that court does not run out of the district; and, secondly, that any other district court of the United States may, in a case pending in the Eastern district, exercise ancillary jurisdiction in the same case over persons within reach of its own process, provided the relief sought properly falls within the first section of the bankrupt act. That jurisdiction extends, among other matters, to "the adjustment and various priorities and conflicting interests of all parties to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to all acts, matters, and things to be done under and in virtue of the bankruptcy." The power to stay suits by creditors, given by the 21st section of the bankrupt act (Rev. St. § 5606), and the power to enforce composition, are not expressly confined to the district court of the district where the petition is pending. They are therefore powers which any district court, in the due exercise of this ancillary jurisdiction, may properly exercise. In this case, therefore, I have no doubt of the power and duty of this court to enjoin the sheriff from any further proceedings under the execution.

The case is clearly one in which the court of the Eastern district would stay proceedings if the officer were within the district. The suit on the part of the creditor is a most clearly unlawful attempt, in direct defiance of the rights of the other creditors, and of the bankrupt, and in violation of the agreement by which he is bound to make good, by legal proceedings, a pretended lien which has no existence in fact or in law.

Injunction granted against the sheriff, staying all further proceedings till the question of the discharge of the bankrupt shall have been determined, without prejudice to any other proceedings in this or any other court for other relief.

[For subsequent proceedings in this litigation, see 11 Fed. 463.]

Case No. 14,035.

TIFFT v. IRON CLAD MANUF'G CO. et al.

[16 Blatchf. 48; [1] 7 Reporter, 456.]

Circuit Court, S. D. New York. Feb. 19, 1879.

BANKRUPTCY—ATTACHMENT IN ANOTHER DISTRICT—INJUNCTION—RIGHT OF COURT TO ISSUE.

1. A composition in bankruptcy by T., in the district court of the United States for the Eastern district of New York, was perfected, he having petitioned in voluntary bankruptcy. After such petition was filed, I., a creditor of T., brought a suit against him, in a state court in the city of New York, in the Southern district of New York, to recover a debt, and levied an attachment on property of T. After that, T. was adjudicated a bankrupt. I. obtained judgment, and issued an execution, and the sheriff was about to sell the attached property. I. was bound by the composition. T. then brought a suit in equity in the circuit court of the United States for the Southern district of New York, against I. and the sheriff, to restrain them, and to have the levy declared void and the property restored to T., and applied for an injunction pendente lite: *Held*, that said circuit court had no jurisdiction to grant the injunction, being forbidden to do so by section 720 of the Revised Statutes of the United States.

2. Although the suit be one arising under the laws of the United States, within section 1 of the act of March 3, 1875 (18 Stat. 470), yet the injunction asked is not authorized by the bankrupt law to be issued by the circuit court, and so within the exception in section 720 of the Revised Statutes.

[This was a bill by Alanson H. Tifft against the Iron Clad Manufacturing Company and Bernard Reilly, sheriff of the city and county of New York. See Cases Nos. 14,036, 14,030, 14,031, 14,029, and 14,033.]

Albert C. Aubrey and Louis Henry, for plaintiff.

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

Charles H. Phelps and Henry E. Davies, for defendants.

CHOATE, District Judge. This is a motion for an injunction pendente lite, upon the complainant's bill. The complainant filed his petition in voluntary bankruptcy, in the Eastern district of New York, on the 11th of February, 1878, and on the same day filed his petition for a meeting of his creditors to consider a proposed composition. The first meeting in composition was held February 28th, 1878 the composition proposed was 33⅓ per cent., for which notes were to be given, payable within eighteen months. On April 11th, 1878, the creditors accepted and confirmed the composition by the requisite majority [Case No. 14,029], and at a hearing before the court on May 21st. 1878, the resolutions were confirmed and ordered to be recorded [Id. 14,033]. On the 18th of April, 1878, the complainant was adjudicated a bankrupt. The Iron Clad Manufacturing Company, one of the defendants, was a creditor of the complainant, having a provable debt, and its name and address and the amount of its claim were inserted in the schedule annexed to the composition petition. On April 10, 1878, after the filing of the petition in bankruptcy, the company commenced an action in the marine court of the city of New York, by attachment, against the complainant, to recover this debt, and, on the 8th of April, 1878, judgment was entered therein for $817 92, and an execution was on the same day issued on the judgment and delivered to the sheriff. The warrant of attachment had been levied, on April 10th, on personal property of the complainant, and, on the 18th of April, the sheriff levied his execution on the same, and now threatens to sell the same under the execution, to satisfy the judgment. The bill further shows, that the loss of this property will disable the complainant from carrying into effect his composition; and the prayer of the bill is, that the levy and seizure be declared void and the property restored to the bankrupt, and that the defendants be enjoined, &c.

This motion for an injunction is resisted on the ground that the court has no power to issue a writ of injunction in this case, to stay proceedings in a state court, being prohibited from doing so, as it is claimed, by section 720 of the Revised Statutes, which provides as follows: "The writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It is not claimed on the part of the complainant that the proceeding sought to be enjoined is not a proceeding in a state court, but it is claimed that this is a case where the injunction is authorized by a "law relating to proceedings in bankruptcy," within the meaning of that section; and this is the question to be determined.

The jurisdiction in this case cannot be sustained on the ground of the citizenship of the parties in different states, because all the parties are residents and citizens of the state of New York. Neither can it be sustained under any provisions of the bankrupt law giving jurisdiction to the circuit court of the United States. Those provisions are contained in sections 4,979, 4,980 and 4,986. Section 4,979 gives jurisdiction only in cases between an assignee and a person claiming an adverse interest; and sections 4,980 and 4,986 give jurisdiction to the circuit court only by way of review or appeal from orders and decrees, in or arising from proceedings in bankruptcy, of the district court of the same district. It is evident, that the circuit court of this district, therefore, cannot entertain this bill under either of these sections. Section 630 of the Revised Statutes, evidently referring to the jurisdiction thus given, provides as follows: "The circuit courts shall have jurisdiction in matters of bankruptcy, to be exercised within the limits and in the manner provided by law."

The only statute under which this bill can be maintained, and that on which the complainant's counsel rely, is section 1 of the act of March 3, 1875 (18 Stat. 470), which provides, that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States." It is not questioned by the defendants' counsel that this is a suit of a civil nature, where the matter in dispute arises under the bankrupt law. The language of the act is general—"arising under the laws of the United States." There is nothing in the other provisions of the act indicating any purpose to except cases where the matter in dispute arises under the bankrupt law. The court, however, in cases coming within this act, does not sit in bankruptcy, although the matter in dispute may arise under the bankruptcy law. It sits as a court of common law or of equity, and section 720 of the Revised Statutes applies to all such cases. This new grant of power does not give jurisdiction of a case or proceeding in bankruptcy; and, therefore, where the relief asked for in a case under this statute is such as it is by statute exclusively within the power of a court sitting in bankruptcy to grant, or such as it is forbidden to any court of the United States to exercise except when sitting in bankruptcy, such relief cannot be given in a suit at law or in equity brought under this statute. Section 720 of the Revised Statutes is a re-enactment of the act of March 2, 1793 (1 Stat. 334,) as modified by the provisions of the bankrupt law of 1867. Prior to the passage of the bankrupt law, the courts of the United States were prohibited from issuing any injunction to stay proceedings in a

state court. But, the 21st section of the bankrupt law (14 Stat. 526,) re-enacted in section 5106 of the Revised Statutes, provided, that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that, if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed." Upon the revision of the statutes the power to issue the writ of injunction, necessarily implied in this section, was provided for in the re-enactment of the prohibitory statute of 1793, by introducing the words, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It is argued, on behalf of the complainant, that this is to be construed as meaning "under circumstances," or "upon a state of facts," where, by a law relating to bankruptcy, the stay by injunction is authorized; that the present is such a case; that, the act of 1875 having given the circuit court jurisdiction without regard to the citizenship of the parties, in suits in equity where the matter in dispute arises under the bankrupt law, the intention was to give the court full equity powers in such cases; and that the court can issue the injunction, because, upon the facts shown, the case is one in which a stay is allowed under the bankrupt law. There would be great force in the argument, if the power given in the bankrupt law were a general enactment authorizing a stay of suits in state courts, without anything to indicate that the power thus given was exclusively conferred on the district court sitting in bankruptcy. The section in question, however, (5106) in so far as it authorizes the issue of an injunction, has been held to be peculiarly addressed to the district court sitting in bankruptcy. In re Rosenberg [Case No. 12,054]. In that case, Judge Blatchford says, that the stay provided for is to be, and is, in practice, granted by the bankruptcy court. It is evidently one of those "things to be done under and in virtue of the bankruptcy," which, by section 4972, are exclusively committed to the bankrupt court, so far as they are committed to a court of the United States; and section 5106 contains in itself enough to show the same purpose. Therefore, the argument for the complainant fails because this is not the case mentioned in the exception, the laws relating to bankruptcy having expressly limited the power to issue the injunction not only to certain circumstances which may exist here, but to a court and a proceeding other than the present. The complainant's case is one which appeals very strongly to the court for the exercise of any powers which it is able to exercise for his relief, since this creditor is proceeding to obtain an advantage over other creditors, in direct violation of the composition agreement by which it is bound, but it cannot have an injunction in this suit. Perhaps the complainant can be relieved in the district court for this district, under its power as a court of bankruptcy, ancillary to the jurisdiction of the district court for the district where the original petition was filed. See Sherman v. Bingham [Case No. 12,762]; Lathrop v. Drake, 91 U. S. 516. The motion is denied.

[For subsequent proceedings in this litigation, see Case No. 14,034, and 11 Fed. 463.]

Case No. 14,036.

In re TIFT.

[17 N. B. R. 421.] [1]

District Court, E. D. New York. March 21, 1878.

BANKRUPTCY—EXAMINATION OF BANKRUPT—POWER OF REGISTER TO LIMIT.

The register has not the power, by an announcement beforehand, to fix a limit of time within which the examination of the debtor must be concluded, without regard to the nature of questions sought to be put, or the interest with which the same are propounded.

[In the matter of Alanson H. Tift, a bankrupt.]

Charles Harris Phelps, for opposing creditors.

A. C. Aubrey, for bankrupt.

BENEDICT, District Judge. The following conclusions are sufficient to dispose of the questions presented by the certificate of the register in this case. Where, in composition proceedings, the debtor attends at the first meeting of creditors, he can, at the instance of any creditor entitled to vote upon the composition resolution, be required to answer any proper question in respect to the particulars required to be furnished the meeting in his statement—i. e., the character and value of his assets, the amount and description of his debts, and the names and addresses of the creditors to whom such debts respectively are due. These inquiries are to be conducted under the direction of the register, who, by general order 36, is required to hold and preside at the meeting, and to report to the court the proceedings thereof, with his opinion thereon. A necessary incident to the power to conduct the inquiry is the power to prevent the examination from being conducted for the purposes of delay or vexation. The inquiry, although had at a meeting of creditors, is, nev-

[1] [Reprinted by permission.]

ertheless, a proceeding before a register, within the meaning of section 5009, and accordingly any issue of fact or of law raised and contested by any creditor in the course of such inquiry, may be adjourned into court for decision by the judge, in the manner prescribed by section 5009. A question of law is raised when under, objection, the register determines a certain course of examination to be frivolous and calculated needlessly to occupy time, and upon that ground refuses to permit the creditor to continue the examination. The proper mode of presenting such a question would be to allow a reasonable number of interrogatories to be put in order to show the course of the examination, which questions being excluded, if the register is satisfied that the examination is being continued for the purpose of delay or vexation, would enable the court to determine whether the line of inquiry was such as to justify the conclusion of the register. Of course a limit could properly be put to the number of interrogatories allowed to be propounded for that purpose. Peck v. Richmond, 2 E. D. Smith, 380. The register has not the power, by an announcement beforehand, to fix a limit of time within which the examination of the debtor must be concluded without regard to the nature of questions sought to be put, or the interest with which the same are propounded. In this case, the register, at a certain stage of the proceedings, announced that the examination of the debtor at the instance of a certain creditor must close at a certain hour, and upon the arrival of that hour terminated the examination, upon the sole ground that the hour had arrived at which he had announced that the examination must close. In this I am of the opinion that the register erred. The reason for the action of the register is stated by him to be that the examination was vexatious and not for a legitimate purpose. The examination, as submitted to me, does not enable me to say that the reason assigned has a foundation in fact. I cannot regard the course pursued in the former examination, which is outside of the inquiry commenced on the 11th. It is the latter only that can be considered on this occasion, and while I find in that examination many questions to have been put and answered, to which objections might properly have been made, I find no questions put and excluded which enable the court to say that that examination was vexatious, or for an improper motive. The papers show that that examination was not closed by reason of the nature of the questions being put, but solely because the limit of time fixed for the examination had arrived. In closing the examination upon that ground the register erred.

The other question certified does not arise in the pending examination, and therefore does not require determination at this time.

[For subsequent proceedings in this litigation, see Cases Nos. 14,030, 14,031, 14,029, 14,032, 14,033, 14,035, 14,034, and 11 Fed. 463.]

Case No. 14,037.

TIGHLMAN v. WERK.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603. Nowhere reported; opinion not now accessible.]

Case No. 14,038.

The TIGRIS.

[3 Law Rep. 428.]

District Court, D Massachusetts. Feb., 1841.

QUI TAM ACTION — VESSEL ENGAGED IN SLAVE TRADE — ALIEN LIBELANT — CONDITIONS — WAR — RIGHT OF SEARCH — WHEN ALLOWED IN TIME OF PEACE.

1. The right of search is a belligerant right, and not allowable in time of peace, unless against pirates or other offenders against the law of nations.

2. Where a vessel of the United States was seized by a British cruiser, on suspicion of being engaged in the slave trade, and was sent to the United States in charge of a British officer, and a libel, qui tam, was filed against her by the seizer; it was *held*, that process in rem would not be denied because the libellant was an alien, but would be granted on condition that he entered into stipulation, with sureties, to abide the final decree, and such interlocutory orders as might be made in the premises. Whether the libel could be ultimately maintained—quære.

This was the case of a libel, filed on the 15th of January last, by H. J. Matson, of the kingdom of Great Britain and Ireland, lieutenant in the navy of her Britannic majesty, and commander of her Britannic majesty's brig Water Witch, prosecuting as well for the United States as for himself, against the brig Tigris, of Salem, in this district, and the goods and effects on board said vessel, for a forfeiture of the vessel and her lading for certain alleged violations, on the coast of Africa, on the 7th day of October last, of several statutes of the United States for the suppression of the slave trade; the Tigris being then under command of Nathaniel Frye, of Salem. On notice to show cause why admiralty process should not issue as prayed for by the libellant, Robert Brookhouse and William Hunt, of Salem, asserted owners of the brig and cargo, offered the following objections against the issuing of a warrant of arrest, on the aforesaid libel: (1) Because the libellant had seized and brought said vessel and cargo into this district, by force and unlawful violence, and the same being so seized and brought in by him, was not now liable to this process in behalf of said Matson. (2) Because no offence had been committed on board of said vessel, such as is charged in said libel, and that of this they were ready to make proof. (3) That said libellant was an alien, and was now in a foreign country, and had not appeared in this court by himself, and no one exhibiting or offering any power or authority to act on his behalf, had appeared for him, to sue and prosecute the above libel. (4) That an alien could not sustain a libel qui tam, in the manner of this case.

These points were argued by—

Mr. Austin, Atty. Gen., and Mr. Hillard, for libellant.

Choate & Perkins, for claimants.

DAVIS, District Judge, then expressed a wish that the question, whether the libellant should enter into stipulation to respond in damages in case he did not succeed, should be argued, and it was accordingly done by the same counsel.

DAVIS, District Judge. In regard to the second objection, it does not present a pertinent subject of inquiry in this stage of the suit, but must be taken, at present, merely in way of protest. In reference to the third objection, considering the tenor of Lieut. Matson's letter, written off Angolan, and sent with the Tigris, there appears reason to infer, that his proceedings in detaining and sending this vessel to the United States, and to the port to which she belonged, was merely for the purpose of having her delivered with her cargo, to the proper authorities here, with the persons on board supposed to have offended against the laws of the United States respecting the slave trade; and not with intent to prosecute in the manner of this libel, if no suit of that description should be instituted by, or in behalf of, the United States. It seems reasonable, therefore, to require evidence of some authority, from that officer, for the commencement and prosecution in this case. In that respect, the affidavits of Mr. Jackson, the officer who came in charge of the Tigris, in regard to Lieut. Matson's instructions, are so far satisfactory, that the process prayed for will not be denied on that ground, nor will it be denied on the mere fact that the libellant is an alien.

It remains, then, to consider the first objection, which presents a question of no ordinary interest. This vessel, admitted to be a vessel of the United States, examined and sent to Salem, by Lieut. Matson, for an alleged breach of the laws of the United States in reference to the slave trade, arrived at Salem on the 30th of December last, in charge of a midshipman of the Water Witch, Mr. Jackson, with nine men; the original officers and crew of the Tigris remaining on board. On the 1st of January, six of the men from the Water Witch left the country for England, in the steamer Caladonia; one absconded. On the day of the arrival of the Tigris she was delivered up, as is alleged to the district attorney. Proceedings were had on the complaint of that officer against Captain Frye, his mate and crew, and those officers and two of the crew were held to recognise for their appearance at the next circuit court, for the offence alleged to have been committed by them; and the African boy, found on board the Tigris on the coast of Africa, and sent in that vessel to Salem, was committed to the care of the marshal of this district. The owners have from that time had possession of the property, but hold it, as is averred, in their behalf, under embarrassing circumstances, especially in reference to the cargo, for constant expectations of a threatened suit for forfeiture.

In the disposal of the case in its present stage, I am to consider, (1) whether admiralty process shall be ordered; and (2) if so, on what terms? It is contended, that the seizure of the Tigris by the libellants was unlawful; a violation of immunity from any such examination and detention by the Water Witch, or any other cruiser of another nation, and in the right of visitation and search, which is strictly a belligerent right, and not allowable in time of peace. This alleged unlawful act on the part of Lieut. Matson, it has been alleged, precluded all proceedings on his part, and in his behalf against the property thus seized and sent to the United States. In support of the positions, several authorities have been produced from judicial decisions at common law and in admiralty in the courts of Great Britain, as well as in the United States.

The law respecting the right of search is clear and decided; it is strictly a belligerent right, arising in that crisis from necessity and for self-preservation, and not allowable in time of peace, unless against pirates or other offenders against the laws of nations. Commercial nations, and none more than the United States, have been uniformly tenacious of this doctrine, and repeated but unsuccessful essays have been made between this country and Great Britain to arrange a mutual modified right of search for the suppression of the slave trade; a cruel and detestable traffic, the guilt and enormity of which, awakened humanity has aroused its energies to put down. By our law a certain description of this trade was declared piracy in 1820. So, also, was it declared by Great Britain in 1824. This declared character of the trade, however, did not render it piracy by the law of nations. It was a statute provision, only affecting the citizens of the respective nations. From the regretted failure of conventional agreement with Great Britain relative to a regulated search, there is reason to apprehend, that vessels of the United States have not unfrequently become participators in that inhuman traffic. This, indeed, was distinctly announced, and with just expressions of reprobation, in the message of the president of the United States, at the opening of the present session of congress. The evidences of guilt in this particular have been so apparent in some instances, that vessels of the United States, bearing the American flag, have been visited, examined and detained by British cruisers on the African coast, and sent to the United States for trial and adjudication. None, however, of this description have been sent to this district, but in the present instance.

The case of The Catharine [Case No. 14,755], recently decided in New York by Mr. Justice Thompson, was of that description. That vessel was the property of a citizen of the United States, and by the righteous judgment of the court was decreed forfeit, though captured and sent in by a British cruiser. Vessels of the United States in that predicament are, therefore, considered as liable to process and condemnation at the suit of the United States. So, also, it is as to proceedings, at their suit, in personam, against the offending individuals in command of such vessels or employed in them, in that prohibited trade. In the present instance, the United States proceeded by complaint against the alleged offenders, brought to Salem in this vessel, taking humane and suitable care of the African boy found on board; but the officers of the government, doubtless after due and sufficient examination and deliberate consideration, have instituted no proceedings against the vessel and cargo, and it remains to be determined whether the commander of the Water Witch can sustain this libel against the Tigris and cargo, or whether he is incapacitated by a wrongful exercise of the right of search.

The case involves questions of peculiar difficulty, when considered in all its bearings, and is of such importance that I am not prepared to direct an immediate dismissal of the libel, especially as it may be questionable whether such a disposal of the case might not preclude a remedy by appeal, if such a course be erroneous. I shall, therefore, order the usual admiralty process; but in view of all the circumstances of the case, the order will be on condition that stipulation be previously given by the libellant, or in his behalf, with competent surety or sureties, to abide the final decree, and such interlocutory orders as may be made in the premises.

This disposition of the case appears to me conformable to the character of the transaction, and the position of the libellant. It may be denominated a tentative suit. Security for costs and damages appears to be a reasonable requisite, preliminary to further proceedings; and public considerations which a court of admiralty should dutifully regard, have also an influence in deciding in this direction. Lieut. Matson's proceedings have been with all the alleviations and mitigations which were compatible with a coercive custody of the property. But the practice is a hazardous one, liable to hardship and abuse; and commanders should be impressed with a sense of their liabilities, in adopting a course with the navigators of other nations, in which they act on their own responsibility, and avowedly, as in this instance, "without orders or instructions to interfere with vessels belonging to citizens of the United States, whatever their employment may be."

In regard to the amount in which stipulation should be required, as I do not consider it a case for award of vindictive damages, if the libellant should fail in his suit, the sum of $1,000 will be sufficient; but the terms of the stipulation will admit of enlargement of the sum, if in the progress of the trial it should appear to be requisite. An early day will be assigned for the hearing, with a reserve of further discussion and consideration of all the objections which have been offered and urged against the issue of admiralty process.

At a subsequent day, the stipulations not having been put in, the libellant asked for further delay, which was objected to.

DAVIS, District Judge, said, that Lieut. Matson evidently regarded this interference with our commerce as a very delicate transaction; and it seemed quite doubtful whether he ever intended that the vessel and cargo should be proceeded against for a forfeiture. He avowedly acted without the authority of his government, and it was not to be expected that Great Britain would assume any responsibility in the case. The most that could be said was, that the vessel was sent to the courts of this country, trusting in the honor of the United States that she would be disposed of as right and justice might require. The officers of our government had not thought proper to proceed at all against the vessel and cargo. This libel was a private affair. The name of the United States was used, but without authority, and no particular leniency could be claimed on the ground of its being a national transaction. Then, how stood the case? Upon a former hearing, he had decided that the libel should not be dismissed because he was desirous that the question, being of importance, might come before the higher court. He must say, that, in his opinion, the libel could not be maintained; but he was willing that the libellant might try the point if he desired it, putting in stipulations for costs and damages. Delay was now asked to obtain sureties. He did not think it ought to be granted. There had already been delay enough. Libel dismissed.

TILDEN (UNITED STATES v.). See Cases Nos. 16,518–16,523.

TILESTON (SICKELS v.). See Case No. 12,837.

Case No. 14,038a.

TILFORD et al. v. OAKLEY.

[Hempst. 197.] [1]

Superior Court, Territory of Arkansas. 1832.

EQUITY — ADEQUATE REMEDY AT LAW — BILL TO ENFORCE MONEY DECREE.

A bill in chancery is not the proper remedy to enforce a decree in chancery for the payment of

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

money, the remedy at law being adequate and complete.

Appeal from Hempstead circuit court.

OPINION OF THE COURT. This is an appeal from the decree of the circuit court of Hempstead county, pronounced in a cause wherein John Tilford & Co. were complainants, and Allen M. Oakley, defendant, dismissing the complainants' bill. The complainants filed their bill to enforce a decree of the Bath circuit court of the state of Kentucky, decreeing the defendant Oakley to pay a specific sum of money. The only question for the consideration of this court is, whether a bill in chancery is the appropriate remedy to enforce a decree in chancery for the payment of a specific sum of money. We think it is not the proper remedy. The complaint had a clear and complete remedy at law, by an action of debt founded on the decree. Thompson v. Jameson, 1 Cranch. [5 U. S.] 282; Post v. Neafie, 3 Caines, 22; Sadler v. Robins, 1 Camp. 253. Decree affirmed.

Case No. 14,039.

TILGHMAN v. HARTELL et al.

[2 Ban. & A. 260;[1] 11 Phila. 500; 9 O. G. 886; 33 Leg. Int. 149; 22 Int. Rev. Rec. 138.]

Circuit Court, E. D. Pennsylvania. April 3, 1876.[2]

PATENT—INFRINGEMENT—DEFENCES—LICENSE—CONTRACT.

In a suit brought for the infringement of a patent, an answer to the bill, alleging a license from the complainant to practise the invention, raises a perfect defence, and where the license is proved the bill must be dismissed. The court will not decree the relief prayed for as the result of an inquiry touching the fulfilment or nonfulfilment of the contract.

[Cited in Kelly v. Porter, 17 Fed. 523.]

[This was a bill in equity by Benjamin C. Tilghman against Thomas R. Hartell and others, for the infringement of letters patent No. 108,408, granted complainant October 18, 1870. See Case No. 14,040.]

George Harding, for complainant.

M. D. Connolly, for defendants.

McKENNAN, Circuit Judge. The relief which the complainant seeks by his bill is contested on the ground that the court has no authority to grant it. There is nothing upon the face of the bill to warrant this objection, for it contains the usual averments of a bill for the infringement of a patent, coupled with an averment of an incomplete arrangement with the defendants for a license to use the patented invention, and prays for the appropriate relief of a discovery, an injunction, and account. It, therefore, presents a case which is clearly within the jurisdiction of the court.

The plea of the defendants, however, alleges that a license was actually granted to them by the complainant to practise the invention described in his patent. If this fact be true, it is a complete answer to the bill, because it would be beyond the power of the court, in this case, to decree the relief prayed for as the result of an inquiry touching the fulfilment or nonfulfilment of a contract between the parties. The only jurisdiction which the court has of such a subject is conferred by act of congress, and is limited to "suits in law or equity arising under the patent or copyright laws of the United States." Now, if a contract has been made, investing the defendants with a right to use the complainant's patent property, an injunction and an account could only be decreed as the consequence of an adjudication that the defendants had forfeited this right by reason of non-compliance with the terms upon which it was granted. But whether such an adjudication ought to be made would depend altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent rights. If this plea then is sustained by the proofs, the bill must be dismissed.

The only witnesses examined in the cause are the defendants and two gentlemen, who were agents of the complainant. They all agree in stating that the subject of a license to use the sand-blast process, as the complainant's invention is designated, was the subject of discussion, and that negotiations touching it were carried on, on different occasions, between one or other of the defendants and one or other of the complainant's agents. But did these negotiations attain the completeness of a determinate contract?

It was manifestly contemplated by both parties that a license to use the patented invention would be furnished to the defendants, and this was to be the conventional basis and evidence of their right to such use. That this license was to be in writing or printed is clearly shown by the proofs. It was, therefore, essential to constitute a contract between the parties, investing the defendants with a right to use the invention, that such license should be delivered to and accepted by the defendants. Without this, there was nothing to bind the complainant to allow the use of his invention for any period, nor the defendants to render a conventional consideration for the enjoyment of such right. Upon this hypothesis the defendants acted; for when the complainant's agent, at different times afterward, transmitted to them a printed schedule of royalties charged for the use of the sand-blast process, and a printed blank for a monthly return to the complainant of the various kinds and amount of work done by it, they regarded these papers as constituting the license for which they had previous-

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

[2] [Reversed in 99 U. S. 547.]

ly negotiated. In this, however, they were obviously in error. The purport and object of these papers are plain upon their face, and they certainly do not, by any possible construction, concede any right to the defendants to use the process to which they relate.

But some time afterward a formal printed license, embodying the terms upon which it was granted and was to be enjoyed, was sent in duplicate by mail to the defendants, one copy of which was to be retained by them, and the other to be returned with their signatures. No answer was made to this suggestion, and in a subsequent interview with one of the complainant's agents the defendants refused to sign any license or agreement, taking the ground that they had authority to use the invention in the papers before furnished to them. Under such a state of facts there is no warrant for the assumption by the defendants that they were licensed to use the complainant's invention, and so their plea, which sets it up, must be overruled.

It is, however, argued that the defendants purchased from the complainant three machines, which were specially adapted to work the patent process, and that such purchase carried with it the right to use the process until they were worn out. But the proofs show that the complainant furnished only parts of these machines, and that he did not hold a patent for any of them. What implication such a sale might warrant it is unnecessary to discuss, because it is very clear that the right to use the process at all was dependent upon an express license to that effect by the complainant. As it does not appear that such a license was obtained by the defendants, it follows that they had no right to work the process upon any machine.

The answer of the defendants admitting the complainant's title to the invention described in the bill and the use of it, there must be a decree for an injunction and account, as prayed for, with costs.

[On appeal to the supreme court the above decree was reversed. 99 U. S. 547.]

[For another case involving this patent, see Tilghman v. Morse, Case No. 14,044.]

Case No. 14,040.

TILGHMAN v. HARTELL et al.

[1 Wkly. Notes Cas. 52.]

Circuit Court, E. D. Pennsylvania. Oct. 24, 1874.

PATENTS—SALE OF MACHINE—LICENSE TO USE—INJUNCTION.

This was a motion for preliminary injunction upon a bill filed for alleged infringement of letters patent No. 108,408, granted to the complainant [Benjamin C. Tilghman] October 18, 1870, for "improvement in cutting and engraving stone, metal, glass, etc. (the sand-blast process). In the fall of 1873, complainant furnished defendants [Hartell and Letchworth] with machines for operating under the said patent, and sent bills for same and for expenses incurred in putting them up. Bill was not paid until March, 1874, complainant meanwhile accepting monthly payments of royalty according to a schedule furnished with machines. In March complainant requested defendants to sign a license wherein was reserved the privilege of changing royalties. Defendants refused, whereupon they were notified to cease operations. The bill and affidavit averred that the machines had been furnished and royalty accepted upon the faith of defendants' promise to sign license. Defendants denied promise, and averred simple agreement for an exclusive license to manufacture in Philadelphia, on terms fixed by schedule furnished with machines.

Mr. Harding, for complainant, argued that complainant's patent was for a process, and hence sale of machines would not amount to a license; admitting the general principle that sale of patented machines carried license to use same; also that the exclusive right to manufacture claimed by defendants amounted to an assignment or interest in the patent, which the statute requires shall be in writing.

Mr. Connolly, with whom was Letchworth, for defendants, maintained that a revocable right to manufacture, grantee not having right to permit others to manufacture, was a license and not an assignment, and hence need not be in writing; that patent, which contains claims for mechanical parts, was not purely a patent for a process, but for a machine as well, and hence sale of machines gave license to vendee to use them, and that complainant, suing merely for amount of license, and there being a direct issue on a question of fact, viz., license or no license, there existed no equity for an injunction.

THE COURT (McKENNAN, Circuit Judge) refused the injunction.

[NOTE. See Case No. 14,039, and 99 U. S. 547.]

Case No. 14,041.

TILGHMAN v. MITCHELL.

[9 Blatchf. 1; 4 Fish. Pat. Cas. 599.] [1]

Circuit Court, S. D. New York. Aug., 1871.

PATENTS—INFRINGEMENT—APPARATUS FOR DECOMPOSING FATTY BODIES—MEASURE OF DAMAGES—PROFITS—SAVING.

1. By the use, for decomposing fatty bodies into fat acids and glycerine, of the apparatus

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 1, and the statement is from 4 Fish. Pat. Cas. 599.]

described in letters patent of the United States granted to Robert Alfred Wright and Louis Jules Fouché, January 25th, 1859, for "improvements in process for decomposing fats," such fatty bodies are so decomposed by the action of water at a high temperature and pressure, and the process is used which is described and claimed in letters patent of the United States granted to Richard A. Tilghman, October 3d, 1854, for 14 years from January 9th, 1854, for an "improvement in processes for purifying fatty bodies."

2. The fact, that, in using the Wright and Fouché apparatus, a lower temperature is employed than that designated in the Tilghman patent, and the fact that more time is employed for the operation, and the fact that a continued agitation or circulation of the fat, water, and steam is kept up, make no difference in the conclusion.

3. The defendant having employed, before he adopted the Tilghman process, a process in which he used lime and sulphuric acid, and it being shown that, as a result of the use of the Tilghman process, he dispensed with the use of lime and sulphuric acid, and saved a quantity of fat which was lost by the use of the prior process, and obtained an increased profit from the glycerine produced: *Held*, that the plaintiff was entitled to recover, as profits, on an accounting, under a decree, in a suit in equity, such saving of lime, sulphuric acid and fat, and such increased profit in respect of glycerine.

[This was a bill in equity by Richard A. Tilghman against Roland G. Mitchell.]

Motion upon exceptions to the report of the master in the case of Tilghman v. Mitchell [Case No. 14,043].[2]

George Harding, for plaintiff.

Charles M. Keller and Stephen D. Law, for defendant.

BLATCHFORD, District Judge. This case comes up on exceptions taken by the plaintiff to the report of the master, filed February 7th, 1870. On the 1st of December, 1864, an interlocutory decree was made in the cause, on final hearing, by which it was referred to the master to state and report to the court an account of the gains and profits which the defendant had received, or which had arisen or accrued to him, from infringing the exclusive rights of the plaintiff by the manufacture, use, and sale of the improvements patented in the letters patent upon which the suit was brought. The bill was filed in 1862. It was founded on letters patent granted to the plaintiff October 3d, 1854, for an "improvement in processes for purifying fatty bodies." The term of the patent was for 14 years from the 9th of January, 1854.

In his specification the patentee says: "My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water, and thereby obtain at the same time free fat acids and solution of glycerine. I mix the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam. The process may be performed more rapidly, and also continuously, by causing the mixture of fatty matter and water to pass through a tube or continuous channel, heated to the temperature already mentioned, the requisite pressure for preventing the conversion of water into steam being applied during the process; and this, I believe, is the best mode of carrying my invention into effect. In the drawing hereunto annexed are shown figures of an apparatus for performing this process speedily and continuously, but which apparatus I do not intend to claim as any part of my invention." He then describes the construction of the apparatus shown by the figures in the drawing. The fat or oil, in a fluid state, is placed in a vessel with from one-third to one-half its bulk of warm water, a disc or piston, in the vessel, perforated with numerous small holes, being kept in rapid motion, up and down, in the vessel, to cause the fat or oil and water to form an emulsion or intimate mechanical mixture. A force pump, like those in common use for hydraulic presses, then drives the mixture through a long coil of very strong iron tube, which, being placed in a furnace, is heated by a fire to about the temperature of melting lead. From the exit end of the heating tubes, the mixture, which has then become converted into free fat acids, and solution of glycerine, passes on, through another coiled iron tube, immersed in water, by which it is cooled down from its high temperature to below 212° Fahrenheit, after which it makes its escape through an exit valve into a receiving vessel. The specification says: "The iron tubes I have employed and found to be convenient for this purpose, are about one inch external diameter, and about half an inch internal diameter, being such as are in common use for Perkins' hot water apparatus. The ends of the tubes are joined together by welding to make the requisite length, but, where welding is not practicable, I employ the kind of joints used for Perkins' hot water apparatus, which are now well known." The heating tube is coiled several times backwards and forwards, so as to arrange a considerable length of tube in a moderate space. The different coils of the tube are kept about a quarter of an inch apart from each other, and the interval between them is filled up solid with cast iron, which also covers the outer coils or rows of tubes, to the thickness of one-half or three-quarters of an inch. This casing of metal insures a considerable uniformity of tempera-

[2] [From 4 Fish. Pat. Cas. 599.]

ture in the different parts of the coil, adding, also, to its strength, and protecting it from injury by the fire. The exit valve is so loaded, that, when the heating tubes are at the desired working temperature, and the force pump is not in action, such valve will not be opened by the internal pressure produced by the application of heat to the mixture; and, therefore, when the force pump is not in action, nothing escapes from the exit valve, if the temperature be not too high. But, when the pump forces fresh mixture into one end of the heating tubes, the exit valve is thereby forced open, to allow an equal amount of the mixture, which has been operated upon, to escape out of the cooling tubes at the other end of the apparatus. The specification adds: "No steam or air should be allowed to accumulate in the tubes, which should be kept entirely full of the mixture. For this purpose, whenever it may be required, the speed of the pump should be increased, so that the current through the tubes may be made sufficiently rapid to carry out with it any air remaining in them. Although the decomposition of the neutral fats by water takes place with great quickness at the proper heat, yet I prefer that the pump should be worked at such a rate, in proportion to the length or capacity of the heating tubes, that the mixture, while flowing through them, should be maintained at the desired temperature for ten minutes before it passes into the refrigerator or cooling parts of the apparatus. The melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matters into fat acid and glycerine takes place with some materials (such as palm oil) at or below the melting point of bismuth. Yet the heat has been carried considerably above the melting point of lead without any apparent injury; and the decomposing action of the water becomes more powerful as the heat is increased. By starting the apparatus at a low heat and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed, can easily be determined. To indicate the temperature of the tubes," (the heating tubes,) "I have found the successive melting of metals, and other substances of different and known degrees of fusibility, to be convenient in practice. Several holes, half an inch in diameter and two or three inches deep, are bored into the solid parts of the castings surrounding the tubes, each hole being charged with a different substance. The series I have used consists of tin, melting at about 440° F.; bismuth, at about 510° F.; lead, at about 610° F.; and nitrate of potash, at about 660° F. A straight piece of iron wire, passing through the side of the furnace to the bottom of each of the holes, enables the workman to feel which of the substances are melted, and to regulate the fire accordingly. It is important, for the quickness and perfection of the decomposition, that the oil and water, during their entire passage through the heating tubes, should remain in the same state of intimate mixture in which they enter them. I therefore prefer to place the series of heating tubes in a vertical position, so that any partial separation which may take place while the liquids pass up one tube, may be counteracted as they pass down the next. I believe that it will be found useful to fix, at intervals, in the heating tubes, diaphragms pierced with numerous small holes, so that the liquids, being forced through these obstructions with great velocity, may be thoroughly mixed together. I deem it prudent to test the strength of the apparatus by a pressure of ten thousand pounds to the square inch, before taking it into use; but I believe that the working pressure necessary in using the heat I have mentioned, will not be found to exceed two thousand pounds to the square inch. When it is desired to diminish the contact of the liquids with iron, the tubes or channels of the apparatus may be lined with copper. The hot mixture of fat acids and glycerine which escapes from the exit valve of the apparatus, separates by subsidence. The fat acids may then be washed with water, and the solution of glycerine concentrated and purified by the usual means. The fat acids thus produced may, like those obtained by other methods, be used in the manufacture of candles and soaps, and be applied to various purposes, according to their quality; and, when desired, they may also be first bleached by chemical agents, or purified by distillation, in a current of steam, or in a vacuum, as is now well understood. I prefer that the fatty bodies should be previously deprived, as far as practicable, of such impurities as would cause the discoloration of the fat acids produced; but, when the fat acids are to be finally purified by distillation, this preliminary purification is of less importance. When sulphuric acid, nitrous fumes, or other corrosive agent, shall have been used for purifying, hardening, or otherwise preparing the fatty body to be operated upon, I take care that all traces of it shall be washed out or neutralized, before passing it through the apparatus. Some fatty bodies, (particularly when impure,) generate, during the process, a portion of active or other soluble acid, which might tend to injure the iron tubes. In such cases, I add a corresponding quantity of alkaline or basic matter to the water and oil before they are pumped into the tubes." The claim is in these words: "Having now described the nature of my said invention, and the manner of performing the same, I hereby declare, that I claim as of my invention, the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure."

This case was brought to a hearing before Mr. Justice Nelson, who, in November, 1864, delivered a written opinion [Case No. 14,-

043], in which he said: "It will be seen, not only from the specification, but also from the claim, that the improvement patented to the complainant is the invention of a process for producing fat acids and glycerine from fatty or oily bodies, which process consists in the action of water upon these bodies at a high temperature and pressure, and which may be effected in any vessel adapted to such use. There is no claim for the vessel or machinery thus used; but, as it was essential to the validity of the process, as an invention, to show how it may be adapted to practical use, two modes are pointed out—one, any convenient vessel well known to the art, and which some of the witnesses called a digester; the other, the coil apparatus; in either of which, as appears from the proofs, the process could be carried into practical effect, according to our construction of the patent. It was urged, on the argument, by the learned counsel for the defendant, that, upon the terms of the specification, the vessel must be entirely filled with the mixture of water and fatty matter, and then be closed, and the contents heated to the point of melting lead, and no steam be permitted to be made in the vessel; and that, upon this hypothesis, no vessel could be made of sufficient strength to endure the pressure. But we do not agree to this construction. In the first place, the degree of heat was given only as the maximum, and under which the process could be most rapidly carried into effect. For, the patentee, speaking upon this part of the specification, says, that no fixed degree of heat can be given, as the different fatty or oily substances that may be used will require different degrees; and that, by starting the vessel at a low heat and gradually increasing it, the best temperature may be ascertained for the particular substance used. In the next place, we cannot agree that a fair construction of the specification tends to the conclusion, either that the vessel was to be entirely filled, or that no steam was to be permitted in it. No doubt it is true, as urged for the defendant, if thus filled, and the vessel closed, and the contents heated to the point of melting lead, or under a pressure that would prevent the existence of steam, the process would be utterly impracticable; and, doubtless, the patentee knew this would be the result, as well as any of the experts. It would require but the commonest knowledge and experience in the business of life to reach such a conclusion. This moderate degree of knowledge, at least, should be kept in view, in construing the general terms of the description. Besides, the patentee does not direct that the vessel should be entirely filled. This is an inference of the learned counsel, from the direction that the vessel must be closed, and be of great strength, so that the requisite amount of pressure be applied to prevent the conversion of the water into steam. Now, all that was intended, as is apparent from the context, by the patentee, was, that the pressure should be so great as to prevent the body of the water in the vessel from passing into steam, as the heated water was the element that separated the fatty acids and glycerine. That there would necessarily be some steam, must have been obvious to the patentee, as well as to any one of common observation. Now, upon this interpretation of the patent, and which we think is the sound one, we repeat what we have already said, that the process could be, and has been, carried into successful operation by the means pointed out by the patentee. Previous to the date of this invention, there were but two modes known, or in practical use, for decomposing fatty substances, and obtaining from them fatty acids and glycerine—one called the lime saponification process; the other known as the distillation process. It is not material to give a particular description of these modes of separating the fatty acids and glycerine. It is sufficient to say, that they were different from the patentee's in the process or mode of producing the result, much more expensive and tedious, and have generally gone out of use, both in this country and in England, since the complainant's improvement has become generally known and practised. We have looked through the proofs in the case with some care, and, without going into them in this opinion, are satisfied that the complainant was the first person who discovered the chemical fact, that fatty or oily substances could be decomposed, and the fatty acids and glycerine separated, by the action of water at a high temperature and under pressure. Then, as to the infringement, it is not material to inquire whether the vessel or machinery used by the defendant is or is not similar to that described in the complainant's patent. These constitute no part of his invention. If the defendant, or the persons under whom he uses his machinery, have discovered new means of carrying into effect the complainant's process, he or they may be entitled to a patent for that improvement. But this would furnish no right to the use of the process. The question here is—does the defendant, whatever may be his vessel or machinery, manufacture or produce fat acids and glycerine, from fatty bodies, by the action of water at a high temperature and pressure, according to the process as explained by the plaintiff in his specification? We are satisfied that he does, and, hence, has infringed the patent. Our conclusion is, that the complainant is entitled to a decree for an injunction and profits."

Voluminous testimony was taken before the master on the reference made to him by the interlocutory decree, and his report is, "that no gains or profits have been proven

to have been received by, or to have arisen or accrued to, the defendant, from the manufacture, use, or sale of the improvements patented in the letters patent set forth and described in the order of reference." The plaintiff excepts to the report of the master, and alleges, in his exceptions, that the master erred in not reporting the following facts as proved: "1. That defendant has made a profit by the saving of the quantity of lime and sulphuric acid formerly used by him in his old process, to produce the fat acids and glycerine which he now produces (without using lime or sulphuric acid) by the action of water at a high temperature and pressure. 2. That the quantity of lime and sulphuric acid thus saved by defendant is thirteen and a half pounds of lime and twenty-seven pounds of sulphuric acid on each one hundred pounds of fat decomposed into fat acids and glycerine, by the action of water at a high temperature and pressure. 3. That defendant has made a profit by the saving of the quantity of fat formerly lost and thrown away with the refuse sulphate of lime produced in his old process, but which fat is no longer lost since his use of complainant's process, in which no refuse sulphate of lime is produced or thrown away. 4. That the quantity of fat thus saved by defendant is two pounds on each one hundred pounds of fat decomposed into fat acids and glycerine by the action of water at a high temperature and pressure. 5. That the quantity of fat decomposed by defendant into fat acids and glycerine, by the action of water at a high temperature and pressure, up to the 9th day of January, 1868, amounted to eleven million five hundred and two thousand eight hundred and ninety-two pounds (11,502,892 lbs.) 6. That the saving of thirteen and a half pounds of lime, twenty-seven pounds of sulphuric acid, and two pounds of fat, upon each one hundred pounds of fat decomposed, was made and realized by defendant upon the said eleven and a half million pounds of fat decomposed into fat acids and glycerine. 7. That the values or market prices of the lime, sulphuric acid, and fat, at the several dates when saved by defendant, are those stated by him in his testimony herein. 8. That defendant has made a profit by the increased strength, purity, and value of the glycerine obtained by his use of complainant's process, as compared with that obtained by his former process. 9. That this increase of value of the glycerine amounts to one-fifth of a cent on each pound of fat from which the glycerine was utilized and obtained, by the action of water at a high temperature and pressure. 10. That the quantity of fat from which the glycerine was utilized and obtained by defendant, by the action of water at a high temperature and pressure, amounted to ten million three hundred and thirty-seven thousand one hundred and forty-seven pounds (10,337,147 lbs.) 11. That the profits made by defendant, by his use of complainant's process, amounted to the principal sum of one hundred and sixty thousand six hundred and ninety-nine $^{5}/_{100}$ dollars ($160,699 05,) being the value of the following articles saved, at their market price when saved, viz.:

Lime saved, 1,552,889 lbs. Value.	$ 11,243 26
Sulphuric acid saved, 3,105,778 lbs. Value	100,663 51
Fat saved, 230,057 lbs. Value....	28,118 01
Profit on glycerine obtained from 10,337,147 lbs. of fat, $^{1}/_{5}$ cent per lb. fat.....	20,674 27
	$160,699 05

—together with interest on said sums from the dates when the saving was realized, as set forth in the calculation appended to the printed argument submitted by the counsel for complainant."

The plaintiff contends, that the defendant, by manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure, according to the plaintiff's process, instead of by the process used by him up to the time he adopted the plaintiff's process, has saved the quantities specified, of lime, sulphuric acid, and fat, in working the specified quantities of fat, and has made the specified additional profit from the specified quantity of glycerine; that such saving and profit are due to the use of the plaintiff's process; and that the defendant must account for the same as profits, under the interlocutory decree. The defendant contends that he has made no gains or profits by the use of the plaintiff's invention; that such invention is incapable of practical use: and that whatever saving the defendant has made by working the process which he uses, is due to something other than any invention of the plaintiff's.

The defendant formerly used, in his manufactory, what was known as the lime saponification process. Twenty-five pounds of water and one hundred pounds of fat were put into a vat. From nine to fourteen pounds of lime were slaked in another vat with sixty-six pounds of water, and the product was then gradually poured into the fat and water, which were boiling, and the whole was kept boiling for about eight hours. It was then allowed to stand and cool, and the water was drawn off, carrying in it the glycerine. The residue, called lime soap, was then decomposed by sulphuric acid, and produced free fat acids. The defendant, since abandoning this old process, has worked under and according to letters patent of the United States, granted to Robert Alfred Wright and Louis Jules Fouché, January 25th, 1859, for "improvements in process for decomposing fats." All the fat he has treated has been treated according to the process, and by the apparatus, described in that patent. The specification of that patent states, that the apparatus which

it describes is chiefly intended for the decomposition of fatty substances into fatty acids and glycerine. A detailed description of the apparatus and of its action is given. There are two boilers. The lower boiler, or first boiler, is completely filled with water. The upper boiler, or second boiler, is filled with water up to one-third of its height, and then filled up to a certain point with the fatty bodies to be decomposed. The first boiler, which is strong enough to resist a pressure of from ten to twenty atmospheres, is gradually heated till the proper pressure, according to the nature of the fatty matter, is attained. The superheated water in the first boiler ascends through a tube, which runs from the top of the first boiler into the upper part of the second boiler, and there terminates in a rose jet discharging downwards. The water, passing through the holes in the rose jet, descends through the fatty matter, and passes out of the bottom of the second boiler, through a tube which enters the top of the first boiler, and passes through its interior to near its bottom, and there discharges into it. The mixture of fatty matter and water, carried down by the passage from the second boiler to the first boiler, is again heated, to recommence its ascending motion, and so on. A continuance of this operation during a period of from five to eight hours, according to the nature of the fatty bodies operated on, and according to the variation of pressure, varying from ten to twenty atmospheres, decomposes the fatty bodies into glycerine and fatty acids, the glycerine remaining dissolved in the water, and the fatty acids floating in the second boiler. The patentees say, in their specification: "We are aware that, firstly, the decomposition of fatty bodies by water, under the influence of heat and of pressure, is a well known scientific fact. Water is substituted for the organic basis; it forms a perfect and fixed combination with the fatty acids, while the glycerine is dissolved in the excess of water. Secondly, that, as this chemical action takes place under the influence of a weak affinity, it is necessary, in addition to the above named physical and chemical conditions, to insure a perfect molecular agitation of the whole mass, and that we wish it to be understood that what we wish to claim and establish as of our invention, consists of an apparatus wherein the water and the fatty matters are heated separately in two different boilers. The first boiler is heated by the source of heat, while the second boiler is heated by the first boiler. In these boilers, the agitation necessary for the chemical action and combination is produced by the pressure of the heated water in the first boiler. This water circulates continuously from the first boiler to the second boiler, and from the second boiler to the first, in a continuous and self-acting or automatic manner, without interruption. The characteristics of our apparatus are, that it produces agitation by circulation alone, a continuous and automatic circulation, produced by the pressure of water. Lastly, our apparatus effects the chemical action in a continuous manner, without the aid of any manual or other assistance." The claim of the Wright and Fouché patent is as follows: "Having described the nature of our invention, and the manner in which the same is to be performed, we do not claim the application of superheated water for decomposing fatty bodies, nor the form of the apparatus above described, which may vary somewhat according to conditions and circumstances; but what we claim as our invention is, producing a continuous automatic circulation of highly heated water, in a very finely divided state, through the bodies under treatment, by means of an apparatus constructed and employed substantially as herein shown and described."

It is manifest, that, in using the Wright and Fouché apparatus, the defendant decomposes fatty bodies into fat acids and glycerine by the action of water at a high temperature and pressure, and thus uses the plaintiff's process. But the defendant urges that he works at a lower temperature than that designated by the plaintiff, and takes more time for the operation, and employs a continued agitation or circulation of the fat, water, and steam; and that these are features not described in the plaintiff's patent, and features to which all the profits made by the defendant are entirely due. Stress is particularly laid on the fact, that, without the use of means to produce agitation and circulation of the fat, water, and steam, the employment of heat and pressure would result in no pecuniary profit. The other points urged are disposed of by the opinion of Mr. Justice Nelson.

It is a mistake to contend that the plaintiff does not, in his specification, enforce the necessity of keeping up an intimate mechanical mixture of the fat and water during the operation. He directs that the fat and water shall be mixed, and he calls, in many places, the liquid that is being operated upon, a mixture. His description and drawing of the coil apparatus state and show that a disc or piston, perforated with numerous small holes, is kept in rapid motion, up and down, in the vessel into which the fat and water are first put, to cause them "to form an emulsion or intimate mechanical mixture." He also states, in reference to the coil apparatus, that "it is important for the quickness and perfection of the decomposition, that the oil and water, during their entire passage through the heating tubes, should remain in the same state of intimate mixture in which they enter them;" and he suggests two devices for maintaining such thorough mixture. It is impossible to maintain the proposition that the plaintiff's specification ought not to be construed as fully disclosing the desirableness of keeping the fat and water intimately mixed during the operation, with a view to

effecting a speedy and complete decomposition, as well when the "convenient vessel" first named is used, as when the coil apparatus is used. The evidence is, that the decomposition will take place without mixture, in a time proportioned to the degree of heat and the extent of the area of surface contact between the fat and the water. Having indicated the propriety of using means to maintain an intimate mixture of the fat and water, the plaintiff is entitled to use, in carrying out his process, any means then known and used in the same art, for maintaining a mixture of fat and water. In the lime saponification process, the stirring or agitation of the fat, water, and lime during the process, in order to keep up an intimate contact between the particles, was employed; and the proofs show the description or use, before the date of the plaintiff's patent, of a vertical churn agitator, to mix fat, water, and lime while being boiled in an upright boiler under pressure, of a rotary paddle-wheel agitator, to mix fat, water, and lime while being boiled in a horizontal boiler under pressure, and of a stirrer rotating on a vertical shaft, to mix fat, water, and lime while being boiled in an open tub. The plaintiff's specification is addressed to persons skilled in the department of manufacturing to which it is applicable; and the evidence is abundant to show, that such persons would have understood, as a matter of course, that, with a view to practical and profitable manufacturing, there must be agitation of the mass, and would have readily used known devices at hand to produce such agitation.

The defendant has entirely failed to show that the plaintiff's process, carried out as described in his patent, is not practicable or practical. It was put in practical operation in London in 1857, a patent having been taken out for it in England, by the plaintiff, January 9th, 1854. It was put in operation in Cincinnati, Ohio, in 1860, and has been in use, under license from the plaintiff, in the United States, ever since, there being ten factories in the United States working under such license. The defendant was notified by the plaintiff in September, 1860, not to infringe the patent, and what he has done has been done wilfully, and not innocently.

It is abundantly shown, that the saving of lime and sulphuric acid and fat, and the increased profit from the glycerine produced, result from the use of the plaintiff's process, and not from the special apparatus of Wright and Fouché. Such apparatus is one means of producing stirring or agitation and mixture. The plaintiff's process, when carried on with other means of maintaining the mixture, produces, as is shown by the evidence, the same saving of lime and sulphuric acid, which is produced by the defendant in using the Wright and Fouché apparatus; and such apparatus is useless unless a high heat and pressure be employed. The defendant previously used the lime saponification process, and abandoned it for the plaintiff's process. He must be regarded as having made directly, by using the plaintiff's process, the saving of lime, sulphuric acid, and fat, and the profit in respect of glycerine, which existed between the use of the two processes, and which saving and profit he would not have made if he had continued to use the old process. He has not made the saving by using the Wright and Fouché mixing apparatus. Ropes used the heat and pressure with a paddle-wheel mixer, and made the saving of lime and sulphuric acid. Jones used a pump to mix, with heat and pressure, and made the same saving. The use of superheated water is the effective decomposing agent in the defendant's process. If the use by the defendant of the Wright and Fouché mixing apparatus saves labor or fuel, as compared with any prior process, the plaintiff is not entitled to the saving thus effected. But the defendant has not shown any such saving of labor or fuel. The proof as to the saving of lime, sulphuric acid, and fat, and as to the increased profit on the glycerine produced, at the quantities and values set forth in the plaintiff's exceptions, is full and clear.

On the hearing, the defendant's counsel did not dispute, that, if the saving of the lime, sulphuric acid, and fat was due to the use of the plaintiff's process, the plaintiff was entitled to the value of such saving, as profits. That is, undoubtedly, a correct principle, as applicable to an accounting for profits, in a case of this description, in equity.

The plaintiff's exceptions above set forth must be allowed. But, as the calculations based on the evidence taken before the master, and furnished by the plaintiff, show just how much the plaintiff is entitled to recover, it is unnecessary to send the case back to the master. The account was taken down to the expiration of the patent, on the 9th of January, 1868. The savings are calculated at thirteen and a half pounds of lime, twenty-seven pounds of sulphuric acid, and two pounds of fat, on each one hundred pounds of fat worked. This, at the prices shown by the evidence, makes the saving, in the aggregate, of lime, sulphuric acid, and fat, $140,024 78. The increased profit on glycerine, at one-fifth of a cent per pound on the quantity of fat worked, was $20,674 27. The saving of lime, sulphuric acid, and fat, is calculated from and including the 1st of July in each year, to and including the 30th of June in the following year, covering the period from and including December, 1860, to and including January 9th, 1868. The increased profit on the glycerine is calculated from and including the 1st of January in each year, to and including the 31st of December in the same year, but only covers the fat worked from and including July 1st, 1861, to and including January 9th, 1868. I think that the plaintiff is entitled to interest from and after the close of each of such years, on the ascertained value of the savings

and profits for the twelve months next preceding. Making up the account on these principles gives the following results:

For the year ending	Increased Profit from Glycerine Sold. Amount received for glycerine sold.	Quantity of fat worked.	Profit at 1-5 of a cent per lb. of fat worked.	Interest to September 1st, 1871. Years.	Per cent.	
Dec. 31st, 1862	$ 6,043 82	Lbs. 1,502,316	$3,004 63	8 2-3	60 2-3	$1,822 81
" " 1863	7,513 97	" 1,050,426	2,100 85	7 2-3	53 2-3	1,127 46
" " 1864	16,490 16	" 1,395,142	2,790 28	6 2-3	46 2-3	1,302 13
" " 1865	15,278 70	" 1,993,051	3,986 10	5 2-3	39 2-3	1,581 15
" " 1866	17,804 88	" 1,613,263	3,226 52	4 2-3	32 2-3	1,054 00
To Jan'y 9th, 1868	35,777 94	" 2,782,049	5,565 80	3 2-3	25 17-30	1,417 76
	$103,774 47	Lbs. 10,337,147	$20,674 27			$8,303 31

For the year ending	Savings of Lime, Sulphuric Acid, and Fat. Quantity of fat worked.	Value of lime, sulphuric acid, and fat saved.	Interest to September 1st, 1871. Years.	Per cent.	
June 30th, 1861	Lbs. 1,165,745	$ 8,006 80	10 1-6	71 1-6	$ 6,402 77
" " 1862	" 1,502,316	11,063 28	9 1-6	61 1-6	7,008 94
" " 1863	" 1,050,426	8,718 84	8 1-6	57 1-6	4,984 27
" " 1864	" 1,395,142	14,556 26	7 1-6	50 1-6	7,302 20
" " 1865	" 1,993,051	33,093 58	6 1-6	46 1-6	14,673 90
" " 1866	" 1,613,263	20,254 43	5 1-6	36 1-6	9,495 35
To Jan'y 9th, 1868	" 2,001,102	28,814 53	4 1-6	29 1-6	8 267 17
	" 781,787	8,006 95	3 29-30	25 17-30	2 062 47
	Lbs. 11,502,892	$140,024 78			$80,287 25

This makes the total amount for which the plaintiff will be entitled to a decree, September 1st, 1871, $229,291 62. Let a decree be entered of that date for that amount, with costs.

[For other cases involving this patent, see note to Tilghman v. Mitchell, Case No. 14,042.]

[NOTE. Pending these proceedings the patent expired, and was extended for seven years from 1867. A bill was then filed, accompanied by a motion for a provisional injunction to restrain the infringement during the extended term. The motion was granted. Case No. 14,042. Both of these cases were then taken to the supreme court on appeal, and the decree in each case was reversed, and the cases respectively remanded, with directions to dismiss the respective bills of complaint. 19 Wall. (86 U. S.) 287.]

Case No. 14,042.

TILGHMAN v. MITCHELL.

[9 Blatchf. 18; 4 Fish. Pat. Cas. 615.] [1]

Circuit Court, S. D. New York. Aug. 26, 1871.[2]

PATENTS — EXTENSION — PRELIMINARY INJUNCTION — NOVELTY — APPARATUS FOR DECOMPOSING FATTY BODIES — LICENSE.

1. On a motion for a preliminary injunction to restrain the infringement of a patent which had been extended, although its extension had been opposed by the defendant, on testimony introduced by him, such injunction was granted, it appearing that the novelty of the invention and the validity of the patent had been sustained, on final hearing, in several suits in equity.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

2. The construction put in the case of Tilghman v. Mitchell [Case No. 14,043], on the specification of the patent granted to Richard A. Tilghman, October 3d, 1854, for fourteen years from January 9th, 1854, for an "improvement in processes for purifying fatty bodies," approved.

3. If the extension of a patent is regular on its face, no question of irregularity or fraud in granting it can be raised by an infringer, in a suit against him for infringement.

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 365.]

4. Although an inventor obtained a patent in the United States for his invention, after he obtained a patent in England for it, and the English patent expired previously to the granting of an extension of the patent for the United States, the fact that such English patent expired before the patent for the United States was extended, forms no objection to the validity of such extension.

5. The novelty of the invention covered by the said patent to Tilghman, and the validity of the said patent, sustained.

6. The defendant not allowed to give a bond as security, in place of having a preliminary injunction issued against him.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

---

[1] [Reported by Hon Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 18, and the statement is from 4 Fish. Pat. Cas. 615.]

[2] [Reversed in 19 Wall. (86 U. S.) 287.]

7. The defendant expressing a willingness to take a license from the plaintiff, under the extended patent, at the usual rate of license established by the plaintiff, an order was made, that, unless the defendant should accept and execute a license, duly executed by the plaintiff, in the usual form, within ten days, under the extended patent, an injunction should issue, as prayed for in the bill.

[This was a motion for a provisional injunction to restrain the defendant Roland G. Mitchell from infringing letters patent [No. 11,766] for an "improvement in processes for purifying fatty bodies," granted to complainant Richard A. Tilghman, October 3, 1854, for fourteen years from January 9, 1854, the date of a prior English patent, and extended November 23, 1867, for seven years from January 9, 1868. A former suit between the same parties is reported in [Case No. 14,043], and [Id. 14,041]; but as the patent expired during the pendency of that suit, the present bill was filed, accompanied by a motion for a provisional injunction to restrain the defendant during the extended term.] [3]

George Harding, for plaintiff.

Charles M. Keller and Stephen D. Law, for defendant.

BLATCHFORD, District Judge. This is a motion for a provisional injunction, founded on letters patent granted to the plaintiff, October 3d, 1854, for fourteen years from January 9th, 1854, for an "improvement in processes for purifying fatty bodies." The patent was, on the 23d of November, 1867, extended by the commissioner of patents, for seven years from January 9th, 1868. The bill was filed in March, 1871. The defendant is the same person who was the defendant in the suit in equity brought against him in this court by the plaintiff on the original patent, before its extension, and in which suit a decision has just been given by this court [Case No. 14,041], on a hearing on exceptions to the master's report.

The bill sets forth, that a suit in equity was brought, in Ohio, by the plaintiff, in 1859, against one Werk, for infringing the patent; and that a decree was made in it, in 1860 (Tilghman v. Werk [Case No. 14,046]), adjudging that the patent was valid. It also sets forth the bringing of the said suit in this court against the defendant, and the decision therein, on final hearing [Id. 14,043], adjudging the patent to be valid, and that the defendant had infringed it. It also sets forth, that, in 1868, the plaintiff brought two suits in equity in Ohio, one against Werk and others, and one against Shillito, for infringing the patent, as extended; that the defendants in those suits alleged in their answers, in defence, that the extension of the patent was void for want of jurisdiction in the commissioner of patents, and for want of due publication, and for want of a proper account of profits, and because of fraud and collusion between the plaintiff and the commissioner of patents; that such defendants, also, in their answers, set up, in support of a defence of want of novelty in the invention, various publications and patents, fourteen in number, references to which are specified, so that they can be identified; that such defendants, also, in their answers, alleged that the plaintiff's invention, as described and claimed in his patent, was not useful and practicable, and, in proof thereof, offered in evidence the testimony of one Moinier, a witness residing in Paris, France, which testimony had originally been taken on the reference before the master in such first suit against the defendant in this court, and is on file in this court, and was admitted by consent of the plaintiff to be read in said two suits under the extended patent against Werk and others and Shillito; that the defendants in said two suits examined as witnesses the defendant Mitchell, and his former partner Florence Verdin, to prove the want of novelty, of utility, and of practicability, in the invention described and claimed in the patent; that Werk and Shillito had been examined as witnesses on the part of the defendant Mitchell in such first suit against him in this court; and that said two suits in Ohio, under the extended patent, went to final hearing in May, 1870, and it was decreed that the plaintiff was the original inventor of the invention patented to him, and that the patent and the extension thereof were valid. An affidavit is annexed to the bill, setting forth, that, on the 2d of March, 1871, the defendant was using and working at his factory, in the city of New York, the same process for decomposing fat into fat acids and glycerine by the action of water at a high temperature and pressure, in the Wright and Fouché apparatus, which he had been using for several years previously and since the year 1861; that, in May, 1869, the defendant was decomposing every week about forty thousand pounds of fat into fat acids and glycerine, by the action of water at a high temperature and pressure, in the Wright and Fouché apparatus, by the same process which he had been using since the year 1861; that, in his answer to the bill in such first suit against him in this court, the defendant stated that he was then decomposing fat into fat acids and glycerine by the action of water at a high temperature and pressure, in the Wright and Fouché apparatus, and that the said process of decomposing fats in the Wright and Fouché apparatus, as practised by the defendant, was adjudged by this court, in November, 1864, to be substantially the same, in principle and operation, as that patented to the plaintiff, and to be an infringement thereof.

The defendant opposes the motion on an

[3] [From 4 Fish. Pat. Cas. 615.]

answer and on affidavits. The answer avers, that the Ohio suit, of 1859, against Werk, was decided without a full or complete presentation to the court of the state of the art bearing upon the branch of manufacture to which the patent relates, and that such decision is not, and was not, in any manner, conclusive as to the real merits of the issues in said cause; that the first suit in this court against the defendant was decided without a full and complete presentation to the court of all the testimony bearing upon the issues in the suit, and upon the state of the art relating to the branch of manufacture to which the patent pertains; that the defendant, since such decision, has obtained certain testimony as to the practical operation of the alleged invention described in the patent, as applied or demonstrated by the plaintiff, and under his direction, proving its practical inability to produce the results claimed by the plaintiff in his patent; that such testimony is highly pertinent to the issues in said cause, and, if it could have been introduced therein before the final hearing thereof, no decree, on final hearing, such as was made, would have been made, but such evidence would have shown the invalidity of the patent, and would have prevented any decree in the suit against the defendant; that, by the decree in the suit, liberty was given to the defendant to give bond in the penal sum of twenty thousand dollars, with a condition to pay, on final decree, either in this court or in the supreme court, on appeal, all sums of money which might be found due from him to the plaintiff, on an accounting before the master, in which case no injunction should issue against the defendant until a final decree in the cause; that the defendant duly gave such bond in such sum, and has since continued to carry on his business in the same manner as he was doing before the rendering of such decision and the entry of such decree against him, and that the plaintiff has made no application to have such order modified or set aside, or to have any injunction issued; that the master in said suit, under a reference, has reported that no gains or profits have been proven to have been received by, or to have arisen or accrued to, the defendant, from the manufacture, use, or sale of the improvements patented in the plaintiff's patent; that, in such suit against the defendant, the decision of the court was made under a misapprehension on its part as to the mode of operation in the process described in the plaintiff's patent, Mr. Justice Nelson considering that the specification did not require either that the vessel containing the mixture of water and fatty matter was to be entirely filled therewith, or that no steam was to be permitted in it, whereas the specification makes both such conditions necessary; that, except for such misapprehension, the decision would not have been against the defendant; that the report of the master is correct; that the application for the extension of the plaintiff's patent was not made or proceeded with in conformity with law, and in such a manner as to give the commissioner of patents jurisdiction of the application, and the extension was obtained by fraudulent and deceptive proceedings as against the public, and by collusion between the plaintiff and the then commissioner of patents; that the plaintiff, before obtaining his patent in the United States, had obtained in England a patent for the same invention, which English patent had expired previously to the extension of the patent for the United States, and that no prolongation of the term of the last named patent could legally be granted under the provisions of the law regulating extensions; that, in the suits brought in Ohio, in 1868, the defendants therein did not set up, as a defence, that the extension of the patent was void by reason of want of jurisdiction in the commissioner of patents, and the defences therein set up as to the invalidity of such extension were not urged or argued in the court, on final hearing, and were not considered or passed upon by the judge by whom the suits were decided, and it was not decided by the court that the extension of the patent was valid; that the decision of the court in the two suits brought in Ohio, in 1868, was not founded on the testimony introduced in those suits, and was not a decision on the real merits of those suits, as established by the evidence therein, but such decision was based upon, and declared to be given by reason of, the adjudications previously made in the suit in Ohio, and in the suit in this court; that the judge who rendered the decision declared in it, that he was not at liberty to consider the questions involved, unembarrassed by previous judgments, and that, although the record in the suits, in reference to views which a superior court might take, contained material additional proof, they were not such as to authorize the same court to overrule its former deliberate adjudications, and the cases already decided as to the patent must be followed, and that said judge, after having referred to the defences set up in those suits, used the following language: "I thus briefly advert to the leading objections, solely to show that they are disposed of by the previous cases, and not to discuss them upon principle. Were I at liberty to treat the whole case upon principle, I fear I should be compelled to give the patent a more limited construction than it has received;" that, in those suits, the court refused to order an injunction against the defendants therein, but held that a bond should be received from the defendants; that the plaintiff has never applied to practical use the improvements described in his patent; that, as so described, they are incapable of being applied to practical use; that the patent is void, for the reason that no adequate means are described or shown in the specification

or drawings, whereby the alleged invention can be reduced to practice; that the means of practising such invention, described in the specification and shown in the drawings, and stated in the patent as being, in the belief of the patentee, the best mode of carrying the invention into effect, are pernicious and dangerous, owing to the degree of heat and pressure required, and would also result in the destruction of the glycerine of the fat, and be otherwise impracticable and devoid of utility; that the claim of the patent does not set forth a patentable subject-matter, and that, by reason thereof, the patent is void; that, in view of the state of the art to which the patent pertains, the defendant has a right to use the process he employs, it being a far superior process to that described in the patent, and differing therefrom in principle, in mode of operation, and in effect produced; and that he is now using, and has been using since the 9th of January, 1868, the same process for decomposing fatty acids which he was using at the time of the commencement of the former suit against him, and that he has continually used such process, and has never used any other process. The answer further states, that the defendant has, since the 9th of January, 1868, decomposed fat into fat acids and glycerine by a process or method patented to Wright and Fouché, in which water at a high temperature and under pressure is employed, but an active automatic circulation of the moisture through the fat is provided for, and such circulation is absolutely necessary for the operation of the process, and without such circulation the process would be more expensive than saponification by lime; that the process so used by the defendant differs materially from the process patented to the plaintiff, not only in degree of temperature and pressure, but in the circulation of the moisture through the fat, which is not permitted by the plaintiff's process; that the defendant's process is the same as that referred to in his answer to the bill in the former suit by the plaintiff against him; that the process as employed by him since the 9th of January, 1868, is as follows: The apparatus consists of two boilers connected by two pipes, one of which connects the top of the lower boiler with the upper portion of the upper boiler, and the other connects the bottom of the upper boiler with the lower part of the lower boiler, running through the top of the latter. The lower boiler and a small portion of the upper boiler are filled with hot water, and the remaining portion of the upper boiler is filled to within about two feet of its height, or about ten-twelfths full, with hot fat. Fire is then applied to the lower boiler, and the water subjected to a temperature of about 374° Fahrenheit. The water, being heated, rises, with the steam, through the first-mentioned pipe, to above the surface of the fat, then descends through the fat with the water formed by the condensation of the steam, to the bottom of the upper boiler, whence it is conducted, by means of the secondly mentioned pipe, to the lower part of the lower boiler; and this process of circulation is continually repeated. The pressure is run up to about twelve atmospheres, and maintained about twelve hours. The boilers used are about two feet in diameter, the upper boiler being about twelve feet in height, and the lower boiler about six feet in height—that the process used by the defendant prior to December, 1860, was substantially as follows: A tank was used, provided with steam pipes fitted with holes, to let the steam enter the tank. Into this tank was put about a foot of water, and into this tank the fat was thrown, and heated by steam, when there was added the milk of lime with a large excess of water. The tank was then covered, and the steaming continued for six or eight hours. This operation being completed, the glycerine produced was drawn off, and the fat acids in combination with the lime shovelled into an adjacent tank and heated by steam, with diluted sulphuric acid. The fat acids thus liberated were then drawn off and settled, and then run into pans to form cakes, which were then subjected to hydraulic pressure, and afterwards pressed in a hot press until all traces of oleic acid were pressed out. Fourteen pounds of lime and twenty-eight pounds of sulphuric acid were used to each hundred pounds of fat—that, since the 9th of January, 1868, the defendant has decomposed into fat acids and glycerine about four and a half million of pounds of natural fat, saving, by the Wright and Fouché process used by him, about six hundred and thirty thousand pounds of lime, and about eleven hundred and sixty thousand pounds of sulphuric acid; that, by the Wright and Fouché process used by the defendant since January 9th, 1868, there may have been two per cent. of fat saved, depending upon the care exercised in obtaining the product; and that the solution of glycerine now obtained by the defendant is of greater strength and purity than that obtained prior to the use by him of the Wright and Fouché process, commenced in December, 1860. The answer then sets up, as establishing the want of novelty in the plaintiff's invention, twenty-one publications and patents. All of these except six were either set up in the answer of the defendant in the former suit against him, or in the answers in the Ohio suits of 1868, or were introduced on the reference before the master in such former suit against the defendant. Those six are the Encyclopédie Roret, of 1849; the French patent to M. Appert, of 1823, in volume 15 of the Brevets d'Invention, of 1828; the 15th volume of the Journal of the Franklin Institute, of 1848; the English patent to William Hawes, of 1839; the English patent to Samuel Guppy, of 1839; and the English patent to Alexander Alliot, of 1851. The answer also avers, that, upon the questions of

novelty, originality, and the prior state of the art, as affecting the validity of the plaintiff's patent and the question of infringement, sixteen of the said twenty-one publications and patents were not cited or offered in evidence by the defendant in the former suit against him, and were not known to the court at the time the decree was made, and that such evidence would have materially affected the decree in the suit.

I must regard the decisions in the three suits in Ohio, and the decision of Mr. Justice Nelson in the suit in this court, followed by the decision on the hearing on the exceptions to the master's report in that suit, and the fact of the extension of the patent, its extension having been, as it appears, opposed by the defendant, on testimony put in by him, as establishing the novelty of the plaintiff's invention and the validity of his patent. So, too, the fact that the use of the Wright & Fouché process is an infringement of the patent, cannot be doubted.

The objection, that the plaintiff's invention, as described in his patent, cannot produce the results claimed in the patent, has been considered and disposed of adversely to the defendant, in the decision given on the hearing on the exceptions to the master's report, in the former suit against the defendant.

The objection, that the decision of Mr. Justice Nelson was made under a misapprehension on his part as to the mode of operation in the process described in the plaintiff's patent, is also without foundation. It is alleged, that Mr. Justice Nelson considered that the plaintiff's specification did not require either that the vessel containing the mixture of water and fatty matter should be entirely filled therewith, or that no steam was to be permitted in it, and that the specification makes both such conditions necessary. On full consideration, I concur in the views of Mr. Justice Nelson on these points, and have no doubt that his interpretation of the specification in regard to them was correct.

As to the validity of the extension, as it is regular on its face, no question of irregularity or fraud in granting it can be raised by an infringer, in a suit against him for infringement. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458; Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 404; Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796; Seymour v. Osborne, 11 Wall. [78 U. S.] 543, 545.

The expiration of the English patent before the patent for the United States was extended, formed no objection to such extension.

In the decision of the court, given by Judge Emmons, in the two suits brought in Ohio, in 1868, he used this language: "Although the record in this case, in reference to some views which a superior court may possibly take, contains some material additional proofs" (beyond those in the previous case in Ohio, and those before Mr. Justice Nelson in the case in this court), "still they are not such as to authorize the same court to overrule its former deliberate adjudications, and to disregard the judgments of a co-ordinate one in a case in all respects substantially like it. Especially is this so where the judge delivering the opinion has taken so leading a part in all the discussions upon this subject in the court of last resort. After much consideration, I am confident that, without a violation of judicial propriety and the best interests of all who pursue or defend here, the cases already decided between these same parties must be followed. It would greatly impair the influence of the court, and the confidence of the suitors, if any succeeding judge turned it into one of appeal for all questions previously decided. Where doctrines are reconsidered, as often they are and should be, the circumstances of the case must be exceptional, and furnish the justification for the action in each instance where it is taken. There are none such in this case. More than ordinary deliberation attended the previous discussions and judgments." These are wise and sound views, and are fitly applicable to the action of this court on the present motion. Nothing is now presented to this court which would authorize it to overrule the deliberate adjudication formerly made by it. That adjudication is fortified by the decisions of the court in Ohio.

The point urged, that the defendant uses a different degree of heat and a different pressure from those set forth in the plaintiff's patent, is considered and disposed of by Mr. Justice Nelson, in his opinion.

In support of the objection that the plaintiff never applied to practical use the improvements described in his patent, and that they are incapable of being applied to practical use. the defendant relies on two letters written by the plaintiff, one dated London, June 25th, 1856, to Thomas Emory & Son, of Cincinnati, and the other dated London, July 20th, 1857, to M. de Fontaine Moreau. But these letters lead to the opposite conclusion. The first letter shows, that the plaintiff had, in factories in London and Paris, exposed the fat and water to a higher heat and pressure for a shorter time, and to a lower heat and pressure for a longer time, and had come to the conclusion that the latter mode of operation was the more convenient one, and had, in connection with it, used an agitator in an ordinary digester; and that he was about putting up at Price & Co.'s works, in London, an apparatus on that plan, capable of treating several tons per day. The lower heat and pressure are within the patent, as has been shown by Mr. Justice Nelson, and the question of the use of an agitator was considered in the opinion given on the hearing of the exceptions to the master's report, in the former suit in this court against the defend-

ant. The second letter shows, that, at the time it was written, the plaintiff's process was being successfully worked in the factory of Price & Co., in London, at a moderately low pressure. In 1860, the plaintiff's process was put into practical use in Cincinnati, in an old form of apparatus. In 1862, it was put into use in Cincinnati, under license from the plaintiff, in another old and different form of apparatus; and, by 1867, ten factories in the United States were working the process under such license. In September, 1860, the defendant was notified by the plaintiff, in writing, not to infringe the patent by using the process he has used, but, in December, 1860, he commenced to practically operate with the Wright and Fouché apparatus, and he has ever since continued to do so.

The defendant, in using the apparatus described by him in his answer as that which he uses, uses the plaintiff's process, and infringes the patent. The process he used down to the time he adopted the plaintiff's process, was the lime saponification process. He now saves the lime and sulphuric acid which he used in that process, and also saves fat, and obtains a solution of glycerine of greater strength and purity. The answer admits, that, up to the time it was put in, the defendant had, since the 9th of January, 1868, decomposed into fat acids and glycerine about 4,500,000 pounds of fat, and saved, by the use of the Wright and Fouché apparatus, about 630,000 pounds of lime, and about 1,160,000 pounds of sulphuric acid. If the price of lime be taken at only $^{75}/_{100}$ of a cent per pound, and the price of sulphuric acid at only 2½ cents per pound, the saving of lime for 40 months would have been $4,725, and the saving of sulphuric acid for the same time would have been $29,000. The saving of fat, at 2 per cent. of the fat worked, would have been 90,000 pounds, for the 40 months, equal, at 12 cents per pound, to $10,800. If the increased profit on glycerine, by reason of its greater strength and purity, be called $^{1}/_{5}$ of a cent per pound on the fat worked, such profit, for the 40 months, would have been $9,000. Thus, the defendant may properly be regarded as having saved, in 40 months, by the use of the plaintiff's process, $53,525, or at the rate of $1,338 12 per month. The bases of calculation are those established on the hearing before the master in the former suit in this court against the defendant, and the result shows the direct saving or profit which the defendant is making by continuing his infringement.

The defendant points to nothing in the six publications and patents which his answer sets up, and which had not, in previous suits, been set up or introduced in evidence, which goes to destroy the novelty of the plaintiff's invention, and there is nothing in the other fifteen to justify the withholding of an injunction.

The great merit and value of the plaintiff's invention, not only in the manufacture of candles, but as a process for obtaining pure glycerine for use in the arts, are shown by evidence, and it is quite time that he should have effective protection. After the decision in his favor by Mr. Justice Nelson, on final hearing, a perpetual injunction would undoubtedly have been ordered to issue, as a part of the interlocutory decree, but for some special considerations which induced the judge to suspend the injunction until the final decree, if the defendant should give a bond in $20,000, conditioned to pay, on final decree, either in this court or in the supreme court, all sums of money which should be found due from him to the plaintiff on the accounting before the master, on the filing and confirmation of the report on such accounting. The bond was given and no injunction was issued. If the original term of the patent had not expired, a perpetual injunction would now be ordered, as a part of the final decree. The plaintiff ought to be in no worse position because his patent has been extended, and he is compelled to make the present motion. I see no ground for allowing a bond to be given in this suit, as security, in place of issuing an injunction. The case is a clear one, on all points. Let an injunction issue, according to the prayer of the bill.

When the order for the injunction came up for settlement, the defendant expressed his willingness to take a license from the plaintiff, under the extended letters patent, at the usual rate of license established by the plaintiff. Thereupon, an order was made, that, unless the defendant should accept and execute a license, duly executed by the plaintiff, in the usual form, within ten days, under the extended letters patent, an injunction should issue, as prayed for in the bill.

[On appeal to the supreme court, the above decree was reversed. 19 Wall. (86 U. S.) 287.]

Case No. 14,043.

TILGHMAN v. MITCHELL.

[2 Fish. Pat. Cas. 518.] [1]

Circuit Court, S. D. New York. Nov., 1864.

PATENTS—DECOMPOSITION OF FATTY BODIES—RESULTS—PROCESS.

1. The improvement patented to Tilghman is the invention of a process for producing fat acids and glycerine from fatty or oily bodies, which process consists in the action of water upon these bodies at a high temperature and pressure, and which may be effected in any vessel adapted to such use.

2. Tilghman was the first person that discovered the chemical fact that fatty or oily substances could be decomposed, and the fatty acids and glycerine separated by the action of water at a high temperature and under pressure.

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

3. It is not to be supposed that the patentee intends to produce a result, which the commonest knowledge and experience in the business of life would show to be utterly impracticable. This moderate degree of knowledge, at least, should be kept in view in construing the general terms of the description.

[Cited in Roberts v. Schreiber, 2 Fed. 867.]

4. If the defendant has discovered new means of carrying into effect the complainant's process, he may be entitled to a patent for that improvement. But this would furnish no right to the use of the process.

[Cited in Whitney v. Mowry, Case No. 17,592.]

5. The question is, does the defendant, whatever may be his vessel or machinery, manufacture or produce fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure, according to the process as explained by the plaintiff in his specification?

This was a bill in equity, filed [by Richard A. Tilghman] to restrain the defendant [Roland G. Mitchell] from infringing letters patent [No. 11,766] granted for an "improvement in processes for purifying fatty bodies," granted to complainant October 3, 1854. The claims, and a portion of the specification, will be found in the report of the case of Tilghman v. Werk [Case No. 14,046].

George Harding and E. W. Stoughton, for complainant.

G. C. Goddard and C. M. Keller, for defendant.

NELSON, Circuit Justice. The bill is filed, in this case, to restrain the defendant from infringing a patent granted to the complainant for a new and useful improvement in processes for purifying fatty bodies, bearing date October 3, 1854, securing the exclusive right to the invention for fourteen years from January 9 preceding.

The patentee declares that his invention consists of a process for producing free fat acids and solution of glycerine from fatty and oily bodies of animal and vegetable origin, which contain glycerine as their base; for this purpose, he subjects the fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain, at the same time, free fat acids and glycerine. He mixes the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture is to be placed in any convenient vessel in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam.

The patentee then states that the process may be performed more rapidly, and also continuously, by causing the mixture of fatty matter and water to pass through a tube or continuous channel, heated to the temperature already mentioned, the requisite pressure for preventing the conversion of water into steam being applied during the process.

He then gives a particular description and drawing of this mode of carrying into effect his process, but claims no part of it as his invention.

The patentee states that the melting point of lead has been mentioned as the proper heat to be used in the operation of his process, as it has been found to give good results. But the change of fatty matter into fat acid and glycerine takes place with some materials (mentioning some of them) at a lower rate of heat, and the decomposing action of the water becomes more powerful as the heat is increased.

He adds, that by starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed, can easily be determined.

The fatty acids, he observes, thus produced, may, like those obtained by other methods, be used in the manufacture of candles and soaps, and be applied to various purposes according to their quality. Some fatty bodies, particularly when impure, generate, during the process, a portion of acetic or other soluble acid; in such cases, he says, he adds a corresponding quantity of alkaline or basic matter to the water and oil before they are pumped into the tubes.

The patentee then sets forth his claim, which is—"Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that I claim as my invention the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure."

It will be seen, not only from the specification, but also from the claim, that the improvement patented to the complainant is the invention of a process for producing fat acids and glycerine from fatty or oily bodies—which process consists in the action of water upon these bodies at a high temperature and pressure, and which may be effected in any vessel adapted to such use.

There is no claim for the vessel or machinery thus used; but, as it was essential to the validity of the process, as an invention, to show how it may be adapted to practical use, two modes are pointed out—one, any convenient vessel well known to the art, and which some of the witnesses called a digester, the other, the coil apparatus; in either of which, as appears from the proofs, the process could be carried into practical effect, according to our construction of the patent.

It was urged on the argument by the learned counsel for the defendant, that, upon the terms of the specification, the vessel must be entirely filled with mixture of the water and fatty matter, and then be closed, and the contents heated to the point of melting lead, and no steam be permitted to be made in the vessel; and that, upon this hypothesis, no vessel

could be made of sufficient strength to endure the pressure; but we do not agree to this construction. In the first place, the degree of heat was given only as the maximum, and under which the process could be most rapidly carried into effect. For the patentee, speaking upon this part of the specification, says that no fixed degree of heat can be given, as the different fatty or oily substances that may be used will require different degrees; and that, by starting the vessel at low heat and gradually increasing it, the best temperature may be ascertained for the particular substance used.

In the next place, we can not agree that a fair construction of the specification tends to the conclusion either that the vessel was to be entirely filled, or that no steam was to be permitted in it. No doubt, it is true, as urged for the defendant, if thus filled, and the vessel closed, and the contents heated to the point of melting lead, or under a pressure that would prevent the existence of steam, the process would be utterly impracticable; and doubtless, the patentee knew this would be the result as well as any of the experts.

It would require but the commonest knowledge and experience in the business of life to reach such a conclusion.

This moderate degree of knowledge, at least, should be kept in view in construing the general terms of the description.

Beside, the patentee does not direct that the vessel should be entirely filled. This is an inference of the learned counsel, from the direction that the vessel must be closed and be of great strength, so that the requisite amount of pressure be applied to prevent the conversion of the water into steam.

Now, all that was intended, as is apparent from the context, by the patentee was, that the pressure should be so great as to prevent the body of the water in the vessel from passing into steam, as the heated water was the element that separated the fatty acids and glycerine. That there would necessarily be some steam, must have been obvious to the patentee, as well as to any one of common observation.

Now, upon this interpretation of the patent, and which, we think, is the sound one, we repeat what we have already said, that the process could, and has been, carried into successful operation by the means pointed out by the patentee.

Previous to the date of this invention, there were but two modes known or in practical use for decomposing fatty substances, and obtaining from them fatty acids and glycerine—one called the lime saponification process, the other known as the distillation process. It is not material to give a particular description of these modes of separating the fatty acids and glycerine; it is sufficient to say that they were different from the patentee's in the process or mode of producing the result, much more expensive and tedious, and have generally gone out of use, both in this country and in England, since the complainant's improvement has become generally known and practiced.

We have looked through the proofs in the case with some care, and, without going into them in this opinion, are satisfied that the complainant was the first person that discovered the chemical fact, that fatty or oily substances could be decomposed, and the fatty acids and glycerine separated by the action of water at a high temperature and under pressure.

Then, as to the infringement, it is not material to inquire whether the vessel or machinery used by the defendant is, or is not, similar to that described in the complainant's patent.

These constitute no part of his invention. If the defendant, or the persons under whom he uses his machinery, have discovered new means of carrying into effect the complainant's process, he or they may be entitled to a patent for that improvement. But this would furnish no right to the use of the process.

The question here is, does the defendant, whatever may be his vessel or machinery, manufacture or produce fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure, according to the process as explained by the plaintiff in his specification? We are satisfied that he does, and hence has infringed his patent.

Our conclusion is, that the complainant is entitled to a decree for an injunction and profits.

[NOTE. For hearing on exception to the report of the master, to whom the case was referred, see Case No. 14,041. Pending the suit, the patent expired, but was extended for seven years from 1867. Plaintiff then instituted another suit against the respondent. Case No. 14,042. Both cases were carried to the supreme court on appeal, and the decree in each case was reversed, and the cases respectively remanded, with directions to dismiss the respective bills of complaint. 19 Wall. (86 U. S.) 287.]

Case No. 14,044.

TILGHMAN v. MORSE.

[9 Blatchf. 421; 5 Fish. Pat. Cas. 323; 1 O. G. 574; Merw. Pat. Inv. 122.] [1]

Circuit Court, S. D. New York. Feb. 17, 1872.

PATENTS—IMPROVEMENT IN CUTTING GLASS—DRIVEN SAND—NOVELTY.

1. The letters patent granted to Benjamin C. Tilghman, October 18th, 1870, for an "improvement in cutting and engraving stone, metal, glass, &c.," are valid.

2. The use, for ornamenting the surface of glass and metal, of the process described in letters patent granted to George F. Morse, November 21st, 1871, for an "improvement in the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here reprinted by permission. The syllabus and opinion are from 9 Blatchf. 421, and the statement is from 5 Fish. Pat. Cas. 323. Merw. Pat. Inv. 122, contains only a partial report.]

ornamentation and dressing of the surfaces of glass and other substances," is an infringement of the first claim of the said patent to Tilghman, which is, "The cutting, boring, grinding, dressing, engraving, and pulverizing of stone, metal, glass, pottery, wood, and other hard or solid substances, by sand used as a projectile, when the requisite velocity has been artifically given to it by any suitable means."

3. The word "artificially," in such claim, and throughout the specification of the Tilghman patent, covers the falling of sand through a vertical tube, high enough to enable the sand to acquire sufficient velocity to do its work. Such claim is a claim for a process or art.

4. The invention of Tilghman consists in the discovery, that a stream of sand, driven with sufficient velocity to cause the grains of sand, through their own velocity and momentum, to act as projectiles against the article to be cut or dressed, will do the work effectually, without any vehicle to carry the sand into contact with the article, and without any contact between anything and the article, except the sand.

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

5. Such invention was not anticipated by a process in which sand or emery was rubbed against the surface of glass by the wires of a rotating wire brush; or by the use, on a locomotive engine, of a stream of sand, combined with a jet of steam, to drive cows from the track of a railroad.

[This was a bill in equity by Benjamin C. Tilghman against George F. Morse.]

[Motion for provisional injunction. Suit brought upon letters patent [No. 108,408] for an "improvement in cutting and engraving stone, metal, glass," etc., granted to complainant October 18, 1870.] [2]

George Harding, for plaintiff.

Charles B. Stoughton, for defendant.

BLATCHFORD, District Judge. This is a motion for a provisional injunction, founded on letters patent granted to the plaintiff October 18th, 1870, for an "improvement in cutting and engraving stone, metal, glass, &c." The specification says: "My invention consists in cutting, boring, grinding, dressing, pulverizing, and engraving stone, metal, glass, wood, and other hard or solid substances, by means of a stream of sand or grains of quartz, or of other suitable material, artificially driven as projectiles rapidly against them by any suitable method of propulsion. The means of propelling the sand which I prefer is by a rapid jet or current of steam, air, water, or other suitable gaseous or liquid medium; but any direct propelling force may be used, as, for example, the blows of the blades of a rapidly revolving fan, or the centrifugal force of a revolving drum or tube, or any other suitable machine. The greater the pressure of the jet, the higher will be the velocity imparted to the grains of sand, and the more rapid and powerful their cutting effect upon the solid substance. At a high velocity of impact, the grains of sand will cut or wear away substances much harder than themselves. Corundum can thus be cut with quartz sand, and quartz rock can be cut or worn away by small grains or shot of lead. I have sometimes used iron sand, composed of small globules of cast iron. By the term sand, in this specification, I mean small grains or particles of any hard substance, of any degree of fineness, of which common quartz sand is a type. The hardest steel, chilled cast iron, or other metal, can be cut or ground by a rapidly-projected stream of quartz sand. Articles of cast or wrought metal may have their surfaces thus smoothed and cleaned from slag, scale, or other incrustation. The surfaces of wrought stone in buildings or elsewhere can thus be cleaned and refreshed. By means of stencil plates, screens, or suitable covering substances, letters or designs can thus be cut or engraved upon hard substances. By varying the shape, number, and direction of the projected streams of sand, and by giving to them and to the articles treated suitable movements by means of lathes, planing, or drilling machines, or other known mechanical devices, cuts or holes may be made of any shape or size. When sand of a brittle nature, such as quartz or emery, is very rapidly projected against a hard material, the grains are broken by the shock into fine powder, and the process may thus be used as a method of pulverization. Where a jet of water under heavy pressure is used, as in hydraulic mining, the addition of sand will cause it to cut away hard and close-grained substances, upon which the water alone would have little or no effect. Pebbles or stones of size and weight as great as can be rapidly projected by the jet of water used will have a battering, penetrating, and dislocating effect, which will assist the disintegrating and scouring action of the water. Heretofore, when sand has been used as a grinding or cutting material, it has been applied between solid substances, moved over each other under heavy pressure, so as to make a series of scratches, as in the ordinary cutting of stone and glass, or else in a solidified form, as in a grindstone or sandpaper, or sometimes in a semi-fluid state, as when a body is rubbed or moved in a mass of sand. The peculiar feature of my invention, which distinguishes it from other methods of cutting and grinding, is, that each grain of sand acts, by its own velocity and momentum, like a bullet or projectile, and pulverizes, cuts, or indents the object it strikes. From this peculiarity of action, it results, that some substances, which, though comparatively soft, are also tough, or malleable, or elastic, and not pulverizable by a blow, such as copper, lead, paper, wood, or caoutchouc, for example, are less rapidly cut and ground by the sand blast, particularly at moderate velocities, than some much harder substances which are brittle or pulverizable, such as stone, glass, or porcelain. Another peculiarity of the sand blast is, that the grinding or cutting action takes place upon irregular surfaces, cavities, corners, and recesses hardly

[2] [From 5 Fish. Pat. Cas. 323.]

accessible to ordinary methods. I believe that steam will generally be found the most convenient impelling jet, particularly for high velocities, but, in some localities, air or water may be cheaper."

The specification then describes, with references to a drawing annexed, a method of carrying the invention into effect, for cutting stone by means of quartz sand projected by a jet of steam. It then proceeds: "For purposes where only a small quantity of material is to be cut or ground away from the surface of a hard substance, and where only a moderate velocity of the sand is required, I have found the current of air produced by the ordinary rotary fan to be convenient. I have used this method for grinding or depolishing glass, china, or pottery, either on entire surfaces, or on surfaces partially covered and protected, so as to produce an engraving of letters, ornaments, or designs. In engraving designs, air is more convenient than steam as an impelling jet, in this respect, that the sand keeps dry and rebounds, leaving the pattern clear, while with steam the sand becomes damp, and is apt to adhere to and clog the fine lines and corners. The sand, being fed into the fan, is carried along, by the currents of air, in a tube or close trunk, and strikes upon the glass, which is held or moved opposite the mouth of the trunk, and cuts, grinds, or stars its surface. One arrangement, which I have found convenient for flat glass, is, to cause the air current from the fan to descend in a narrow vertical tube of a cross section about three feet long by one inch wide, into the top of which the sand is evenly introduced by numerous small pipes, at the rate of about twenty cubic inches per minute for each square inch of cross section. A travelling apron carries the sheets of glass gradually and regularly beneath the sand blast, at about one inch distance. The finer the sand used, and the less the pressure of the blast, the finer is the grain of the depolished surface. Also, the finer the sand used, the more weak and delicate may be the texture of the covering substance used to produce the design. Good results have been obtained with designs cut in a layer of wax, and with paper or lace pressed close to the glass, and using sand which passed through a sieve of fifty wires per inch, and an air blast of the pressure of about one inch of water. With sand reduced to very fine powder, and an air blast of a pressure of eight or ten inches of water, a very delicate depolishing of the surface of glass has been produced. Numerous processes are known and used in the arts for producing, painting, or transferring designs on surfaces. Any of these processes by which a design can be produced or transferred in a sufficiently tough and resistant medium, may be used to prepare a surface for being engraved by the sand blast. Many natural objects, such as plants, leaves, insects, &c., which can be fastened flat upon a surface, have sufficient strength and resistance to a blast of fine sand to admit of their outline being thus engraved. Glass colored by a thin stratum of colored glass on one surface, may be ornamented by designs cut or ground through its colored stratum. Designs engraved by the sand blast to a sufficient depth, either in relief or intaglio, on a smooth surface, slate or glass, for example, can be reproduced by known processes of printing. When the sand blast, at moderate velocities, is directed upon a metallic surface, it removes but little of the metal, but the grains of sand make innumerable small indentations of the surface, and produce a frosted, dull mat or dead appearance. By using suitable stencil plates, or covering substances, designs or devices can thus be engraved on metallic surfaces. If desired, the sand may be propelled by a current of air produced by suction, or a partial vacuum made in any convenient manner, as by a fan or steam jet, or any other known machine; or the sand may be impelled by a mixed current of steam and air, produced by a steam jet in the ordinary manner. I have produced some cutting and grinding effects by sand impelled by the force of gravity. A stream of sand fed into the top of a high vertical tube, at first falls slowly, but, after the air in the tube is set in motion, the sand gradually falls more rapidly, and can finally acquire velocity sufficient to grind or depolish glass. I have described above several arrangements for projecting the same with the requisite velocity, but I do not mean to confine myself thereto. Any method or arrangement may be used by which sufficient velocity can be artificially given to the sand to enable it to cut or grind the object." The claims of the patent are seven in number. The first claim is the only one which it is proposed to consider in this case, and is as follows: "The cutting, boring, grinding, dressing, engraving, and pulverizing of stone, metal, glass, pottery, wood, and other hard or solid substances, by sand used as a projectile, when the requisite velocity has been artificially given to it by any suitable means."

The defendant is using, for ornamenting the surfaces of glass and metal, the process described in letters patent [No. 121,119] granted to him November 21st, 1871, for an "improvement in the ornamentation and dressing of the surfaces of glass and other substances." The specification of that patent states, that "the surfaces of the glass or other substances to be ornamented or dressed, which surfaces may be of plain, curved or other form, are subjected to the action of a falling or gravitating mass of corundum and emery, which compound constitutes the dressing material, substantially in the manner hereinafter described. The mechanism which I employ consists substantially of one or more hoppers or receptacles for receiving the dressing material,

and one or more tubes connecting with the receptacles, for conveniently directing the said material, during its gravitation, upon the glass or other substance to be dressed." The specification then describes, with references to a drawing annexed, the machine to be used. A longitudinal box is divided, by means of partitions, into a series of hoppers, into each of which a mass of the dressing material is placed. Pendent from the centre of each of the hoppers is a small tube about eight feet in length, through which the dressing material descends by gravitation, until it is discharged through the lower end of the tube. The upper extremity of each tube is provided with a slide valve, by which the quantity of dressing material which falls through the tube may be regulated or wholly shut off. A shallow tray under each tube receives the dressing material as it is discharged. In each tray is a cushion on which the workman rests the glass plate or other substance to be dressed. The dressing material is a compound of corundum in powder and emery in powder. These substances, having been intimately mixed, are placed in the hoppers, the glass plates, or other substances, to be ornamented or dressed, are then held beneath the lower extremities of the tubes, and the slide valves are opened so as to allow the dressing material to descend by gravitation and fall upon the surface of the glass or other substance. The specification says: "The effect of this dressing material is to cut the surface of the glass or other substance, giving it a grained appearance of beautiful hues, even texture, very ornamental and desirable. In order to produce designs of any desired pattern upon the glass or other substance, I place upon the surface thereof a pattern, cut out either in paper, cloth, textile material, metal, paper gelatine, parchment, rubber, gutta percha, or collodion film, or any other film or suitable substance having such a nature that it will throw off or resist the action of the dressing material, and, when the aforesaid patterns are applied to the glass or other substance, and subjected to the action of the dressing material in the manner described, the glass or substance will be dressed or cut only in the open parts or interstices of the pattern, while the parts of the glass or substance that are protected by the pattern will not be cut or acted upon by the dressing material, and thus some portions of the glass or substance will be cut or dressed, and the other portions left in their original condition, and the contrasts thus produced will form an ornamental configuration or dressing upon the surface of the glass or other substance. By continuing the action of the dressing material upon the surface of the glass or other substance for a sufficient length of time, in connection with patterns of suitable nature, as described, I form raised patterns having almost any desired degree of relief. In the same manner, I also produce intaglio patterns or depressions to almost any desired degree, in the surface of the glass or other substance. The dressing material, as fast as it is discharged from the hoppers, is to be replaced in them again, either by attendants or by suitable mechanism. * * * I am aware of the patent granted to B. C. Tilghman, October 18, 1870, for cutting or dressing with sand projected against the object which is to be dressed or ornamented, and desire to disclaim all that is therein shown and described." The specification states that Morse's invention consists in the machine and in the compound described in the specification and pointed out in the claims. The claims are to, first, one or more hoppers and tubes, combined, as described, with a suitable receptacle thereunder for the article to be dressed or ornamented, as and for the purpose set forth; and, second, a compound formed of coarse particles of corundum and emery intimately mixed and applied, as and for the purpose set forth.

There can be no doubt of the great merit and utility of the plaintiff's invention. It has been extensively applied to practical use. The defendant, in his patent, disclaims having been the inventor of any thing shown and described in the plaintiff's patent, and confines his claims to the mechanical arrangement of a hopper, a tube and a cushion in combination, and to the use of the mixed compound of corundum and emery.

It is set up, in defence, that it has, for many years, been customary to deaden or roughen parts of the surface of articles of smooth glass, by covering over certain portions with thin sheets of metal, or other material, cut out into such shapes as to form or leave patterns or designs, and then subjecting the exposed surface of the glass to the frictional action of some suitable material, produced by such material striking against the exposed portion of the glass. It is not alleged that, prior to the invention of the plaintiff, a simple stream of falling sand or granulated substance was used to wear away or roughen the exposed portions of glass, but it is alleged that it was always known that any solid or liquid material, falling continually on any surface, would wear away the latter, such as a water drip, or jets of falling water, perforating stone. There is nothing in all this that touches the plaintiff's invention. His invention consists in the discovery that a stream of sand, driven with sufficient velocity to cause the grains of sand, through their own velocity and momentum, to act as projectiles against the article to be cut or dressed, will do the work effectually, without any vehicle to carry the sand into contact with

the article, and without any contact between anything and the article, except the sand.

This view disposes of the apparatus or process described in the provisional specification of John Robinson, in England, of December 13th, 1866, for "improvements in ornamenting glass," so as to produce a bright pattern or design on a rough or dead ground on the surface of the glass, or a dead pattern or design on a bright ground, and thus ornament globes or glasses for lamps, and dishes, decanters, and articles of glass in general, and flat or curved sheets or plates of glass. Robinson says, that, in ornamenting the glass, he applies, and secures to the glass, plates of metal having the form of that portion of the design which it is intended shall be bright, and then subjects the surface of the glass "to the action of a rotating wire brush fed with emery or sand and water, or other material capable of roughening or deadening the surface of the glass," and that the surface of the glass is thereby roughened or deadened, except at the parts protected by the metal plates, "the said parts being unoperated upon by the wire brush," and being left bright. He states, that if the protecting plates have a pattern cut out of them, a roughened or deadened ornament or pattern on a bright ground is produced. It is urged, that this process of Robinson produces an action and effect very similar to that produced by the defendant in the use of a concentrated stream of granulated material falling or poured upon the article to be operated upon, at about right angles to its surface, where there is a greater or less accumulation of the material all the time, and where, during the displacement of the particles, a continuous friction and rubbing on the surface being operated upon is kept up; that the action and effect so produced by the defendant are not similar to what occurs in projecting, at a high velocity, a very small stream of sand against a surface obliquely; and that the process of Robinson is not a grinding process, but is one in which, by the action of the wires of the brush, the exposed surfaces are deadened or roughened, just as they are deadened or roughened, and not ground away, in the defendant's process. Whether the process of Robinson was practically of any use is not shown, and is left to conjecture. But, even if useful, in its employment, the surface of the glass was subjected "to the action" of the wire brush, and the parts roughened or deadened were put in that condition by being operated upon by the wire brush, as Robinson expressly states. It is true, that the brush was "fed with emery or sand and water." What part the emery or sand fulfilled is not stated—whether it, by means of the water, was held to the points of the wires in the brush, and was brought into contact with the surface of the glass, as such points revolved, or whether it formed a bed, kept fed, on the surface of the glass, such surface being maintained as horizontally as possible, and the particles of emery or sand were rubbed by the revolving points of the wire brush against the glass. Robinson states that the emery or sand is capable of roughening or deadening the surface of the glass. But his process, so far as it can be understood, is to rub the emery or sand against the surface of the glass, by means of the rotating wire brush. There is no suggestion that the work is done by using the grains of emery or sand as projectiles, through the velocity and momentum imparted to them. If the rotation of the wire brush would make projectiles of the grains of emery or sand, by a velocity of rotation sufficient to overcome their adhesion, through the water, to the wires of the brush, it would be a pure matter of accident whether those projectiles would strike the glass. It seems probable that the sand and water were fed to the surface of the glass, and that the wire brush was used to scratch the grains of sand against the glass. The description is very vague. Whatever the process was, it would suggest to no one the plaintiff's invention, or the process used by the defendant.

Grave reference is made, on the question of novelty, to patents granted for projecting a stream of sand combined with a jet of steam, from a locomotive engine, for the purpose of driving cows from the track of a railroad, and the learned expert who makes an affidavit on the subject says, with great truth, that the only difference between such use, in combination, of a jet of steam and a stream of sand, and the use by the plaintiff of the combination of a jet of steam with a stream of sand, is, that, in the former case, the sand, after having had velocity imparted to it, came in contact with cows, while, in the latter case, it comes in contact with glass, stone, &c. This is the only difference, but in this difference lies the distinction between the two. No one, from observing the temporary operation of the process on the animal, would infer that he could, by the same means, produce the results which the plaintiff describes. Nor is there any resemblance in kind between those results and the result produced on the animal.

It is urged that the plaintiff, in his first claim, claims the cutting, &c., of stone, &c., by sand used as a projectile, only when the requisite velocity is "artificially" given to the sand; that this confines him to a mode of propelling the sand such as he describes, or equivalent means; that, notwithstanding what is said in the specification about "the force of gravity," the first claim does not allude to or cover the natural velocity acquired by the falling of a body; that such claim covers only velocity artificially given; that, in the defendant's process, the requi-

site velocity is not artificially given to the sand; and that, therefore, the defendant does not infringe the first claim of the plaintiff's patent. The plaintiff, in his specification, not only states that he has produced some cutting and grinding effects by sand impelled by the force of gravity, and that a stream of sand fed into the top of a high vertical tube at first falls slowly, but, after the air in the tube is set in motion, the sand gradually falls more rapidly, and can finally acquire velocity sufficient to grind or depolish glass, but he speaks of causing an air current, created by a fan, to descend in a vertical tube into the top of which sand is fed, against flat glass held about one inch below the bottom of the tube. The process used by the defendant is fully described in the plaintiff's specification. The word "artificially," in the first claim of the plaintiff's patent, and throughout the specification, covers the falling of sand through a vertical tube high enough to enable the sand to acquire sufficient velocity to do its work. The work is done because the sand falls through a tube. It would not be done if the sand fell unconfined and unguided by a tube, not only because the tube concentrates the sand and makes a stream of it, which can be directed effectively against a given space on an object, but because, as the plaintiff's specification states, the falling of the sand in the tube, which is at first slow, sets the air in the tube in motion, and then the sand gradually falls more rapidly until it finally acquires sufficient velocity to do the work. There is thus produced an artificial current of air. The air would have no current, if not set in motion by the falling of the sand through the high vertical tube. This current of air gives an artificial velocity to the falling sand, greater than the natural velocity which, as a falling body, it would have outside of the tube. Such artificial velocity grows to be the requisite velocity. The requisite velocity is thus artificially given to the sand. The artifice is the confinement of the falling sand in a high vertical tube, into the top of which it is fed, with free access of air to the tube.

The first claim of the plaintiff's patent is for a process or art, and is valid. It is infringed by the defendant. There is no doubt as to the novelty and utility of such process. The fact that the plaintiff has extensively applied it to practical use, and has been, and but for the infringement committed by the defendant would still be, in the undisturbed possession, use and enjoyment of the exclusive privileges secured by the patent, and in receipt of the profits of the same, as averred in the bill, is not contradicted. An injunction must, therefore, issue, as prayed for.

[For other cases involving this patent, see Cases Nos. 14,039 and 14,040; Hartell v. Tilghman, 99 U. S. 547.]

Case No. 14,045.

TILGHMAN et al. v. TILGHMAN.

[1 Baldw. 464.] [1]

Circuit Court, D Pennsylvania. April Term, 1832.

EQUITY—REFORMATION OF CONTRACTS—PLEADINGS—MARRIAGE CONTRACT—WIFE'S PORTION—ADMISSIONS IN ANSWER—EXECUTOR.

1. Equity will not enforce a contract which is not definite and precise in its terms, or reform a written contract by a previous one by parol on the same subject; any variance will be presumed to have arisen from a change of intention, in the absence of fraud, mistake or accident.

2. The writing must recite or refer to something by which to reform it, or there must be some matter of higher authority than the writing to authorize it

3. If a paper deliberately agreed upon to effect an object, fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement.

4. A party must rely on the case stated in his bill or answer; if he sets out a contract in writing, he cannot recover on a verbal one not set up in the bill or answer.

5. Equity will not construe a marriage contract differently from its terms, in favour of the parties to the marriage, though they would do it in a similar case in favour of the issue.

6. By an agreement in consideration of an intended marriage, the portion of the wife was to be raised out of her real estate of which her father was tenant by the curtesy, by a sale after she arrived at twenty-one; the marriage took effect; the wife attained twenty-one, and died two months afterwards, without any act done by her towards the completion of the settlement, or any request by the husband to the father to have it done. *Held*, that as the act must be a concurrent one, the party who claims a remedy for non performance must aver and prove performance, or an offer and readiness to perform, on his part.

7. Where no time is fixed in the contract, the party desirous of performance must hasten it by a request. That none being made after the wife came of age, the father or his estate was not liable for the non performance.

8. A general allegation in a bill against an executor, that he retains the money of the estate in virtue of a pretended debt, claimed from the testator by a pretended contract which the bill denies, and the prayer of the bill is generally for an answer to the matters charged therein, does not make the answer of the executor evidence to support such debt, when he admits there is money of the estate in his hands, for which he must account if he does not establish the debt.

9. An answer denying the right of a complainant is evidence in favour of a defendant. But if he admits the right, and sets up new matter in bar; if he admits the charge, and avers a discharge at a different time by a distinct transaction, or sets up an affirmative claim in his own right to the subject matter claimed by the complainant, it is not evidence in his favour; the defendant must make out his case as a plaintiff ought to do.

[Cited in Reid v. McCallister, 49 Fed. 17.]

This case arose on a bill filed by the complainants, who were legatees under the will

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

of the late Chief Justice Tilghman, against E. S. Burd and Benjamin Chew, Jr., Esquires, his executors, praying for an account of his estate and payment of their legacies out of the surplus.

Separate answers were filed by the executors, Mr. Burd admitting a balance on hand for distribution among the legatees, Mr. Chew claiming a right to retain it for a debt due him by the testator. The existence of this debt was the only matter in controversy. By the will the testator devised the residue of his estate to his grandson, the son of the defendant, Chew, and the testator's only daughter and child, in full property; in case of the death of the grandson before twenty-one and without issue, among other bequests was the following, "My son-in-law, Benjamin Chew, Jun., if living at the time of the death of my grandson as aforesaid, shall have for his own use 5000 dollars lawful money aforesaid, in addition to the sum of 10,000 dollars to which he is at all events entitled at my death in right of his late wife, by virtue of a bond which I gave her in my lifetime." Legacies were also given to the complainants.

The will was dated the 16th of October, 1819; the grandson died the 6th of April, 1820, under age and without issue; the testator died the 29th of April, 1827, without having altered his will, of which the defendants took the administration. The legacy of 5000 dollars and the post obiit bond of 10,000 dollars were received by Mr. Chew before filing the bill.

After reciting the will, &c., the bill proceeds in the usual form and concludes with the following charge and prayer.

"But now, so it is, may it please your honours, that the said Benjamin Chew, Jun. and Edward S. Burd, combining and confederating with others, to your orators unknown, whose names, when discovered, they pray leave to insert, with apt words to charge them as parties, pretend that the said personal estate of the testator, and the proceeds of the sale of the real estate are not more than sufficient to pay and satisfy his funeral expenses, debts and legacies, by reason of an alleged debt to a very large amount, claimed to be due from the testator to the said Benjamin Chew, Jun., one of the said executors, upon a certain pretended contract or agreement entered into between the testator in his lifetime and the said Benjamin Chew, Jun. Whereas your orators charge that the testator never did enter into any such contract or agreement as is pretended, and that no debt is in law or equity due to the said Benjamin Chew, Jun., by virtue of the said pretended contract or agreement, or in any other manner whatever; or, that if the testator did ever enter into any such contract or agreement as is pretended, it was satisfied in his lifetime or by bequests and devises to the said Benjamin Chew, Jun. in his will, which the said Benjamin Chew, Jun. has accepted. And the said executors do refuse to come to a just and fair account with your orators for the personal estate of the testator, and the proceeds of the sales of the real estates aforesaid, in order that the clear residue of the testator's estate may be ascertained, and to pay over to your orators such proportion of the same as they are entitled to receive under the directions of the said will. All which actings and doings of the said executors are contrary to equity and good conscience, and greatly to your orators' prejudice. In consideration whereof, and forasmuch as your orators cannot have plain, adequate and competent remedy at law, to the end therefore that the said executors and their confederates, when discovered, on their oaths or affirmations, full, direct and true answers may make to all and singular the matters and things hereinbefore set forth as if they had been particularly interrogated thereon; and that they may render and set forth a just and true account of all and singular the personal estate of the said testator, and of the moneys arising from the sale of the said real estate, and pay over to your orators such proportion of the clear residue of the testator's estate as they are entitled to receive under the directions of the said will; and that your orators may have such further relief in the premises as is consistent with equity and good conscience, and as to this honourable court shall seem meet."

As it was admitted that the executors had faithfully administered, and accounted for all the estate which came to their hands, it is not deemed necessary to refer to the answer of Mr. Burd, or to any other part of that of Mr. Chew, except what relates to the debt claimed to be due to him by the testator, which is as follows:

"And this defendant further shows for answer to the complainants' said bill the following facts and circumstances, which, as he is advised and believes, clearly manifest the existence of a heavy debt due to him from the said testator, and justify and require the appropriation of any funds which may be in the hands of the defendants as executors in discharge thereof.

"Previously to the intermarriage of this defendant, the terms and conditions upon which the marriage should take place were treated of, and an arrangement was made between the said testator, this defendant, and his father, Benjamin Chew, Esq., whereby it was mutually promised and agreed that the latter should give to this defendant, on the said marriage, land in fee simple valued at 5000 dollars, and allow him the interest of 25,000 dollars annually. And the said William Tilghman would give for the advancement of his daughter in the said marriage 30,000 dollars. And he further declared and promised to this defendant, and to his said father, that he, the said Wil-

liam Tilghman, would do on the occasion of the said marriage whatever the said Benjamin Chew the elder would do, and more.

"On the day previous to the said marriage the testator aforesaid exhibited and presented to this defendant a paper in the proper handwriting, and with the proper signature of the said William Tilghman, and received the assent in writing of this defendant to the same. The fourth schedule, hereto annexed, as part of this answer, is a true copy of the said paper and assent, and the original is ready to be produced to this honourable court.[2] On the 11th day of July, 1816, the said marriage accordingly took place. The said testator afterwards declared to the defendant's said father what had been concluded and articled between himself and this defendant by the contract of the 10th day of July, 1816; and although the stipulations thereof varied materially from the original intent, meaning and views of the said father of this defendant, and from what had been previously agreed upon between them, yet, moved by his affection toward his son and daughter-in-law, and disregarding the inequality of these subsequent conditions, for the first time then submitted to him, after the said marriage had taken place, but for and in consideration of the stipulations on the part of the said William Tilghman thus reduced to writing, he, the said father of this defendant, assented to the agreement made on the 10th day of July aforesaid, and undertook to add largely to the advantages he had previously agreed on for the said marriage, stipulating that in case of the defendant's death he would give to his family the same provision designed for the defendant himself in the event of his surviving his said father. The fifth schedule, hereto annexed as part of this answer, is a copy of the memorandum made by the said William Tilghman, dated the 16th day of August, 1816, relative to this transaction, and supports the allegation of the defendant, while it exhibits the confirmation of the said testator of the contract which he had previously made.[3]

"The defendant further states, that during the summer and autumn of 1816, and in the winter and spring of 1817, the said William Tilghman paid, at various times, to this defendant, and to others for him and for his use, according to and in part performance of the said contract of the 10th day of July, 1816, the sum of 2500 dollars. These payments are manifested by the copy of entries in the said William Tilghman's books, which form the sixth schedule hereto annexed.[4] In the autumn succeeding the marriage, the said William Tilghman requested this defendant and his wife, on their return from his

---

[2] Philadelphia, July 10, 1816. My Dear Sir, —As my daughter, to whom you are to be married is under age, I think proper to mention what I propose to be done after she arrives at twenty-one; and from the conversation we have recently had, I make no doubt but it will be agreeable to you In order to procure an income we must resort to the Northampton estate, which, although valuable, is unproductive in its present state. I intend that so much of it shall be sold as will produce 30,000 dollars, of which 5000 may be expended in furniture, and the remaining 25,000 placed in your hands, to be used by you as you think proper. This capital of 25,000 dollars is to be considered, after your death, as a debt due from your estate. If your wife survives you she is to receive it from your estate, and if she dies before you she is to have the right of disposing of it as she pleases, either by last will and testament, or any writing in nature thereof, or any other writing executed in the presence of at least two witnesses, during her coverture; but if she should die without making any such disposition, then, after your death, the said 25,000 dollars is to be distributed according to the law of Pennsylvania, in the same manner as it would be if your wife had died possessed of it and unmarried. Provided, that if it should be made to appear by any books, writings or papers of yours, in what property, real or personal, the said 25,000 dollars stand invested at the time of your death, then, instead of that sum being considered as a debt against your estate, the specific property shall go to your wife, if she survives you absolutely; or in case she dies before you, be subject to her disposition as aforesaid; and if she makes no disposition thereof, it shall descend or be distributed, according to its nature, in the same manner as if she had died seised and possessed of it unmarried. I am, dear sir, very sincerely and affectionately, yours, William Tilghman.

To Benjamin Chew, Jun., Esq.

July 10, 1816.—The above proposals are perfectly agreeable to me, and I engage to do any thing necessary on my part for carrying them into effect. B. Chew, Jun.

William Tilghman, Esq.

(Indorsed) 10 July, 1816.—W. Tilghman's proposals respecting his daughter's property to B. Chew, Jun., and Mr. Chew's assent as to the same.

Mem. May 10, 1818. The settlement intended to have been made of part of my daughter's estate was prevented by her unfortunate death, soon after she came to the age of twenty-one. The land which was to have been sold with her concurrence, cannot now be sold, as the reversion, after my death, is vested in her infant son. Mr. Chew, however, will receive 10,000 dollars on my death, being the amount of a bond which I gave to my daughter, in consideration of her releasing to me her interest in certain parts of her real estate. William Tilghman.

[3] August 16, 1816. I this day showed to B. Chew, Esq., the writing signed by his son Benjamin and myself, July 10th, 1816, respecting the disposition of my daughter's fortune, and he approved of it. I then mentioned to Mr. Chew, that my intimacy with him and confidence in his integrity, had rendered it unnecessary to enter into any thing like a contract with him concerning the estate to be given by him to his son; but that I took for granted, that in case of his son's death, leaving issue by my daughter, he would make the same provision for his son's family by his will, which he would have made for his son himself, in case he had survived his father. Mr. Chew declared this to be his settled intention; that justice required that the issue should stand in the place of the parent, and his own father had acted on that principle in making his will, and he himself should certainly do the same. Wm. Tilghman.

(Indorsed) 16th August, 1816.—Mem. of a conversation between W. Tilghman and B. Chew, Esquires, respecting provision for his son's family in case he should die in his father's lifetime leaving issue.

[4] This schedule is omitted as it contains only the items so noticed.

father's residence, then preparing to set up his own establishment, to reside with him temporarily, as he stated he had not then raised the money agreed on. He also stated to this defendant, that until he could raise the money he had agreed to pay him, he would pay this defendant the interest thereon. And this defendant replied, that he would not expect the said interest to be paid during the time he should reside with him, which this defendant continued to do, from the middle of the month of October, 1816, until the death of his wife (which took place on the 16th day of June, 1817), and for an inconsiderable time afterward, to wit, until the 1st day of July, 1817, or within a few days more or less.

"This defendant further states, that at the instance of the said William Tilghman, an act of assembly of the commonwealth of Pennsylvania was passed on the 11th day of April, 1792 (4 Dall. Laws, 462), whereby the said William Tilghman was empowered to sell and convey the estate and property of his said daughter, during her minority, in and adjacent to the town of Northampton (commonly called Allentown), and the land so authorized to be sold by the said William Tilghman is the same land referred to in the said paper, dated the 10th day of July, 1816. But the said William Tilghman, notwithstanding the said authority, and his said contract which he was thereby authorized and empowered to conclude and to execute, did not sell and convey the said land during the minority of his said daughter, for the purpose of executing and fulfilling his said contract; nor did he pay over to this defendant the amount or any part of it received by him from sales previously made by him of several parts or portions of the said land, unless the above mentioned 2500 dollars be considered as a part of the proceeds of such sales; nor did he in any way (except as to the said sum of 2500 dollars) pay this defendant any part of the said sum of 30,000 dollars. And although the said William Tilghman then was, and until the time of his death continued to be tenant by the curtesy and in possession of the said estate, he did not sell or convey, or attempt to sell or convey the same, or any part of it, after his daughter became of age, nor did he propose to her or to this defendant to proceed to sell the same, or any part thereof, during her life, nor to this defendant after her death, in order or with intention to execute and perform his said contract of the 10th day of July, 1816. Nor did he in any way pay to this defendant, or to any one for him, any part whatever of the interest accrued to him on the money due upon the said contract, except that in consequence of several conversations had during the summer of 1818, in which this defendant remonstrated urgently with the said William Tilghman, upon his omission to fulfil the said contract, and to pay the interest upon the sum due thereon, and showed the inconvenience this defendent was, by the omission, subjected to, as well as the reciprocal nature of the contracts made at the time of the said marriage, the said William Tilghman authorized the defendant to receive as his tenant at will, under a stipulated rent, and under other conditions, the profits of a small farm, part of the land mentioned in the said contract, and part of the land which he was empowered to sell during the minority of his daughter by the said act of assembly of the 11th day of April, 1799, as this defendant conceives, which said profits did not net to the defendant 100 dollars per annum, as he verily believes. And this defendant took the said profits towards satisfaction of the interest due to him in part, as far as the said profits would go, not being able to obtain other without legal proceedings, which the nature of his connexion with his father-in-law, the said William Tilghman, would not for decency permit, and the said defendant always intended and avowed his intention to discount the amount of the net profits received by him from the said farm, from the interest due to him, whenever he should come to a full settlement and obtain payment thereof. The seventh schedule hereto annexed, is a true copy of the said authority, in the proper handwriting of the said William Tilghman.[5]

"During the minority of the said Elizabeth Margaret, and before her said marriage, the said William Tilghman sold divers estates, of which she was (solely or jointly with others) seised in fee simple of her own right, to wit: A farm in Bucks county, Pennsylvania, to John Flack, on the 13th day of February, 1804, for 1500 pounds. A lot in Chestnut street, Philadelphia, to George Fox, Esq. on the 31st day of March, 1802, for 1000

[5] Philadelphia, 22d August, 1818. My Dear Sir,—It was my wish, as I have often told you, to take upon myself the entire expense of maintaining and educating my grandson; but you are of opinion that this would be attended with inconveniences. I have, therefore, determined to give you possession of the farm in Lehigh county, now in the occupation of my tenant, Peter Walpman, together with my share of the crop this year, the best that ever was made there. You are to pay me a rent of one dollar yearly on the 1st day of January, if demanded, pay the taxes, keep the buildings and fences in good order, and suffer no waste to be committed in the woodland. You may have the farm during my life, subject to the following conditions: 1st, As every thing in this world is uncertain, it may happen that hereafter I may find it expedient to reside, at least during the summer seasons, in Lehigh county; in such case, I am to have the right of resuming the possession of any part or the whole of the farm; but if the child shall be living, and you shall still desire that he should receive his support immediately from yourself, rather than me, I will pay you, by way of equivalent, as much as in the opinion of judicious men would be a fair rent for the farm. 2d. If (which God forbid) the child shall die, I shall stand in a very delicate situation with respect to the estate in Lehigh county, and therefore must reserve the right of doing with this farm what, upon reflection, it shall appear to me that justice and prudence may require; but in all events, I shall be disposed to conduct myself towards you with kindness and liberality. I am, affectionately, yours, William Tilghman.
Benjamin Chew, Esq.

pounds. And a farm in Morris county, New Jersey, to Amos Grandine, on the 20th day of February, 1799, for 3000 dollars. Also, after the said Elizabeth Margaret attained full age, the said William Tilghman requested this respondent (then married) to execute a deed of conveyance with his wife to Margaret Tilghman Lawrence (now M'Whorter), of all the estate, right and title of himself and his wife in and to a tract of land in Middlesex county, New Jersey, called the Longbridge farm, in pursuance of an engagement made to that effect by the said William Tilghman to Colonel John Lawrence, father of the said Margaret T. Lawrence; a copy of which engagement, and of a letter from the said William Tilghman to the said Margaret T. Lawrence, in the proper handwriting of the said William Tilghman, form the eighth schedule hereto annexed.[6] The respondent accordingly proposed to his said wife to comply with the request of the said William Tilghman in this respect, and they accordingly did execute on the 14th day of May, 1817, a deed of conveyance to the said Margaret Tilghman Lawrence (now M'Whorter), for all the estate of this respondent, and of his said wife (being one equal sixth part), in the said tract of land. And the said William Tilghman also requested the respondent (after his marriage as aforesaid) to execute a release to him of his own and of his wife's claims and titles to the said estates sold by the said William Tilghman, and to their purparts or proportions thereof, for which the said William Tilghman stood engaged by certain obligations, copies whereof form the ninth schedule hereto annexed.[7]

"And the said William Tilghman declared to the respondent that he would therefor give a bond for 10,000 dollars, payable after his death, which he estimated to be an equivalent or more for the said estates and properties. And the respondent and his wife thereupon executed a deed dated the 14th day of May, 1817, a copy of which forms the tenth schedule hereto annexed.

"But the respondent doth not, and never did consider the said bond an equivalent for the property released, but it became his property at the time of the execution thereof, and was so declared to be by the said William Tilghman to the respondent. The said bond remained in the respondent's possession, from the time of its execution until the said William Tilghman's death, and until the payment thereof by an appropriation of funds belonging to the estate. The eleventh schedule, hereto annexed, contains a copy of said bond, which was executed and delivered on the same day and at the same time with the deed of release aforesaid (although it bears on its face the date of the subsequent day). The respondent expressly alleges and maintains that a debt is now due to him from the estate of the said William Tilghman, by reason of the stipulations contained in the instrument hereinbefore referred to, dated the 10th day of July, 1816, and that he never received payment of the same, except to the extent of 2500 dollars as aforesaid. And the respondent denies that the said debt has ever been satisfied, either in the lifetime of the said William Tilghman, or by bequests and devises in his will. And the respondent expressly and especially denies that he ever received the said sum of 10,000 dollars in satisfaction, partly or wholly, of any debt due to him, except the debt due upon the said bond, or that he received the legacy of 5000 dollars, mentioned in the complainants' bill, in satisfaction or discharge of any debt or engagement, contract or liability whatever, or of any part or portion thereof, or that he received the profits of the farm, above mentioned, in satisfaction of the interest on the sums due to him, except so far as the amount of the said profits would go towards the discharge of the same; but maintains that his right to recover the balance due upon the instrument of July 10th, 1816, and the interest that has accrued thereon, is unimpaired and in full force, to wit, the sum of 27,500 dollars, with interest thereon from the 1st day of August, 1817, deducting from the amount of the said

[6] Schedule eight consists of three documents, by which it appears, that Mrs. Chew's grandmother died in 1799, upon which Longbridge farm descended to her issue, and testator's daughter, in right of her deceased mother, took one-sixth. But her grandfather stating that the grandmother had always intended this farm for her daughter Margaret (Mrs. M'Whorter), testator entered into a written stipulation that his daughter, on attaining her majority, should comply with her grandmother's intentions as to this one-sixth of the farm. Accordingly when Mrs. Chew attained her majority, she and her husband, by deed of the 14th of May, 1817, united in a conveyance of her one-sixth for the consideration, therein expressed, of natural love and affection, and of one dollar, which is the conveyance referred to in this part of the answer.

[7] Ninth, tenth and eleventh schedules consist of sundry documents, by which it appears that of certain real estate sold by the testator before his daughter's marriage for 9666 dollars and 67 cents, he was tenant by the curtesy, with remainder to his daughter as heir to her mother; that testator (with the consent of his daughter's nearest collateral relatives and heirs) conveyed the same in fee simple to the purchasers, with covenants that his daughter on her majority, or the heirs of his wife, if she died in her minority, should confirm the title. Mr. and Mrs. Chew accordingly, on the 14th of May, 1817, released the same to the testator, who executed deeds of confirmation as required. The release of the 14th of May, 1817, recites the facts fully, and is expressed to be in consideration of one dollar, and of 10,000 dollars secured by the testator to be paid to his daughter or her representatives within one year from his death. The bond securing this sum is accordingly an obligation to the daughter, payable within one year after testator's death, and is the same which is mentioned in the will. The eleventh schedule is a copy of this bond and of a receipt and acknowledgment by Mr. Chew, the defendant, when he received payment of it out of the estate. The acknowledgment refers to the consideration of the bond, and declares that the money is received in full satisfaction thereof.

interest the net profits received from the said farm from the 22d day of August, 1818, to the 29th day of April, 1827, when, by the death of the said William Tilghman, he was deprived of the said profits. And the respondent further states that he did not, at any time, or in any manner, relinquish or waive his right to receive from the said William Tilghman, and from his estate, the sum stipulated in the instrument dated the 10th day of July, 1816, with interest thereon. On the contrary, he declared repeatedly to the said William Tilghman, and at sundry times, that he considered the same due to him, and the said William Tilghman liable for the same. The said William Tilghman gave no direct or sufficient answer to such remarks, but on one of the occasions referred to observed, that if he was to pay this defendant, he would have to sell the house over his head, which expression was among the most powerful reasons why this respondent deferred insisting on his legal rights during the lifetime of his said father-in-law. On two different occasions the defendant declared to the said William Tilghman as aforesaid (that he considered the said sum due, and the said William Tilghman liable for it), previously to the 10th day of May, 1818. He did not prosecute or pursue his claims except by personal remonstrances during the lifetime of the said William Tilghman, because of a sincere attachment to him, and of a decent respect for his ease and comfort, and because of the respondent's firm conviction that his lawful rights, acquired and purchased by an ample, valuable consideration furnished by his father, as well as by the good consideration of his marriage, would be in no manner impaired by his postponing to take legal measures for their recovery. The respondent states that at the foot of the instrument dated the 10th day of July, 1816, there appears a memorandum, dated the 10th day of May, 1818, a copy of which is part (numbered B) of the fourth schedule hereunto annexed. The respondent explicitly denies that he, at any time, directly or indirectly assented to the same memorandum, or to the principles therein expressed. He positively asserts that he had no knowledge whatever thereof, or of any intention of the said William Tilghman to make such a memorandum, until long after it was made; and he distinctly and positively alleges and asserts, upon his oath, that it is in spirit and in letter, in form and in matter, wholly and directly contradictory and at variance with his views, expectation, belief and conviction, and with his unvaried, avowed, well known and positive declarations and determination. The said instrument, dated the 10th day of July, 1816, having been prepared by the said William Tilghman, and presented by him to this defendant for assent, and having the signature of this respondent to it, and it being a matter of indifference in the hands of which of the two parties it should remain, when they had such faith in one another as to make and sign but one copy of an obligation, without witnesses, whereby they were bound to each other in the amount of so many thousands; and this respondent having a perfect confidence in the honour and good faith of his father-in-law, which are manifested by the preservation of the instrument, it naturally remained in the said William Tilghman's possession. But the respondent always regarded it as remaining there as in a place of safe keeping merely, without any right in either party to add, alter, amend or impair its full force and effect, and without any right of either party to inscribe or to indorse thereon any thing expressing sentiments of either party derogatory to their mutual understanding at the time the contract between them was made. And the respondent expressly protests against the said memorandum, and maintains that the original instrument itself remains in full force and virtue altogether unaffected by the memorandum made by one of the parties. The respondent further states, that besides the sales of the said William Tilghman, already enumerated, he and his wife did, on the 3d day of April, 1798, convey to a certain Samuel Davis, for a nominal consideration, a tract of land being the estate of his said wife, the mother of the wife of the respondent, in the county of Northampton, containing five hundred acres adjacent to the borough of Northampton, which was reconveyed by the said Samuel Davis, on the same day, for a like nominal consideration to William Tilghman alone, who afterwards sold the same in various parcels to various persons for large sums of money, which were invested by him, as the respondent has frequently heard and does verily believe, in the purchase of the house and lot in Chestnut street, where he resided for many years, and which he afterwards sold for 42,500 dollars. And the said William Tilghman, during the minority of his said daughter, sold, under the power vested in him by the act of assembly dated the 11th day of April, 1799, sundry lots of ground belonging to his daughter, reserving a ground rent of 1 or 2 dollars on each lot sold, payable to himself for life, and after his death to his said daughter and her heirs. And he also received from the purchasers, for his own use, large sums of money or value, in addition to the said ground rents, amounting at the least to 6800 dollars. And the said William Tilghman did request and desire this respondent, after the decease of his said wife, to unite with him in a petition to the legislature of Pennsylvania for authority to sell, during the minority of the respondent's said son, lots in the borough of Northampton belonging to the said son of the respondent; the respondent did accordingly join in such petition. An act of assembly was passed on the 23d of March, 1818 (Laws of 1817-18), giving the said authority, and

sales were made in virtue thereof, by the said William Tilghman, who received the purchase money or value amounting to more than 700 dollars. The said William Tilghman thus received from the various sources aforesaid, property and estates belonging to the wife and son of this respondent, or which would otherwise have belonged to them, a sum of money exceeding 50,000 dollars, which in equity and good conscience ought to have been applied to the discharge of the marriage contract aforesaid. The respondent, therefore, denying any injury or wrong to the complainants, denies also that there is any hardship to them in his taking and appropriating from the estate of the said William Tilghman the money which is due to him upon the said marriage contract and the interest thereon accrued, inasmuch as the said William Tilghman added to his own estate a sum much larger than is sufficient to pay the amount stipulated for by the said contract, together with the interest thereon, by means which were derived from the estates which would otherwise have come into the possession of the wife and son of this respondent and of himself." The conclusion of the answer is in the usual form.

The following paper was read in evidence at the hearing, together with the indorsement thereon, which was in the handwriting of the testator.

"The disposition which I wished to make of the estate of Elizabeth M. Tilghman, as it shall become subject to my disposal, is as follows: The law shall take its course with all land which may belong to her, except in case of no issue surviving her, when I renounce the tenancy by the curtesy. If I should survive her, I renounce my legal right to her personal property, except issue shall survive her also. All property will be included in the above two sections, which is considered as capital belonging to her estate. These two provisions to take effect in case of the subsequent death of issue, which may have survived her. To give full power of making a writing testamentary, which may dispose of every part of her estate, except issue survive her, when the disposition shall not be to their disadvantage. It being always understood, that during the coverture my control over all the estate is to be bounded by the law only, and that this arrangement is not to be considered as extant until the moment when its provisions are to take effect, and then my own estate shall be answerable to them. The law provides for the distribution of my estate, at the least the advantages it gives her shall be fully preserved to her. Finally, no debt of mine shall affect her estate, which shall have priority to all other claims upon my property. B. Chew, Jun.

"Done 10th July, 1816, at Philadelphia."

Indorsed—"July 10, 1816. B. Chew, Jun.'s proposals to W. Tilghman, respecting his daughter's property.

"Mem.—Instead of these proposals, W. T. drew others more favourable to Mr. Chew, which were assented to by Mr. Chew. These writings are dated July 10, 1816."

Mr. Rawle, Jun., for complainants.

The conversation between Mr. Tilghman and Mr. Chew, Senior, as detailed in his deposition, was not a contract for a marriage settlement, but was merely preliminary to the one made on the 10th July following; which having been assented to by all parties, was a substitute for what had been before in contemplation, merging any agreement which could be inferred from it. Taking the agreement as now set up, it has no mutuality. Mr. Chew claims the 30,000 dollars as payable to himself for his own use, while he would hold the Jersey farm in fee, and receive the interest of the 25,000 dollars without any obligation by him or his father to provide for the widow or the issue of the marriage, in case they survived him, thus leaving both sums at his disposition. The subsequent agreement of Mr. Chew, Sen., that in case of his son's death he would continue the same provision for the issue as he had made for his son, still left Mrs. Chew wholly unprovided for; it never could have been intended by Mr. Tilghman to give 30,000 dollars for a consideration so precarious and unequal. He was at liberty to raise that sum as he pleased, to settle it as he might think proper, with a reversion to his own family, as was the case with the portion to be given by Mr. Chew, if his son died without issue of the marriage. The letter of 10th July shows that the fund was to be raised out of the daughter's property; that letter does not bind Mr. Tilghman to pay any thing of his own; it was the only contract between the parties, the completion of which was prevented by Mrs. Chew's death without any act or default of Mr. Tilghman. It could not be done before she was twenty-one, and as her estate was to create the fund, it required hers and Mr. Chew's deed to do it. Mr. Tilghman was not answerable when this became impossible by her death (1 Bac. Abr. 139; Fonbl. Eq. c. 6, § 2; 2 Pow. Cont. 19, 20; 2 Freem. 35; Finch, 445; Skin. 287) or bound to do any act towards performance till requested by Mr. Chew. Mr. Chew had not performed his part of the contract, and cannot claim a specific execution by Mr. Tilghman, nor can he connect his claim under the agreement, with the sales made by Mr. Tilghman, under the act of assembly; as the real estate, if unsold, would go to Mrs. Chew's heirs in case of her death, and if sold, the proceeds were directed by the law to be paid to such persons as would have been entitled to the estate, if it had remained unsold (4 Dall. Laws, p. 463, § 4), or if sold subject to a ground rent, the reversion was to her heirs (Id. p. 464, § 5).

Mr. Chew cannot claim under the verbal agreement and the letter of the 10th of July,

but must make his election, as they are widely different. He cannot take the legacy under the will, without abandoning the present claim, as it will absorb the whole residuary fund and defeat the intentions and express dispositions of the testator; a man cannot take a benefit under a will, and defeat one of its devises. 2 Rop. Leg. 378, 383; 15 Ves. 391, note. Mr. Chew must fulfil the directions of the will, or refund what he has received under it (2 Brown, Ch. 600), and having undertaken the execution of the will, he must perform all the trusts thereof. His claim is barred by the lapse of time. Mr. Tilghman denied the claim in 1818, which was not repeated by Mr. Chew during the lifetime of the former, nor was any notice given to him that it would be asserted; the declarations of Mr. Chew to third persons, that he intended to claim the debt, can have no effect on the case. Besides, he has bound himself by signing the petition to the legislature in March, 1818, for a sale of the lands out of which the fund was to be raised, in pursuance of which, Mr. Tilghman was authorized to make sale thereof for the benefit of his grandson, or such persons as were entitled to the reversion.

J. R. Ingersoll, for Mr. Chew.

Mr. Tilghman was bound to provide and place in the hands of Mr. Chew 30,000 dollars, the contract was confirmed by the marriage, which fixed his liability; he received an equitable equivalent in actual pecuniary advantage, the claim has neither been discharged nor waived, it was valid against him during his life and is a charge on his estate, which equity will not take out of the hands of Mr. Chew till it is paid. There are besides equitable grounds for enforcing this claim independent of the marriage contract, arising out of sales made of Mrs. Chew's real estate, from which Mr. Tilghman received, beyond the amount of the post obiit bond, about the amount of the promised portion. Equity, looking to substance, not form, will inquire whether the whole case makes out a contract which is binding in conscience and good faith (1 Pow. Cont. 189), and supply all defects in form (Fonbl. Eq. bk. 1, c. 1, § 7), or mistakes in drawing the paper (2 Vern. 480); it will take both the verbal and written agreement into view, and make one contract, if either or both import one. The verbal contract was full and complete as the basis of the proposals of Mr. Chew, Jun. to settle the 30,000 dollars on his wife and children, which brought out the substitute of 10th July, but for which, Mr. Tilghman would have remained liable under the verbal contract. He considered this substitute as better for Mr. Chew than his own proposals, as appears by his indorsement, and they must be so construed in equity. The paper of July refers to the previous conversations admitting an obligation to provide the sum first stipulated; it proposes to do it out of the daughter's estate, but it is an undertaking by Mr. Tilghman to raise the 30,000 dollars, without any act to be done by Mr. Chew or his wife. It was a boon asked by Mr. Tilghman, to release himself and estate from the obligation of the contract, by raising her portion out of her property, not by an immediate sale, but after she was twenty-one; the letter of 10th July is a guarantee that she should then confirm the contract; if she refused or neglected, Mr. Tilghman remained liable on his original undertaking. In agreeing to this proposal, Mr. Chew stipulated only for his own performance, not hers, though his joining might be necessary, yet as he did not promise for her, the risk was Mr. Tilghman's, not Mr. Chew's. Mr. Chew had then no interest in the property, as Mr. Tilghman was tenant by the curtesy, so that his deed could give no effect. Before he could have any interest, his wife must be seised in deed (Co. Litt. 29a), if of a reversion, the particular estate must determine during coverture, his seisin must be of an immediate freehold or the inheritance to give him any interest. Her deed, therefore, would have availed on the same rule that a fine levied by a feme covert is good to estop her, though not her husband (Hob. 225); but as he was estopped by his assent, her deed would have made the title good. A feme covert may release dower without her husband joining, and may do by deed here whatever she may do by fine in England; the only difference is, that here the separate acknowledgment must be set out. Had Mrs. Chew died before coming of age, the performance of the agreement of July would have been impossible by the act of God, but as she arrived at twenty-one, when the condition could have been performed, the contract became single, as there was no default in Mr. Chew. 2 H. Bl. 178. The default was in Mr. Tilghman, for he took a deed of confirmation of sale made by him, from Mrs. Chew in May, 1817, after she became of age, and no reason has been shown why he did not also procure her deed confirming this agreement. In this agreement the promises of Mr. Tilghman and Mr. Chew, Sen. were the consideration, not the performance on either side; it is not the case of precedent or concurrent conditions, on the performance of which by one party the obligation of the other depends, but a marriage contract in which the issue of the marriage being interested, the default of one party will not exonerate the other. 1 Pow. Cont. 261; 2 Pow. Cont. 18, 19; 1 Ves. Sr. 377, 378. Here it was in the power of Mr. Tilghman to have had the agreement perfected, he is consequently entitled to no relief against his own default. 1 Fonbl. Eq. 391; 2 Freem. 35.

The agreement of July was only a modification of the verbal contract, as to the mode of settlement, the nature of the estate of Mr. Chew, and the substitution of the daughter's for the father's property to raise the fund,

which were the attributes or incidents, the mode of carrying the contract into effect, not the contract itself. That was neither extinguished or superseded, it bound Mr. Tilghman to make the provision out of his own estate, if it was not done from the daughter's; Mr. Chew has a right to rely on both agreements as evidence of the one contract, he cannot give any evidence to contradict his answer, or claim any relief not asked for; but as he is a defendant asking only to be dismissed, the same strictness as to averments is not required, as if he was a plaintiff. 2 Anstr. 397, 491. It is enough that the answer discloses the whole case, relying on a debt or duty existing before the 10th July, which must be discharged in some way, several deeds made at the same time, on the same subject, are but one. 1 Fonbl. Eq. 436; 1 Brown, Parl. Cas. 14; 17 Serg. & R. 110. The answer is explicit in relying on a contract, an agreement in consideration of marriage, it is fully proved, whether completely made at one, or different times is not material, it was in part performed on the part of Mr. Chew, Sen. who might take a year to complete it, as no time of performance was fixed. It was not material whether it was completed before or after the marriage, as was decided in Magniac v. Thomson [Case No. 8,956], or whether the fund was to be raised from the father's or daughter's estate, as she was his only heir, unless he survived her, in which case his estate must do it. The post obiit bond had no connection with this contract, as it was for money then due by Mr. Tilghman, for the lands sold.

Proposals in writing by the friend of a suitor to the friends of the woman, though no answer is returned, if a marriage ensues, are an agreement executed, binding on all sides (15 Vin Abr. 282, W, pl. 1; Finch, 146); so when it was done by a letter, and the offer in part performed or the marriage assented to, or no dissent expressed (2 Vin. Abr. 322, 373), the party is not deprived of the benefit of the contract, though he receives a legacy left him by the will of the party bound, it will be presumed to be given from affection, and not in satisfaction (15 Vin. Abr. 282).

Mr. Tilghman could not revoke this contract by his memorandum of May, 1818, the consideration was a continuing one, and good to support any promise after marriage (2 Salk. 96), the advance of money to buy furniture shows Mr. Tilghman's understanding that he was personally bound by the contract, of which it was a confirmation, as was the giving possession of the Northampton farm after August, 1818, and the giving and accepting the deed of the Longbridge farm in May, 1817.

As marriage was the consideration of the contract, it was complete on that event, so as to be in no wise affected by the death of Mrs. Chew, which was provided for in the agreement of the 10th July, a right to the promised provision accrued on the marriage, it was a debt due to Mr. Chew continuing till satisfied, he became a creditor to the estate of Mr. Tilghman, entitled to his debt as well as any legacy left him by the will. In 3 Ves. 466, the supposed rule that a legacy extinguishes a debt, is called an absurd one; here the will directs debts and legacies to be paid, in such cases both must be paid (1 P. Wms. 408); so in any case where the legacy is less than the debt (2 Madd. 36; 2 Vern. 498; 2 P. Wms. 553; 11 Ves. 544). It is a rule that a party cannot claim in repugnant rights under and against a will, if he claims under it, he must claim under the whole taken together (1 Thomas' Coke, 454, 525; 1 Brown, Parl. Cas. 492; 2 Ves. Jr. 560, 693, 696); as when a testator devises property which is not his own, and gives an equivalent to the owner, he shall be put to his election, if he accepts the equivalent he must relinquish what has been devised to another (Atk. 182; 2 Ves. Jr. 696; 4 Ves. 531; 9 Ves. 533; 13 Ves. 220). Here, however, there is no repugnancy; the will charges the whole estate with both debts and legacies, without any direction that the legacy shall discharge the demand, in such cases a party is not put to his election (1 Atk. 509; 2 P. Wms. 553); nor unless there is a plain intent, or necessary implication in the will that the legacy shall be a satisfaction (1 Ves. Jr. 523; Id. 265); the presumption is against the extinguishment of a debt (3 Atk. 67); the legacy must be given for such purpose or the debt remains (2 Ves. Sr. 636); and unless the will directs it, a creditor cannot be put to his election (2 Madd. 42; 12 Ves. 154).

The receipt of the legacy being no bar to the debt, its obligation on Mr. Tilghman is not impaired by his omission to provide the fund when it was in his power; it is in clear proof by Mr. Chew's declarations, that he never abandoned the claim, in his answer he states that Mr. Tilghman promised to pay interest on what was due. This averment is not contradicted, and is evidence, though not directly responsive to the bill; for the bill referred to the whole subject matter of the claim of Mr. Chew, as to which he was called on to answer particularly. As it cannot be pretended that it was the intention of the parties, that Mr. Chew should be unprovided for, by the failure to make the contemplated settlement in Mrs. Chew's lifetime, equity will decree an equivalent (Fonbl. Eq. bk. 1, c. 6, § 9), so that the intended object shall be effected. In addition to this consideration, there are two contracts, which must be executed unless they have been dissolved by the parties who made them; the agreement of the 10th July did not merge the previous one unless it was consummated, its failure left the former in full force, Mr. Chew's assent to it as a substitute, was to it when executed, not to take the promise as actual performance.

The lapse of time as an equitable bar, is fully accounted for by the situation of the parties towards each other, the events follow-

ing the marriage and the declaration of Mr. Tilghman of his inability to pay the amount without selling his house over his head, stated by Mr. Chew in his answer responsive to the bill. The time for performance was indefinite, after Mrs. Chew became twenty-one; time is therefore no statutory limitation; it does not run against an executor nor is he bound to plead it. 1 Atk. 524; 15 Ves. 498. A party who wishes to avail himself of time as a bar, must plead it, insist on it in his answer, or by a special replication. 1 Atk. 493; 2 Madd. 244.

Equity considers that as done which ought to be done. The marriage fund was in the hands of Mr. Tilghman in his lifetime. Mr. Chew now holds it. Equity will decree his retention of it according to the original intention of the parties. 2 Comyn, Cont. 406. Mr. Chew is a creditor whose debt is not extinguished by being an executor. Retaining for his own debt is consistent with a due course of administration. The complainants are volunteers, conditional legatees. The claims of justice and cravings of bounty can both be satisfied out of the estate, by decreeing to Mr. Chew the use of the fund for life, on giving security for its payment after his death, when the complainants will be entitled to its ultimate enjoyment.

Mr. Binney, for complainants.

The plaintiffs claim legacies left them by the will of Mr. Tilghman and offer refunding bonds. payment is resisted by one executor on account of a debt due to himself; the case comes before the court as on a declaration and plea in bar, presenting a definite issue, on the decision of which the allegations of the answer are not evidence, because not responsive to the bill. The bill suggests the claim of Mr. Chew as the plaintiffs understood it, the answer sets it up under the agreement of July 10th, 1816, and no other, and it is set out specially; the part performance relied on, the breach, the stipulation creating the alleged debt, are all referred exclusively to this agreement, with a denial that it was relinquished, or that the defendant ever agreed to the memorandum made by Mr. Tilghman in May, 1818. The answer alleges also, that the agreement of July was left in the hands of Mr. Tilghman, as the contract between them, and that Mr. Tilghman received more money from the estate of Mrs. Chew than was required to make up the sum agreed to be settled. This is the case to which the defendant has sworn, the court can decide on no other (Linker v. Smith [Case No. 8,373]; 6 Johns. 543); for if after failing to establish what is sworn to, a defendant can rely on other matters, his conscience is not in his answer; the decree must be on the matter sworn to in the answer, which is denied by the general replication. The claim is made by Mr. Chew in his own right, not in right of representing his wife. He can make no claim under the act of 1818, as Mr. Tilghman was accountable to the owners of the reversion after his death, nor under the act of 1799, as his heirs were bound to pay Mrs. Chew, if she arrived to twenty-one, or to the heirs of Mrs. Tilghman in case of Mrs. Chew's death without issue.

The claim is a stale one, and the less to be favoured by concealing it from Mr. Tilghman, while a declaration was made to others that it was intended to be made, as he was not put on his guard, so as to meet it by evidence, or to deny it by his answer. The purchase of furniture was no part performance of the contract of July, for it contained no reference to furniture, the possession of the farm was gratuitously given on account of the child, as appears by the letter of Mr. Tilghman in August, 1818. The averments in the answer that it was on account of interest are not proved, and so not evidence; we may use the answer to show the admissions of Mr. Chew, but are not bound by its assertion of any thing against us, because they contain affirmative matter, not as a defence to the bill but in support of a claim in bar.

The defendant must prove the contract he sets up in his answer, proof of a different one is not admissible, or if received, the decree is erroneous. 5 Johns. 543; Thompson v. Tod [Case No. 13,978]; [Simms v. Guthrie] 9 Cranch [13 U. S.] 19; [Carneal v. Banks] 10 Wheat. [23 U. S.] 181. We come prepared to meet the alleged agreement of the 10th of July, and not the verbal one which was in conflict with it, if there was a modified agreement compounded from the two, it is neither proved nor set up in the answer, so as to admit evidence touching it, and the answer avers it to be different from the one made in July and ratified by all parties in August. This was the only modified agreement, on the defendants showing, on which there is any pretence for a claim. The verbal contract, taken as proved by Mr. Chew, Sen., is too vague for any decree to be made upon it, the promises were by Mr. Tilghman to make up 30,000 dollars for his daughter, and by Mr. Chew to make up the same sum for his son. Neither was to provide for the child of the other, a settlement on the daughter out of her own estate would have been a compliance with the promise. The paper of July contains no promise, but merely a declaration of the mode of raising an income, on which no debt can arise or a claim for damages be founded, the answer states no facts from which a duty can be inferred, it does not aver the daughter's consent, any offer or demand of performance by Mr. Chew, or any refusal or default in Mr. Tilghman, no covenant, guarantee or engagement that the daughter shall execute the necessary deeds, nor any personal liability assumed by him on her default. It was necessary for Mr. Chew to join, for the remainder in fee being in her, her deed alone was void. 2 Rop. Prop. 97; Ath. Mar. Sett. c. 2. No purchaser would have taken hers and Mr. Tilghman's deed, and as Mr. Chew had not offered to join, he has no claim; the acts required to

perfect the agreement were concurrent in both parties, and neither can recover for a breach without averring and proving performance or offer to perform, though it is otherwise as to independent covenants. 2 Saund. 352a, note 3; Doug. 691. Both parties took the risk of Mrs. Chew's death, the party desirous of performance was bound to hasten the other by a request, if either is in default in law, he can have no claim in equity; here the defendant is in the position of a plaintiff, bound to make out a clear case of a debt due, or a duty assumed by Mr. Tilghman, binding on him and his estate. The agreement of July is an informal one, which equity will mould by the exercise of its largest powers, in order to effectuate the intention of the parties by making a limitation in strict settlement, or in providing for the issue, contrary to the words of the agreement, if such appears to have been the object of the agreement. Here it was only a provision for the marriage, not looking to the issue or the death of either Mr. Chew or his wife, no estate in trust was created, the fund was to be raised by a sale, it was for the use of the wife, and chancery would make such a decree as would secure it to her and the issue of the marriage. The only act required from Mr. Tilghman was a deed conveying his estate by the curtesy, Mr. Chew and wife owning the estate in fee could compiete the settlement, it has failed by the common default of all parties would any demand of performance by either, of course, without liability for the consequences.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice. The alleged contract between Mr. Tilghman, and Mr. Chew the defendant, consists of two parts: 1. The conversation between Mr. Tilgnman and Mr. Chew, Sen., communicated to Mr. Chew, Jun.; 2. The letter of Mr. Tilghman of the 10th of July, 1816, assented to by both the Messrs. Chew. Taking the conversation as a verbal agreement, it was a mutual promise that each should provide for his own child a portion of 30,000 dollars; no fund was designated out of which the portions were to be raised on either side, except as to 5000 dollars by Mr. Chew, by conveying a farm in Jersey to his son; neither party assumed any obligation to provide for the child of the other, referred to any provision for the issue of the marriage, or any limitation or mode of settlement of the respective portions. The object seems to have been a personal provision for the parties to the marriage, to be made separately by their parents, each taking on himself the raising their portions for their own use, neither promised that the child of the other should have any interest in his own child's portion during the marriage, or after the death of either. The promise of Mr. Chew, Sen. to make the same provision for the issue after his son's death, as he was to make for his son in his lifetime, formed no part of the conversation before the marriage, but is admitted to have been made afterwards; that promise however did not extend to Mrs. Chew if she survived her husband, and as the Jersey farm was to be conveyed to Mr. Chew, Jun. in fee, she could have only her dower out of it. The declaration by Mr. Chew, Sen. of his intention to make the same provision for his son's family by his will, as he would have made for his son if living, was also after the marriage, and in consideration of the agreement of the 10th of July; so that previous to that day, there is no evidence that Mr. Tilghman had made any promise or agreement to give the defendant any interest in his wife's portion, or to so settle it on her as to give him any control over it. The extent of any obligation assumed, was to give or make up to his daughter the stipulated portion; in law the defendant was no party to this promise so as to sustain an action for it, but even if he had any legal right to it, a court of law must award it to him absolutely, having no power to compel him to settle it on his wife or children. This promise therefore could create no legal debt due to defendant or give him any claim to damages for its breach at law, it must be treated as other contracts for the payment of money or the performance of collateral acts. A plaintiff must show his interest in the act to be done, its extent, the breach of the contract, with the amount of damages he has sustained thereby; these would be insuperable obstacles in the present case (conceding the verbal agreement to be fully proved and clearly broken) to a recovery at law. It is only in a court of equity that all parties in interest could apply for the apportionment of a fund, to which no party had an exclusive right, but even there it would be difficult if not impracticable to give the present defendant any relief. The contract is so vague and indefinite in most of its important parts, that if the decision in this case turned upon it, "this defect in the proof would be fatal to the claim of the defendant." The contract sought to be enforced onght to be clearly proved, its terms to be precise, so that neither party could reasonably misunderstand them, if it is vague, uncertain, or the evidence insufficient, a court of equity will leave the party to his remedy at law. Colson v. Thompson, 2 Wheat. [15 U. S.] 341.

Contracts in consideration and contemplation of marriage are binding in law and equity, yet they must have those attributes which will alone induce courts of equity to decree a performance variant from its terms. In this case the promise of Mr. Tilghman was not made to meet any stipulation made by Mr. Chew in favour of the intended wife, each parent was free to have made a settlement on his own child of their respective

portions with a reversion to themselves and their own right heirs, which equity would not disturb in the absence of any agreement to the contrary. Marriage agreements are construed in equity most liberally in favour of the issue of the marriage, who are considered as purchasers incapable of taking care of themselves. Equity will protect them under marriage articles limiting an estate tail to the parties to the marriage, by decreeing to them an estate for life only, with a remainder to the issue in strict settlement. 2 Vern. 658; 1 Ves. Sr. 239; 2 Atk 40; 2 Johns. Cas. 222; 1 Desaus, 443. But this rule does not apply to the parties, unless by the terms or manifest intention of the agreement they appear to have an interest in the fund to be provided. In this case there seems to me to be no such agreement or intention, but if Mr. Chew, Sen. had promised to give to his intended daughter-in-law a life estate in his son's portion if she survived him, there would have been powerful reasons for holding Mr. Tilghman bound to make an equivalent provision for his intended son-in-law. This would make the promise mutual, whereas all mutuality would be wanting by holding him so bound by the contract as stated and proved. It is not in equity a necessary incident to a marriage contract that the husband should have any interest in the wife's portion, when she has none in his, or that the survivor should have a life estate in the other's portion; this will not be decreed unless agreed upon, or necessary to carry the contract into effect on principles of justice and equity. In my opinion this contract created no debt or duty on the part of Mr. Tilghman which can be enforced in equity, for the want of precision in its terms, and the want of a promise by Mr. Tilghman to make a personal provision for the defendant, in both which respects the contract is defective.

The next inquiry is, whether the verbal contract formed a part of the written one of 10th July, or whether the latter is to be taken as the final agreement of the parties, complete in all its stipulations according to their intention therein expressed, and a substitute for the verbal one as contended by complainants, releasing Mr. Tilghman from all personal liability. On the other hand, the defendant contends, that there was an existing liability in Mr. Tilghman, continuing after the 10th of July, until that agreement was performed, the risk of which was assumed by him, who remained liable under the first contract, when the second failed by his daughter's death.

It is difficult to account for the written proposition of the defendant which led to the contract of July, if there had been a subsisting contract made, definite and precise in its terms; the subject matter was not a provision to be made by Mr. Tilghman for his daughter or her intended husband, or a conveyance of his property for the purpose, but her real estate which was to provide the marriage portion. On this subject the verbal contract was silent, as well as on the nature of the limitations. Had the defendant's proposition been accepted, he would have been without any interest in his wife's portion, in the event which has happened, which is inconsistent with an existing obligation in Mr. Tilghman to give it to him absolutely or for life, or the existence of a contract so definite as to be visible or tangible in a court of equity, as to give him any right. It remained then for the parties to make a contract specifying the fund for raising the portion, with such a limitation as would give the defendant an interest in it; this was intended to be done by the agreement of July, which is full and complete in all its parts; referring to no previous contract to be modified, it fully expresses the intention of the parties. So far as it accords with the previous inchoate contract, it reduces it to writing, which, in the absence of fraud, mistake, ignorance or latent ambiguity, cannot be varied, impaired or explained by parol evidence (2 Call, 12; 4 Desaus. 211; 3 Hen. & M. 416, 417), or stating circumstances previously to the writing ([Hunt v. Rousmanier] 8 Wheat. [21 U. S.] 208, 211). If it differs from the terms of the conversation, the writing is a declaration of a change of the original intentions and an agreement to alter and rescind them. 1 Fonbl. Eq. 173, 174; Talb. 20; Amb. 317.

This conversation between Mr. Tilghman and Mr. Chew, Sen. can be viewed only as leading to or forming the basis of the writing, or as a distinct substantive contract between the parties, put into writing as marriage articles; in either case a decree must be made conformably to the construction of the written agreement, or it must be reformed according to the rules of equity, by something which more correctly indicates the intention of the parties than the agreement itself. Otherwise it must be taken to be the only and very contract subsisting between them. Any contract, however solemn, may be reformed by matter of higher consideration than the contract, but this power of reformation is limited; there must be something definite by which to reform a contract, it must refer to or recite some other agreement on which it is predicated, which it was intended to carry into effect, to which it must conform, and by which it must be controlled, construed or regulated.

Articles in consideration of and previous to marriage, are considered in equity as the heads of an agreement for a valuable consideration (2 Atk. 40; 3 Hen. & M. 406); they will be so construed as to carry into effect the intention of the parties for the benefit of the issue for whom they are purchasers (11 Ves. 228; 2 Desaus. 126; 1 Desaus. 443; 3 Ves. 245; 18 Ves. 54); any mistakes will be corrected by reforming the article

or settlement. A settlement after marriage, reciting articles before marriage, may be reformed by them; so if it was intended to be pursuant to the articles, any variance between them being presumed to be by accident. Talb. 20, 181; 1 Ves. Sr. 239; 2 P. Wms. 349, 356; 3 Brown, Parl. Cas. 333, 334; 1 P. Wms. 123; Comyn, 417; Amb. 317; 2 Vern. 658; 3 Hen. & M. 408. But the evidence of intention by which to make the reformation must be by a recital, a letter of instructions or declaration of intention, not by conjecture, but in words showing it (1 Ves. Jr. 59, 151; 5 Ves. 597, note, 600; 3 Brown, Ch. 27), otherwise the variance is presumed to be by a new agreement (1 Fonbl. Eq. 173, 174; Talb. 20). The great object of marriage settlements, is to restrain the parties from disposing of the fund to the prejudice of the wife and issue, and it is in their favour and necessarily against the husband, that equity reforms and construes them liberally to embrace the object intended; this will be done in favour of the husband or wife, where they claim in consideration of a settlement made, or to be made by them or their friends, so as to make the contract operate beneficially for the party intended to be benefited by it. 1 Munf. 98, 112, 390. But if the plaintiff in equity has not completed his promised provision for his wife and issue, or if by her death without issue he has suffered no prejudice by what he has done towards its completion, or if by the agreement the portions were to be equal, and the husband has not made up his, equity will leave him to his legal remedy. 2 Freem. 35, 36; 3 Ves. 246.

If an instrument professing or intended to carry an agreement into effect, is so drawn by mistake as not to effect the object, it will be reformed in conformity therewith; the instrument being insufficient for the purpose intended, the agreement is considered unexecuted, and the delinquent party will be held to its performance. If however the parties have deliberately agreed on an instrument to effect their intention, which meets the views of both, it becomes incorporated into their agreement, and if not founded in mistake in fact, and is executed in strict conformity with itself, equity will not decree another security, or act as if it had been agreed on or executed. It will compel the execution of agreements fairly made, but will not make them for parties, or decree the execution of any other instrument than the one agreed on. The death of the party who was to execute the instrument which was to give efficacy to the agreement, though it frustrates the intention of the parties by an event not provided for, does not alter the case. Where the parties have on deliberate advice rejected one instrument and adopted another, equity will not decree a different one to be executed, or that to be done which the parties supposed would be effected by the instrument finally agreed upon. Hunt v. Rousmanier, 1 Pet. [26 U. S.] 9, 17, 8 Wheat. [21 U. S.] 201, 210.

In the application of these principles to this case, I can perceive no just ground for reforming the agreement of the 10th of July; from its terms it appears to have been the only agreement intended to be carried into effect, so it appears to have been considered by all parties by their subsequent conduct, and having been deliberately made, must be considered as the only foundation of defendant's claim. It is so set up in his answer and expressly stated, that though it varied essentially from the verbal contract, it was assented to by all parties, and left with Mr. Tilghman for safe keeping as the contract agreed upon; such is the case presented by the answer, on which the issue is depending on the general replication. This issue is on the facts and case stated in the answer, not on any other matter which may be offered or given in evidence at the hearing. 4 Madd. 21, 29; [Lenox v. Prout] 3 Wheat. [16 U. S.] 527; [Hughes v. Blake] 6 Wheat. [19 U. S.] 468. The opposite party must have notice by the answer of the matters relied on, so as to shape his replication accordingly, and offer countervailing evidence; he is not to be taken by surprise, or lose the opportunity of asking leave to file a special replication, which cannot be done without leave. [Leeds v. Marine Ins. Co. of Alexandria] 2 Wheat. [15 U. S.] 380; Peirce v. West [Case No. 10,909]. The same rule applies to a bill so as to enable a defendant to demur, plead or answer, according to the case stated. 1 Munf. 395; 7 Ves. 457; 12 Ves. 79; [Simms v. Guthrie] 9 Cranch [13 U. S.] 25; [Carneal v. Banks] 10 Wheat. [23 U. S.] 188; 6 Johns. Cas. 349. A party who sets up a right against another, must be confined to the allegation of his bill or answer, the court will permit no evidence of any other matter than such as tends to prove those allegations, or decree on any thing not put in issue or admitted by the pleadings. [Fullerton v. Bank of U. S.] 1 Pet. [26 U. S.] 612; Thompson v. Tod [Case No. 13,978]; [Harding v. Handy], 11 Wheat. [24 U. S.] 103; 6 Johns. 559, 563. The defendant's counsel contend for a broader rule in case of an answer than a bill, where the answer is merely a defence against a right asserted by the plaintiff, as in a tithe cause, where it was held sufficient to set up a composition or commutation generally as a defence. Anstr. 404, 491. Cases of this description are exceptions to the general rule, on account of the difficulty of definite proof, but where a defendant in his answer, goes beyond mere matter of defence, and sets up an affirmative claim, he becomes a plaintiff and must make out his case by proper allegations and corresponding proofs. Such is the present case, both parties are claimants of the same fund, one to recover, the other to retain; the only ground of denial of the plaintiff's claim, is an assertion of an affirma-

tive claim by defendant in virtue of a contract set out in the answer, both parties being actors in their own adverse right, we must decide as if the defendant's case was in a bill filed by himself.

Taking then the agreement of the 10th of July as the contract relied on for the foundation of the defendant's claim, it will be considered according to the intention of the parties, without regard to form or manner of expressing it, as a contract or articles of marriage formally executed, as a valid binding agreement or covenant to be executed according to the principles of equity, regarding only its substance. The marriage having been solemnized, is a consideration which entitles the defendant to the performance of the contract in good faith, for which the estate of Mr. Tilghman is answerable, if its breach has been by his default, or its non performance has been owing to the occurrence of any event, against which a court of equity can properly consider him as having undertaken to provide.

It was stipulated that so much of the daughter's estate be sold, after she would arrive at twenty-one, as would raise 30,000 dollars, which would be in nine months after the date of the agreement; no time was limited in which it was to be done after she arrived at twenty-one, the sale could not be before, for although Mr. Tilghman by the act of 1799 could sell, he was bound to appropriate the proceeds in the manner pointed out by that law. The postponement of the sale was from necessity, not for the convenience of Mr. Tilghman, the annual value of the estate was trifling, neither party by the terms of the agreement assumed the risk of the settlement being defeated by the death of the daughter, nor is there any principle of equity which would make Mr. Tilghman personally answerable for the consequences. That does not seem to have been contemplated at the time, it was a proper subject for a provision, had any been intended, the object was a provision for the marriage, this agreement was agreed on for security of its performance, deliberately made and accepted as satisfactory. Had it been intended to substitute the estate of Mr. Tilghman as the fund in place of the daughter's estate in the event which has happened, it would have been so stipulated, or such intention have been manifested; had it been intended to bind the estate of the wife, she would have been a party. The defendant's proposals immediately preceding the contract were, that if no issue survived her, he would renounce the tenancy by the curtesy, and all legal right to his wife's personal estate, the same provision was to take effect on the subsequent death of the issue who should survive her. This proposal met the very case which has occurred, and negatives the belief, that in the same event, Mr. Tilghman was personally to be bound, or that a stipulation to that effect was left out of the agreement by accident or mistake; it must therefore be taken as the only security required, the insufficiency of which by the death of Mrs. Chew affords no ground for our interference. Hunt v. Rousmanier [supra], is authoritative on this point.

As the agreement could not be performed before the arrival of Mrs. Chew to twenty-one, no cause of action could accrue till that event, it happened on the 19th of April, 1817, she survived it two months, so that there was time to have completed the settlement, yet though arrangements were made as to sales of her property by Mr. Tilghman, nothing was done in relation to the settlement, or any offer or demand made to execute it. Its completion required the concurrent act of all parties, of Mr. Tilghman to release his estate by the curtesy, of Mr. Chew and wife to convey the reversion; the acts must be simultaneous, or the conveyance of the fee must precede the release of the life estate, and the latter, if made to take effect immediately by a separate deed, would have left Mr. Chew and wife the sole power of disposing the whole estate, with no other control than by a court of equity in virtue of the marriage articles. Mrs. Chew was then under the legal control of her husband, her deed was indispensable, it must be her voluntary act, Mr. Tilghman could exercise no control over her, nor could he by his own act complete the settlement. The important question then arises, on whom does the law throw the duty of doing, or offering to do the acts necessary to performance, and what is such default in either party, as subjects him to a debt or damages by non performance, without request by the other, when the contract fixes no time for performance?

An obligation to pay money without naming the time of payment, creates a debt due presently on demand; if for the performance of a transitory act, it must be done in a convenient time without request, when the concurrence of the obligee is not necessary; if it is necessary, the obligee must hasten the performance by a request, or the obligor may take his lifetime. He shall also have a reasonable time after a request, and the obligee shall name a time for performance, as the making a feoffment. If the condition be to infeoff a stranger, the obligor shall require him to name the time and place, and do it in convenient time, unless the act requires the concurrence of the obligee, or of the obligee and stranger, in which case the obligor does not take on himself for the obligee who is party to the deed, as he does in the case of a stranger. 6 Coke, 31; 2 Coke, 79; Co. Litt. 208, 219; Cro. Eliz. 798; 1 Rolle, Abr. 436, pl. 1; 1 Brown, Ch. 55. In cases of forfeiture, the party is allowed his lifetime to perform the act. 1 Call, 88, 89. The party who is to have the benefit of the act may do it when he pleases. 3 Day, Com. Dig. 103, G, 3, pl. 16. Where prompt performance of the act is necessary to give the party its benefits, or its immedi-

ate fruition was the motive for the contract, it must be done in a reasonable time. Co. Litt. 208; 2 Coke, 75, 78; Wing. Max. 463, 464, pl. 31; 5 Serg. & R. 383. If to be done on demand, a reasonable time is allowed. 1 Rolle, Abr. 443, 449; 3 Day, Com. Dig. 104. If the acts to be done are mutual or concurrent, the party who sues must aver and prove performance on his part, or an offer and readiness to do so. 2 Saund. 352, note; Doug. 691; 11 Serg. & R. 200, 352; 12 Johns. 212. Acts to be done by both parties at the same time, are deemed mutual and concurrent, though stipulated by different instruments they are one contract, one is the consideration for the other. [Morgan v. Morgan] 2 Wheat. [15 U. S.] 299; [Goldsborough v. Orr] 8 Wheat. [21 U. S.] 224. A plaintiff in equity must aver and prove the performance of those acts, which were the consideration of the contract to be enforced. [Colson v. Thompson] 2 Wheat. [15 U. S.] 344. If the promise is to an intended son-in-law that the father will make for his intended wife the same provision as he had done for his other children, the plaintiff must aver and prove what that provision was. 1 Call, 84, 89. Taking this contract then according to its terms, there was no legal obligation on Mr. Tilghman to be the first to move towards its completion, he was in no default without a request by the defendant, nor is there any case made out for equity to interfere, to carry into effect the intention of the parties, to correct any mistakes or cure the effects of any accident.

A different view of the case might be necessary, if the answer could be considered as evidence, so as to put the plaintiffs to disprove the matters set up in support of the defendant's claim, in the same manner as he is bound to do in relation to the denial of the plaintiff's right, according to the rules of equity in ordinary cases. The defendant is not in this position, in his answer he admits the receipt of money as executor, by which is bound to the extent of the charges against him; if in his answer he had averred the simultaneous payment of the sum so admitted, the whole must be taken as evidence, so as to put the plaintiff to disprove the payment. But if the payment or discharge is alleged at a different time from the receipt, or by a distinct transaction, the answer will be taken as an admission of the receipt, but not as evidence of the payment; so where the answer sets up an affirmative right or claim, as a bar to an account, or to retain the money in the hands of the defendant, he must establish it independently of his oath; so where he in his answer alleges any distinct independent fact as a bar to plaintiff's claim. 6 Johns. 559; 2 Johns. Cas. 87, 90; Gilb. Ev. 45; 4 Brown, Ch. 75; 7 Ves. 404, 587; 13 Ves. 53, 54; Amb. 589; 2 Madd. 445; 2 Eq. Cas. Abr. 247, 248; Kohne v. Ins. Co. of North America [Case No. 7,921]; 1 Munf. 395; 4 Hen. & M. 511; 1 Ves. Jr. 546. So of matter of avoidance set up by plea. Gernon v. Boecaline [Case No. 5,367]; 1 Johns. 590; 14 Johns. 74; 17 Johns. 367. An answer is no evidence as to matter not necessarily drawn out by the bill, or not directly charged, if not inquired of or forming part of the discovery sought; so where the fact inquired into is immaterial, and the answer is a departure from the question. 14 Johns. 63, 74; 1 Munf. 396, 397; 10 Johns. 544; [Leeds v. Marine Ins. Co. of Alexandria] 2 Wheat. [15 U. S.] 383; [Lenox v. Prout] 3 Wheat. [16 U. S.] 527; [Hughes v. Blake] 6 Wheat. [19 U. S.] 468; 1 Johns. Cas. 461; 1 Johns. 589, 590.

On these well established principles, I have excluded from my consideration all the allegations of the answer to which they apply, and being clearly of opinion that the defendant has not made out his claim on the merits, have not examined into the effect of the lapse of time, or the staleness of the demand. It is proper however to remark, that I adhere to the rule laid down in Baker v. Biddle [Case No. 764], and had this case required its application, it might have had a powerful if not a conclusive effect.

There must be a decree to account.

HOPKINSON, District Judge. A primary, and certainly the most important part of the discussion at the bar, has been upon the question, what was the contract of the parties? Until this is settled it would be an idle waste of time to inquire into the alleged violations. I shall therefore first direct my attention to that question; and it seems to me that if we trace this marriage negotiation from its commencement to its termination, we shall not be at a loss to discover the intention of the parties in its progress and conclusion. Legal formalities were not regarded, for the whole transaction was governed by a spirit of liberality on both sides, and conducted with that mutual confidence which the situation of the persons concerned in it, and their long and ultimate acquaintance entirely warranted.

The pecuniary arrangements for this marriage began in the conversation between William Tilghman and Benjamin Chew the elder, the precise date of which is not fixed, but we may assume that it was certainly antecedent to the proposals made by William Tilghman and accepted by the younger Mr. Chew. It has been so understood in the argument on both sides, nor have we clear and certain evidence of the agreement which is said to have resulted from that conversation. The respondent, Mr. Chew, in his answer, states that the agreement was, that his father should give him land worth 5000 dollars, and allow him annually the interest of 25,000 dollars, and that Mr. Tilghman should give his daughter, for her advancement, 30,000 dollars, and that he promised to do on this occasion whatever the respondent's father would do, and more. In the deposition of Mr. Chew the elder, he states that he told Mr. Tilghman that he would make out to his son a farm in

New Jersey which he estimated to be worth 6000 dollars, and immediately after the marriage would contribute and pay to his son 1500 dollars annually in addition. That in consequence of this general information Mr. Tilghman stated, without any great difficulty or much consideration, that he would make up the sum of 30,000 dollars for his daughter. If we were called upon to execute this agreement, there would be much difficulty in ascertaining its true meaning in a very important particular, that is, whether Mr. Tilghman intended and promised to give to his daughter the sum of 30,000 dollars from his own property, in addition to the estate which would come into her possession at his death, or whether the intention only was to anticipate, in this respect, the event of his death and put her then husband at once into the enjoyment of so much of her property. Many considerations would naturally come into the decision of this question, were it necessary to pass a judgment upon the effect of the conversation alluded to; but the subsequent proceedings of the parties relieve us from these difficulties. On the 10th of July, 1816, the day before the marriage was solemnized, Mr. Chew the younger tendered to Mr. Tilghman certain proposals in writing, we have them now before us. As they were not adopted, they are of no further consequence at this time than as they may show that Mr. Chew the younger did not suppose his marriage contract had been finally arranged and settled between his father and Mr. Tilghman, or it is difficult to assign a reason for his making proposals so different from the terms said to have been agreed upon in the conversation between those gentlemen, and without, as far as we know, any consultation or explanation with his father on the subject. The conduct of Mr. Tilghman is equally irreconcilable with an understanding on his part that this affair had been settled already; in which case his reply to these proposals would actually have been that the contract was concluded, and no longer in his power, without the assent of the parties concerned, and with whom he had contracted. So far from this was the understanding of Mr. Tilghman, that he did not make the least allusion to what had passed between him and Mr. Chew; but offers other proposals to Mr. Chew instead of his, which Mr. Tilghman thought more favourable to Mr. Chew than his own, and which certainly were so, and which were assented to in writing by Mr. Chew. In the course of this negotiation, in which proposals were made by both of these parties, and a contract finally agreed upon and signed, neither of them made any reference to any antecedent contract, but both seem to have considered the whole subject to be open to them, and entirely at their disposal. The assent of Mr. Chew the elder was not thought necessary, either to annul the former agreement or to give validity to the new one. If, however, that assent were necessary, it was afterwards fully given. Under such circumstances, I cannot but consider the proposals of Mr. Tilghman delivered to Mr. Chew the younger and by him formally assented to in writing, as the only subsisting contract between the parties; as the only contract brought before the court. The respondent has also so considered it, as in his answer this is the contract insisted upon, and for the breach of which he requires redress or compensation. In deciding upon a transaction which took place more than fifteen years ago, it is very satisfactory to have a written document for our guide, rather than the imperfect recollection of conversations, perhaps not fully and mutually understood at the time, and which now are still more uncertain and obscure. On the 10th day of July, 1816, the day before the celebration of the marriage between Mr. Chew and Miss Tilghman, the father of the lady "presented to Mr. Chew, the respondent, a paper to which the respondent gave his assent in writing." It is in the form of a letter. We must carefully scan the language used, as it was written by one who well understood the force of every word contained in it, and was remarkably precise in all matters of business. It is as follows: "As my daughter, to whom you are to be married is under age, I think proper to mention what I propose to be done after she arrives at twenty-one; and from the conversation we have recently had, I make no doubt but it will be perfectly agreeable to you. In order to raise an income we must resort to the Northampton estate, which, although valuable, is unproductive in its present state. I intend that so much of it shall be sold as will produce 30,000 dollars, of which 5000 dollars may be expended in furniture, and the remaining 25,000 dollars be placed in your hands, to be used by you as you think proper. This capital of 25,000 dollars is to be considered after your death as a debt due from your estate. If your wife survives you, she is to receive it from your estate, and if she dies before you she is to have the right of disposing of it as she pleases, either by last will and testament or any writing in nature thereof, or any other writing executed in the presence of at least two witnesses; but if she should die without making any such disposition, then after your death the said 25,000 dollars are to be distributed according to the law of Pennsylvania, in the same manner as it would be if your wife had died possessed of it and unmarried." This is the proposal, the agreement, the contract, by whatever name it may be called, on the part of Mr. Tilghman; and it seems to me to be hardly possible to raise a question upon its meaning, or even to turn it into any form of expression which will be more intelligible and explicit; but, if amplified for explanation, does it not amount to this and no more? "You are about to marry my daughter; you will require money to furnish your house and an income to maintain your family. My daughter has a real estate which is unproductive, and therefore will not furnish the

money and income you require, but it is valuable, and if sold and turned into money it will supply your wants. As she is under age, this cannot be done at present, but I propose that after she arrives at twenty-one, so much of her Northampton estate shall be sold as will produce 30,000 dollars, a part of which, 5000 dollars, shall be applied to the purchase of furniture, and the residue be a capital to produce the income you require." The agreement or proposal goes on to put this capital of 25,000 dollars precisely in the situation, as to Mr. Chew's rights, and the rights of his intended wife, as it would have been had it remained in real estate. Is there a word here which intimates even a suggestion that in any event these 30,000 dollars, or any part of them, were to be drawn from the estate of Mr. Tilghman? Is there any thing like a promise on his part, that if, from any cause, the fund which was to produce the money should fail, or the execution of his proposal be prevented, he would make it good from his own property; he would be responsible to Mr. Chew for his disappointment? I perceive nothing of this sort. That which was to be done to carry this arrangement into effect was not to be done by Mr. Tilghman; was not under his control or power. He could have no part or agency in it beyond his interest in the land to be sold as tenant by the curtesy. Indeed it has been argued at the bar, that he was not, upon strict construction of the proposals, bound to release that. I consider his proposal however as binding him to do whatever should be necessary on his part to execute that proposal, and that it would have been a breach of good faith if he had refused to unite in the conveyance of the land he proposed to sell. This is, however, no question here. It is plain that the execution of the plan or proposal agreed upon between Mr. Tilghman and Mr. Chew, depended, for its completion, upon the will and the acts of Mr. Chew and his wife, and it would be very extraordinary if Mr. Tilghman had made it the direct interest of Mr. Chew and his wife, not to execute it, by making himself responsible out of his own estate for its failure; for it is contended, that the undertaking of Mr. Tilghman that the 30,000 dollars should be raised and paid to Mr. Chew, was an absolute promise to pay so much money, to be produced by the sale of the Northampton property, if it could or should be so done, but if not so produced, to be paid by Mr. Tilghman from his own resources; in short, that the promise to raise this amount and pay it into the hands of Mr. Chew, was absolute and unconditional. If, when Mrs. Chew arrived at twenty-one, she should refuse to make the conveyance, without which the land could not be sold and the funds could not be raised, Mr. Tilghman was to answer for the default; if by unexpected events the intended sales should become impossible, Mr. Tilghman was to indemnify Mr. Chew for the disappointment. In the first case it is clear, that while, by the refusal of his wife to sell, Mr. Chew would hold the possession of the estate from which the money was to come, he would also be entitled to demand from her father the money. A contract so unreasonable cannot be raised by ingenious arguments and forced constructions; it should appear to be the intention of the parties by explicit and unequivocal terms.

If this be the meaning of the contract, the question occurs, has it been defeated by any thing done or omitted to be done on the part of Mr. Tilghman? Has it failed by his default; or has its non performance arisen from circumstances not under his control, and which on the face of the contract appear to be the contingencies, known to both parties, on which its execution necessarily depended? The contract was dated on the 10th of July, 1816; Mrs. Chew became of age on the 19th of April, 1817, and died on the 16th of June of the same year; that is, three days short of two months after she attained her full age. It is expressly stated, that whatever was to be done to carry the proposals into execution, was "to be done after she arrived at twenty-one." If it could be conceded that the engagement of Mr. Tilghman was absolute, that it should be done after Mrs. Chew arrived at that age, equity would nevertheless give a just and reasonable construction to the words which designate the time of performance; and by looking at what was to be done, ascertain the period of performance, after which a default would be adjudged. The words are, "I think proper to mention what I propose to be done after she arrives at twenty-one." It can hardly be contended that the responsibility of Mr. Tilghman, whatever it was, that this should be done, attached on the moment his daughter arrived at twenty-one; and if this were not the case, but a reasonable time will be allowed for performance, we must find that reasonable time in the nature of the acts to be performed. Here, too, we have the written document for our information and guide. The money to be raised was to be procured by a resort to the Northampton estate; so much of which was to sold as would produce 30,000 dollars. Can we imagine that it was the expectation or intention of either of these parties that this large sum could be raised from these sales in the short space of two months; and that there was a default in Mr. Tilghman in the performance of his contract because it was not done? Again, it was undoubtedly in the option of Mr. and Mrs. Chew, when she came of age, to go on to make the sales of land according to the proposal and previous intention, or to retain the land and look to that, or to other resources, for the required income. On the part of Mr. Tilghman, nothing could be done in execution of the proposals, but to release his interest in the land, as tenant by the curtesy, and there is no proof or allegation that he ever refused to do this; that he was ever asked to do it, or that its not having been done form-

ed any impediment, delay or disappointment in making the sales, in raising the money or in defeating, in any respect, the execution of the proposals of the 10th of July, 1816. If this be so, the failure in the completion of the design cannot be traced, in the smallest degree, to Mr. Tilghman, by his doing or omitting to do any thing contrary to his proposals, even if they may be considered as a contract. This design was defeated by the afflicting death of one of the parties whose co-operation was indispensable; and it was fully in the view of the respondent, that it could not be executed if that event should happen; and of course the whole arrangement, the whole plan for raising this money, would necessarily fail if this event should take place before it could be completed. I may add, that the object and intention of raising it also failed on the death of Mrs. Chew.

In my opinion, Mr. Chew, the respondent, has not established his right to retain any part of the funds or estate of his testator, William Tilghman, in satisfaction or on account of any claim or demand he has against that estate by reason of any contract, matter or thing set forth in his answer.

TILGHMAN (VANDEVEER v.). See Case No. 16,846.

Case No. 14,046.

TILGHMAN v. WERK.

[2 Fish. Pat. Cas. 229; 1 Bond, 511.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1862.

PATENTS — VALIDITY — MANUFACTURING FREE FAT ACIDS—TILGHMAN'S PROCESS—INFRINGEMENT—DAMAGES.

1. Tilghman's invention consists in a process for manufacturing free fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and, consequently, under pressure, on fatty bodies or substances.

2. The invention is based on a discovery made by plaintiff that water highly heated and under pressure, of itself, possesses a chemical power of decomposing fat bodies into their elements, fat acid and glycerine.

3. The plaintiff's patent covers all the modes and processes by which the principle of his invention is made operative in practice.

[Cited in McComb v. Brodie, Case No. 8,708.]

4. The degree of utility is not pertinent to the question of the validity of a patent, but may, perhaps, form a proper subject of inquiry in estimating the quantum of injury resulting from the infringement.

[Cited in Cook v. Ernest, Case No. 3,155.]

5. The description of Tilghman's process in his specification is sufficient. A fixed rule is given, which will certainly insure success, and it is also made known that certain variations may be made without changing the process.

6. The gist of the plaintiff's invention is the discovery of a principle in science which he claims to have made practically useful by the process he describes. It is plain that he who adopts that principle, to an available or practical extent, so far invades the exclusive right of the patentee; and to the extent that he has adopted or used the process, is chargeable with infringement.

7. Hence, where the patentee described a process for the decomposition of fatty matter by the action of water at a high temperature and pressure, so as to dispense with the fourteen per cent. of lime previously used, and the defendant used heated water at a lower temperature and less pressure, and used seven per cent. of lime, *held*, that this was an infringement of the patent.

8. The amount which the plaintiff should recover, is to be measured by the profit which the defendant has derived from the adoption and use of the plaintiff's invention.

This was a bill in equity, filed to restrain the defendant [Michael Werk] from infringing letters patent [No. 11,766], granted to the complainant [Richard A. Tilghman], October 3, 1854, for an "improvement in processes for purifying fatty bodies." The nature of the invention will appear from the following extracts from the specification: "My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water, at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain, at the same time, free fat acids and solution of glycerine. I mix the fatty body, to be operated upon, with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel, in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, that the requisite amount of pressure may be applied to prevent the conversion of water into steam. * * * The melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matter into fat acid and glycerine, takes place with some materials (such as palm oil) at or below the melting point of bismuth, yet the heat has been carried considerably above the melting point of lead, without any apparent injury, and the decomposing action of water becomes more powerful as the heat is increased. * * * What I claim as my invention is the manufacture of fat acids and glycerine from fatty bodies, by the action of water at a high temperature and pressure." The defendant used a tank, in which he proposed to effect the decomposition of the fat by the direct application of superheated steam to the mass of oil or fatty substances, thus producing fat acids without distillation or the direct application of fire. For this process he obtained letters patent, dated October 5, 1858, in which, after stating that superheated steam alone, of a tempera-

[1] [Reported by Samuel S. Fisher, Esq., reprinted in 1 Bond, 511, and here republished by permission.]

ture of from 800° to 900° F., will effect the decomposition, he says that acids and alkalies may be used in combination with the superheated steam to render so high a temperature unnecessary, and states that at a temperature of from 400° to 530° F., the use of seven pounds of lime and fifty pounds of water to every one hundred pounds of fatty matter will be sufficient.

George Harding and Henry Stanbery, for complainant.

N. C. McLean and Charles Fox, for defendant.

LEAVITT, District Judge. As explanatory of the delay which has occurred in the decision of this case, it is proper to remark that it was argued before Judge McLean and myself, near the close of the October term, 1860. A short time after the argument, and before he could prepare an opinion, that distinguished and lamented judge left this city to take his place in the supreme court at Washington. After some conference in relation to the case, from which it was apparent there was an entire concurrence of views between the judges as to all the principal points, it was arranged that Judge McLean should take the papers, and write an opinion at Washington. Owing probably to his feeble health through the winter, resulting in his death, he did not, so far as I am informed, state his views in writing, and now, under some disadvantages certainly, it has devolved on me to announce the conclusions of the court.

The plaintiff, Tilghman, has filed his bill in equity, claiming to be the first and original discoverer of a new and useful improvement in the process for the decomposition of fatty substances and oils for practical purposes. He alleges that the exclusive right to his invention is secured to him by letters patent, granted by the United States, dated October 3, 1854; and that the defendant, Werk, has violated the right thus secured to him under his patent, by the use of a certain apparatus and process in the manufacture of fat acids at the city of Cincinnati. The bill prays for a discovery as to the matters alleged, and such relief as the equity of the case may require. In his answer, the defendant denies, in the first place, that the plaintiff is the first and original discoverer of the method or process described in his specification and covered by his patent; and avers that substantially the same process was known long before the date of the plaintiff's patent, and in practical use in France, and is described in several works published in that country, the authors and compilers of which are named and specifically referred to. The defendant also denies any infringement of the rights of the plaintiff under his patent, and avers that the method or process used by him is essentially different from that claimed and described by the plaintiff, and is the product of his own invention, and is secured to him by a patent, granted October 5, 1858. The answer further alleges, in substance, that the improvement claimed by the plaintiff is of no value, and incapable of being practically and economically used by manufacturers.

The plaintiff, in his specification, describes the nature of his improvement as follows: "My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water, at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain, at the same time, free fat acid and solution of glycerine. I mix the fatty body, to be operated upon, with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel, in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, that the requisite amount of pressure may be applied, to prevent the conversion of the water into steam."

This comprehends substantially the nature of the invention claimed by the plaintiff as new and original. The other part of the specification describes minutely and with great clearness the apparatus and appliances by which the proposed result is produced. It is not necessary to notice critically the process as described, as the defendant's answer takes no exception to the sufficiency of the specification.

1. As to the originality of the invention claimed by the plaintiff and covered by his patent. It appears, from the above extract from the specification, that the invention of the plaintiff consists in a process for the manufacture of fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and, consequently, under pressure, on fatty bodies or substances. The invention is based on the discovery, claimed by the plaintiff to be original with him, that water, under the conditions above set forth, of itself, possesses a chemical power of decomposing or separating fat bodies into their elements, fat acid and glycerine. Now, the answer of the defendants sets up that the same process is described in Payen's Chemistry published in the year 1851; in Regnault's Chemistry, published in 1853; and in Roret's Encyclopedia. These are all French publications, of dates anterior to the date of the plaintiff's patent; and, under the patent laws of the United States, if any of the processes described are identical with the invention claimed by plaintiff, it is fatal to the validity of his patent. By reference to these publications, and to the testimony of the distinguished experts which is before the court, the inference seems to be irresis-

tible that there is a substantial difference between the processes they describe and that patented to the plaintiff. Neither of the works referred to describe or notice any such chemical decomposing power pertaining to water at a high temperature, and under pressure, which constitutes the main element in the discovery claimed by the plaintiff. Regnault and Payen describe a process of decomposition consisting in a separation of fat acids by the destruction of the glycerine, one of the elements of the fatty body, but do not mention the use of water highly heated, under pressure, as the decomposing agent. In the description contained in Roret's Encyclopedia, lime is required as the decomposing agent, in quantities sufficient to effect the separation of the fatty body into fat acid and glycerine. No allusion is made to the process described by the plaintiff, and which is the distinguishing feature of his invention. In confirmation of this view of the publications referred to, and as conclusive of the point under consideration, it may be remarked that the experts examined on behalf of the plaintiff—Professors Booth, Rogers, and Genth, gentlemen of distinguished reputation in the walks of science, and who profess to be acquainted with the French works referred to—unite in saying that they describe no process resembling or identical with that described by and patented to the plaintiff. They also agree in saying that in so far as their knowledge and research extend, there is no publication extant which describes the plaintiff's process, and, in their judgment, it is new and original with him; and even the scientific gentlemen who have testified, as experts, on behalf of the defendant, do not say that they have knowledge of any work or publication, dating back of the plaintiff's patent, which describes his process. The invention of Milly & Motard, described in Roret's Encyclopedia, is perhaps a nearer approximation to that of the plaintiff's than any other referred to by the defendant. They describe a close boiler, in which fat and water were subjected to the action of high temperature and pressure. But, in their process, they do not rely on these agencies to effect the separation of the elements of the fatty bodies, but require lime in sufficient quantities, to combine with all the fat, and thus prevent the formation of any free fat acid. So, too, it appears, that in the patent of Arthur Dunn, described in volume ii., second series of the "Repertory of Patent Inventions," he used a steam-tight vessel, and applied a temperature of 310° F., and, by the use of soda, produced soda soap, and not free fat acid.

It is obvious that, in all the descriptions of these processes, they are essentially different from the plaintiff's invention, by whose apparatus free fat acid is produced solely by the chemical action of water, at a high temperature under pressure. It is certainly true that some of the discoveries referred to, especially Milly & Motard, and Dunn, approached very nearly to the discovery of the plaintiff; but as certainly stopped short of the object. They failed to reach the important chemical truth, that highly heated water, under pressure, will produce from fatty bodies free fat acid and solution of glycerine without any other agency. This view is most convincingly exhibited by the testimony of the experts who have been examined as witnesses. It is also sustained by the commissioner of patents, who in his note to the defendant Werk, of June 26, 1858, rejecting his first application for want of novelty, distinctly informs him that Mr. Tilghman is the acknowledged discoverer of this process. I have no hesitation in concluding that the attempt to invalidate the plaintiff's patent for want of originality in his invention has wholly failed.

2. The patent, however, is assailed on other grounds, which I will briefly notice. First. It is insisted that while it may be practicable to separate fatty bodies by the action of heated water, according to the plaintiff's process, it can not be economically and practically used, and therefore the invention patented is of no utility. The defendant, in his answer, while he does not take issue distinctly on the utility of the invention, alleges that it is liable to two objections, which prevent it from being of practical use. The first is, that the great heat required to produce the result proposed, will speedily destroy or greatly injure the tank and pipes employed; and, second, that so much time is required in completing the process, that practically it is of no utility. As to this point, it is only necessary to advert to the familiar principle in the law of patent rights, that a presumption of the utility of an invention arises from the grant of the patent; and this presumption can only be repelled by clear proof that it is utterly worthless. There is not only no such evidence in this case, but it is proved upon actual experiments that the plaintiff's process has been successfully applied to practical use. What may be the degree of utility is not an inquiry pertinent to the question under consideration, but may, perhaps, form a proper subject of inquiry hereafter, if it is proved that the defendant has infringed the plaintiff's patent, in estimating the quantum of injury which has been sustained. Second. It is also contended, by the defendant's counsel, that the patent of the plaintiff is a nullity, because it does not describe the process by which the result claimed is to be produced with sufficient precision, and that no one, though skilled in the business, could determine, except by experiment, the precise degree of heat required. On this point it may be remarked, in the first place, that the defendant has offered no evidence tending to prove the existence of any practical difficulty in the use of the process de-

scribed in the plaintiff's specification. The learned experts who have testified for him, say they have tested the practicableness of the described process, by actual and successful experiments. And it also appears from the evidence of the witnesses, Ropes and Grant, that they have actually produced free fat acid and solution of glycerine by the plaintiff's process, making no mention of any difficulty from a want of exactness in the specification as to the degree of heat required. And referring to the specification, it seems to be sufficiently explicit to answer the requirements of the statute, construed in the liberal spirit in which, by repeated judicial decisions, this instrument should be viewed. The language of the specification in reference to the temperature of the heated water is as follows: "The melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matter into fat acid and glycerine, takes place with some materials (such as palm oil) at or below the melting point of bismuth, yet the heat has been carried considerably above the melting point of lead, without any apparent injury, and the decomposing action of water becomes more powerful as the heat is increased." Now, it is well known that lead melts at 612° Fahrenheit, and bismuth at about 510°. There is, then, a precise degree of heat—612°—recommended and prescribed as sure to produce a good result in changing common fatty bodies to acid and glycerine—and a lower temperature—the melting point of bismuth—510°—when palm oil or similar substances are to be operated upon. And it clearly does not render the specification liable to objection for want of certainty and clearness, that the patentee states that the degree of heat may be carried above these figures without injury. Nor is the sufficiency of the description impeached by the fact that the desired result has been produced at a lower temperature of water. There is a fixed rule given which may be safely followed, while it is made known that the manufacturer may safely depart, to some extent, from this rule, if, from experiment and a just exercise of discretion, it should be expedient to do so. This specification is not therefore, liable to the objection urged in argument, and so often referred to in the books, that the process described can not be carried out without the necessity of previous experiments. Third. Another ground of objection to the validity of the patent is. that it is merely for a principle, and not for a process, and therefore void. It seems to the court this objection is fully met by a reference to the words of the patentee in describing his invention. In the introductory part of his specification, he claims to have invented "a new and improved mode of treating fatty and oily bodies," and continues as follows: "My invention consists of a process for producing free fat acids and solution of glycerine," etc. Now, it is well settled, and needs no citation of authorities to prove it, that the discovery of a new and abstract principle in science or mechanics can not be the subject of a patent. And clearly, if this patentee has discovered merely the principle or scientific fact, that superheated water, by its own power, will effect the decomposition or separation of fatty substances into acids and solution of glycerine, he could not have obtained a patent; or, if a patent issued, it would be void. But he claims and has described more than this. He claims the discovery of a new principle, and a process by which that principle may be made practical and operative. This process is minutely and fully described, and that is all the law requires. It has been adjudged a patentable invention by the officer of the government selected with special reference to his qualification for the position, and by him a patent has been issued, securing to the patentee the exclusive benefit of his invention, for the term prescribed by law. I do not feel called upon to overrule and set aside the judgment of the commissioner of patents, in the case now before me.

3. The next inquiry relates to the question of infringement. The bill alleges that the defendant "is now constructing and using the said patented improvement in some part thereof, substantially the same in construction and operation as in said letters patent mentioned." On the point of infringement, a mass of evidence has been offered on both sides, and it has been discussed at length by counsel. Without reviewing the evidence in its details, I will state, as concisely as I can, the conclusions to which I have arrived; and I may remark that as there seems to be no controversy as to the process or appliances by which the defendant decomposes fatty bodies, it is unnecessary here to describe them with minuteness. The sole inquiry is, whether the mode or process used by the defendant is substantially identical, in whole or in part, with that patented to and used by the plaintiff? The invention of the plaintiff has been already sufficiently noticed. As to the defendant's invention it appears, that in May, 1858, he applied for a patent, and filed his specifications describing his invention and the process by which it was to be made practical. He there claimed as his invention "the manufacture of fat acids by subjecting fatty or oleaginous bodies to the direct action of superheated steam, either with or without the use of other agents." This application was rejected for the reason stated by the commissioner, that the invention claimed by the defendant was covered by the previous patent granted to the plaintiff. The defendant filed a new application, in which he modified his original claim and describes his invention as consisting "in the combination and arrangement of the apparatus as herein set forth, for the saponifica-

tion of fatty bodies." And this he proposes to effect by the direct application of superheated steam to the mass of oil or other fatty substances, and thus producing fat acids without distillation or the direct application of fire. In his conclusion, he claims, as new, "the combination of boiler, superheating furnace, and tank." In the description of his process, he says: "The superheated steam alone, of a temperature of from 800° to 900° F., will effect the decomposition, but acids and alkalies may be used in combination with the superheated steam to render so high a temperature unnecessary." He then states that at a temperature of from 400° to 530° F., the use of seven pounds of lime and fifty pounds of water to every one hundred pounds of fatty matter will be sufficient for the superheated steam. Thus modified, a patent was granted to the defendant October 5, 1858. In his answer, the defendant calls his invention "a combination of machinery, or improvement in apparatus for manufacturing fatty acids, etc., by superheated steam, and a tight tank by which the fatty acids are produced without distillation, or the direct action of fire." He also states that the fatty substances are placed in the tank, closed at the top to retain the heat and steam, with six or seven pounds of lime, and one hundred and thirty pounds of water to every one hundred pounds of the fatty matter, and introduces steam heated to 340° or 350° F., which, in connection with the action of the lime and water produces a lime soap, and sets the glycerine free in five hours after the operation is begun. The lime soap is afterward decomposed by the use of sulphuric acid, and the fat acids become free.

This synopsis of the defendant's invention, as described and used by him, sufficiently exhibits its essential features. And the question for decision is, whether in any of its processes, or modes of operation, it infringes any right granted to the plaintiff by his patent. It has been before stated, that the claim of the plaintiff is in substance, that, by his process, superheated water, under pressure, is the sole agent in the decomposition of fatty substances, and separating them so as to form free fat acids, and solution of glycerine. Does the defendant's process effect, or is it capable of effecting, the same result by substantially similar means? In giving an answer to this question, it is unnecessary to institute a critical comparison of the machinery and appliances respectively used by the patentees. It is not controverted that they are essentially alike. The defendant produces the heat necessary to decompose the fatty mass in his tank, by the use mainly of steam heated to a high temperature, which necessarily causes the water forming a part of the contents of the tank, to rise to the same temperature as the steam, thus avoiding the direct application of fire to the tank, according to the process he describes; and by his distinct admission in his answer, a portion of water is used as a decomposing agent. It is also proved by the witnesses, that, in the defendant's process, water is required and used. And it is clear that, in that process, it is the superheated water, necessarily under pressure, which effects, to a certain extent, the decomposition of the fatty contents of the tank. The scientific gentlemen examined as witnesses for the plaintiff unite in saying, after full experiments, that, in their judgment, this result is due to the chemical action of the superheated water, on the precise principle of the plaintiff's invention. It is true that two experts, called as witnesses for the defendant, state it as their belief, not based, however, on experiment, that the decomposition can not take place at a temperature of water less than 550° or 600°. And hence it is urged by the counsel for the defendant, that there is no identity in the two processes.

In support of this view, it is insisted, that in the defendant's process the water is heated only to 350° or 400°, and at that temperature can have no decomposing power, and therefore that the processes are essentially different in principle. The fact relied upon to sustain this position is not made out by the evidence. The opinions of the two chemical experts referred to, can not prevail against the positive statements of no less than five witnesses, that by experiment it is found that, at a temperature of 350°, the heated water, under pressure, as applied by the defendant, will produce free fat acid by its chemical action alone. As I understand the law, the plaintiff's patent covers all the modes and processes by which the principle of his invention is made operative in practice. In Curtis on Patents (section 233) the author says: "These cases show that when a party has invented some mode of carrying into effect a law of natural science, or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of his invention; that he is entitled to protect himself from all other modes of making the same application; and, consequently, that every question of infringement will present the question whether the different mode, be it better or worse, is in substance an application of the same principle. The substantial identity, therefore, that is to be looked to in cases of this kind, respects that which constitutes the essence of the invention, viz: the application of the principle." On this point the authorities are numerous; but it seems to the court unnecessary to make a special reference to them. It is clear the plaintiff, in this case, does not, in his specification, restrict himself to any certain or fixed temperature of heated water as necessary to produce the required result. He names the melting point of lead, 612°, because, as he says, it is known to operate successfully; but he does not say, or intimate, that a higher or lower temperature may not be expedient or useful. He does indeed state, what would be entirely obvious without it, that the rapidity of the process of

decomposition, by the chemical action of the heated water, will be in proportion to the degree of its heat. He has, therefore, in effect, provided for a much higher temperature than 612°, by recommending the use of a tank strong enough to resist a pressure of ten thousand pounds to the inch.

There is but one other point connected with the question of infringement, to which it seems necessary to advert. I refer to the position assumed by the counsel for the defendant, which, as I understand it, is, that if the defendant has adopted the principle of the plaintiff's invention in part only, and uses an agency in his process, which is not a part of the plaintiff's invention, he does not infringe his right under his patent. It is contended, and the evidence proves it, that the defendant uses two distinct agents in his process. He has the superheated water, and, in addition, uses six or seven pounds of lime to each one hundred pounds of the fatty mass in the tank. The result of this, as appears satisfactorily from the evidence, is, that a part of this mass is converted into free fat acid, and a part is saponified or converted into what some of the experts designate as an acid lime soap. There seems to be no question that the production of the free fat acid is due solely to the decomposing power of the heated water, and the saponifying effect to the alkaline properties of the lime acting on the mass of fat. As to the first of these effects, the production of free fat acid, the precise principle which constitutes the distinguishing feature of the plaintiff's invention is clearly brought into requisition in the process. As to the other, the saponifying action of the lime, there is no invasion of the plaintiff's claim, for the obvious reason that he does not name or provide for the use of lime in the process described in his specification.

Upon this state of facts, the question is, has the defendant so far appropriated the invention of the plaintiff as to render him liable for an infringement? The answer to this inquiry seems so obvious that I shall not discuss it at any length. The principle is undoubted, that in a patent for a mechanical structure, the novelty and utility of which consists wholly in a combination of things before known and in use, there is no infringement by the use of any of the separate parts of the combination. But this principle can have no application to the present case. The gist of the plaintiff's invention is the discovery of a principle in science, which he claims to have made practically useful by the process he describes. Now, it seems plain that he who adopts that principle, to an available or practical extent, so far invades the exclusive right of the patentee. The logical sequence of the opposite doctrine would be, that there could be no infringement unless the patented invention was adopted to the extent of producing the full results proposed by the patentee. In the case of this defendant, his discovery, which constitutes a distinct part of his claim, that a small percentage of lime will facilitate and hasten the decomposition of the fatty mass in the tank, may be and probably is useful and meritorious, and would well entitle him to a patent; but certainly it gave him no right to adopt the plaintiff's invention in giving effect to his own. His claim for a patent should have rested on the fact, that he had discovered an improvement of the principle and process covered by the prior patent to the plaintiff. To the extent, therefore, that he has, without the license or authority of the plaintiff, adopted and used his process, the defendant is chargeable with an infringement. It is perhaps to be regretted that the defendant, in applying for a patent, had not limited his claim to an improvement of the plaintiff's invention. In that form his patent would have been sustainable, and would have been beneficial, not only to the defendant, but the public. It is in evidence that under the old process of separating fatty matter for manufacturing purposes, fourteen pounds of lime were required to every one hundred pounds of the mass, which produced lime soap; and the separation of this soap into free fat acid and glycerine, required the use of thirty-five per cent. of sulphuric acid. This was an expensive process; and the discovery that, through the joint agency of superheated water, and six or seven per cent. of lime, the desired result could be speedily and successfully effected, was in an economical view, an important invention, and apparently of practical utility.

I can not hesitate upon the law of this case, applicable to the facts proved, in holding, first, that the plaintiff's patent is valid to the extent of his claim—and, secondly, that the defendant has infringed upon the plaintiff's patented rights to the extent indicated. In the present posture of the case, it is obvious no decree can be entered for damages arising from the infringement. The rule of compensation sanctioned by the express provision of the statute, is the actual damages sustained by the plaintiff; and this damage is measured by the profit which the defendant has derived from the adoption and use of the plaintiff's invention. But in this case, this adoption and use have only been to a partial extent, and there are no data before the court by which the profit to the defendant can be ascertained. The amount of the recovery in the case can not be great—and it may be, the plaintiff does not desire a decree for damages. While it is clear from the evidence that it is practicable by the plaintiff's process alone to effect the decomposition of a fatty mass as claimed by his patent; yet it is perhaps questionable whether it can be successfully adopted by the manufacturer. The evidence shows that about twenty hours are required to effect the desired result by this process; and some of the witnesses are positive, that in this country at least, the length of time required to perfect the process is a fatal objection to its practical use. It appears that those who

have tried it have found it necessary to expedite the process of decomposition by the use of from one-half to two per cent. of lime; and with this addition the trials have been very successful. But the plaintiff, under the conviction that the use of superheated water, under pressure, would, of itself, effect the desired end, has made no claim for the use of lime in his process, and can not complain of its use as an invasion of his rights.

If the plaintiff desires it, the case will be referred to a master to inquire into and report the actual profit which the defendant has derived from the adoption and use of the plaintiff's process, to the extent that it has been adopted and used by the defendant.

A decree may be entered in accordance with the views stated by the court.

[For other cases involving this patent, see Cases Nos. 14,041–14,043.]

TILLEY (CHAMPLIN v.). See Case No. 2,586.

Case No. 14,047.

TILLEY v. THARP.

[3 Cranch, C. C. 290.] [3]

Circuit Court, District of Columbia. May, 1828.

PLEADING AT LAW—MISNOMER—PRACTICE—SPECIAL BAIL.

Upon a motion to appear without bail because the affidavit to the plaintiff's account by mistake of the attorney who wrote it, named the defendant James instead of William; the court took time to consider till the next day, when the mistake was corrected.

The declaration and the account filed were against William Tharp, but the affidavit at the foot of the account was against James Tharp.

Mr. Beale, for defendant, offered to appear without bail.

R. P. Dunlop, for plaintiff, said it was his mistake in writing the affidavit, and he would have it amended to-morrow.

THE COURT (nem. con.) said they would consider until to-morrow, to give the plaintiff's counsel an opportunity to correct the mistake, when it was corrected and the defendant ruled to give special bail.

Case No. 14,048.

The TILLIE.

[7 Ben. 382.] [1]

District Court, E. D. New York. July, 1874.[2]

COLLISION—LONG ISLAND SOUND—TUG AND TOW—FALSE LOG—FABRICATED EVIDENCE.

1. A tug was taking a tow of canal-boats through Long Island Sound eastward, and was overtaken by the propeller T. just after sundown March 24th, 1873. The T. struck one of the boats in the second tier of the tow, causing damage for which the owner of the boat brought suit against the propeller. No fault was alleged against the canal-boat; but, in defence, the T. set up an extreme darkness of the night, and her master, when examined as a witness, produced a log-book, purporting to have been kept by him, to show it and also the time of the collision. *Held*, that, upon the evidence, the log-book must be thrown out as fabricated, and with it the testimony it was brought to support; and, no other sufficient defence appearing, the boat was entitled to recover against the propeller.

2. A proved fabrication of evidence, unexplained, will compel an adverse decree.

In admiralty.

R. D. Benedict and Henry R. Wing, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

BENEDICT, District Judge. This action is brought to recover of the steamboat Tillie the damages received by a canal-boat in a collision, which occurred on the Sound about nightfall on the 24th of March, 1873. The canal-boat was one of nine boats, at the time being towed through the Sound to the eastward by the tug U. S. Grant. Her locality in the tow was on the port side of the second tier from the stern. When the Grant and her tow was near the Stepping-Stones, the tow was caught up with by the Tillie, also bound eastward, and the latter vessel, coming up behind, ran into the canal-boats in tow of the Grant, with speed unslackened, and, striking the libellant's boat in the stern, caused the damage in question.

No fault is attributed to the canal-boat, and she is conceded to be entitled to recover of one tug or the other, or of both. She proceeds against the Tillie alone, and alleges that the accident arose from the failure of the Tillie to see the tow ahead of her when she might easily have done so. The defence of the Tillie is, that the night was so dark as to render it impossible to see the canal-boats at any distance.

In this controversy a material question of fact, and the controlling one, relates to the darkness at the time of the collision. Incidental to this question is that of the time of the collision. The accident happened just after sundown on the 24th of March; and, to sustain the statement of those on the Tillie, that at the time it was so dark that it was impossible for them to see the canal-boats which the Grant had in tow until upon them, a log-book is produced, which the captain of the Tillie swears was the log-book of his vessel kept by him at the time, in which book the entries of March 24th contain the statement, written by him at the time, as he says, that the collision occurred at 6:50 p. m., and it was then very dark.

This log-book is challenged by the libellant, and it has been plainly charged that the log-book is a false log, fabricated for this action, in order to support the defence

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

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

[2] [Affirmed in Case No. 14,049.]

here set up. It seems needless to discuss in detail the points of evidence which are relied on to discredit the log. Unquestionably there are features, connected with the book, that are calculated to cast great suspicion upon it, which there has been no effort to explain. It is sufficient here to say that the absence of explanation, the manner of witnesses when interrogated in respect to the entries in the log, the failure to produce the other book which it appears was kept, and the conflicting statements of the witness in respect to the entry of the collision made in the log, have led me with great reluctance to the conclusion that the charge of the libellant against this log is true. This conclusion disposes of the case; for, in a conflict of evidence such as the case presents, the production of a fabricated log warrants the rejection of the testimony which it is brought to support. If possible, it ought never to happen that a case sought to be supported by a fabricated log-book should succeed; and while charges of this kind are not to be listened to unless based upon strong evidence, if they are supported by testimony and remain unanswered on the evidence, they compel an adverse decree. Let a decree be entered for the libellant, with a reference to ascertain the amount.

[On appeal to the circuit court, the above decree was affirmed. Case No. 14,049.]

Case No. 14,049.

The TILLIE.

[13 Blatchf. 514.] [1]

Circuit Court, E. D. New York. Aug. 16, 1876.[2]

ESTOPPEL—HUSBAND AND WIFE—COLLISION—LOOKOUT—LIGHTS.

1. A canal-boat, wholly owned by a married woman, was injured in a collision with a steam-tug. Her husband filed a libel in rem, in his own name, as owner, against the tug, to recover the damages sustained. At the time of the collision, and thereafter, the libellant and his wife resided in New York. On the trial, the wife testified as a witness for the libellant, and gave material evidence to sustain his claim for damages. It was shown that, in fact, the action was brought by and with the assent of the wife: *Held*, that the wife would be equitably estopped from bringing another suit, and that this suit could be maintained.

[Cited in The William F. McRae, 23 Fed. 560.]

2. A tug with her captain on deck, and a man at her wheel, and no other lookout, held not to have had a proper lookout.

[Cited in Cianciminos Tow & Transp. Co. v. The Ripple, 41 Fed. 64.]

3. The absence of lights on a canal-boat held unimportant, when she could have been seen without lights on her, and when there was so much daylight that lights on her would not have afforded any aid in discovering her.

[Cited in The City of Troy, Case No. 2,769; The Buckeye, 9 Fed. 667.]

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

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

James K. Hill, for claimant.

HUNT, Circuit Justice. On the evening of March 24th, 1873, the canal-boat John H. Stim, while being towed by the steamer U. S. Grant through Long Island Sound, in an easterly direction, was run into and injured by the steam propeller Tillie. At the time of such injury the boat John H. Stim was the exclusive property of Catharine Madden, wife of the libellant; and the libellant had no ownership or interest in said vessel at the time of said injury, or at the time of commencing this action. At such time, the libellant and his wife were, and ever since have been, residents of the state of New York. The said Catharine testified as a witness on the trial of the action, being called by her husband, and giving material evidence to sustain his claim for damages. The tow of the U. S. Grant consisted of nine boats, in three tiers, of three boats each, and the John H. Stim was the outside boat on the port side of the second tier. She was in that position when she was run into by the Tillie, and such collision occurred at about twenty minutes after six o'clock p. m., and when the light and the weather were such that the Stim and the other boats in the tow could have been seen by the officers of the Tillie, if a good lookout had been kept, and ought to have been seen by those in charge of her. The sun set at six o'clock and eleven minutes. The boats were not seen by the captain or lookout of the Tillie until that vessel was directly upon them. She ran between two of the boats in the stern tier, and against the boats in the second tier. The Tillie had no other lookouts than the man at the wheel, and the captain, who was in the fore part of the vessel, attending to the navigation of the vessel and giving orders for the same. The man at the wheel shifted the wheel and handled the engine, by the captain's orders. The pilot was in the cabin, drinking a cup of coffee, when the collision occurred. The Tillie was running at a speed of eight knots to the hour, and, when running at that speed, could have been brought to a dead standstill, by means of her reverse engines in less than her length.

I have, throughout the examination of this case, entertained great doubt of the right of the libellant to maintain this action. He brings the suit in his own name, alleging himself to be the owner of the boat injured, and claiming the damages as his own. He does not sue as husband for the use of his wife, as master for the use of the owner, or as agent or representative of any one. He appears in his own behalf only, and for his own benefit. The general rule cannot be doubted, that the owner of the claim present-

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

[2] [Affirming Case No. 14,048.]

ed must be the party to the suit for its recovery. If the chattel of A. is injured or destroyed, A. must bring the suit to recover the damages resulting; and an action by B. must necessarily result in a failure. This is the rule in all courts. The fact that one is an agent of the owner, upon principle, can give him no more interest in the property, and no greater right to sue in his own name, as owner, for an injury to it, than if he were not an agent. By the laws of the state of New York, the bill of sale given in evidence established the title of this vessel in Catharine Madden, the wife of the libellant, and, by the same laws, she is entitled to bring an action in her own name for an injury to it.

It is laid down, in the case of The Una [Case No. 14,331] that the master of a vessel, whose owners are foreigners and absent from the country, may bring a suit in his own name, to recover the damages resulting from a collision. Whether justly or not, stress is laid upon the fact that the vessel and her owners were foreign and absent. In the case before us, this circumstance does not exist. The master and the owner are both residents of the state of New York.

Three cases have been decided in the supreme court of the United States, viz.: Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40; Lawrence v. Minturn, 17 How. [58 U. S.] 100, and McKinlay v. Morrish, 21 How. [62 U. S.] 343, which are supposed to bear upon this point. In the latter two cases, the action was by the consignees, in their own name, and the question turned upon the interest of the consignees in the cargo, and it was held that this interest gave a right of action. In the case in Peters, the action of the agent was ratified by the power of attorney of the consignees, for whom he sued. The case of The Commander in Chief, 1 Wall. [68 U. S.] 43, holds, that the objection of want of proper parties, viz.: that the owners of the vessel were not the owners of the cargo, and cannot sustain the libel, cannot be taken for the first time, upon the argument in the supreme court. In the case of The Ilos, Swab. 100, where the damage had been pronounced for, in a suit by A., and, on reference to assess damages, it appeared that B., not A., was the registered owner of the vessel injured, and A. claimed to be the beneficial owner, by a bill of sale not registered, Dr. Lushington ordered the case to proceed, and the money to be paid into the registry for the benefit of the party entitled to it. The objection was not taken on the trial, nor did the fact then or there appear. The order was made upon a motion to dismiss, arising subsequent to the decision upon the merits. The case scarcely affords ground to determine what would have been the opinion of the learned judge, had the question arisen in the course of the trial and upon issue made. These authorities do not leave the question of the libellant's right to sue in this case in as good a position as might be desired. It is clear, in fact, however, that this action is brought by and with the assent of the wife, the real owner. I think it would not be tolerated in the real owner of a claim, that he should sit by and see another prosecute for its recovery, and even aid in such recovery by his own testimony in this suit, and then bring his own action to recover the same demand. He would be equitably estopped. I, therefore, proceed to consider the case upon its merits.

The evidence satisfies me that the collision occurred at about twenty minutes past six o'clock, on the 24th of March, 1873, at about ten minutes after sundown. The claimant's witnesses generally place this time at twenty minutes before seven. I think this is an error. It certainly is, unless the libellant's witnesses are guilty of the grossest perjury, in general not only, but in the specific facts to which they testify. The son of the captain of the Tillie, a witness for the claimant, testifies that he could see the land as they passed Fort Schuyler and Throgg's Neck, corroborating the numerous witnesses to that fact, on the part of the libellant. I have no doubt, that, if reasonable care had been exercised by those on board of the Tillie, the tow of boats could have been readily seen and avoided.

The Sound was a mile wide at this point, and the passage to the north of the Grant and her tow was unobstructed. There was no proper lookout on the Tillie, in form or in fact. The captain, who attends to the navigation of the vessel, is held not to be a proper lookout. A lookout should give his entire and undivided attention to ascertaining the vessels in front of, or near to, his own vessel, and reporting the same. The master, who is charged with the general care of a vessel, and gives his attention to that duty, is not, and cannot come, within this description. Neither is the man at the wheel—whose duty it is to keep the vessel on a prescribed course, to do which he must keep his eye on the compass, and receive and obey orders—a competent lookout, within this rule. Especially is this so, if, as in this case, he is charged with the duty of signalling to the engineer the directions necessary to be given to him. These two persons constituted the only lookout on the Tillie, as she proceeded up the Sound on the night in question. I think the lookout was not sufficient in law; and, in fact, I think they did not exercise the care that the occasion required.

The testimony afforded by a log-book is usually entitled to much respect. The log-book of the Tillie, offered in evidence, is surrounded by so much doubt, and, to use a mild term, so many mistakes and discrepancies in relation to it are presented, and its internal appearance is so suspicious, that it must be entirely rejected.

The absence of lights on the canal-boat

is not important. The evidence is quite satisfactory, that, if reasonable attention had been given, the boats in the tow could have been seen without lights on them; and that such was the condition of the daylight, that lights would not have afforded any aid in discerning them. They were plainly visible from the Grant, at a distance of about six hundred feet; and the boats of another tow were also visible at the distance of a mile, as was the land on each side; and one witness was reading by the remaining daylight. Lighted lamps are not important for good or for evil, when the daylight remains so strong as in the present case. No claim is made, in the answer, that the lights of the Grant were defective or insufficient.

I find nothing in the evidence which would justify me in holding that the negligence of the Tillie and her officers is affected by any negligence of the Grant or the canal-boat injured.

The judgment of the district court should be affirmed.

Case No. 14,050.

Ex parte TILLMAN.

[3 App. Com'r of Pat. 282.]

Circuit Court, District of Columbia. March 15, 1860.

PATENTS—PAVEMENTS—CLAIMS —HOW TO BE CONSTRUED.

[1. Tillman's invention of an improved pavement "whose surface is composed of alternate elevations and depressions, substantially equal in number and surface, and nearly rectangular, the depressions being large enough easily to admit either calk of the horseshoe, their sides nearly vertical, the longest sides nearly crosswise of the street," does not infringe Isaac D. Kirk's invention. Kirk's invention was alternate elevations and openings. In Tillman's invention the elevations and depressions are substantially equal in number and in surface; in Kirk's they are equal in number, but unequal in surface.]

[2. Where the claim is certain and specific, but a construction can be put upon the specification which would extend the claim of the inventor to such an extent as to make the invention unpatentable, such a construction should not stand in the way of the clear and specific claim, and a patent should be issued.]

Appeal [by Samuel D. Tillman] from the decision of the commissioner of patents, for refusing to grant to him letters patent for his improvement in pavements.

MORSELL, Circuit Judge. He states his claim to be in the same words as stated in the report of the examiners, unnecessary therefore to repeat it here. The commissioner for his decision adopts the report of the examiners, date 25th February, 1858, which is in these words: "The nature of this invention is very clearly indicated by the claim, which is as follows: What I claim as new, and for which I ask letters patent, is a pavement whose surface is composed of alternate elevations and depressions, substantially equal in number and surface, and nearly rectangular, the depressions being only large enough easily to admit either calk of the horseshoe, all their sides nearly vertical; and the longest sides nearly crosswise of the street; thus giving sure foothold at the shortest possible intervals, while the wheel was smoothly upon the elevations, without falling into the depressions, as described." The principle upon which this pavement is constructed, the applicant says (page 8 of the specification) "being the formation of a continuous series of surfaces, on some of which the wheel may at all times press perpendicularly and roll without impediment; and the formation of indentations alternating with such surfaces, each of which extends crosswise to the road, sufficiently to admit the toe-piece of a horseshoe, and yet exclude the wheel, in common use," it is evident that a slight alteration of the contour of the indentations and grade faces will not alter the principle as set forth.

It is proper that some of the modifications should be noticed and explained. The corners of the indentations may be rounded, and the sides slightly curved, and it may be proved by experience that such modifications may add to the durability of the road. When the plates are laid on a foundation, the bottom part of such indentations may be left off, so as to form an opening through the plate, instead of an indentation merely. The longitudinal lines of the indentations may run slightly oblique, provided there is still room for the admission of the toe calk, as set forth. Now let us compare the pavement of Isaac D. Kirk, to whom a patent was refused in 1853, and to which reference was made in the first letter of rejection, with that of Tillman, taking the above recited claim; and, what is announced as the equivalent of the devices thereby covered as the foundation of such comparison, both are cast iron pavements. Tillman's has alternate elevations and depressions, Kirk's alternate elevations and openings through the pavement; but these openings constitute a modification of Tillman's depressions, for he has said above that, under certain circumstances, the bottom part of such indentations may be left off, so as to form an opening through the plate, instead of indentations merely. In Tillman's the elevations and depressions or openings are substantially equal in number and in surface; in Kirk's they are equal in number, but unequal in surface. But we understand from the specification that substantial equivalency is obtained when the width of each indentation, being a little more than that of the heel-calk of a common horseshoe, and the length slightly exceeding that of the toe-calk of such shoe, the area of such elevation shall bear such a relation to the area of each depression as deduced by the above rule, and the eleva-

tions and depressions be so arranged with respect to each other as that the wheel shall have a constant perpendicular support; or, in other words, without the point of pressure and the axis of the wheel shall always be in the same vertical line. Now this condition cannot always be fulfilled, even in Tillman's pavement, unless the depression be made so small that the toe-calk cannot enter, for, as has been well remarked in the official letters of the 31st of December, last, it is well known that the ties of many a wheeled vehicle are narrower than the usual length of the toe-calk. It follows, then, that if such a wheel travel over a single series of elevations in the direct line of traction, there will be movements of time when it will have no vertical support. But, under whatever circumstances the wheel shall have a constant vertical support on Tillman's pavement, under precisely the same circumstances will it have the same support on Kirk's. We must therefore conclude that the elevations and depressions in Kirk's pavement are substantially equal in surface, as well as in number. Tillman's elevations and depressions or openings are nearly rectangular. Kirk's openings have the figure of a rhombus. But Tillman does not confine himself to the rectangular form, for he has described in his specification and shown by his drawings that the depressions may be modified in form without violating the principles of his invention, and among those modifications are the ellipsoid and rhomboid figures. The form of the depressions being changed, a change of form of the elevations is necessarily involved; hence, when Tillman employs the rhomboid form of depression, it and the elevation are substantially like those used by Kirk. Tillman's depressions, as claimed, are only large enough to admit either calk of the horseshoe. In the specification their width is described as bearing a little more than the heel-calk, and their length as slightly exceeding that of the toe-calk. Kirk's openings are considerably larger (as seen in his model) than either the heel or toe calk of a common horseshoe, but what is the patentable limit between "a little more" and "slightly exceeding" and "considerably larger." We confess that we can discover none, when it is considered that the depressions or openings in both Tillman's and Kirk's pavements are designed for the common purpose of offering a firm foothold for the horse.

Finally, Tillman's depressions have all their sides nearly vertical, and the longest sides nearly crosswise of the street, and these are also instituted between Tillman's invention and that of Titus and des Granos, to which reference has also been made by the examiner, a still closer resemblance might be established than that found to exist between Tillman's and Kirk's; but we deem this unnecessary, and have only to say, in conclusion, that, in view of the references adduced, we are disposed to think that the claim submitted might have been allowed had it not been so enlarged and explained in the body of the specification as clearly to bring it within the scope of the cases referred to by the examiner. As it stands, we can only recommend that a patent be refused, which we accordingly hereby do.

On the 25th February, 1858, the commissioner says: "The aforegoing report is confirmed, and the application rejected." The office correspondence of the 5th and 12th of April, 1858, show that the above objections "that the claim, by certain terms used in the body of the specification, so enlarged and explained said claim as to bring it within the scope of the cases referred to by the examiner, was not known to the appellant or made until in the action of the examiners of appeal, and that, immediately on information thereof, he offered to explain or strike out, * * * as not intended when they were inserted, for any such purpose, in reply to his suggestion to that effect, in his letter of the 5th of April, 1858." The office letter of the 12th of that month is in these words: "In reply to your letter of the 5th inst., as asking for the return of your specification for improvement in pavement, you are informed that the action of the office on February 25th, rejecting your application, is regarded as final, and that your papers are not now in a condition for further amendment. See sections 30 & 114 of the enclosed rules."

In the appeal from this decision the appellant has filed seven reasons of appeal. The first five are in general terms denying the application of the particular references to his invention. The sixth is: "Because the Hon. commissioner of patents, in rejecting said application, erred in deciding that the invention described and claimed therein was of a character 'too indefinite to support a patent,'" and also erred in deciding that the claims in said specifications were so enlarged and explained by the body of the specification as to bring it within the scope of the cases above referred to in these reasons of appeal. The seventh is in general terms.

This was the state of the case when laid before me. Upon due notice, also, the appellant appeared by his attorney, and, having filed his written argument, submitted the case.

As I understand the foregoing decision, it is that, if the summing up or claiming clause of the specification stood alone, a patent would have been granted according to the appellant's application, so that it only remains for me to consider the force of the objection, that, by the operation of certain terms used in the body of the specification, the claim is so enlarged and explained as clearly to bring it within the scope of

the cases referred to by the examiner. If so, the appellant strangely misunderstood them, for it appears throughout other parts of his plan that his great objection was to remedy the evils consequent upon the practical use of pavements made according to the devices of said references. To remove the objection, it appears from the files in the office that, immediately upon its being known to him, he offered to strike out the objectionable terms, which offer is in writing, and filed in this case, and shows strong reasons why the stringency of the rules under which it was refused should have been relaxed.

Upon a careful examination, I think it will appear that the intention in using the words was merely to describe the matter on which the claim rests, and its mode of application, and to guard against attempts of invaders of his rights by pretended improved modifications. As to certainty, it must always depend upon the nature of the subject, and more must not be required than to a common intent, as in popular use, and intelligible to a workman skilled in the art or science to which it appertains. The language of the statute is so "as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, and compound the same," etc. The words in the connection in which they stand appear to me to contain a plain intelligible hint. The openings or depressions are to be merely wide enough to admit the toe-calk, readily, and no wider, and to exclude the thread of the wheel. The sides of these openings are to be nearly in a right line, and nearly vertical, and nearly at right angles to the direction of the road or street. The objectionable terms are "a little more" and "slightly exceeding," the limitation is "sufficient to admit the toe-piece of a horseshoe, and yet exclude the wheel in common use." It seems to me that, whatever the use refined criticism might see of indefiniteness, this plain workman, using the popular sense, would have no difficulty in knowing that it did not mean considerably larger, such as in the invention of Kirk. If, however, this view is incorrect, yet it is plain that the commissioner has misapprehended the rule of patent law on the subject of the proper construction.

It is true that on certain occasions, when necessary to explain any ambiguity in the summing up or claim part of the specification, for the purpose of truly understanding the claim, resort should be had to the body of the specification, that the whole may be taken together, according to the rule, that in support of the claim a liberal, not a strict, construction shall prevail. But in this case there is no such necessity, for the commissioner himself has said: "The nature of this invention is very clearly indicated by the claim, which is as follows," etc. Is a forced construction of words, found in the body of the specification to make a clearly defined claim in the summing up clause broader than the invention intended and so defined? The rule is well settled by a number of authorities, both in this country and in England (see note 1, to Curtis on Patents, section 132), in the opinion of Sir N. C. Tindall: "There can be no rule of law which requires the court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant. On the contrary, such construction ought to be made as will, consistently with the fair import of the language used, make the claim of invention coextensive with the new discovery of the grantee of the patent. And we see no reason to believe that he intended, under this specification, to claim either the staves, or the position of the staves as to their height in the drying house, as a part of his own invention." Curtis, in the same section, expressing his view of the rule, says: "That a specification should be so construed as, consistently with the fair import of language, will make the claim coextensive with the actual discovery. So that a patentee, unless his language necessarily imports a claim of things in use, will be presumed not to intend to claim things which he must know to be in use." So in the decision of Davoll v. Brown [Case No. 3,662], by Judge Woodbury, as stated by Curtis (section 387): "If this statement or description of the invention is clear and explicit, then the language in which he has made his claim, which is generally to be found in a summary statement of the subject matter for which he asks a patent, may and should be construed so as to include the actual invention previously set forth, if it can be so construed without violation of principle." The judge further says: "I do this, not to prejudice him by including more than is in his summary, and thus making the latter too broad, and hence void; but it is to aid him," etc. Again: "I do not see, however, that the obvious meaning of the summary, standing alone, is altered by the description when they are carefully analyzed."

I feel, therefore, obliged to say there is error in the decision of the commissioner, and that the same is hereby reversed and annulled, and I do direct that a patent issue to said appellant for his improved invention, as prayed.

TILLMAN (BENJAMIN v.).. See Case No. 1,304.

Case No. 14,051.

TILLOTSON v. MUNSON.

[5 Biss. 426; Merw. Pat. Inv. 138.] [1]

Circuit Court, N. D. Illinois. Oct., 1873.

PATENTS—NOVELTY—FILTER WELL.

A claim "in its application as a buried water reservoir in the bottom of a well, a filter, consisting of a perforated cylinder or cylinders, the central space forming a chamber into which the water is filtered, and from which the water supply is drawn," is not for a new subject matter, because the idea of burying any kind of filter is shown in Mr. Bartlett's patent, and the same kind of filter shown in complainant's patent was previously shown in the Andries patent, and the idea of admitting no air to the interior of the filter, and thereby securing the atmospheric pressure to force the water through the soil into the filter was shown in the drive wells of prior date.

[This was a bill in equity by Eliphalet N. Tillotson against Mad. C. Munson.]

L. L. Coburn, for complainant.

West & Bond, for defendant.

BLODGETT, District Judge. The bill in this case alleges that on the 3rd day of April, 1866, letters-patent were issued from the patent office of the United States to R. H. Dewey and E. N. Tillotson, for an improved filter well; that on the 25th day of October, 1870, said letters-patent were surrendered and re-issued [No. 4,165] to said E. N. Tillotson and W. E. Tillotson. In the specifications appended to the re-issued patent the patentees say their invention "consists in inserting within the bottom of the well a cylindrical receiver or vessel, closed at both of its ends, and with its sides perforated with a series of small apertures, for forming communication between the inside and outside, so that the water surrounding such vessel, or contained in the stratum of earth in which it may be placed, can freely pass into the same, while at the same time the entrance of sand, etc., and other debris is entirely prevented, the inside of such vessel or receiver being divided into two or more separate compartments by concentric perforated partition plates, in the outer one of which chambers may be placed charcoal, or other filtering substances, for cleansing the water from all impurities, a pipe being connected with the inner chamber, having upon its upper end, above or near the surface of the ground, a suitable lifting pump for raising the water contained in the same." * * * Within the outer chamber they placed coarse sand, in the intermediate one charcoal or other suitable filtering substance or substances, so that as the water passes from the well, or ground, into the inner chamber of the receiver to the pump-pipe it would be cleansed of all impurities. After placing the filter thus constructed in the bottom of the well, the well could be filled up, if desired, so that the filter would be entirely buried, the pipe forming the only communication by which the water could be withdrawn.

The claim is as follows: "In its application as a buried water reservoir, in the bottom of a well, the filter, consisting of a perforated cylinder or cylinders, the central space forming a chamber into which the water is filtered, and from which the water supply is drawn by an ordinary elevating device as described." The bill then alleges an infringement of this patent by the defendant and prays an injunction and damages. The answer denies that Tillotson and Dewey were the original and first inventors of the device described in the original and re-issued letters-patent, and insists that substantially the same thing had been patented and described in letters-patent issued by the government of Belgium to Edward Andries, dated February 9th, 1864, and by letters-patent of the United States, issued to said Edward Andries, dated March 28th, 1865; by letters-patent of the United States to J. H. Brunt, dated November 28th, 1865; letters-patent of the United States to J. C. & M. V. Campbell, dated January 9th, 1866; letters-patent of the United States to W. D. Bartlett, dated February 19th, 1856. The answer also denies that the wells made by defendant infringe upon the patent of the complainants. Proof has been taken upon both the issues tendered by the answer, and the case was ably argued upon these questions at the hearing.

Upon the question of novelty, the proof shows that on the 19th day of February, 1856, a patent was issued by the United States to W. D. Bartlett, for an improved cistern for wells, the leading feature of which was the construction of a reservoir at the bottom of a well, into which the water could pass and from which it was to be drawn by a pump. Provision was also made for surrounding this reservoir with filtering material through which the water must pass before it entered the reservoir. This reservoir was to be buried or covered up, so that the only communication was by the pump-pipe and an air-pipe, the inventor supposing an air-pipe communicating with the atmosphere necessary to make the pump operative. Here we had, in 1856, the idea of a buried reservoir or receiver, which was also to be made, to a greater or less extent, as the circumstances might require, a filter to purify the water; probably not as perfect a filter as the complainant's, but still a filter surrounding the reservoir from which the water was to be drawn.

By the patents issued to Edward Andries, first by the Belgium government, on the 9th of February, 1864, and secondly in this country on the 28th of March, 1865, a filter is described constructed in all its essential features exactly like complainant's filter; that is to say, with concentric casings of

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 138, contains only a partial report.]

perforated metal around a water chamber and the spaces between those casings filled with gravel, charcoal and other filtering material. It is true that in their re-issued patent complainants are not obliged to have more than one space for filtering material, but in their original patent they require more than one, so that I cannot deem the re-issued patent any less obnoxious to the charge of want of novelty by reason of their dispensing with one or more spaces for filtering material, the important characteristic being the casing of perforated metal surrounding a water chamber, and outside of that one or more concentric casings and the space or spaces filled with filtering material. Andries does not suggest the covering up or burial of his filter at the bottom of the well, but Tillotson does not require them to be so treated in order to be used. He simply says that it may be covered up "if desired." Andries intended his device to be used mainly for the purpose of filtering the water in open wells, rivers, the holds of ships, swamps, etc. All Dewey and Tillotson have done, is to take an Andries filter and bury it in the bottom of the well, or permit you to bury it "if desired." Bartlett had conceived the idea of burying a filter in the bottom of the well long before the Andries or Dewey & Tillotson patent, and had placed a full description of his device upon the records of the patent office. After him no one could patent the idea of burying a reservoir in the water stratum. If complainants or Dewey & Tillotson had invented a new filter to be used as a buried reservoir or filter, they might have had a patent on the new kind of filter, but not on the idea of burying it, for Bartlett had anticipated them on that point.

But it has been strenuously urged by the counsel for the complainants that their buried filter performs a new and different function from that of the Bartlett, because, being buried in the water-bearing stratum, and external air excluded, the atmospheric pressure bearing upon the water in the earth is utilized, and the moment a vacuum is created in the water-chamber by withdrawing the water through the pump, the atmospheric pressure drives the water through the filter into the water chamber, while in an open well it would only pass in by the slower process of filtration, or by the pressure of gravitation. And the evidence, by experiments performed in the presence of the court at the hearing, satisfies us that the atmospheric pressure does perform the function claimed in the operation of complainant's well when it is covered or buried. But this is not a feature peculiar to complainant's well. All the "drive wells," as they are called,—that is, wells made by forcing a pipe into the earth till the water-bearing stratum is reached, and then drawing the water into the pipe through perforations at or near its lower end,—operate upon precisely the same principle as complainant's well, so far as atmospheric pressure is concerned. The idea of a buried reservoir and filter is Bartlett's; the filter complainants use was invented by Andries; while the simple straight pipe driven into the earth to where water is found utilizes atmospheric pressure to the same extent and upon the same principle as the complainant's buried well. Indeed the aid of atmospheric pressure is invoked by the Andries filter when used in an open well surrounded by water. The moment the action of the pump exhausts the water from the water chamber, the pressure of the atmosphere helps to drive the surrounding water through the filter into the chamber to fill the vacuum. So that I think we may say properly in the light of the evidence there is nothing new in complainant's device.

This view of the case, upon the question of novelty, makes it unnecessary for us to consider the evidence applicable to the issue of infringement.

The bill will therefore be dismissed.

TILLOTSON (UNITED STATES v.). See Case No. 16,524.

Case No. 14,052.

In re TILLS et al.

[11 N. B. R. 214.] [1]

District Court, W. D. Missouri. 1875.

EXECUTION — DELIVERY TO OFFICER — RETURN — HOW FAR BINDING—BANKRUPTCY—SEIZURE BY MARSHAL—EFFECT UPON PRIOR EXECUTION.

1. The judgment-creditor in an execution is not so far bound by the return of nulla bona on the writ that he may not be permitted to show that there was, during the life of the execution, personal property of the execution defendant within the limits of the city which the constable might have seized.

2. The delivery of an execution to the officer does not give him any property in the goods of the defendant, but only a lien which binds the goods in the hands of the execution defendant, or of any one to whom he may voluntarily convey them; but such lien will hold neither the goods nor their proceeds in the hands of an officer who has seized them under process from a court of competent jurisdiction at the instance of another creditor.

3. The writ first executed will take the goods without regard to their dates or the time of delivery to the officers, and the lien given by such delivery binds the goods against a voluntary transfer.

4. The seizure of the goods of the execution defendant by the United States marshal under a warrant of seizure, upon an adjudication of bankruptcy on a creditor's petition, is such an execution of process as will divest the lien of a prior unlevied execution.

[Distinguished in Re Paine, Case No. 10,673.]

By J. D. S. COOK, Register:

On December 28th, 1872, Nehemiah Holmes, since deceased, recovered judgment against

[1] [Reprinted by permission.]

Tills & May before the recorder of Kansas City, ex-officio justice of the peace within the city, for one hundred and fifty-six dollars and thirty cents. On January 16th, 1873, execution issued on said judgment and was placed in the hands of the city marshal, who had the powers of a constable within the city limits. The execution was never actually levied on any property of Tills & May. On January 21, 1873, fourteen writs of attachment issued by justices of the peace of the township in which Kansas City is situated, were levied by the constable of that township, on all the property of Tills & May, consisting principally of a stock of furniture in that city. On the 24th of January, 1873, a petition for adjudication of bankruptcy was filed by creditors against Tills & May, upon which they were adjudicated bankrupts, and a warrant for the seizure of their property issued to the marshal of the district. On this warrant all their goods, etc., were seized on February 13th, 1873, and sold by the marshal under order of court, and the proceeds are now in the hands of the assignee. April 14th, 1873, the city marshal returned the execution in his hands with the following return indorsed thereon: "Executed the within writ by making diligent search and cannot find anything belonging to the within-named defendant on which to levy. Done in the City of Kansas, Kaw Township, Missouri, this 14th day of April, 1873." August 26th, 1873, Mary R. Holmes, who is the administratrix of Nehemiah Holmes, then deceased, made proof of debt claiming a lien on the proceeds of the personal property seized and sold by the district marshal under the warrant of seizure and order of sale, by virtue of section 5, c. 184, Gen. St. Mo., and the claim was allowed as secured. To set aside this allowance the assignee has applied for a re-hearing of the claim. The section of the statute referred to is as follows: "* * * The execution, from the time of delivery to the constable, shall be a lien on the goods, chattels, and shares in stocks of the defendants, found within the limits within which the constable or other officer can execute the process."

Four objections are urged to the allowance of this claim as a secured debt. First. It is contended that the plaintiff in the execution is bound by the return of nulla bona by the officer, thereon; and cannot be permitted to show that there was, during the life of the execution, any personal property of the execution defendants within the limits of the city. Second. That, if the execution creditor had any lien by virtue of the execution, it was upon the goods themselves; and he should have enforced it against them specifically, and cannot follow the proceeds in the hands of the assignee. Third. That the lien conferred by the statute is valid only against the property in the hands of the execution debtor, and those to whom he has voluntarily assigned the property; but it is not binding as against a subsequent seizure by an officer under legal process, and a sale made by him upon such seizure. Fourth. That, even if the claimant had a lien on these goods or their proceeds during the lifetime of the execution, such lien was lost, by the lapse of time, the execution being returnable in ninety days from the date of issue, and having been returned before the proof of debt was made and the lien claimed.

I do not think the first point is well taken. The return does not say that Tills & May had no property within the City of Kansas. It is "that the officer could not find any property whereon to levy." This does not show that there was not property of the defendants which he failed to find, or that there was not property which he did find, but on which he could not levy because it had been already seized by the marshal under the proceeding in bankruptcy. Nor can I see how the plaintiff would be bound by the return if the officer had expressly stated in it that the defendants had no property within the city. If so, then the plaintiff could not have had an alias execution issued and levied on property which belonged to the defendants before the return was made, but which had not been seized under the first execution. The return would have estopped him from showing that such property was the property of the defendants.

The second and third objections may be considered together. They make it necessary to inquire into the nature and extent of the lien given by the delivery of an execution to a constable under the statute in question. If it is such a lien as the laws of the state would enforce, notwithstanding the seizure of the goods by an officer under legal process, then the same lien will be allowed in the bankruptcy proceeding if properly asserted. What then is the lien which the laws of this state give to the plaintiff in an execution which has been delivered to the officer. This question was much considered in the case of Field v. Milburn, 9 Mo. 492. In that case the execution had been issued and delivered to the constable, and before any levy was made by him, the goods of the defendant in the execution were seized by the sheriff on attachments in his hands. The goods seized were sold by order of the circuit court, and the plaintiff in the execution claimed the proceeds. The court held that the goods were bound by the levy of the attachment; that the latter took precedence of the execution, having been first levied. The case of Payne v. Drewe [4 East, 523], cited by the court, was one in which a sheriff was sued for having returned nulla bona on an execution delivered to him, and attempted to excuse himself by showing that prior to the delivery of the execution to him a sequestration was issued out of chancery against the goods of the same defendant, but had not been executed. The court held the sheriff liable, although they gave to the sequestration the force of an execution at common law, and as a lien upon

the goods, from the time of awarding the commission. The court, Lord Ellenborough delivering the opinion, held that as between different writs from the same or different courts, the one first actually executed will bind the property without regard to the priority of the lien created by their delivery to the officer. In Smallcomb v. Cross, 1 Ld. Raym. 251, a creditor had an execution issued and delivered to the sheriff, but did not require the same to be levied, and afterwards the plaintiff delivered an execution against the same defendant, and caused a levy to be made and the goods sold, and bought them himself at the sale. The sheriff then levied the first execution on the same goods, and the purchaser at the execution sale (the plaintiff in the second execution) sued the sheriff and the first execution plaintiff in trover. The court held that the property in the goods passed by the sale under the second execution, the one first levied, and that the plaintiff was entitled to the goods and their proceeds, and, "by the whole court—if a fieri facias had been sued the first day of the term, and another fieri facias afterwards, and the last had been first executed, the other had no remedy but against the sheriff." And per Holt, Chief Justice: "If a writ of execution be delivered to the sheriff against A., and A. becomes bankrupt before it be executed, the execution is superseded; and consequently the property in the goods is not absolutely bound by the delivery of the writ to the sheriff." In some of the states the rule is that the lien will hold against the second execution until the latter has been fully executed by a sale. That is, that the officer who levies the second execution first upon the goods cannot hold them against the first execution unless the goods seized have been sold under his writ; that it is the sale and not the levy which determines the priority. This is the rule in Illinois, as laid down in Rogers v. Dickey, 1 Gilm. 636, and in some of the other states, as appears from the cases there cited. That case adopts the rule laid down by Lord Ellenborough in Payne v. Drewe [supra], but holds that the writ has first attached in point of execution when a sale is made under it. The court of Missouri has, however, adopted the Kentucky doctrine, that the levy of a writ, when more than one exists, gives priority to the one levied. 9 Mo. 492, supra.

It follows from these authorities, that the delivery of an execution to the officer does not give the officer any property in the goods of the defendant, but only a lien which binds the goods in the hands of the execution defendant, or of any one to whom he may voluntarily convey them, but such lien will hold neither the goods nor their proceeds in the hands of an officer who has seized them under process from a court of competent jurisdiction at the instance of another creditor. That as between such different writs, the one first executed will take the goods, without regard to the dates of the writs or the time of their delivery to the officers. The lien given by such delivery binds the goods against a voluntary transfer, but not one made under legal process. Is the seizure of the goods by the marshal of the district, under warrant of seizure upon an adjudication of bankruptcy on creditor's petition, such an execution of process as will divest the lien of a prior unlevied execution? It is an authority equally competent with an execution from the state court, to bind the goods of the defendant, when executed by the proper officer, and is thus within the very terms of the rule of Lord Ellenborough as approved by the supreme court of the state. It is a writ issued from a court of competent jurisdiction on an adjudication made adversely to the defendant, on petition of a creditor, and thus would seem to have the same effect in binding the goods of the bankrupt as the levy of an attachment or execution would have. In its effect upon the equitable estate of the bankrupt, it has been compared to an equitable attachment, and the assignee held to take such an estate with a superior equity to that of a judgment-creditor who had an execution returned unsatisfied, but who had not filed a creditor's bill. In re Mebane [Case No. 9,380]. If this is not the case, then we have in the present case the singular anomaly of an execution whose lien had been postponed by the levy of attachments upon the property of the debtor; these attachments dissolved by the adjudication in bankruptcy, and thereupon the lien of the execution creditor revived, and taking precedence of the attachments which had superseded it. That is, the attaching creditors, by their vigilance and activity, gain the preference over the execution creditor—their liens are destroyed by the still superior vigilance of the petitioning creditor, and thereupon the execution creditor, who has exercised no vigilance and made no effort to secure his claim, gains a preference over both. It cannot be that such is the case. It would certainly be a novel application of the maxim "Vigilantibus non dormientibus subveniunt leges." Nor will it answer to say that the assignee takes all the property of the bankrupt, subject to all liens which would affect the bankrupt himself. The assignee represents the bankrupt, it is true, but he also represents the creditors of his estate. He is not bound by any lien or encumbrances which are not valid as against creditors. For example, in this state an unrecorded chattel mortgage would not bind him. As we have seen, the lien which the delivery of the execution gives to the constable is not valid against a creditor who procures the goods of the debtor to be seized on adverse process, and the assignee represents creditors who are in the actual exercise of that right by obtaining the adjudication of bankruptcy, and having the goods seized thereon. His claim is paramount, and the execution creditor cannot enforce his lien.

I have given this point the more attention

because my views seem to be opposed to those of Judge Blodgett in the case of In re Weeks [Case No. 17,350]. That was a case in Illinois, where the rule is, as we have seen, different from that adopted in Missouri. 1 Gilm. 636, supra. Whether his ruling was based on that distinction or not I cannot say; but in the view I am compelled to take of the nature of this lien, as interpreted by the supreme court of this state, I cannot hold otherwise than I have done in regard to its effect.

This view of the case renders it unnecessary to dispose of the fourth objection raised by the assignee to this security; whether, admitting that the execution was a lien, the claimant was not bound to prove and claim it during the lifetime of the execution and while the lien was in existence, and whether the return of the execution did not terminate its effect so that no lien could be afterwards based upon it. The question is not free from difficulty, and I give no opinion upon it.

KREKEL, District Judge. I agree with the register in the conclusions reached, and much of the reasoning by which he arrives at them. Had the execution been levied on the property prior to the marshal seizing, the lien would have held good even against the proceeds in the bankruptcy court, as decided in Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473]. This case affirms the view taken in a very early case decided in this court. The judgment of the register is affirmed, and the claim allowed as unsecured.

TILLSON (MILAN DISTILLING CO. v.). See Case No. 9,539.

Case No. 14,053.

TILLY v. BROWN et al.

[1 Hayw. & H. 148.] [1]

Circuit Court, District of Columbia. Aug. 28, 1843.

NEGLIGENCE — INJURY FROM MACHINERY — CONTRIBUTORY NEGLIGENCE.

1. Where injury is caused by negligence in the management of machinery, and the negligence is such as no prudent man would be guilty of, the party injured is entitled to recover in damages for the injury sustained.

2. A party employed in a place where there is machinery, must not expose himself to the danger arising from its management if he wishes to make the owner of the machinery responsible for injury received while the machinery is in operation.

[This was an action for damages by John H. Tilly, by his next friend, John Tilly, against Thomas Brown and Francis Dodge.]

The declaration contained two counts. The first count averred that certain machinery of great power was under the management, supervision, attention and care of a servant of the defendants. That the defendants, by their said servant, carelessly and negligently managed, supervised and attended to said machinery while in operation; that the plaintiff was caught and drawn within said machinery while the same was in operation, whereby one of the plaintiff's arms was broken and rendered wholly useless. The second count averred that the injury was caused by the defendants carelessly and negligently managing and attending to said machinery while in operation, &c., by reason thereof, the plaintiff sustained damage to the value of ten thousand dollars, and whereupon he sues.

Brent & Brent, for plaintiff.

Jos. H. Bradley and Jas. Marbury, for defendant.

BY THE COURT. If the jury believe from the evidence that the defendants employed a competent machinist with directions to construct a machine for rolling dough, and that said machinist did in fact construct such a machine and deliver the same to the defendants, with general caution and direction to manage the same, so as to preserve the machinery and avoid danger, without any particular caution as to that point of the machinery where the accident happened; that the defendants employed a careful and competent person to superintend the machinery and to keep the boys employed at the machinery in their proper places while at work, and the accident and injury complained of happened, not from the fault or negligence of the defendants or their superintendent; then the plaintiff is not entitled to recover in this action. If from the evidence the jury shall find that a number of boys not any older or larger than the plaintiff were employed on the said machine any length of time without any injury having happened to them, and the said accident happened, not while the said boy was in the execution of the work for which he was employed by the defendants, but in consequence of his leaving his said work, and carelessly exposing himself to the danger, then the plaintiff is not entitled to recover in this action. But if the jury shall find that the injury complained of was caused by such negligence of the defendants, as no prudent man would be guilty of, in the management of his own affairs, then the plaintiff is entitled to recover.

The following instructions prayed for by the plaintiff was refused by the court, the chief judge doubting: If the jury find from the evidence, that the plaintiff being an infant of about nine years, was employed by defendants, with his father, without any compensation to serve about their bakehouse, and that, after having been employed for the first two or three months out of doors, in sawing up wood for the ovens, he was then put to work in the room where

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

dangerous machinery was in operation, and within four or five feet of the dangerous part of the machinery; that all danger from that part of the machinery might have been easily and at a trivial expense, prevented by sheathing on the outside, that although the nature of his particular employment did not require him to approach the dangerous part of the machinery nearer than four or five feet, yet he might pass close to it and in fact did so while performing the work about which he was set, at the time he received the injury complained of, being the loss of his left arm; then such evidence is competent to be left to the jury to consider whether the defendants were or were not guilty of negligence and the degree of negligence.

The jury brought in a verdict for the defendants. Plaintiff moved for a new trial, because the court erred in giving the instructions asked by the defendants, and because of newly discovered evidence. The court overruled the motion for a new trial.

TILSON (SHURLDS v.). See Case No. 12,827.

Case No. 14,054.

The TILTON.

[5 Mason, 465.] [1]

Circuit Court, D. Massachusetts. May Term, 1830.

ADMIRALTY—PETITORY SUITS—WRECKED SHIP—SALE—EFFECT OF—BONA FIDE PURCHASER.

1. The admiralty has jurisdiction of petitory as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession.

[Cited in The Wave, Case No. 17,297. Cited in note in The Watchman, Id. 17,251. Cited in The Perseverance, Id. 11,017; Davis v. Child, Id. 3,628; Leland v. The Medora, Id. 8,237; The North Cape, Id. 10,316; Taylor v. The Royal Saxon, Id. 13,803; Ward v. Peck, 18 How. (59 U. S.) 268; Tunno v. The Betsina, Case No. 14,236; Thurber v. The Fannie, Id. 14,014; Grigg v. The Clarissa Ann, Id. 5,826; Snyder v. A Floating Dry Dock, 22 Fed. 686; Haller v. Fox, 51 Fed. 299.]

2. The admiralty has jurisdiction in case of a wrecked ship, to decree a sale upon application of the master.

[Cited in The Wave, Case No. 17,297.]

3. The master of a ship has not, in virtue of his office, any authority to sell a ship, except in cases of extreme necessity, where the vessel is wrecked, or unnavigable, &c.

[Cited in The Henry, Case No. 6,372; The Dawn, Id. 3,665; Joy v. Allen, Id. 7,552; The Lucinda Snow, Id. 8,591; Fitz v. The Amelie, Id. 4,838; The Bridgewater, Id. 1,864; The Raleigh, 37 Fed. 126.]

[Cited in Prince v. Ocean Ins. Co., 40 Me. 487.]

4. If he sells without such necessity, the sale is invalid, notwithstanding he has acted with good faith, at least, where the contest is between the owner and the purchaser.

[Cited in The Henry, Case No. 6,372; U. S. v. The Etta Id. 15,060; The Eliza Lines, 61 Fed. 313.]

5. Quære, how it would be between the underwriter on a policy, and the owner?

[Cited in Gloucester Ins. Co. v. Younger, Case No. 5,487.]

6. A wreck sale, made by authority of the statute laws of a state, is valid to pass the title to the property, where there is no owner or agent present to protect or claim the property.

[Cited in Coie v. The Brandt, Case No. 2,978; Fitz v. The Amelie, Id. 4,838.]

7. Construction of the laws of North Carolina on this subject. A sale at the solicitation or order of the master is not a statute sale under those laws, binding the owner.

8. A statute sale, if fraudulent, will not bind the owner, unless in favour of a bona fide purchaser, for a valuable consideration, without notice, actual or constructive, of the fraud.

[Cited in The Henry, Case No. 6,372; Tufts v. Tufts, Id. 14,233; The Bridgewater, Id. 1,864.]

9. What is such notice?

10. The sale by an admiralty court of a wrecked ship, upon the application of the master and a survey made, is within its jurisdiction, but is not conclusive upon the owner or upon third persons.

[Cited in The Henry, Case No. 6,372; The Dawn, Id. 3,665.]

This was a libel, brought originally in the district court by George W. Otis & Jonathan Thaxter, of Boston, to obtain possession of three quarter parts of the schooner Tilton, alleging that they were the owners of the said three quarter parts, and that possession thereof was wrongfully withheld from them by the said Schenck, McCabe, & Smith. The claim and answer set up a title by purchase, in McCabe & Smith, to three quarter parts, and in Schenck, to one quarter, and set forth the facts connected with the sale and purchase. The replication denied the validity of the sale.

The principal facts were as follows: The schooner sailed from New York on the 18th of May, 1828, in ballast, bound to Conwaysborough, in the state of North Carolina; three quarter parts of her being owned by the libellants, Otis & Thaxter, and the remaining quarter part by Samuel Tilton, the master. In the course of the night of the nineteenth, she was stranded upon the beach near the banks of Chickamacomico; the next morning, Tilton made his protest before a notary public, and applied to a wreck commissioner, who examined the situation of the schooner, and at the solicitation of Tilton, advertised her to be sold on the thirty-first of the same month. At the instigation of Tilton also, a survey was had on her by three persons appointed by the notary, who, on the day of the sale and a few hours previous thereto, reported that the schooner ought to be sold, where she lay, for the benefit of all concerned. She was accordingly sold on the thirty-first, as advertised, by O'Neil, the wreck

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

master, and was bid off by one Pharaoh Farrow, for the sum of $196.50. She was afterwards floated by persons employed by Farrow, and taken to a neighbouring harbour, where she lay about a month, during which time the master, Tilton, came on to Boston, and claimed his insurance; and after his return to Chickamacomico, she was taken to the port of Washington, in North Carolina, Tilton, Farrow, and O'Neil, going in her, where, on the 21st of July, Farrow conveyed one half part of her to Tilton, and a quarter part to O'Neil; the considerations expressed in the bills of sale corresponding with the sum paid for the schooner by him, and he conveying only such title as he derived from the sale by the wreck commissioner, O'Neil. She was then registered at the custom-house as the property of Farrow, Tilton, and O'Neil. On the same day, Farrow and O'Neil conveyed three quarter parts to McCabe & Smith, for $400 each; the bills of sale expressly excluding any warranty, further than for such title as they acquired by the bill of sale of the wreck commissioner. On the 12th of the following month of August, Tilton also conveyed his half part to McCabe & Smith, for about $1050. And on the same day, McCabe & Smith conveyed one quarter part to Schenck, and appointed him master. A coasting license was afterwards taken out for the schooner, and she was repaired, and sent with a cargo to Boston, where she was seized by the libellants on the ground, that the sale made on the beach was altogether unnecessary, illegal, and collusive, and that they had, therefore, never been divested of their interest in the schooner.

Charles G. Loring, for libellants.
David A. Simmons, for claimants.

STORY, Circuit Justice. This is a libel in a proceeding in the admiralty, technically called a cause of possession, the object of which is to restore to the rightful owner the possession of a ship, which is unlawfully withheld from him, or of which he has been wrongfully dispossessed. It is well known to those, who are conversant with the original elements of the jurisdiction exercised by the courts of admiralty, that it extended its claims to all causes of a maritime nature, inclusive of questions of prize, whether they arose from contracts or from torts, the nature of the contract deciding the point of jurisdiction in the former cases, and for the most part the locality of the tort in the later cases. The subject was a good deal considered by me at an early period of my judicial life, in the case of De Lovio v. Boit [Case No. 3,776], and I am not yet convinced, that the doctrines therein stated are unfounded in a just view of the intrinsic rights of the admiralty, whatever may have been the measure dealt out to it with severe jealousy by the courts of common law. Godolphin, in his treatise on the Admiralty, lays it down, that its jurisdiction is clear in "all matters that concern owners and proprietors of ships as such" (Godol. Adm. Jur. 43; Zouch. Adm. 93, etc., 98, etc., 102, etc.); and it is as broadly stated in Clerke, Praxis Adm. tit. 41, which is a book of undoubted authority. Suits in the admiralty, touching property in ships, are of two kinds; one called "petitory" suits, in which the mere title to the property is litigated, and sought to be enforced, independently of any possession, which has previously accompanied or sanctioned that title; the other called "possessory" suits, which seek to restore to the owner the possession, of which he had been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property. 2 Browne, Civ. & Adm. Law, 113, 114, 117, 118, 397, 406, 430. Until a comparatively recent period, the court of admiralty exercised undisturbed jurisdiction over both classes of cases, as upon principle it is still entitled to do. Lord Stowell, in the case of The Aurora, 3 C. Rob. Adm. 133, 136, adverting to this subject, expresses himself in language not to be misunderstood as to the matter of right. "It is well known," says he, "that it was formerly held for a very long time, and down to no very distant period to be within the jurisdiction of this court to examine and to pronounce for the title of ships on questions of ownership. It was not until some time after the Restoration, that it was informed by other courts, that it belonged exclusively to them; since that time, it has been very cautious not to interfere at all in questions of this nature. Where the consideration of property arises incidentally, and in such a manner as is not disputed between the parties, the court can hardly be said to judge on the matter of property, as being a matter of question." In the case of The Warrior, 2 Dod. 288, he alludes to the same subject, in terms quite as direct. "It is certainly true," says he, "that this court did formerly entertain questions of title to a much greater extent than it has been lately in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the Restoration, however, it was informed by other courts, that such matters were not properly cognizable here; and since that time it has been very abstemious in the interposition of its authority. The jurisdiction over causes of possession was still retained; and although the higher tribunals of the country denied the right of this court to interfere in mere questions of disputed title, no intimation was ever given by them, that the court must abandon its jurisdiction over causes of possession." What his lordship here states, as to the actual exercise of the jurisdiction in former times, is borne out by

authorities. See Clerke, Praxis Adm. tit. 41; Radley v. Egglesfield, 2 Saund. 259; Edmonson v. Walker, 1 Show. 172; Zouch. Adm. 102; Godol. Adm. Jur. 31, 43, 44; Exton. Adm. 71; 2 Browne, Civ. & Adm. Law, 114, 430; Haly v. Goodson, 2 Mer. 77. In respect to petitory suits, the jurisdiction has been silently abandoned in England, for a considerable length of time; but in respect to possessory suits, it is still upheld by a constant and free exercise. And if in such possessory suits a question strictly of mere property arises, especially if it be of a complicated nature, the court ordinarily declines to interfere. But it does not always wholly abandon its ancient jurisdiction; and sometimes it will, in its discretion, retain the cause, and direct the question of title to be decided in some other tribunal, and mould its own decree according to the ultimate decision there. Lord Stowell, in the case of The Pitt, 1 Hagg. Adm. 240, alluding to this subject, says: "The court is certainly in the habit of transferring possession from the actual holder, sometimes by its own movement, sometimes at the instance of other courts, which have no direct powers for that purpose. But it considers itself bound to consider itself as moving within very narrow limits, if it proceeds at all, originally upon a question of title. It undoubtedly would not be inclined, in any case, to transfer a possession without regarding the title of the party, who claims the transfer. It must be satisfied, that he is potior jure; and it must be in cases extremely simple, that it acts on a merely preferable title to be reached by its own judgment." See, also, The Guardian, 3 C. Rob. Adm. 93; The Aurora, Id. 133; The Partridge, 1 Hagg. Adm. 81; Ex parte Blanshard, 2 Barn. & C. 244; The Experimento, 2 Dod. 38; The Warrior, Id. 288. Indeed, the court of admiralty in England considers itself, even in cases of possession, not merely as ministerial, but as having a large discretion or equity, and therefore entitled to refuse its interference, if it deems it inequitable or unjust. It will not hold an equitable title sufficient to justify its interposition against the legal title to restore possession; but it might, perhaps, sometimes deem such a title sufficient to restrain it from interfering with an existing possession under it. The Sisters, 4 C. Rob. Adm. 278, 5 C. Rob. Adm. 155.

I am not aware, that this distinction between petitory and possessory suits (somewhat analogous to the distinction in actions respecting the realty between droitural and possessory suits) has in point of jurisdiction, ever been admitted into the actual practice of the courts of the United States, sitting in admiralty. It stands, as far as I have been able to trace it, upon no principle, unless it be, that titles to property derived from the common law, shall be no where litigated, except in the courts of common law, a proposition, that, carried to its full extent, would prostrate the entire jurisdiction of the admiralty in instance causes. Indeed, the titles to ships principally depend upon the maritime law, as recognised and enforced in the common law; and the admiralty does little more in most instance causes, than to carry into effect the declarations of the maritime law, so recognised and enforced. No doubt exists, that the admiralty possesses authority to decree restitution of ships wrongfully withheld from the owners. Ex parte Blanshard, 2 Barn. & C. 244. And if so, it ought to possess plenary jurisdiction over all the incidents. That was the clear opinion of Lord Hale, in Radly v. Eglesfield, 1 Vent. 173; Id. 308, which was afterwards confirmed by the whole court; and it was there said, that when the admiralty hath original cognizance of the principal matter, it hath also cognizance of the incidents thereto. The same case is reported in other books, and particularly in 2 Saund. 260, and 2 Lev. 25, where the doctrine is stated at large. It had been decided in the same way in the reign of Queen Elizabeth, (Anon., Cro. Eliz. 685,) and the doctrine is so reasonable in itself, that the difficulty is to conceive, how it could ever have been questioned. In the exercise of the prize jurisdiction, it has been constantly admitted to the largest extent.

In cases not strictly of prize, but partaking of their nature, as in cases of illegal captures in violation of our neutrality, the courts of the United States have never hesitated to inquire into and decide the title, however complicated. See Talbot v. Jansen, 3 Dall. [3 U. S.] 133; Del Col v. Arnold, Id. 333; L'Invincible, 1 Wheat. [14 U. S.] 257; The Alerta, 9 Cranch [13 U. S.] 359; The Neustra Senora de la Caridad, 4 Wheat. [17 U. S.] 497; The Antelope, 10 Wheat. [23 U. S.] 66; The Santa Maria, 7 Wheat. [20 U. S.] 490. In cases of salvage and bottomry, a like course has been adopted (The Mary Ford, 3 Dall. [3 U. S.] 188; The Adventure, 8 Cranch [12 U. S.] 221; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240), as well as in cases of seizure for forfeitures (The Mars, 8 Cranch [12 U. S.] 417; The Plattsburg, 10 Wheat. [23 U. S.] 133; The Antelope, Id. 66, 11 Wheat. [24 U. S.] 413, 12 Wheat. [25 U. S.] 546). But what is still more directly applicable, in cases of marine torts the supreme court has gone at large into the question of proprietary interest, and has moulded its final decree according to the ultimate rights established by the parties. Rose v. Himely, 4 Cranch [8 U. S.] 241, is an instance full of intricate and perplexing inquiries on this very point of title.

For myself, meaning to speak with all due deference for the judgment of others, I feel bound to confess my inability to perceive any sound distinction, as to the point of jurisdiction, between petitory and possessory suits. If there were a series of American decisions on the subject, which in point of authority

ought to control my judgment, I should cheerfully bow to them. But finding none, I adhere to the doctrine, that the admiralty possesses a rightful jurisdiction over both.[2] In cases like that before the court, I do not find, that Lord Stowell has felt himself absolutely constrained to abandon all jurisdiction in England, because a title arose under a sale of a ship by the master, upon the ground of necessity. See The Partridge, 1 Hagg. Adm. 81; 2 Barn. & C. 244; The Pitt, 1 Hagg. Adm. 240; The Experimento, 2 Dod. 41; The Warrior, Id. 288. In the case of The Warrior, 2 Dod. 288, he explicitly denied, that the court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties, that there is a conflicting claim of title. One cannot, indeed, but feel the truth of the language of Lord Tenterden, that this jurisdiction of the court of admiralty is a most useful part of the jurisprudence of the country. Ex parte Blanshard, 2 Barn. & C. 244. As such, I cannot but think, that it ought not to be surrendered but upon principles too clear to admit of judicial doubt. My duty, therefore, compels me in this cause to travel over questions, which I would otherwise have gladly yielded up to other tribunals.

There is another point of no inconsiderable importance, upon which it is necessary to bestow some attention, before the court proceeds to a more exact consideration of the facts. It is, how far the master of a ship, virtute officii, is clothed with authority to sell the ship. There is no pretence to say, that he possesses such an authority under the ordinary circumstances of the voyage. And the only question is, how far he possesses it in cases of extraordinary unforeseen emergency, acting bona fide for the interest of all concerned. There appears to have been a good deal of reluctance on the part of the British courts to admit such an authority in the master, even under circumstances of serious peril and difficulty. Lord Hale is supposed to have decided against it, in the case of Tremenhere & Tresillian, 1 Sid. 452, which was referred to his decision. In Johnson v. Shippen, 2 Ld. Raym. 982, Lord Holt used language, which has been construed to lead to a similar conclusion. I rather doubt, whether either of these cases justifies such an interpretation. There is a remark made in a very old reporter (Jenk. case 16, note,) to a very different effect. It is there said, "The master of a ship in case of danger and extremity may cast the goods into the sea; and in some cases sell the ship, although it does not belong to him, as in case of famine," &c. Lord Ellenborough, however, as late as the case of Hayman v. Molton (1803), 5 Esp. 65, laid down the doctrine with such unusual hesitation, that it is very expressive of his opinion of the then state of the law on that subject. "Where," said he, "a case of urgent necessity and extraordinary difficulty occurs, where a ship has received an irremediable injury, under such circumstances, the captain acting bona fide for the benefit of the owners, might sell the ship for the benefit of the owners. This is the disposition of my mind, but I cannot lay it down as positive law." The case of Reid v. Darby, 10 East, 143, had a tendency to throw still greater doubt over the whole matter, although it was finally disposed of upon another ground. To what is suggested in that case, as to the want of jurisdiction in the admiralty courts to decree the sale of a ship in a case of necessity upon an application of the master, I, for one, cannot assent. I agree, that in such a case the decree of sale is not conclusive upon the owner, or upon third persons, because it is made upon the application of the master, and not in an adverse proceeding. But I cannot but consider it as strictly within the admiralty jurisdiction. It is prima facie evidence of a rightful exercise of authority, but no more. The proceeding, being ex parte, cannot be deemed conclusive in favour of the party promoting it. Upon a question of this sort I should incline to follow other authorities, and to repose with more confidence upon those, who are accustomed to administer the maritime law in admiralty courts. It does not appear to me, that Lord Stowell, with all his habitual caution in entertaining jurisdiction, has considered such a sale an absolute excess of judicial authority. Looking to the language used by him in the cases of The Fanny & Elmira, Edw. Adm. 117, and The Warrior, 2 Dod. 288, 293, 295, I should draw the conclusion, that but for the controlling authority of the courts, which he was bound to obey, he would have affirmed the jurisdiction. See, also, The Lady Banks, 1 Hagg. Adm. 306. But see Morris v. Robinson, 3 Barn. & C. 196; Abb. Shipp. pt. 1, pp. 8, 11, c. 1, § 3; 3 Kent, Comm. 95.

The doctrine of the supreme court of the United States, as I gather it from the case of Janney v. Columbian Ins. Co., 10 Wheat. [23 U. S.] 411, 418, is, that this is properly a part of the admiralty jurisdiction. Mr. Justice Johnson there said, in delivering the opinion of the court, "In other parts of the world, it is very generally exercised as an

[2] In the laws passed in the colony of Virginia in 1659, 1660, there is one declaring, that the governor and council shall "have full power and authority of a court of admiralty, to cognoss, determine, and administer justice in all things pertaining to sea-fairing, that shall appertaine, happen, or fall out within the jurisdiction of this collonie, either between mariner and merchant or mariner and master, as likewise all complaints, contracts, offences, pleas, exchanges, assecurations, debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of shipps, freights, hyres, and all other business among sea affairs done on the water, and when within the limits of the jurisdiction of Virginia, or the laws and cognizance thereof, with the cognition of writs, the causes and actions of reprisals, of letters of marque, to take stipulations, cognitions, and instructions."

incident to the admiralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the United States;" and he intimated a clear opinion, that congress might regulate the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction. Shortly after the case of Reid v. Darby was decided, the same question respecting the right of the master to sell in a case of necessity came before Lord Stowell for consideration; and that distinguished judge, with his accustomed felicity of reasoning, maintained the affirmative. The Fanny & Elmira, Edw. Adm. 117. In subsequent cases, his judgment appears to have reposed with confidence on the same decision. The Warrior, 2 Dod. 288; The Pitt, 1 Hagg. Adm. 240.

The doctrine in England seems at last, after a good deal of intermediate discussion, to have settled down in this result, that the master has an authority in a case of extreme necessity, acting with good faith and for the general benefit of all concerned, to sell the ship. That is the clear exposition of the law in Idle v. The Royal Exchange Assur. Co., 8 Taunt. 755; Read v. Bonham, 3 Brod. & B. 147; and Robertson v. Clarke, 1 Bing. 445. But at all events, as between the owner and the master, it is not sufficient that the sale be one of good faith on the part of the master, and for the benefit of all concerned, unless there be an urgent necessity. See Read v. Bonham, 3 Brod. & B. 147. Whether the same rule applies as between the owner and the underwriter on a policy of insurance, admits of more doubt. Lord Chief Justice Dallas, in his elaborate judgment in Idle v. Royal Exchange Assur. Co., 8 Taunt. 755, strongly maintained, that in such a case it was sufficient to justify the sale, that there was good faith in the master, and that the sale was for the benefit of all concerned. Id. But that decision seems not to have been sustained, or at least not firmly established in more recent cases. See Robertson v. Clarke, 1 Bing. 445; Maeburn v. Leckie, Abb. Shipp. pt. 1, p. 6, c. 1; Cannan v. Maeburn, 1 Bing. 243.

The doctrine recognised in America, so far as it has fallen under my observation, substantially conforms to that in England, and limits the right of the master to sell to cases of urgent necessity. So it was held in Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 249, and the like opinion may be deduced from cases in the New York Reports. Fontaine v. Phoenix Ins. Co., 11 John. 293; Center v. American Ins. Co., 7 Cow. 564. My learned brother, the late lamented Mr. Justice Washington, in Scull v. Briddle [Case No. 12,569], distinctly affirmed the right of the master to sell in a case of necessity, in a foreign country; but he thought it unjustifiable in the country, where the owner lives. This qualification of the rule seems to me not maintainable, where the necessity is clearly made out, though the circumstance, that the sale is in the country of the owner, may lead to very close watchfulness as to the degree of that necessity.

Without intending to commit myself in a case between the owner and underwriter, my judgment is, upon the most careful survey of the authorities, as well as upon general principles of law, that the master has a right to sell the ship in cases of urgent necessity. But at least, as between the owner and a purchaser at the sale, the title of the former is not devested, unless such necessity exists, notwithstanding the master may have acted with entire good faith, and in the exercise of a sound and honest discretion. I am happy to have the deliberate opinion of Mr. Chancellor Kent, in his learned Commentaries in support of this doctrine. 3 Kent, Comm. 134.

It may be justly inferred, that the general maritime law, as recognised in foreign nations, is not more favourable to the power of the master. The Consolato del Mare (article 253) contains a provision permitting the master to sell the ship, if she becomes from age unseaworthy, and by parity of reason, on account of innavigability from any other cause. On the other hand, the Laws of Oleron, the Laws of Wisbuy, and the Commercial Ordinance of Louis XIV, absolutely prohibit the sale of a ship by the master in all cases. Laws of Oleron, art. 1; Laws of Wisbuy, art. 13; 1 Valin, Comm. lib. 2, p. 444, tit. 1, art. 22. Valin sturdily contends for the policy of this prohibition, remarking, "Vocabulum enim istud, maitre, intelligendum est tantum de peritiâ in arte navigandi, non de dominio et proprietate navis;" and urging the general prevalence of fraudulent sales. The modern code of France contains a very proper exception of the case of innavigability of the ship; but subject to this, the modern law of France enforces the antecedent prohibition of the old law in an expressive manner. Code de France, art. 237; 2 Boul. P Dr. Com. p. 85, § 17; 3 Socre Esprit du Code Comm. p. 120, art. 237.

I adopt then the argument urged at the bar, that it must be proved, that there was a pressing necessity to justify the sale; and I go farther and hold, that if such necessity existed, the sale, to bind the owner, must be conducted with entire good faith, and must be optima fide and above exception. And this leads me to the consideration of another topic, much discussed at the bar, how far the laws of North Carolina, on the subject of the sale of wrecked vessels, give validity to the title thus acquired. Those laws, as far as I have been able to collect their import from the statute book of the state, seem founded in a sound policy, and in furtherance of the principles of justice and humanity. Acts N. C. 1801, c. 599; Id.

1805, c. 689; Id. 1817, c. 953; Id. 1818, c. 975, of the authorized edition of 1821. They provide for the appointment of wreck commissioners in certain maritime districts, to assist vessels stranded, or in danger of being stranded. Where any vessel or other property is cast ashore, "without any person present to claim the same as owner," the commissioner is authorized to take possession of them and, under certain circumstances, to advertise them, and, if not claimed within twelve months, then to sell them. But if perishable, the same may be sold after public advertisement for a period not less than ten, nor more than twenty, days. The commissioners are punishable for any fraud or neglect of duty, and are required to give bonds for the faithful discharge of their duty. Provision is also made, that the commissioners shall be deemed proper officers to advertise and sell at public auction any cargoes, which may be stranded or cast on shore in their respective districts, "except the captain, owner, merchant or consignee shall choose to superintend such sale himself, or to remove the property without selling it." This latter provision presupposes the presence of the owner or his agent, and does not impart an original authority to the commissioners to sell in invitum; but clothes him with authority to act as auctioneer in cases of an implied or express assent of the owner, or his agent. The terms of the act confine the authority to the sale of cargoes; whether it has ever been extended by implication to ships, I do not know. It is most probable, that the omission to include ships was a mere mistake, originating in the very common imperfection of a careless and hasty legislation. But unless there were some judicial decision of the state tribunal to the contrary, I should consider the error one, which could not be supplied by the construction of a court, extending the words beyond their import, but to be remedied by the act of the legislature. It is not material, however, to consider this point, because every sale made under this clause, must be considered as authorized by the owner or his agent; and consequently, it derives its force and validity from that circumstance, as a sale by procuration. It is in no just sense a statute sale, where the act of the commissioner is conclusive upon third persons, virtute officii; but it is open to all the considerations belonging to all other sales, made at the instance of the parties in interest, by persons having a public authority to conduct sales. But where the sale is made by a wreck commissioner in cases falling within the language of the law, "without any person present to claim the same as owner," a very different interpretation ought, as I conceive, to be given to his act. He is there made, virtute officii, the agent of the owner for public purposes, and his authority to sell, if exercised in good faith, is conclusive to transfer the title to the property to any purchaser at the sale. No one can doubt the legal authority of a nation to provide for the transfer of property under circumstances, where there is no known owner to provide for its safety; and least of all ought such an authority to be questioned, where the property is of a perishable nature. I meddle not with the question how far any state in this Union can legislate, so as to interfere with the admiralty and maritime jurisdiction confided to the government of the United States, by the constitution. But subject to that consideration, the general authority would seem to be undeniable, as an attribute of sovereignty. See Grant v. M'Lachlin, 4 Johns. 34. Such a sale, however, though generally conclusive upon the title of the owner, is so only in cases of good faith. A statute sale by a public officer may be impeached, as, indeed, more solemn acts may be, for fraud; and the purchaser can protect himself only by showing, that he is a bona fide holder, without notice of, or participation in, the fraud. A fortiori, a sale made by the consent of the owner or his agent, may be avoided for fraud.

The circumstances of the present case do not call upon the court for a more minute expression of its opinion upon this point. But as a corollary from what has been said, it may be deduced, that the commissioner cannot, himself, become a purchaser, in whole or in part, at such a sale. He is a trustee, acting in a public capacity, and the law will not permit him to evade his own proper duties, or expose him to the temptation of a corrupt influence in conducting the sale, from motives of private interest. This is a salutary principle of public policy, and has been often applied with severe exactness to public as well as private trustees. Sugd. Vend. (17th. Ed.) p. 588, c. 14, § 2, and cases there cited. The same principle applies with quite as much if not more force to the master, when he acts as the agent of all concerned under an authority, superinduced by an urgent necessity in the course of a voyage. Under such circumstances, if he orders a sale, he cannot become a purchaser at the sale; and if he does, his title may be avoided at the election of the original owners. Church v. Marine Ins. Co. [Case No. 2,711]; Barker v. Marine Ins. Co. [Id. 992]; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Chamberlain v. Harrod, 5 Greenl. 420. There is, I admit, no positive disability on his own part, or on that of the wreck commissioner, to become a purchaser from the real purchaser, after the sale. But in such cases, there is a most suspicious watchfulness exercised on the part of the law, to search the transaction to the very bottom; and nothing but entire good faith, uberrima fides, on their part, will suffice to give validity to their title.

The Warrior, 2 Dod. 288; The Fanny & Elmira, Edw. Adm. 120; Hayman v. Molton, 5 Esp. 65.

In the present case there is the less room to doubt as to the authority, under which the sale was actually made, because in the advertisement for the sale of the vessel by the wreck commissioner, it is expressly stated, that the sale was made "by order of Capt. Tilton, late master, for the benefit of all concerned therein;" and the bill of sale by the wreck commissioner to the asserted purchaser, also expressly states, that the vessel was exposed "to public auction by the solicitation of" &c. [the master.] This makes it very plain, that all parties understood it to be a voluntary sale, under the sanction of the master, and that the wreck commissioner derived his authority from that source.

In this view of the matter, an objection has been suggested to my mind, though I do not remember that it was insisted on at the bar. It is this,—if the master has an authority to sell in cases of necessity, he must still sell in the manner prescribed by law, as the agent of the owner, or his act will be void. If he sells as agent, the bill of sale must be in the name of his owners, and not in his own name. He cannot depute another person for this purpose; and even if he can, still that person must execute the bill of sale in the name and as the agent of the owner, and not in his own name. In the present case, the bill of sale was executed in his own name by the wreck commissioner, and not in the name of the master or owner. It is, therefore, in legal contemplation, a mere nullity, and cannot pass any title. Such is the objection, and there is a good deal in the case of Reid v. Darby, 10 East, 143, which may be urged in support of it. But upon a full consideration of it, my opinion is, that, however justly it might apply in the case of Reid v. Darby, where the question was between British subjects under the British registry act, (as to which I decide nothing,) it is not generally applicable to cases of sales by necessity in a foreign country, where registry acts of a like strict nature do not exist, or bind the parties to the sale. It seems to me, that the agency of the master in cases of necessity, is an agency arising by operation of law. His power to sell is not derived so much from the supposed assent of the owner, as from the principles of law, to prevent a total loss of the property. The master acts, virtute officii, as master, and being in possession of the property, the law treats him as one capable of selling in his own name, but for the benefit of the owner. If any assent of the owner is to be presumed, it is an assent to sell in his own name in such cases, if that is, (as it is believed to be,) the usual, if not the invariable course. Foreign purchasers in a foreign country can have no knowledge of the persons, who are the real owners; or if they may have knowledge of those, who were owners at the commencement of the voyage, they can have no knowledge of any intermediate transfers by sale, by death, by bankruptcy, or by operation of law; and if no sale would be good, except made in the name of the persons, who were the real owners at the time, many of the purchases made in cases of sales of necessity would be liable to be avoided. Sales of all other property of the owners, except ships, made by the master in his own name, would be generally deemed sufficient to pass the title, if the sale were otherwise justifiable. Foreigners treat with him, as they do with factors in like cases, as owner de facto. My opinion, therefore, is, that in a case of sale, strictly of necessity, the master may give a sufficient title in his own name, as by operation of law substituted owner pro hac vice, or at least as an agent capable of passing the possession and property by a bill of sale executed in his own name. It is far from being universally true, that a person, who sells as agent, must always sell in the name of his principal in order to give validity to the transfer. A factor sells in his own name; an auctioneer commonly sells in his own name; and so a master selling perishable goods in cases of necessity, where he is not consignee; so a sheriff, where at common law he sells wrecked goods, which are perishable. See 2 Inst. 168. If then the master might sell in his own name, and the sale is made with his privity and consent by a person, who usually gives a bill of sale, as wreck commissioner in his own name, it is clear to my mind, that the master is as much bound by such a sale so sanctioned by him, as if the bill of sale were in his own name. If the owner had authorized the wreck commissioner to sell, and give a bill of sale of the ship in his own name, would it be indured, that he should afterwards reclaim the property, because the bill of sale was not in his, the owner's, name? Would it not be deemed a perfect sale, binding him at law as well as in conscience and equity? I think it would, and that any other doctrine would encourage every sort of fraud upon innocent purchasers. If the owner will stand by, and see his own property sold, as the property of another, courts of equity have said, that he shall in many cases, for the suppression of fraud, be bound by it. And there are many cases even at law, where a party will not be allowed to set up his legal title against an innocent purchaser, where the owner has connived at the sale, or has acted fraudulently. But in a court of admiralty, which endeavours to regulate its doctrines by principles of equity, a party coming thither to seek redress, or to obtain possession of property, will not be permitted to avail himself of its jurisdiction, or authority, to defeat a clear equitable right by insisting on an inequitable legal right. The court will withhold its interference in such

a case. In this view of the objection, it would not be material, even if it had a better legal foundation than, I think, it really possesses. For, if the sale were necessary, and the transaction in all other respects optimâ fide, the defect of a legal execution of the papers would not entitle the owner to a decree of possession.

Having discussed the legal principles applicable to cases of this nature, let us now see, what is the real posture of the facts in the present case. The schooner Tilton belonged to Boston, and was owned by the libellants and the master, (Capt. Samuel Tilton;) the former owning three quarters, and the latter one quarter of her. She was duly enrolled and licensed at Boston for the coasting trade, and sailed from New York on the 18th of May, 1828, bound to Conwaysborough, in the state of North Carolina, on a contract to take in freight there. On the night between the 19th and 20th of the same month, she was, by the perils of the sea, stranded on the coast of North Carolina upon a beach or sandbank, part of the bank of Chickamacomico. On the morning of the next day the master and crew got ashore, and the master, upon consulting some of the inhabitants, there being a small fishing settlement in the neighbourhood, concluded to apply to the wreck commissioner appointed by the government, for that part of the coast, and to authorize him to sell the vessel, as she lay on the bank. She was accordingly advertised by the wreck commissioner for sale on the 31st of May, and was sold on that day for the sum of $196.50, including all her tackle, apparel, and furniture. A survey was made on her on the day of sale, and not before. The sale was conducted by the wreck commissioner, and the nominal purchaser at the sale was one Pharaoh Farrow, to whom a bill of sale was given by and in the name of the wreck commissioner, dated on the same day. It recites the original enrolment, and contains a special warranty, warranting the title "according to his authority as commissioner of wrecks," against all persons. The sale was made between 12 and 2 o'clock of the day. It is admitted, that on the same day, after the sale, the wreck commissioner purchased one quarter, and the master (Tilton,) one half of the vessel, at the price she was bid off at, and immediately afterwards, Farrow departed, and the wreck commissioner and Tilton (the master), and the mate, (the rest of the crew having been dismissed a few days before,) and about eight or ten other persons, hired for the occasion, went to work to endeavour to get the vessel off, and the wind and tide favouring, she was accordingly got off that night; and her leaks being stopped, she was carried by the master and other persons through Ockracocke Inlet, and brought to anchor in Pamlico Sound, on the inner side of Chickamacomico banks, where she remained for about one month. In the intermediate time, and before the vessel left Chickamacomico, Capt. Tilton returned to Boston, there being an insurance there upon the vessel for the benefit of all the owners, to the amount of $3,000, and he endeavoured to procure payment of his share of it; but the underwriters resisted payment upon the ground, as it is understood, that the abandonment was not good, it not being a case of a total loss. Capt. Tilton then returned by the way of New York, to Chickamacomico, and there (according to his own account, in a letter dated afterwards at Washington, on the 27th of July, 1828,) he went on board of the schooner Tilton, and took her under his command to Washington, in the state of North Carolina, where she remained a short time, and underwent some repairs. While there, the original ship papers were deposited in the custom-house; and on the 21st of July, 1828, Farrow executed a bill of sale, reciting the original enrolment, of one quarter of the schooner to the wreck commissioner, and another bill of sale with a like recital, of one half to Tilton, (the master,) pursuant to the original agreement with them on the day of sale, and for a proportional sum of the original purchase money. On the same day, Farrow procured the schooner to be registered in the custom-house at Washington, as the joint property of himself, the wreck commissioner, and Tilton. On the same day (the 21st of July,) the wreck commissioner, by a bill of sale of that date, reciting the register, and that Tilton was master, conveyed his one quarter part (for which he had given $49.12½ only), to McCabe & Smith, (the claimants,) for $400; and on the same day Farrow, by his bill of sale of the same date, reciting the register, conveyed to McCabe & Smith, his remaining quarter part, for $400. McCabe & Smith, thus became the owners of one half of the vessel, and Tilton of the other half. It is also material to state, that the bills of sale from Farrow to the wreck commissioner, to Tilton and to McCabe & Smith, warranted the title in a special form only, "against all and every person and persons whomsoever, as far as I can do by virtue of the title to the said schooner, vested in me by the bill of sale from the commissioner of wrecks, dated the 31st of May, 1828, and no further." The bill of sale from the wreck commissioner also, to McCabe & Smith, warranted the title "so far as I can do by virtue of the title to said vessel, vested in me by bill of sale from Pharaoh Farrow, bearing date the 21st of July, 1828, and no further." On the 12th of August, 1828, Tilton conveyed his one half of the schooner to McCabe & Smith, for $1050, reciting in the bill of sale the register, and that he, Tilton, was then master; and on the 23d of the same month, McCabe & Smith, by a bill of sale reciting the register and that Tilton was master, conveyed one quarter part to Schenck, (the other claimant) for the sum of $500. These two last

bills of sale from Tilton, and McCabe & Smith, contain general covenants of warranty to the vendees against all persons. It is under the conveyances thus set forth, that the present claimants assert their title to the entirety of the schooner. The schooner was on the same day duly enrolled and licensed for the coasting trade, and soon afterwards sailed from Washington for Boston, under the command of Schenck, and after her arrival there was arrested upon the admiralty process, by which she is now before this court.

Such is the general outline of the facts, as they are presented in an historical order. And the questions growing out of them and the other proofs in the cause, which have been most acutely and elaborately discussed at the bar, are these: (1) Was there in the present case any necessity, which would justify the master in making the sale? (2) If there was, was the sale actually made bona fide, and without fraud by the master, or with his privity and consent? (3) If not, are the present claimants entitled as bona fide purchasers for a valuable consideration without notice of the fraud, to be protected in their actual title under the sales made to them? If the first question is decided against the claimants, their title is at an end, for it is then the case of sale made by one possessing no competent authority. If on the other hand the sale was a sale of necessity, then if fraudulently made, it cannot avail the claimants, if they had notice of the fraud, or were fairly put upon inquiry by the nature of their title and the circumstances, under which they took it. If they are bona fide purchasers of the title without any notice, constructive or actual, of any fraud in the sale, then, upon the general principles of law, their title stands firm and purged of the fraud.

In the first place then, was this a case where an actual necessity existed for the sale, in the sense, which I have already endeavoured to explain in the former part of this opinion? It is material to state, that the onus probandi here rests on the claimants. They are to establish beyond any reasonable doubt, that there was such a necessity, otherwise their title never took effect. The libellants stand upon their original title, and until that is displaced by another, clearly proved, they may rest upon it. Now, upon the first blush of the case we have the fact, that the vessel was not fatally injured, but she was got off at the first effort seriously made for that purpose, and at a very trifling expense, and she did not sustain any great injury from the stranding. Considering the length of time she lay on the beach, and her exposure to the inroads of the sea, if it were as great as the witnesses testify, her injury during the period was marvellously small, and her preservation somewhat remarkable. I am aware, that there was a fortunate concurrence of favourable wind, and tide, and sea, at the time when she was actually gotten off; but looking to the tale told by the log-book, it is by no means certain, that if similar efforts had been previously made, they would not have been equally successful. The season of the year was mild and favourable; the means, at least for some strenous efforts, were at hand; and at a comparatively small distance there were men and means without the hazard of great expense, which had in other cases been found ready and adequate and successful. I admit, that we are not in a case of this nature to look solely to the event. Cases have occurred (and they may again occur) of such utter hopelessness, that in point of reason and common sense, a sale would seem to be instantly required without any effort of relief; and yet by some extraordinary circumstances beyond the reach of human foresight, the property has been finally redeemed from the peril, and has survived the disaster. In such cases the sale is nevertheless justifiable, and binding upon all parties. But where the relief has been in fact procured by the application of ordinary means within reach, we have a right to expect, that the necessity for sale should be such as could not admit of any reasonable doubt or delay; that the master ought not in common prudence to have made any efforts, and that the preservation of the vessel is to be looked upon as a piece of good luck and rare fortune, rather than of superior judgment, or skill, or enterprise.

Now, in the present case, no effort was in fact made by the master to relieve the vessel, (for I lay aside his abortive attempt by hoisting the sails, when he had no adequate assistance on board,) from the first moment of stranding up to the time of the sale, a period of eleven days. The vessel was a valuable vessel, insured for $3000, and certainly worth from $2000 to $2500. He was upon the coast of his own country, and not upon a barbarous or inhospitable foreign shore. He was within a short distance of several commercial ports, where supplies might have been obtained, or at least sought. Upon the very spot there were men enough to aid him in any reasonable efforts to get the vessel off, and at a reasonable price. It is not pretended, that the neighbouring population either did refuse, or would have refused any such service. They never were asked. And if they had refused, even if the laws of North Carolina on this subject had slumbered, there were men at no great distance, who had been accustomed to such services. What advice the master took does not appear; or whether in reality he took any entitled to much weight. The wreck commissioner denies having given any advice to sell, and the notary, upon whom he seems to have relied, speaks pointedly to the danger of the vessel, but he does not seem to have been the leader of the plan of sale. If the master was of opinion, under existing

circumstances, that it was best to sell; still as the sale was to be deferred for ten days, what was there in the meantime to prevent him from taking some steps and making some preparations to relieve the vessel, if a favourable time should occur? He could not but know, and so is all the testimony, that the vessel in her present state, if she could not be got off, would not sell for more than the value of her materials, of her sails and rigging and furniture, and there would not be any new hazard from the experiment. Every day's delay in the sale was adding something to the risk of getting the vessel off, and there was some motive therefore, to sell at once, or to attempt her relief. The weather, too, might at that season of the year be presumed to be favourable, and in point of fact during the intervening period it was so. But from the very first, the master declined all efforts, and he dismissed his crew before the sale, and remained in an utter state of inaction until roused after the sale was made. Let us put the question to ourselves, whether a master, honestly bent towards the interest of his owners, as well as his own, would, if the vessel had been uninsured, have conducted himself in this manner? The master's subsequent conduct was so disingenuous towards both the owners and underwriters, that it is somewhat difficult to escape from the conclusion, that he had some sinister motive at bottom. It is true, that his subsequent conduct ought not to prejudice the claimants, who were not parties to his acts, but it is impossible wholly to disentangle his acts from one another. Why should he have concealed, both from the owners and underwriters, his purchase after the sale?

Then, what was the state of the vessel? She was on a sand beach, buried, in part, in the sand, and accessible on one side at least to the tide. The amount of injury to her was not great. Some tree-nails are said to have been started, which, however, were easily replaced. It is said, that some of the planks of her bottom were started, and so it is stated in the protest; but that statement upon the whole evidence is, to say the least of it, extremely doubtful. It is not made out by evidence, omni exceptione major. It is encountered by opposing testimony, which is at least as disinterested, and of no inconsiderable positiveness, as well as weight. Her fore foot was off; but that was not very difficult to replace. She leaked considerably, and some oakum was started; but she was not unmanageable. What is decisive on this head is, that with some small repairs she reached Boston, and was there afterwards found by ship-wrights, who had repaired her but a short time before her disaster, very little hogged, and in their opinion nearly, if not quite, as strong and sound, as she was before the voyage. She has since performed a voyage with a heavy cargo, without complaining.

The survey, which, strangely enough, was not called until the day of sale, and therefore could have had no influence upon the master to sell, does not represent the injury to the vessel to be very serious. The surveyors say, that they found the vessel "high upon the beach with the larboard bilge much injured, and in all probability injured in the starboard bilge also, as that part lieth down in the sand, and therefore recommend Capt. Tilton to sell the vessel and materials." It is not a little remarkable, that the survey states no particulars of the injury, although in such instruments, it is usual, and important, to enumerate them at large. If by the bilge being "much injured," it was meant, that the bottom was broken in, or the timbers displaced, why was it not said so? There is no satisfactory proof, that the vessel was, in reality, bilged, in the nautical sense of the term. And there is some reason to believe, that the North Carolina testimony has incautiously, if not studiously, exaggerated the injuries from the stranding. The principal repairs at Washington seem to have been of no extraordinary a nature. The ship-wright, who repaired her, states, "that he there hove her down, examined and repaired her; he found many of her tree-nails in the bottom started an inch or more; her fore foot all off; the oakum in her seams somewhat started; her keel hogged about six inches; one of the channel benches was carried away, and her tiller was broken. The vessel appeared to him to be very strongly built, and to have undergone a great deal of hardship by chafing of her planks, and the starting of her tree-nails. He in repairing her had to drive many spikes into her bottom, better to secure where her tree-nails had been started." Another witness (Whittier) adds, she had a new mainmast put in, and was graved and repaired. Neither of them states, that any plank in the bottom was started.

But the statement of the injury and repairs, even as thus exhibited by the ship-wright at Washington, is brought into serious question by the testimony of the witnesses, who afterward examined and repaired her at Boston. The result of that testimony is, that the planks and tree-nails could not have been started in the manner stated; that the planks of the bottom were not chafed, or the seams caulked; and that there was no hogging of the vessel beyond what ordinarily belongs to vessels of her age and size. They admit however, that there was a new forefoot. I do not say, that this last testimony is more worthy of credit than the former; but such a conflict necessarily diminishes the confidence, which the court would otherwise repose in the former. It leaves behind it a lingering suspicion, that there has been some effort to exaggerate the injury to the vessel, or some want of caution in the recollection of the witnesses.

Then, as to the local position of the vessel.

She was certainly on a very dangerous and exposed shore, and open to the rake and full violence of the sea in an easterly storm. It is also in proof, that a large majority of vessels stranded on that coast are not got off, or at least are not got off, until after they are sold. The banks too are thinly inhabited; and it is not too much to presume, that the inhabitants have an interest to discourage efforts to get them off, if not to obstruct such efforts. But the vessel was undoubtedly safe in her position, unless an easterly storm came on. There is no evidence, which establishes, that she might not have been got off by proper means. On the contrary, the general concurrence of the testimony is, that she might have been relieved by getting her on ways and launching, but not in any other manner. Nevertheless, she was got off in a different manner, and by the use of her sails and shores. The expenses of an attempt to get her on ways, and launch her, do not appear to have been disproportionate to the object, or very great, and I cannot but think, that under all the circumstances, the master ought to have resorted to it. The winds and the weather were not unfavourable for it. Why he did not make any such attempt is not satisfactorily explained, for it is not shown, that the means were not within his reach. One cannot but perceive, that being fully insured, he might not have any strong personal interest to stimulate his exertions. But on the other hand, the expenses of a trial, even if unsuccessful, must have been borne by the underwriters. The means to secure such expenses were in the hands of the master by a pledge of the materials, and by the lien given for such services by the general maritime law, even if the master could not, under the circumstances, have obtained funds upon the credit of the owners and underwriters.

The circumstances also attendant upon the sale are not such as would lead the court to place implicit confidence in the master's judgment and character, either as to the necessity or good faith of the sale. The proceeds of the sale were $196.50, a sum wholly disproportionate to the real value of the rigging and furniture, independent of the hull. The real value of the cables and anchors and other moveable materials could not have been less than $500, and was in all probability more, if not upon the spot, at least in any neighbouring commercial port, to which they might have been transported. The master might have bid them in at the sale, for the benefit of the owners and underwriters, to whom they must have been far more valuable. It is difficult to see, why he did not, unless he had some private sinister interest. He and the wreck commissioner became confessedly purchasers on the same day, immediately after the sale, of three quarters of the vessel; and Farrow, the nominal purchaser, then disappeared, and did not again connect himself actively with the vessel or her fate, until after she arrived at Washington. As soon as the purchase is made, the master and wreck commissioner begin their efforts to get her off, nay the efforts seem to have been begun before, and in a few hours their success is complete. The master returns to Boston, and studiously conceals from the other owners, as well as from the underwriters, that he had acquired any new or superior interest under the sale, nay, affirming that he had no interest in the purchase of the vessel under the sale. Failing to obtain payment of the insurance, he returned to North Carolina, and there took command of the vessel, then lying in Pamlico Sound. Although he and the wreck commissioner had purchased on the day of sale, they had no title from Farrow until the time (21st July) when it became necessary to change the papers at the custom-house, at Washington. For aught that appears in the case, up to this period a profound silence had been observed by all the parties as to the interest of the master, if not of the wreck commissioner. The latter appears as owner, only for the purpose of disposing of his share to the first purchaser he can meet. The vessel was sold at Washington, without repairs, for $1850, and of this sum the wreck commissioner received $400, and the master $1050.

It is said, that there is no proof that the sale was fraudulent, or that the master or wreck commissioner had made any bargain before the sale with Farrow; and that they are not by law prohibited from becoming sub-purchasers after the sale. Admitting that there is no absolute disability on their part to become sub-purchasers after the sale, still, in a transaction like the present, they must disprove their antecedent connexion with the sale in the fullest and most unqualified manner. The presumption of law is against them. The presumption of fact, in the absence of all controlling circumstances, is almost irresistible. It is for the furtherance of common justice and good faith, that persons in their situation should be compelled to purge themselves from every imputation of fraud, before they are permitted to derive any interest in trust property, which they undertake to sell, and which they may be tempted to sacrifice. In the present case it appears to me, that the interest of the owners and underwriters was wholly sacrificed. In respect to the master, acting as an agent for all concerned, I have very great doubts, whether he could become a purchaser at all without an option in his employers to take the beneficial interest to themselves. See Chamberlain v. Harrod, 5 Greenl. 420. Lord Stowell in the case of The Fanny & Elmira, Edw. Adm. 117, 120, said: "The fact that the master afterwards became a subordinate purchaser under the purchaser at the sale, of one fourth part of the vessel, and at the price, which he himself had given for her, smells rank of collusion." The same circumstances occur here in a stronger form, and the

subsequent conduct of the master and of the other parties to the sale fortifies every unfavourable conclusion. They could scarcely be ignorant of his motives for his return to Boston, or of his intentional concealment of the transactions at the sale, and immediately succeeding it. They connived at it, if they did not participate in it. Their subsequent conduct has no tendency to disarm suspicion. If every thing was in entire good faith, why should the bill of sale to the wreck commissioner and the master have been withheld until after the master's return from Boston; and why did Farrow and the commissioner then sell with special warranty, referring back to the wreck sale? If the master's conduct was honest, why should he have scrupled to receive a special warranty from Farrow, and have required some urging and argument to take it? Why should he have written such a disengenuous letter to the owners, under the date of the 27th of July, disguising and concealing all the material facts? I cannot admit that there is no proof of fraud in the sale. On the contrary, it seems to me difficult to avoid the conclusion, that the facts of the case afford very strong presumptions of fraud. And these presumptions go farther, and cast a shade over the other parts of the case. They bear with no inconsiderable force upon the question of the necessity of sale, for if there was a fraudulent combination at the sale, it is easy to see, that means could be found to make out the necessity. Fraud, therefore, in such a case, is not to be treated as an independent fact, but as a fact, which travels along with the transaction in all its stages, to justify doubts, and to withdraw confidence.

There are many other topics, which have been adverted to by the counsel on each side, to sustain or defeat the defence. I do not go over them, because whatever may be their influence, either jointly or separately considered, they do not materially affect the conclusions, to which my mind has arrived. The claimants have failed to satisfy my mind, that the sale was one of necessity, and still more so, that such as it was, it was a sale free from fraud. In the former view, the title of the claimants wholly fails, whatever may be their innocence or want of knowledge of the defects of title. In the latter view, it would be necessary to show, that they had notice of these defects.

I acquit the claimants of all connexion with any fraud, or participation in it. I do not doubt, that they are bona fide purchasers. But I am not satisfied, that they had not constructive notice of all the defects of title, at least so far as to put them upon inquiry. In the first place, they purchased with a full knowledge of all the antecedent history of the vessel. The ship's papers then in the custom-house, and recited in their own title deeds, showed, who were the original owners, and that Tilton was part owner and master. The other papers showed the manner and consideration of the wreck sale, and the purchase of the wreck commissioner and the master for a proportionate sum of the original price; and this long after the vessel was sold at Washington. They showed, that Tilton was still master, and claimed to be owner of one half of the vessel, under a sale made by his own order and solicitation. They showed that the master was personally a great gainer by the sale. Their own title deeds also referred them to all the other papers, and pointed out the fact, that the other sub-purchasers stood upon a special warranty, and they were contented to take from them a special warranty. It is well known, that the general custom is to give a general warranty, and any exception naturally excites suspicion, and implies doubt. The party, who accepts such a title, is presumed to inquire into and to take the chances of any defect upon himself. It has been suggested, that McCabe & Smith never examined the bills of sale, and were ignorant of the fact of a special warranty. But, how can this be made out? The bills of sale were so drawn by the deputy collector, according to the instructions of one of the parties; and the deputy admits, that he never knew of a case of special warranty before. It was not then an unadvised act of the scrivener. The bargain was made before the parties came to him, and therefore he knows not what had previously passed in respect to this subject. But surely, it cannot be permitted to a party to set up ignorance of the contents of a bill of sale executed in his presence, and under which he asserts his title. The law presumes, that he has read it, or that he knows what its contents ought to be. It is not now pretended, that the vendors meant to give bills of sale with a different warranty. There was no mistake on their part, and there is no evidence, that McCabe & Smith contracted for a different title. When they subsequently purchased of the master his half of the vessel, they took a bill of sale with general warranty, and this precaution is not without its weight in giving a construction to the former special warranty, which could scarcely have passed without the observation of all the parties in interest, after it had attracted the attention of the master.

It appears to me then, that McCabe & Smith do not stand in the situation of parties, who purchase without knowledge of the actual derivation of title. They had the means of knowing all the material facts, and they ought to have exercised reasonable diligence in searching the transaction to the bottom. Prima facie, the title was suspicious and infirm. It was a sale by a wreck commissioner, who immediately became a purchaser, under authority of a master, who also became a purchaser at the price given at the original sale.

Upon the whole, looking to all the circumstances of the case, and having weighed the arguments of counsel with due care, my opinion is, that the sale was invalid, and convey-

ed no title to the claimants, and that therefore the decree of the district court ought to be affirmed.

Case No. 14,055.

TILTON v. OREGON CENTRAL MILITARY ROAD CO. et al.

[3 Sawy. 22; [1] 1 Cent. Law J. 267.]

Circuit Court, D. Oregon. April 25, 1874.

TAXATION — ASSESSMENT — UNCERTAINTY — CLOUD UPON TITLE—TAX DEED.

1. An assessment of real property should substantially comply with the requirements of the statute (Code Or. p. 898) which requires each tract or parcel of land to be designated according to the United States surveys, if it be a subdivision of the same, or otherwise by specific metes and bounds or other certain description; therefore an assessment to the O. C. M. R. Co. of 196,008.99 of acres of land in Jackson county, in gross, without any other designation or description of the same, is void for uncertainty.

[Cited in brief in Alexandria Canal Railroad & Bridge Co. v. District of Columbia, 5 Mackey, 378, 380.]

2. An assessment of real property which contains no valuation of the same except this: "Total value of taxable property, 245,011." there being no mark or sign to indicate whether such figures were intended to represent eagles, dollars, cents or mills, or other thing capable of being numbered, is void for uncertainty.

[Cited in Re Boyd, Case No. 1,746.]

3. A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof.

[Cited in Gregg v. Sanford, 12 C. C. A. 525, 65 Fed. 156; Rich v. Braxton, 15 Sup. Ct. 1018.]

4. Under Laws Or. 1865, p. 10 (Comp. 1874, p. 767), a tax deed is primary evidence of title and the regularity of the prior proceedings, which evidence can only be overcome by the proof of certain facts dehors the deed; therefore the same casts a cloud upon the title of the property.

Motion for a provisional injunction [by Charles E. Tilton] heard and determined upon the bill—no one appearing for the defendants.

Cyrus Dolph and E. C. Bronaugh, for complainant.

DEADY, District Judge. It appears from the bill that the complainant is a citizen of New York. That the defendant, "The O. C. M. R. Co.," is a corporation formed under the laws of Oregon, with a capital stock of $100,000 divided into 400 shares of $250 each, and the defendant, McKenzie, is the sheriff of Jackson county, Oregon. That the O. C. M. R. Co. is the owner in fee of a large number of acres of land in said county, in 300 and odd distinct parcels, particularly described by township, section and range, and the plaintiff is the owner of thirty-one shares of the capital stock of said company. That said company is assessed upon the assessment-roll of Jackson county for 1873 as the owner of 196.008.99 acres of land in said county, in gross, without any other designation or description thereof, and without any valuation of the same other than this: "Total value of taxable property, 245,011." That the taxes levied upon the lands so assessed to said company by the proper authorities of said county, amount to $4,410.20, and the same will be collected by the defendant McKenzie by the sale of said lands, or so much thereof as may be necessary for that purpose, and a cloud be thereby cast upon the title of said company, unless restrained by the order of this court; and that said assessment is illegal and void for want of certainty in the description and valuation of said lands.

That this assessment is illegal and void, there is no room for doubt. The law prescribes that the assessor in making an assessment of real property shall set down in the assessment-roll, in separate columns, the following: 1. A description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, range, and section in which the land lies; or, if divided into lots and blocks, then the number of the lot and block. 2. The number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into blocks and lots. 3. The full cash value of each parcel of land taxed. 4. In case the land be other than a subdivision of the United States survey, or lots and blocks, it must be described by specific metes and bounds, or otherwise, so as to make the description certain. Code Or. p 898

In the case under consideration, the assessment-roll contains no description of the land whatever, except that there is in all 196,008.99 acres situate somewhere in Jackson county. Neither the township, range, nor section, nor the metes and bounds of the tract, nor any parcel or portion of it is given.

Neither is there any cash value given in this roll of the whole or any portion of this land. It should have contained a valuation of each parcel and of the whole. The figures "245,011," entered in the column headed "Total valuation of taxable property," do not indicate any value. They are mere numerals signifying an abstract number.

In Hurlbutt v. Butenop, 27 Cal. 54, and People v. San Francisco Sav. Union, 31 Cal. 135, it was held that an assessment was void for want of a valuation of the property, where the figures in the valuation column were entered without any mark or sign to indicate whether they were intended to represent eagles, dollars, cents, or mills. Say the court in the latter case: "In the assessment-roll, in the column headed 'valuation,' there is nothing whatever to indicate what the figures are intended to represent; and, under the authorities cited, we are not authorized to say they mean dollars. They are simply numerals—'barren figures'—that are as often employed to indicate anything else that may be numbered, as dollars; or, if money is in-

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

dicated, the denominations may be either eagles, dollars, cents or mills."

But this assessment is clearly void on account of the omission to describe the lands and each separate parcel thereof by legal subdivisions according to the United States survey, or by specific metes and bounds, or in such other manner as to make the description certain, as required by law.

The question has not been passed on by the supreme court of the state, but in Kelsey v. Abbott, 13 Cal. 616, an assessment was held void because the statute was not substantially complied with in the matter of the description of the property. This case has been followed by Lachman v. Clark, 14 Cal. 133; Moss v. Shear, 25 Cal. 44; People v. Sneath, 28 Cal. 615; Smith v. Davis, 30 Cal. 537; People v. San Francisco Sav. Union, 31 Cal. 135; and Taylor v. Donner, Id. 481.

The ruling in these cases was recently followed in Huntington v. Central Pac. R. Co. [Case No. 6,911], where an assessment of the defendant's railway in several counties of the state was held void, and the collection of the tax thereon restrained, because the same was "not made in accordance with the provisions of the statute" in the matter of the description of the land or lands upon which the ties and rails were laid.

But although the assessment is illegal and void, that fact alone is not sufficient to authorize the interference of a court of equity to restrain the collection of the tax. "It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." Dows v. City of Chicago, 11 Wall. [78 U. S.] 110; Ewing v. St. Louis, 5 Wall. [72 U. S.] 418; Hanniwinkle v. Georgetown, 15 Wall. [82 U. S.] 548; Coulson v. Portland [Case No. 3,275]; Mooers v. Smedley, 6 Johns. Ch. 30.

According to the allegations of the bill, and the course of proceedings prescribed by the law of this state, the defendant McKenzie, if not restrained, will proceed to levy upon and sell the lands of the O. C. M. R. Co., or sufficient thereof to pay this tax and the costs of the proceedings; and in due time thereafter will make and deliver a deed therefor to the purchaser, which, upon its face, will pass the title and carry with it the presumption that all the proceedings preliminary thereto were done and had in accordance with the law, which presumption can only be overcome by proof of either: "1. Fraud in the assessment or collection of the tax. 2. Payment of the tax before sale, or redemption after sale. 3. That the property was sold for taxes for which the owner of the property, at the time of the sale, was not liable, and that no part of the tax was levied or assessed upon the property sold." Sess. Laws 1865, p. 10.

The deed must contain a description of the property sold; but of the preliminary proceedings it need only state the amount bid, the year in which the tax was levied, that it was unpaid at the time of sale, and that two years had since elapsed, and no redemption had.

The description required to be inserted in the deed is of the property sold; and although the description on the assessment-roll may be so insufficient as to render the assessment void, it does not follow that that fact will appear in the deed. The collector may levy upon any one or more of the 300 and odd distinct parcels of real property belonging to the O. C. M. R. Co., in Jackson county, and sell and convey the same by proper and sufficient description on account of the non-payment of this tax. A warrant for the collection of delinquent taxes is to be deemed an execution against property, and executed as such. Code Or. p. 909.

It is not clear that the legal effect of such a deed could be avoided, unless it was held that the tax for which the land was sold was not "levied or assessed" thereon, because of the insufficiency of the description and valuation in the assessment-roll. The assessment could not be held fraudulent because simply insufficient or erroneous. A mistake or omission is not necessarily a fraud.

But however this may be, this deed would at least cast a cloud upon the title. As was said by the court in Huntington v. Central Pac. R. Co., supra: "It would only be necessary for the plaintiff to produce his deed to show title. It would then devolve upon the defendant to show affirmatively, by evidence dehors the deed, such fatal defects in the assessment as it is admissible to show under the provisions cited, the deed itself being conclusive as to other particulars; and this brings it within the test by which the question is determined whether a deed would be a cloud upon title established in this state by the decisions of the supreme court." In Pixley v. Huggins, 15 Cal. 133, the rule by which to determine whether a deed would cast a cloud upon the title or not, was stated as follows: "Would the owner of the property in an action of ejectment, brought by the adverse party, founded on the deed, be required to offer evidence to defeat the recovery? If such proof would be necessary, the cloud would exist; if no proof would be necessary, no shade would be cast by the presence of the deed."

It appearing, then, that the assessment and tax are invalid, and that if the collection of the tax is enforced, it will necessarily result in a deed being made to the property, or some portion of it, which will cast a cloud upon the title thereof, the complainant is entitled to an injunction.

Let a writ of injunction issue, according to the prayer of the bill, until the further order of this court. Injunction granted.

TILTON (UNITED STATES v.). See Case No. 16,525.

TILTON, The MARIETTA. See Case No. 9,084.

Case No. 14,055a.

TINDALL v. MURPHY.

[Hempst. 21.] [1]

Superior Court, Territory of Arkansas. Dec., 1823.

EVIDENCE—EXECUTION—JUDGMENT.

An execution is not admissible as evidence, unless the judgment on which it issued is produced.

Appeal from Pulaski circuit court.

[This was an action by Thomas H. Tindall against Benjamin Murphy.]

Before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. The only question presented by the record is, whether the execution offered in evidence by the appellant was properly excluded. We are of opinion that it was incompetent evidence. To have authorized its introduction, the judgment upon which it issued should also have been produced. 3 Litt. 14; 1 Salk. 409; 2 Johns. 281; 12 Johns. 213; 2 South. [5 N. J. Law] 813; 20 Johns. 338; 5 Serg. & R. 332; 1 A. K. Marsh, 158; 1 B. Mon. 94; 1 Gilman, 136. Affirmed.

NOTE. By a statute of Arkansas in force 20th March, 1839, it is provided that, when an officer shall sell any real estate or lease of lands for more than three years, he shall make the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars recited in the execution, also a description of the time, place, and manner of sale; which recital shall be received in evidence of the facts therein stated. Dig. p. 504, § 60. This was intended to supersede the necessity of producing the records from which the recitals are made, and to furnish evidence of the authority under which the officer acted, as well as the manner in which he had executed that authority. It is, however, only prima facie, and not conclusive, evidence, and may be rebutted by proof. Newton's Heirs v. State Bank, 14 Ark. 10; Hardy v. Heard, 15 Ark. 184.

Case No. 14,056.

TINGEY v. CARROLL et al.

[3 Cranch, C. C. 693.] [2]

Circuit Court, District of Columbia. Dec., 1829.

PLEADING AT LAW—PROOF—VARIANCE—SEAL—FIRM NAME—JOINT SEAL.

1. In an action of debt against Daniel Carroll and William Brent, survivors of Charles Carroll and Eli Williams, upon articles of agreement, and averring the articles to be "sealed with the seals of the said Williams and Carrolls, and the said William Brent;" if on profert and oyer the articles appear to be signed and sealed thus: "Williams & Carrolls, (seal,)" "Wm. Brent, (seal,)" "Thomas Tingey, (seal,)" the variance is fatal on general demurrer.

2. One joint contractor cannot bind the others by seal.

3. There cannot be a joint seal for divers persons not incorporated.

[Cited in Jackson v. Simonton, Case No. 7,147.]

The case was argued by Mr. Swann, for the plaintiff, and by Mr. Tabbs, for the defendants, who cited Horner v. Moor, cited in 5 Burrows, 2614; Skinner v. Dayton, 19 Johns. 513; Gordon v. Austin, 4 Term R. 611; Cabell v. Vaughan, 1 Saund. 291; Longmore v. Rogers, Willes, 288; Tidd, Prac. 527, 1 Chit. 643.

Mr. Swann contended, that if every member of a firm be present, and one seals for all, it is the deed of all; but he cited no authority to that point.

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. This is an action of debt for $5,000, the penalty of articles of agreement between Thomas Tingey, in behalf of the United States, on one part; and the defendants and others, on the other part. The declaration states that Daniel Carroll, of Duddington, and Wm. Brent, surviving obligors of Eli Williams and Charles Carroll, now deceased, and the said Daniel Carroll and William Brent, were summoned to answer to Thomas Tingey, for account of the navy department of the United States, of a plea that they render to him 5,000 dollars, which to him, as agent aforesaid, they owe, and from him unjustly detain, &c. Whereupon the said T. T., by T. S. his attorney, complains, that whereas on the 29th of June, 1812, at the county of Washington aforesaid, certain articles of agreement were made and entered into between the said T. T., commandant of the navy-yard, Washington, for and on behalf of the navy department of the United States on the one part, and the said Eli Williams, Charles Carroll, and Daniel Carroll, then acting under the name and firm of Williams & Carrolls, and the said Wm. Brent, of the other part, which said articles witnessed, That the said Williams & Carrolls and the said William Brent had thereby firmly and duly contracted with the said T. T., &c. For the true and faithful performance of which the said Williams & Carrolls and the said William Brent did thereby bind themselves jointly and severally to the said T. T., for account of the said navy department, in the full and penal sum of 5,000 dollars, &c., which said articles of agreement, sealed with the seals of the said Williams & Carrolls and the said William Brent, the said plaintiff brings here into court, &c. After oyer the defend-

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

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

ants demurred to the declaration. The articles of agreement were "made and entered into between Thomas Tingey, commandant of the navy-yard, Washington, for and on behalf of the navy department of the United States, on the one part, and Messrs. Williams & Carrolls and William Brent, all of the county of Washington, in the District of Columbia, on the other part." "For the true and full performance of which, the said Messrs. Williams & Carrolls and William Brent" "jointly and severally bound themselves," &c. "Signed, sealed, and delivered, the day and year first above written. Williams & Carrolls, (seal,) Wm. Brent, (seal,) Thos. Tingey, (seal.) Witnesses present: B. H. Tomlinson. Mord. Booth."

In support of the demurrer it is said, that the instrument produced upon oyer, is not such an one as is set forth in the declaration, because it is not sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Carroll of Duddington, and that such variance is fatal on general demurrer. On the part of the plaintiff, it is suggested that demurrer is not the proper remedy for the defendants, but that the plea should have been non est factum; because upon that plea the plaintiff might perhaps prove that Eli Williams, Charles Carroll, and Daniel Carroll, were all present at the sealing, and that each acknowledged the one seal as his, and delivered the instrument as his act and deed; in which case it is supposed that the allegation would be supported that the instrument was "sealed with the seals of the said Williams & Carrolls;" and that the court cannot now, upon the face of the instrument, say that it is not so sealed, and therefore cannot say that there is a variance between it and the instrument averred in the declaration. The books are full of authorities, that if the instrument produced upon oyer be not such as is set forth in the declaration, the variance is fatal on demurrer. Thus in the case of Cooke v. Graham, 3 Cranch [7 U. S.] 229, the plaintiff demurred specially to the plea of the defendant. The supreme court adjudged the plea to be good. But as, upon demurrer, whether general or special, by either party, the court must look into the whole record, and give judgment against him who, in pleading, has committed the first substantial fault, they discovered that the declaration was on a bond dated on the 3d of January, but the bond produced on oyer was dated on the 3d of October, and adjudged the error to be fatal, and reversed the judgment. In that case it might have been said, as it is said here, that if non est factum had been pleaded, the plaintiff might have shown that the bond, although dated on the 3d of January, might have been delivered on the 3d of October, which might then have been called the date of the obligation, and would have supported the issue on the part of the plaintiff, upon the plea of non est factum. But the court said that the objection was fatal upon demurrer, and they decided against the plaintiff on his own special demurrer.

The question then arises, is there a substantial variance between the instrument alleged in the declaration, and that produced upon oyer. The declaration avers that the defendants Daniel Carroll and William Brent, are the survivors of the four contractors, Eli Williams, Charles Carroll, Daniel Carroll, and William Brent; and that the agreement was made between Thomas Tingey, of the one part, and the three first-named contractors, "acting under the name and firm of Williams & Carrolls, and the said William Brent, of the other part;" and it makes a profert of "articles of agreement, sealed with the seals of the said Williams & Carrolls, and the said Brent." In the instrument produced, the Christian names of the three first-named contractors are not mentioned, nor does it therein appear who Messrs. Williams & Carrolls were; nor is it stated therein that they constituted a mercantile house or firm, or acted as a firm or copartners. It is signed, "Williams & Carrolls, (seal.) William Brent, (seal.)" The witnesses did not certify that it was signed, sealed, or delivered. They merely say that they were present. The averment, in the declaration, that the agreement was "sealed with the seals of the said Williams & Carrolls," must mean, either that it was sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Carroll, or that it was sealed with the seal of the firm of the said Williams & Carrolls, or with a joint seal of Eli Williams, Charles Carroll, and Daniel Carroll. If it be an averment that it was sealed with the seals of Eli Williams, Charles Carroll, and Daniel Carroll, it is evident that the averment is not true; for there is but one seal where, upon that supposition, there ought to be three; nor does the instrument purport, on its face, to be severally sealed by those three gentlemen. It purports to be the joint signature and seal of whoever may be known under the appellation of "Messrs. Williams & Carrolls." If it be an averment that it was sealed with the seal of the firm of Williams & Carrolls, or with the joint seal of Eli Williams, Charles Carroll, and Daniel Carroll, then it was not the deed of the three; because there cannot, at common law, be a seal of a firm, or a joint seal for any number of persons not incorporated; and, therefore, if such be the averment, the declaration, upon its face, would have been bad without oyer. If the other be the meaning of the averment, then it is not true upon oyer, and the declaration is bad, for the variance.

The question now is, not whether the defendants did or did not enter into a contract, but whether the instrument produced be such an one as is described in the declaration; that is, sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Car-

roll; for no lawyer will venture to say, that there is any such thing known to the law as a seal of a firm, or a joint seal of several persons not incorporated; and a declaration setting forth an instrument under such a seal, would be bad on its face. That one partner of a mercantile house, or firm, cannot bind the other partners by deed, is a rule of law long since established; and in the case of Harrison v. Jackson, 7 Term R. 207, Lord Kenyon, C. J., says—"I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject. The parties came to nisi prius with the facts admitted on both sides: for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted that one partner might bind the rest. But the power of binding each other by deed is now, for the first time, insisted on, except in the nisi prius case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety." That case, of Harrison v. Jackson, was covenant upon an instrument, averred in the declaration to have been sealed with the seal of W. Sykes, for himself and the other two defendants, who were not present at its execution; and the subject of it was a partnership transaction. There it was not necessary nor proper to demur for variance upon oyer; because the instrument produced corresponded with that stated in the declaration. The plea was non est factum; and judgment was rendered for the defendants. The counsel, in that case, cited Perk. Pl. § 134, who says—"One piece of wax may serve for all the grantors, if every one put his seal on the same piece of wax, or another do so for them." But that other must have authority, and must put the seals there. He also cited the case of Mears v. Serocold, which is the nisi prius case alluded to by Lord Kenyon in Harrison v. Jackson. He cited also the case of Ball v. Dunsterville, 4 Term R. 313. But that was a deed sealed by one of the defendants, for and in behalf of himself and the other, and so executed and delivered by the authority and in the presence of that other. In giving judgment for the plaintiff, the court relied principally upon that circumstance, and said that "no particular mode of delivery was necessary; for that it was sufficient if the party, executing the deed, treated it as his own."

In the case of Clement v. Brush (1802) 3 Johns. Cas. 180, the supreme court of New York decided that one partner cannot bind his copartner by seal; and that a single bill, concluding, "As witness our hands and seals, Brush & Howell (Seal)" and written, signed, and sealed by Brush, was the proper debt of Brush alone. So in the case of Green v. Beals, 2 Caines, 254, Judge Livingston, in delivering the opinion of the court, said—"It is settled in England (7 Durn. & E. [7 Term R.] 207), notwithstanding an opinion of Lord Mansfield, at nisi prius, to the contrary, that one partner, in consequence of the general authority derived from the articles of copartnership, cannot execute deeds for the other. Were it otherwise, they would be enabled to dispose of the real property of each other, and to create liens on it without end. This would render such connections more dangerous than they already are, if not discourage them altogether. There can be no doubt, therefore, that on the plea of non est factum a verdict must have been found for the defendants." So, also, in the case of Skinner v. Dayton, 19 Johns. 513, 531, Judge Platt said—"If the associates are considered as partners, one of them could not bind his copartners by a seal, without special authority; and admitting that, as a partner, the appellant might, in this instance, have made a contract, without seal, which would have bound all the associates, yet, as he used a seal, the simple contract, as partners, was merged in the covenant; and thereby it became, in judgment of law, his own individual contract, unless he could prove that his associates specially authorized him to seal for them." Again, in page 533, he says—"By executing that contract, Skinner neither created any obligation, nor gave any right of action against any person but himself." Judge Yates, in the same case, page 546, says—"It is undoubtedly settled law, that one person cannot seal for another without express authority; and that, by assuming to act without it, a personal obligation is created. That authority may, however, in some cases be by parol; as in the case of Ball v. Dunsterville, 4 Term R. 313."

In the present case, there is no averment in the declaration that the seal, opposite the names of Williams and Carrolls, was put there by either of the partners, for himself and his copartners, by their authority. If there had been such an averment, there would have been, perhaps, no variance. U. S. v. Spaulding [Case No. 16,365]. But when the declaration avers the instrument to be under the seals of Eli Williams, Charles Carroll, and Daniel Carroll, and no such seals are found upon it, nor their names mentioned in it, it is impossible, in my opinion, to say that there is no variance Being, therefore, of opinion, that if the averment in the declaration is to be understood as an averment that the articles of agreement were under the seal of the firm of Williams & Carrolls, or under the joint seal of Eli Williams, Charles Carroll, and Daniel Carroll, the declaration is bad on its face, because there cannot be, in law, any such seal. And that if it is taken to be an averment that the articles were under the seals of Eli Williams, Charles Carroll, and Daniel Carroll, there is, upon oyer, a fatal variance between the instrument declared upon and that which is produced. I think, therefore, that the judgment upon the de-

murrer ought to be rendered for the defendants.

MORSELL, Circuit Judge, concurred in the result of this opinion, but not exactly for the same reasons.

THRUSTON, Circuit Judge, dissented.

The plaintiff had leave to amend, but the attorney of the United States dismissed the suit.

TINGEY (ORMSBY v.). See Case No. 10,580.

Case No. 14,057.

TINGLE v. TUCKER.

[1 Abb. Adm. 519.][1]

District Court, S D. New York. April, 1849.

SEAMEN — WAGES — DISCHARGE BY CONSUL — CONTINUING CLAIM FOR WAGES — DECEIT — COLLUSION.

1. Where a master procures a seaman to be discharged by a United States consul in a foreign port, if any deceit or collusion has been practised by the master in obtaining the discharge, he can claim no benefit or immunity under it

2. When there is no evidence of improper conduct on the part of the master in obtaining a seaman's discharge by a consul, and it appears that the consul has proceeded fairly, and on clear prima facie proofs has ordered the seaman to be discharged for criminal conduct, such discharge itself is a bar to any continuing claim for wages which might be enforced if the seaman's connection with the vessel still subsisted.

[Cited in Coffin v. Weld, Case No. 2,953; The Paul Revere, 10 Fed. 158.]

3. The propriety of the consul's interference is to be determined upon the facts before him, and not by the case which may be afterwards shown upon a trial.

This was a libel in personam by Abraham Tingle against Joseph I. Tucker, master of the ship Diadem, to recover wages. Four other suits were brought by other members of the crew of the Diadem, upon the same state of facts, and involving the same questions. The five suits were consolidated and heard as one. The five libellants were all colored men. The libels showed that the ship was up in January, 1848, for a voyage from New York to Apalachicola, thence to one or more ports in Europe, and back to a port of discharge in the United States. Some of the libellants sailed with the vessel from New York to Apalachicola, and all of them performed the voyage from Apalachicola to Marseilles. The libellants charged that they were ill treated on the voyage, both as to provisions and as to time and manner of work, and that on the arrival of the ship at Marseilles, they were, by order of the defendant, thrown into prison, and there detained until the ship sailed; and that they were then left by her at that place, although willing and desirous to continue on board and to perform the voyage. The libellants averred their own good conduct during the voyage, and claimed full wages to the time of the arrival of the ship at the port of New York, together with their expenses incurred in Marseilles, and in returning home; the aggregate amount of their claims being $702. The answers denied any improper conduct on the part of the respondent towards the libellants, and alleged that the libellants had been fully paid all their earnings by advances made to them, and by expenses and disbursements which the respondent incurred by reason of the misconduct of the libellants on board the ship. The answer then alleged that on the passage to Marseilles, the libellants were guilty of disorderly conduct, amounting to open mutinity and revolt, and which was carried to the extreme of depriving the officers of the command and control of the crew, and putting them in fear for their lives; that on the arrival of the ship at Marseilles, the conduct of the crew was reported to the United States consul at that port, who, after taking the depositions of the officers and steward, and inquiring into the facts, ordered the libellants to be discharged from the ship, and sent to the United States for trial; that in so doing, the consul acted on his own judgment and authority, though, as respondent believed, his own life and the ship would have been unsafe, if the libellants had remained on board. The respondent further averred, that he had no knowledge that the libellants were imprisoned at Marseilles. On the hearing, numerous and very contradictory proofs were put in, relating to the conduct of the libellants complained of by the respondent. It did not appear, however, upon the whole, that the libellants were guilty of any extreme misconduct, or that the officers had any reasonable cause for apprehending personal danger or any intentional mutiny. It was further shown, that on the arrival of the libellants in New Orleans for trial, the proofs which were offered to the grand jury there were regarded by them as insufficient foundation for indictment. It was, however clear, that the conduct of libellants was at times perverse and offensive to the officers, and that they were deficient in ready subordination and alacrity in the performance of their duties.

The respondent relied upon the discharge granted by the United States consul as being conclusive on the question relative to the conduct of the libellants. The certificate of discharge was as follows:—"Consulate of the United States, Marseilles. I, D. C. Croxall, consul of the United States at Marseilles, certify that Captain Joseph I. Tucker, master of the ship Diadem, of New York, personally came and appeared before me, at my office in the city of Marseilles, on the 19th day of May, A. D. 1848, and after depositing his ship's papers, declared that he had a charge to enter before me against several of the

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

crew of the said ship, and proceeded to charge Joseph Tilman, Abraham Tingle, Henry Tingle, Joshua Boston, and David Martin, colored seamen, with having committed divers acts of premeditated violence, disobedience, abuse, and direct personal obstruction of the execution of his lawful orders on board said ship during her voyage from New York to Apalachicola, and from thence to Marseilles. That said five seamen exercised great influence over others (colored) of the crew, and caused them to join in all their bad and mutinous conduct. That his (the said captain's) life had been threatened by one if not more of said seamen, and that neither he nor his officers had any control or command over them or the men under their influence. That he, and his first officer, did not consider it proper or safe that said five men, the ringleaders, should be retained on board. That they, the said master and mate, should be afraid and unwilling to proceed again to sea with them, and therefore requested me, the said consul, to take steps to have said ringleaders removed from said ship and imprisoned, not deeming his (the said master's) person or life safe from them, and that he should produce proofs preparatory to the discharge of said seamen from said ship. I certify that after examining said master, the first officer, the cook, E. Cooper, and a seaman named Lewis, (George,) and also Mrs. Caroline Tucker, wife of the said captain, separately under oath, and finding the said master's statement confirmed by the other witnesses, I accordingly discharged said five seamen named herein, as the ringleaders in the various acts of mutiny, disobedience, abuse and revolt charged against them, from said ship, and shipped other seamen in their stead. Witness my hand and official seal, at Marseilles, this 3d day of June, 1848. (Signed,) D. C. Croxall, United States Consul. (L. S.)"

Alanson Nash, for libellants.

E. C. Benedict, for respondent.

I. The rule of law is clear that the captain has the right in cases of incorrigible disobedience, mutinous and rebellious conduct, to discharge a seaman before the end of the voyage. Turner's Case [Case No. 14,248]. The law clothes him with that discretion.

II. Consuls, too, have very large discretion in such matters, even by statute. It is a mistake, however, to consider the functions and powers of consuls as mere creatures of the statutes of the United States. Consuls have certain duties given to them by statute, but they are international ministers deriving most of their powers from the law of nations and international usages, and in all nations have always had a very extensive and beneficial jurisdiction, as well in advice as in action in all this class of cases. It is the duty of a master in all such cases to address himself to the consul of his nation for advice and aid, and doing so, the law will protect him when he acts in good faith.

III. In this case, every thing shows that the captain and the consul acted deliberately and honestly in the exercise of an official discretion. That discretion was conferred upon them by the law, and it is a principle to which there is no exception, that when the law confers discretion, it protects the exercise of that discretion. If it be exercised in good faith, the act is binding, and the party that exercises it is subject to no consequences. If the innocent suffer, it is their misfortune; if the guilty escape punishment it is their good luck.

IV. The men were lawfully discharged; their voyage was legally ended and their wages stopped. They were legally sent home by the consul to be tried. That they were never tried was their good fortune, but it has no effect upon the conduct of the captain or the consul.

BETTS, District Judge. The sufficiency of the action taken by the United States consul at Marseilles to exonerate the respondent from liability for the improper imprisonment of the libellants and for their discharge from the ship, is the main point to be considered and disposed of.

The proceedings before the consul were had at the instance of the respondent; and if any deceit or malpractice had been resorted to by him to induce the official act of the consul, he could not claim any immunity or benefit under that act. There is nothing in the case, however, to show improper conduct or blamable motives on the part of the master in referring the subject to the consul, or that he did not act in the belief that the libellants had committed offences against the laws of the United States, and that the consul had rightful authority to examine into and adjudicate upon the charges, and take order thereon against the seamen.

The consul certifies and returns in full the proofs taken by him, and states his proceedings to have been had by virtue of section 5 of article 35 of the consular instructions relative to seamen of the United States.

The instructions referred to are not before the court, but they probably have relation to the duties of consuls under the acts of 1803 and 1840.

Section 1 of the act of February 28, 1803 (2 Stat. 203), implies the power of a consul to discharge a seaman in a foreign port, and to give a certificate of such act on his part; as by the provisions of the section such certificate of the consular consent to the discharge relieves the master from the penalty imposed for not bringing back to the United States such seaman with the ship.

The act of July 20, 1840, in terms requires the concurrence of the seaman and master in an application to the consul in order to authorize him to discharge the seaman in a foreign port under the provisions of subdivisions 5 and 6 of section 1 of that act. 5 Stat. 395. The discharge contemplated by

those sections is, however, manifestly one from the obligation of the shipping contract, and has no connection with the authority of consuls in repressing criminal offences committed by seamen, or in bringing them to punishment therefor.

Subdivision 11 of section 1 of the same act (Act July 20, 1840; 5 Stat. 395) declares, "it shall be the duty of consuls and commercial agents to reclaim deserters, and discountenance insubordination by every means in their power, and when the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end in the most effectual manner."

It is known to be the familiar practice, in French ports especially, for consuls, upon the representations of masters of vessels, and on a proper substantiation of facts, to obtain the interposition of the local police, which of its own authority commits seamen to prison because of offences on board of their vessels, or for insubordination of conduct. Cases of this nature have for many years been of frequent occurrence.

It is also a common exercise of authority by American consuls in foreign ports, to send home for trial, in their own ships, or by a different conveyance, seamen accused of crimes committed at sea or in foreign ports. I am not aware that the obligation of ship-masters to bring home such prisoners, or the authority of consuls to transmit them, has ever been directly questioned. Some of our most distinguished admiralty judges have expressed strong doubts as to the power of consuls in these respects; and also, whether, in case seamen are imprisoned abroad or sent home compulsorily by them, such acts exonerate the master from liability to the men for full wages and damages.

Those cases will be more particularly adverted to in another view of this subject. The question now raised in this cause, it is to be remarked, was not directly presented in those for decision; and the suggestions of the courts, as to the authority of those acts, were accordingly incidental, and in illustration of the general doctrines of the law.

The inquiry in the present case is, whether the consul, upon the facts asserted by him, could lawfully discharge the libellants from the ship, and authorize the master to make up his crew by employing others in their place.

The testimony taken before the consul proves that the conduct and threats of the libellants on board of the vessel were highly mutinous, and that the officers had reasonable grounds for fear for their lives, and had no power to control or restrain the men, at sea.

The testimony of the captain and his wife, taken by the consul, could not be admitted on the trial of the respondent in court, the suit being personally against him for wages. The testimony, also, given by Cooper and Lewis, two of the crew, before the consul, was retracted, or changed in essential features on their examination in this court. Two other persons on board, who were not witnesses before the consul, were examined in court, as were also the libellants each for the others. These proofs rendered the balance of evidence plainly in favor of the libellants against the charge that their acts had been dangerous to the safety of the vessel or her officers. This result of the trial here, does not, however, authorize the conclusion that the case before the consul did not warrant his proceedings, nor but that the hearing in this court, had it been on an indictment before a jury, where the testimony of the master of the vessel and his wife would have been competent, might have led to the conviction of the seamen of the mutinous conduct charged against them. The point, then, is whether the consular act, upon the proofs before him, in detaching these men from the ship, and ordering them home, to be there dealt with under the laws of the United States, on charges for criminal offences committed at sea, fails to bar their right to demand wages to the end of the voyage, because the evidence before the courts on full hearing disproves the necessity or propriety of the consular order. It is to be observed that the decision of the consul is not given merely at the instance and on the representation of the master and respondent. He examined into the charges officially, and decided the course he would adopt upon full hearing of proofs.

Judges Hopkinson and Ware strongly intimate that the act of a consul in confining or discharging a seaman for criminal misconduct abroad, affords no protection to the master on a demand by the seaman for wages and expenses and damages accruing by his discharge or imprisonment. Wilson v. The Mary [Case No. 17,823]; The William Harris [Id. 17,695].

The force of these suggestions may, perhaps, be regarded as modified by the views expressed by Judge Ware in the more recent case of Smith v. Treat [Id. 13,117]. This was a suit brought by the libellant, a seaman on board of the Nimrod, against the master of the vessel, for the recovery of wages. It seems that, by reason of the criminal conduct of the libellant at sea, he was arrested, upon the arrival of the vessel at Point Peter, in the West Indies, and confined in prison, no other civil authority being invoked than that of the American consul at that place. He was subsequently, by order of the consul, sent home in irons to answer to the charges brought against him abroad for such offences.

In relation to that case, the Judge says: "As it was, it was certainly the duty of the master to call upon the civil authority of the place, and put the affair in a train of judicial examination. The result of that inquiry

was, that Smith was sent home as a prisoner to answer for his conduct to the laws of his country. And from the facts developed on the trial here, it appears to me, that the civil authorities were perfectly justified in this course." Smith v. Treat [supra].

Although it is not conceded in this decision, that the consul's discharge of the seaman abroad, and issuing a certificate of such discharge, because of his criminal conduct, would bar to the man the recovery of his wages here, yet wages were in fact denied him, because, by his own misconduct, he had disqualified himself from performing the services for which wages were to be paid.

My mind is better satisfied with the more direct and practical principle applicable to the facts. The rightful authority and duty of the consul to interfere and take a seaman from his ship, when his continuance there is dangerous to officers or men, being recognized,—The Nimrod [Case No. 10,267]; Smith v. Treat [Id. 13,117],—I think it results that such practical discharge terminates the connection of the seaman with the ship, and disqualifies him from suing the master or ship for after wages of the voyage, and it is quite immaterial whether the judgment of discharge rendered by the consul in this instance, constitutes a bar to the action, if his act legally separated them from the ship and her service.

This of course presupposes that there has been no improper collusion or deceit on the part of the master or owners, and that the consul has proceeded with integrity and on probable cause in his doings. The consul is personally liable to the party injured, if guilty of any abuse of power, for all damages occasioned thereby. Act 1840, art. 18 (5 Stat. 397). I apprehend, however, that the sounder and safer doctrine is, that when on clear primâ facie proofs he orders a seaman to be discharged from a vessel for criminal conduct threatening the safety of the vessel, or of her officers or company, and transmits him home for trial on the accusations, such discharge is a bar to any continuing claim for wages, that might be enforced if his connection with the vessel still rightfully subsisted.

The propriety of the consul's interference is to be determined upon the facts before him at the time, and not by the case which may be shown afterwards on trial. As in the present instance, displacing part of the testimony legitimately admitted by the consul, and introducing other not heard by him, may give the case a new aspect, and show that the seamen, though debarred of wages eo nomine by the act of the consul, may yet resort to the master for damages because of their improper severance from the ship.

Although the evidence before me is irreconcilably conflicting on many points, I consider the preponderance of it to support the demand of the libellants for wages up to the time of their discharge, and that no forfeiture or bar of those wages is established by the respondent.

The expenses incurred by them in Marseilles, by imprisonment or otherwise, were not caused by the master. His application to the consul was that the men should be discharged or taken from the vessel. That was granted. Then the consul, following his own judgment of his duty in furtherance of public justice, had the men committed to prison, and afterwards sent home, as prisoners for trial.

The testimony does not fix upon the defendant any responsibility for these acts, which can be enforced in this form of action.

The decree will be, that the libellants, in these respective causes, recover their several wages up to the time of their discharge at Marseilles, with costs to be taxed; and that the demand for wages to the termination of the home voyage be denied. Order accordingly.

Case No. 14,058.

TINKER v. VAN DYKE et al.

[1 Flip. 521;[1] 14 N. B. R. 112; 8 Chi. Leg. News, 235.]

Circuit Court, E. D. Michigan. March Term, 1876.[2]

EFFECT OF REPEALS AND AMENDMENTS UPON RIGHTS GIVEN BY STATUTES—BANKRUPT LAW—PENAL STATUTES REPEALED AND GENERAL EFFECT OF REPEAL OF LAWS.

1. The clauses in the bankrupt law [of 1867 (14 Stat. 517)] which give the power to an assignee to sue for and recover the amount of unlawful preferences paid to particular creditors are not penal in their nature, and when repealed are not subject to the rule of construction which applies in case of repeal of penal statutes.

2. Whenever substantial rights are created by statute or commercial contracts are regulated, the repeal of laws on which they depend, will not receive a retroactive application, unless the law expressly or by implication so declares. The cases deciding that this clause of the bankrupt law is penal, disapproved.

[Cited in Oxford Iron Co. v. Slafter, Case No. 10,637.]

3. Certain judgments hold that statutes imposing liabilities upon corporators in certain exigencies for debts of the corporation were penal and would not be enforced in other states. These are at war with the case in 2 Wall. 450 [Steamship Co. v. Joliffe], holding that the repeal of such clauses as to existing contracts impaired their obligation.

[Cited in Warren v. Garber, Case No. 17,196.]

4. The clause in section 5021, Bankrupt Law, amending section 39, where the word "knew" is used instead of the words "had reasonable cause to believe," does not apply to proceedings in bankruptcy commenced before Dec. 1, 1873.

[5. Cited in Crump v. Chapman, Case No. 3,455, to the point that, under the amendment of 1874, a sale which is an act of bankruptcy on the part of the insolvent is not void as to the vendee, unless the vendee knows that it is made in fraud of the provisions of the bankruptcy act.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] Affirming Case No. 16,849.]

[In error to the district court of the United States for the Eastern district of Michigan.]

Alfred Russell, for plaintiff in error.
D. M. Dickinson, for defendant in error.

EMMONS, Circuit Judge. [Philip J.] Van Dyke was appointed trustee before the amendment of 1874 [18 Stat. 178], which so changed the former law as to require that a creditor obtaining a preference should know that the debtor was insolvent instead of "having reasonable cause to believe he was so insolvent." The bankrupt law transfers all the property of the bankrupt to the assignee as of the day of adjudication. Van Dyke, for the benefit of creditors, had a right unconditionally to one thousand dollars, in the hands of [Lowell W.] Tinker, as the immediate conveyance of the adjudication under the former law, but, as his suit was not commenced nor tried before the amendment, it is claimed by the defendants, that it was necessary to prove under it, that he knew the insolvency of his debtor, and that "having reasonable cause to believe" was not sufficient.

It has been argued at two different hearings, with far more than ordinary pertinacity, that this clause in section 39 of the bankrupt act, is penal in that sense which brings it within the familiar rule that rights arising under such laws are gone by their repeal. It is said also to be remedial, so as to bring it within the rule of construction which applies statutory alterations of the mere form of the remedy to pending proceedings. The defense, also, with much confidence, relied upon the frequently misapplied rule that actions given by statute are gone by its repeal.

No question of constitutional power is involved in this discussion. The authority of congress to divest vested rights, and impair contracts in the enactment of a bankrupt law, is conceded. The question before us is purely one of interpretation: Did congress, having an undoubted right so to do, intend to make the new rule applicable to pending causes?

As a very general rule, when we have repeatedly ruled a point, as we have this one, sustained as it is, by so much express decision, we should not deem it necessary to prepare a formal judgment. The exceptional labor of the argument for the defendant, and an influential dictum by Judge Dillon, we think justify the attention we give it.

The following judgments expressly deciding this question, for the sake of that conformity which should characterize judicial rulings, ought to be followed, even if we did not as fully as we do, approve their principle.

Van Dyke v. Tinker [Case No. 16,849], is the report of this case in the court below. The learned district judge relies chiefly upon the provision in the amendatory act, that the alteration of section 39 here in question, shall apply to all cases of involuntary bankruptcy, commenced since Dec. 1, 1873, which he holds is equivalent to an express legislative declaration that it shall not apply to any cases commenced before that time. We see no answer to this argument. The repealing clause, properly construed and modified by the proviso of section 39, leaves the whole of this section as it formerly stood, in full force as to all causes pending before Dec. 1, 1873. Brooke v. McCraken [Case No. 1,932] is a very intelligent opinion, holding that the amendment to section 35 is not to be applied to pending proceedings; it notices the provision limiting the application of a similar amendment to section 39, and declares that the 35th section comes within the general principle that all laws affecting substantial rights, are to be applied to the future only. Judge Deady cites the following federal judgments, announcing this rule: Harvey v. Tyler, 2 Wall. [69 U. S.] 347; Steamship Co. v. Jolliffe, Id. 458; McEwen v. Den, 24 How. [65 U. S.] 244; U. S. v. Starr [Case No. 16,379]; Schenck v. Peay [Id. 12,450]; Ex parte Billing [Id. 1,408]; Ex parte Hope Min. Co. [Id. 6,681]. We have examined these cases; they fully sustain the application of the rule to the case before the court. Steamship Co. v. Jolliffe, 2 Wall. [69 U. S.] 458, was a case where a statute gave a pilot half fees for tendering his services. The tender was made, but before the action was brought, the statute was repealed, and another enacted in its stead, providing for the performance of the same duties. The opinion of Justice Field is somewhat ambiguous, but we think he does not intend to rest it upon the ground that by retroactive application of the law, the obligation of contracts would have been impaired, or the property of a citizen divested, without due process of law. He does call it a quasi contract, and speaks of the right as a vested one, but concludes this portion of his judgment by placing it upon the presumed intention of the legislature, and quoting Chief Justice Shaw, in Wright v. Oakley, 5 Metc. [Mass.] 406, where it is substantially said that when one statute is repealed, and another modifying it only contemporaneously entered in its stead, the old law may be considered as still in existence in reference to causes of action which accrued under it. We think that the argument of Judge Field intends to concede the power of the legislature, by express enactment, to have barred the recovery; but that in all cases where such rights were involved as those which he decided the pilots' in that case to be, the presumption was of a contrary intent. We think it a precedent for holding here, that the intention was, not to divest the unconditional right of the assignee to this sum of money. The right of the creditors was perfect, and should not

be divested without express enactment, or an implication wholly unambiguous.

In Hamlin v. Pettibone [Case No. 5,995], Judge Hopkins very fully considers this question, and decides that the amendment is not to have a retroactive application to causes arising anterior to December, 1873. He relies not only upon the express limitation in the act to that period, but applies the rule that statutes affecting substantial rights divesting causes of action which have fully accrued, are not without express declaration or the strongest implication to be applied to past transactions.

In Hitchcock v. Way, 6 Adol. & E. 943, cited by him, an English court refused to apply ex post facto to a statute which took away a defense in gaming contracts, even in favor of a bona fide purchaser, without notice. And see In re Montgomery [Case No. 9,732]. Bradbury v. Galloway [Id. 1,764] follows from the preceding cases, and quotes, as quite decisive of this question, section 13 of the Revised Statutes, which provides "that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, etc." The words "penalty" or "forfeiture" have no application here, unless the far fetched argument be tenable, that this clause in section 39 be penal; we elsewhere say we think it is not. The law cited disposes of this question in favor of the plaintiff if it is so, and the word "liability" would serve the rights of the assignee in this case, whatever may be its nature. Singer v. Sloan [Case No. 12,898], recently decided by Judge Dillon, contains a dictum relied on by the defendant to give this clause a retrospective application. Evidently the learned and usually careful judge had not, as he was not called upon to do, fully examined the subject. He cites Sedg. St. & Const. Law, 129 et seq., that all rights dependent upon a statute fall by its repeal; but this same author, on page 134, in discussing the same subject, after having noticed one exception to the rule quoted by Judge Dillon, says that a second exception is constituted of those cases "which affect rights of action which have attached and become vested under the original law, and existing at the time of the repealing statute." The facts upon which the judgments rest, cited by Mr. Sedgwick in illustration of this exception, clearly show it is applicable to the case before us. The words here quoted are almost literally like those in the judgment of Justice Field in Steamship Co. v. Jolliffe [supra]. In re King [Case No. 7,781], by Justice Miller, held that the amendment providing that a bankrupt should be discharged although his assets did not pay 50 per cent., as provided by the original law, was applicable to cases commenced before the amendment in this respect; differing from the conclusion of Judge Blatchford in Re Francke [Id. 5,046]. It may well be that this clause was intended to apply as Justice Miller holds, while that before us should not be construed to divest the action of the assignee.

Upon authority, the question comes before us with six well considered judgments, holding directly upon the question before us, that the amendment did not apply to proceedings in bankruptcy commenced before December, 1873. The dictum of Judge Dillon is all that we find opposed to it.

Beyond this reference to these judgments upon the question before us, we shall do little more than testify that we have gone over the ground of the argument, and that suitors have had the benefit of our consideration of the labor of their counsel.

The following cases, unquestionably resting upon the penal character of the rights which were held to be abrogated by a repeal of the law, are acquiesced in as sound and wholesome law: 21 Mich. 390; [State v. Baltimore & O. R. Co.] 3 How. [44 U. S.] 534. In the later case, Chief Justice Taney draws the line clearly between penal provisions in a law and its other clauses creating contracts and relating to substantial rights. 2 Dana, 330; 5 Rand. [Va.] 657; Anonymous [Case No. 475]; [Yeaton v. U. S.] 5 Cranch [9 U. S.] 281; [Norris v. Crocker] 13 How. [54 U. S.] 429,—are all of the same general character, and are no more appropriately cited here than a very great number of other like adjudications.

A few cases have been referred to upon statutes regulating political rights, supposed to be analogous to the clause now before us for construction. We see no similarity. In reference to such laws, it would require a very strong expression of the legislative will for the court not to apply them retrospectively in reference to all unclosed matters. Tivey v. People, 8 Mich. 128; People v. Green, 58 N. Y. 295; [State v. Baltimore & O. R. Co.] 3 How. [44 U. S.] 534; [Inglis v. Sailors' Snug Harbor] 3 Pet. [28 U. S.] 157; [Butler v. Com.] 10 How. [51 U. S.] 402; [Ex parte McCardle] 7 Wall. [74 U. S.] 506,—are all of such character.

Several judgments were cited and analyzed to show the power of the state and federal legislatures to effectuate the intention of parties by retroactive legislation, giving validity to imperfect contracts and insufficient action under former laws. This necessary and beneficent power is not questioned. All such laws should receive a most liberal construction to effectuate such purpose. Of this class are 16 Ohio, 377; 57 N. Y. 177. Similar adjudications in the federal and state courts are numerous.

Decisions upon statutes which affect the form of remedy only are equally foreign to the case before us; such are all the following cases in defendant's brief: Robinson v. The Red Jacket, 1 Mich. 173, and Moses v. The Missouri [Id. 507], referred to in it, contains the true distinction upon the subject. 21 Pick. 169; 9 Barn. & C. 750; 50 Mo. 554; 11 N. Y. 281,—are to like effect. The general subject treated in these cases is too familiar

to require additional citation and treatment.

To show that this clause, which equally distributes all the property of a bankrupt among his creditors is penal, and consequently that a state court will not enforce it—the able judgment of Justice Christiancy in Voorhies v. Frisbie, 25 Mich. 476, and Bingham v. Claflin, 7 N. B. R. 412, are cited.

Whatever we might have said of those judgments had jurisdiction been declined, upon the ground that the federal courts were the more fit forum for such actions, we most emphatically dissent from that portion of the reasoning, upon which they rest, declaring this clause of the bankrupt law to be penal in its character and applying the inapplicable rule announced in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 240, and The Antelope, 10 Wheat. [23 U. S.] 66.

One of these cases was in reference to a particular regulation of a foreign government, and the other a penal forfeiture to the United States. Their inapplicability to this clause of the bankrupt law is manifest. Neither the Michigan nor the Wisconsin court takes any notice whatever of any one of the following judgments, many of them by the most elaborate and convincing argument deciding the point directly the other way. Brown v. Cuming, 2 Caines, 33; Barstow v. Adams, 2 Day, 70; Barclay's Assignees v. Carson, 2 Hayw. [N. C.] 243; Kelly v. Holdship, 1 Browne [Pa.] 36; Sullivan v. Bridge, 1 Mass. 511; and in 1846, Dewey, J., in 10 Metc. [Mass.] 583, under the bankrupt law of 1841 cites the foregoing cases under the former law as setting at rest this question at that period. His discriminating judgment draws the distinction between a home national bankrupt law, which ex rigore operating upon persons and property within the state, passes title in præsenti to the assignee, and a foreign one who must come here claiming rights solely under his judicial appointment. In Stevens v. Mechanics' Sav. Bank, 101 Mass. 109, this principle was deemed so clearly applicable to the present bankrupt law that, as the court say, it was abandoned in argument. See fully in accord 102 Mass. 428; 7 Bush, 66; 64 Pa. St. 74.

We think these judgments could not have been called to the attention of the learned courts of Michigan and Wisconsin. These two opinions being recently cited in New York, called from the court of appeals in Cook v. Whipple [55 N. Y. 150], a citation of a portion of the preceding cases and a most pointed dissent from the assertion that this clause of the law had any element of a penal character. Some respect is due to so long and unbroken history, and we can hardly be asked to follow two judgments asserting principles so novel and at war with precedent. The adverse adjudications might be greatly multiplied.

Halsey v. McLean, 12 Allen, 438, and 33 Md. 487, and other similar adjudications holding that when laws impose liabilities upon the officers and shareholders of corporations for the nonperformance of some duty upon the ground that they are penal in their character, they will not be enforced in foreign jurisdictions, have been cited as analogies for holding this clause of the bankrupt law to be of a similar penal character. Whether these and the numerous other similar decisions collected and well analyzed in 33 Md. 487, are consistent with the judgment in [Hathorn v. Calef] 2 Wall. [69 U. S.] 10, we briefly consider hereafter.

A law imposing liability for the debt of another as a consequence of a wrongful omission of duty, is clearly distinguishable from one which provides for the equal distribution of a bankrupt's assets among his creditors.

It is no more penal to declare that a creditor who receives payment in violation of the bankrupt law shall hand over what he receives to the assignee, than that he who holds personal property belonging to the bankrupt shall be subject to an action in trover if he refuses to deliver it upon demand.

As well might it be said that an action on the case for fraud in violation of the common law is penal in its character, because the citizen is made to respond for the consequences of his wrong. The many judgments authorizing suits in state courts by assignees in bankruptcy, declare that their rights rest upon the same general principles as if they accrued under the common law.

In Grant v. Hamilton [Case No. 5,695], of which there is a very imperfect report only, which we argued when at the bar, an action was sustained in the federal court to recover back property won upon a horse race under a statute of Michigan.

Upon a very full review of judgments, Judge McLean held that the law was not a penal one, that it created property rights between citizen and citizen, and, like any other obligation created by law, could be enforced in the federal courts—a penal law, it was conceded, could not be. Numerous adjudications were cited to his honor, showing that the many state laws, authorizing recovery back of property, which passed from citizen to citizen, in violation of law, were not penal unless a greater amount was authorized to be recovered than was actually received.

These citations do not appear in his judgment. They have not been cited to us, and we have no time to reproduce them. They are all directly at war with the doctrine of the cases which hold the liability of corporations to be penal.

It would be unpardonable in a case like this to discuss at any length the rectitude of judgments, after having declared their inapplicability to the point in judgment.

The analogy, however, between the cases we have been considering and that of a suit to recover back money from a creditor who

has unlawfully received a preference, was so urgently pressed that we add a word in regard to them. These judgments are so many and from courts of such high respectability, that we should feel great reluctance in disregarding them. We submit, with great respect, that they have entirely misapplied the doctrines upon which they rest. A law which creates a liability between citizen and citizen, as further security for the contracts of a corporation of which the obligated person is a member, has in it no penal element whatever in that sense which makes one court refuse to enforce the penalties of foreign governments. The history of this principle shows that it had its origin in the political hostility of opposing nations; laws intended to guard the revenue; penalties to enforce the political regulations of other countries were not enforced by tribunals, whose government was presumed to be opposed to the policy which such laws were intended to promote.

The rule never had any application to the colonies and much less to the several states and the federal judiciary after we became one nation, with a common commerce and a common interest in the power, peace, and prosperity of the whole people.

When penal actions founded upon the laws of other states were rejected by our courts, as in some instances upon the ground of comity they might have been, this old rule should not have been invoked.

All those provisions of law intended to secure the performance of private contracts, and in which the property rights of private citizens alone were concerned, should never have been deemed penal statutes within the rule excluding jurisdiction.

The federal courts would decline jurisdiction in a qui tam action under a state law for a penalty for a violation of the Sabbath, for defrauding a state tax law or any other law of a purely political character; here the rule would be applicable; to extend it to that large and rapidly growing class of cases, where the citizens of one state have rights of action against those of another, under laws creating liabilities for corporate premises, will make a fearful inroad upon the jurisdiction of the federal judiciary.

A very large percentage of all the commerce, manufactures and trading of the country is coming to be done by state corporations; the citizen relies in large degree upon the security afforded by those obligations imposed upon officers and shareholders for an omission of their duty. To call this obligation a penalty is to exclude the jurisdiction of the federal courts by a mere name. We can see no distinction in principle between a state statute which should repeal a provision in a railroad or bank charter, rendering liable directors and shareholders if they incurred debts beyond the amount of the capital paid in, or failed to make proper scrutiny and publicity of the accounts of their corporation, and a law divesting such a liability, unanimously held to be unconstitutional in Hawthorne v. Calef [supra].

In this case a railroad charter provided that shareholders should be liable to the extent of their shares for the debts of the corporation, if there was a deficiency of corporate assets. This provision was repealed anterior to the bringing of an action. Held, it violated the obligation of the contract implied between the shareholders and the creditor growing out of the statute and their reciprocal action under it. In this case the liability was fully statutory; there was no liability at common law on the part of the corporators for the debts of the corporation.

The court cites as analogous, Woodruff v. Trapnall, 10 How. [51 U. S.] 190, in which it was held that the repeal of a law which made bills issued by a bank receivable in payment of state debts, could not deprive a citizen of the liberty of so applying them. Corning v. McCullough, 1 Comst. [N. Y.] 47, is also approbated, which quite fully accords with the principles stated.

Between the statute involved in [Hawthorne v. Calef] 2 Wall. [69 U. S.] 10, and those which the state judgments cited have held to be pure penalties, and therefore cognizable only in the courts of the state which enacts them, we see no such difference in principle as to cause a circuit court of the United States to refuse to entertain an action upon the ground that one is penal, and to entertain it under the other because it is a contract.

To erect such a distinction into a rule of law, would enable state legislatures, by the mere form and phraseology of a statute, to create property rights of which the federal courts could take no cognizance, and thus do indirectly, what, in Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445, the supreme court said they could not do directly.

This liability constitutes a part of the law of the contract. See, also, Ochiltree v. Railroad Co., 21 Wall. [88 U. S.] 252, 253.

The rule so frequently quoted in the books that what is created by statute may be taken away by statute was also largely relied upon at the bar. We remarked during the argument, and now repeat, there never was any such rule administered anywhere.

When remedies are created, penalties enacted, crimes defined and punished, political regulations established by statute, they may be abrogated by their appeal.

When repealed, the presumption is in favor of a retroactive application. It is a misdescription of the principle involved in these classes of cases, to say the right of action is gone because they are statutory.

They are gone on account of the nature of the statute, the right regulated, and the persons to be affected; because, in these peculiar instances, and other analogous cases, statutory rights are abrogated by repeal of the law, it by no means follows that all

other statutory rights of a different character, creating substantial property rights, upon which business transactions between citizen and citizen are vested, fall in the same circumstances.

Large numbers of the latter class are protected by various constitutional inhibitions —federal and state.

When you pass beyond the protection of the constitution, and arrive at those vested rights which involve substantial property values, then, although the abstract proven may exist to destroy them, the presumption will be that the legislature did not intend to do so, unless it expressly so declares.

From the multitude of cases so declaring, we cite in addition to those already referred to, only the following: Dash v. Van Kleeck, 7 Johns. 477, which contains a full discussion by most able judges, and reviews the elementary writers and decisions down to their date. The duty of construing all laws prospectively, where rights are affected, is strongly insisted upon; and, see 4 Serg. & R. 401; [Ogden v. Blackledge] 2 Cranch [6 U. S.] 272. No principle is more familiar in the federal jurisprudence.

It was also argued that, however courts might deal with affirmative provisions of law which prescribe new rules of conduct, and create new obligations, applying them prospectively only when such appeared to be the intention of the law-maker, that no such liberty of interpretation existed when a statute was unconditionally repealed.

We see no difference whatever, in principle, between the two cases, deeming it, in all instances, a mere matter of construction, depending upon the subject matter and language of the law. We should have thought it unworthy of consideration, but for the answer made by Justice Cowen, in Butler v. Palmer, 1 Hill, 324, to some judgments cited in favor of a wholly prospective application of a law in judgment before him.

He does distinguish them by saying they are cases of positive enactments, and not unconditional repeals. If we might impute to that learned judge the absurdity of saying, that in no case could the legislature repeal a clause in a statute, saving all rights accrued under it, his language, literally interpreted, might be read to mean that in every case of repeal, irrespective of circumstances, the courts are forbidden to confine its effects to future cases only. He cites many old English judgments in reference to political, penal, remedial and criminal statutes, in reference to which such a rule of presumption is rightfully declared; but all that is meant in the judgment, is that in case of a repeal, stronger language and more persuasive circumstances are required to authorize a limited application than will produce the same effect in reference to a new affirmative enactment.

The judgment, instead of being at war with our own, when rightfully understood, is an argument to show that in every instance the legislative will is to be ascertained and executed.

TINKER (VAN DYKE v.). See Case No. 16,849.

TINKLEPAUGH (UNITED STATES v.). See Case No. 16,526.

TINSTMAN (FIRST NAT. BANK OF MT. PLEASANT v.). See Case No. 4,805.

TIOGA R. CO. (BLOSSBURG & C. R. CO. v.). See Case No. 1,563.

TIPPETT (TARLTON v.). See Case No. 13,754.

TIPTON (MORGAN v.). See Case No. 9,809.

TIRRELL (GILBERT & B. MANUF'G CO. v.). See Case No. 5,417.

Case No. 14,059.

TISDALE v. MUTUAL BEN. LIFE INS. CO.

[3 Ins. Law J. 58;[1] 4 Bigelow, Ins. Cas. 58.]

Circuit Court, D. Iowa. 1874.[2]

LIFE INSURANCE — PROOFS OF DEATH — FACT OF DEATH—PRESUMPTIONS—GRANT OF ADMINISTRATION—MISTAKEN IDENTITY.

1. Defendants claimed that the proofs of death of the insured submitted by the plaintiff were not sufficient. *Held*, that if these formal proofs of loss were made by the plaintiff, and no objection was made to them by the defendant, the present objection to their inefficiency is to be considered as waived.

2. This being a civil action, the jury was to decide by a preponderance of evidence.

3. The fact that letters of administration had been granted to a probate court on the effects of the insured constitutes a prima facie evidence of his death, and changes the burden of proof from the plaintiff to the defendant, and in the absence of countervailing evidence the plaintiff is entitled to recover.

4. The proceeding before the probate judge being ex parte, the defendant not being present, it does not require very strong evidence to overcome the prima facie case thus made.

5. The absence of motive to abscond is a material fact to be taken into consideration in a doubtful case.

6. Cases of mistaken identity are so frequent that evidence that the insured was seen subsequent to the appointment of an administrator, if it is inconsistent with other evidence in the case, must be received and considered with scrupulous care.

7. The mere fact of the disappearance of the insured without apparent motive is not a sufficient ground from which his death can be inferred, but the jury must take into consideration all the facts and circumstances attending his disappearance and absence.

[This was an action by Hattie B. Tisdale against the Mutual Benefit Life Insurance Company on a policy of insurance.]

O. P. Shiras and F. Brewer Rood, for plaintiff.

Austin Adams and D. C. Cram, for defendant.

---

[1] [Reprinted by permission.]

[2] [Reversed in 91 U. S. 238.]

LOVE, District Judge (charging jury). This is an action upon a policy of insurance issued by the defendant to the plaintiff. It is admitted that this policy was issued by the defendant, and the policy itself is before the jury in evidence. But the defendant contends that the plaintiff cannot recover, because the proofs of loss were not sufficient. It was necessary by the terms of the policy that the plaintiff, in order to be entitled to the money, should make certain proofs of loss; that is, proofs of the death of the insured. If you find from the evidence that these so-called "formal proofs" were made, and no objection was made to them by the defendant, you will treat as waived the objection as to their insufficiency. In other words, it was the duty of the defendant, if they considered the formal proofs sufficient, to notify the plaintiff of that fact, and require further proof; and, if they put their objections to paying the money upon other grounds, they cannot now take advantage of the insufficiency of the proofs. This is a civil action; it is not a criminal prosecution, and the jury are under the necessity of determining the case by a preponderance of evidence. Conclusive evidence of the facts in this case is not to be expected.

There is a certain conclusive force of evidence necessary in a criminal prosecution, but, this being a civil action for the recovery of money, the rule of law is that the jury must determine it by the preponderance of evidence. The burden was originally upon the plaintiff to make out her case; but the jury will see as I proceed that the burden was in the progress of the trial shifted to the defendant.

The real question in this case is whether the insured, Edgar Tisdale, was dead at the time of the issuing of the letters of administration. That is the real question the jury are called upon to decide. It was incumbent upon the plaintiff to prove that fact. The plaintiff has shown the jury, as evidence of that fact, letters of administration issued by the probate judge to her as administratrix. This the defendant objects to as inadmissible. It is the duty of the court to instruct the jury that the evidence is sufficient to make a prima facie case, and to change the burden from the plaintiff to the defendant. I must explain in as few words as possible the meaning of the terms "prima facie case:" It is a case made by evidence that entitles the plaintiff to recover in the absence of countervailing evidence. If there is no evidence to overcome the case thus made, the plaintiff is entitled to a verdict. A prima facie case may be of greater or less strength. A prima facie case, though not conclusive, is sometimes so strong that it requires evidence of great force to overcome it. The case made by the letters of administration, although sufficient unless overturned, is still not a strong case. The prima facie evidence is but slight, and, of course, it would not require very conclusive evidence to overcome it. The reason is very obvious. This defendant was not before the probate judge. It was an ex parte proceeding. The letters of administration were issued, perhaps, upon very slight proof. The probate judge, however, did find from the proof before him that the party was dead, in order to issue the letters of administration. These, without any contradictory evidence, give the plaintiff the right to recover; but I must say that it does not require very strong evidence to overcome the prima facie case thus made.

The court is requested to instruct the jury in regard to the absence of motive on the part of Tisdale to abscond. Supposing you should adopt the defendant's theory of the case, looking at it from his standpoint, to wit, that Tisdale was not dead at the time letters of administration were issued, but that he had absconded. In the absence of any motive on his part to abscond, it will not be presumed that he did abscond; but if from the evidence the jury find the fact to be that he did abscond, then the want of motive would have nothing to do with the case. If the jury find that he did abscond, then it would follow that some motive existed. The absence of motive to abscond is a material fact, to be considered in a doubtful case. If the principal fact be proved,—that is, if this party was seen at Baxter Springs some time subsequent to the appointment of an administrator,—and this fact is shown as proof of his having absconded, then the fact of a want of motive to abscond is unimportant, because we cannot always look into the human heart and discover its motives. Crimes are frequently committed of a very grave nature, and yet we can discover no motive. In general, motives must be inferred from facts, rather than facts inferred from motives. If it is established by proof that an act has been done, we know there is some motive for it, though we cannot always see what that motive was. If there is a total absence of motive, that is to be taken into consideration, in a doubtful case, in forming a conclusion as to the fact itself. For instance, if it were proved that one man had killed another, and it appeared as if he had no motive to kill; that the party killed was his friend, at least not his enemy; that he stood in kindly relations towards the deceased,—though the fact of the want of motive would have weight in a doubtful case, yet in the case thus supposed it would avail nothing.

I am also requested to instruct the jury as to the question of identification,—whether the jury can rely upon the identification of a party by others. This matter scarcely admits of legal definition. The truth is that we do ordinarily rely upon our recollection of other men. If a man should say to you that he saw an individual of your acquaintance at a distant place, you would believe

him in the absence of proof to the contrary. If at any time you have met a man of your acquaintance, and subsequently a controversy arises which calls into question this fact, you at once recall the circumstance of your meeting him, and you put confidence in your recollection of his person. Nevertheless, experience shows that we often make mistakes in this way, and so many cases of mistaken identity occur that it is our duty to receive such evidence to show error. Then the jury must receive and consider evidence of personal identity which is inconsistent with other evidence in the case with scrupulous care and caution. This is all, gentlemen, that the court can say upon this question of identity. It does not admit of anything like a precise legal definition, in my opinion.

I am requested by the defendant to give to the jury some instructions in writing, which I will do. They are as follows:

(1) The plaintiff must prove affirmatively the death of Tisdale, whether the defendants objected to the sufficiency of the preliminary proofs of loss or not.

(2) If the jury are not otherwise satisfied from the evidence in the cause of the death of Tisdale, they cannot infer his death from the fact that he disappeared, and that no motive for his voluntary absence has been proved.

The above is given by the court with this explanation: that from the mere fact of the disappearance of Tisdale without apparent motive it would not be safe to infer his death, and, if this is all that the jury find to be proved in this case, their verdict ought to be for the defendant. But it is the duty of the jury to consider all the circumstances attending the disappearance and absence of Tisdale. Not only the mere fact of his disappearance, but the length of time during which he has been absent and not heard from; all the circumstances attending his disappearance; the efforts, if the jury believe any to have been honestly made, to find the insured, and to ascertain the place of his abode; the motives or want of motives, as shown by the proofs, to abandon his wife, family, and home; the state of his mind and affections with respect to his family and business,—in a word, the jury must not fix their attention upon any one or more isolated facts or circumstances disclosed by the evidence, and thus form their judgment of the probability of Tisdale's death.

Evidence has been given to the jury to show his relation to his family, the situation of his business, and the state of his mind, what he said in Chicago about his intention to return home, and what he said about his family. We know by experience that men gravitate strongly towards the home of their affections. It is their nature to do so, unless they are unhappy in their domestic relations. Of course, in determining this question, the jury must take into consideration not the fact of his absence, but the length of time of his absence. If it were seven years, that would raise a presumption by law of his death, but, if not absent seven years, the presumption does not arise, although there is an absence of six and one-half years. In this case it is necessary that the absence be corroborated, because there is no legal presumption of his death from mere lapse of time.

Your verdict will be, gentlemen: "We, the jury, find for the defendant;" or "We, the jury, find for the plaintiff in the sum of —— dollars, with —— per cent. interest, from the —— day of ——, 1873." If you find for the plaintiff, she will be entitled to recover the amount of the policy, with interest running from ninety days from the time of the proof of loss.

I would say, in conclusion, that it is of the very greatest importance that you should find a verdict in this case. You will see yourselves that this is a ruinous litigation. The amount is not large, but the expenses are very heavy; therefore you must make an earnest effort in finding a verdict.

Verdict for plaintiff for full amount of policy.

[The case was removed by writ of error to the supreme court, where the judgment above was reversed. 91 U. S. 238.]

Case No. 14,059a.

TISDALL v. The HERO.

[Nowhere reported; opinion not now accessible.]

Case No. 14,060.

The TITAN.

[8 Ben. 7.] [1]

District Court, E. D. New York. Jan., 1875.

COLLISION—AT PIER—FASTENINGS.

1. A steam tug, with a boat alongside, was intending to take her out of a slip in which they were. The tide pressed the tug against the side of a canal boat, which was lying fastened to the side of the pier. The captain of the tug told the captain of the canal boat to get out more fastenings to the wharf, lest, when the tug started, the canal boat should be carried away from the pier, but the captain of the canal boat did not do so. When the tug started, the pressure of her by the tide against the canal boat carried the latter away from the pier, breaking the fastenings, which were otherwise sufficient to hold her, and carrying her against another vessel, from which collision she received injury. Her owner filed a libel against the tug, to recover the damage. *Held*, that the canal boat was not bound to get out the extra fastening.

2. If the tug was so pressed against the canal boat, she ought not to have started her engines till she had pushed herself away from the canal boat, as she could have done, and she was liable for the damage.

In admiralty.

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

Beebe, Wilcox & Hobbs, for libellant.
A. W. Hall, for claimants.

BENEDICT, District Judge. This action is brought by the owner of the canal boat Agnes, to recover damages occasioned to that boat while lying moored on the south side of the pier, at the foot of 24th street, in the North river.

The libel alleges that the Titan, as she was entering the slip, carelessly came in contact with the canal boat. The answer alleges that the Titan at no time came in contact with the canal boat, but that the damages complained of arose from the fact that the canal boat was so improperly fastened, that she went adrift, as the Titan was going out of the slip, by the force of the ordinary current attendant upon a passing vessel, and, while so adrift, was injured if at all by coming in contact with another vessel near by.

The evidence in the case shows, conclusively, that the Titan did come in contact with the canal boat, although it is not certain that any injury was caused by the first contact; and the circumstances as proved by the claimants show the Titan in fault. The claimants' evidence shows that the Titan came alongside, and in contact with this boat, then moored at a pier where she had a right to be; that while the boats were so in contact, the Titan put her engines in motion to go out of the slip with a boat she had taken alongside; and that the pressure of the tide held the Titan against the canal boat so firmly, that when she moved she took the canal boat with her, breaking the line which fastened the canal boat to the inside boat, and thus placing the boat adrift.

The master of the Titan admits that he anticipated this result, and, before he moved, vainly endeavored to persuade the master of the canal boat to strengthen his fastenings; and he now claims that the omission of the canal boat to put out more lines when requested, absolves the tug from all responsibility. But the canal boat was under no obligation to be so fastened as to withstand the action of the Titan under such circumstances. She was sufficiently fastened to hold herself against any tide or any current which the Titan might make in the slip, and she was not bound to do more. It was the duty of the tug, when she found herself held by the tide so firmly in contact with the canal boat, to have pushed herself clear before setting her engines in motion. This I judge she could have easily done, but, if not, then she was in fault for placing herself in such a position in respect to the canal boat. The decree must be for the libellant, with a reference to ascertain the damages.

TITAN, The. See Cases Nos. 12,666 and 12,667.

TITAN, The (HOTALING v.). See Case No. 6,714a.

Case No. 14,061.

The TITIAN.

[6 Ben. 346.][1]

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

COLLISION — LONG ISLAND SOUND — STEAMER AND SCHOONER—LIGHTS.

1. A steamer and a schooner came in collision at night in Long Island Sound. The wind was southwest, and the schooner was heading east, and making nine or ten knots an hour. The steamer was heading west by south, making five or six knots an hour. The schooner made no change in her course. When the lights of the steamer were first seen a little on the starboard bow of the schooner, the latter showed a torchlight on that side, and afterwards showed it again shortly before the collision. The master of the steamer saw the torchlight, a little on the port bow of the steamer. He also, at the same time, saw a red light and several bright lights apparently on a steamer on his port hand. He ported for a little time, and then straightened up on his course again, and, on seeing the torchlight again on his port bow, ported again, as he said, because the pilot whom he had on board said it must be on a pilot boat, and he did not wish to be spoken; and, on the re-appearing of the torchlight a third time, still on his port bow, he put his helm hard a-port and stopped his engine, and then, seeing the schooner's green light, reversed it, but too late to avoid the schooner, which was struck on her starboard side and sunk: *Held*, that the steamer was bound to have kept out of the way of the schooner.

[Cited in Brainard v. The Narragansett, 3 Fed. 256.]

2. That the steamer was in fault in porting on first seeing the torchlight but a little on her port bow, without anything to indicate which way the vessel showing it was proceeding, and in following up the schooner, as she did, by repeated portings, instead of starboarding or stopping until she found which way the schooner was going.

In admiralty.

J. C. Carter, for libelants.
W. C. Barrett and C. Donohue, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner Daniel Williams, on their own behalf, and on behalf of the owners of cargo and other property which was on board of said schooner, to recover the sum of $53,000, as the damages sustained through the sinking of said schooner by a collision which took place between her and the steam propeller Titian, between ten and eleven o'clock, p. m., on the 6th of December, 1871, in Long Island Sound, a short distance to the eastward of Little Gull light. The schooner was bound from New York to Boston. The steamer was on a voyage from Cape Breton to New York. The sky was overcast, but the atmosphere was clear, and there was no difficulty in seeing lights. The wind was southwest, and the schooner was making nine or ten knots an hour, with her foresail, mainsail, jib, flying jib, and fore gaff-topsail set. The steamer was making five or six knots an hour.

---

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

The story of the libel is, that the schooner was sailing on a course nearly or quite due east, when those on board of her discovered a bright light, apparently the masthead light of a steamer, a little over the starboard bow of the schooner, and which they supposed to be on a steamer approaching and bound west; that thereupon the master of the schooner showed a lighted torch on the starboard side of the schooner, and the vessel bearing said light approached, and, as she approached, bore further aft on the starboard side of the schooner, and soon exhibited her green light to the schooner; that, about this time, the torch so exhibited began to grow dim, and the master of the schooner, although it then appeared to him that the approaching vessel was designing to pass, and would pass, the schooner at a safe distance on the starboard side, nevertheless went below, and redipped and relighted his torch, and again exhibited it as before; that, just as he went below for that purpose, the approaching vessel showed her starboard light, and, when the master of the schooner again came on deck, the said vessel, which proved to be the steam propeller Titian, was coming up and directly upon the schooner, and did come upon her, striking her a square and heavy blow just forward of the main rigging, and crushing in her starboard side, so that she speedily sank, one of her crew going down with her, and being drowned; that the schooner, besides exhibiting such torchlight, had colored lights set, according to law, and the same were burning brightly; that, at all times, from a considerable period of time before the masthead light of the Titian became visible to those on board of the schooner, down until the collision, the schooner kept her course without change; that the collision was wholly caused by the improper and unseamanlike conduct of those in charge of the Titian; and that they saw one, at least, of the colored lights of the schooner, and also the said torchlight, in ample time to enable them to take the requisite precautions to prevent the collision.

The answer sets forth, that the Titian had on board an experienced Long Island Sound pilot; that the wind was southwest, blowing a ten-knot breeze, and the night dark and cloudy, with a clear horizon; that the Titian was steering west by south; that her master and the Sound pilot were on the bridge, two men were at the wheel, and one man was on the lookout; that the speed of the Titian was about five knots an hour; that her master and her pilot observed "a red and several bright lights" on her port bow, "and also a flare-up light close to Gull Island light," and almost at the same moment the lookout reported "said light on the port bow;" that the vessel with the flare-up light, if she had continued an east course, would have passed on the Titian's port bow; that the helm of the Titian was ported, and her course headed to the northwest, and the master and pilot, seeing that "said light" was a good distance on their port side, and seeing no sign of any flare-up light, changed the course of the Titian from northwest to her original and true course of west by south, and some time thereafter a flare-up light was again seen by those on board of the Titian, about two points on her port bow; that the vessel with the flare-up light, if she had continued an east course, would have passed on the Titian's port bow; that the helm of the steamer was again ported, to give "said vessel with the light" abundant room, and, "the light approaching," the helm was put hard a-port, and the engines were stopped and reversed full speed, and then, for the first time, a dim green light was observed on the approaching vessel, the fact being, that the schooner had starboarded her wheel, and changed her heading, to cross the Titian's bow; that, at the moment the green light was observed, the Titian was three points off her course, and was heading northwest by west; that, in about a minute after the green light on the schooner was observed, the vessels collided, the schooner striking the Titian about five feet abaft her port bow; that, at the time of the collision, the headway of the Titian was nearly stopped, and she was barely moving through the water, heading northwest by west, while the schooner was right before the wind, heading northeast; that the collision was occasioned solely by the ignorance and want of skill of the master and crew of the schooner; that the collision was the fault of the schooner, in not keeping on her proper course, in starboarding her helm, and in not having proper lights set and burning brightly; and that the schooner was not properly provided with steering apparatus.

It is impossible not to remark the confused statements of the answer. From them, it cannot be ascertained, whether it was a red light, or a flare-up light, that was reported by the lookout, or what light he reported; or whether, on "the vessel with the flare-up light" any other light was seen by the Titian at the same time that the Titian saw on that vessel the flare-up light; or what light it was which was seen a good distance on the port side of the Titian at the time no sign of any flare-up light was seen; or when the flare-up light which had been seen had disappeared. A motive for the confused and indefinite statements in the answer may, perhaps, be found in the fact, that the lookout on the Titian had been examined by a deposition in writing on the 15th of December, 1871, as a witness on the part of the libellants, and that the master of the Titian had been examined by a deposition in writing on the 21st of December, 1871, as a witness on the part of the claimants, and that the answer was sworn to on the 13th of January, 1872. The lookout, Diez, who was on the top-gallant forecastle, testifies, on his direct examination: "Q. Did you see the schooner, or her lights, before the collision? A. Yes, sir; I saw the light. Q.

What lights did you see? A. I saw a green light and a flash light. Q. How long before the collision did you see these lights? A. I can't tell exactly. I think it was near ten minutes. Q. What did you do, if anything, upon seeing the lights? A. I reported them. Q. Do you recollect whether you saw the green light or the flash light first? A. I believe it was the green light I saw first. I could not make out what light it was first. My belief was it was the green light. It was too far off first. Q. How did you first report it—what did you say? A. A light a little on the port bow. Q. Did you afterwards see that light nearer, so as to make out what it was? A. Yes, sir. Q. And what was it? A. A green light. Q. Did you report it more than once? A. No, sir. Q. When you reported it, was any response made? A. I did not hear any answer. Q. Was it afterwards reported again by anybody? A. Not that I know. Q. How soon after you first saw the light did you see the flash light? A. I can't tell exactly. Q. State how the vessels came together? A. The schooner came very near across our bow, so that we struck her about amidships, on the starboard side, about a square blow." On cross-examination, he testified: "Q. Can you tell me which light you first saw on the schooner? A. The first I saw I could not make it out what light it was, but I believe it was the green light. Q. On which side of the schooner did you see the light? A. It was on the starboard side of the schooner. Q. On which side did you see the flash light? A. It must have been on the starboard side. I could not see it on the port side. The sails were on that side. Q. Can you tell me what time passed between the time you saw the first and second light on board the steamer? A. There was not much time; a short little while."

The master, Buchanan, was on the bridge, 123 feet abaft of the stem of the vessel, in a less favorable position than Diez was for making out what the uncertain light was which Diez says turned out to be the green light of the schooner. The master testifies, that, while on the bridge, he observed "a red and several bright lights, apparently a steamer, and a flare-up light, close to Gull Island light;" that he ported, and stood to the northward for some little time; that, "observing the red light to be a good distance on the port side, and no signs of the flare-up light," he "kept the steamer on her course again;" that, about ten minutes afterwards, he saw the flare-up light again, about two points on the port bow; that he asked the Sound pilot what was the meaning of the flare-up lights, and received the reply that it must be a pilot boat; that he ported the helm; that the flare-up light showed again, evidently closing; that he ordered the helm hard a-port, and turned the telegraph to stop, and then, for the first time, seeing a green light, turned the telegraph to reverse full speed; and that the lights closed rapidly, the sails of a schooner could be made out, and the vessels collided. The master also says, that his first porting brought the vessel to northwest, a change of five points, she having been heading west by south; that, when the flare-up light was seen the second time, it appeared to be a safe distance on the port side; that he then ported again, because he had a Hell Gate pilot on board, in addition to the Sound pilot, and, thinking that the flash light was a pilot boat, wanted to keep clear of her, so as not to be asked to take a pilot from her; that, when he saw the green light, the steamer must, by the hard a-porting, have been two points off her course, but he does not speak from seeing the compass; that, immediately before he put his helm hard a-port, the light on the schooner bore nearly two points on his port bow; that, at the time of the collision, the Titian must have been heading north of northwest, which would be more than five points off her course of west by south; that the schooner was, at that time, right before the wind, heading northeast; that the flare-up light appeared three times, and disappeared twice; that "the flare-up light" was reported by the lookout, almost simultaneously with its being seen by the master; that the report of the flare-up light was, "a light on the port bow;" and that he heard no other report from the lookout of any light, after that, and before the collision.

The purport of the testimony of Diez is plainly, that he reported a light but once; that no other report of any light was made; that the light in reference to which he made the report was not a flash light; and that his report was "a light a little on the port bow." I do not understand the testimony of Diez as expressing a doubt as to whether the first light he saw was a green light or a flash light, but I understand it as meaning that his doubt was whether the first light he saw was a green light or a red light, and so a doubt whether such first light was on the starboard side or the port side of a vessel. When he first saw the first light, he could not make out clearly what it was, as between a green light and a red light. Whatever it was, he reported it merely as "a light." But, when the light he so first saw and so reported came nearer, he saw it to be a green light. When he saw the flash light, he recognized it as a flash light, that is, a white light, and not a colored light, and never had any doubt that it was a flash light, and never supposed it was a colored light.

The master of the Titian admits, that the report of Diez was merely "a light on the port bow," and that that was the only report there was, and yet the master calls such report a report of a "flare-up light," because he himself, 123 feet abaft the stem, saw a flare-up light almost at the same time, and saw no green light at that time. He saw a red light and several bright lights, all apparently on one and the same vessel, and that a steamer. That would indicate a steamer coming from

the westward, and on his port hand. He also saw a flare-up light. If such flare-up light was on a vessel other than such steamer, he could tell nothing as to the direction in which such vessel was going, because he saw no colored light or lights on her. But he ported and stood to the northward for a little time. This brought the red light of the steamer coming from the westward (for there was one), a good distance on the port side. The flare-up light was no longer seen. He then stopped porting. He afterwards saw the flare-up light again, on his port bow, and, although he regarded it as being at a safe distance on his port side, he ported again, because the Sound pilot said the flare-up light must be on a pilot-boat, and he, the master, did not wish to be bothered by having the pilot-boat speak him; that then the flare-up light disappeared; that afterwards the flare-up light re-appeared on his port bow, and he then put his helm hard a-port, and stopped his engine; that then, for the first time, he saw a green light; and that he then reversed at full speed, and saw the sails of the schooner, and the vessels struck. Such is the story of the master of the Titian.

The great discrepancies between the accounts given by the lookout and the master need no observation. Such accounts are both of them entirely variant from anything that can be made out from the answer; and they serve to show why, with the stories of Diez and of the master spread upon paper, the claimants, finding it impossible to tell what the real truth was, put in the confused and uncertain answer which has been referred to. Moreover, the testimony of the master is a wide departure from the answer. The master distinctly gives it to be understood that it was the flare-up light which was reported; and that when, after porting the first time, he ceased to port, he did so because the red light of the steamer coming from the westward was a good distance on the port side, and because the flare-up light, so reported, and which he had seen, had disappeared. The answer says, that the light which had opened to a good distance on the port side, by the first porting, although not the flare-up light, was the light which the lookout had reported. In this view, if the light which had so opened, by the porting, was the red light of the steamer coming from the westward, the answer would mean that the light which the lookout reported was the red light of such steamer. Yet the master expressly testifies that the light which the lookout reported was the flare-up light.

Much cannot be said in favor of the management of a steamer which, seeing a flare-up light, apparently on a vessel, and but a little on the port bow, ports her helm, without anything to indicate which way the vessel showing the flare-up light is proceeding. Then the master steadies, after porting, and the light disappears, but he soon sees it again about two points on his port bow, and then ports again, and the light disappears, but he does not shake it off, and it appears the third time, no farther off than nearly two points on his port bow, and then he puts his helm hard a-port, and runs over the vessel that carries such light. How was this done? Manifestly, from the evidence, in this way. The flare-up light was first seen, before the first porting, but a little on the port bow of the Titian. The Titian and the schooner were approaching each other nearly end on. The Titian then ported. The master says that such first porting carried her to northwest, and that he then kept her on her course again. But there is no satisfactory evidence that she got back to her original course. If she did not get back from northwest more than two points she would still have the flare-up light two points on her port bow, as the schooner was heading east. Then, further porting, with the flare-up light, when seen, always on the port bow, brought the Titian so as to head, at the collision, to the north of northwest, while the schooner was still proceeding east. This accords with the story of the libel, which is fully supported by the witnesses from the schooner. The schooner kept an east course steadily, and did not change, and the steamer persistently followed the schooner up, by porting, instead of starboarding, or of stopping, without altering her helm, until she could tell which way the vessel with the flare-up light was proceeding.

The Titian was bound to keep out of the way of the schooner, or to show a satisfactory excuse for not doing so. The only excuse set up is, that the schooner changed her course, and that excuse is not made out.

There were two steamers going to the westward at the time and place of this collision. The schooner insists that the Titian was the most southerly one of these two steamers, and was on the starboard hand of the schooner, and that the most northerly one of these two steamers was on the port hand of the schooner, and passed by to the westward after the collision. The counsel for the claimants advanced the theory, on the trial, that the Titian was the most northerly one of these two steamers, and that the schooner collided with a steamer which was always seen off the port bow of the schooner, in order to make out that the schooner must have changed her course, so as to be struck on her starboard side by a steamer which was seen off her port bow, and which kept porting. The advancing of such a theory, in the face of the evidence, shows a weakness on the part of the defence, which is a virtual confession of fault. The master of the schooner says, that the most northerly one of the two steamers passed him after the collision, perhaps half a mile off, while he was in the water. The master of the Titian destroys this theory of the claimants, in saying that he saw two other steamers, one going to the east, which passed on his port

side, and one, shortly before the collision, on his starboard quarter. If the Titian was the most northerly steamer of the two going to the west, she should have seen a steamer on her port quarter, going to the west. The pilot of the Titian testifies, that there was a steamer going to the westward, behind him and a short distance to the northward of him, and that she passed him after the collision. In the face of this testimony, to urge that the collision was with the more northerly steamer, is to contend that the collision was not with the Titian.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages.

Case No. 14,062.

In re TITUS.

[8 Ben. 411; [1] 8 Chi. Leg. News, 284.]

District Court, E. D. New York. April 11, 1876.

HABEAS CORPUS—JURISDICTION—EXTRADITION BETWEEN STATES—AGENT—MALICIOUS PROSECUTION.

1. T. was commissioned by the governor of the state of Arkansas to present to the governor of the state of New York a requisition for the surrender of a fugitive from justice from Arkansas, named McD., which was based on an indictment found against McD. by the grand jury of Ashley county, Arkansas. T. presented the requisition and the authenticated indictment to the governor of New York, who issued to the sheriff of the county of Kings a mandate for the arrest of McD. and his delivery to T. as the agent of the state of Arkansas. The sheriff arrested McD. in pursuance of the mandate, but before he was delivered to T. he was released from the custody of the sheriff upon habeas corpus issued by a justice of the supreme court of the state. McD. thereupon commenced a suit against T. for malicious prosecution; and obtained from the supreme court of the state an order for the arrest of T. Being held in custody under such order of arrest, T. presented a petition to this court for a habeas corpus, setting forth the facts and claiming his discharge on the ground that he was held in custody by reason of acts committed by him in pursuance of the laws of the United States and which were justified by those laws. *Held*, that the only acts charged upon T. were acts done by him as the agent appointed by the executive of the state of Arkansas, which acts were those prescribed by the act of congress of 1793 [1 Stat. 302], now section 5278 of the Revised Statutes of the United States.

2. This court therefore had jurisdiction, under section 753 of the Revised Statutes, to grant the writ of habeas corpus for the purpose of inquiring into the cause of his restraint.

3. The governors of the states and their agents, in reference to the extradition of fugitives from the justice of a state, are compelled to rely upon the statutes of the United States for authority to do the acts required thereby, and the statutes of the United States, when complied with, afford them justification.

4. The petitioner was therefore entitled to the writ of habeas corpus.

5. T., who was simply the messenger of the state of Arkansas, was not bound to look into the indictment on which the requisition was founded, and determine at his peril whether it charged a crime within the meaning of the laws of the United States.

6. The arrest of McD. was by order of the governor of the state of New York; and that whatever T. had done, in presenting the requisition to the governor, was only a ministerial act, for which he was justified by the direction of the governor and therefore he incurred no personal liability.

7. The allegation of malice against T. did not change the case, so long as the acts done were within the scope of the authority conferred upon him and justified by the laws of the United States.

At law.

John J. Allen and Chas. A. Ray, for petitioner.

Sullivan, Kobbe & Fowler, in opposition.

BENEDICT, District Judge. The petitioner, H. B. Titus, presents his petition for a writ of habeas corpus, directed to the sheriff of the county of Kings, to the end that he may be discharged from the custody of such sheriff. The facts upon which the petitioner bases his demand for a discharge are as follows:

On the 7th day of November the governor of the state of Arkansas commissioned the petitioner to present to the governor of the state of New York the requisition of the governor of Arkansas for the surrender of a fugitive from justice from the state of Arkansas, named Augustine R. McDonald, together with a duly authenticated copy of an indictment found against the said McDonald by the grand jury of Ashley county, Arkansas. In pursuance of his commission and the instructions of the governor of the state of Arkansas, the petitioner, as such agent, presented said requisition, together with said authenticated indictment, to the governor of the state of New York, who, thereupon, issued to the sheriff of the county of Kings his mandate directing the arrest of McDonald, and his delivery to the petitioner, the agent of the state of Arkansas duly commissioned and authorized to receive said fugitive, in accordance with the laws of the United States in such case made and provided. The sheriff of Kings county on receipt of the mandate of the governor arrested McDonald for the purpose of delivering him to the petitioner in accordance with the terms of the mandate; but before such delivery was made the fugitive was released from the custody of the sheriff upon habeas corpus issued by a justice of the supreme court of the state of New York. After being so released McDonald brought an action for malicious prosecution against the petitioner, and obtained from the supreme court of the state an order for his arrest, in pursuance whereof he is now held in custody by the sheriff of Kings county. Being so detained

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

in custody, he presents his petition to this court, setting forth the above facts, and claims his discharge at the hands of this court, upon the ground that he is detained in custody by reason of acts, committed by him in pursuance of the laws of the United States, and which are justified by such laws.

Notice of the application having been given to the attorneys for McDonald, at whose suit the petitioner is imprisoned they have appeared, and, in opposition to the petition, deny the jurisdiction of this court to issue the writ of habeas corpus, upon the ground that the acts of the petitioner, which were the foundation of the action against him, are not acts done in pursuance of any law of the United States, and the further ground that the indictment, presented to the governor of the state of New York and upon which he issued his mandate to the sheriff, does not charge any crime of which the grand jury of Ashley county, Arkansas, could take cognizance; whence it is concluded that all the proceedings towards the surrender of McDonald were void, and afford no justification for the petitioner and no foundation for the interposition of this court.

By the constitution of the United States the whole subject of interstate extradition is remitted to the cognizance of the general government. This jurisdiction of the government of the United States is exclusive. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 622. The act of 1793, now section 5278 of the Revised Statutes of the United States, provides the method by which such extradition is to be accomplished. That statute authorizes the executive authority of any state from which a fugitive from justice may have fled, to demand his return of the executive authority of the state to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the state, charging the person demanded with having committed treason, felony or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the state from which the person so charged has fled. Upon receipt of the requisition and certified indictment, the executive authority of the state, to which such person has fled, is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making the demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

The petition and accompanying documents disclose plainly that the only acts charged upon the petitioner, and because of which he is arrested, are acts performed by him as the agent appointed by the executive of the state of Arkansas in pursuance of the commission issued to him by such governor, which acts are those prescribed by the act of 1793 as above stated.

The case of the petitioner, therefore, is that of a ministerial officer acting within the scope of an authority conferred upon him by the governor of a state, by virtue of the provisions of the act of 1793, who, being held in custody by reason of such acts, applies for his discharge from such custody by virtue of the provisions of law found in chapter 13, tit. 13, of the United States Revised Statutes.

Those provisions of law make it the duty of the judges of the courts of the United States within their respective jurisdictions to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty, where a prisoner is in custody for an act done or omitted in pursuance of a law of the United States. Rev. St. U. S. § 753. The question therefore is, whether the petitioner is in custody for acts intended to be covered by section 753 of the Revised Statutes of the United States.

It is contended, in opposition to the petition, that acts performed in and about the surrender of fugitives from justice are not acts done in pursuance of the laws of the United States, but are the acts of a governor of a state done in discharge of his duty, to the state and not otherwise. Reliance is placed upon the case of Kentucky v. Dennison, 24 How. [65 U. S.] 66, for this position. But I do not find the position to be supported by the authority referred to, nor do I consider it tenable on principle. The case of Kentucky v. Dennison [supra] simply decides that the supreme court of the United States has no power to issue a mandamus to compel the governor of a state to cause the surrender of a fugitive when demanded by the executive of the state from which he has fled. The question here raised could not arise in that case, for the reason that in that case the governor of Ohio refused to act at all. Here the governors respectively have acted, and the acts performed are those required by the laws of the United States to be performed.

It seems clear that the authority exercised is an authority conferred by the laws of the United States and by no other laws. The supreme court of the United States in Prigg v. Pennsylvania [supra], when speaking of the act of 1793, say: "As to the authority so conferred upon state magistrates, while a difference of opinion has existed and may exist still on the point in different states, whether state magistrates are bound to act under it, none is entertained by this court that state magistrates may, if they choose, exercise that authority unless prohibited by state legislation." So in Kentucky v. Dennison, where it was argued that the act of 1793 must be held to speak only to state authorities, and to leave its execution wholly to the authorities of the states themselves, and therefore to be void, the su-

preme court, maintaining the validity of the act, declares that the act makes it the duty of the state executive to cause a fugitive from justice to be delivered up, and that "as the duty of the governor of the state where the fugitive was found is in such case merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or congress to authorize it."

There are no laws of the state to authorize the acts specified in the act of congress. The governors and their agents are compelled, therefore, to rely upon the statute of the United States, for authority to do the acts required thereby, and the statute of the United States affords them justification.

It seems impossible, therefore, to hold that when they so act they act otherwise than in pursuance of a law of the United States. In so acting they but discharge an absolute obligation created by a law of the United States which they are bound to perform, and for which there is no other law, and their acts are none the less acts done in pursuance of a law of the United States, because, as decided in Kentucky v. Dennison, there is no power in the general government to use coercive measures to compel performance.

This view of the scope of section 753 appears to be in harmony with the object of the statute, which plainly is intended to afford to all persons arrested for acts done in discharge of obligations to the United States and arising under the constitution and laws thereof, a summary method of obtaining release from unjust imprisonment. Certainly those are entitled to such protection and are clearly within the spirit of the act, who in conformity with a law of the United States, exercise that portion of the delicate and important power in respect to fugitives from justice granted by the constitution to the national government, which has been called into operation by the act of 1793—a power of necessity belonging to the national government, but which operates largely, if not exclusively, in the interest of harmony between the states.

Entertaining these views, which find support in the Case of Smith [Case No. 12,968], I am bound to hold that the petitioner is entitled to require of this court a writ of habeas corpus, to the end that an inquiry be had into the causes of the restraint of his liberty.

A further question presented by the petition has been discussed upon this motion and may here be decided. It arises out of the matter charged in the indictment, which accompanied the requisition of the governor of Arkansas and disclosed the judicial proceeding in Arkansas upon which the surrender of the fugitive was demanded.

The contention upon the indictment is, that it is an indictment found by the grand jury of Ashley county, Arkansas, and undertakes to charge McDonald with a crime not cognizable by any court of the state of Arkansas, the charge being subornation of perjury, committed within such state, in procuring one Martin to commit wilful perjury within said state before a United States commissioner, in a deposition taken by such commissioner to be used in an action then pending between said McDonald and the United States. This indictment, it is said, is void, because it charges no crime within the jurisdiction of a grand jury of the state of Arkansas, and renders all the proceedings taken in regard to the surrender of the fugitive, void—whence it is concluded that the acts performed by the petitioner cannot be held to be acts done in pursuance of a law of the United States.

But I cannot accede to this view. If it be true that it is competent for this court to look into the indictment transmitted by the governor of Arkansas and authenticated by him, and if this court can be called upon to determine whether a crime has been charged therein in the manner required by the laws of the state of Arkansas, and whether, as matter of law, subornation of perjury committed within the state of Arkansas can by the laws of the state of Arkansas be made an offence against the laws of that state, when the perjury is committed before a United States commissioner in a deposition taken to be used in a court of the United States, still it cannot be that the petitioner, who is simply a messenger of the governor of the state of Arkansas, and who is not alleged to have done otherwise than is required by his commission, was bound to look into the indictment, and required at his peril to determine whether it charged a crime within the meaning of the laws of the United States. The petitioner did not arrest the fugitive nor demand his arrest. The arrest was made by direction of the governor of the state of New York, upon the demand of the governor of Arkansas. And if there can be said to have been anything done by the petitioner in respect to the arrest of the fugitive, which could render him liable in an action for malicious prosecution, his acts are plainly ministerial and he is justified therefor by the directions of the governor.

The jurisdiction of the executive of the state over the subject matter is clear, and the petitioner has done no more than is prescribed to be done by the laws of the United States, acting under the directions of the executive, who, by the same law, was authorized to give such direction. No personal liability was therefore incurred.

Nor is the case changed by the allegation that the motives actuating the petitioner were malicious. So long as the acts done were within the scope of the authority conferred upon him and justified by the laws of the United States, it matters not what feelings the petitioner entertained towards the

fugitive, nor what result he hoped would follow from the action taken by the governor of the state. My determination therefore is, that the petitioner is entitled to his writ of habeas corpus as prayed for.

Case No. 14,063.

TITUS et al. v. HOBART.

[5 Mason, 378.] [1]

Circuit Court, D. Massachusetts. Oct Term, 1829.

INSOLVENCY—DISCHARGE—EFFECT OF IN ANOTHER STATE—REMEDIES—LEX FORI.

1. Where a contract is made between citizens of the same state, and the defendant is afterwards discharged under the insolvent act of such state from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought in another state, according to the lex fori.

[Cited in Towne v. Smith, Case No. 14,115.]

[Cited in Hochstadter v. Hays (Colo. Sup.) 17 Pac. 292.]

2. No state regards the forms or modes of remedies in other states to enforce contracts; but acts upon its own processes only.

[3. Cited in New England Screw Co. v. Bliven, Case No. 10,156, to the point that state statutes are rules of decision in the courts of the United States when they prescribe a law governing the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the tribunals of the United States.]

Assumpsit on a promissory note, dated at New York on the 27th of September, 1827, whereby the defendant [Enoch Hobart] promised the plaintiffs, by their partnership name of Titus & Hicks, to pay them $568.85, in six months after date. The declaration also contained the usual money counts. The case came before the court, by the consent of parties, upon a question what judgment ought to be rendered upon the following facts. The note was given in New .York by the defendant, then an inhabitant of New York, to the plaintiffs [William A. Titus and another], then merchants in New York. It was not paid when it fell due. On the 5th of April, 1828, the defendant took the benefit of the insolvent act of New York, and received his certificate from the recorder of the city of New York, whereby it was declared "that the person of the said insolvent shall be forever hereafter exempted from imprisonment for, or by reason of, any debt or debts due at the time of making the said assignment, or contracted for before that time, though payable afterwards, and if in prison from his imprisonment; and all sheriffs and other officers are authorized to cease from imprisoning hereafter the said insolvent on any writ, process, or execution, for any such debt or debts as aforesaid."

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

Mr. Ward, for defendant, contended, that the judgment and execution ought to go only against the goods and estate of the defendant, and he cited Hinkley v. Marean [Case No. 6,523]; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213; 5 Mass. 509; 10 Mass. 337.

Mr. Dunlap, for plaintiff, argued, that the judgment ought to be general, and he cited [James v. Allen] 1 Dall. [1 U. S.] 190, 191; Hinkley v. Marean [supra].

STORY, Circuit Justice. This case differs from that of Hinkley v. Marean [Case No. 6,523], in one circumstance only, and that is, that both of the parties were citizens of New York at the time of the discharge and certificate granted to the insolvent. There is no pretence to say, that the insolvent act of New York operates a discharge or dissolution of the contract. It purports to do no more than discharge the person from imprisonment for antecedent debts. Now, nothing is better settled, than that the effect of such a discharge is purely local. It is addressed to the courts of the state, under whose authority the exemption is allowed. But it has nothing to do with the process, proceedings, or judgments of the courts of other states; which are governed altogether by their own municipal jurisprudence. Whenever a remedy exists, it is administered according to the lex fori, and such judgment is given, as the laws of the state, where the suit is brought, authorize; and not such, as the laws of other states authorize. The distinction between the obligation of contracts, and the mode of applying remedies thereto, is well established. The former is universally recognized according to the law of the place, where the contract is made; the latter is bounded by the territorial limits, and is not of efficiency elsewhere. A general judgment therefore, according to our law, must be entered; and not such a judgment, as might be taken in New York under the insolvent act, even if it would be a judgment limited to the goods and estate of the insolvent. Judgment accordingly.

TITUS (SHIRLEY v.). See Case No. 12,796.

Case No. 14,064.

In re TIVOLI BREWING CO.

[11 N. B. R. 470.] [1]

District Court, S. D. New York. 1875.

BANKRUPTCY—FAILURE TO PAY COMMERCIAL PAPER—FORTY DAYS' LIMIT—PREMATURE PETITION.

The petition in this case was filed June 19, 1874, the only act of bankruptcy alleged being a failure to pay the commercial paper of the debtor, which fell due June 4, 1874. *Held*, that as under the amendment of June 22, 1874 [18 Stat.

[1] [Reprinted by permission.]

178], no person can be adjudged a bankrupt for failure to pay commercial paper before the expiration of forty days from the maturity of the said paper; and as this provision applies to cases commenced since December 1, 1873, this petition stands as having been prematurely filed and cannot be amended, and must therefore be dismissed, without costs.

In bankruptcy.

BLATCHFORD, District Judge. The petition in this case, in involuntary bankruptcy, was filed June 19, 1874. The only act of bankruptcy it alleges is the failure to pay commercial paper which fell due June 4, 1874. As under the act of June 22, 1874, no person can be adjudged a bankrupt for the failure to pay commercial paper, on a petition filed before the expiration of forty days from the maturity of the paper (instead of fourteen days, as under the former law); and as this provision applies to cases commenced since December 1, 1873, this petition stands now as having been prematurely filed, and cannot be availed of after the expiration of the forty days, and cannot be amended, but must be dismissed, without costs.

TOBACCO (UNITED STATES v.). See Case No. 16,527.

TOBACCO FACTORY (UNITED STATES v.). See Case No. 16,528.

Case No. 14,065.

TOBEY v. COUNTY OF BRISTOL et al.

[3 Story, 800.] [1]

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

COUNTIES — AGREEMENT TO ARBITRATE CLAIM — LEGISLATIVE ACT—REVOCATION—COURTS—CONCURRENT JURISDICTION.

1. Where the legislature of Massachusetts passed a resolve, authorizing the county commissioners of Bristol to examine the claims of the plaintiff against the county, and to make him proper allowances therefor; and also to refer his claims to the determination of arbitrators mutually chosen by themselves and the plaintiff, which determination should be final; and afterward, accordingly, the plaintiff presented his petition to the county commissioners, praying them to refer all his claims to arbitrators, and they passed an order to refer certain of his claims, but not all, to which the plaintiff declined to accede, and brought the present bill to compel the commissioners to refer the whole of his claims, and to agree upon arbitrators selected from the schedule of persons offered by the plaintiff,—it was *held*, that the commissioners had no authority under the resolve to submit a part of the plaintiff's claims, without submitting all.

2. The act of the commissioners, in executing the authority under the resolve, was not founded in a contract, but was an exercise of judicial functions.

3. Were it otherwise, a court of equity would not enforce an agreement to submit a question to arbitration: and the present case was not one, in which a specific performance could be decreed, since such a decree might be both impracticable and inequitable.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Corbin v. Adams, 76 Va. 61.]

4. The proper remedy of the plaintiff against the defendants for a refusal to act judicially under the resolve, was by mandamus.

[Cited in Colcs v. Peck, 96 Ind. 341.]

5. This court, as a court of equity, possesses no revisory power over the state courts, in the exercise of their jurisdiction.

6. An agreement to submit a question to arbitration will not be enforced in equity, but must depend on the good faith and honor of the parties; but an award under such an agreement will be enforced.

[Cited in Laflin v. Chicago, W. & N. Ry. Co., 34 Fed. 864.]

[Cited in Chamberlain v. Connecticut Cent. R. R., 54 Conn. 487, 9 Atl. 244; Knaus v. Jenkins, 40 N. J. Law, 293; Noyes v. Marsh, 123 Mass. 287; Pearl v. Harris, 121 Mass. 393; Sanford v. Commercial Travelers' Mut. Acc. Ass'n (Sup.) 33 N. Y. Supp. 513.]

7. Courts of equity never enforce the specific performance of any agreement, where the decree would be a vain and imperfect act, or where the specific performance might be productive of injustice to the parties.

[Cited in Tufts v. Tufts, Case No. 14,233; Tscheider v. Biddle, Id. 14,210.]

[Cited in Danforth v. Philadelphia & C. M. Ry. Co., 30 N. J. Eq. 16; Knaus v. Jenkins, 40 N. J. Law, 293; Werden v. Graham, 107 Ill. 180.]

8. An agreement to submit a matter to arbitration, is, both at law and in equity, revocable before the award is given, but not afterward; and it cannot be made irrevocable by any agreement of the parties.

[Cited in Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 143, 11 Sup. Ct. 514; Rowe v. Williams, 97 Mass. 166.]

9. The specific performance of an agreement is not a matter of right, which a party can demand from a court of equity, but is merely a matter resting in the sound discretion of the court.

[Cited in Trott v. City Ins. Co., Case No. 14,189; Hankinson v. Page, 31 Fed. 188.]

10. This court has ample power to entertain a cause over which the state court has jurisdiction, provided this court have full concurrent jurisdiction.

This was a bill in equity. The bill was amended at different times, and, as amended, in substance stated, that in the year 1838, Jonathan Tobey made a contract with the said county of Bristol, whereby he undertook to work, build and construct a public road in the said county, from the town of Taunton to the town of New Bedford, in consideration of a sum of money to be paid to the plaintiff by the said county, which contract was first made in behalf of the said county by their commissioners of highways, who at the same time engaged that the said road had been duly located by them, and the location thereof was afterwards ratified by the county commissioners of the said county. That, at the time of making the original contract, he agreed with the said commissioners to procure the location and construction of a highway in the county of Plymouth, Massachusetts, at his own proper charge, without

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

which the highway first mentioned would have been of no public utility; that by the neglect of the said commissioners of highways to cause their location of the said road to be duly recorded, the plaintiff experienced great inconveniences in working and constructing the said road, and for the same cause, was for a long time unable to procure the location and construction of the said highway in the said county of Plymouth, according to his said undertaking and agreement, in consideration whereof the said commissioners of highways undertook and promised the plaintiff that all damages, which should be or had been sustained by him, by reason of their neglect as aforesaid, should be made good to him, and that he should be paid for procuring the location of the said highway in the said county of Plymouth, and, in the mean time, the plaintiff diligently prosecuted the work of building the road first mentioned, and completed the same early in the year 1830; but by reason of the said neglect on the part of the said commissioners of highways as aforesaid, he was unable to procure the location and construction of the said highway in Plymouth county, until several years afterwards, and finally procured the same at a great sacrifice of time and of money, and to the postponement and injury of his own private affairs. That the county of Bristol did not pay the plaintiff for the said work and services, nor for the said damages, except as to a small part, and that, after repeated offers to submit the question to a board of arbitration, he finally was obliged to bring his action at law against the said commissioners, and after great expense and loss of time, and making great sacrifices to pay the debts he had incurred in making the said highway, he finally recovered judgment against the said county of Bristol, and also against the said commissioners of highways, which was assumed by the said county, and obtained payment for the greater part of his said claims for work and some of his services and expenditures; yet he never has been paid for all his damages occasioned by the said neglect of the said commissioners of highways as aforesaid, which have been very great and distressing, nor for his pecuniary losses and distresses by the grievous and unreasonable neglect of the said county of Bristol to pay him his just dues as finally settled in this court. That being fully convinced, that the said county of Bristol were bound in equity and conscience to make good to him his said damages, losses and expenditures, he exposed the whole subject before the legislature of the said commonwealth by a petition, by him preferred to that body, who, after a full hearing of the parties, passed a resolve for the relief of the plaintiff. That the county commissioners of the said county of Bristol, having been authorized by the said resolve to refer the said claims of the plaintiff to the determination of arbitrators, mutually to be selected by them and the plaintiff, the plaintiff, on the 9th day of June, 1839, presented his said claim against the said county of Bristol, to the county commissioners of the said county, for the year aforesaid, then in session, and thereupon an agreement was entered into between your orator and the said commissioners to refer the same to the arbitrament and final award of Theron Metcalf, John W. Lincoln and Artemas Hale, Esquires; but the schedule of the said claims not having been annexed, was lost by accident, and not by any fault of the plaintiff, and thereupon the plaintiff drew up another schedule thereof, to be annexed to the said agreement, and offered the same to the said commissioners for that purpose, but which they declined receiving, and insisted upon a copy of the original claim and schedule, which it was not in the power of the plaintiff to make, as it was drawn up by his counsel, and no copy was preserved. After considerable delay and ineffectual attempts on the part of the plaintiff to have the said reference proceed, he, on the 7th day of July, 1840, made and presented to the said commissioners his petition, by which he recapitulated the circumstances of the loss of the said schedule, and offered to submit his claims as then and before presented, to the said referees, and further offering to enter into an additional agreement, by which all the circumstances attending the said loss, should be also submitted to the consideration of the said referees, but that the said plaintiff and the said county commissioners and the said county declined and refused to accept the said offer and complete the said agreement, pretending that Leonard Tobey, a brother of the said plaintiff, had been induced by the plaintiff to write to one of the said referees, John W. Lincoln, and to request him to decline serving as a referee in the case. Whereas the plaintiff then declared, and now declares, that if any such letter was written, it was written without his knowledge, request or assent, that he had no agency whatever in causing it to be written, but was desirous that the said referees should proceed to arbitrate and award, respecting said claims. And that afterwards, May 22nd, 1842, at a meeting of said commissioners, preferred to them his petition in writing, and therewith also a full account of his said claim, and calling their attention to the said resolve, respectfully requested them to agree to refer all his said claims to disinterested men, that the same might be finally settled and disposed of. And the said commissioners, after a full hearing by counsel, both on behalf of the said county, and on behalf of the plaintiff, took time to advise thereupon, and at their meeting in the month of September, of the same year, resolved and agreed to grant the prayer of the plaintiff's said petition, and to refer the said claims to the determination of arbitrators, to be mutually chosen in pursuance of the said resolve, and

caused the entry of their said resolve and agreement to be made upon their records, by James Sproat, the clerk of the said commissioners. That he thereupon presented to the said commissioners a paper containing the names and additions of persons in all respects qualified and suitable to be selected as such arbitrators, and requested the said commissioners to select three of the persons therein named as arbitrators, and having presented the same to the said commissioners, they agreed that they were suitable persons for such arbitrators, and that they would select from among them, three persons who should compose that board, and the plaintiff consented thereto. But that the said commissioners deferred making such selection, and on the 22nd day of November following, at a meeting of the said commissioners then held, they wholly declined and refused to make the said selection in pursuance of their resolve and agreement aforesaid, and passed a formal resolve by which they offered to refer a small portion of the plaintiff's said claims, and declared themselves ready to proceed to the said selection of arbitrators. That whatever was alleged to have been done by Leonard Tobey, a brother of the plaintiff, to induce the said failure, was wholly unauthorized by the plaintiff, and that it was wholly out of his power to make a copy of the original schedule of claims designed to be referred, and which was lost by accident. That on the 22nd day of the said November, the plaintiff again appeared before the said commissioners, and made his petition in writing, praying them to proceed to the selection of referees to hear and determine respecting the said claims, according to their agreement on the said twenty-second day of September. Whereupon the said commissioners agreed to make the said selection, upon condition that large portions of the said claims, specified in their agreement, should be excepted in the said reference, and not considered by the referees, and refused to proceed to such selection unless the plaintiff would accede to the said condition. But that the said commissioners, by an order then passed, wholly refused to proceed to the said selection, according to their said agreement; but declared themselves ready to proceed to the said selection, in order to arbitrate upon a part of the said claims only; and also, at their sittings in the month of August, one thousand eight hundred and forty-three, when again requested by the plaintiff to proceed to the said selection of referees, the said commissioners again declared their willingness to proceed to such selection only upon the same condition, that is to say, to arbitrate a part only of the plaintiff's claims.

The bill prays, that the said county of Bristol may be compelled by the decree of this honorable court, specifically to perform their said agreement with the plaintiff, and that the said Whitmarsh, Brownell and Briggs, or their successors in the office of county commissioners for the said county, may be compelled, by the decree of this honorable court, to proceed to select from the schedule of the names of the persons so presented and delivered to them for that purpose, as aforesaid, by the plaintiff, three persons, to whose determination and final award, the said claims of the plaintiff may be referred, according to the provision of the resolve of the legislature of the commonwealth of Massachusetts, before referred to, the plaintiff hereby offering specifically to perform the said award on his part, and to submit his said claims, to the three persons whom the said commissioners shall select from the said schedule, according to his said agreement, and that the determination of the three persons so selected, shall be final and conclusive, upon all his claims against the said county: and that the plaintiff may have such further and other relief in the premises, as may seem meet and the circumstances of this case require.

The petition to the legislature, referred to in the bill, was as follows:

"To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court Assembled: Respectfully represents Jonathan Tobey, of Tiverton, in the county of Newport, and state of Rhode Island, that on the first day of January, A. D. 1828, he contracted with the county of Bristol, in the said Massachusetts, to make a road, then said by the highway commissioners of the said Bristol, to have been legally located by them, which, together with a contemplated new road in Plymouth county, would open a new and more eligible avenue from Taunton to New Bedford: and your petitioner at the same time undertook to procure the location of the contemplated part of the said road in Plymouth county. That by reason of an omission by the said commissioners of Bristol county, to record their said location of the said road, the same was illegal, and your petitioner was put to great expense and delay to procure the legal location of the said road in Plymouth county, and the working of the same. Whereupon the said original contract was mutually waived by your petitioner and the agents of the said Bristol county, and the commissioners thereof undertook and promised him to pay and indemnify him for all expenses, costs, charges, losses, delays and labors and additions by reason of the said omission to make a record as aforesaid. And your petitioner now alleges and shows that he has fully complied with all his undertakings in every particular, and that the said road is a very useful one for the county. But your petitioner shows that the said county did not perform their contracts, but for a long time delayed payment, and though the said road was accepted by the said county, in June, A. D. 1830, as being completely worked according to contract, your petition-

er was obliged to have recourse to suits at law, and obtained partial recompense by the verdicts of juries, in the circuit court for Massachusetts district. And now your petitioner represents that the long delay of payment on the part of the said county of Bristol and the said commissioners, has operated very injuriously upon him, and for the last ten years has kept him in perplexity and embarrassments, and that he has suffered great losses, which could not, by the rules of law, be inquired into and passed upon by the juries who tried his cases. That two law suits, one with the county, and another with the said commissioners, succeeded in obtaining for him but very partial compensation, since he has paid, for counsel fees and incidental charges, large sums of money, and his embarrassments, expenditures, time and labor growing out of the said omission of the said commissioners to make their said record, and for which they promised indemnity in full, have occasioned losses and damages to him far exceeding the amounts covered by the aforesaid judgments. And inasmuch as the present board of county commissioners do not feel authorized to indemnify your petitioner for his losses, expenditures, labor and delays aforesaid, and inasmuch as it may be doubtful how far they would be justified by law in so doing, your petitioner respectfully asks your honorable body to pass a resolve by which the county commissioners of Bristol county may be authorized to investigate the items of your petitioner's claims, and make an equitable settlement of the same on the part of the said county, with your petitioner, or, if they see fit, refer the same to the arbitrament and determination of such person or persons as may be mutually agreed upon by the said commissioners and your petitioner. And as in duty bound will ever pray."

The resolve of the legislature was as follows:

"Commonwealth of Massachusetts, in the Year One Thousand Eight Hundred and Thirty-Nine, Resolve on the Petition of Jonathan Tobey: Resolved, for the reasons set forth in the said petition, that the county commissioners of the county of Bristol be authorized to examine the claims which the said Jonathan Tobey alleges he has against the said county, and for which he has no legal or equitable remedy, and to make him such allowances therefor as to them may seem expedient, just, and right; and the said commissioners are further authorized, if they see fit, to refer the claims of the said Tobey to the determination of arbitrators mutually selected by themselves and the said Tobey; the decision of the said commissioners or of the said arbitrators in the premises to be final."

The original answer of the county was as follows:

"That they have been informed, and believe it to be true, that the said Tobey contracted with the inhabitants of the said county of Bristol, to build the highway in the said bill mentioned as lying within the limits of the said county of Bristol, and such acceptance was declared and recorded on the 29th day of June, in the year 1830. That the inhabitants of the said county of Bristol, through their duly constituted agents, deeming the claims made by the said Tobey, on account of the building of the said road, unfounded and unjust, declined to pay the same, and the same were the subject of an action at law, brought and tried in this honorable court. These respondents have no knowledge, belief, or information, save what is contained in the said bill, as to any proposition for any arbitration, such as is mentioned in the second interrogatory. That the said Tobey did bring an action at law against certain persons who formerly were county commissioners for the said county of Bristol, and these respondents crave leave to refer to the record of the said suit now remaining in this honorable court, as evidence of the cause of action and what was recovered therein. And the said county of Bristol had always, until the resolve of the legislature conferred on their agents authority to do so, refused to pay anything, either to the said Tobey or the said defendants who were sued by him, in the action last aforesaid, and after obtaining the authority so to do, by the resolve last aforesaid, they paid unto the said defendants the sum of $6503.08. That the said Tobey did present his petition to the legislature, but the respondents have no knowledge that the county commissioners of the county of Bristol were present before the committee when the same was heard, and when the resolve passed. Thomas A. Greene, Esq., one of the said commissioners, was a member of the legislature. That the said Tobey did present to the then county commissioners of Bristol county, some time in the year 1839, but the precise time is not now known to these respondents, his petition founded on the said last mentioned resolve, and also a statement of his claims, which differed materially from the statement afterward made by him and annexed to the said bill. And the said commissioners agreed to refer the said claim to the arbitration of three persons who were designated and agreed upon; but the said Tobey, or Leonard Tobey, a brother of the said Tobey, as your respondents are informed and believe, afterward carried away the said statement of claims, and the said Tobey, though requested, has ever since refused to restore the said statement, or to furnish one similar thereto. That the said Leonard Tobey, at the instigation, as your respondents believe, of the said Jonathan Tobey, after the said arbitration was agreed upon, wrote to John W. Lincoln, Esq., who was selected as one of the said arbitrators, requesting him not to act as referee in the said case. And no ar-

bitration was had in the said matter. That the said board of county commissioners did not act further on the petition of the said Tobey, and a similar petition came on to be heard before the present board, consisting of the persons who are named as defendants in the said bill.

"And these respondents further say, that after hearing and considering the petition of the said Tobey, the present board caused its clerk to make the following record: 'Jonathan Tobey now on this 22nd day of November, 1842, moves the hon. county commissioners to proceed to the selection of referees, to whom to refer the claims of Jonathan Tobey against the county of Bristol, according to the decision of this hon. court, made September term, 1842. On this motion, ordered that the commissioners will refer all claims which Jonathan Tobey has presented against the county of Bristol, excepting such claims as have been embraced in the said Tobey's suits against the said county, and against Noah Claflin and others, and also excepting all the claims the said Tobey has presented arising out of his prosecution of his suit against the said Noah Claflin and others, which said suits were instituted and prosecuted in the United States court, and are now ready to proceed to the selection of referees.' And these respondents deny that any other record has at any time been made by the order of the said board, or that the said board hath passed any other order or made any other assent respecting an agreement to refer the claims of the said Tobey, except what is shown in and by the record last aforesaid. And that they have no recollection that the said board of county commissioners ever declared that the names of persons presented by the said Tobey were the names of suitable persons for arbitrators, and they do not admit it to be true that the said board ever made any such declaration. And these respondents deny that the said board of county commissioners ever agreed, that they would select three of them to be arbitrators, as is mentioned in the said bill. These respondents admit, that the said board have declared, as appears in and by the said record, that part of the claims made by the said Tobey, ought not to be, and so far as the said board could determine, should not be submitted to arbitration. And the said board always has refused, and doth now refuse, to consent to any arbitration which shall embrace any such claims, deeming it unfit so to do. And these respondents say, that by force of the statute laws of the commonwealth of Massachusetts, and of the resolve of the legislature, it is left entirely to the discretion of the said board whether or no any arbitration whatever should take place: that it was not the intention of the legislature to subject the inhabitants of the county of Bristol to the payment of claims, which had no foundation, either in law or equity, as the said Tobey's claim avowedly had not, except by the free choice of the representatives of the said inhabitants, viz.: the said board of county commissioners. That it was not the will of the legislature to compel the said board either to agree to a reference or to select the arbitrators: that the first was to be done only if the said board saw fit, and the second by mutual consent; and they pray the judgment of this honorable court, whether the said board, acting in a judicial capacity, under and by virtue of the said resolve and of the statute laws of Massachusetts, can be compelled by the decree of this honorable court to exercise its discretion, or to refer the claims of the said Tobey annexed to the said bill, when the said board explicitly declares that it does not think it fit to do so. And these respondents further insist and submit to this honorable court, that the said board of county commissioners are created and established by, and hold their jurisdiction and authority under the statute laws of the commonwealth of Massachusetts, and under and by virtue of the law of that commonwealth, the supreme judicial court of that commonwealth has a general power of supervision and control over the said board, according to the course of the common law, by writ of mandamus and other proper process: and if it be true, as is alleged in the said bill, that it is fit and proper that the said board should be compelled to proceed to the selection of referees, (which these respondents deny,) the only proper means so to compel them is by a writ of mandamus, which affords a plain, adequate and complete remedy, according to the course of the common law. And these respondents further insist and submit that no agreement such as a court of equity can or will specifically enforce, is shown by the said bill. And these respondents further answering say, that the said board was induced to come to the decision which appears in this record, partly by reason of petitions from sundry inhabitants of the said county, in aid of the said petition to the said board, and these respondents are now informed and believe that signatures were obtained to the said petitions by the said Tobey by misrepresentations, to wit: that the said Tobey represented to signers of the said petitions that the said commissioners were desirous that such petition should be presented, and they crave leave to exhibit proof thereof if the same shall become material. And the respondents pray that they may be hence dismissed with their reasonable costs and charges in this behalf unjustly sustained."

The original answer of the county commissioners was exactly similar. The answers of the county to the amended bill were substantially as follows: They admit that on the 9th day of June, in the year 1839, the said Jonathan Tobey did present to the then county commissioners of the said county of Bristol, a claim against the said coun-

ty, and that an agreement was entered into between the said Tobey and the said commissioners to refer the same to the arbitration of Theron Metcalf, John W. Lincoln, and Artemas Hale, Esquires. And the defendants further answering say, that they are informed by the surviving members of the said board of county commissioners, and believe, that the claim then presented by the said Jonathan Tobey against the said county amounted only to between $10,000 and $11,000, and the said defendants are further informed and believe, that the said Tobey then said that this claim was all the claim he had against the said county. The defendants are further informed and believe that the then board of county commissioners, consisting of Thomas A. Greene, William Seaver and Elkanah Bates, in order that there might be an end to litigation between the parties, requested the said Tobey to give to the said county a release of all claims, except the said claim embraced in the said account, which was agreed to be referred. That such a release was drawn up and delivered to the said Tobey, or to Leonard Tobey, brother of the said Jonathan, to be signed and returned; that the said release was afterwards delivered to the said county commissioners, signed by the said Jonathan Tobey. The rule of reference was then signed by Thomas A. Greene, the chairman of the said board of county commissioners, and delivered with the other papers in the case, to Leonard Tobey, the brother of, and believed to be the authorized agent of, the said Jonathan Tobey, and that they have never since been returned, though requested so to do by this board of county commissioners, and that they are informed and believe, that until the month of February, 1840, no intimation was made to the said commissioners by the said Tobey or any one for him, that his said schedule of claims was lost. It was then stated that Leonard Tobey had lost the said bill or schedule of claims. That the said board of commissioners, as these defendants are informed and believe, then required of the said Jonathan Tobey, that he should satisfy the said commissioners by affidavit, of the loss of the said bill or schedule, and should prepare another as near like the former one as he could, and then state in what particulars he desired it amended. No part of this request or requisition was complied with on the part of the said Tobey, as these defendants are informed and believe. These defendants further say, that they are informed and believe, that at that time, the said Leonard Tobey had it in his power to supply the loss of the original bill, by furnishing one either precisely or substantially like it, but that he was not permitted to do so by the said Jonathan Tobey or by his counsel. These defendants further say, that they are informed and believe that the said Leonard Tobey acted in relation to the said Jonathan Tobey's claim and matters connected therewith, as the agent of the said Jonathan Tobey; and these defendants are further informed and believe, that the said Leonard Tobey has repeatedly stated that he could supply the loss of the said original schedule, or furnish one substantially like it, but his brother, Jonathan Tobey, or the said Jonathan Tobey's counsel, would not permit it to be done, or did not wish it to be done. The answers of the county commissioners to the amended bill were to the same effect.

Bartlett & Webster, for plaintiff.
B. R. Curtis, for defendants.

STORY, Circuit Justice. On the 30th of March, 1839, the legislature of Massachusetts passed the following resolve on the petition of Jonathan Tobey, the plaintiff in the present suit. "Resolved, for reasons set forth in the said petition, that the county commissioners of the county of Bristol be authorized to examine the claims, which the said Jonathan Tobey alleges he has against the said county, and for which he has no legal or equitable remedy, and to make him such allowances therefor as to them may seem expedient, just and right; and the said commissioners are further authorized, if they see fit, to refer the claims of the said Tobey to the determination of arbitrators, mutually selected by themselves and the said Tobey; the decision of the said commissioners, or of the several arbitrators, in the premises, to be final." It is obvious, that the design of this resolve was to clothe the commissioners with an authority which they did not before possess, and to enable him to have administered to him, against the county, some remedial redress for claims, for which he before had no legal or equitable remedy. Although the resolve is not very exact in its language, it would seem to have given to the commissioners the alternative of one of two courses; either of themselves to examine the whole of the claims of Tobey contemplated in the resolve, and to allow such of them as they might deem expedient, just or right; or to refer the whole of the same claims to arbitration, as the commissioners should deem fit; so that a final decision, in the one way or the other, should be made of all the premises. It does not seem to me that the resolve contemplated a partial arbitration of these claims, or a partial examination of them by the commissioners. The petition of Tobey, on which the resolve was founded, does not refer to any account or specific enumeration of the claims laid before the legislature. But doubtless the resolve was intended to apply to such claims only as Tobey then had or professed to have against the county. At the March term of the court of county commissioners, in 1842, at an adjournment of the court in May of the same year, Tobey presented his petition to the commissioners, stating that he had "a claim against the county of Bristol growing out of the construction of a road from Taunton to

New Bedford," and requesting "that his said claim and all his claims may be referred to disinterested men, that the same may be finally disposed of." From the testimony of the witness, Timothy G. Coffin, it appears, that the claims referred to in the petition, were those stated in the account B. annexed to the present bill in equity. The petition was continued to the September term of the court of commissioners in 1842, and after a hearing of the counsel for the petitioner, an entry was made on the docket of the court, apparently by order of the court, "Jonathan Tobey, petitioner for reference. Granted." There were several adjournments of the September term of the court; one on the 5th day of October, 1842, and another on the 22d of November, of the same year. At what precise time the above docket entry was made does not appear. But at the adjournment on the 22d of November, the following order was passed by the court. "Jonathan Tobey, now on the 22d of November, 1842, moves the hon. county commissioners to proceed to the selection of referees, to whom to refer the claims of Jonathan Tobey against the county of Bristol, according to the decision of the hon. court, made September term, 1842. On this motion, ordered, that the commissioners will refer all claims, which Jonathan Tobey has presented against the county of Bristol, excepting such claims as have been embraced in the said Tobey's suits against the said county, and against Noah Claflin and others, and also excepting all the claims the said Tobey has presented arising out of his prosecution of his suit against the said Noah Claflin and others, which said suits were instituted and prosecuted in the United States court, and are now ready to proceed to the selection of the referees." To any arbitration, with such exceptions, Tobey declined to accede; and the present bill is brought to compel the county commissioners, by injunction or otherwise, to agree to arbitrators to be selected from the schedule of persons offered by the plaintiff, and, under the prayer for general relief, for the appointment by mutual consent, of other persons as arbitrators, if the list so offered is not acceptable. Pending the proceedings in this court, one of the county commissioners has gone out of office, and a new commissioner has been appointed in his stead; and it is admitted, that the suit cannot be finally disposed of without his being made a party. But this objection being merely in its nature dilatory only, and not ending the proceedings, but only requiring a supplemental bill, the parties have been content to argue the cause upon what is, after all, the main question to be decided. And that question is, whether this court, as a court of equity, possesses authority to compel the county commissioners to submit to any arbitration, under the circumstances of the case.

Before proceeding directly to this question, it may be well to dispose of some considerations stated at the argument, in a brief manner. The final order of the county commissioners makes certain exceptions from the claims of the plaintiff, which they offer to submit to arbitration. Now, in my judgment, if any of the excepted claims were, in fact, in the contemplation of the resolve of 1839, the commissioners have no authority, under the resolve, to submit a part of them only, to arbitration; but are bound to submit the whole, if any. Of course, as has been already intimated, if any of the claims are new, and are not comprehended in the resolve, they would not fall within the same predicament; but would constitute a good ground why the submission of them to arbitration should be declined. In respect to another point made at the bar, that a sufficient and appropriate remedy, if any lies, will lie in the state court by way of mandamus; that is certainly a consideration entitled to much weight, if the entertaining of the present bill be a matter solely for the exercise of the sound discretion of this court. But if the case be one over which this court possesses a full jurisdiction, and the party has rights, which he is entitled to have protected by its authority, I do not know that the existence of a concurrent jurisdiction in the state court would authorize this court to decline jurisdiction over the cause.

The grave question is, whether this court, as a court of equity, does possess jurisdiction to compel the defendants to submit the claims of the plaintiff to arbitration, under the circumstances of the present case. I observe, that at the argument, the case has been treated by the plaintiff's counsel as a matter of contract or agreement on the part of the commissioners, to submit the claims to arbitration; and that when the court, upon petition of Tobey, entered upon their docket, through their clerk, "Granted," it amounted to a consummated agreement to refer the same, and nothing remained but mutually to agree upon the arbitrators. But I entertain great doubts upon both parts of the proposition. In the first place, an agreement to refer without saying more, how, and when, and to whom the submission is to be, can hardly be deemed anything more than an inchoate and imperfect agreement, the first step, only, in a negotiation, which is to fall of itself, if the arbitrators are not subsequently agreed upon. It is rather of the nature of a conditional consent to refer, provided the parties can agree upon the arbitrators. In the next place, it does not seem to me that the act of the commissioners in executing this authority, is to be treated as founded upon, or constituting of itself; any contract or agreement whatsoever. It is an exercise by them of a public special authority, confided to them by the resolve, not as individuals, but as a court, and acting as a court. No one can reasonably doubt, that the authority to examine and allow the claims is to be in the exercise of judicial functions, by the commissioners, as much

so as the laying out of a highway, or the award of a committee or jury, to ascertain the amount of the damages. The commissioners were not by the resolve authorized, in terms, to make any contract or agreement, nor were they personally bound by any award made by the arbitrators, if duly chosen. But the award would bind the county, not upon the footing of being a contract or agreement made by the commissioners, for and on behalf of the county, but by mere operation of law, as a legal liability, imposed upon the county as a public corporation, independent of contract or agreement, under and in virtue of the resolve. But supposing it to be otherwise, and here there was a real contract or agreement, not conditional but absolute, on the part of the commissioners, to refer the claims to arbitration, can such an agreement be enforced by a court of equity? No one can be found, as I believe, and at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration, has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way. The cases are divided into two classes. One, where an agreement to refer to arbitration has been set up as a defence to a suit at law, as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defence against the suit; and have declined to enforce the latter as ill-founded in point of jurisdiction. In respect to the former class, I will barely refer to Wellington v. Mackintosh, 2 Atk. 569; Mitchell v. Harris, 4 Brown, Ch. 311, 2 Ves. Jr. 129; Kill v. Hollister, 1 Wils. 129; Street v. Rigby, 6 Ves. 815; and Thompson v. Charnock, 8 Term R. 139. In respect to the latter class: In Street v. Rigby, 6 Ves. 813, 818, Lord Eldon significantly said, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators, or that any discussion upon it has taken place in experience for the last twenty-five years; and he referred to the case of Price v. Williams, 3 Brown, Ch. 163, before Lord Thurlow, in which he, Lord Eldon, was counsel, where Lord Thurlow held, that the court could not perform such an agreement. I do not find in the very brief and unsatisfactory reports of the case of Price v. Williams, Id., and 1 Ves. Jr. 365, any notice of this point; but there cannot be any serious doubt of the accuracy of Lord Eldon's recollection of the case. In Gourlay v. Duke of Somerset, 19 Ves. 430, Sir William Grant, one of the greatest masters of equity of his age, expressly said, that a bill seeking to enforce the specific performance of an agreement to refer to arbitration, was a species of bill that has never been entertained by a court of equity. There are several other cases bearing strongly on the same doctrine, such as Milnes v. Gery, 14 Ves. 400; Blundell v. Brettargh, 17 Ves. 232; and Wilks v. Davis, 3 Mer. 507. But a later case, directly in point, is Agar v. Macklew, 2 Sim. & S. 418, where Sir John Leach utterly refused to decree the specific performance of an agreement to refer to arbitration. On that occasion, he said: "I consider it to be quite settled, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such a case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement."

It was suggested at the argument, that the ground upon which this doctrine of courts of equity is founded, is not solid or satisfactory. If this were admitted to be true, I do not know that any judge would now deem it correct or safe to depart from it, as he must content himself upon this, as many other occasions, to administer the established law, and walk in the footsteps of his predecessors, super antiquas vias. But, in truth, I do not well see, that the doctrine could have been otherwise settled. The two general grounds on which it rests, belong to other branches of equity jurisprudence as well as this. What are they? The first ground is, that a court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice. The common tribunals of the country do possess these means; and although a party may have entered into an agreement to submit his rights to arbitration, this furnishes no reason for a court of equity to deprive him of the right to withdraw from such agreement, and thus to take from him the locus penitentiæ; and to declare that the common tribunals of the country shall be closed against him, and he shall be compelled to submit all his rights and interests to the decision of another tribunal, however defective or imperfect it may be, to administer entire justice. The argument at the bar misconceived the doctrine of the court on this head. Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they

have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs. One of the established principles of courts of equity is, not to entertain a bill for the specific performance of any agreement, where it is doubtful whether it may not thereby become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected. The specific performance of an agreement is, by no means, a matter of right which a party has authority to demand from a court of equity. So far from this, it is a matter of sound discretion in the court, to be granted or withheld, according to its own view of the merits and circumstances of the particular case, and never amounts to a peremptory duty. Now we all know, that arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?

It his been said at the bar, that in modern times, most nations, and especially commercial nations, not only favor arbitrations, but in many instances make them compulsive. But in considering this point, two circumstances are important to be kept in view. In the first place, whenever arbitrations are made compulsive, it is by legislative authority, which at the same time, arms the arbitrators with the fullest powers to ascertain the facts, to compel the attendance of witnesses, to require discovery of papers, books and accounts, and generally, also, to compel the parties to submit themselves to examination under oath. In the next place, these arbitrations are never, or at least not ordinarily, made compulsive to the extent of excluding the jurisdiction of the regular courts of justice; but are instituted as mere preliminaries to an appeal to those courts, from the award of the arbitrators, if either party desires it, so that the law, and in many cases, the facts also, if disputed, are re-examinable there. So that, in many cases, it will be found, that protracted litigation and very onerous expenses often follow as necessary results of the system. Indeed, so far as the system of compulsive arbitrations has been tried in America, the experiment has not, as I understand, been such as to make any favorable impression upon the public mind, as to its utility or convenience. At all events, it cannot be correctly said, that public policy, in our age, generally favors or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to the ordinary operations of the common law. It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards. This was decided as long ago as in Vynior's Case, 8 Coke, 81b. The reason there given, is, that a man cannot, by his act, make such authority, power, or warrant not countermandable, which is by law, and of its own nature, countermandable; as if a man should, by express words, declare his testament to be irrevocable, yet he may revoke it, for his acts or words cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable. This doctrine has been constantly upheld down to the present day, as will appear from the cases of Milne v. Gratrix, 7 East, 607; Clapham v. Higham, 1 Bing. 89; King v. Joseph, 5 Taunt. 452. But where an award has been made before the revocation, it will be held obligatory, and the parties will not be allowed to revoke it, and the courts of law as well as of equity will enforce it. In this view of the matter, courts of equity do but follow out the dictates and analogies of the law. When the law has declared, that any agreement for an arbitration is, in its very nature, revocable, and cannot be made irrevocable by any agreement of the parties, courts of equity are bound to respect this interposition, and are not at liberty to decree that to be positive and absolute in its obligation, which the law declares to be conditional and countermandable.

And this leads me to remark in the second place, that it is an established principle of courts of equity never to enforce the specific performance of any agreement, where it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement, impracticable or inequitable, to be enforced. 2 Story, Eq. Jur. § 959a. Thus, for example, courts of equity will not decree the specific performance of an agreement for a partnership in business, where it is to be merely doing the pleasure of both parties, because it may be forthwith dissolved by either party. See Story, Partn. §§ 189, 190, and Colly. Partn. (2d Ed.) bk. 2, pp. 132, 133, c. 2, § 2; 1 Story, Eq. Jur.

§ 666, and the cases there cited; Crawshay v. Maule, 1 Swanst. 515, the reporter's note. So, upon the like ground, courts of equity will not decree the specific performance of a contract by an author to write dramatic performances for a particular theatre, although it will restrain him from writing for another theatre, if he has contracted not to do so (2 Story, Eq. Jur. § 959a; Morris v. Colman, 18 Ves. 437; Clarke v. Price, 3 Wils. Ch. 157; Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393); nor will they compel the specific performance of a contract by an actor to act a specified number of nights at a particular theatre (Kemble v. Kean, 6 Sim. 333); nor will they compel the specific performance of a contract to furnish maps to be engraved and published by the other party (Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393). In all these cases the reason is the same, the utter inadequacy of the means of the court to enforce the due performance of such a contract. The same principle would apply to the case of a specific contract by a master to paint an historical picture, or a contract by a sculptor to carve a statue or a group, historical or otherwise. From their very nature, all such contracts must depend for their due execution, upon the skill, and will, and honor of the contracting party. Now this very reasoning applies with equal force to the case at bar. How can a court of equity compel the respective parties to name arbitrators; and a fortiori, how can it compel the parties mutually to select arbitrators, since each much, in such a case, agree to all the arbitrators? If one party refuses to name an arbitrator, how is the court to compel him to name one? If an arbitrator is named by one party, how is the court to ascertain, if the other party objects to him, whether he is right or wrong in his objection? If one party names an arbitrator, who will not act, how can the court compel him to select another? If one party names an arbitrator not agreed to by the other, how is the court to find out what are his reasons for refusing? If one party names an arbitrator whom the other deems incompetent, how is the court to decide upon the question of his competency? Take the present case, where the arbitrators are to be mutually selected, when and within what time are they to be appointed? How many shall they be,—two, three, four, five, seven, ten, or even twenty? The resolve is silent as to the number. Can the court fix the number, if the parties do not agree upon it? That would be doing what has never yet been done. If either party should refuse to name any arbitrator, or to agree upon any named by the other side, has the court authority, of itself, to appoint arbitrators, or to substitute a master for them? That would be, as Sir John Leach said in Agar v. Macklen, 2 Sim. & S. 418, 423, to bind the parties contrary to their agreement; and in Milnes v. Gery, 14 Ves. 400, 408, Sir William Grant held such an appointment to be clearly beyond the authority of the court. In Wilks v. Davis, 3 Mer. 507, 509, Lord Eldon referring to the cases of Cooth v. Jackson, 6 Ves. 34; Milnes v. Gery, 14 Ves. 400, 408; and Blundell v. Brettargh, 17 Ves. 232, —said: "It has been determined in the cases referred to, that if one party agrees to sell and another to purchase, at a price to be settled by arbitrators named by the parties, if no award has been made, the court cannot decree respecting it." In Cooth v. Jackson, 6 Ves. 34, Lord Eldon said: "I am not aware of a case even at law, nor that a court of equity has ever entertained this jurisdiction, that where a reference has been made to arbitration and the judgment of the arbitrators is not given in the time and manner according to the agreement, the court have substituted themselves for the arbitrators and made the award. I am not aware that it has been done even in a case where the substantial thing to be done is agreed between the parties, but the time and manner in which it is to be done, is that which they have put upon others to execute." The same learned judge, in Blundell v. Brettargh, 17 Ves. 232, 242, affirmed the same statement, substituting only the word "prescribe" for "execute." So that we abundantly see, that the very impracticability of compelling the parties to name arbitrators, or upon their default, for the court to appoint them, constitutes, and must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration. It is essentially, in its very nature and character, an agreement which must rest in the good faith and honor of the parties, and like an agreement to paint a picture, or to carve a statue, or to write a book, or to invent patterns for prints, must be left to the conscience of the parties, or to such remedy in damages for the breach thereof, as the law has provided.

There is another consideration, which is entitled to great weight, under the circumstances of the present case, which has been already alluded to. It is, that if the authority was confided to the commissioners, as a court, and they were to act judicially under the resolve, it seems to me, that if they refused to act, and it was not a matter left in their mere discretion, the appropriate remedy lies in the supreme court of the state, as the appellate jurisdiction competent to compel inferior tribunals to do their duty; and the fit remedy would be by mandamus. This court, as a court of equity, possesses no revisory power over the acts of the state tribunals in the exercise of their jurisdiction. It has no authority to compel them to do their duty, or to abstain from the exercise of their functions. It belongs ad alium examen.

Without going more at large into the subject, it appears to me, that the present is not a case in which this court can afford any

relief whatsoever to the plaintiff, however strong his claims may be upon the justice of the county and its public functionaries. I shall, therefore, order the bill to be discharged, but without costs to the defendants.

Case No. 14,066.

TOBEY v. CLAFLIN et al.

[3 Sumn. 379.] [1]

Circuit Court, D. Massachusetts. Oct., 1838.

PLEADING AT LAW—AMENDMENT—NOLLE PROSEQUI—COURTS—FOLLOWING STATE PRACTICE.

1. A party will be allowed to amend, before trial, his writ and declaration, by striking out the name of one of the defendants.

[Cited in Heath v. Goslin, 80 Mo. 317; Reading v. Beardsley, 41 Mich. 127, 1 N. W. 968.]

2. The courts of the United States are not implicitly bound by the practice and decisions of state courts, with regard to amendments.

3. Semble, that a nolle prosequi may be entered at any time before verdict, whether the defendants unite, or sever in their pleas.

Assumpsit, for work and labor and services, against three defendants [Noah Claflin and others].

The plaintiff [Jonathan Tobey], by his counsel, Bartlett & Webster, now before trial, moved to amend the writ and declaration by striking out the name of David Green, one of the defendants.

The motion was resisted by C. P. Curtis and Fletcher for defendants, who cited Redington v. Farrar, 5 Greenl. 379; Chandler v. Parkes, 3 Esp. 76; and Noke v. Ingham, 1 Wils. 89.

The counsel for the plaintiff cited Colcord v. Swan, 7 Mass. 291; and Parsons v. Plaisted, 13 Mass. 189; and the reasoning of the court in Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 46.

STORY, Circuit Justice. The powers of the courts of the United States to grant amendments under the judiciary act of 1789, c. 20, § 32 [1 Stat. 91], are very large, and have always been construed liberally in furtherance of public justice. In the present case, though the amendment, in a technical sense, may go to the foundation of the suit, if all the defendants are not proved to have joined in the contract; yet it is plain that it does not touch the merits. In the present state of the law, in a suit founded in contract, if all the defendants are not proved at the trial to have made the contract, a verdict must be found for all the defendants, notwithstanding it may be clearly proved that two out of three of the defendants did so contract. Perhaps it is to be regretted that such a rule ever was established; but it is too firmly fixed now to be shaken. The object of the amendment is, to get rid of this technical objection; and to enable the plaintiff to recover, if he can prove a joint contract of two of the defendants, although not of all three. It is, therefore, an application in furtherance of justice, and to suppress expensive litigation; for if a verdict should be given in the present suit, in favor of all three of the defendants, it would be no bar to a subsequent suit against two of them, founded on the same contract; for the same evidence and proofs would not be necessary to support each action. Therefore it is plain, that, in a sound sense, the objection is to the form, and not to the merits of the suit.

But it is said, that there are authorities, which, though ruled in other courts, ought, upon the present point, to govern this court. As a matter of judicial duty, I do not know that the practice of other courts, not sitting under the authority of the general government, ought to have any decisive weight here; for the laws of the United States, having given authority to the courts of the United States to allow amendments in very large and comprehensive terms, the allowance must be a matter of sound discretion in this court, with a view to carry into effect in the fullest manner the real objects of the legislature.

The case of Redington v. Farrar, 5 Greenl. 379, is certainly full in point, as to the matter of practice in the supreme court of the state of Maine. But the decision in that case is directly at variance with the decisions in Colcord v. Swan, 7 Mass, 291, and Parsons v. Plaisted, 13 Mass. 189; where an amendment was allowed by striking out the name of one of the defendants to a suit founded in contract. It is true, that in that case, the defendant thus struck out was a feme covert. But that can make no difference in principle; since the only ground for striking out her name was, that she was not legally bound by the contract, which is equally true in regard to every other person, joined as a defendant in any suit, who is not a party to the contract sued on. The MS. case, cited at the bar before Mr. Chief Justice Shaw, goes the full length of the present application; for he allowed one defendant in a suit on a contract to be struck out of the writ and declaration after full argument and consideration, upon general principles.

I have not been able to find any case in the English courts directly in point. The reason probably is, that until the recent statute of William IV. (St. 3 & 4 Wm. IV., c. 42), no amendment could be made at nisi prius, where alone it would be usually asked, in order to meet a variance created by the evidence at the trial; and applications of this sort to the courts in term do not ordinarily find their way into the reports.

The cases, relied on by the defendants' counsel, from the English reports, turn upon wholly distinct considerations. The right of a party to enter a nolle prosequi against one of the defendants, before, or at, or after a trial, is a very different matter from the

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

right of the court to allow him to amend by striking out a party from the record. The latter is a matter of discretion in the court, to be granted or refused, according to circumstances. The former (at least in some cases) is a matter of right, if it exists at all, dependent upon principles of law, and not subject to the discretion of the court. The cases of Noke v. Ingham, 1 Wils. 89, and Chandler v. Parkes, 3 Esp. 76, were questions turning altogether upon the point, whether the plaintiff had a right to enter a nolle prosequi or not. In the former case (1 Wils. 89) two persons were sued in assumpsit; one pleaded a former judgment, which, upon a replication putting the matter in issue, was found against him; and the other pleaded a discharge as a bankrupt, under the bankrupt laws; and as to him, the plaintiff entered a nolle prosequi. Upon a writ of error, the court held that the plaintiff had a full right to enter the nolle prosequi. In Chandler v. Parkes, 3 Esp. 76, two persons were sued in assumpsit; one pleaded his infancy, and as to him the plaintiff offered to enter a nolle prosequi. But Lord Kenyon held, that he had no right to do it. The same point was decided the same way, in Jaffray v. Frebain, 5 Esp. 47. The same point arose in Hartness v. Thompson, 5 Johns. 160, and the supreme court of New York held a doctrine directly the reverse, that in such a case a nolle prosequi might be entered; and this last decision was afterwards approved and followed by the supreme court of Massachusetts, in Woodward v. Newhall, 1 Pick. 500. Indeed, in this latter case, the motion was in the alternative for leave to enter a nolle prosequi, or to strike out the infant's name from the writ; and the motion was granted by Mr. Justice Wilde who sat at the trial. The case of Moravia v. Hunter, 2 Maule & S. 444, fully recognized the doctrine of Noke v. Ingham, 1 Wils. 89. Mr. Sergeant Williams in his note to Salmon v. Smith, 1 Saund. 207, note 2, has examined the subject of the right to enter a nolle prosequi in cases founded upon contract; and asserts, that where the defendants join in their pleas, a nolle prosequi cannot be entered, as to one, after verdict. But where they sever in their pleas, and the plea of one goes to his personal discharge, or does not deny the original cause of action, there a nolle prosequi may be entered as to him, and proceedings still had against the other. But this whole subject, as to the right of a plaintiff to enter a nolle prosequi, was fully considered, and all the leading authorities commented on, in the case of Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 46, 80, in the supreme court of the United States; and it was held, that where the defendants sever in their pleadings in a case of contract, the plaintiff may enter a nolle prosequi against one, either before, or after judgment. This last decision I am bound to follow in its leading principles and analogies. The very object of the present motion is to get rid of a possible difficulty, if the defendants should join in their pleas, of entering a nolle prosequi at the trial. Upon principle, indeed, I am not able to see any very satisfactory reason, why a nolle prosequi might not be entered at any time before verdict, whether the defendants had united or severed in their pleas; since, then, upon the whole record, the only question would be, as to the contract of the remaining defendants. But as to this I decide nothing.

It appears to me, that the granting of the amendment in this case is fully justified by principles of general convenience and policy, and is in furtherance of public justice. It is an exercise of sound discretion to prevent the operation of an objection, which does not touch the substantial merits of the controversy between the parties. I shall therefore grant the leave to amend. I should grant the leave if there were no authority in point. But I unhesitatingly follow the cases in the Massachusetts Reports, as founded in sound sense and legal propriety. Amendment granted.

Case No. 14,067.

TOBEY v. LEONARD et al.

[2 Cliff. 40.] [1]

Circuit Court, D. Massachusetts. Oct., 1861.

PLEADING IN EQUITY—EFFECT OF ALLEGATIONS IN ANSWER—CONTRACT TO CONVEY LAND—EXTRANEOUS EVIDENCE.

1. Where the allegations of the answer are directly responsive to the bill, courts of equity cannot decree against such denials of the respondents, on the testimony of a single witness.

2. The rule is universal that the complainant in such a case must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief.

3. The complainant, calling upon the respondent to answer an allegation, admits the answer to be evidence; and if it is testimony, it is equal to the testimony of any other witness.

4. Where the complaining party parts with the title, and it passes from him to the respondent, the rule admitting extraneous evidence to show the real character of the conveyance may apply; but it has no application to a contract to convey land, or to an agreement to give a bond or written instrument to convey the same, in cases where the party to be charged derived his title from a stranger.

[Cited in Clapp v. Huron County Banking Co., 50 Ohio St. 541, 35 N. E. 308.]

5. In a suit to compel performance of an alleged oral agreement to convey lands, not purchased by respondent of the complainant, *held*, that evidence to show that the complainant or his grantor had a right to redeem certain parcels of the land was inadmissible, under the pleadings, the bill confessedly not being one for redemption.

This was a bill in equity brought to enforce a trust in lands.

Jonathan Tobey, the father of the complain-

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

ant, being the owner of certain real estate situated in New Bedford, and known as his homestead farm, on the 28th of January, 1830, conveyed the same in mortgage to one William Rotch, to secure a debt of $5,000, and being also the owner of certain other real estate in New Bedford and Acushnet, he conveyed this in mortgage, and also the real estate previously mortgaged, to Stephen S. Tobey and his brother Leonard W., to secure an indebtedness of $6,000. Subsequently the brother of the complainant conveyed to him all his interest in the mortgage, and the debt secured thereby. Jonathan Tobey having failed to meet the condition of the mortgage to William Rotch, the mortgagee, on November 28, 1849, entered and took possession of the premises for breach of the condition, and for the purpose of foreclosing. Notwithstanding the foreclosure, the mortgagor continued in the occupancy of the premises as tenant at will of the mortgagee, during his lifetime, and, after his decease, as tenant at will of his legal representatives, until some time during the year 1858 or 1859, when the title having passed out of the mortgagor, by foreclosure, those interested brought ejectment to obtain possession.

The bill alleged that, pending that suit, the owners having expressed a willingness to sell the premises to the defendant in that suit for less than the original mortgage debt, and less than the value, he, the defendant in that suit, applied to the respondent, Horatio Leonard, who had married his daughter, to procure the money for him of his father, Nehemiah Leonard. They proposed to ascertain the lowest price at which the homestead could be purchased, and afterwards informed him that at could be obtained for $2,500, by their giving two notes payable in twelve months, one to be signed by Nehemiah Leonard for $2,200, and the other by Horatio for $300. Certain suggestions were made at the time by Nehemiah Leonard, as to cutting wood from the real estate as a means of paying the notes to be given for the purchase-money. Both the complainant and his father were informed by the parties that the senior Leonard would be unwilling to assist in the matter without other security besides the farm included in the mortgage; that he would require the mortgagor and the complainant to convey all their interest in all their real estate before referred to; and they consented to those terms upon the condition that a bond or written agreement should be given back specifying the terms of the agreement under which the conveyances were executed, and upon the payment of what sum a reconveyance of all the real estate should be made. Deeds of quitclaim were accordingly prepared, conveying to Horatio all the interest which the grantors had in all the beforementioned real estate, and the same were duly executed and handed to the grantee, with the expectation, on the part of both grantors, that the agreement to reconvey all said real estate upon the payment of the $2,500, &c., would be given when Horatio or Nehemiah obtained a deed of the homestead. As additional security, and at the request of Horatio, Jonathan Tobey afterwards gave him a bill of sale of all his stock and farming utensils, and carriages, and on March 3, 1860, Nehemiah and Horatio purchased the farm included in the mortgage to William Rotch, by giving their notes in the amount and for the time before stated, and the farm was conveyed to Horatio, who, on June 12, 1860, conveyed the same to Nehemiah. Further, the complainant averred that neither he nor the said Jonathan could obtain from the said Nehemiah any agreement in writing showing how he held the real estate, and that, upon application to him for that purpose, his answer was that when the notes were paid he would make it all right; that in July, 1860, he purchased of the said Jonathan, by deed and bill of sale, all the real estate before referred to, and all his right to have the same conveyed to him, under the agreement, together with all his interest in the stock, farming utensils, &c., for $5,500, and on August 2d he tendered to said Nehemiah the sum of $2,640, and to said Horatio $370, being the respective amounts of their notes and interest, and a reasonable sum to each for their time, and requested Nehemiah to convey to him, the complainant, all the aforesaid real estate, and requested them, or such one of them as had the title under the bill of sale, to convey the stock, farming utensils, and carriages, but each of them refused so to do. Fraudulent combination to deprive him of his rights was then charged upon information and belief. The bill further set up that said Nehemiah alleged that he had conveyed the real estate to Rodolphus and John Ashley, and they to Henry Spooner and Joshua B. Ashley, but that the grantees had at the time knowledge of the complainant's rights and claim; that the conveyance made by him and his grantor to Horatio and Nehemiah were without consideration, and were made solely to secure the notes given for the purchase of the farm; and that the understanding was that the complainant and his grantor should remain in possession, and that the cutting of wood to raise money to meet the notes should be done by him and the complainant, and that they had accordingly remained in possession. The bill prayed for a decree that respondent should convey the real estate, stock, &c., to complainant, upon the performance by the complainant of what devolved upon him under the agreement, for compensation for waste, and for an injunction.

S. Bartlett and D. Thaxter, for complainant.

It is true that when the defendant, in express terms, upon his own knowledge, nega-

tives the allegations in the bill, the oath of one witness is not sufficient to control such denial. But the oath of one witness when supported by any corroborative circumstances which give a preponderance in his favor is sufficient; and the preponderance in this case is overwhelming. 2 Daniell, Ch. Prac. (Perkins' Am. Ed.) 985; Adams, Eq. 145; 1 Greenl. Ev. § 260. The defendants also set up as a bar to this suit the statute of frauds, and alleged that the complainant cannot prevail, because neither the agreement for which the suit is brought, nor any memorandum or note of it, is in writing, signed by the party to be charged therewith. The decisions of this circuit and of the supreme court clearly take this case out of the operation of the statute, and the question raised can no longer be considered an open one. Jenkins v. Eldredge [Case No. 7,266]; Babcock v. Wyman, 19 How. [60 U. S.] 289; Russell v. Southard, 12 How. [53 U. S.] 139; Morris v. Nixon, 1 How. [42 U. S.] 126; Taylor v. Luther [Case No. 13,796]. The doctrine that part performance will take a case out of the statute of frauds is well settled and recognized everywhere. 2 Story, Eq. Jur. §§ 759–761, 1522.

The next question is, are John S. and Rodolphus Ashley bona fide purchasers, without notice, within the principles of a court of equity? It is a well-settled rule that whatever is sufficient to put a party on inquiry is good notice. Where a man has sufficient information to lead him to a fact, he is put upon inquiry, and shall be deemed cognizant of it. Pritchard v. Brown, 4 N. H. 397, 404, 405; Flagg v. Mann [Case No. 4,847]; Carr v. Hilton [Id. 2,437].

B. F. Thomas and R. Olney, for respondents.

Did the whole estate owned by Jonathan Tobey in 1830 pass under the mortgage to Rotch? Melvin v. Proprietors of the Locks & Canals on Merrimack River, 5 Metc. [Mass.] 15, 29, 30; Thatcher v. Howland, 2 Metc. [Mass.] 41, 44, note; Wheeler v. Randall, 6 Metc. [Mass.] 529; Shep. Touch. 78, 93; 3 Greenl. Cruise, 267, 269–271. See Kendall v. Brown, 7 Gray, 210; Johnson v. Simpson, 36 N. H. 91. The land involved in this suit lying in Massachusetts, the title to it can be acquired and lost only in the manner prescribed by the law of the place where the land is situate. U. S. v. Crosby, 7 Cranch [11 U. S.] 115; Kerr v. Moon, 9 Wheat. [22 U. S.] 565; M'Cormick v. Sullivant, 10 Wheat. [23 U. S.] 192; Darby v. Mayer, Id. 465; Hosford v. Nichols, 1 Paige, 220; Story, Confl. Laws, §§ 363–373, 424, et seq.; Cutter v. Davenport, 1 Pick. 81; Wheat. Int. Law, 116; Jeter v. Fellowes, 32 Pa. St. 465; Nicholson v. Leavitt, 4 Sandf. 252, 276. And by the General Statutes of Massachusetts (chapter 100, § 20): "No such trust (i. e. concerning lands), whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration, and without notice of the trust; nor prevent a creditor, who has no notice of the trust, from attaching the premises, or taking them on execution, in like manner as if no such trust had existed." The "notice" required under this section of the General Statutes, to defeat a purchaser's title, is actual notice, because the following section (section 21) declares that the recording of an instrument of trust in the registry of deeds for the county "shall be deemed equivalent to actual notice," &c. It cannot reasonably be supposed that the registration authorized in section twenty-one was meant to be equivalent to anything but the same notice required in section twenty; i. e. "actual notice." The two sections are to be construed together; and as to the meaning of the word "notice," employed in section twenty, section twenty-one operates by way of limitation and definition. If by "notice" in section twenty had been intended both actual and constructive notice, there would have been no propriety in subsequently enacting that one form of constructive notice (namely, registration) should be equivalent to actual notice, when all constructive notice was so equivalent. But, in Massachusetts, it has always been the law, independently of any express statute provision, that a recorded deed could be affected or defeated by a prior unrecorded deed, only when the subsequent grantee has actual notice of the prior conveyance; and that mere possession or other constructive notice will not produce that result. Norcross v. Widgery, 2 Mass. 509; M'Mechan v. Griffing, 3 Pick. 149; Lawrence v. Stratton, 6 Cush. 163, 167; Hennessey v. Andrews, Id. 170; Houghton v. Bartholomew, 10 Metc. [Mass.] 138; Curtis v. Mundy, 3 Metc. [Mass.] 405.

Any other construction of these sections than that contended for would produce the anomalous result of placing executory contracts, resulting in mere equities, on a better footing than those rights or estates which have been perfected with all the forms and solemnities known to the common law; and would give the holder of an equitable mortgage, or of an equity growing out of a contract of sale, and not recorded, a superiority over subsequent creditors and purchasers, which would be denied to a mortgage or a sale consummated by a conveyance, unless placed on record. Possession will not operate as notice if explained, and if it is fully shown by the accompanying circumstances, or otherwise, to be consistent with the conveyance which is assumed to be made; and, in this case, the continued occupation of the estate by the Tobeys could not operate as notice, because entirely explained by the attendant circumstances. Rogers v. Jones, 8 N. H. 264; Williamson v. Brown, 15 N. Y. 354; Cunningham v. Buckingham, 1 Ohio, 264; Cook v. Travis, 22 Barb. 338, 359–361; Butler v. Stevens, 26 Me. 484; Bell v. Twilight, 22 N. H. 500; Billington v. Welsh, 5 Bin. 132; Flagg v. Mann [supra]; M'Mechan v.

Griffing, 3 Pick. 149; Hewes v. Wiswell, S Me. 94; Holmes v. Stout, 2 Stockt. Ch. [10 N. J. Eq.] 419; Nutting v. Herbert, 37 N. H. 346. The quitclaim deeds of the two Tobeys having been put on record, they are estopped from relying upon any mere continuance in possession as notice of any remaining rights or equities in themselves. Nehemiah Leonard and the other defendants were not bound to go beyond these publicly recorded declarations. They had a right to presume the Tobeys' possession to be consistent with their conveyances, and that they were mere tenants at will or by sufferance to their grantee, Horatio Leonard. Scott v. Gallagher, 14 Serg. & R. 333; Woods v. Farmere, 7 Watts, 382; Newhall v. Pierce, 5 Pick. 450; New York Life Ins. & Trust Co. v. Cutler, 3 Sandf. Ch. 176. See White v. Wakefield, 7 Sim. 401; Bayley v. Greenleaf, 7 Wheat. [20 U. S.] 46, 51; Plumer v. Robertson, 6 Serg. & R. 179; Cook v. Travis, 22 Barb. 338, 359-361.

As to constructive notice to Nehemiah Leonard of the Tobeys' rights (if it shall be held that any constructive notice would avail), it is manifest, that, to charge Nehemiah Leonard with constructive notice, is at variance with the whole theory of the complainant's case, with the allegations of the bill, and the testimony of Jonathan Tobey. But further, constructive notice of any right of redeeming the farm in either of the Tobeys can be fixed upon Nehemiah Leonard only upon the ground of continued possession of the Tobeys, or of their complaints against Horatio Leonard, made after his purchase, and communicated to Nehemiah. These complaints, however, cannot operate as constructive notice to Nehemiah Leonard, because it is shown by evidence reliable and not contradicted, that he once investigated them, went to see Jonathan Tobey on account of them, and learned from him that the sole cause of the complaints was Horatio's mode of disposing of the wood. Holmes v. Stout, 2 Stockt. Ch. [10 N. J. Eq.] 419. Moreover, Horatio Leonard had also given him the most positive assurances that the Tobeys had not asked, nor had he promised, any sort of right or interest in the farm to the Tobeys, or either of them. Jones v. Smith, 1 Hare, 43; Buttrick v. Holden, 13 Metc. [Mass.] 355; Rogers v. Jones, 8 N. H. 264. Nehemiah Leonard paid the price for the farm simultaneously with its being conveyed to him. By force of the agreement indorsed on the schedule of debts, as well as by the agreement with the creditors, he immediately became bound to the specified creditors of Horatio Leonard to the amount of their respective claims. He thereby appropriated the purchase-money beyond the power of revocation; and so pledged himself in respect of it to third parties, that he could not resist paying it to them upon their demand. Frost v. Beekman, 1 Johns. Ch. 288; Jewett v. Palmer, 7 Johns. Ch. 65. See Gilday v. Watson, 5 Serg. & R. 267; Boggs v. Varner, 6 Watts & S. 469; Ward v. Lewis, 4 Pick. 518; Bryant v. Russell, 23 Pick. 508; Carnegie v. Morrison, 2 Metc. [Mass.] 381; Frost v. Gage, 1 Allen, 262. If Nehemiah Leonard had no notice of the trust, then the Ashleys, his grantees, cannot be affected by it. Lowther v. Carlton, 2 Atk. 242; M'Queen v. Farquhar, 11 Ves. 467, 478; Trull v. Bigelow, 16 Mass. 406; Boynton v. Rees, 8 Pick. 329; Mott v. Clark, 9 Barr [9 Pa. St.] 399; Lacy v. Wilson, 4 Munf. 313. And they did not make their purchase without diligent inquiry, in the usual course, as to the state of the title, and not till after consultation with counsel. See Jackson v. Van Valkenburgh, 8 Cow. 260; Bellas v. M'Carty, 10 Watts, 26; Wilson v. McCullough, 23 Pa. St. 440; Barnhart v. Greenshields, 28 Eng. Law & Eq. 77, 85; Jolland v. Stainbridge, 3 Ves. 478; Butler v. Stevens, 26 Me. 484; Kerns v. Swope, 2 Watts, 78; Epley v. Witherow, 7 Watts, 163, 167; Woods v. Farmere, Id. 382, 387.

The agreement set out in the complainant's bill is within the statute of frauds of Massachusetts, and within the statute regulating the creation of trusts. Gen. St. c. 105, § 1; Id., c. 100, § 19; Boyd v. Stone, 11 Mass. 342. By the law of Massachusetts, we respectfully submit, since these lands lie in Massachusetts, this cause must be determined. The contract sought to be enforced by the bill is within the letter, and within the reason and sound policy, of the statute of frauds,—a statute whose provisions bind courts of equity equally with courts of law. The case, as stated in the bill, does not fall within the cases cited. The most important are Babcock v. Wyman, 19 How. [60 U. S.] 289; Jenkins v. Eldredge [Case No. 7,266]; Taylor v. Luther [Id. 13,796].

CLIFFORD, Circuit Justice. Some care is required in the examination of the allegations, setting forth the supposed grievances of the complainant, in order clearly and fully to understand the real nature of the claim presented in the bill of complaint. Confessedly it is not a bill to redeem, as is manifest from a single reading; and no pretence of the kind was set up at the argument. Neither the complainant nor his grantor had any interest, absolute or defeasable, in the homestead farm, at the time the same was purchased by Horatio Leonard of the legal representatives of William Rotch. Nothing of the kind is pretended; and, if the pretence were made, it could not be supported for a moment, as the bill of complaint alleges, and the whole evidence shows, that the title had then passed out of the mortgagor by foreclosure. Foreclosure of that mortgage gave the mortgagee a perfect title in fee-simple absolute, as it was prior in date to the one given to the complainant and his brother. Title to the homestead farm, therefore, was acquired by the respondent from those who owned the land

in fee-simple; and no interest therein, either absolute, equitable, or contingent, belonging to the complainant or his grantor, passed to the said respondent by virtue of that deed. The right of redemption in the mortgagor under the mortgage to William Rotch was gone, and the title had become absolute in the legal representatives of the mortgagee. The former ownership, under the circumstances, really amounts to nothing; but the case must be considered precisely as it would be if the mortgagor had never owned the premises. All the negotiations for the purchase were made by the respondent, who became the grantee in the deed, and he secured the consideration by giving his own note and that of his father; and he has since paid the amount of the consideration, without resort to any funds derived from the complainant or his grantor. They furnished no funds to make the purchase, and it is not alleged in the bill of complaint that the grantee in the deed agreed to purchase the land in any other name than his own. Looking at the case, therefore, as stated in the bill of complaint, it is obvious that the grantee in that deed took a title in fee-simple, subject to the legal and equitable operation of the alleged oral agreement to convey the land to the complainant and his grantor upon the terms and conditions therein prescribed. Keeping these explanations in view, the next important consideration is to observe the exact terms of agreement upon which, so far as respects the homestead farm, the rights of the complainant and his grantor depend, as alleged in the bill of complaint. The terms of the agreement were, "that a bond or written agreement should be given back, specifying the terms of the agreement under which the conveyances were executed, and upon the payment of what sum a reconveyance of all the real estate should be made." Taking the language of the bill of complaint which precedes the statement of the agreement in connection with what follows, and it is evident that the complainant intends to allege, and does, in fact, allege, that, according to his understanding of the agreement and that of his grantor, the conveyance back to them was to be made upon the payment of the notes given for the purchase-money and interest, and a reasonable sum for the services of the purchaser. Clearly, therefore, the case stated in the bill of complaint is, that one or both of the principal respondents agreed to purchase certain lands of a third person, and to give to the complainant and his grantor a bond or written agreement to convey the same to them, upon the payment of certain sums of money; and that they have refused to execute and deliver the bond or written agreement, or to convey the land. Confining attention to the claim for the homestead farm, and leaving out of view for the present the claim that two parcels of land were embraced in the quitclaim deeds which do not belong to the homestead, the explanations already given show the true and exact nature of the controversy involved in this suit, which may be reduced to a single proposition. Complainant alleges, that one or both of the principal respondents, prior to the 3d of March, 1860, or on that day, agreed with him and his grantor to purchase a certain tract of land, described as the homestead farm of his grantor, and to give back to them a bond or written agreement to convey the same to them, upon the payment of the purchase-money and interest, and a reasonable compensation for their services, and that they have refused to give back the bond or written agreement, or convey the land, although they have purchased the land; and the complainant and his grantor have tendered the money according to the agreement, and are in no way delinquent in regard to the same. Denial is made by the respondents of every branch of the proposition; and they insist that, if it were fully proved, it would not entitle the complainant to relief under the prayers set forth in the bill of complaint. Matters of fact, under the circumstances, must first be considered; for, unless the complainant has proved the material allegations of his bill of complaint, he cannot be entitled to relief. Separate answers are filed by the respondents; and, upon an examination of the allegations, it appears that those filed by the two principal respondents are directly responsive to every material allegation in the bill of complaint. Take, for example, the answer filed by the respondent who purchased the homestead, which is the branch of the controversy under consideration. Responding directly to the allegations of the bill of complaint, he expressly denies the whole foundation of the complainant's claim. He denies, among other things, that the owners of the homestead farm ever expressed a willingness to sell the same to the complainant or his grantor for a sum less than the mortgage debt, or less than its value; or that the complainant or his grantor ever applied to him to procure money for them from his father to purchase the farm, or for any purpose; or that he and his father, or either of them, ever engaged to ascertain for them the lowest price at which the farm could be purchased, or to make any inquiries upon the subject for their benefit; or that they, or either of them, ever informed those parties that they could or would purchase the premises on their account or to their use; or that any such suggestion as is alleged, as to cutting wood as a means of raising money to pay the notes, was ever made by them, or either of them; or that they, or either of them, ever promised or suggested that his father would be unwilling to assist them, without such further security as is alleged in the bill of complaint; or that the complainant or his grantor ever, in any way or at any time, ever said or suggested that any bond or written instrument of any kind

whatsoever should be given back, stating or suggesting that a reconveyance should ever be made of the premises; and he expressly alleges that no bond, or other written instrument or writing for a conveyance or reconveyance, was ever named or suggested to him, except as made in the bill of complaint. Equally explicit, also, are the denials in the answer of the other principal respondent. Such denials, to the extent that they relate to facts within the knowledge of the respondent, and are responsive to the allegations in the bill of complaint, must be received as evidence. Courts of equity cannot decree against such denials, in the answer of the respondent, on the testimony of a single witness. On the contrary, the rule is universal, that, under such circumstances, the complainant must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. That rule stands upon the reason, that, when the complainant calls upon the respondent to answer an allegation, he admits the answer to be evidence; and, if it is testimony in the case, it is equal to the testimony of any other witness; and, as the complainant cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. Clarke's Ex'r v. Van Riemsdyk, 9 Cranch [13 U. S.] 160; Hughes v. Blake, 6 Wheat. [19 U. S.] 468.

Much reliance is placed by the complainant upon the testimony of his father, who is his grantor of one half the interest claimed, as before explained. His testimony respecting the circumstances attending the purchase of the homestead farm from the heirs of William Rotch is very explicit, and is given at great length. He states, that he learned from Horatio Leonard and his father, during the pendency of the ejectment suit, that the heirs would sell the property for $2,500; that he and the complainant applied to his son-in-law to help them to the money; but he said he would not, unless his father would assist. Whereupon, the witness states, he applied to the father, and that he agreed to grant the assistance, if the heirs would take his notes on twelve months, and the witness and the complainant would pay them when they fell due; that he agreed to those terms. Speaking of the conversation, the witness states that it took place at the house of his son-in-law; that he and the father of his son-in-law were alone. "Nobody else (was) in the room, and the door was shut." When he went away he remarked, that if the heirs would accept $2,500, and take his notes, and if the complainant and the witness would take care of the notes, he would give them, but that he must be secured on the land. His son-in-law came to him that evening, and told him that he and his father had had a conversation with one of the heirs upon the subject, and that it was agreed that his father should give his note for $2,200, and that he, the son-in-law, should give his note for $300, both payable in twelve months; and that the heirs should give a bond for a deed of quitclaim, on the payment of the notes. Confirmatory circumstances are then stated by the witness, corresponding substantially with the allegations in the bill of complaint; and, after concluding that relation, he adds that his son-in-law came back alone from the visit to the heirs, and gave him the information before stated, and said, that he would have the papers made all right, including a statement of what the agreement was between the witness and the father of his son-in-law. Directions, however, were given by the witness, to his son-in-law, to go to the office of his attorney, who had charge of the ejectment suit, and have the papers prepared; and in a day or two, at the request of his son-in-law, he went to the office of his attorney, and signed a deed, without reading it, or knowing what was in it, and went out, leaving the complainant there with his son-in-law and his attorney. In answer to another interrogatory, he states that it was agreed between him and Nehemiah Leonard, at the interview between them, in the house of his son-in-law, that he was to have a writing, to show what the understanding was; and he states that the same thing was talked over between him and Nehemiah and Horatio together that same afternoon, and it was agreed that he should have such a writing. Particular mention is also made of a conversation between the complainant and Nehemiah Leonard, in which he states in substance and effect, that the respondent said that all he wanted was the money to meet the notes, and that he took hold of the transaction to help the complainant. Several other conversations with one or the other or both of these respondents are given by the witness, in which, as he states, they substantially admitted that he was to have the agreement for a conveyance. On cross-examination, he admitted that he suggested to the complainant to buy out the farm, and take the fight with the Leonards; and that he stated to him, at the same time, that he should be a witness for him, if he brought a suit. Circumstances of a confirmatory character are also adduced by the complainant; and they were earnestly urged upon the consideration of the court at the argument, and will be briefly noticed at the present time. Reference is made to the bill of sale of the personal property; but there is no evidence to show a delivery, or that one article of it ever went into the possession of the grantee; and the clear inference from the case is, that it was made for some other purpose. Certain witnesses also testify to various conversations with one or the other of the principal respondents; but there is not one of the conversations that has much tendency to prove the alleged agreement to give the bond or other written instrument, or which may not reasonably be explained as consistent

with the truth of the answers. Special reference is also made to the details of the arrangement, as set forth in the bill of complaint; but all those matters must be weighed in connection with the circumstances which existed at the time the arrangement was made. The title in the homestead had become absolute in the heirs of the mortgagee, and all hope of being permitted to remain longer in possession was gone. His sons could do nothing, and he was destitute of means to do anything himself. Unless something was done, the homestead farm must pass into the possession of strangers. One resort only remained, and that was to appeal to his son-in-law; and he accordingly went to his house to make that appeal. But the son-in-law could not furnish the means unless his father would render him assistance. Difficulties arose and objections were made in regard to the confusion in the title papers. All had full confidence in the attorney who had charge of the ejectment suit, and application was made to him for advice and assistance in that behalf. Accordingly, he prepared the title papers, and they were all executed in his presence. Under these circumstances the evidence offered by the complainant is hardly sufficient to prove his case, even when unopposed by that offered by the respondents. Much testimony, however, has been offered by the respondents, and the complainant's testimony must be weighed in connection with all that is of a contradictory character. Great reliance is placed by the complainant upon the testimony of his grantor, to overcome the allegations of the answers; but the testimony of that witness is subject to observations. More than twenty witnesses have been examined to impeach his character for truth and veracity; and although a greater number even have been called to support his character, still the affirmative statements of the first class do impair his credit. His own statement also, that he advised the complainant to purchase his interest and take the fight with the respondents, accompanied as it was with the remark, that he should be a witness if a suit was brought, adds something to the distrust created by the testimony of those witnesses. Nothing can be more explicit than is the denial, in the answers of the respondents, of every material allegation in the bill of complaint; and those denials are strongly confirmed by the statements and acts of the complainant and his grantor during the negotiations for the purchase of the farm, and before and after the conveyances were made. Strong confirmation of the truth of the answers is also derived from the statements of the complainant's grantor, made pending the negotiations, and during his visit to the family of his son-in-law. Those statements are fully proved, not only by three of the children of his son-in-law, but by two or three persons who were residing in the family. Subsequent acts and declarations of the same party are also introduced, which go very far to show that there was no such understanding as is alleged in the bill of complaint. The respondents also examined Thomas M. Stetson, the attorney, who had charge of the ejectment suit, and who prepared the conveyances between the parties. His testimony shows that he advised the defendant in that suit, that he had no defence; that he suggested to Horatio Leonard to buy the farm; that he was not willing to buy a part, unless he could have the whole; that he objected to making the purchase, on account of the confusion in the title papers and of the litigious spirit of the defendant in that suit; that the defendant urged the purchase upon his son-in-law, in order that the property might remain in the family; that the writing, consenting to judgment in that suit and the quitclaims, were executed at the same time, in his office, in the presence of the complainant and his grantor; that the quitclaims were given at the recommendation of the attorney, not to pass any valuable interest, but merely to make a clear and unquestionable title; and that nothing was said about any right of redemption in the complainant or his grantor, or any reconveyance from the grantee. Suffice it to say, without entering more into the details of the evidence, that I am of the opinion that the complainant has failed to prove the agreement set forth in the bill of complaint.

But suppose it were otherwise, and it were fully proved that Horatio Leonard, before and at the time he purchased the farm of the heirs of William Rotch, made the agreement set forth in the bill of complaint; still it is insisted by the respondents that the complainant cannot prevail, because neither the agreement, which constitutes the foundation of the suit, nor any memorandum or note of it is in writing, signed by the party to be charged therewith. Gen. St. p. 527, c. 105, § 1; Id. p. 502, c. 100, § 19; Boyd v. Stone, 11 Mass. 342. They insist that the statute extends to any agreement by which rights already acquired in real estate, under a deed, are enlarged or qualified; that not only is an agreement to execute a mortgage invalid, without writing, but also that an agreement to make a defeasance to an absolute conveyance, or to convert a written mortgage into a conditional sale. or to foreclose a mortgage, even when the agreement is made by solicitors, in anticipation of a decree of court to the same effect, are also invalid, unless the promise, contract, or agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. Gen. St. 527; Browne, St. Frauds, p. 272, § 267. On the other hand, it is assumed by the complainant, that the decisions of the supreme court and of this circuit clearly take this case out of the operation of

the statute, and so clearly so, that the case can no longer be regarded an open one. To support that proposition, they refer to the following cases, and insist that they are decisive of the point: Jenkins v. Eldredge [Case No. 7,266]; Babcock v. Wyman, 19 How. [60 U. S.] 289; Russell v. Southard, 12 How. [53 U. S.] 139; Morris v. Nixon, 1 How. [42 U. S.] 126; Taylor v. Luther [Case No. 13,796]. After a careful examination of those cases, I am of the opinion that they do not control the question involved in this case. Take, for example, the case of Russell v. Southard [supra], and the only point decided is, that when the question before a court of equity is whether a deed, which purports upon its face to be an absolute deed, was in reality a deed or mortgage, extraneous evidence is admissible to show that it is only a mortgage. Subsequently, when the question was again presented in Babcock v. Wyman [supra], a majority of the court adhered to the same rule. No such question, however, is presented in this case, as fully appears from the explanations already given. Suppose the rule to be a sound one; still it has no application to this case. Where the complaining party parts with the title, and it passes from him to the respondent, that rule may be applied; but it has no application to a contract to convey land, or to an agreement to give a bond or written instrument to convey the same, in cases where the party to be charged derived his title from a stranger. Browne, St. Frauds, p. 272, § 266; Ledford v. Ferrell's Adm'r, 12 Ired. 285; Clabaugh v. Byerly, 7 Gill, 354; Boyd v. Stone, 11 Mass. 342; Woods v. Wallace, 22 Pa. St. 171; Cox v. Peele, 2 Brown, Ch. 267. Judge Story pressed the exception to the rule to the utmost verge in Jenkins v. Eldredge [supra], but he by no means went far enough to bring this case within the operation of the principle which he there adopted. Agency is not proved in this case, and it cannot be regarded as a case of resulting trust. Proof of fraud also is wanting; and there is no just pretence of part performance, unless it be assumed that the purchase of land by one party is a part performance of an agreement made by him to convey the land to another; which cannot be admitted. None of the elements, therefore, which Judge Story found it necessary to combine, to support the decree in Jenkins v. Eldredge, are to be found in this case.

Some of the evidence introduced to prove the oral agreement set forth in the bill of complaint has some tendency also to show that the complainant or his grantor may have a right to redeem the parcels of land, if any, included in the quitclaim deeds which were not embraced in the mortgage to William Rotch. Should that suggestion be made, the answer to it is, that the bill of complaint is not one for redemption. Suit was brought upon the alleged oral agreement to give a bond or other written instrument, to convey upon certain conditions, and not for the redemption of those lands. Evidence was taken by both parties, in respect to the allegations in the bill of complaint; and the tender and demand made by the complainant had respect to the same matter of controversy. In view of the whole case, I am of the opinion that the complainant, upon the proofs exhibited, has shown no ground for relief; and the bill of complaint is accordingly dismissed with costs.

[Upon an appeal to the supreme court the cause was remanded by that court to the circuit court for further proceedings. 2 Wall. (69 U. S.) 423.]

Case No. 14,068.

TOBIN et al. v. WALKINSHAW et al.

[1 McAll. 26;[1] 5 Am. Law Reg. 106.]

Circuit Court, N. D. California. July, 1855.

PLEADING IN EQUITY—ANSWER—WANT OF PARTIES—NOMINAL PARTIES—JURISDICTION.

1. Matter of avoidance in an answer responsive to the bill on a motion for an injunction, is to be deemed as the affidavit or sworn statement of the defendant;—on the trial it must be proved.

[Cited in U. S. v. Parrott, Case No. 15,998.]

2. A plea for want of parties is not matter in abatement. It goes in bar to the whole bill. If the defect be fatal, it may be relied on by way of plea or in the answer.

3. If a joint interest is vested in the defendants with absent parties, the court has no jurisdiction; if the interest is separable, the jurisdiction attaches

4. The act of congress of February 28, 1839 [5 Stat. 321], and the 49th rule of equity of the circuit courts of the United States, enable the court to dispense with nominal and, in some cases, necessary parties, but never with a party deemed indispensable.

[Cited in Alexander v. Horner, Case No. 169.]

5. Where one is out of the jurisdiction of the court, the fact should be made to appear in the pleadings; and it should be prayed that he be made a party should he come within the jurisdiction of the court.

6. Where any necessary party is within the jurisdiction of the court, and is not made a party, there is no jurisdiction, save in case the parties are so numerous as to bring the case within the exception to the rule.

7. Where a bill omitted to make two persons who were necessary parties, and who were within reach of process; and where there were absent parties, and without the jurisdiction of the court; and the bill prayed for cancellation of conveyances in which those absent parties were interested,—the court had no jurisdiction of the case.

This was a motion for an injunction and the appointment of a receiver.

E. L. Goold and E. W. F. Sloan, for complainant.

A. C. Peachy, for defendant.

McALLISTER, Circuit Judge. Among the numerous questions which have been sub-

[1] [Reported by Cutler McAllister, Esq.]

mitted during the argument of this motion, there is one which arrests attention in limine, and, in the view I have taken of the case, will preclude a decision on any other. That question is one of jurisdiction. In advance of any discussion on this point, I desire to advert to a question which was argued incidentally by the solicitors for the respective parties. I allude to the question—"How far is matter of avoidance in an answer to be treated as evidence by the court?" An examination of the authorities has conducted me to the conclusion that the rule is, that upon the hearing, after the answer is put in issue, new matter set up by way of avoidance must be proved by defendant; but that on a motion for, or on a motion to dissolve, an injunction, such new matter in the answer responsive to the bill is to be deemed evidence in favor of defendant, as his affidavit or sworn statement. As this opinion is necessarily very extended on what I deem the principal point in the decision of this motion, my reasons for the conclusion to which I have come in relation to the question of new matter in the answer, will be reserved for some future case or occasion.

In regard to the want of parties in this case, which gives rise to the question of jurisdiction, it has been urged by complainants, that it is too late for defendants to object a want of parties, and that this was matter only for a plea in abatement. Now, a plea for want of parties is not matter for abatement. It is a plea in bar, and goes to the whole bill, as well to the discovery as to the relief prayed. 1 Daniell, Ch. Prac. 337. Again, the rule is, that if want of parties is apparent on the face of the bill, the defect may be taken advantage of by demurrer. If such defect be vital, it may be insisted on at the hearing, and if the court proceed to a decree, such decree may be reversed. If the defect is not apparent on the bill, it may be propounded by way of a plea, or it may be relied on in a general answer. Story, Eq. Pl. § 236. In Van Epps v. Van Deusen, 4 Paige, Ch. 75, it is said, defendant is not bound to demur or plead. He may make the objection in his answer, and may have the same benefit of the objection at the hearing as if it had been taken by plea or demurrer. The thirty-ninth rule of equity expressly gives the right to defendant to avail in his answer of anything which would be good in the form of a plea in bar; and the fifty-second rule provides, that where defendant by his answer suggests the want of parties, plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection alone. These rules evidently authorize a party to avail himself of a defect for want of parties as effectually in his answer as by plea in bar. Had defendants availed themselves of the right to plead in bar, much time and discussion would have been saved. But they have the right to bring forward their objection in the form of an answer. Having done so, I am called on to decide if if there are such parties before the court as will authorize it to adjudicate upon this cause, whether this court be deemed a court of general equity jurisprudence, or whether the peculiar structure of the limited jurisdiction of this court under the constitution and laws of the United States be considered. In Cameron v. M'Roberts, 3 Wheat. [16 U. S.] 591, where the citizenship of the other defendants than Cameron did not appear on the record, the supreme court of the United States certified—"If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested), could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." In Mallow v. Hinde, 12 Wheat. [25 U. S.] 194, the principle is affirmed, that though the rules as to parties in equity are somewhat flexible, yet, where the court can make no decree between the parties before it, upon their own rights which are independent of the rights of those not before it, it will not act. The court say, "We do not put it on the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure as to jurisdiction." In Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 98, the court say that merely formal parties might be dispensed with; but where parties are essential to the merits of the question, and may be much affected by the decree, such parties are indispensable.

The principle enunciated by the supreme court in the foregoing cases, is a reiteration of one universally recognized in equity jurisprudence. Story, Eq. Pl. § 137. The rule in equity differs from the rule of law, both in the necessity of joining all interested parties in the suit, and in the option of joining them as plaintiffs or defendants. At law, a disputed issue is alone contested, the immediate disputants are alone bound by the decision, and they alone are parties to the action. In equity, a decree is asked, and not a decision only; and it is therefore requisite that all persons should be before the court whose interests may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. Adams, Eq. 699, 703, 704. The act of congress of February 28, 1839 (5 Stat. 321), and the forty-seventh equity rule of this court, have been cited by complainant's solicitors and relied on to sustain the jurisdiction in this case. They have also adduced the case of Doremus v. Bennett [Case No. 4,001], as to the interpretation of the act of congress. That was a case at law. Now, it is true, that by their provisions, the circuit courts of the United States are authorized, in certain cases, to proceed against one or more defendants in the absence of oth-

ers, where such others are not inhabitants of or found in the district when and where the suit is brought. But both the act of congress and the forty-seventh rule have been elaborately considered, and the construction of them fixed, by the supreme court of the United States in the recent case of Shields v. Barrow, 17 How. [58 U. S.] 130. In that case it is settled, that neither the act of congress nor the rule impinges on the general doctrine, and that if the citizenship of parties be such that their joinder would defeat the jurisdiction of the court, such fact will not supersede the necessity of making them parties; so far as the said act and rule apply to suits in equity, it is to be understood they are no more than the legislative affirmance of the rule previously established by the adjudications of the supreme court of the United States. The act of congress removed any difficulty as to jurisdiction between parties who are competent under the general rule of equity jurisprudence; and the forty-seventh rule of practice is only a declaration, for the government of practitioners and courts, of the effect of the act of congress and the previous decisions of the supreme court. "It remains," say the court, that a circuit court "can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." Id. 141.

The general rule as to the parties to a bill is not, then, altered by the act of congress and the equity rule cited by the solicitors for complainants; nor is that rule affected by the limited jurisdiction of the courts of the United States. The fact that a person is without the reach of the process of the court will not dispense with the necessity of making such person a party, provided he be an indispensable one. Parties to bills are divided into three classes (Shields v. Barrow, 17 How. [58 U. S.] 139): 1. Nominal. 2. Necessary. 3. Indispensable. If a nominal party be beyond the reach of the process of the court, being a party having no interest to be affected by the proposed decree, that fact cannot defeat the jurisdiction of the court. An instance of this class of parties is, where one is joined as a party for sake of conformity in the bill, having no interest, legal or equitable, to be affected by the decree. The second class, known as necessary parties, are such as have an interest in the controversy, and ought to be made parties to enable the court to do complete justice by adjusting all the rights involved; still, if their interests are separable from those before the court, they are not indispensable parties. Mr. Justice Curtis has referred, as an instance of a necessary party, to the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738. This case has been cited by the solicitors for complainants, as the strongest case; and in their written brief upon the point under consideration, they say: "This (case) seems to us conclusive as to the rule in a case of trespass." It is due to the able counsel and the importance of the question, that proper consideration be paid to this case. We shall give it that consideration hereafter. The third class of cases enumerated by Mr. Justice Curtis are the indispensable, who have such an interest in the controversy that a decree cannot be made without affecting that interest; and the inquiry is, do the pleadings in this case disclose the fact, that there are absent persons whose interests make them indispensable parties? The rule we are considering laid down generally is, that where the rights of an absent person will be much affected by the decree asked for, the court cannot proceed to a decree. This general rule is to be applied to the circumstances of each case as they shall arise. By ascertaining how this rule has been applied in precedent cases, we will understand how to apply it to the case at bar.

In Mallow v. Hinde, 12 Wheat. [25 U. S.] 194, the complaint set up a claim to a tract of land under a survey, No. 537, in the name of John Campbell, who, by his will, devised and bequeathed this, among other muniments of title, to Richard Taylor and others, executors in trust for the children of his sister. Taylor alone qualified, and took upon himself the execution of the trust. He never assigned or conveyed to the cestui que trusts, but permitted them to take the management of the claim into their own hands. Subsequently, when these last had arrived at full age, they entered into contracts with one Elias Langham, whereby he became entitled to survey No. 537, and he subsequently conveyed the land to complainants. Thus stood the case, when the defendant Hinde, with full knowledge of the rights of complainant, procured from Taylor a military warrant belonging to him (Taylor) in his own right, made an entry thereof in his (Hinde's) right, and having caused a survey to be made thereupon covering survey No. 537, obtained a patent for the land. Having thus got the legal title, he instituted actions of ejectment against the complainants, and obtained judgments of eviction against them. A bill, setting forth the whole transaction, charging notice of complainant's rights, and gross fraud against defendant was filed, which prayed for an injunction to enjoin defendant from proceeding on his judgments, and for general relief. Here was as tortious an act and as great fraud as could be perpetrated under the forms of law, charged upon defendant. The defendant denied all fraud, set up the bona-fides of the transaction, neither admitted nor denied the contracts between the cestui que trusts and Langham, and insisted, if there were any such they were fraudulent. Neither Taylor nor the cestui que trusts were made parties, being out of the jurisdiction of the court. An objection for want of parties arose, and it was insisted that both Taylor and the cestui que trusts were indispensable parties. The court

so decided. They say: "The complainants claim through certain contracts made between Langham and the cestui que trusts. How can a court of equity decide that such contracts ought to be decreed specifically without having the parties before them? Such a proceeding would be contrary to all rules which govern a court of equity, and against the principles of natural justice." In respect to Taylor, it was urged that he had parted with his "incidental right;" but the court determined that he and the cestui que trusts were indispensable parties. "If," say the supreme court, "the United States courts were courts of general jurisdiction, it could not be doubted that the absent persons would be indispensable parties." But it is urged, that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, &c., ought not to be adopted by the courts of the United States, because, from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it. In answer to such argument, the court proceeds to show that no modification of the rule to an extent by which the rights of an absent person may be materially affected, is admissible, and concludes by saying—"We put this case on the ground that no court of equity can adjudicate directly upon a person's rights without the party being actually or constructively before the court;" and the bill was found defective for want of parties. In Brookes v. Burt, 1 Beav. 106, a bill was brought by one tenant in common against defendant, who, it was alleged, had wrongfully and in defiance of complainants' title, entered into possession and received the rents and profits of the property; it was further alleged, that complainants had commenced an action of ejectment for the premises, which defendant defended; that before the trial of such ejectment, plaintiffs discovered that the property was subject to an outstanding term which was vested in one Mr. Worsley, which defendant threatened to set up to defeat the action at law; and, lastly, the bill alleged that James Wavel, the co-tenant in common with plaintiffs, was at the time residing out of the jurisdiction of the court. (It should be observed here, that the objection was, that the co-tenant in common was not made a party complainant.) There was a general demurrer for want of equity, on the ground that Wavel, the co-tenant, and Worsley, in whom the outstanding term was vested, were indispensable parties to the bill. The court decided that the holder of the outstanding term was not, but that the co-tenant was. On the argument it was urged in relation to Wavel, that he was part owner of the property; that, among other things prayed for, was a declaration of right, the delivery of the title-deeds of the property, and for an account of the rents and profits, matters in which the absent party was interested, and that therefore the suit which sought to deal with the inheritance was defective for want of parties. To this complainants replied, that the proposition embodied in the objection was, that if there be twenty tenants in common, and a stranger get possession, one of the tenants in common cannot recover the possession of the rents and profits from the stranger without making the other nineteen persons with whom he has no dispute parties to the suit; that this was an ejectment bill, and must be governed by the same rules as an ejectment at law; that Wavel, the co-tenant, was out of the jurisdiction of the court. Lastly, it was urged that the complainants were entitled to some portion of the relief prayed for, and, at the time of the hearing, they might waive part of the relief sought, and obtain the rest; that the demurrer, therefore, covered too much, and must be overruled. Such were the arguments by complainants in that case; and they are similar to those urged in this case by complainants' solicitors. To all the master of the rolls replied: "It appears to me, this demurrer must be allowed. * * * Where the demurrer is for want of parties, it is not sufficient for the plaintiffs to say, that there is some part of the relief which can be abandoned at the hearing. * * * The bill prays for accounts and the delivery up of title-deeds. * * * I conceive Wavel is a necessary party. * * * The demurrer must be allowed." 1 Beav. 111. In Turner v. Hill, 11 Sim. 1, a bill was filed to compel defendant to transfer her share in a mine to complainant, which it was alleged she had obtained by fraudulent means, and to account for and pay to plaintiff the profits thereof, and that a receiver might be appointed of the profits of the mines. It was objected, that the other adventurers in the mine were indispensable parties, inasmuch as an account was called for; and the vice-chancellor decided against the objection on the sole ground that the bill did not call for an account of the mine, but for that of the specific share sued for. He says: "That passage in the prayer of the bill which asks for a receiver of the profits of the whole mines, is clearly a mistake, for the plaintiff is seeking, by his bill, to recover no more than a hundredth share of the mines; and therefore, in common fairness of construction, that passage ought to be referred to the profits of that share." Considering such to be the fair construction of the bill, he decided it was unnecessary to make the other shareholders parties. A similar decision, for the same reasons, was made in the case of Turner v. Borlase, 11 Sim. 17; and appeal was carried to the lord chancellor (Id. 18), and the decision in it confirmed, the distinction drawn between a prayer for the profits of the mine and those of the particular share sued for, being carefully sustained. In giving his decision on the appeal, the chancellor said: "It was, however, observed, that the bill prayed a receiver of the profits arising from the said mines; and if that must necessarily be intended to

mean the general profits of the mines, it would be asking for that which could not be granted, in the absence of all the other adventurers; but I do not understand the expression to have that meaning. All the case made and all the relief asked, relate to the particular shares," &c., "and I must understand the profits as to which the receiver is asked, to be the profits spoken of, which makes the whole consistent, and for which purpose the other adventurers would not be necessary parties." Id. 20. The decision of the court below was therefore affirmed, and the demurrer overruled; but the chancellor, in conclusion, declared, that his judgment on the demurrer was on the facts admitted by it; but if the facts at the hearing so admitted were not sustained, the opinion he had just delivered could have no bearing on the case.

The principles deducible from foregoing authorities are—1. That the general rule in equity is, that all persons whose interests may be materially affected by a decree, must be before the court to enable it to act. 2. That this rule may be relaxed so as to dispense with formal, and, under special circumstances, with necessary parties. 3. That the rule which has been announced by the decisions of the supreme court of the United States is but a reiteration of the doctrine of a court of equity in the application of its chancery jurisdiction. 4. That the act of congress of February 28, 1839, and the forty-seventh rule of equity, which allow one or more defendants to be sued in the absence of others without the jurisdiction of the court, apply only to competent parties, are simply an affirmance of previous decisions of the supreme court of the United States, and do not vary the rule as to indispensable parties. [Shields v. Barrow], 17 How. [58 U. S.] 141. 5. That the peculiar structure of the limited jurisdiction of the courts of the United States does not abolish or modify the rule as to indispensable parties; and the fact that such are without the jurisdiction, will not enable the court to proceed against the parties before it. 6. That it has been decided by the supreme court of the United States [Mallow v. Hinde], 12 Wheat. [25 U. S.] 194, that where complainant seeks to set aside a fraudulent purchase of land by defendant, and to enjoin his proceeding on a judgment he had obtained in an ejectment at law against complainant, the party through whom the latter claimed his equitable title was an indispensable party. 7. That it has been decided in the English chancery (1 Beav. 106), that one tenant in common cannot, without joining with him his co-tenant, sustain a bill in equity against the trespasser in possession, and enjoin him from setting up an outstanding term, inasmuch as the bill prayed for the delivery of title deeds and account of the rents, these being matters in which the absent person was interested, and was therefore an indispensable party; that where a question arises as to parties, it is not for the complainant to say, the court must proceed to a hearing when he (complainant) may disclaim a part of the relief and obtain the balance; and, lastly, that the fact that the absent party resided out of the jurisdiction of the court, made no difference in the application of the rule. These last principles are deducible from the case of Brookes v. Burt, 1 Beav. 106. It is to be again noted, that this was a case brought by one tenant in common to assert a right against a wrong-doer; and the absent tenant in common was deemed an indispensable party. How much stronger is the case at bar, where it sought to injuriously affect the rights of part owners, who are absent! If, in the former case, the person is deemed an indispensable party, a fortiori he must be so deemed in the latter. 8. That it has been decided that, where bill is filed to compel defendant to transfer to complainant a share in a mine fraudulently obtained by him, and to account for the profits thereof, jurisdiction will be sustained on the ground that the bill seeks only a specific share in the profits thereof; but it is expressly affirmed, that if the bill had sought for a delivery of title-papers, which touches the inheritance, or for an account of the mines, these being matters in which the other adventurers in the mine were interested, the court could not proceed, such other adventurers being indispensable parties.

Let us apply these principles to the case at bar. The complainants in their bill allege title to certain premises situate in this state; that defendants have wrongfully entered into possession thereof, and are committing a trespass thereon by cutting down timber and excavating mines or minerals therefrom, and that they (the complainants) have instituted an action of ejectment against the defendants for the purpose of evicting them therefrom. The bill prays against defendants—1. That an account be taken for the year preceding the filing of the bill, of the amount of timber cut and destroyed on the premises, and a similar account of the quicksilver so taken. 2. That injunction may issue to restrain defendants from further trespass. 3. That a receiver be appointed to take charge of the mine, and the reducing establishment connected therewith, and all the products thereof, now within the jurisdiction of this court. 4. That on the final hearing, the conveyances made, under which defendants claim title, may be ordered to be delivered up and canceled, the injunction made perpetual, and for general relief.

An answer has been filed, and the facts necessary to be looked to, in connection with the question as to parties, are found on pages 43, 44, and 45. The facts disclosed are, that there are proprietors of the mine and land other than defendants. That of

them, four in number, viz.: Eustaquio Barron, Eustachio M. Barron, Martin La Piedra, and Maria Ortiz, are without the jurisdiction of this court; that John Parrott and James R. Bolton are also co-owners of the premises, and that they are within the reach of the process of the court. It is further averred, that long before the institution of the action of ejectment at law, and before the exhibiting of the bill, a contract was entered into by the owners of the mine, with certain persons, for the working of them; and it is contended that both the proprietors and contractors should be made parties.

Upon the authority of the cases cited above, I cannot doubt that the owners are indispensable parties in this case. In the opinion of the court, the authority of cases is hardly needed.

What is the character of this bill? It does not seek the interposition of this court to recover the specific shares of the mine or land, and the profits thereof, property of the defendants. If it did, it would come within the authorities, and the limits of natural justice. But the bill asks, that an account of profits belonging to other people, and title-deeds to property in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled. It further asks that the profits of all the owners should be wrested from them and paid into the hands of a receiver. Now, can this court call for an account of the profits of the mine, or arrest such profits, or direct a cancellation and delivery of the title-deeds, in the absence of parties both within and without the reach of its process, who are interested in those profits and those title-deeds? Were the court to do any one of these things, would not the rights of the absent be materially affected? It is urged, that the court can entertain jurisdiction of this case, issue the injunction, and wait until the hearing, when the complainant may waive a portion of the relief prayed for, and the court can decree so much of that relief as they may be entitled to. This course would be contrary to authority, and in violation of the reason of the thing. We have seen that the lord chancellor has said in Brookes v. Burt, that when the question of parties arises, it is not sufficient for the complainant to say "that there is some part of the relief which can be abandoned at the hearing." Again, apart from authority, on what ground of justice or reason can this court arrest, by injunction, the profits of the mine from absent persons until the hearing, for the purpose of ultimately getting an account from the defendants of their specific interests? Would the arrest of these profits "affect" the interest of the absent owners? If so, should a court of equity proceed in their absence? "Audi alteram partem" is alike a dictate of natural justice and a precept of municipal law. I have searched in vain for a precedent that would justify this course. The able counsel for complainants would have found such, if any existed. The case of Osborn v. Bank of U. S. [9 Wheat. (22 U. S.) 738], has been adduced as the authority which seems to them conclusive in favor of such jurisdiction; and it has been intimated to me by one of the counsel, that it has been exhibited to several of his professional brethren, who concur in the opinion that it is conclusive on the point. That case, therefore, claims attention. The opinion in that case occupies seventy-six pages of the reporter. To show what were the points decided, by traveling through it, would be time misspent. But there is a short method of doing this, and one, perhaps, which will conduct to a more correct conclusion than any this court could pursue. By reference to the prospectus, published by Mr. Justice Curtis, in [Shields v. Barrow] 17 How. [58 U. S.] 141, it will be found, that his plan in giving his new edition of the supreme court reports was, to endeavor to give, in the head-notes, the substance of each decision. They are designed, he says, to show the points decided by the court, not the dicta or reasonings of the court. Now, upon reference to his head-notes to Osborn v. Bank of U. S. [supra], we find that the only points which, in his opinion, were decided in that case which touch the question under consideration, are—1. A court of equity may restrain, by injunction, a public officer of a state, from acting under a void law of a state to destroy a franchise. 2. As the state cannot be joined as a defendant, its agent may be sued alone; and if he has specific moneys or notes wrongfully taken, in his possession, they may be ordered to be returned.

So far as any decision in this case goes, it does not touch the case at bar. But reference has been had to certain observations made by Chief Justice Marshall, while delivering the opinion of the court, and citations from the opinion have been inserted in the brief of solicitors for complainants, which are deemed directly applicable to the case at bar. The first citation is from [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 842, and is as follows: "The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act and is not equal to the remedy in chancery, which prevents the repetition and protects the privilege. The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and many cases of destruction, will, we think, apply in this. Indeed, trespass is destruction where there is no privity of estate. If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit can-

not be maintained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say, that the laws could not afford the same remedy against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?"

The propositions asserted in the above observations are—1. That though the single act of an illegal tax is the subject of an action at law, its repetition makes it a continuing trespass, which a court of equity may enjoin. 2. That where the principal is exempt from all judicial process, being a sovereign state, the privilege which belongs to such principal is not communicated to the agent who does the wrong. 3. That under such circumstances the court, acting on the principle, "Lex non cogit ad impossibilia," will, at instance of complainant, issue an injunction to restrain the agent from committing the tortious act. These propositions cannot control this case: 1. Because there is no question of principal and agent in this case. 2. The necessity of dispensing with a necessary party who was exempt from judicial process, does not exist in this case. On page 846, Chief Justice Marshall says, "Had it been in the power of complainant to make it (the state) a party, perhaps no decree ought to have been pronounced." 3. Because the attempt in this case is to make defendants liable as principals in a tort, and asks the court to arrest the profits of absent parties for the purpose of making defendants responsible for the consequences of their own tortious act. There are two other citations from the opinions of the court. The first is a continuation of the first above quoted, and is in these words: "We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties." Here this second citation ceases, and another is taken from the succeeding page (844), as follows: "In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only, and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would, in fact, be irreparable; and the cases are innumerable in which injunctions are awarded on this ground." Now, this latter citation establishes this proposition, viz.: That the agent would pay over to the principal, who was exempt from all judicial process, and being unable to respond to the damages, the injury would be irreparable, and, therefore, it is ground for injunction. To this extent it goes; but the whole is dependent for its application upon the fact, whether defendant is responsible upon an implied contract solely for the amount in his hands. This is evident, as the court puts the hypothesis: "Now, if the party before the court would be responsible for the whole injury," &c.

To prove why the court considers the defendant liable, it is necessary to cite the remarks which intervene between the two quotations cited above: "Now, if the party," say the court, "would be responsible for the whole injury, why may he not be restrained, &c. The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiring into the validity of this reason, if it be true. We ask if it be true. Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." It was on the ground, then, that the equitable action for money had and received could be maintained against the agent,—for money in his hands, and received by him in legal consideration to the use of plaintiff,—that Chief Justice Marshall uses the observations quoted, to sustain the proposition that injunction might issue to restrain the payment over by the agent to his principal. Can this apply to the case at bar? No one pretends that such action could lie against defendants in this case. Independently of all other views, there is one which covers this whole case, and precludes the idea that it can control the

one at bar. It has been shown that the absent parties are indispensable in this case. Such was not the fact in the case relied on. The state of Ohio was but a necessary party, and there was a discretion in the court to dispense with such party. True, the interest of the state, in quantity, extended to the whole amount in controversy; but what was the nature of that interest? It was not a vested nor an equitable interest. It was never in the possession of the absent party; nor had the state an equitable right to it, for the court never could recognize the possession of a fund, or an equitable right to possession in the principal, where that fund had been raised in fraudem legis by the agent. The object of the bill was to arrest the fund in its transit from the agent to the principal. Hence, the nature of the interest held by the state was, to use the language of Mr. Clay, in his argument, "a collateral and contingent interest," which will not make a party who must be joined. Hence, again, Mr. Justice Curtis, in 1855, in the case of Shields v. Barrow, 17 How. [58 U. S.] 130, in his classification of parties, enumerates several instances of the different kinds of parties, excluding the case of Osborn v. Bank of U. S. [supra], from the class of indispensable, and including it among that of necessary parties; which latter, as we have seen, may under peculiar circumstances be dispensed with. It is by attention to the distinction between necessary and indispensable parties, that the numerous decisions of the courts, made in the application of the general rule, may be harmonized.

Cases have been referred to, in which persons who are without the reach of the process of the court have been dispensed with; but in all such it will be found, that the absent persons were either formal or necessary parties, but not deemed indispensable. In this case, I am satisfied that the owners of the mines are parties whose interests must necessarily be affected by any decree which can be made in conformity with the prayer of this bill. Cases are also cited to show that the courts of the United States will consider the rule as to parties flexible where the absent persons, who should be made parties, are out of the reach of the process of the court; but in each of them it will be found, that the utmost extent to which a relaxation has been carried, has been to dispense with a necessary party only. But there is one feature in this case which distinguishes it from all others. It is, that two of the absent persons whose interest would be affected by a decree, are residents of this city and within the reach of the process of this court. The only reason for their omission as parties is the fact, that their introduction would oust the jurisdiction of this court. But if bringing them before the court, this case would be beyond its jurisdiction, can the court, by indirection, adjudicate upon their rights, and thus do indirectly what it could not, rightfully, directly do? I think not.

The present motion is therefore denied, and it is ordered accordingly.

[See Cases Nos. 14,069 and 14,070.]

Case No. 14,069.

TOBIN v. WALKINSHAW et al.

[McAll. 151.] [1]

Circuit Court, N. D. California. July, 1856.

MEXICAN LAND GRANT—APPROBATION OF DEPARTMENTAL ASSEMBLY — QUANTITY GOVERNED BY SPECIFIC METES AND BOUNDARIES — SEGREGATION.

1. A Mexican grant which had never received the approbation of the departmental assembly, and had never been segregated from the public domain before the treaty of Guadalupe Hidalgo, is not a title on which to maintain ejectment against any save a trespasser.

2. The rule at common law is, that in the construction of a deed, quantity must yield to specific metes and boundaries.

3. Such rule cannot be applied, in all cases, to Mexican grants.

4. The grant in this case is subject to be located at different places, as one or other of the three lines given may be selected as the base line. Such fact precludes any action by the court in this case.

5. Segregation of private from public land is a political act, and belongs to another department of the government.

This is an action of ejectment, brought for the recovery of lands situated in the county of Santa Clara, in this state. A jury trial was waived by the parties, and the case submitted on the law and facts to the court; each party reserving to itself the right of exception to the rulings of the court on the admissibility of the evidence, and to its decisions of the law upon the merits. The evidence offered, and the rulings thereon, with a statement of the facts proved, are given in the opinion of the court.

[See Case No. 14,068.]

Howard & Goold and E. W. F. Sloan, for plaintiff.

Halleck, Peachy & Billings, for defendants.

McALLISTER, Circuit Judge. This action is brought for the recovery of certain lands situate in the county of Santa Clara, in this state. The cause came on to be heard at the present term of this court, a jury trial waived, and the case submitted on the law and facts to the court; each party reserving the right of excepting to the rulings of the court, in relation to the admission of testimony, and to their decision of the law upon the merits. The plaintiff introduced and relied upon the expediente of Jose Reyes Berreyesa, and grant, dated 20th August, 1842, issued to him by Governor Alvarado, for the premises in

[1] [Reported by Cutler McAllister, Esq.]

controversy, under which grant plaintiff claimed title. The grant was in the ordinary form of Mexican grants, and had annexed to it their usual conditions.

To the introduction of this testimony the defendants objected on the following grounds: 1st. Because it is no evidence of title on which an action of ejectment can be maintained. 2d. It is no evidence of possession, or its extent, if entry under it is proved. The objections were overruled, and point reserved.

The defendants subsequently gave in evidence an alleged grant from the supreme government of Mexico, of later date than that of Berreyesa's, and an expediente under which they claimed from the Mexican government, a property in a quicksilver mine, alleged to be on the land sued for, and the delivery of which mine to the assignor, under whom the defendants claim, is alleged to have been given in the year 1845. To all this documentary evidence the plaintiff objected. The objections were overruled, and the point reserved. The sheriff's deed to Walkinshaw, one of the defendants, for the interest of one of the heirs of the grantee, Jose R. Berreyesa, was also given in evidence. This was all the documentary testimony which went directly to prove title.

The first question, and which lies at the foundation of this action, arises out of the objections made by defendants to the title of plaintiff. It therefore first demands attention. It is conceded that the grant under which the plaintiff claims, has never received the approval of the departmental assembly, and it is contended by defendants that the title of plaintiff held under it, is therefore inchoate. To ascertain the character of this title, we must look to the Mexican legislation, from which it derived its existence. The supreme executive of Mexico, in accordance with the provisions of the sixteenth section of the colonization decree of the 18th of August, 1824, prescribed certain regulations, under date of 21st November, 1828 [Hall's Comp. Mexican Laws, p. 150, § 503], having for their object the colonization of the lands in the territories of the republic. The first article of these regulations confers on the political chiefs of territories, the power to grant lands, with the restriction that the grants should be issued in accordance with the general law, and under the qualifications therein expressed. The first three of these qualifications are directory, and relate to the class of persons who are to become grantees, and the character of the lands to be granted. The fourth confers on the political chiefs a power to grant or accede to the petition of the applicant, which is the foundation of the grant subsequently obtained. The fifth, sixth, and seventh articles prescribe the mode in which grants are to be made definitively valid; and the eighth provides that after they have been made so, a patent signed by the political chiefs, shall be issued, which shall serve as a title to the party interested, expressing therein that it had been made in strict accordance with the provisions of the law, by which "they shall proceed to give the possession."

From the foregoing it results:

First.—That although power is given by the fourth article to the political chiefs, to accede or not to the petition, the power to issue a patent or grant is withheld, or rather it is not conferred upon them until after the concession was made definitively valid, by having received the approbation of the departmental assembly.

Second.—That no evidence of title was to be delivered to the interested party until after the issuing of such a patent.

Third.—That it was not contemplated that the party should go into legal possession until such patent shall have been delivered to him; the eighth article declaring it was by virtue of it, and the laws therein expressed to have been observed, that they should proceed to give the possession.

The fifth and sixth articles declare that, in order to render grants definitively valid, they shall receive the previous approbation of the departmental assembly, to which they shall be referred; and in case the political chiefs fail to obtain such approval, they shall report to the supreme government for its decision. Such was the course prescribed by Mexico for the granting of lands in her territories. It is evident that the departmental assembly was intended to be made the depositary of the granting powers to such an extent, that the political chief could alien no portion of the public domain without their previous approbation. To them his action of acceding to a petition for a grant was to be referred, and he was to obtain their approval before he could thus alien, and before the evidence of title could be properly delivered to petitioner.

It seems clear that the supreme government of Mexico never entrusted to one man the uncontrolled power of disposing of the public domain. He was permitted to inquire into the circumstances attending the petition, and accede to its prayer, and thus place the petitioner in a position to obtain a grant; but it was not until after the approval of another department of the government that he was permitted to issue a grant; nor was it, as we have seen, contemplated that a party should go into judicial possession until such approval had been obtained. A policy thus cautious has always characterized the Spanish American governments. In Upper Louisiana, while in a provincial state, although the lieutenant-governor had the right to make concessions, order surveys, and even place grantees in possession, the supervisory action of the intendant-general of Upper Louisiana and Lower Florida was necessary; and until his formal confirmation of the grant previously given, had been obtained, the party interested was deemed to have only an equi-

table title. In Coahuila, although the governor had more ample powers of concession than those conferred upon the political chiefs of California, the confirmation of his acts by the intendant-general was deemed necessary to complete the title of the party. In her legislation relative to the colonization of lands in California, Mexico did not depart from the cautious policy which distinguishes the Spaniard and his descendants. She did not confide to one man the exclusive power of granting, but interposed between him and the exercise of absolute power, the necessity of an approval by the departmental assembly, and in case they did not co-operate with him, an appeal to the home government. The approval of the assembly was made precedent to the issue of the grant.

The practice which prevailed in earlier times in California was in conformity to the law. The decree or concession was made, submitted to the assembly for approval, and then the patent or formal title was issued. Subsequently, it became the ordinary usage for the governor to issue the concession and grant simultaneously, or the latter shortly afterwards, inserting in it a provision that it was subject to the approbation of the junta, as in this case. Such approval was frequently obtained subsequently, and a testimonio, or certificate of the fact, delivered to the party; in many cases, no approval of the junta was obtained. The grantees, however, if they were not in the occupancy of the land, as not unfrequently was the case, would enter into the possession of all the lands described in the grants thus issued, and retain it, although, in many cases, their grants had not received the approbation of the assembly. The Mexican authorities, however, recognized the importance of the approval of the junta, for the governor inserted in the grants a provision expressly subjecting them to the approbation of that body; and, so far as the numerous records of land cases which have come under our supervision show, we are led to the conclusion that the subordinate Mexican functionaries generally acknowledged the necessity of the approval of the junta to constitute title. We find a practical illustration of this in the case of U. S. v. Vaca [Case No. 16,604]. This case is No. 54 on the calendar of the land commissioners, and No. 74 on the docket of the district court.

In May, 1844, Vaca presented his petition to the governor, setting forth, among other things, that he had obtained a grant in the preceding year for a tract of land; that he had solicited the justice of the peace, for his jurisdiction, to give him juridical possession of the place, which had been refused because petitioner had not obtained the approval of the assembly to his grant; and concluded by affirming that the magistrate had overlooked, in some cases, the condition which required the approbation of the junta, and prayed an order from his excellency, directing the said justice to place petitioner in juridical possession without compelling him to wait for the approval of the assembly. On this petition is the marginal order of the governor, which, as to that portion of the prayer which referred to the juridical possession, states: "With regard to the judicial possession which is claimed in this writing, the government is not authorized to order it to be given without the previous approbation thereof by the most excellent departmental assembly."

It is true, as alleged by the plaintiff, and before stated, that many parties went into possession of lands under grants made expressly subject to the approbation of the junta, and which had not received their approval; and it may be also true that this frequent practice may have induced a belief among many that such approval constituted no part of the title. But no usage or practice of the kind could convert the title, if originally inchoate, into a perfect one. The issuing of the grant by the governor, before obtaining the approval of the junta, with other circumstances, might give the party an equity which would bind the government; but it could do no more. In Menard's Heirs v. Massey, 8 How. [49 U. S.] 293, the party claimed under a grant from the lieutenant-governor of Upper Louisiana. The concession granted the land, dispensed with an immediate survey, but required that when any one settled on the place a survey should be executed, after which the party was to solicit from the intendant-general his title in due form. It was admitted that the lieutenant-governor had a right to deal with the public domain, make concessions, direct lands to be surveyed, and to put grantees into possession. "This, however," say the supreme court, "does not settle the question." A usage also prevailed in Upper Louisiana to which the court refer: "It is remarkable (say they), that if we may trust the best information we have on the subject, neither the governor nor the intendant-general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate." Referring also to the position of Upper Louisiana at the time, the difficulties of intercommunication between its several parts and New Orleans, and the general condition of the country, as the reasons which rendered the completion of the title in due form almost impracticable, they conclude by saying, "There are but two instances known to exist, where the intendant-general was applied to for a complete title." But all this "did not settle the question." "It does not depend (say the court) upon the existence of power, or want of power in the lieutenant-governor, but on the force and effect of the right his concession conferred."

We have not overlooked the fact that there is some difference between the imperfect titles issued by the governor of California, and those by the sub-delegates of Louisiana. In the latter cases the grantees were ex-

pressly referred to the intendant-general to solicit the title in due form. In California, no more formal title was contemplated than that issued by the governor. But that title was not to issue until the concession had been approved. When therefore, it was delivered without such previous approbation, and made expressly subject to it, the situation of the grantee was analogous to the holder of a concession from the lieutenant-governor of Louisiana, in this, that both required the approval and confirmation of other officers or functionaries of the government to render their titles finally valid. If, then, the usage which prevailed in Louisiana, more uniform than that which had been relied on in California, could not change the character of title as originally ascertained by the nature of the right conferred by the concession, so in this case the title of the plaintiff must be fixed by the force and effect of the grant, and the laws of Mexico which gave it birth. This we have done by an analysis of the regulations of 1828, which has conducted us to the conclusion that the title of the plaintiff is merely inchoate. Previous to the citation of authorities to fortify the construction we have placed upon this title, it may be well to notice some suggestion which have been made upon this point.

It is urged that by the governor's grant, the title to the land passed, liable only to be defeated by the refusal of the departmental assembly to approve it. This would be treating the refusal as a condition subsequent, which, on its happening, would defeat a previously vested estate. But the eighth article distinctly shows that it was not intended that a defeasible estate should vest by the governor's concession alone, else, why withhold from the party all evidence of title until after the approval had been obtained. The document issued after such approval was the only evidence of title the law gave him, and without which he could not obtain judicial possession. The argument which attributes the suggested effect to the governor's concession supposed the party to have acquired an estate, without receiving any evidence of title, and when by law he could receive no such evidence nor be placed in legal possession until after the concession had received the approval of the junta. Such construction would defeat the whole policy of the law. If the party acquired by the governor's grant a legal title to the land, which was valid until defeated by the refusal of the junta to approve, the happening of such event could always be prevented by the governor's withholding the expediente from the departmental assembly. If they were never asked to approve, they could have no opportunity to refuse. It was only the governor's grant definitively valid that gave to the party interested a right to receive a documento, or title, and to be placed in legal possession of the land. The refusal of the departmental assembly to approve it, was not a final bar to the proceedings; the governor was in such event bound to send it to the supreme government for its decision; but it was not until its approval was obtained, and the proceedings consummated by delivery of the documents, that the title passed, to any portion of the land, from the Mexican nation.

Another suggestion has been made. It is, that inasmuch as the governor could not legally deliver the grant to the party interested until he had obtained the approval of the departmental assembly, such approval may be presumed from the delivery of the grant. The expediente in this case discloses no action whatever on the part of the junta, in relation to this grant. Besides, such presumption would have to be made in the face of the fact, disclosed by the archives for years, that the governors always issued the grant before the approval of the junta, as evidenced by the testimonios, or certificates, as to the fact of the approval having been subsequently obtained. Lastly, such presumption is forbidden by the grant itself, which declares on its face, that it is issued subject to the approval of the assembly.

We pass now to the authorities which sustain the conclusion to which an examination of the Mexican legislation has conducted us, in relation to the character of the plaintiff's title.

In U. S. v. Cervantes [Case No. 14,768] my associate gave a construction to the regulations of 1828, and viewed a Mexican grant which had not received the approval of the departmental assembly, as a mere inchoate title. The case was carried on appeal to the supreme court of the United States [18 How. (59 U. S.) 553]; but the construction placed by him on the point under consideration was not reviewed, as the appellate tribunal decided the cause on the rulings made by them in the cases of U. S. v. Fremont [Id. 30], and Arguello v. U. S. [Id. 539]. In U. S. v. Reading [Id. 16,127], Commissioner Hall says: "In the present case, although the claimant had received a formal title from the granting officer, and under it had taken possession of the land previous to the occupancy of the territory by the troops of the United States, and was in the quiet enjoyment of it at the time of the cession by Mexico, yet as something remained to be done to perfect his title, viz., the approval of the departmental assembly, his title must be held to be an incomplete and imperfect one." In Edwards v. Davis, 3 Tex. 321, the construction of the fourth article of the colonization decree of 18th of August, 1824, which requires the approval of the supreme executive to grants of land within the ten littoral leagues, came incidentally before the court, and they intimated that had the question been properly before them they would have deemed a grant by the governor of Texas and Coahuila a nullity if it had not received the approbation of the supreme government, in compliance with

the law. In the case of Republic v. Thorn, 3 Tex. 499, the question came up and was decided in accordance with the intimation in the preceding case. In Paschal v. Perez, 7 Tex. 349, the test is given by which the character of an inchoate is to be distinguished from that of a perfect title: "An imperfect title is one which requires a further exercise of the granting power to pass the fee in the lands, which does not convey full and absolute dominion, not only against all private persons, but as against the government, and which may consequently be affirmed or disavowed by the political granting power." In Hancock v. McKinney, 7 Tex. 456, the rule is thus stated: "If the title was perfect it would separate the land in controversy, proprio vigore, from the public domain, and the land would cease to be of the vacant land of the state, unless it so became by the terms of the grant, or by some action of the judicial or political authority of the state."

The distinction between perfect and inchoate titles rests on this basis, that is to say: "If the grant was to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect in præsenti, it is a perfect title, requiring no further action of the political authority to its perfection." "But if there remained anything to be done by the government or its officers, such title or right is imperfect, and until it received the sanction of the political authority, it could not claim judicial cognizance." 7 Tex. 457. Applying these tests to the grant under which the plaintiff claims, we cannot fail to conclude that further action was required from the Mexican authorities, viz., the approval of the departmental assembly to perfect it; in the absence of which the title it conveys must be regarded as imperfect and inchoate, and as such incapable of separating any portion of land from the public domain proprio vigore. It has been urged that the decisions of the supreme court of the United States in the Fremont and other cases, establish that these Mexican grants pass the fee to the land, and constitute such title as will sustain ejectment. Whatever may be the conclusion at which that tribunal may arrive on this point, we see nothing to authorize us to consider that their decisions heretofore made, have gone to the extent contended for. They have determined that these grants pass a vested and immediate interest, and one which should be recognized by a court of equity; and beyond that we do not understand them to have gone. To these grants are annexed certain conditions which are clearly subsequent; and if the title had been complete, the non-performance of them could only have been availed of in the manner prescribed by law for the defeat of legal estates subject to forfeiture. But the titles under the Mexican grants being deemed merely inchoate, were treated as such; and the supreme court enter into a minute examination of the facts of each case with a view to ascertain its equities, and whether the non-performance of subsequent conditions should forfeit the right of the party to have his claim confirmed. It is improbable that if the court had viewed these titles as legal, they would have placed the confirmation of claims under them on equitable grounds.

In the case of Arguello v. U. S. [supra], Mr. Justice Wayne characterizes, in totidem verbis, the Mexican grants which had not received the approval of the departmental assembly, as "equitable titles." For all purposes of this case it is only necessary, regarding them in a court of law, to fix their character as inchoate.

The action of the supreme court of this state, though not very determined, as far as it has gone sustains the conclusion at which this court has arrived, although not for the same reasons. In Leese v. Clarke, 3 Cal. 17, the general principle is affirmed, that a Mexican grant without proof of compliance with the conditions, is at best an inchoate title, and the land passed to the United States, who hold it subject to the trusts imposed by the treaty of cession, and the equities of grantees. This doctrine was reversed in the case of Vanderslice v. Hanks, 3 Cal. 27; but on the rehearing of the former it was reaffirmed. Such has been the doctrine in the highest court of this state since 1852. At the July term, 1856, of the same court, in the case of Gunn v. Bates [6 Cal. 263], two justices presiding, one of them, resting exclusively upon his construction of the decision of the supreme court of the United States, in the Ritchie and Fremont Cases, considered the question no longer an open one, and gave an opinion adverse to the doctrine affirmed in Leese v. Clarke. But the other justice, although he concurred in the decision on other grounds, dissented from the reasons assigned by his associate. He says, "I do not think the plaintiff's title sufficient to sustain an action of ejectment." The doctrines announced in 1852 remain still the exponents of the judicial action of our highest state tribunal.

Upon full examination of the Mexican regulations of 21st of November, 1828, and on the authorities which touch upon the subject, our convictions are, that the title of the plaintiff is inchoate, that the grant under which it is held, segregated no portion of the public domain; consequently, no title to any portion of the land in controversy was divested from the Mexican nation; and lastly, by well settled law, such title gives no standing to the plaintiff in the ordinary tribunals of the country. [Burgess v. Gray] 16 How. [57 U. S.] 48.

It is urged by counsel that if the grant under which the plaintiff claims does not pass a legal estate, it is a colorable title which, accompanied by possession, is sufficient to show the extent of such possession. This principle is applicable to cases where there

is no adverse title, or where the defendant does not dispute the seizin of the plaintiff, and is a mere intruder. An illustration of the application of such principle is to be found in Christy v. Scott, 14 How. [55 U. S.] 282, cited by plaintiff's counsel. The doctrine enunciated there is, that where the plaintiff avers seizin in himself of the premises, and the defendant is a mere intruder, and admits or, what is equivalent in pleading, does not deny the seizin, such intruder may not question the plaintiff's title. "If (say the court) the plaintiff, as his petition avers, was actually seized, and the defendant being an intruder ejected him, it was an unlawful act, and the action is maintainable notwithstanding the state of Texas may have a true title, or may have granted it to another." In the case at bar, the defendants deny the seizin of the plaintiff, and that is an issue to be tried. The plaintiff seeks to establish for himself such seizin by the adduction of a colorable written title, and proof of possession, in the face of an adverse title. In the cases where a plaintiff may thus recover, the defendants are without color of title—mere intruders. But where the defendants show an adverse title, the party must, as the plaintiff has done in this case, rely upon his title-deed. Can the defendants be fairly deemed to be mere intruders without color of title? They claim title from the same source whence the plaintiff derives his. That title may upon investigation prove invalid; but surely those who have gone into possession under claim of title, and have expended large amounts of money on the faith of such title, cannot be considered as intruders, and as such estopped from questioning the title of him who seeks to dispossess them. Independent of an entry under claim of title, there are circumstances in this case which divest the entry of the character of an eviction.

José Fernandez, a witness, swears he was present with others, when judicial delivery of the mine was given to the assignor of the defendants; that during a portion of the time, Berreyesa, the grantee under whom plaintiff claims, was present; that when informed they were delivering possession of the mine, he said, "he did not care for the lomas, but he wanted the valley lands." Another witness, Antonio Suñol, confirmed the foregoing. Such was the character of the original entry, with at least the apparent authority of a Mexican functionary, under the forms of law, and with no objection made by the grantee. This took place in 1845; since then, the defendants, claiming under that judicial act, have been working the mine, thus delivered to their assignor in the presence of the grantee under whom the plaintiff claims. We allude to this testimony solely with a view to show that defendants cannot be regarded as mere trespassers, and thus make their case an exception to the general rule, which demands that the plaintiff must recover on the strength of his own title. Upon the validity of defendants' title, we do not consider we are called on to decide until the plaintiff's right to sustain his action against them be established. If we have not ascertained the character of the plaintiff's title to be inchoate, and therefore not the subject of ordinary judicial cognizance, the inquiry arises, whether, if a legal title passed to the land by the grant, it is in this case in the power of the court to locate the granted premises. If a fee passed, did it attach to all the land included in the boundaries named in the grant, or to the one league it was intended to convey?

It has been urged that, by the terms of the grant, all the lands to the extent of the boundaries mentioned, ascertained by the evidence to be from two to two and a half leagues, vested in the grantee without regard to quantity, which is stated in the grant to be one league; and this, it is contended, is the correct construction of the grant. It is true, that where a conveyance of land is made with specific metes and bounds, although the ambit includes a larger quantity than that mentioned, in the construction of the conveyance mention of quantity is made to yield to boundaries; and it is held that the whole land passes to the grantee. This is a familiar principle of the common law; but its applicability to the case at bar is not perceived. The rule at common law rests upon the presumed intention of the parties; and in order to carry that intention into effect, in the absence of other proofs on the face of the conveyance, the court will reject quantity in favor of boundaries. Hence, where the latter are so specific and distinct as to indicate with certainty the identity of the land intended to be conveyed, the mention of quantity must yield to boundaries that are thus specific; the latter being deemed more convincing proof than the former, of the identity of the land intended to be conveyed. In this case, quantity is not mere matter of description. It enters into and is inseparable from the thing granted. There are two conditions annexed to the grant, and forming a part of it. The second condition requires the party to solicit the respective justice to give judicial possession, by whom the boundaries should be marked out, &c. Whence the necessity of having the boundaries marked out, if they had been so designated in the grant that the land intended to be conveyed could be identified? The third condition stated that the land of which mention is made, is one league, referring to the diseño, and prescribes that the justice who may give the possession, will have it measured conformably to ordinance, leaving the surplus to the nation, for the uses which may suit. There was not necessity for any provision in the grant for measurement, nor would there have been a reserve of the surplus, had it been intended to convey the

whole. So far from the grant operating to pass to the grantee a right of possession to the whole, the ordinance to which reference is made in the grant shows that no right of possession passed under the grant, proprio vigore. One of the articles expressly declares: "That no person, although he may have an older grant than others, can himself take possession, survey, or mark out his landed property, unless by judicial authority, and by citation of his neighbors; therefore whatever is done otherwise shall be null, of no value or effect." Ordinanzas de Tierras y Aguas, 94.

There can be little doubt that the interest intended to be conveyed was to a certain quantity of land; and the name of the ranch of which it formed a part, and its general boundaries, given to indicate the tract from which that quantity was to be taken by the agent of the grantor and, after such segregation, possession thereof delivered by him to the grantee. By reference to the expediente of the plaintiff, it will be seen he was aware of the quantity of land conveyed in his grant. By a petition presented by him on the 10th of February, 1844, to the governor, he stated that he had received a grant, and had returned it because it had subjected him to one league, whereas he had solicited two; and he requested that a dispatch might be sent him for two leagues. So far as the evidence goes, there is no reason to suppose his prayer was acceded to; and the grant under which plaintiff claims is believed to be the one once repudiated by him, because it subjected him to one league. On this petition there is an indorsement by M. Jimeno, the secretary, which shows the views entertained of the grant by the Mexican authorities. It recites that: "To the person representing these, was granted a single league, as is shown in the respective expediente; and if his pretension is to have more extension, it would be proper for the justice of the pueblo of San Jose to make report, after summoning the adjoining neighbors, especially the neighbor Justo Larios, with whom he formerly had a dispute."

We have heretofore had occasion to express our views in relation to the system of granting lands which formerly existed in California. Neither the grantor nor the grantee had the means of defining quantity by measurement No actual surveys, under the Mexican rule, have come to the notice of this court; and we believe the true condition of things as it existed, is correctly stated in the instruction by the department of the interior of the United States to the board of commissioners, on the 11th September, 1851: "There are, it is believed, no Spanish or Mexican plats of survey extant, of lands in California; no actual surveys, so far as this office is advised, having ever been executed during the sovereignty over the country of either Spain or Mexico." Under this state of affairs, metes and boundaries were inserted in the grant merely to indicate the general locality, from which the number of leagues conveyed were intended to be taken. The grantor presented a rude sketch, dignified with the name of a diseño or map, on which certain outward boundaries were described, without regard to distances, and in some instances without true indications as to their bearings, the prominence of which objects seemed to have been the inducement for calling for them. Within these exterior boundaries was the land needed; and the petitioner, in his application for it, described it in effect as so much land bounded by those exterior limits; and by such description it was granted. The grantor, equally ignorant of quantity, guarded the public interest by specifying the number of leagues granted, reserving the surplus to the nation, and protecting that surplus by securing its segregation before the owner could obtain legal possession of the land granted. In a word, conjectural estimates were substituted for actual surveys; and in such a system the mention of quantity, as a word of limitation, is more significant than in a common-law conveyance.

To apply rules of construction which regulate the system of common-law conveyancing, in all cases, to one so anomalous as that which existed in California, would be impracticable, and defeat the object at which the common law aims viz., to carry out the intention of the parties. The rule of construction as laid down by the supreme court of the United States is, that the words of a grant are always construed according to the intention of the parties, as manifested in the grant by its terms, or by reasonable and necessary implication, to be deduced from the situation of the parties and the thing granted. [U. S. v. Arredondo] 6 Pet. [31 U. S.] 740. Submitted to this test, we cannot consider that the whole land passed in this case.

We have not overlooked the fact that it was customary to annex similar conditions, as to quantity, to Mexican grants indiscriminately. To those where no surplus of land could exist, as well as to those where the quantity included in the general locality greatly exceeded that intended to be granted. But such usage affords no good reason to regard all conditions as to quantity, annexed to every species of grant, as formal and inoperative. In one class of cases, while the insertion of such conditions evidence an intention to reserve a portion of the land included in the outward boundaries, such evidence is rebutted by the fact that no surplus could remain, or was contemplated to exist. In the other, the existence of a large surplus over the amount intended to be granted, clearly evidenced that there was something more than form which led to the annexation of conditions as to quantity. In each class of cases it is the duty of the court to apply the rule of construction given by the supreme court of the United States, that a

grant is to be construed according to the intention of the parties, as manifested by the words of the grant, aided by reasonable implication, deduced from the situation of the parties and the thing granted. [U. S. v. Arredondo] 6 Pet. [31 U. S.] 740. We do not desire to be understood to mean, that when land is sufficiently described by boundaries, and the quantity of land included within them approximates to the number of leagues granted so nearly that the excess might be deemed to be covered by the words "more or less,"—that we would give to the conditions annexed to such a grant, restricting quantity, the consideration we feel constrained to give to cases where there is a large excess over the quantity intended to be conveyed.

All that has been said in relation to the question whether the whole land described in the grant, in this case, passed to the grantee, has been predicated upon the assumption that a fee passed on the execution of the grant to the grantee. But our conclusion, as above stated, is that the grant, never having been executed by the granting power, according to law, divested no portion of the land from the Mexican nation, and consequently passed no legal estate to the grantee, on which this action can be sustained.

In the view entertained by the court on this point, it is perhaps unnecessary to consider the remaining suggestions of plaintiff's counsel, in relation to the location of the granted land. But it has been argued with zeal by counsel, and demands, for that reason, some attention. It is urged, that if the whole land did not vest in the grantee, the plaintiff is entitled to one league; and that the land is sufficiently described to enable the court to locate it. That the western boundary, the dividing line between the ranchos of Berreyesa and Justo Larios, is sufficiently defined; and, making it the base line, the league may be run off. Days have been consumed in ascertaining how this line should be run; and after the closest examination it is not found to be more certain than the northern line; and this latter is the boundary first named in the grant, whereas the western is the last one called for. Between these two lines, a selection may be attended with serious consequences to the respective parties, a selection we do not think within the appropriate province of this court to make.

It is evident, that the grant is subject to be located at different places by the selection of different base-lines; and such fact precludes the action of this court.

In Stanford v. Taylor, 18 How. [59 U. S.] 409, the concession was for forty by forty arpens in extent, along the river "Des Peres," from the north to the south, which is bounded on the one side by the lands of Louis Robert, and on the other by the domains of the king, &c. The supreme court say, in relation to this concession, which had been confirmed and thus become a perfect title: "On which side of Louis Robert's land it is to lie, we are not informed further than that it is to lie along the river from north to south. The uncertainty of out-boundary in this instance is too manifest, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land." The decision in this case turned upon the point that the land admitted of two locations. It is settled law that—"where a claim to a specific tract of land has been confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment; but where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land; nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department." [Stanford v. Taylor] Id.

The one league of land in this case, from the description of the outward boundaries, admits of different locations; and the grant itself carries with it a condition calling for a survey. The interposition, therefore, of the executive is necessary to give a separate existence to the specific land to which the estate can attach. [Ledoux v. Black] Id. 473. The right of the plaintiff is a jus ad rem, not a jus in re. He is certainly entitled to one league of land, but he is entitled to it on the terms mentioned in his grant: the league was to be severed by the grantor. The law which existed at the time of the grant and referred to by it declared, as we have seen, any possession a nullity unless previously measured by the proper officer of the government. No public survey of the land had been made anterior to the treaty of Guadalupe Hidalgo. By that instrument the land passed to the United States, subject to the plaintiff's right, and with it passed also the right of segregation. This is a political act, and belongs not to this court.

In Fremont's Case, the supreme court say: "Under the Mexican government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. * * * The right which the Mexican government reserved, to control this survey, passed with all other public rights to the United States; and the survey must now be made under the authority of the United States; and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract."

But setting aside all considerations in relation to the power of this court to locate the granted premises, we place our decision on the ground that the documentary title produced by the plaintiff himself must control his rights, and that under it no legal estate passed which can maintain the present ac-

tion. The attorneys for the defendants will submit the draft of a verdict in favor of the defendants for the signature of the judges.

[See Case No. 14,070.]

Case No. 14,070.

TOBIN v. WALKINSHAW et al.

[1 McAll. 186.] [1]

Circuit Court, N. D. California. July Term, 1856.

ALIENS—CITIZENSHIP—ACTS AND DECLARATIONS—INTERNATIONAL LAW — CEDED TERRITORY — TREATY — FOREIGNER NATURALIZED IN MEXICO BEFORE CESSION OF CALIFORNIA.

1. Acts and declarations of a party as to his intention in remaining in or removing from a country, though not simultaneous with his act, are, under special circumstances, admissible to prove the intention with which he acted, if made ante litem motam.

[Cited in Doyle v. Clark, Case No. 4,053.]

2. Where the intention or knowledge of a party becomes a material fact, acts and declarations, although collateral to the main subject, still, having a bearing upon it, are admissible as evidence.

3. By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former government are changed, and new ones arise between them and the new government.

[Cited in State v. Boyd, 31 Neb. 721, 48 N. W. 739, and 51 N. W. 602.]

4. The manner in which this is to be effected, is ordinarily the subject of treaty.

5. The contracting parties have the right to contract to transfer and to receive respectively the allegiance of all native-born citizens, but the naturalized citizens, who owe allegiance purely statutory, when released therefrom, are remitted to their original status.

This action was ejectment, and defendants pleaded to the jurisdiction of the court, on the ground that Alexander Forbes, one of the defendants, was not an alien and subject of Great Britain, as alleged in the complaint. Issue was taken by replication, and submitted to the jury, who returned a verdict in which they found that James Alexander Forbes, one of the defendants in this case, was, at the time of the institution of this suit, an alien and subject of Great Britain. A motion is now made to set aside the verdict of the jury, on the grounds,—1. That testimony as to the acts and declarations of the party done and made ante litem motam, tending to show what country he elected to adopt, was improperly permitted to go to the jury. 2. That the verdict was contrary to the facts.

[For former proceedings, see Cases Nos. 14,068 and 14,069.]

Howard & Gould and E. W. F. Sloan, for complainant.

Peachy & Billings, for defendants.

McALLISTER, Circuit Judge. To sustain their plea, defendants relied on the admitted facts, that said Forbes, a native of Great Britain, was at the date of the treaty of Guadalupe Hidalgo a naturalized citizen of Mexico, that he has continued to reside in California since the execution of the treaty, and that he has never made any declaration of an intention to retain the rights of a Mexican citizen. These facts, it was contended, with the subsequent admission of California into the Union, fixed at once and by mere operation of law, the status of American citizenship upon the defendant Forbes. To disaffirm the plea, and sustain the allegation that defendant was an alien, plaintiff proved that in 1851 the defendant, against whom two actions at law had been instituted in the courts of this state, petitioned for their removal, and had them removed, from the state courts into the district court of the United States for the Northern district of the state of California (then exercising circuit-court powers), on the ground, that he was, at the time, an alien, and subject of the kingdom of Great Britain. That to accomplish that object, he executed bonds reciting that fact, and his attorney, under his instructions, swore to the fact. It was also in proof, that in the same year (1851), a suit was brought on the equity side of said district court; and to the bill filed the answer of defendant admitted that he was at that time an alien, and subject of Great Britain. Lastly, it was deposed by a witness whose testimony was not attempted to be impeached, that the defendant, in 1851, told him he was not a citizen of the United States, that he did not intend to become one at present, because he desired to be able to litigate in the courts of the United States. To the testimony sustaining the plea, objections were made by attorney for defendants, on the ground of incompetency, and were overruled by the court. This verdict is in the opinion of the court, fully sustained by the testimony given, and the only ground on which it can be set aside is, that the evidence was improperly admitted to go to the jury. In the view the court will hereafter take of this case, the question of the competency of the testimony might be dispensed with. But as it may not be inappropriate to allude to this testimony, the court will briefly advert to the objections made to its competency.

The argument of counsel is, that the provisions of the treaty of "Guadalupe Hidalgo," with the residence of defendant in California, being a naturalized citizen of Mexico, for a year after the date of that instrument; the fact that no evidence was produced to prove defendant ever made a declaration of his intention to retain the rights of a Mexican citizen, together with the admission of California into the Union, all fixed, once and forever, upon the defendant the status of an American citizen, which cannot be altered by the testimony. The consideration of this argument involves, to

[1] [Reported by Cutler McAllister, Esq.]

some extent, a construction of the article of the treaty of Guadalupe Hidalgo, upon which it is predicated. This article stipulates as to those Mexicans who should prefer to remain in the ceded territory, that they may either retain the title and rights of Mexican citizens, or acquire those of American citizens; but declares that they shall be under the obligation to make their election, within one year from the date of the exchange of the ratification of the treaty, and those who shall remain after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become citizens of the United States. We will first consider this article as giving a right of election. If he elected to retain the character of a Mexican, he was to manifest it by a declaration, whether in writing, verbally, or by matter of record, is not stated. The treaty is more indefinite as to the manner in which he is to manifest a contrary intention. In fact, it prescribes no way in which he is to manifest his intent not to become a citizen of the United States. The omission to make a declaration to continue a Mexican, and his residence for a year after the date of the treaty, would be prima-facie evidence of his election to become a citizen of the United States. There is also one rule of evidence prescribed by the treaty as to his intention, the fact of his remaining in the country without having made any declaration of his intention. This cannot be deemed conclusive testimony, for election presupposes intention; it is an operation of the will. If the legal conclusion be absolutely fixed upon him in despite of the intent or the purpose of his residence, what becomes of the right of election?

In Inglis v. Sailors' Snug Harbor, 3 Pet. [28 U. S.] 123, the court say, "How, then, is his father, Charles Inglis, to be considered?—was he an American citizen? He was here at the time of the Declaration of Independence, and, prima facie, may be deemed to have become thereby an American citizen. But this prima-facie presumption may be rebutted; otherwise there is no force or meaning in the right of election." Considering, then, for the present, that the right of election had been clearly given to the defendant, the question is, not what do his feelings or interests now prompt him to do, but what did he do within the year his right of election existed. On one side, we have the prima-facie evidence prescribed by the treaty, his continued residence, and the fact that in the year 1851 he had voted at a corporation election. To counteract these, we have solemn legal instruments executed by defendant, describing himself as an alien and subject of Breat Britain. Availing himself of that allegation, he removed cases brought against him from the state to the federal courts, filing an answer in a court of equity, in which he swore to the fact—his attorney, under his instructions, swearing to the same fact, and himself not only stating that he was not a citizen of the United States, but did not intend to be, as he wished to be able to litigate in the courts of the United States. To all these acts and declarations, it is urged, they are incompetent evidence, because done and said after the expiration of the time within which the right of election was to have been exercised. The general rule of evidence undoubtedly is, that acts and declarations not done and made simultaneously with the factum probandum, and not forming part of the res gestæ are inadmissible. Yet if an alleged fact cannot exist together with other facts, the proof of the latter facts disproves the existence of the former. If the declarations and acts of Forbes in 1851 were established, they would necessarily disprove the alleged fact that he had previously elected to become a citizen of the United States. They were, therefore, to be left to the jury. It is settled, that the declarations and acts of a party are admissible to qualify and explain his intention in removing, or the character of his residence, in a question of domicil. And it is to be borne in mind that we are considering the admissibility of this testimony in view of a construction of the treaty, which gives to a party a right to elect whether he will retain the title and rights of a Mexican, or take those of a citizen of the United States. To exercise this right, there was no necessity, under the treaty, that there should have been an actual removal, nor is such actual removal the only evidence that the right of election has been exercised. In the case of Inglis v. Sailors' Snug Harbor, 3 Pet. [28 U. S.] 123, the court say, "It surely cannot be said that nothing short of actually removing from the country before the Declaration of Independence will be received as evidence of election." And the court proceeds to consider the acts of the party, adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts beside that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar, defendant remained in this country, and, with a view to ascertain his intention in remaining, his acts and declarations, though made subsequently to the time, were left to the jury to find in what manner he had elected.

But there is another aspect in which the testimony may be received. It constitutes by reason of its character an exception to the general rule, that declarations and acts not forming a part of the res gestæ are inadmissible. That exception applies to cases where the intention of a party becomes material, in which cases facts evidencing the intention, although collateral and foreign

to the main subject, still, as having a bearing upon the question of intent, are admissible. In Wood v. U. S., 16 Pet. [41 U. S.] 360, it is said, in questions "where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." Now, if the right of election was awarded to the defendant, and it was not the intention by the rule of evidence the treaty creates, to force upon the party who remained in the country American citizenship contrary to his intent (which we think is not the case), then the intent of the party in remaining becomes a material question; and matter en pais—such as the acts and declarations of the party—although not forming a part of the res gestæ, are admissible so far as they serve to show the intent. In the Inglis Case, hereinbefore cited, the court went into the consideration of the acts and doings of the party for a series of years, to ascertain what election he had made at a particular time anterior to them; and say, "Those lead to the conclusion that it was the fixed determination of the party, at the Declaration of Independence, to adhere to his native allegiance." In fact, intent is best known to the party, is often secret until developed by acts and speech. "Acta exteriora indicunt interiora secreta." Lastly, this testimony is admissible as admissions made by a party through his declarations and acts spoken and done ante litem motam, and opposed to the right he now seeks to maintain.

But the court does not consider that the right of election was given to the defendant by the treaty of Guadalupe Hidalgo; and therefore the discussion as to the admissibility of testimony might have been dispensed with. The intention of the 9th article of that instrument was to fix the status of all Mexicans who should prefer to remain in the ceded territory. By a principle of international law, on a transfer of territory by one nation to another, the relations of the inhabitants towards each other undergo no change; but their relations with their former sovereign are dissolved and new ones between them and the government which has acquired their territory are created. The same act which transferred their territory, transfers the allegiance of those who remain in it, and the law which may be denominated political is changed. American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 542. This right to change the political relations of the inhabitants of a ceded territory arises out of the character of those relations as recognized by the law of nature and nations. Birth binds man by the tie of natural allegiance to his native soil, and such allegiance gives, by the principles of universal law, to the country in which he was born rights unknown to mere voluntary or statutory allegiance. Upon the right to transfer this natural allegiance has been engrafted, this right of election in the party whether he will retain his allegiance to his old sovereign, or pay allegiance to the new. Should he elect to retain his allegiance, he must do so without injury to the new government; and such election is generally accompanied by removal from the country, unless regulated by treaty. The object of the treaty of "Guadalupe Hidalgo" was to regulate the exercise of this right of election by such parties as by the principles of international law were subject to their jurisdiction as contracting parties. The Mexican government stipulated for a right for Mexicans resident in the territory, to elect at any time within a year after the date of the treaty to retain their title and rights as Mexicans; the government of the United States guarded against the abuse of the right, by limiting the time within which it was to be executed, and stipulating that if the election was not made within the time limited, they should be considered as having elected to become citizens of the United States. The right of the two governments thus to stipulate in relation to native-born Mexicans, under the law of nations, is unquestionable. It was evidently proper that the status of all such should be fixed. If they were neither to continue Mexican citizens nor become citizens of the United States, a whole people would become disfranchised. They would have no status as citizens, owe no allegiance, and be left in the anomalous position of a people without a country. Not so with the defendant Forbes. So soon as he had been released from the voluntary allegiance to Mexico, he was remitted to his original status. No power existed in one government to transfer, or in the other to receive, the voluntary or statutory allegiance of a naturalized citizen. Neither had the right to say to such, "You shall continue your allegiance to Mexico, although she has conveyed it away; or you shall become a citizen of the United States." The allegiance of the naturalized citizen is the offspring of municipal law. Unlike natural allegiance, its support does not rest upon the law of nature and the code of nations. The only relations that Mexico or the United States could change, were those arising from those sources. Nor does the language of the treaty anthorize the conclusion that the contracting parties intended to include within the word "Mexicans" naturalized citizens of foreign countries. The language of the treaty of Guadalupe Hidalgo, differs materially from that used in the treaty by which Florida was acquired in 1819, and the treaty of Paris, in 1803, by which Louisiana was ceded to the United States. In the 8th article of the treaty of Guadalupe Hidalgo, Mexicans are only mentioned as entitled to the rights of election. The whole of this arti-

cle refers to Mexicans; and the 9th article speaks of "Mexicans" only, and provides, that those who do not preserve the character of Mexican citizens shall be subsequently incorporated into, and become entitled to all the rights of citizens of the United States. Naturalized citizens are nowhere included eo nomine, within the provisions of the treaty; and in the opinion of the court, it was not intended to include them. This construction of the treaty is sought to be defeated by the assumption, that the change in the political relations of the inhabitants of the ceded territory was contemplated to be made by the treaty with their consent by giving to them the right of election; hence, that it is to be reasonably concluded that naturalized citizens were intended to be included in the term "Mexicans." The answer is, first, it is a violence to the language of the treaty so to construe it; secondly, the allegiance of the naturalized citizen was not a subject of transfer between the contracting parties; and thirdly, the argument surrenders the whole question: because if the defendant was included in the treaty, his consent was essential to entitle him to exercise the right of election. This is the very question found by the jury on the trial of the issue of election or no election, upon evidence the court considers competent on the trial of such an issue. In a word, if the defendant Forbes, a naturalized citizen of Mexico, is to be brought within the provisions of the treaty because he consented to them, then his consent, involving intention and election, is an issuable fact which has been found against defendants by the jury. But in the opinion of the court, the election was given only to Mexicans who remained in the ceded territory longer than one year after the date of the treaty, who were during that interval to select to retain Mexican rights, or be considered citizens of the United States. Both governments had the right so to negotiate in regard to Mexicans; but in relation to the defendant Forbes, a naturalized citizen, his voluntary allegiance might be released by Mexico—not transferred. On his release, he was remitted to his original status of a British subject, derived from his birth; and the courts know no principle of law which would authorize the government of the United States to compel the transfer of the defendant's voluntary allegiance from Mexico to themselves. The contracting parties did not intend to do so. The court considering the defendant without the provisions of the treaty, his claim to be a citizen of the United States under them cannot be sustained; and he stood at the execution of the treaty, and now stands, where his acts and declarations and original status have placed him—an alien, and subject of Great Britain.

The motion to set aside the verdict in this case, must be overruled.

TOBIN, The ELLEN. See Case No. 4,379.

TOBY (GOODYEAR v.). See Case No. 5,585.

Case No. 14,071.

TOBY v. RANDON.

[6 West. Law J. 218.]

District Court, D. Texas. 1849.[1]

SLAVERY IN TEXAS.

Thomas Toby sued David Randon on two promissory notes, amounting to $3,500. The defendant contended that the money was not justly due, as the property he received for the notes was slaves, natives of Africa, who were brought through Cuba contrary to the laws of Spain, and taken to Texas in 1835, in violation of the laws of Mexico. The plaintiff contended that at the time of the Revolution the negroes were held in slavery, their condition was fixed by the constitution of the republic of Texas of 17th March, 1846.

WATROUS, District Judge, sustained the plea of the defendant, and gave judgment in his favor.

[The cause was carried by writ of error to the supreme court, where the judgment of this court was affirmed, with costs. 11 How. (52 U. S.) 493.]

Case No. 14,072.

[Ex parte TOCHMAN.

[1 Hayw. & H. 268.][2]

Circuit Court, District of Columbia. May 22, 1847.

PRACTICE AT LAW—ORIGINAL PAPERS—LEAVE TO WITHDRAW—COPIES.

The general rule that the original papers filed in a suit shall not be withdrawn without leaving attested copies does not apply to a case in which there are no parties litigant before the court, and the court sees no use in retaining them.

At law.

Motion to withdraw papers filed with his answer to Mr. Bradley's information.

On the 19th of May, 1847, after THE COURT had given its opinion in regard to the information given by Mr. Bradley to the court containing certain charges against Mr. [Gaspard] Tochman, but not asking for any specific remedy or proceeding against him, Mr. Tochman moved for leave to withdraw the papers which he had filed with and referred to in his answer to those charges, THE COURT having decided that the case did not in his opinion call for the exercise of its summary jurisdiction. As the information did not ask for any specific remedy, but left the subject entirely to the discretion of the court, it seems to be a question between Mr. Tochman and the court only whether the court shall permit the papers filed by him

[1] [Affirmed in 11 How. (52 U. S.) 493.]

[2] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

to be withdrawn without leaving attested copies. There being no parties litigant before the court, the general rule, that the original papers filed in a suit shall not be withdrawn without leaving attested copies, does not seem to be applicable to the present case. There is no person who can claim any right to have the papers retained, and we can see no use in retaining them. If, however, any person desires to have copies of any of them before they are withdrawn, the court will permit such copies to be taken at the cost of the persons requiring the same, and for that purpose the papers will remain as they are until the 29th day of this month, on or after which day the papers filed by Mr. Tochman with his answer as aforesaid may be withdrawn by him.

By order of THE COURT.

TOCHMAN (BRADLEY v.). See Case No. 1,788

TOCHMAN (FENDALL v.). See Case No. 4,726.

TOD (THOMPSON v.). See Case No. 13,978.

TODD (ALEXANDER v.). See Case No. 175.

TODD (BICKNELL v.). See Case No. 1,389.

Case No. 14,073.

TODD v. CRUMB.

[5 McLean, 172.] [1]

Circuit Court, D. Ohio. Oct., 1850.

LIMITATION OF ACTIONS—JUDGMENT—POLICY OF STATUTE—PLEA.

1. The statute of limitations of Ohio does not bar an action on a judgment.

[Cited in Randolph v. King, Case No. 11,560.]

[Cited in Fries v. Mack, 33 Ohio St. 58; Stockwell v. Coleman, 10 Ohio St. 42.]

2. A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty.

[Cited in Burns v. Simpson, 9 Kan. 662; McAfee v. Covington, 71 Ga. 272; O'Brien v. Young, 95 N. Y. 431; Peerce v. Kitzmiller, 19 W. Va. 574; Tyler v. Winslow, 15 Ohio St. 368.]

3. Nor is a judgment barred by the provision, that four years shall be a bar to all actions not enumerated in the statute.

4. It would be inconsistent with the policy of the statute, to bar a judgment in four years, while fifteen years are required to bar a promise in writing.

5. To an action on a judgment, the defendant cannot, in his plea, contradict the record.

[This was a suit by Zerah Todd against Stephen Crumb.]

Mr. Parsons, for plaintiff.

OPINION OF THE COURT. This suit is brought on a judgment rendered in the state of New York. The defendant filed four pleas: 1. Nul tiel record. 2. Satisfaction. 3. Statute of limitations of fifteen years. 4. The limitation of four years. To the 3d and 4th pleas the plaintiff has demurred, and the case on the demurrer is now submitted. This question arises on a construction of the statute of limitations of this state, and it appears the point has never been ruled by any of the courts of the state. The statute provides, "that all actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, must be brought within fifteen years." And in the same section it is provided, that "all other actions not herein enumerated, must be brought without four years after such right of action shall have accrued." As the action before us is founded upon a judgment, it becomes a question whether it is barred by the statute. It must be observed that the actions by name are not barred, without reference to the causes on which they are founded. An action, whether it be upon the case, covenant, or debt, is barred in fifteen years, if it be founded upon an obligation in writing, and not otherwise. This cannot apply to an action brought on a judgment, as that is not an agreement in writing, nor is it a specialty in the legal sense of that term. Can the other provision of the act apply: "All other actions not herein enumerated, must be brought within four years after such right of action shall have accrued"? This evidently applies to a contract, written or parol, where the time of action accrues. This cannot be said of a judgment strictly, as it has reduced the right of action to judgment. Besides, it would seem to be inconsistent with the policy of the act, to require a suit to be brought in four years from the rendition of a judgment, when fifteen years is the limit to an action on a note of hand or other agreement in writing. There being no provision of the statute which bars a judgment, it follows there is no limitation to an action brought upon it. The demurrer to the pleas therefore is sustained. The defendant made affidavit that he had never been served with process, in the suit where judgment was obtained against him: and that he never employed an attorney to appear for him. From the record in New York it appears the declaration was filed against the defendant in custody, &c. It has been held in New York, that to an action brought on a judgment the defendant may deny in his plea the service of process, even in contradiction of the record. But the correctness of this ruling may well be doubted. If the fact of service of notice appeared from the record, it would seem that the record can no more be contradicted, in this respect, than any other fact apparent on the record. But as this question is a new one in this court, leave is given the defendant to file his plea, subject to exception; and the cause was continued.

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

Case No. 14,074.

TODD v. The EUPHRATES.

[Nowhere reported; opinion not now accessible.]

TODD (HOWELL v.) See Case No. 6,783.

Case No. 14,074a.

TODD et al. v. The JAMES ADGER.

[22 Betts, D. C. MS. 115.]

District Court, S. D. New York. 1855.[1]

COLLISION — RATE OF SPEED AT NIGHT — ENGLISH RULE AS TO LOOKOUT — CHANGING COURSE IN UNCERTAINTY — CARRYING LIGHTS BY SAILING VESSEL.

[1. Collision occurs at sea between steamer and schooner; steamer carrying accustomed lights, and moving at rate of 9½ knots; schooner going at rate of 2½ or 3 knots, and displaying no standing lights, but raised a lantern as a signal when the steamer was observed nearing her, but far enough away to enable steamer to avoid her had it been seen. The schooner was not seen by the steamer until it was too late. *Held*, that the collision was the fault of the steamer; that when moving at night a steamer should keep a proper lookout, and reduce its speed.]

[2. A vessel should not change its course in uncertainty when in danger of collision.]

[3. A schooner is not bound by maritime law to carry lights while under way.]

[This was a libel by William J. Todd and others against the steamboat James Adger to recover damages for a collision.]

BETTS, District Judge. Collision between the schooner Trader and the steamboat James Adger off Barnegat, on the high seas, at one o'clock a. m.; the schooner coming from the south towards New York and the steamer on her voyage from New York to Charleston. The schooner was running on a light breeze from N. E. by E., and was heading about S. S. E.; the steamer running by steam only, without sails, but with the wind abeam. The steamer's starboard side struck schooner's larboard bow. The schooner was abandoned by the crew, and was lost. The steamer carried the accustomed lights, one on each paddle box and one aloft, and had two competent lookouts stationed forward. The schooner was not seen from her until directly on the collision, and when no time remained to avoid her. The schooner carried no standing lights, but raised a lantern as a signal when the steamer was observed nearing her, but far enough off to enable the steamer to avoid her, had it been discerned. The steamer was running nine and a half knots. The wind was light, and schooner had little more than steerage way on her going 2½ or 3 knots. A vessel with sails at the time might be seen a sufficient distance from the steamer to enable the latter to keep away from her. The steamer, on discovering the schooner, starboarded her helm, and within a minute and a half, as estimated, struck her starboard bow on the larboard side of the schooner. She did not know the course of the schooner. If she had ported her helm, it would have carried her under the stern of the schooner. Schooner also ported her helm at same time, but vessel did not feel it. The schooner was not bound by the maritime law to carry lights whilst under way. Jones v. The Hanover [Case No. 7,466]; The Delaware v. The Osprey [Id. 3,763]; The Iron Duke, 2 W. Rob. Adm. 385. She did all that was incumbent on her in exhibiting and waving a light as a warning to the steamer. Jones v. The Hanover [supra]. By the English rule it was the duty of the steamer, if the darkness was so thick as to disable her from discovering vessels ahead, to reduce her speed to a slow rate, and call on deck the disposable part of her crew, to aid in keeping watch. The Europa, 2 Eng. Law & Eq. 562. This, until recently, has been regarded to be substantially the law in United States courts. The Bay State [Case No. 1,148]; Fish v. The Black Warrior [Id. 4,813]. Particularly when the steamer was in a thoroughfare of other vessels. A decision of the United States supreme court would seem to hold a steamer, when she has the usual lookout properly stationed in the night time, excused from liability for a collision happening because the lookout did not discover a sailing vessel ahead upon which she runs. The Columbus, 17 How. [58 U. S.] 181. This decision, if correctly understood, restrains and qualifies the rule of responsibility of the ship for lack of diligence or failure of a lookout to discern and give warning of vessels on the track of steamers. But keeping within the broadest latitude of that decision, the steamer was culpable in this case in particular after receiving notice of the schooner being ahead. First, that the lookout did not notify the officer on deck of the course the schooner was running; second, that the steamer did not stop headway and back her engine; third, that she starboarded her helm, when in case of doubt and uncertainty it was her duty so to do. This duty is fastened upon her by the decision in the case of The Columbus, 17 How. [58 U. S.] 181. The court hold it clearly her duty to stop the engine and back from the danger, and particularly not change her course in uncertainty. So is the English law. The Perth, 3 Hagg. Adm. 414; The Rose, 2 W. Rob. Adm. 1; The James Watt, 2 W. Rob. Adm. 270. If she did not know the position and course of the vessel ahead, or made any variation of her own course, she was bound to port her helm. The Neptune, 10 How. [51 U. S.] 558. It was a fault of the lookout in not calling out the position and course of the schooner. The evidence is she would have been avoided by the steamer had not the latter starboarded her helm. The steamer was also in fault in keeping up a speed of

[1] [Affirmed in Case No. 7,188.]

9½ to 10 knots, if the night was so thick and dark that she could not make out a vessel ahead in time to keep clear of her, although she had competent lookout stationed. The Rose, 2 W. Rob. Adm. 1; The Virgil, 2 W. Rob. Adm. 201; [Newton v. Stebbins] 10 How. [51 U. S.] 606. It is incumbent on steamers running in thick weather to hold themselves under such management that they can steer from or back out of the way of any vessel within the distance such vessel may at the time be discoverable from her by the use of reasonable diligence.

Upon the facts in proof the collision must be attributed to the omissions and mistakes of those in charge of the steamer, and in no way to any fault on the part of the schooner. A decree must be entered that the libellants recover their damages, and that the steamer be condemned therefor, and that a reference be had to a commissioner to compute and ascertain the damages. On the reference evidence can be given whether the loss of the vessel might have been avoided by proper efforts on the part of her crew, &c. Decree accordingly.

[The claimant subsequently appealed to the circuit court, where the decree of this court was affirmed. Case No. 7,188.]

TODD (MARYLAND v.). See Case No. 9,220.

Case No. 14,075.

TODD et al. v. TOWNSEND.

[9 Am. Law Rev. 150.]

District Court and Circuit Court, D. Connecticut Aug. Term, 1874.

BANKRUPTCY—MORTGAGES FRAUDULENT AS TO CREDITORS.

[A mortgage made by a bankrupt purported to be given to secure a present existing debt, due and bearing interest, and specifically described in the mortgage as evidenced by a promissory note mentioned. It was in fact given, however, in part as security for other debts already secured by other mortgages, and in part for possible future loans or advances which the mortgagee might make and probably expected to make or procure, but which he was not bound by any agreement to make or procure, and in respect to the making or procurement of which no definite plan was settled between the parties. *Held*, that the mortgage was fraudulent and void as to creditors, and should be set aside at the suit of the assignee in bankruptcy.]

In this case THE COURT, on a bill in equity by [Alfred Todd and Philando Armstrong], assignees in bankruptcy [of George T. Newhall, against James M. Townsend], set aside a mortgage which was given in good faith, but so drawn as to be voidable by the bankrupt's creditors for constructive fraud; holding that the assignees in bankruptcy had all the rights, in this respect, of attaching creditors.

[An appeal being taken to the circuit court by the defendant, the opinion of that court is as follows:]

WOODRUFF, Circuit Judge. I concur in the opinion pronounced in the court below that the mortgage in question herein is void as against the creditors of the bankrupt. This seems to me established by the decisions of the courts of the state, and to be in conformity with sound principle. In reference to the late cases in the supreme court of Connecticut, relied upon by the appellant, it appears on a careful examination that, while the court sustained the mortgage there in question as good and valid between the parties, it is carefully stated that the rights of creditors are not involved. Potter v. Holden, 31 Conn. 385. It is also noticeable that in the present case the mortgage is not only liable to the objection that whereas it purports to be given for a present existing debt, due and bearing interest, and specifically described as in and by a definitely mentioned promissory note, it was given and intended, not alone as a security for possible future loans or advances, which the mortgagor might and probably expected to make or procure, but which he was not bound by any agreement to make or procure, and in respect to the making or procurement of which no definite plan or mode of procedure was found or settled between the parties, but it appears also that it was, as to ten thousand dollars (part of the sum mentioned therein), intended as security for other debts already secured by other mortgages, and as to this it was, without any intention or any circumstance to put creditors upon enquiry, an acknowledgment of indebtedness for twenty thousand dollars, and an incumbrance of real estate to that amount, when the true debt was ten thousand dollars only. On both grounds the mortgage should be held void as a fraud upon creditors, directly tending to deceive, hinder, and delay them. If void as against creditors, then, upon the grounds stated in Re Leland [Case No. 8,234], and other cases cited by the district judge, the assignee is entitled to a decree.

The state of my health forbids my entering more fully into a discussion of the arguments most ably presented by the counsel for the appellant.

Let the decree be affirmed, with costs.

[See 91 U. S. 452.]

TODD (TOWNSEND v.). See Case No. 14,118.

TOLAND (SCOVILLE v.). See Case No. 12,553.

Case No. 14,076.

TOLAND v. SPRAGUE.

[14 Am. Jur. 302.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1834.

COURTS — FEDERAL JURISDICTION — CITIZENSHIP — FOREIGN DOMICIL.

Whether the circuit court of the United States in one state has jurisdiction of a suit against a citizen of another state, domiciled and resident in a foreign country, by process of foreign attachment, the defendant himself not being in the district at the commencement of the suit, and not served with the process.

[This was a suit by Henry Toland, a citizen of the state of Pennsylvania, against Horatio Sprague, a citizen of the state of Massachusetts.]

Mr. Gilpin, for plaintiff.

F. W. Hubbell, for defendant.

HOPKINSON, District Judge. This suit, as appears by the writ, is a foreign attachment, and an order is endorsed on the writ to attach the goods, chattels, rights and credits of the defendant in the hands of certain persons named, which has been done. On the part of the defendant a motion has been made to quash the writ and the proceedings upon it, on the ground that the defendant is a citizen of Massachusetts, against whom this suit cannot be maintained in this court, as it has no jurisdiction in such a case. To support this position the judgment of this court in the case of Hollingsworth v. Adam has been cited, as reported in 2 Dall. [2 U. S.] 396. The defendant, in that case was stated in the writ to be a citizen of the state of Delaware, and an affidavit was produced of the fact that he was so. Upon this it was alleged that the federal courts had no jurisdiction of the suit. The objection was founded on the 11th section of the judiciary act [1 Stat. 78], which provides that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court,—and no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant at the time of serving the writ." In the case referred to, the court quashed the writ. If the facts of the case now before us were the same with those of Hollingsworth v. Adam, we should not hesitate to follow that decision. But are they so? By the affidavit here produced and filed, the truth of which has not been contradicted, it appears that Horatio Sprague, the defendant, although not denied to be a citizen of the United States, is not now, and for a long time past has not been, an inhabitant of or residing in the United States. but that for a long time, to wit, ten years and more, he has been settled and residing in and an inhabitant of Spain, being there largely engaged in business as a merchant and trader; and that he has not within the time stated, been within the United States, nor has he, to the affirmant's belief, any intention of returning to the United States, and that the said Horatio is now, and for some time past has been, a consul of the United States at Gibraltar, in Spain aforesaid; which is proved by a certificate from the department of state.

The question is whether a defendant in those circumstances is within the provision of the 11th section of the judiciary act, which has been referred to, and entitled to the exemption or privilege thereby to a certain description of persons? Does he bring himself within the terms of that description? He takes his ground on the words of the act, and alleges that he is a citizen of the United States; that this is a suit brought against him by original process, and that he is not an inhabitant of the district in which the suit is brought, nor was he found within it at the time of serving the writ. If the words of the act had been that no suit should be brought against a citizen of the United States in any other district but that whereof he is a citizen, it would be enough for the defendant to show that he is a citizen of the United States, and is not a citizen of Pennsylvania, to bring himself under the protection he claims from this suit, without any further inquiry as to the state to which he does belong, or the place of his actual residence. But the act speaks of inhabitants, not of citizens, in this part of it. It was therefore indispensable for the counsel of the defendant to prove, and such has been his effort, that in the construction of this provision the descriptive term "inhabitant" means and is synonymous with "citizen." If he has succeeded in this he has made out his case. For this purpose he has cited several adjudged cases. Nothing is more reasonable than that general expressions used by a judge shall be considered in connexion with the particular subject to which they are applied; and as an authority they will seldom be carried beyond the case to be decided. As to Hollingsworth v. Adam, in 2 Dall. [2 U. S.] 396, it cannot be doubted that that was a civil suit by original process, to wit, a foreign attachment brought by a citizen of Pennsylvania against a citizen and inhabitant of the state of Delaware, then residing in Delaware. So it appeared on the plaintiff's writ, and no evidence was offered to contradict or explain it. Such is not the case before the court. In Read v. Bertrand [Case No. 11,601], the plaintiff, a merchant of New York, entered into a contract in the year 1818 with the defendant to furnish him with an assortment of jewellery, which he was to take from place to place in the United States, to sell on commission. After passing through many states, he went to New Orleans, and opened a store there for the sale of the goods. In 1819 he came to Philadelphia to meet the plaintiff concerning their mutual business. He afterwards proceeded to Havana and New Orleans, and came

again to Philadelphia, where he wrote to the plaintiff at New York, informing him that he came to have a settlement with him. While waiting at Philadelphia for the plaintiff, he was arrested at his suit. It is such a state of facts the learned judge had under his eye, and to which his observations must be applied. He says, and it cannot be questioned, for he uses the very words of the act of congress, that one of the parties to a suit must be a citizen of the state where the suit is brought and the other a citizen of some other state. As the clear consequence of this position, he says that the plaintiff, in the case before him, being a citizen of New York, the court could not entertain jurisdiction of the suit, unless the defendant were a citizen of Pennsylvania at the time the suit was brought. He proceeds to declare that judicial citizenship, or that species of citizenship intended by the constitution and the act of congress, is nothing more nor less than a residence or domicil in a particular state, the person being at the same time a citizen of the United States. The domicil may be changed from one state to another, but the removal must be bona fide and permanent, not temporary; and the intention is to be gathered from his conduct, declarations, &c.

The case then before that learned and discriminating judge was one in which the plaintiff was a citizen of the United States, resident in New York, and the defendant also a citizen, residing in Pennsylvania, where the contract between them was made; and the question was whether his removal to New Orleans with an intention of making it his residence was permanent or temporary. If the latter, then his domicil continued in Pennsylvania, and a suit was well brought; if otherwise, the suit was not well brought, because neither of the parties was, in any sense, a citizen of the district or state in which it was brought. This was a question of fact which was left to the jury. It is sufficient to remark on this case that no opinion was given, nor was it called for, on the meaning of the term "inhabitant," in a subsequent part of the 11th section of the act, nor upon this whole clause in it,—relations with other parts of the section, and to which we are now required to give a construction. An argument, indeed, has been raised upon the general expressions of the judge to bring them to bear on the case; but, however strong the argument may be, we must keep in mind that they were intended for the question then under consideration, for the state of facts then in the view of the court, and can be received as a judicial decision no further. In the case cited the removal or change of residence was from one state to another, and the question was of which of the United States he should be judicially considered a citizen, and in such a case the judge says that he was a citizen of the state in which he resides, or has his domicil. It seems to be impossible to give any other meaning to the words of the act, "or the suit is between the citizens of a state where the suit is brought, and a citizen of another state." This clause will be senseless unless some criterion be adopted to fix what shall make a man a citizen of one or another state; of one state in contradistinction to the others; and residence is the only or the most certain and convenient criterion that can be taken. But such a case is different in point of fact from one in which the question is not which state, as between two of the United States, the defendant is a citizen, but where he has no residence or domicil in any state, having removed to a foreign country; and consequently the criterion of residence in one or the other state cannot be applied to him. How far he may be embraced by the principle is another matter; but this opinion of Judge Washington, as well as another that has been cited, relates entirely to the construction to be given to that part of the 11th section of the act which grants jurisdiction to the federal courts in suits "between a citizen of the state where the suit is brought, and a citizen of another state," that is, where both parties are citizens residing in the United States; and he gave no consideration at all to the meaning of that part of the section which we are now called upon to construe.

We will now consider the law as it has a direct bearing on the case before us. The 11th section of the act professes to designate the original cognizance of the circuit courts of the United States, and it is thus broadly given: "Of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between the citizens of the state where the suit is brought, and a citizen of another state." This is the general grant of jurisdiction, and we find a designation or description of the circumstances which shall constitute an individual a citizen of one or another state. In a subsequent part of this section certain limitations or exceptions are made to this grant of jurisdiction, the object of which appears to be to prevent the vexatious and oppressive use of it, and to have it exercised with as little injury and inconvenience to the party defendant as possible. It is provided that "no person shall be arrested in one district for trial in another, in any civil suit before a circuit or district court." Without this, a defendant might have been taken in New Orleans or Maine, and brought for trial in Philadelphia. But further, it is provided that "no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." We see here the same intention to prevent oppressive proceed-

ings in a suit carried on. The first special provision enacts that the arrest of the person shall not be made in one district for trial in another; and the other, that no civil suit shall be instituted against a defendant in any district but that which he inhabits, or unless he shall be in another. It may be that a part, perhaps a most material one, of the motive or intention of these enactments was a jealous respect to the territorial rights and immunities of the several states, who would not allow their inhabitants to be arrested by process from the courts of another state, or even compelled to attend a suit there, unless they gave up this protection by going voluntarily into another state, and exposing themselves to a service of the writ. If this were in the view and intention of congress in making these enactments, it will have an important influence on the question of their application to a case of a citizen not residing within or under the protection of any state. The phraseology of this section has been framed with care, and should be carefully attended to. In declaring the jurisdiction of the courts generally, it is given over suits where an alien is a party, or the suit is between citizens of different states. But where the limitation to this power is imposed, or the exemption from it described, the law no longer speaks of a citizen of one state or another or of the United States, but extends the protection or privilege from arrest to every person, be he citizen or alien; and no person, even though he should not be an inhabitant, but a transient passenger, shall be arrested in a civil action in one district for trial in another. This looks like territorial immunity, for such a person, however distant from his residence, may be arrested in passing through a state, by process from a federal court of that district, but not of another. Proceeding on the same principle, either of personal privilege or state rights or both, they enact that "no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." Who, then, is exempted from the general power of the court given by the first part of the section, or rather to what description of a party to a suit is the limitation or modification of that power to be applied? To an inhabitant of the United States, and necessarily an inhabitant of some district of the United States; and whether he be an alien or a citizen, while he is an inhabitant of any district he has this protection of the law, and no longer. When he ceases to be an inhabitant of any part or district of the United States, he withdraws himself from the operation of this clause of the judicial act, and from the privilege he enjoyed under it as an inhabitant of the United States. Can we say that a debtor, who abandons his domicil here, and assumes one in a foreign country, shall retain a privilege or protection, which was accorded to him by the name and description of an inhabitant of the United States, and not otherwise? It must be kept in mind that we are now considering the question of jurisdiction only as it is dependent upon or regulated by this clause in the judicial act. There is another view of this question, which has not been taken in the argument, and which is too grave and important in itself to be disposed of on a summary motion like the present. The question we allude to is whether the original constitutional jurisdiction of the federal courts extends to non-resident citizens, and whether they fall, in certain circumstances, within a limitation of that jurisdiction. Supposing that the restrictive clauses we have referred to had not been enacted, or putting them aside, would non-resident citizens be in any way or by any process, subject to the jurisdiction? When the constitution, in creating the judicial power of the government, speaks of controversies "between citizens of different states," and the judicial act of suits "between a citizen of the state where the suit is brought, and a citizen of another state"—are we, necessarily, or on a reasonable construction of these clauses, to understand that resident citizens only are intended to be embraced by their power. The defendant will have the full benefit of this objection to our jurisdiction as of any other matter that may avail him, on a formal plea to the jurisdiction. The court will give a judgment that may be revised by a higher tribunal.

If, as in the case of Hollingsworth v. Adam [supra], this writ were issued in a direct violation of the plain language of the act of congress, we should not refuse to quash it, but, as this is not the case, however cogent the argument may be that urges us to the same conclusion, we will put the party to his plea. The motion to quash is overruled.

[NOTE. The defendant entered special bail to the attachment, and, having appeared and pleaded to the same, the case was tried by a jury on the 21st day of November, 1836, and a verdict, under the charge of the circuit court, was rendered for the defendant, on which a judgment was entered by the court. This judgment was reversed by the supreme court in 12 Pet. (37 U. S.) 300.]

TOLBEE (UNITED STATES v.). See Case No. 16,529.

Case No. 14,077.

The TOLEDO.

[1 Brown's Adm 445.] [1]

District Court, E. D. Michigan. March, 1873.

PRACTICE IN ADMIRALTY—CROSS-LIBEL—SECURITY FOR DAMAGES—FORM OF ACTION.

The 53d rule in admiralty, requiring the respondents in a cross-libel to give security to re-

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

spond in damages as claimed in the cross-libel, applies as well to actions in rem as to those in personam.

Motion to vacate an order requiring libellant to give security to answer the cross-libel, and for stay of proceedings.

H. B. Brown, for the motion, cited The Bristol [Case No. 1,889].

W. A. Moore, contra.

LONGYEAR, District Judge. Rule 53, under which the question presented arises, reads as follows: "Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security, in the usual amount and form, to respond in damages as claimed in the said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given." Timothy Crowley, master of the scow Snow Bird, filed his libel in rem against the propeller Toledo, for collision. The propeller having been seized, the Union Steamboat Company, a corporation organized and existing under the laws of the state of New York, owner of the propeller, put in its claim and answer, admitting the collision as alleged, but denying that the propeller was in fault, and alleging that the collision was caused solely by the fault of the scow, and setting up a counter-claim for damages on account of the same collision, in the sum of $700, for the recovery of which the respondent filed therewith its cross-libel against the scow, and prayed for a stay of proceedings upon the said original libel, until security should be given as required by the said rule 53. No process has been issued upon the cross-libel, but an order was granted staying proceedings upon the original libel, conditionally, as prayed in the answer, and to vacate which this motion is now made.

The ground of the motion is that rule 53 applies to libels and cross-libels in personam only, and not to those in rem. The language of the rule used in describing the subject-matter to which it relates is certainly broad enough to cover both classes of cases; and, looking to that, and to the evil which the rule was evidently intended to remedy, it does not seem to me to admit of a doubt that such is the scope and effect of the rule. Before the rule, no security could be obtained, or proceedings had upon a cross-libel without the issuing and service of process. On this account, it often resulted that any remedy by cross-libel was impossible, on account of the libellant in the original libel, in an action in personam, or the vessel represented by the libellant in an action in rem, being and remaining beyond the same jurisdiction. This often resulted in the grossest injustice and oppression, equivalent in some cases to an absolute failure of justice. The respondent or claimant in the original suit in such cases, was obliged to follow the libellant, or the vessel, into other, and often foreign jurisdictions, involving ruinous outlays and delays. And often, when arrived where the libellant or the vessel was, he found there was no admiralty jurisdiction of the particular cause of action in question, on account of which he was deprived of the power to obtain security by a seizure of the vessel, and was obliged to resort to an action at common law, or forego any remedy whatever; and that, too, while his opponent had the full benefit of security by seizure under our admiralty jurisdiction. For instance: In the British American provinces, the admiralty and maritime laws of England prevail. By those laws there is no admiralty jurisdiction beyond tide-water, and hence none upon the waters of the great lakes, and their connecting waters, and the St. Lawrence above tide-water—which are nearly equally divided between those provinces and the United States, and constitute the boundary between the two countries to a vast extent, being not far from 1,500 miles in all. All the waters named being public navigable waters, and it being now well settled that the English rule as to tide-water, does not obtain in this country, and that the jurisdiction of the United States admiralty courts extends over all public navigable waters, our courts have and entertain jurisdiction over the waters named. Now, in case of a collision between an American and a Canadian vessel on some of those waters (which is exactly the present case), the Canadian owner may libel the American vessel in our courts (just what was done in this case), and obtain security for the damages he may recover by a seizure of the vessel—a privilege which is denied the American owner in the Canadian courts, notwithstanding the collision may have been caused in part, or even wholly, by the fault of the Canadian vessel. In my opinion it was to remedy this class of evils that rule 53 was made. If I am correct in this, then it would deprive the rule of its chiefest virtue to limit it to actions in personam alone. And I can see no good reason in the nature of the cases to which it relates for so limiting it in its application. The cases to which it relates are described in the rule as being those of cross-libels filed upon any counter-claim arising out of the same cause of action for which the original libel was filed. It must be, then, a cross-libel filed upon a claim arising out of a contract, tort, or other cause of action of which the court already has jurisdiction by the original libel. In case of a counter-claim being set up, a cross-libel is necessary, not to give the court jurisdiction of the subject-matter—it already has that—but in order to entitle the party setting up such claim to affirmative relief; such relief, when granted, however, must, from the nature of the

case, be such and such only, as, in the language of the rule, as well as upon those familiar general principles governing cross-actions, arises "out of the same cause of action for which the original libel was filed." A seizure is therefore not necessary to give the court jurisdiction of such counter-claim, independently of rule 53; and before that rule a seizure was necessary only as a security for the enforcement of the remedy. The means of obtaining that security, without the necessity of process and a seizure, is provided for by the rule, and I can see no good reason, constitutionally or otherwise, why it may not be done in that manner. Neither can I see anything in the language of the rule by which its application is necessarily limited to actions in personam. The court was referred, upon the argument, to a recent decision in the district court for the Southern district of New York (The Bristol [supra]), holding that rule 53 is limited to suits in personam, as is here contended. The learned judge in that case seems to lay considerable stress upon the use in the rule of the expression, "respondents in the cross-libel," as implying a suit in personam. I can agree with him so far as to concede that a more fortunate expression might have been used to indicate what I conceive must be its meaning. Libellants in an original libel, whether in personam or in rem, must, of necessity, become "respondents in the cross-libel;" and I think that is all that is meant by the expression. And I think this meaning is further indicated by the provision of the rule for a stay of proceedings; because it would be unjust to the libellant in the original libel that all proceedings upon the original libel should be stayed until such security shall be given, as the rule provides, if he is not the person meant. An examination of others of the admiralty rules shows that the terms "respondent" and "defendant" are used indiscriminately, as having the same meaning, with a seeming disregard for exact technical nicety in the use of terms, and as equally applicable to suits in rem and in personam. At all events, I do not think there is sufficient in the use of that expression to do away with what is, to my mind, the evident object and purpose of the rule.

I entertain a high respect for the learning and ability of the judge who delivered the opinion above referred to, and have derived much aid in the past, as I expect to in the future, from his published opinions. It is very seldom I have occasion to differ with him, and when I do so it is with the greatest reluctance. In this case, for the reasons given, I am compelled to do so. I hold, therefore, that rule 53 applies to suits in rem as well as to suits in personam. Motion denied.

TOLEDO, P. & W. R. CO. (SECOR v.). See Case No. 12,605.

*

END OF CASES IN BOOK 23.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ACKNOWLEDGMENT.

Page

It is sufficient if it appear by the certificate of the execution and acknowledgment of a deed by a feme covert that the statutory directions were substantially complied with.. 644

ACTION.

The fact that plaintiff has a remedy ex contractu against others is no bar to a suit ex delicto against a wrongdoer..... 230

Where a person having an election to bring his suit either on a contract or for a tort, proceeds to judgment without a declaration, he cannot subsequently file a declaration for a tort, where the whole course of his proceedings shows that he proceeded upon a contract..... 915

Whenever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration. 116

Where it appears that plaintiff is entitled to the whole of a given sum in certain given rights, it is no objection to a recovery by him that it is not shown how much he is entitled to in each right..... 142

The respective claims of contending assignees of a cause of action pending in court will not be decided on motion..... 937

Adjoining Landowners.

See "Mines"; "Waters and Water Courses."

ADMIRALTY.

See, also, "Affreightment"; "Average"; "Bills of Lading"; "Bottomry and Respondentia"; "Charter Parties"; "Collision"; "Demurrage"; "Marine Insurance"; "Maritime Liens"; "Pilots"; "Pleading in Admiralty"; "Practice in Admiralty"; "Salvage"; "Seamen"; "Shipping"; "Towage"; "Wharves."

Jurisdiction—In general.

The district court in admiralty is governed by the maritime code possessed before the Revolution, where not altered by law or by a change of circumstance.....1028

Laws and principles which govern the maritime courts of the United States in cases where no regulations are prescribed by our own laws.....1028

The statutes of 13 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country 29

In cases of torts, injuries, and offenses locality brings them within the admiralty jurisdiction, but in cases of contract it is also necessary that the subject-matter be of a maritime nature..... 877

—— Persons and property.

Admiralty has jurisdiction to entertain suits in personam, where the parties are foreigners of different nationalities.....1003

Page

In the case of a suit between foreigners jurisdiction will not be declined where the request is delayed, and the position of the parties has changed in the meantime.....1003

The court declined jurisdiction in a controversy between foreign seamen and their vessel where the parties might have had redress by a tribunal of their own country.....1104

—— Rights and controversies.

Admiralty jurisdiction over a maritime cause is in its nature complete. It extends to the person as well as to the res, and cannot be confined to one of the remedies on a contract when the contract itself is within the cognizance of the court..... 29

Every contest between the owners and mariners and the owners and builders or equippers of a ship for the navigation of the sea is cognizable in the admiralty..... 29

A contract relative to services on board a vessel on the sea or within tide waters cannot be enforced in admiralty, unless the service is essentially maritime..... 877

A contract to transport a passenger on the high seas or on tide water is a maritime contract, and within the admiralty jurisdiction 158

Steamboats and lighters engaged in trade or commerce on tide water and the seamen employed on board are within the admiralty jurisdiction, but not ferry boats, or those engaged in ordinary traffic along the shores of a river..... 877

A contract for services on board a vessel employed in transporting fuel across the Delaware river cannot be enforced in admiralty 877

Admiralty has no jurisdiction of a claim for services rendered to a vessel on the rocks, and materials furnished in aid thereof, under employment by the owners in charge to assist them.....329, 330

The admiralty jurisdiction of the federal courts extends to petitory as well as to possessory suits 797

Admiralty has jurisdiction over petitory as well as possessory suits to reinstate owners of ships who have been wrongfully displaced from their possession.....1277

A purchaser who has been put in possession, though he has no bill of sale, may maintain a possessory suit in admiralty.....1179

Admiralty has jurisdiction in case of a wrecked ship to decree a sale upon application of the master.....1277

Such sale is not conclusive upon the owner or upon third persons.....1277

—— Torts.

The admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or within the ebb and flow of the tide..... 957

Admiralty has jurisdiction of a personal tort committed upon tide waters within a local harbor, where connected with other matters within admiralty cognizance..... 942

Admiralty has jurisdiction in cases of collision upon tide waters in Chesapeake Bay or its tributary rivers..... 773

Procedure. Page
A libel in admiralty was dismissed pro forma for want of jurisdiction in order to allow an immediate appeal..... 481

ADVERSE POSSESSION.

See, also, "Ejectment."

A possession without claim of title affords no presumption of right from mere lapse of time 615
A deed is not to be presumed where the evidence shows that plaintiffs frequently remonstrated, and consulted counsel about redressing their wrong..... 83

AFFREIGHTMENT.

See, also, "Admiralty"; "Bills of Lading"; "Carriers"; "Charter Parties"; "Demurrage"; "Shipping."

Where the charter party is not proved, or is silent in regard to the consignee or mode of delivery, the bills of lading are controlling evidence of the contract of affreightment.. 242
In the absence of any statute or established general usage to the contrary, Fast-Day must be considered as an ordinary working day for the purpose of lading or unlading cargo 682
A discharge of the cargo commenced before may be continued on Fast-Day..... 682
Sufficiency of evidence of proof of delivery of goods involving the question of the alteration of receipts after signature..... 270
The wharf being the place of delivery, evidence that the number of articles called for by the bill of lading were placed thereon will exonerate the ship, as against evidence that a lesser number were received at the consignee's storehouse, whither his own cartman conveyed them 269
A known usage of trade and navigation from New Orleans to Northern ports to touch at Havana for cargo, prevents such act being a deviation 891
An intention to take on cargo at an intermediate port is not a deviation, where made known to the shipper when bills of lading were executed 891
The acceptance of cargo by the shipper with knowledge of a deviation restores the shipowner's right to freight..... 891
But receiving cargo with the knowledge of a deviation does not deprive the consignee of his right of action for special damages sustained by the deviation, and such damages may be recouped in an action for freight... 891
Freight may be recovered by the master against the consignee in admiralty, either in personam or in rem..... 891
The lien for freight is discharged by delivery to the consignee without demanding freight or notifying him of a lien therefor, in the absence of a special agreement or local usage to the contrary, irrespective of the intentions of the master..... 680
The fact that goods sold at auction by the master for freight in San Francisco in 1850, brought only half the amount and were sold within two weeks by the purchaser at three times such amount, does not show fraud or unfairness, where the sale was made in the usual way after due advertisement..... 468
The vessel is liable where, by the negligence of the master, the cargo is exposed to injury by an excepted peril..... 680
Where the vessel is laid up for the winter with cargo on board, the master must take precautions to prevent injury from dampness or mold, and to protect the deck load from the effects of snow and ice..... 680
A shipper who agrees that his goods shall be carried on deck, and assents to the manner of stowing and protecting them, cannot recover for an injury by rain, where all reasonable care was taken of them during the voyage 1002
The defense that the loss of cargo arose partly from a necessary jettison on account of perils of the sea and partly from a sale for necessaries must be established by clear and conclusive proof 648
Where the owner of a cargo of a sunken vessel raises it, after notice to the owner of the vessel, the expense of such raising may be allowed as damages in a suit for nondelivery 425

Agency.

See "Principal and Agent."

ALIENS.

See, also, "Courts."

On a transfer of territory by one nation to another the political relations between the inhabitants of the ceded territory and the former government are changed.....1346
Naturalized citizens of such ceded country, who owe allegiance, purely statutory, when released therefrom, are remitted to their original status 1346
Alien friends are entitled to claim the same protection of their rights in the federal courts as citizens 742, 744

APPEAL AND ERROR.

The allowance or nonallowance of costs in an admiralty case being a matter within the discretion of the court, is not a subject of appeal 814
The judges of the federal circuit court on a motion for a new trial cannot certify to a division of opinion at the trial itself, unless both were present 744
The limitation of the time for bringing writs of error to five years after rendition of the decree complained of (Act 1789, § 22) does not apply to writs of error coram nobis 236
The allowance of an appeal to the supreme court relates back to the time when the original application was made to the judge of the circuit court, and entitles the party to a stay 1137
A writ of error is not a supersedeas unless served within 10 days after rendition of the judgment, irrespective of agreements of the parties for a stay of execution.....1097
On a joint decree against respondents for a maritime tort there may be separate appeals where respondents have severed in their pleadings, or jointly pleaded a general denial 957
Form and sufficiency of record on appeal from a consular court of Japan to the circuit court for the district of California.... 815
A bill of exceptions which shows that the exceptions were taken for the first time four days after the verdict and judgment will not be considered 214
A statement by counsel of the evidence, not made a part of the bill of exceptions, though formally certified by the clerk, is no part of the record 214
The question of the admissibility of certain documentary evidence is not available where the same is not set forth in the bill of exceptions 116
The circuit court, on an appeal in admiralty, will not disturb the finding of the district court on a question of fact depending upon the weight of the testimony and credibility of witnesses, though differing from such court 425
New testimony, introduced on an appeal in admiralty, except under peculiar circumstan-

Page

ces, is not entitled to the same consideration as testimony introduced in the first instance 773
On an appeal in admiralty, where the question is purely one of fact depending upon the testimony of numerous witnesses, the judgment will not be reversed except for clear error 773
A bond on appeal from a judgment of the justice of the peace, conditioned on payment if the judgment of the justice is affirmed or more recovered on a trial de novo, is discharged where a judgment for a less sum is recovered 515

APPEARANCE.

See, also, "Courts"; "Removal of Causes."

An appearance by attorney, and the filing of a plea to the jurisdiction by attorney, and not in person, is a submission to the jurisdiction 903
A special appearance, entered by the clerk upon the order book at the request of defendant's attorney, without leave of court, *held* an admission of jurisdiction..... 903
An appearance by defendant, shown by the record, cannot be denied by plea or otherwise 1035

APPRENTICE.

An indenture, signed and sealed by a minor 15 years old, bound out by his father, is binding on him, though he is not named therein, and there are no covenants on his part..... 275
The order of the orphans' court to bind out an apprentice does not of itself create the relation of master and servant..... 55

ARBITRATION AND AWARD.

Under a statute authorizing county commissioners to refer the claims of a person to arbitrators, *held*, that the commissioners had no authority to submit a part only of his claim without his consent.....1313
An umpire provided for in an order of reference may be appointed before the referees have heard the evidence and discovered that they could not agree..... 503
An umpire must give notice to the parties and to the arbitrators of the time and place of his proceeding to act.....1147
An umpire must hear the parties..... 605
After delivering their award, the arbitrators cannot again act upon the case without new authority..... 650
An award is void which is not final and conclusive, and does not embrace all the matters submitted, and settle the dispute.. 650
Where one of the arbitrators has prejudged the cause, the award will be set aside..... 605

ARMY AND NAVY.

A person illegally conscripted into the federal army may be discharged on habeas corpus 107
Under Act March 3, 1863, § 3, if a married man over 35 years of age be enrolled and drafted in the first class, he may be discharged by a federal court on habeas corpus 107
On habeas corpus to discharge an alleged minor, who swore on his enlistment that he was over 21, evidence may be given as to whether he understood what he was swearing to 134
A clerk in the employ of a paymaster of the United States army is in the military service, and subject to trial by court-martial for forging vouchers in the disbursement of a reconstruction fund..... 931

ARREST.

See, also, "Bail"; "Execution"; "Extradition"; "False Imprisonment."

An inhabitant of Alexandria county, D. C., may be arrested in Washington county without a non est in Alexandria county...1060
A person arrested in a civil suit, and going to another state in virtual custody of his bail, may there be arrested in another civil suit, if his bail voluntarily relinquish all claim to his detention..... 413

ASSAULT AND BATTERY.

A man cannot lawfully push another off from his land without first requesting him to leave 1024
On the plea of not guilty plaintiff need not prove that defendant assaulted him first. Contra on the plea of son assault demesne 20
In a joint assault and battery a recovery in a suit against one is a bar to a suit against the other 576

ASSIGNMENT.

The equitable interest of a cestui que trust by way of contingent remainder is capable of assignment..... 362
An assignment of rents with a power of attorney to collect them as they become due is enforceable in equity, though the assignor die before they are collected..... 783

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy"; "Insolvency."

Quære, whether, in Rhode Island, an insolvent assigning only a part of his property for the benefit of all his creditors may stipulate for a release..... 72
An assignment for benefit of creditors by a debtor absconding with a large sum of money is fraudulent as to creditors where it stipulates for a release as a condition of obtaining a preference under the assignment 72
An assignee in insolvency has no right to retain goods which were in the hands of his assignor for sale on commission, on which the latter had a lien as security on accommodation acceptances given to the owner after a tender of such acceptances and a demand of the goods..... 853

ASSISTANCE, WRIT OF.

A writ of assistance will not issue against persons who are not parties to the suit, or did not come in under them after suit commenced 1093

ASSUMPSIT.

A declaration in general indebitatus assumpsit for property sold and delivered is not supported by evidence of a sale and delivery under a special contract for a price named 643

Attachment.

See "Bankruptcy"; "Execution"; "Garnishment"; "Writs and Notice of Suits."

ATTORNEY AND CLIENT.

Page

An attorney chargeable with negligence is liable only to the extent of the injury his client has received 477

AVERAGE.

The right to receive contribution in general average is not founded on contract, but on a principle of equity..... 320

In the case of a vessel dragging her anchors towards the shore in a gale to avoid the danger of being beaten to pieces on rocks the master voluntarily slipped his cable, and allowed the vessel to be thrown on the beach. *Held* a general average loss 317

The rule that the shipowner is entitled to a commission upon the amount contributed for in general average, is rounded upon the law merchant, and is not controlled by a particular local usage in contravention thereof 320

A court of equity has jurisdiction to take an account of a general average loss, and decree contribution among those entitled to receive and bound to pay..... 317

BAIL.

See, also, "Arrest"; "Execution"; "Principal and Surety."

Where there is no declaration, special bail will not be required unless plaintiff appears at the return of the writ.....1028

If special bail be taken out of court by two justices of the peace by recognizance, there must be two sureties..... 937

No justification of bail is necessary where it is entered for the purpose of making a surrender 112

BAILMENT.

See, also. "Pledge."

A sale by the bailee will not pass title to the property 280

BANKRUPTCY.

See, also, "Assignment for Benefit of Creditors"; "Compositions"; "Insolvency."

See, also, "Bills, Notes, and Checks."

Operation and effect of bankruptcy laws and of proceedings thereunder.

The date of the passage of the bankrupt act *held* to mean the date of its approval. (Act 1841, § 4.)..... 826

The fact that an insolvent bank was extinct as a corporation, and its assets were being administered upon under decree of a state court when the petition was filed, will not prevent the bankruptcy court from entertaining jurisdiction 1135, 1139

A railroad corporation is a private commercial corporation within the meaning of section 37 of the bankrupt act..... 530

After the filing of a petition in bankruptcy no creditor can acquire a lien by attachment, judgment, levy, or otherwise on the property of the debtor which belonged to him at the time of filing the petition.....1213

Attachments are dissolved by the proceedings without reference to the property on which they are levied, and an officer in possession under the attachment cannot retain the property until payment of his fees..... 2

A sheriff, where not restrained by the bankrupt court, may proceed to sell after the adjudication under a levy and advertisement of sale made before the adjudication..... 887

Page

A debtor who has filed a voluntary petition, but objects to an adjudication, has no standing in the bankruptcy court on an application to enjoin a creditor from enforcing his claim by attachment 1210

After the bankruptcy of defendant, against whom a decree has been obtained in a state court operating as a lien upon his property, plaintiff cannot proceed under a state statute for a discovery of assets..... 727

State bankrupt laws.

Act La. March 14, 1842, in relation to the liquidation of banks, *held* in effect a bankrupt law, and superseded by the bankruptcy act of 1867 .....1135, 1139

The Louisiana laws relating to insolvency, insolvent debtors, etc., were superseded by the bankruptcy act of 1867.....1135, 1139

State insolvent laws, which merely protect the person from imprisonment, and do not affect the contract, are not suspended by the bankrupt act. (Act 1841.)..... 349

Jurisdiction of courts.

As to the powers of the district court in other districts than that in which the bankruptcy proceedings are pending.....1213

The district court of a district other than that in which bankruptcy proceedings are pending may stay the enforcement of a judgment within its jurisdiction, obtained in an action in the state court, commenced after the filing of the petition in bankruptcy.1213

The circuit court of a district other than that in which the bankruptcy proceedings are pending has not similar powers.....1217

Register—Powers and duties.

No opinion will be given on abstract questions certified to the judge by the register.. 307

Commencement of proceedings—Voluntary bankruptcy.

The stockholders of a creditor bank are not parties in interest so as to be entitled to object to a decree..... 677

One partner may petition for an adjudication against all the members after a dissolution of the partnership..... 209

The fact that such partner undertook to pay all the debts is immaterial, where the creditors did not accept him as their sole debtor 209

—— Involuntary bankruptcy.

A petition which alleges as the act of bankruptcy the failure to pay commercial paper maturing after December 1, 1873, filed before the expiration of 40 days from such maturity, is prematurely filed, and cannot be amended 1312

A refusal to pay commercial paper at a date prior to that stated in the petition cannot be given in evidence..... 582

The admission of a fact from which a fraudulent intent will be inferred will be given full effect, though it be coupled with a denial of such fraudulent intent..... 454

The construction and sufficiency of pleadings depend upon the rules of the court in which the petition is pending..... 454

Acts of bankruptcy.

It is not an act of bankruptcy for one partner to influence or procure the departure of another from the state..... 852

The making of conveyances in contemplation of bankruptcy and to prefer creditors, which are declared void by section 2, Act 1841, are acts of bankruptcy..... 66

Giving a warrant of attorney to a mere indorser, whereby he secures a priority, is not to be considered an involuntary act, so as to prevent it from being an act of bankruptcy, for an indorser has no legal power of coercion 66

A refusal on the ground of a legal defense is not a stoppage or suspension within the meaning of the act.....1019

Page

A refusal to pay commercial paper made in good faith on the ground of a valid defense or a defect in the title of the holder is not an act of bankruptcy..... 582

When the stoppage of payment of commercial paper is fraudulent, it is not necessary that it be continued, and a suspension of payment for 14 days, though without an element of fraud, constitutes an act of bankruptcy 1019

A note, given by a merchant for money loaned payable to his own order on demand, and duly indorsed by him, is "commercial paper" 582

A stipulation in a suit at law upon a note giving time to plead does not operate as an extension of time upon the note, as against the bankrupt act..... 582

Adjudication.

An adjudication against a firm by a partner on his voluntary petition, where the firm had been dissolved by the death of a copartner, is void 835

An adjudication against a firm, obtained by one partner on his voluntary petition, without giving the notice required by Sup. Ct. Rule 18, is void..... 835

A surviving partner may be adjudged bankrupt on an act of bankruptcy committed by him in administering the partnership assets, although the separate estate of the deceased partner will pay all his debts, joint and separate 4

Where the debtor in involuntary proceedings indorsed on the copy of the petition served on him an admission of the truth of its allegations, except those relating to fraud, but before the day to appear filed an involuntary petition, and was adjudicated a bankrupt thereon by the register, *held* that the adjudication was void and an adjudication would be made in the involuntary proceeding 51

An adjudication entered upon a confession of the acts of bankruptcy charged cannot be set aside after the death of the bankrupt on the application of a creditor who has proved his debt..... 932

A creditor not appearing to the petition in bankruptcy is not estopped from denying the acts of bankruptcy charged so far as they affect him with notice..... 932

Assignee—Election, appointment, and removal.

The mortgagee of a homestead may vote on the choice of an assignee on his whole claim 89, 861

A motion by the bankrupt to set aside the appointment of an assignee can only be entertained by the district judge upon notice, and not by the register..... 134

—— Rights, duties, and liabilities.

Neither the court nor register is the general adviser of the assignee in his dealings with the assets 307

Assignees are chargeable with interest on all moneys which they have collected, if not paid into the registry within 60 days after it is received. (Act 1841.).....1153

The assignee is not liable for rent accruing after the adjudication unless he elects to accept a lease, and occupation of leased premises independently of the lease is not evidence of such an election..... 844

Property of bankrupt—What constitutes.

A certificate of membership in a board of trade *held* not an asset which would pass to the assignee 453

The franchise of a bankrupt railroad company is property of such company subject to sale in the bankruptcy proceedings..... 530

The property of minor children accumulated by their sole exertions with their father's consent which has always stood in their names does not pass to the assignee..... 825

—— Custody and control. Page

The bankrupt, after filing his petition, has no right to sell any of his property even to raise money to pay lawful fees.....1021

An assignee under a general assignment under a state law which is avoided by proceedings in bankruptcy must turn over all the property and proceeds to the assignee in bankruptcy, and cannot deduct compensation for his services..... 274

Where a surviving partner is adjudged bankrupt on an act of bankruptcy committed in administering the partnership assets, the messenger will take possession of the joint assets in his hands, and also of his separate property 4

—— Exemptions.

The bankrupt was allowed to retain from the proceeds of a mortgage fraudulently transferred the amount paid counsel for preparing his petition and schedules, and the amount determined by the assignee for the temporary support of himself and family, but not the probable expenses of procuring his discharge 1021

The assignee has a discretionary power, under section 14, Act 1867, in setting apart "other articles and necessaries," and his action will not be reversed unless an abuse of authority plainly appears..... 917

The exemption of "other articles and necessaries" cannot include manufactured articles kept for sale..... 917

Real estate cannot be set apart as exempt under the head of "articles or necessaries"..1144

No individual exemption can be allowed out of the partnership estate at the expense of the joint creditors..... 51

Property exempt by the laws of the state where the bankrupt resides and where the petition is filed will be secured to him, wherever it may be situated, and whether exempt by the law of its situs or not..... 2

In Kansas the whole house occupied as a home by the bankrupt is exempt, though a portion of it is used, and was constructed with a view to be used, for a brewery.... 861

When the bankrupt and his family do not keep house, but are boarding, money may be allowed by the assignee for their temporary subsistence 1114

Where the bankrupt's application to the assignee for an exemption is refused, the proper way of bringing the matter up is by exception to his decision..... 917

—— Liens.

Where other courts have taken full jurisdiction of property on which liens are asserted, the bankruptcy court will not in general interfere 674

The United States are not bound by the general equity rule for marshaling assets, nor by the rule prescribed by the bankrupt act in conformity thereto, any further than as that rule is founded in the particular case on the lien of the several parties inter sese 224

A judgment obtained by the United States against persons composing a bankrupt firm, though for a debt on which one of the partners was liable as principal and the other as surety, is entitled to priority over all partnership creditors..... 224

The proceeds of goods levied on by execution under judgments whose validity is not disputed, and afterwards seized by the marshal under the warrant in bankruptcy, must first be applied to such judgments... 574

An execution against the bankrupt delivered to the sheriff prior to the filing of the petition, but not levied, gives a valid lien as against the assignee who took possession of the bankrupt's property before the return day of the execution..... 114

The lien of a prior unlevied execution is divested by a seizure of goods by a mar-

Page

shal under warrant in bankruptcy proceedings 1276

Liens of judgments obtained after the execution of a general assignment valid by the state laws or at common law which is set aside at the instance of the assignee in bankruptcy are not valid against him where they would not have attached had the assignment been allowed to stand..... 838

— Sale.

Lien creditors are not bound by the sale of lands which were subject to their liens, where their priorities were not first definitely ascertained on personal notice to them.. 674

A person claiming title under a deed from commissioners under the bankrupt law of 1800 must show their authority, and that their proceedings were regular..... 936

Proof of debts—What is provable.

A judgment for a fine is not a provable debt 456

A person, who in good faith purchases claims against a bankrupt with the intention of stopping proceedings and giving him time, may prove them..... 212

The beneficiaries of a trust fund, invested by the executor in his partnership business with the knowledge and consent of his copartner, may prove their claim against the partnership, although they have proved it against the estate of the executor..... 866

Fiduciary debts are provable equally with other debts, and, if the creditor elect to prove such debts, they will be barred by a discharge. (Act 1841.) 826

Creditors recovering judgment after the adjudication need not vacate their judgments in order to prove the claims on which they were rendered..... 1

— Secured debts.

A creditor of a firm holding security on the separate property of a partner may prove the claim against the joint assets without releasing such security..... 923

A creditor secured by mortgage may apply to the court to have the property sold and the proceeds applied on his debt. If insufficient to extinguish it, he may prove for the unpaid part..... 50

— Procedure.

Proof of claim cannot be made before a notary 231

A creditor residing in the judicial district where the proceedings are pending must prove his claim before the register of that district 231

The deposition of a creditor residing in another district must be taken before a register in that district; and, where residing in a foreign country, before a minister, consul, or vice consul of the United States 231

Claims purchased for the purpose of stopping proceedings against the bankrupt should be proven as of the date of adjudication, but may draw interest to date of actual payment 212

The register may postpone, until the choice of an assignee, the proof of a debt, in respect to the validity of which a doubt has arisen on the ground of a preference..... 1

Examination of bankrupt, etc.

The register has no power to limit in advance the time for the conclusion of the examination of the bankrupt.....1219

On the examination of a witness respecting the bankrupt's estate on the application of a creditor, other creditors have no right to intervene and object to questions put 340

On such examination the witness is not entitled to counsel, and he may be compelled to answer questions respecting his transactions with the bankrupt..... 340

Page

The bankrupt's attorney may attend the examination, and object to improper questions put to the bankrupt, but the latter has no right, without consent of the magistrate, to consult his attorney before answering... 687

Costs: Fees: Disbursements.

Marshal's bill of costs considered..... 640

The register may require that his lawful fees for conducting an inquiry instituted by a creditor should be paid or secured before entering thereon.....1209

An assignee under a general assignment under a state law, which is avoided by proceedings in bankruptcy, will not be allowed compensation or expenses out of the fund 274

The assignee will not be allowed for auctioneer's charges in making a sale, unless he show a necessity for his services..... 543

Discharge—Proceedings to obtain.

The court may allow the bankrupt to withdraw his petition, and file a new one at a later day..... 480

The final oath of the bankrupt need not be made or filed until the hearing..... 457

The 50 per cent. clause is not operative against a bankrupt if the fair cash value of the assets turned over to the assignee is equal to 50 per cent. of the claims proved on which he was liable as principal debtor.1020

Amounts paid to lien creditors are not to be deducted before ascertaining the requisite percentage of assets to entitle the bankrupt to a discharge..... 619

In ascertaining such percentage the property is to be taken at its value at the time the petition is filed..... 619

A debt due from a bankrupt under an agreement made on the surrender of a lease for a term, that he would pay any deficiency arising on a reletting by the landlord, will be considered as contracted at the time of such agreement (Act July 14, 1870), and not at the time a judgment was obtained therefor 552

Under Act July 27, 1868, the discharge is not contingent upon the amount of dividends actually received by the creditors...1020

The pendency of an examination of the bankrupt is good cause for an adjournment of the proceedings on an order to show cause why the bankrupt should not be discharged 1018

— Proceedings in opposition.

A person having an equitable claim against the estate may oppose the discharge. (Act 1841.) 826

A creditor cannot oppose the discharge unless he enter his appearance in opposition thereto within the day appointed for showing cause against the petition therefor 457

In the case of an adjournment on the return day of the order to show cause the time to file specifications of objection will run from the adjourned day..... 678

Where there is no opposing party, the proceedings may be continued from day to day to suit the convenience of the bankrupt 457

A creditor who has duly appeared in opposition cannot move to dismiss the petition for want of prosecution, but should move to set it down for hearing..... 457

— Acts barring.

It is no bar to a discharge that the debt was contracted by fraud.....134, 678

It is no objection to the discharge that the bankrupt paid the expenses of making proofs of claims against his estate..... 480

A decree in a suit in a state court between a creditor and defendants, of whom the bankrupt was one, declaring a conveyance by the bankrupt void as in fraud of creditors, is not conclusive when such conveyance is set up by the creditor in bar of the discharge 382

Page

The existence of fiduciary debts, contracted by the bankrupt before the passage of the act, will not prevent his discharge, as to debts not of a fiduciary character. (Act 1841.) 826

Misapplication of fiduciary funds after the passage of the act deprives the bankrupt of all right to a discharge from any debts whatever. (Act 1841.) 826

The omission of a particular debt from the schedule, unless intentional and fraudulent, will not bar a discharge. (Act 1841.) 826

The fact that a firm carrying on business and borrowing money in connection with a farm is a large stockholder in a manufacturing corporation does not make its members merchants or tradesmen, so that failure to keep books of account will prevent their discharge..... 77

"Tradesman," in the bankrupt act, is limited to a small merchant or shopkeeper 77

—— Scope and effect.

The terms of a discharge, however general, cannot affect the rights of a creditor to whom the bankrupt owed a debt in a fiduciary capacity, who did not prove the same. (Act 1841.) 826

A surety on a guardian's bond is not among the class of persons not affected by a discharge. (Rev. St. § 5117.)..... 727

An injunction issued by the bankruptcy court, staying proceedings against the bankrupt in a state court until the question of final discharge should be determined, is ipso facto dissolved by the granting of the final discharge 932

—— Vacating: Setting aside.

Creditors moving to set aside a discharge cannot prove at the trial acts of the bankrupt not set forth in the specifications..... 848

Upon a motion to set aside a discharge the bankrupt's wife cannot be required to testify as a witness against him..... 848

Prohibited or fraudulent transfers.

A security, given when insolvent, under an agreement made when solvent, and when the debt was contracted, is not voidable as against creditors..... 194

Where, under the local law, a deed does not take effect as to creditors and subsequent purchasers until it is recorded, a deed recorded within six months of the commencement of bankruptcy proceedings, irrespective of the time when it was executed, is a transfer within six months....1143

A mortgage upon a stock in trade, made within four months of the petition in bankruptcy, may be good in so far as it was given to secure advances then made, and invalid in so far as it was given to secure a pre-existing debt..... 199

A mortgage given to secure existing indebtedness and possible future loans, as to which no definite agreement was made, *held* fraudulent and void as to creditors.....1352

A creditor who, with reasonable cause to believe the debtor insolvent, takes a judgment note more than six months before the petition is filed, cannot obtain a preference by the entry of a judgment and the levy of an execution on the debtor's stock of goods within such time..... 849

A judgment obtained within four months before the filing of a petition in bankruptcy in proceedings to subject a fund to the payment of a judgment against the bankrupt *held* void, and the judgment creditor, having received the fund, less the costs of his action, is liable for the whole amount.. 233

Taking property on attachment or execution is receiving a preference, but merely recovering judgment is not..... 1

A general assignment of all the debtor's property in trust, first, to pay the debts of certain creditors in full, and to apply the balance pro rata to the debts of the others, where the property is insufficient to pay all in full, is fraudulent on its face..... 110

Property assigned in fraud of the act, though under a general assignment for the equal benefit of all creditors, made in strict compliance with the insolvent law of the state, may be recovered by the assignee.... 835

A person is held to be insolvent when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation..... 216

Creditors who have to resort to legal measures for the collection of accounts long overdue will be held to have reasonable cause to believe the debtor insolvent..... 216

Proof that the bankrupt, while insolvent, paid or secured defendant in full, without making adequate compensation to his other creditors, casts upon defendant the burden of showing that he did not know at the time that the bankrupt was insolvent..... 110

The payee and indorser of a note paid by the maker in the usual course of business to the holder, is not chargeable with taking a preference where he had nothing to do with the payment, although he knew of the maker's insolvency 982

The rule would be otherwise if the indorser procured such payment to be made by the maker with intent to give a preference.... 982

Payment to depositors by insolvent bankers is not made good by the fact that the debtors acted under advice of counsel to save a criminal prosecution..... 214

Suits and proceedings in relation to the estate.

The circuit court has no jurisdiction of a bill by the assignee of a bankrupt firm against the assignee of a member thereof to require him to pay complainant a surplus after individual creditors are satisfied..... 6

The district court has jurisdiction, under Rev. St. § 4970, of a suit by creditors against the assignee of a bankrupt member of a firm to procure an adjudication of their debts and their right of priority as against individual creditors, and may give complete relief therein 511

A summary petition by the assignee, and not a plenary suit, is the proper remedy against the bankrupt to recover property illegally withheld by him.....527, 1021

A proceeding to compel the bankrupt to deliver to the assignee a policy of insurance on his life, which he claimed to have transferred to his son before the bankruptcy, must be by plenary bill 1

The assignee may proceed by summons or petition upon a forthcoming bond, and need not resort to a plenary suit..... 165

Goods seized by the marshal were delivered to a purchaser from the bankrupt on his giving a forthcoming bond. A decree setting aside the sale as fraudulent was finally affirmed in the supreme court. The purchaser being insolvent, *held*, that the assignee might proceed either upon the forthcoming bond or one of the appeal bonds, and without first enforcing the same against the estate of the purchaser 165

A bill in equity by the assignee is not demurrable on the ground that he has a complete remedy at law, where the facts show that questions of fraud, trust, and partnership are all involved in the case at issue.. 789

In the case of property held by defendant under claims in different rights, *held*, that a suit in the form of a creditors' bill was the proper remedy 176

The fact that there are other creditors of defendant is no objection to the assignee's bringing a suit to recover assets in the form of a creditors' bill..... 176

The circuit court will entertain a bill by an assignee against several mortgagors and oth-

Page

er lienholders to ascertain the amounts due, and sell all the property free from incumbrances 459

The cause of action by a trustee in bankruptcy to recover a payment made by the bankrupt of money, the title to which was in an assignee under a general assignment, *held*, did not accrue, under Rev. St. § 5057, until he became vested with the title of such assignee under a decree setting the assignment aside as void under the bankrupt act.. 695

Review.

Any lien creditor may appeal from a decree affecting his rights to the supervisory jurisdiction of the circuit court..... 674

A bill or petition under Act 1867, § 2, for a review of an adjudication of bankruptcy may be heard by the circuit judge in chambers at any place within the circuit, whether within or without the district where the bankruptcy proceedings are pending.....1139

On a revisory petition to the circuit court the case will not be taken up de novo, but the error complained of must be particularly set forth 452

On an appeal by a creditor from a decision of the district court rejecting his claim the case is reconstructed in the circuit court, and the issues are made up and tried in the same way as if the case were originally commenced in such court..... 93

On a trial of a claim upon a judgment, matters which were available to the bankrupt as a defense in the original suit cannot be set up 93

On an appeal by a creditor from the decision of the district court rejecting his claim, where a declaration and plea are filed, the creditor has a right to a jury trial..... 920

Such right will not be held to have been waived where the appeal is inadvertently submitted, and decided as if the cause had been brought up by writ of error..... 920

Arrangement with creditors: Composition.

The president of a bank, which claimed to be entitled to a preference, is not a proper person to be a member of the committee of creditors 339

A receiver appointed in proceedings in a state court, which were one of the grounds upon which the adjudication was made, is not a proper person for trustee..... 339

An excuse of a bankrupt for failure to attend an adjourned meeting in composition proceedings, that he had already been subjected to an exhaustive examination, and that his business required his constant attendance, *held* sufficient 1208

Where a resolution of composition has been adopted and confirmed by the requisite number of creditors, the right of a creditor to examine the bankrupt under Rev. St. § 5086, is suspended 1212

As to the power and duty of the register in permitting the examination of the bankrupt or suspending a pending examination..1209

The refusal of permission to take a copy of the inventory, which is at all times accessible to the creditor, is not prejudicial..1212

The refusal of the register to proceed with the examination of the debtor until his fees are paid or secured is no ground of opposition to the recording of a resolution of composition 1212

It is a substantial objection to the approval of a resolution of creditors, under section 43, Act 1867, appointing a trustee and committee to supervise his action, that the committee is composed of only two, one of whom is the trustee 88

Amending and repealing acts.

The clauses in the bankrupt law which give the power to an assignee to sue for and recover the amount of unlawful preferences

Page

are not subject to the rule of construction applied in cases of repeal of penal statutes..1297

The amendment of June 22, 1874, is inapplicable to a suit in equity by the assignee to recover a fraudulent preference in compulsory proceedings commenced prior to December 1, 1873 982

The amendment of 1874, substituting the word "knew" in place of the words "had reasonable cause to believe," as applied to vendees of insolvents, is inapplicable to proceedings in bankruptcy commenced before December 1, 1873.....1297

An adjudication after the amendment of 1874, where the petition was filed before such amendment, must be in accordance therewith 730

BANKS AND BANKING.

The holder of bank bills is entitled to be paid in specie, by weight, the amount of such bills, upon a demand within the usual banking hours of the bank..... 346

The bank is bound to keep its money counted or weighed, or to employ servants sufficient to count or weigh it, so as to pay all demands made within the usual banking hours 346

One bank demanding payment of the bank bills of another is not bound to receive its own bills in payment, but may demand specie 346

Where a bank, having a large amount in bills of another bank, by agreement with it placed the same in the hands of a third party as collateral, and the other bank drew drafts on New York, also advancing additional collateral to pay possible expenses of protest, *held*, in an action on the drafts, that the agreement was not pleadable in bar, the drafts having been taken as payment..... 79

A loan by a national bank in excess of the restriction (Act June 3, 1864, § 29) is not void; but making such a loan subjects the bank and its officers to the forfeitures and penalties prescribed in section 53..... 568

It is no defense to a suit by the receiver of a national bank against a stockholder to recover the amount of an assessment made by the comptroller of the currency that the assessment was not needed by the receiver.. 254

BILLS, NOTES, AND CHECKS.

Interpretation.

A note absolute on its face may be made payable on conditions by a separate agreement as between the original parties, and an assignee with notice is affected with existing equities 963

Checks.

A check in the hands of the payee, before presentation, acceptance, or payment, is not an assignment of any part of the fund in the hands of the drawee..... 214

Indorsement and transfer.

A collateral agreement between the parties to a negotiable note that it is to be paid only on certain conditions cannot be set up in defense to a suit by a bona fide transferee for value, though a state statute provides that the maker may set up any defense against the assignee which he could make against the payee 964

Query whether an indorsement of the negotiable paper must be proved to have been made before it became due..... 271

Demand: Notice: Protest.

A promissory note transferred by indorsement after maturity is payable on demand, and demand and notice are necessary to charge the indorser, though he knew the

Page

maker to be insolvent at the time of indorsing it 57
In the case of a joint and several promissory note, a demand must be made upon both makers to charge the indorser, though one resides in another state..... 725

Release or discharge of indorser.
An indorser on the notes of a bankrupt is not discharged by an extension of time given to the bankrupt by the holder.....1206

Actions.
After a note is taken up by the indorser its negotiability ceases, and his assignee cannot sue in his own name..... 515
A person cannot sue as an indorsee unless he be the owner of the note, or have some legal or equitable interest therein. A mere agent, to whom a note is indorsed by his principal for the benefit of the latter, cannot maintain such suit 894
Under the provision of the Indiana statute giving the indorsee a right of action against the indorser, after having used due diligence to obtain the money, the indorsee of a note secured by a mortgage on lands in another state need not first exhaust such security.. 572
Want of consideration for a subscription to a college endowment fund is no defense to a note given in settlement thereof..... 308
A declaration on a note made payable at a particular place need not aver that the note when due was presented at such place for payment 1033
An agreement made on the indorsement in blank of a dishonored note, that the indorser should not be liable except on the maker's insolvency, may be shown by parol..... 804

BILL OF LADING.

See, also, "Admiralty"; "Affreightment"; "Carriers"; "Demurrage"; "Shipping."

The bill of lading, though not conclusive, is strong evidence of the apparent condition of the cargo..... 680
A bill of lading may be explained by showing that the goods receipted for as shipped were in fact returned to the shippers 469
A bill of lading, signed by the purser, who was not authorized to sign bills of lading, for goods not entered on the ship's manifest nor stowed with the other freight, acknowledging freight paid, may be contradicted by showing that the goods were carried as a personal favor to the owner, and no freight was expected to be paid.... 342
A person to whom a bill of lading is assigned as security for the payment of goods purchased of him by the shipper, under said bill of lading, is not liable to the shipowner for the freight..... 549
A person to whom a draft secured by a bill of lading is made payable as "cashier," for the purposes of collection, may proceed against the vessel in his own name for a wrongful delivery of the cargo to another 886
The indorsee of the shipper's bill of lading, who cashed a draft on the consignee on the faith thereof, may recover the amount of the draft, with interest, against the vessel which delivered the goods to the consignee without production of the shipper's bill of lading.....884, 886
A master having stipulated by bill of lading to deliver cargo to a certain consignee, afterwards signed a second bill of lading by which he stipulated to deliver a certain part of the cargo to plaintiff as security for money subsequently borrowed of plaintiff by the shipper. *Held* that, if he delivered all the cargo to the original consignee, he was liable to plaintiff for failure to deliver the stipulated part to him..... 81

BONDS.

See, also, "Principal and Surety"; "Railroad Companies."

Page

The marshal may include his commissions in a forthcoming bond, and is also entitled to commissions upon an execution on the bond 935
A defective forthcoming bond will, at plaintiff's request, be quashed, as well as the execution upon which it was founded.. 471
A forthcoming bond, given by mistake for less than the judgment, may, on plaintiff's motion, be quashed on paying costs of the motion..... 20

BOTTOMRY AND RESPONDENTIA.

Authority to raise money upon the vessel itself in the absence of other means is implied where the owner refuses to pay a bill given for supplies furnished, and sends the creditor to demand payment from the master in a foreign port..... 937
The consignee of a vessel may apply the proceeds of a cargo and the freight to pay sums due on account of its purchase, without affecting his right to take a bottomry bond from the master for supplies subsequently furnished 937
The necessity for supplies to support a bottomry bond need not have been so urgent that the vessel must have been lost to the owner without them..... 937

BOUNDARIES.

A boundary "on," "by," or "to" to a stream, includes the land at least to low-water mark 946
A boundary "on" the bank of a river, referring to fixed monuments of the bank, limits the grant to the bank, and excludes the flats below it..... 946
Where the land, according to a plan referred to in the deed, is bounded "on" a river, with no other specific boundaries, the flats will pass by operation of law..... 946

Bounties.

See "Fisheries."

CARRIERS.

See, also, "Affreightment"; "Average"; "Bill of Lading"; "Charter Parties"; "Demurrage"; "Shipping."

Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocation, may be excluded.....1192
A regulation by a railroad company that canal boats unloading coal at its dock to be received on its cars there should employ its shovelers and rent its hoisting tubs at certain rates, being the usual market price, *held* unreasonable 1163

CHARTER PARTIES.

See, also, "Admiralty"; "Affreightment"; "Average"; "Bill of Lading"; "Demurrage"; "Shipping."

A vessel chartered on a time charter for a voyage at a specified rate must sail without unnecessary delay, and proceed with all reasonable dispatch to her destination..... 343
Damages for a breach of such obligation are the difference between the fair market values of the cargo when it ought to have

Page

been delivered, and at the time when the vessel actually arrived..... 343

Under a charter party for a voyage to a certain port, or, in case it be blockaded, to a market and return, the vessel is not liable for the time necessarily consumed in the deviation to ascertain whether the port of destination was blockaded..... 132

Insufficient sail, resulting in lost time on the voyage, *held* would render the vessel liable for subsequent injury and loss of the cargo, where she was obliged to put into port within 200 miles of home in anticipation of heavy weather..... 995

The vessel is not liable for a loss or damage on account of the deck storage, where it must have been contemplated from the very nature of the cargo that it should be stored on deck..... 647

But where the loss arises, not on account of the cargo being stored on deck, but because it was improperly secured, the vessel will be *held* liable..... 647

The master will be *held* negligent in not keeping a vigilant watch while at anchor, and in not being prepared to drop a second anchor when his chain parts in a sudden blow 995

CHATTEL MORTGAGES.

See, also, "Bankruptcy."

Registry notice in New York of a chattel mortgage on a vessel does not affect third persons unless the owner continued to reside in the state..... 952

A renewal notice in New York subsequent to Act July 29, 1850, is ineffectual unless the mortgage be also recorded in the office of the collector of the port..... 952

COLLISION.

See, also, "Admiralty"; "Pleading in Admiralty"; "Practice in Admiralty"; "Shipping"; "Towage."

Nature of liability: Contributive fault.

A steamboat unavoidably injuring another in the confusion incident to an attempt to extricate her from a threatened conflagration, will not be *held* responsible for the damage 34

The master of a vessel will be *held* justified in bearing down on another vessel to leeward, which has hoisted her colors, as if to speak him, if it is the custom to do so.. 156

A vessel will be *held* at fault for racing under full sail with another vessel on a dark night, when other vessels on the same course have taken in their light sails.....1001

The relative situation of a vessel, and the probability of a change therein at the time that a course is decided upon by another, will determine the question of negligence of the latter 992

Rules of navigation.

The ordinary rules of navigation designed to prevent collision are binding on fishing vessels while engaged on their fishing grounds 381

The rule of navigation on the Ohio river, giving the ascending boat the right to choose her course, does not give her the right where the boats are on opposite sides of the river with ample water between, unnecessarily or capriciously to require the decending boat to change her course.....1155

The ascending boat on the Ohio river should not cross the channel, when a descending boat is so near as to involve risk of collision 1155

Between sail vessels. Page

In the case of sail vessels having the wind free, the one on the port tack must give way 1001

In the case of vessels sailing on meeting courses nearly opposite, where both have the wind free and neither ports her helm, as required by Admiralty Rule 11, both will be *held* in fault..... 588

Query, whether such rule is applicable in the case of sailing vessels meeting end on, or nearly so, one being closehauled and the other sailing free..... 588

Vessels moored, etc.

A vessel moving out of a pier, where other vessels are moored alongside, is charged with the duty of seeing that all lines are unfastened 1145

A canal boat lying at a pier is not bound, at the request of the master of a tug taking another boat out of the slip, to get out extra fastenings to prevent the canal boat breaking loose by the pressure of the tug carried against her by the tide.....1304

A vessel lying near to, but not moored at, a wharf, without a signal light, and with her boom rigged out board, is responsible for a collision with another vessel moving prudently to her accustomed berth..... 80

A vessel anchored within 300 yards of the Battery, at night, without a light or a watch on deck, *held* solely liable where injured in a collision with a steamboat rounding the Battery in the usual manner to make her pier at Cortlandt street..... 881

Tugs and tows.

In the case of a collision by a tow, where there is no proof as to the agreement for towage or the local usage, the tug will not be presumed to have been under the control of the tow..... 487

Tug *held* liable for collision by stern tow with schooner anchored in the St. Clair river for an attempt to pass the bend in the river with more than one vessel in tow.... 487

River and harbor navigation.

A steamer will be *held* in fault for running at a speed of 17 miles an hour in the nighttime, through a crowd of vessels, whose lights are seen by her..... 594

A vessel which attempts to haul by another grounded in the entrance to a dock, after being warned that there is not room enough, is liable for all injuries caused by her jamming 242

A vessel aground in a narrow channel, in a situation to permit of other vessels passing her in safety, should, on the approach of another, cease her efforts to get off, until such other vessel has passed..... 992

It is not a fault for a tow to enter the channel of St. Clair Flats while another tow is coming through in an opposite direction.. 541

Lights, signals, etc.

The vessel which did not carry the statutory lights is prima facie at fault..... 773

The absence of lights on a canal boat just after sundown, when they would not have afforded any aid in discovering her, is not a fault 1267

Neglect by a vessel, having the right of way, to show the regulation lights, does not relieve another vessel from observing the rules of navigation, and using all practicable precautions to avoid a collision..... 554

A tug, lying in the open lake, waiting for a tow, and exhibiting colored lights, is *held* to the responsibility of a steamer under way 413

Lookouts: Officers, etc.

A tug with her captain on deck and a man at her wheel, and no other lookout, has not a proper lookout 1267

Page

The failure of the lookout of a sail vessel to reannounce the colored lights of another vessel, which was not under way, *held* not a fault *413

The officer in charge of a sail vessel, whose lookout has reported a light in such a position that there is no apparent danger of a collision, is not at fault in leaving the future watching of such light to the lookout..... 413

Particular instances of collision.

Between steamer and schooner, where the latter's torch was mistaken for that of a pilot boat, and the steamer continued to bear down upon her, instead of changing her helm, or stopping until she found out the schooner's course, and was *held* solely in fault.....1305

Between steamer and schooner, where the latter's lantern was not seen through the negligence of the steamer's lookout, and the steamer was *held* solely in fault.....1351

Between bark and tug lying at rest in Lake Huron, where the latter, exhibiting colored lights, was *held* solely at fault in not getting out of the way.....*413

Procedure.

A proved fabrication of evidence, unexplained, will compel an adverse decree.....1266

Damages denied for want of preponderating proof in a great conflict of evidence.... 381

Rule of damages.

The value of a cargo of bone and oil lost in the Arctic Ocean is to be estimated at its market value in the home port of the vessel at the time when it would ordinarily have arrived there, if shipped at the time and from the place of the collision..... 554

In the case of a cargo of coal sold at private sale without notice to the parties chargeable for the damages, *held*, that the loss shown thereby was recoverable, but the practice was disapproved..... 996

The loss of a vessel, abandoned by an experienced and capable master in good faith, is to be taken as a total loss, although the other vessel, almost as badly injured, succeeded in reaching port..... 554

Demurrage is allowed from the time the injured vessel is necessarily detained, if she has lost employment..... 242

A collier, during the busy season, may be presumed to have lost employment..... 242

Demurrage *held* not recoverable for the time lost by the vessel being frozen in while undergoing repairs at the place to which she was taken 996

In estimating the damages to a ship on a whaling voyage, demurrage is to be allowed for the time she is in port undergoing repairs 555

The pro rata share of the net earnings of an association of vessels, based upon the valuation on each vessel, *held* a proper basis for demurrage, where one of the vessels was injured in a collision..... 422

The services of other vessels of an association, of which the injured vessel was a member, furnished a person under a contract for raising the vessel at a specific sum, are proper items of expense..... 422

The salary and board of the master of a vessel while superintending her repairs *held* a proper charge 422

Division of damages.

Where libelant has been guilty of gross fault, and that of respondent is in any degree doubtful, a decree for division of damages will not be rendered..... 413

It being the usage in New York harbor to run steamboats in a dense fog, where two steamboats collided when running at the same speed the court will not hold either vessel at fault, and a division of damages will not be decreed 586

COMPOSITIONS.

See, also, "Bankruptcy."

Page

A settlement with a debtor by accepting an offer of compromise, with a proviso that no other creditor should receive better terms, is not vitiated by the debtor's afterwards voluntarily paying some of his other creditors in full 307

CONFLICT OF LAWS.

The forms or modes of remedies in one state to enforce contracts are not regarded in other states 1312

CONSTITUTIONAL LAW.

Transportation of freight and passengers from one state to another, or through more than one state, either by land or water, is interstate commerce 530

A denial of the writ of habeas corpus by a state judge is not a deprivation of liberty without due process of law..... 728

The examination of the books of a person, under section 14 of the revenue act, is not an infringement of the constitutional provision protecting persons from unreasonable searches, etc 261

The appointment of supervisors of congressional elections by the federal circuit judges under Rev. St. § 2011, is a judicial act, and the statute is not unconstitutional..... 430

A constitutional provision requiring a uniform rate of taxation does not prohibit municipal aid to railroads..... 652

A constitutional provision that the state shall not be a party to or interested in any work of internal improvement does not prohibit the legislature from authorizing municipal aid to railroads..... 652

CONTEMPT.

A person who brings an action in one court against a receiver appointed by another, without the consent of the latter, is guilty of a contempt, although the receiver's possession is not disturbed thereby.....1088

The proper remedy for a person, having a demand against a fund in the hands of the receiver, is to bring his demand into the court appointing the receiver.....1088

CONTINUANCE.

A continuance will be granted where depositions have been taken by one party without notice to the other..... 210

Absence of a material witness may be good ground for a continuance, although he resides more than 100 miles from the place of trial, so that the moving party might have taken his deposition 591

The absence of a witness on the hearing of an admiralty appeal is no ground of continuance, where he failed to attend in the court below, and no effort was made to secure his attendance in the circuit court until five days before the case on appeal was called for trial 773

CONTRACTS.

See, also, "Sale"; "Vendor and Purchaser."

Where a contract to cut a channel in a river is partly performed, when a freshet clears out the balance, and the contractor is notified not to complete the contract, he is entitled to recover the fair and reasonable

Page

profit which would have been made by him had he been allowed to complete it.....1038

COPYRIGHT.

A copyright cannot be secured without compliance with the statutory requirements as to the deposit of a copy of the title before publication and a copy of the book after publication 268

The doctrine of the right to abridge criticised, and *held*, that a copyright should be protected under the rule applicable to a patented machine 171

A fair abridgment, though it injure the sale of the original book, is lawful; otherwise as to a compilation..... 171

A compiler or reviewer cannot extract from a copyrighted work so as to convey the same knowledge as the original book..... 171

One compiler cannot avail himself of the labor of another by copying from his book extracts from common sources..... 171

A translation of a copyrighted romance into another language is not an infringement of the copyright, though the author has herself a copyrighted translation..... 201

A book of 1856 pages *held* to be infringed by an abridgment in 348 pages, which copied one-sixtieth part of the former book in the form of scattered paragraphs, constituting one-fifteenth part of the infringing book.... 171

A part of a book may be an infringement and the other parts not. In such case the relief will only extend to the part considered an infringement 171

Before granting an injunction on a charge of infringement, the court will generally refer the matter to a master with instructions to report the extent of the infringement, if any, that the court may act on the case.... 171

A purchaser under a sheriff's sale of a copper plate on which a copyrighted map is engraved, may take impressions therefrom, and sell the same..... *15

Commissions received from sales of a pirated map are profits to be accounted for by the commission merchant selling them..... 14

An account of profits may be decreed to the owner of a copyright as incidental to an injunction, but it must be prayed for in the bill, and cannot embrace penalties..... 8

CORPORATIONS.

See, also, "Banks and Banking"; "Insurance"; "Marine Insurance"; "Municipal Corporations"; "Railroad Companies"; "Receivers"; "Telegraph Companies."

In Iowa a corporation for pecuniary profit becomes a body corporate as soon as the articles of incorporation are duly filed, though it has no paid-up capital, and does not file a sworn statement or procure a certificate authorizing it to commence business, as required by law..... 137

In such case the individual members are subject to the penalties and liabilities provided by law, but they cannot be *held* liable as partners 137

A by-law, adopted by the directors, and not by the incorporators, where two-thirds were present as required by the charter, is a nullity 899

A corporation chartered for sawing and manufacturing wood cannot legally invest money in a bank for the purpose of carrying on the business of banking..... 384

Such corporation cannot buy shares in a banking institution to more than its authorized capital, and bind the corporation or members for the payment of promissory notes given therefor..... 384

Page

An insurance company, though forbidden by its charter from investing in national bank stock, after holding the stock and receiving dividends thereon, is estopped from setting up the unlawful acquisition to escape liability for an assessment on the subsequent insolvency of the bank, where the latter did not know in what manner the stock was acquired 251

A judgment against a corporation in a suit of which it had no notice is not binding on it in another state in which the corporation was domiciled..... 384

A contract for the issue of stock at less than the charter price is not enforceable... 311

A sale of stock by the directors at a less rate than that fixed in the charter is unlawful and void..... 311

The issuing by the directors of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond at a discount is unlawful and void 311

A power given to the directors to sell the property of the company, or notes and bonds belonging to it, does not apply to the capital stock 311

It is not necessary that the charter contain a prohibition against taking subscriptions at less than the charter price..... 311

A contract by a corporation with purchasers of certificates of stock to pay them a higher rate of interest than that permitted by law is invalid, and a subsequent contract founded thereon, to apply the excess of interest in a manner contemplated therein, will not be enforced in equity..... 351

An agreement by the corporation to receive depreciated stock in other companies at its par value in payment of subscriptions is no defense to a suit against other stockholders on their subscriptions..... 525

A stockholder is not exonerated individually from debts consequent on a lawful act against which he objected and protested, unless he seasonably sells out or withdraws as a member..... 384

The members of a corporation are not bound in their individual capacity by a recovery in an uncontested suit against it in another state, where they had no notice and opportunity to defend..... 384

COSTS.

Where several distinct causes of action are united in the same libel, the costs may be distributed, and each party recover costs on those branches of the action in which he succeeds 942

A small undisputed claim, which has never been demanded, cannot be tacked to a contested claim so as to recover costs on the latter 489

Full costs decreed claimant in admiralty, although the demands of libellants are less than $50 each..... 489

Costs will be denied a seaman who has not given the master and owners a reasonable time for an amicable settlement of his claim 443

Where a minority owner of a vessel objects to a proposed voyage, he is entitled to a bond for the safe return of the vessel, and his failure to demand it will not prevent his recovering costs on a libel therefor..... 310

A third person, who appears and defends in behalf and in the absence of the party to a suit in admiralty, is personally liable for the clerk's fees..... 189

Fees paid to the officers of the court by the claimant of property seized are not to be repaid by the United States, under Act Feb. 28, 1799, § 8, where the libel is dismissed.. 187

A dismissal "without costs to either party" does not relieve the parties from liability to

Page

the clerk for fees for services rendered at their request 189

No costs can be taxed save those allowed by the act of 1853.....1131

Since the act of Feb. 26, 1853, the district court in admiralty has no power to award an additional sum to libelants in the court's discretion under the name of a counsel or proctor's fee 326

The rate of compensation of proctors in admiralty is controlled by the statutes in force at the time the right to costs accrues, or at the time of taxation..... 326

In an equity case, where depositions are not admitted on final hearing, the solicitor's fee of $2.50 is not allowed (Act Feb. 26, 1853.) 100

The distinction between an affidavit and a deposition considered 100

Security for costs in the case of a nonresident plaintiff may required at the trial term, in default of which a continuance will be granted 986

COURTS.

See, also, "Admiralty"; "Bankruptcy"; "Equity"; "Maritime Liens"; "Removal of Causes"; "Rules of Court."

Comparative authority of federal and state courts: Process.

The pendency of a replevin suit in a state court to settle the right of property in a vessel will be *held* to bar a libel in admiralty to settle the same right between the same persons 797

But a replevin suit in a state court by a part owner of a vessel does not affect the jurisdiction of a court of admiralty in a proceeding by libel in which all the parties in interest are before it.....1186

While a court of chancery in another state than that in which land is situated cannot make a decree affecting the title, they may decree a conveyance where they have jurisdiction of the person of the owner, and enforce the same by attachment or otherwise.. 700

Federal courts—Jurisdiction in general.

The repeal (Act July 13, 1866, § 68) of Act June 30, 1864, § 50, leaves the jurisdiction of the federal courts in cases arising under the revenue laws to stand on Act March 2, 1833, and that act does not confer jurisdiction in cases arising under the internal revenue laws..... 20

—— Grounds of jurisdiction.

The federal court has no jurisdiction on the ground of diverse citizenship, unless all the persons on one side of the controversy are citizens of different states from all the persons on the other side..... 822

The limitation in section 11 of the act of 1789 is confined to the time when the suit is commenced 897

Where a suit is auxiliary to one previously commenced and still pending between citizens of different states, it is no objection to the jurisdiction that the parties are citizens of the same state..... 154

Under the act of 1839, a party defendant who does not reside in the district may voluntarily become a party to the suit without ousting the jurisdiction of the court..... 762

The rule that jurisdiction once acquired by virtue of the citizenship of the parties cannot be ousted by a change of residence applies only where jurisdiction has vested by a suit 897

The marshal's return should show affirmatively that the subpœna was served on defendant within the district in which the suit was brought in order to confer jurisdiction, where the bill alleged that defendant was a resident of another state..... 903

Page

An allegation in the complaint of residence of the parties is not necessary to give jurisdiction 831

—— Circuit courts.

A foreign corporation, filing with a state auditor, pursuant to the state laws, a stipulation that service on the auditor will bind the company, is not, by virtue thereof, an "inhabitant" of, or "found" within the state, under Act March 3, 1875..... 90

The court acquires jurisdiction over a defendant corporation by service of its subpœna upon the superintendent and general managing agent within the district.....1113

Whether the circuit court can obtain jurisdiction of a suit against a citizen of another state residing in a foreign country by process of foreign attachment, where defendant is not found in the district,—quere?.....1353

—— Administration of state laws.

The settled construction of a state law by the highest court of the state is controlling on the federal circuit court.....1070

A decision of the highest court of a state, holding an act of its legislature unconstitutional, is binding on the federal court only where it is based upon special provisions of the state constitution..... 652

The decisions of the supreme court of a state construing its state constitution and laws in relation to securities given by municipalities to aid railway companies, are not necessarily binding on the federal courts.. 968

The federal court refused to follow a decision of the highest court of the state, holding laws authorizing municipal aid to railroads to be unconstitutional, where opposed to repeated decisions on other laws involving the same principle, and to the unanimous decisions of courts of other states in analogous cases 652

The federal courts will follow the decisions of the state courts on questions of pleading. (Act June 1, 1872.)..... 735

The federal courts are not bound in the interpretation of deeds by the decisions of the state courts..... 946

A decision by the highest court of a state, that a foreclosure of the mortgage under a law of the state was bona fide, and made in conformity thereto, is binding on the federal court 351

—— Procedure.

The circuit courts adopt the local remedies of the respective states..... 214

The federal courts are not implicitly bound by the practice and decisions of the state courts with regard to amendments.....1323

COVENANT, ACTION OF.

Covenant will not lie on the condition of an injunction bond 381

COVENANTS.

See, also, "Vendor and Purchaser."

Construction of covenant in relation to lands taken in execution to satisfy a debt.. 905

CREDITORS' BILL.

A creditors' bill is maintainable in the federal court in the form prescribed by the state statutes 472

The Illinois statute of 1877, giving the county court full jurisdiction in the case of assignments for creditors, does not deprive courts of equity of jurisdiction of a creditors' bill to set aside a fraudulent assignment or preference consummated prior to the assignment 247

Page

Reduction of a claim to judgment is an indispensable prerequisite to a creditors' bill 55

Where the debtor disposed of $200,000 worth of stock before making a general assignment of $18.000, *held*, that a receiver would be appointed..... 247

On a creditors' bill to recover assets pledged to a national bank as security on the ground that the loan secured was ultra vires, it appeared that afterwards the debtor had made a general assignment for creditors. *Held*, that complainant could have no relief, for if the bank had no title the title became vested in the assignees under the general assignment 68

CRIMINAL LAW.

See, also, "Arrest"; "Bail"; "Extradition"; "Fines"; "Habeas Corpus"; "Witness."

The federal district court has exclusive jurisdiction of crimes committed in the Gosport navy yard in Virginia. (Rev. St. § 711.) 708

The "navy yard" includes contiguous waters necessary to float vessels of the navy while at the navy yard..... 708

CURTESY.

In Rhode Island, a husband is not entitled to a life estate, as tenant by the curtesy, of a remainder or reversion owned by the wife, but only of real estate of which he had actual seisin and possession in fee..... 126

CUSTOM AND USAGE.

A general custom of the Lake ports as to delivery will not control as against a particular custom of one port..... 242

CUSTOMS DUTIES.

Customs laws.

Foreign goods once lawfully imported lose the character imparted to them by such admission on their re-exportation, and cannot again be imported without a permit..... 840

Goods of whatever growth or manufacture, brought from a foreign port or place, and landed at a port or place within the United States without a permit, are forfeited 840

Opium shipped from San Francisco to Portland by the way of Victoria, B. C., and taken ashore there, for however short a time, cannot be landed by the same vessel at Portland without a permit..... 840

The question whether certain articles upon which a specific duty is imposed by name is, like certain other articles, within a treaty stipulation for nondiscriminating duties, is exclusively for congress..... 784

Rates of duty.

Goats' hair plush or mohair plush, composed partly of cotton, *held* dutiable as a manufacture of "goats' hair or mohair," under Act Aug. 30, 1842.....1159

Shingles not specifically enumerated in Act March 2, 1861, *held* dutiable at 30 per cent., as manufactures of wood..... 116

Invoice: Entry: Appraisal.

Under Act Aug. 30, 1842, § 16, and Act July 30, 1846, § 8, duties are to be assessed upon the appraised value of goods imported by their manufacturer, notwithstanding there is an invoice sworn to by their owner.1100

The additional duty of 20 per cent. (Act July 30, 1846, § 8) is not imposed where the invoice price is raised more than 10 per cent., where the importer is the manufacturer, or procured the goods in the country of their production otherwise than by purchase 1100

The lowest cash price given by a merchant in a regular proposition for wine for export in quantities will fix a market value for the purpose of invoicing wines in substance the same as those offered.....1168

The "actual market value" of wines at the "place" where they were procured or manufactured determined in the case of wines dosed and prepared for export.....1168

An appraisement regularly made under Act April 20, 1818, c. 74, for the purpose of ascertaining the value of goods subject to an ad valorem duty, is conclusive as to the value on which the duty is to be estimated. 690

Under such act, the actual cost is still the true basis of valuation..... 690

Payment: Protest.

Where the protest is written on the entry, the description given of the goods in the entry need not be repeated in the protest.....1100

The protest must state distinctly every ground of objection intended to be relied on, and no others are available.....516, 1100

Objection to the regularity of the appraisal proceedings is not raised by a protest "against paying additional duty and penalty on" the goods described, "they being appraised too high."....1100

Violations of law: Forfeiture.

Debt is the proper form of action for the recovery of penalties for violations of the law 116

Counts for duties and for double values may be joined in the same case..... 116

A count for illegally receiving, concealing, or buying may be joined with one for illegally importing 116

A district court judge has power on complaint or affidavit to issue a warrant for the seizure and production of books or papers relating to merchandise, in respect to which a fraud on the revenue is alleged to have been committed 116

Sufficiency of the warrant in such case and waiver of defects therein..... 116

The objections to books, etc., offered in evidence on the ground that there was no authority to issue or serve the warrant, is insufficient to raise the question of defects therein at the hearing..... 116

A sentence of condemnation forfeiting a portion of a cargo from an omission to enter the same in the manifest is erroneous, unless the libel charge the particular omission 988

A bail bond given by the claimant is good, though the condition does not exactly conform to Act March 2, 1799, c. 128, § 89.... 268

Such section does not extend to delivery on bail on seizures under other acts..... 268

DAMAGES.

See, also, "Contracts"; "Collision"; "Patents."

A stipulation "to forfeit $1,000 if we fail to carry out this contract," *held* a provision for a penalty to cover actual damages, and not for liquidated damages..... 782

The measure of damages for a failure to transfer corporate stock according to contract is the price of the stock on the day when it ought to have been transferred.... 727

Substantial doubts existing as to any of the elements of damage in a case of tortious taking must operate against the wrongdoer.. 605

The measure of damages for the tortious taking of a whale is full indemnity to the owner; and in the case of whale ships the labor of securing and transporting the proceeds is not to be considered..... 605

DEATH BY WRONGFUL ACT.

Page

The father of a minor child, killed by the wrongful act of defendant, may recover for the loss of his services to the time when he would have become of age, irrespective of the time when death ensued..... 368

An action for the injury to a minor child by the wrongful act of defendant, in the absence of a statute, does not survive the death of the person injured, and cannot be brought by his representatives or next of kin 368

DECEIT.

The gist of an action for a false affirmation of the credit of another is fraud; and the action is not sustained if the representation was in substance true according to the party's knowledge and belief..... 688

A warehouseman who draws a fabricated receipt is liable to the person who accepted and paid a draft on the faith of it for the injury received 479

In the case of commission merchants, the amount of commissions which they expected to receive is an item of damage..... 479

DEED.

See, also, "Vendor and Purchaser."

A conveyance to a parent by a child recently of age is prima facie valid, and its validity does not depend on adequacy of price.. 362

A deed of lands not in the grantor's possession at the time of its execution does not convey the lands, and a covenant of seisin therein is not broken as to them..... 964

A plan of a tract of land referred to in a deed for purposes of description is to be treated as if it were annexed to and made part of the deed..... 946

Deeds are always construed according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom..... 946

The description, said to contain "about" so many acres, "more or less," will be considered as a representation of quantity, and in the case of an unreasonable excess or deficit equity will correct the mistake..... 964

A deed, in Indiana, until properly acknowledged, is not notice, though it is recorded, and is valid between the parties..... 254

As between a deed executed before an attachment and a deed under the attachment, *held* that the former, being first properly acknowledged and recorded, conveyed the paramount title..... 254

A deed executed out of Indiana for land within it, acknowledged before a justice of the peace, should bear the county clerk's certificate, and not that of the secretary of state 254

The recording of a deed in the proper office is only prima facie evidence that it was regularly proved and admitted of record..... 644

The surrender and cancellation of a deed does not reinvest the title in the grantor... 472

DEMURRAGE.

The refusal to admit a claim for demurrage in loading will not justify a refusal by the master to sign bills of lading, and the owners cannot recover for a delay caused thereby 1167

An agreement for quick dispatch supersedes any custom of discharging vessels by which they are to take their turn at the wharf 874

Naming a wharf in a charter party containing such a stipulation amounts to an undertaking that the wharf shall be unincumbered 874

A proviso against liability for detention, unless by "default" of the charterer, exempts him only from delay from causes beyond his control acting directly to retard the discharging 874

The master is entitled to the presumption that he knows best where his vessel should anchor, and his changing the place of anchorage to a greater distance from the shore *held* no defense to a claim to demurrage in loading 1167

A carrier is not justified, from press of business at a port preventing delivery for several days, in taking the goods to another place, and forwarding them from there to the consignees 242

Demurrage allowed without interest.....1167

DEPOSITION.

A commission to take depositions in another state will not be granted without an affidavit showing it to be necessary for the purposes of justice..... 471

A deposition, taken before trial, of an informer, who is entitled under the act of congress to a portion of a fine, forfeiture, or penalty, is not admissible..... 988

In taking ex parte depositions under the act of congress, the requirements of the act must be strictly complied with.....1160

Where the name of the magistrate is written across the place where the envelope is sealed, it is sufficient evidence that the deposition was sealed up by him.....1160

Directing the sealed deposition to "the judges" of the court is sufficient.....1160

The party offering a deposition taken de bene esse must show that the requirements of the act have been complied with to entitle it to admission in evidence..... 988

An objection to a deposition taken de bene esse, that it was not taken and returned according to law, *held* to apply to it as a deposition in chief..... 988

A waiver of all objection to a deposition taken de bene esse does not impart any new character to it, and does not make it a deposition in chief..... 988

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators"; "Wills."

The Rhode Island statutes of 1768 and 1822 respecting estates of persons dying without known heirs or representatives in the United States, apply to undivided interests in an estate..... 27

Discharge.

See "Bankruptcy"; "Insolvency."

DISCOVERY.

See, also, "Creditors' Bill."

After a verdict at law, plaintiff may maintain a bill in equity for a discovery as to usury in the contract on which the verdict was founded..... 506

Defendants cannot be compelled to answer whether, upon a note being sent to them to be signed, they did not substitute a note for the same amount, dated on Sunday, as this would subject them to a penalty for violating the Sabbath..... 54

DISTRICT OF COLUMBIA.

Page

The commissioners of the city of Washington, under Act Md. 1793, c. 58, § 2, may resell public lots as often as a purchaser should fail to pay for them, and charge each preceding purchaser with the loss upon the resale.....1149

DOMICILE.

See, also, "Courts"; "Prize"; "Removal of Causes."

The presumption that a domicile once acquired continues does not prevail when its effect would be to impose upon the party the character of an enemy to his government 179

EJECTMENT.

See, also, "Adverse Possession"; Real Property"; "Right, Writ of."

Where a defendant in ejectment, in fraud of his agreement with a purchaser on a mortgage foreclosure pending the ejectment suit, confessed a judgment to the latter, *held*, that the judgment would be set aside, and defendant continued as a nominal party to preserve the jurisdiction of the court.. 962

The owner of the fee in ejectment against a squatter, who has neither claim nor color of title, and has admitted title in plaintiff's grantor, need not produce other evidence of title than the conveyance from his grantor... 584

EMBARGO AND NONINTERCOURSE.

Act March 1 1809, c. 91, applies to all goods of British manufacture, etc., although imported into a neutral country before the passage of that act. 846

The arrival of a vessel within the Chesapeake Bay for the purpose of procuring a pilot in anticipation of a storm, *held* sufficient to subject her to forfeiture.....1107

The nonintercourse law was not repealed by the declaration of war with Great Britain, except so far as its provisions were inconsistent with a state of war.....1107

EQUITY.

See, also, "Courts"; "Injunction"; "Pleading in Equity"; "Practice in Equity."

A court of equity cannot enforce the performance of a judicial function. The proper remedy in such case is by mandamus..1313

A bill in equity is not the proper remedy to enforce a decree in equity for the payment of money, as the remedy at law is adequate and complete.....1222

Where a paper deliberately agreed upon to effect an object fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement.....1243

An agreement to submit a question to arbitration will not be enforced in equity. Such an agreement is revocable before the award is given 1313

In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statute of limitations which governs courts of law in such cases. In other cases, they act upon the analogy of the limitation at law 351

In a case of gross laches in prosecuting, or long acquiescence in the assertion of adverse rights, where the statute of limitations does not apply, the court will consider the claim barred..... 351

Constructive trusts being purely of equitable cognizance, lapse of time is no absolute bar to relief; and, when the trust arises out of fraud, each case is to be determined on its own circumstances..... 32

Long acquiescence and lapse of time is a good ground against permitting a deed to be impeached as fraudulent..... 362

Equity will not reform a written contract by a previous parol contract on the same subject 1243

A party seeking to set aside a contract on the ground of misrepresentation and concealment has the burden of showing the same 816

Where a court of equity obtains control of a fund and the parties entitled to it, its distribution will be directed to the parties ultimately entitled thereto.....1098

ESCHEAT.

An inquest of office for lands escheating to the government by reason of alienage is not conclusive against a person neither party nor privy thereto, nor a tenant at the time, and he may show that there are lawful heirs, not aliens, in esse..... 135

Seisin by the commonwealth under inquest of office of lands will be deemed to continue until the title is lawfully parted with 135

A resolve of the legislature, releasing such title to another, may be construed as a grant if necessary to give it effect..... 135

ESTOPPEL.

The grantor is not estopped by recitals in the deed to show in an action for the purchase price that the consideration has not been paid 615

An agreement made by plaintiff with a warehouseman to take certain winter wheat in part payment for a special deposit of spring wheat converted by him will not estop plaintiff from suing for the conversion where defendant had no title to the winter wheat 919

EVIDENCE.

See, also, "Trial"; "Witness."

Judicial notice.

The court will take judicial notice that Astoria is on Long Island, and that commerce is carried on by its inhabitants by means of ferry boats..... 424

Presumptions: Burden of proof.

Where defendant, who has received payment of a joint debt, admits the joint interest of plaintiff without stating its amount, of which he had knowledge, plaintiff's interest will be deemed to be an equal interest, nothing appearing to the contrary.. 142

Declarations and admissions.

The admissions of a party to a suit may be given in evidence as independent testimony, though he has been sworn as a witness, and no impeaching questions asked him 220

Documentary.

In an action at law by one partner against the other, a partnership book kept by defendant is not evidence against plaintiff, although it has been in his possession.. 470

Copies of accounts and papers in the office of the quartermaster general, certified by the third auditor of the treasury, whose official character is certified to by the secre-

Page

tary of the treasury, are admissible in evidence 1092
A document attested by the clerk of a court with its seal and the certificate of its presiding judge, and called an "exemplified copy," is competent evidence of the judgment described in it under Act May 26, 1790, though not sufficient at common law or under the state laws..... 744
A copy of a manifest of a cargo certified by a notary *held* not admissible..... 651
A copy of a judicial record, having a flourish with the pen on the margin of each page, instead of a seal, *held* not admissible. 651
A copy of a deed duly recorded is, after 60 years, admissible to establish a grant under which a person claims title to land..... 135
Record copy of deed *held* admissible without producing the original or accounting for its nonproduction 962
An execution is inadmissible without the judgment on which it was issued.....1291
A recital in a deed under which possession has been held for 60 years, that the grantor is heir, and sells as such, is prima facie evidence of the fact..... 135

Parol evidence.

Parol evidence is not admissible to explain or contradict a contract to convey land or an agreement to give a bond or writing to convey, where the party to be charged derived his title from a stranger..1324
Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design upon mutual confidence between the parties..... 778
Parol evidence cannot be given of a statement of account by a master in chancery in a suit pending in another court..... 470
In an action against an indorser of a note parol evidence is admissible to show an agreement with plaintiff whereby defendant was to be discharged on the happening of a particular event 450

Competency: Materiality: Relevancy.

The acts and declarations of a person as to his intention in remaining in or removing from a country, though not simultaneous therewith, are admissible to prove his intention 1346
A notary who has no personal recollection of making a demand may testify from entries made in his book at the time..1146, 1152

Weight and sufficiency.

The unsupported evidence of a witness of admissions obtained by him from a party for the purpose of charging him thereby, is entitled to but little weight..... 408

EXECUTION.

See, also, "Attachment"; "Bankruptcy"; "Bonds"; "Garnishment"; "Judgment."

A justice of the peace cannot issue an execution as on a supersedeas upon the mere indorsement on the back of the original judgment that it is superseded..... 973
An alias fi. fa. or a new levy is not necessary where the first levy and inquisition are set aside by the court.....1070
A vague levy on land may be rendered certain by an appraisement in which it is particularly described 389
The writ first executed will take personal property without regard to their dates or the time of delivery to the officers, and the lien given by such delivery binds the goods against a voluntary transfer.....1273
A fieri facias, received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied.. 80

Page

The return to the execution nulla bona need not state that the officer made search for property 472
The death of defendant after the levy does not affect the power of the sheriff to sell: otherwise in the case of a death before levy. 389
Execution issued on a dormant judgment is irregular, but a title acquired under a sale thereon is good..... 389
A sale for a grossly inadequate consideration will be set aside where the attorney prepared the writ for the clerk, taxed the costs, prepared the advertisement, directed a large quantity of land to be levied on, and himself became the purchaser..... 436
An agreement to prevent a sacrifice of property, under which it is bid off for its full value, is no ground of setting aside the sale 887
The acknowledgment of a sheriff's or marshal's deed *held* a judicial act, which would cure all defects in process or its execution which the court had power to remedy by their order 1070
Where a sheriff's deed is certain, it cannot be avoided collaterally by a defect in the levy 389
The title of the purchaser at a sheriff's sale cannot be affected by irregularities in the proceedings, unless they are such as to render the proceedings absolutely void.... 389
An execution, after the expiration of the time within which it is made returnable, is of no force, and an arrest under it is a trespass 210

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills."

Where it appears that a large sum of money is likely to come into the administrator's hands, he may be ordered to give additional bonds, failing which he may be removed 805
An administrator who, after a decree ascertaining the distributive shares, takes guardianship of a minor distributee, will hold his share as guardian, and not as administrator 763
In such case the sureties in the administration bond are not liable for the ward's share 763
The executor or administrator may submit an account of his testator or intestate to arbitration, and his acceptance of the award is binding on all concerned..... 237
Where an executor was directed to apply $500 to the manumitting of certain slaves, which he wrongfully failed to do for several years, *held*, that he was not chargeable with interest thereon for the benefit of the residuary legatees 53
A contract by a person, as administratrix and as guardian of infant heirs, with an agent, to redeem lands from tax sales, and to perfect titles in consideration of a conveyance of a moiety, will be *held* personally binding upon the administratrix as to her share, and upon the infants to the extent of a liberal remuneration for services performed 816
A covenant by an executor on a conveyance of land of his testator in his capacity as executor, and not otherwise, is not binding upon him in his individual capacity, although it may not be binding on the estate. 905
A sale of a final settlement certificate by the administrator for the highest market price, though below its nominal value, is valid 237
A judgment for the purchase price of lands, sold by commissioners at a public sale, by the acre, as directed by a decree of

Page

the court, will be enjoined to the extent of any deficiency, though the commissioners declared that the purchaser must buy at his own risk, both as to quantity and title 237

A scire facias will issue on a suggestion of a devastavit to subject the executor or administrator de bonis propriis..... 823

The administrator of decedent's domicile is entitled to receive from the administrator appointed in another state the balance of assets remaining after paying debts therein 525

An administrator appointed in one state may sue in the courts of another before obtaining letters therein, and after he has obtained such letters may aver the fact by amendment 525

Exemptions.

See "Bankruptcy"; "Homestead."

EXTRADITION.

A subject of the king of Prussia, charged with having committed a crime in Belgium, is extraditable under the treaty with Prussia of June 16, 1852, as for a crime "committed within the jurisdiction" of Prussia, where such person is punishable for such crime in Prussia, where a prosecution therefor has been commenced..... 281

The treaty of extradition with Bavaria of 1853 was not abrogated by the operation of the constitution of the German empire, adopted in 1871..... 927

Where the treaty of extradition does not require the issuing of an executive mandate, it is not a prerequisite to jurisdiction.. 927

It is not a necessary preliminary to an investigation that a warrant of arrest should have been issued or proceedings had against the accused in the foreign jurisdiction 927

The statutes in relation to documentary evidence from abroad in extradition cases (Act Aug. 12, 1848. § 2; Act June 22, 1860; Rev. St. § 5271) examined..... 296

In the case of a person held in custody under commitment by a commissioner for surrender under a treaty of extradition, writs of habeas corpus and certiorari may both be issued 296

On the return to such writs the court has no power to revise the decision of the commissioner on the question of fact as to the criminality of the accused..... 296

But the court must inquire whether the commissioner acquired jurisdiction, and whether he had legal or competent evidence before him of the facts found, but has no right to inquire into the sufficiency of such evidence as is competent..... 296

The president may lawfully decline to surrender the accused, after his commitment for surrender and the refusal of a discharge on habeas corpus, on the ground that the case is not within the treaty, or for insufficiency of the evidence..... 296

FACTORS AND BROKERS.

See, also, "Principal and Agent."

When the principal can trace his property as distinct from that of the factor, he can recover it in whosesoever hands it may come 1066

Where the proceeds of notes taken by a factor del credere on the sale of his principal's goods are received by the assignees in insolvency of the factor, they may be recovered by the principal, subject to a deduction for the factor's commissions and charges 1066

FALSE IMPRISONMENT.

A collector of taxes may be sued in trespass for imprisoning a party taxed as an inhabitant of a town, who is not an inhabitant 1189

FINES.

Fines and penalties may be enforced either by an execution against defendant's property or by capias; but where the sentence directs collection by execution a subsequent imprisonment under a capias is illegal 867

FISHERIES.

See, also, "Seamen"; "Shipping."

The fastening of a harpoon in a whale, with a line attached, gives the boat the right to the whale, under the usage of whaling, though the whale subsequently escape, and is captured by another..... 558

A whale, killed and left anchored with marks of appropriation, is the property of the captors, and their title is not divested by a subsequent removal by others..... 605

A seaman in the whale fisheries has no property in the oil or bone taken, and the vessel owners are the proper persons to sue for a wrongful taking by another..... 605

A vessel is not subject to forfeiture under the act of July 29, 1813, on the improvident payment of a bounty, where not entitled to it, but only for the act of fraud and deceit in obtaining it, whether rightfully entitled to it or not..... 494

Forfeiture.

See "Customs Duties"; "Fisheries"; "Informers"; "Internal Revenue"; "Shipping."

FRAUD.

Fraud may be proved by circumstances.... 700

FRAUDS, STATUTE OF.

A promise by a third party to pay a judgment debt if the creditor will suspend collection for six months is an original promise, and need not be in writing under the Ohio statute 60

A verbal agreement to pay the debt of another, although confessed in the answer, will not be enforced in equity if the statute of frauds is insisted upon in the answer.....1051

The admission of a parol agreement in the answer will not prevent defendant from protecting himself against a performance by pleading the statute.....1094

Fraudulent Conveyances.

See, also, "Assignment for Benefit of Creditors"; "Bankruptcy"; "Insolvency."

GARNISHMENT.

Funds of the debtor in the hands of a third person are subject to garnishment, though such third person is liable as indorser on the bills of the debtor, which he is subsequently compelled to pay..... 766

Page

The undivided interest of defendant in a negotiable treasury certificate issued in payment of an award can be attached in the hands of a garnishee, even before it is due.. 225
A judgment rendered in the federal circuit court cannot be attached by process issued out of a state court against the plaintiff in the judgment..... 986
Any corporation having property in the state is "a body politic within this state," within section 13 of the Nevada act, directing proceedings against trustees of debtors.1113

GRANT.

See, also, "Mines"; "Public Lands."

Ordinary grants and those for meritorious services are governed by the same principles and regulations 862
The rule at common law, that in the construction of deeds quantity must yield to specific metes and bounds, cannot be applied to Mexican grants.....1338

HABEAS CORPUS.

See, also, "Army and Navy"; "Extradition."

A person under arrest by state officers for an act done under process of a federal court or in executing a federal law may be discharged on habeas corpus.....1015
Where a writ of replevin from a federal court was fraudulently obtained with the purpose of carrying off property, and the party is indicted for larceny therein, the federal court will not discharge him on habeas corpus 1015
The federal court may issue the writ in the case of an arrest and imprisonment by state authorities of a person accused of a crime committed in one of the places mentioned in Rev. St. § 711..... 708
An agent of a state arrested in a suit for malicious prosecution for obtaining from the governor of another state, on the presentation of an authenticated indictment, a mandate for the arrest of a fugitive from justice, under which a person is arrested, is entitled to his discharge on habeas corpus by a federal court.....1309
Proceedings on habeas corpus in a federal court will be quashed where it appears that the prisoner is confined upon a regular charge and commitment, after examination duly had by a court of competent jurisdiction, for a criminal offense exclusively cognizable in the state court, and that the prisoner is not restrained of his liberty without due process of law..... 728

HEALTH.

Where a vessel is detained an unreasonable length of time by the board of health of a city, acting as quarantine officers, before permitting her to land, the city is liable in damages. 392

HOMESTEAD.

See, also, "Bankruptcy."

In Nevada the interest of a tenant in common in the dwelling house and land occupied by him as a homestead, not exceeding $5,000, is exempt..... 527
In Texas a homestead may embrace any number of city or town lots, designated and used as a homestead, and not exceeding in the aggregate $5,000 in value, irrespective of improvements thereon, whether remote from or contiguous to each other..... 906

Page

A person, in Georgia, who keeps a rented house, with hired servants, and makes his home therein with a widow, whom he has educated, and regards as his adopted daughter, though not legally adopted, is entitled to a homestead exemption, as the head of a family, but is not entitled to additional land for the children of such widow, forming part of his household..... 730
An unmarried man, having orphan children bound to him under the apprentice laws of Texas, and conducting a household with hired servants, is not entitled to a homestead as the head of a family..... 379

HUSBAND AND WIFE.

The wife's portion of a marriage settlement was to be raised out of her real estate, of which her father was tenant by the curtesy, by a sale after she arrived of age. The wife died shortly after arriving of age, without any act done by her, or request by her husband. *Held*, that her father was not liable for nonperformance.....1243
In Indiana the wife may require that her interest in her husband's land, which she has mortgaged to secure his debt, shall not be sold if her husband's interest will sell for enough to satisfy the debt..... 890

INDIANS.

An actual settler on "Cherokee neutral lands" under the treaty of July 19, 1866, may transfer his right to purchase the land, and the grantee may make the required proof..... 257

INJUNCTION.

See, also, "Equity"; "Patents."

Upon an attachment for contempt in disobeying an injunction, evidence is not admissible to contradict the affidavit on which it was granted, nor will the court grant a rule to show cause.....1147
The attachment will not be quashed on account of a misnomer in the injunction, nor will the court receive a plea in abatement. 1147
The irregularity in the service of the subpœna to answer is no ground for withholding an injunction against defendant, who had notice of the motion, and appeared to oppose it..... 902
A notice to dissolve an injunction must be given 10 days before the term. If given in term, a term's notice is required..... 132

INSANITY.

A man may be mentally so deranged as to authorize relief against judgments obtained against him during such a state of mind, though he be not so absolutely insane as to avoid all his contracts..... 595
As to the validity of a sale of lands by a guardian of a non compos tenant in common, joining in a deed with the cotenants 946

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors"; "Bankruptcy"; "Compositions."

A trustee in insolvency may maintain a bill for relief against judgments confessed by the insolvent, on notes given upon usurious and gambling considerations..... 974
In such suit defendant will not be relieved from stating the true consideration of

Page
the notes as prayed in the bill, on the ground that his answer might subject him to a penalty or forfeiture..... 974
Effect of discharge after arrest on a cap. ad resp. and before the return..... 190
Costs accruing partly before and partly after the discharge are barred thereby.... 849
A certificate of discharge under the insolvent laws of one state is no bar to an action by a citizen of another state..... 49
Where the discharge does not affect the contract, but only exempts the insolvent from future imprisonment, a suit may be brought on the contract in another state according to the lex fori.....1312

INSURANCE.

Stipulations in a policy not required by or conforming to the state statutes, *held* should be disregarded.....1060
A life policy, taken for the benefit of and assigned to a person who has no insurable interest in the risk, is void..... 550
A contract of life insurance, entered into by a Northern insurance company with a resident of a Southern state before the Rebellion, which provides that it shall be void on the nonpayment of premiums, is not suspended by the war, though the performance of the condition is made impossible, or the contract made illegal by the war; and a court of equity cannot relieve the party from a forfeiture..... 620
The agency of one representing an insurance company, authorized to receive premiums and renew policies, becomes unlawful when the insured and the insurer become public enemies..... 620
The concealment of incendiary threats, made so long prior to the insurance as not to increase the hazard, will not avoid the policy 1060
The failure of the company, when not fraudulent, to give notice to the assured that a premium or premium note was about falling due, as customary, will not save the policy from a forfeiture provided therein for failure to pay the premium or premium notes 1057
No notice by the company is necessary to render the policy void.....1057
A custom of the company to allow 30 days' grace cannot affect the rights of the parties under the contract.....1057
Where payment of the premium was to be made on the first day of the succeeding month, which fell on Sunday, *held*, that an offer to pay made on Monday was sufficient, though the building burned on Sunday 772
The local agent of a foreign company, who has power to effect insurance and collect premiums, is presumptively authorized to make a verbal contract to renew a risk, and to give time for payment of the premium 772
The distinction pointed out between untruthful answers to specific questions and the mere failure to make full answers.... 550
Warranty that the assured had never "been addicted to the excessive or intemperate use of any alcoholic stimulants," and does not "use habitually intoxicating drinks as a beverage," construed..... 550
Warranty in relation to "good health" and being "free from any symptoms of disease" construed..... 550
The involuntary omission of an existing mortgage from proofs of loss is immaterial..1060
Specific objections to proofs of loss are considered as a waiver of all other objections of which the company had knowledge..1060
Where proofs of loss are received without objection, all objections to their sufficiency will be considered as waived.....1302
Page
One who holds a life policy to secure a past debt and future advances may recover the full amount due thereon, irrespective of the amount of his debt against the assured 550
The burden to establish a defense of a breach of specific warranties as to existing facts in an action on a life policy is upon the insurer..... 550
There is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity, and plaintiff has the burden of showing it..... 856
Insanity defined, which will excuse an act of self-destruction so as to render the insurer liable, notwithstanding a condition avoiding liability where the insured shall "die by his own hand."..... 856
The mere fact of the disappearance of the insured without apparent motive is not a sufficient ground from which his death can be inferred.....1302
The grant of letters of administration on the effects of the insured is prima facie evidence of his death.....1302
The actual loss is the measure of damages where recovery is restricted to the cost of replacing the property destroyed, less its depreciation from use, etc., and the difference in values before and after the fire will not give such indemnity.....1060

INTEREST.

See, also, "Usury."

Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due.... 491
Where a vessel is lost by explosion while in the possession of a lessee, and he is held liable for her value, he may be charged with interest from the date of the explosion.... 76

INTERNAL REVENUE.

The procuring of a false certificate to be made by a gauger, as to the emptying of spirits to be rectified and the destruction of the stamps, will forfeit the spirits, though the fraud was not successfully carried out 875
A regulation requiring a regauging of distilled spirits on their being emptied to be rectified, and the certificate of the gauger as to the destruction of stamps, *held* valid and reasonable..... 875
Where the distiller refuses to fix the time to run off the mash on hand before the notice of suspension takes effect there can be no legal suspension..... 208

INTERNATIONAL LAW.

The right of search is not allowable in times of peace, except against pirates or other offenders against the law of nations..1220

JAIL AND JAILER.

The court will not interfere in the exercise of the discretion vested in a jailer, as to the custody of his prisoner, unless it appear that he has abused such discretion for the purposes of oppression..... 725

JUDGMENT.

Rendition and entry.
Where the record produced upon the plea of nul tiel record shows a verdict only, the court will presume that a judgment was entered pursuant thereto..... 823

Page

A decree nisi on default of appearance does not become absolute until the end of the term succeeding that to which the decree shall be returned "executed." 72

Validity.
Where the record shows that there was no personal service on defendant, who entered no appearance, the judgment is a nullity 1035

Lien.
A judgment in Ohio has relation to the first day of the term, and from that time constitutes a lien on the lands of defendant which lie within the jurisdiction of the court 316
The Pennsylvania law of 1798 limiting the lien of judgments is a law of property and title applicable to judgments in the federal circuit court, of record before its passage 1070
In Pennsylvania, a sale by a sheriff under a judgment in the state court passes a title to the purchaser discharged from a prior judgment in the federal court, either against defendant, as whose property it was sold, or against any persons from whom it was conveyed to defendant 1070

Operation and effect.
A former judgment is no evidence in an action, except between the same parties or their privies 609
A judgment in plaintiff's favor on coupons of county bonds is not conclusive in a suit by him on other coupons of the same bonds.. 62
A decree in a suit by the vessel owners against a shipper for freight, where the defense is nondelivery, is not evidence either for or against the master in a future suit against him by the shippers 544

Actions on judgments.
A judgment is not an agreement, contract, promise in writing, or a specialty, within the Ohio statute of limitations 1350
A judgment on an attachment, being a proceeding in rem, will not support an action out of the state 1035
An averment that the court which rendered the judgment was a court of general jurisdiction, duly created by the state laws, is sufficient on demurrer, without alleging that it had jurisdiction of the person of defendant, either by service of process, appearance, or otherwise 847
Under the act of 1790 the certificate of a judge styling himself "one of the judges" is not a sufficient authentication. It should appear that he was the chief justice or presiding judge 59

JUSTICES OF THE PEACE.

Separate actions may be brought on notes held against the same person, though their aggregate amount exceeds the jurisdiction of the justice 908
No appeal lies from a judgment of a justice of the peace in the District of Columbia unless the debt or demand exceed the sum of five dollars 1153
On an appeal from the justice of the peace the cause should be tried de novo on the merits 777
It is no ground of reversing the judgment of a justice rendered on a specialty that neither plaintiff nor his agent appeared at the trial 777

LIENS.

See, also, "Admiralty"; "Bankruptcy"; "Maritime Liens"; "Shipping."

Page

An equitable lien, though not necessarily creating a property in a thing, must amount to a charge upon it so that it may be recognized and enforced in a court of justice.. 351

LIMITATION OF ACTIONS.

See, also, "Adverse Possession"; "Ejectment"; "Equity"; "Maritime Liens."

Act April 30, 1790, § 32, limiting suits for penalties to two years, is repealed by implication by Act Feb. 28, 1839, § 4, which extends the time to five years 101
The Ohio statute of limitations barring actions founded upon a specialty or any agreement, contract, or promise in writing after 15 years, and all other actions after 4 years, is inapplicable to a judgment... 1350
A state statute of limitations is not applicable to a sale of land exempted by federal authority from state taxation 576
State statutes of limitation are inapplicable to suits in equity in the federal courts, but under ordinary circumstances the limitations prescribed by them will be adopted.. 32
The immunity from suit arising when a cause is barred by limitation is a personal immunity, which follows the person of the debtor into whatever state or territory he may go 650
When a cause of action is once fully barred by the statute of limitation, the legislature has no authority to again revive it by lengthening the period of limitation or excepting certain cases from the operation of the statute 650
A debt contracted in Indiana and barred by the laws of the state to which the debtor subsequently removed, is barred in Indiana, though it would not have been barred if the debtor had remained in such state.. 650
In the case of an unliquidated demand, where the parties have come to a settlement, and determined the sum due by mutual agreement, the limitation begins to run from the time of such settlement 162
In Maine, in the case of a mutual and open account current, where the party sleeps on a demand without entering it on his account until the period of limitation is elapsed, the account is barred 162
A person in Alexandria county, D. C., is not "beyond seas" in respect to persons residing in Washington county 345
The plea of the statute cannot be put in after the rule day, unless it be shown by affidavit to be necessary to the justice of the case 1023

LOTTERIES.

Lottery tickets cannot be sold in the District of Columbia for a lottery authorized by a state law 1062

MARINE INSURANCE.

See, also, "Average."

The owner of a vessel, who has contracted to sell her for a certain sum, and to make title, has an insurable interest to the extent of the value of the vessel 270
Construction of time policy in relation to destination and voyage 270
The policy covers belligerent risks where there is no warranty of neutrality 210
A policy insuring freight on a steamboat and barge against total loss "at and from St. Louis to New Orleans," covers freight on additions to the cargo made during the voyage 92
Where in such case the barge was sunk, and her cargo transferred to the steamboat,

Page

and no other barge could be procured to carry cargo previously engaged at intermediate ports, *held*, that the policy covered all freight which would have been earned but for the loss of the barge..... 92

Upon a valued policy, a misrepresentation as to the age and size of the vessel will not avoid the policy..... 210

Where the defenses are misrepresentation, negligent navigation, deviation, and unseaworthiness, the onus probandi as to the three former is on defendant, but the assured must prove seaworthiness.....1197

In cases of double insurance the insurers are liable ratably for the amount of the loss, and not according to priority of contract; and one who has paid the whole loss can compel the others to contribute their proportions 1183

MARITIME LIENS.

See, also, "Admiralty"; "Affreightment"; "Bottomry and Respondentia"; "Charter Parties"; "Demurrage"; "Salvage"; "Seamen"; "Shipping."

The right to a lien.

By the general maritime law a shipwright has a lien for materials, labor, etc., expended in repairs..... 29

A person who furnishes repairs upon the order of the master is entitled to a lien, though the master was in fact, without his knowledge, holding the vessel as custodian for the marshal..... 379

A lien arises for repairs and supplies furnished a vessel at a port other than that in which her legal owners reside, at the request of one to whom they had agreed in writing to transfer the title, where the purchaser subsequently assigned the contract to a resident of the port, who completed the contract..... 447

A lien arises for supplies furnished on the credit of a vessel in New York, where she is registered, where the owner resides in New Jersey..... 952

A lien arises for advances made in good faith to enable the master of a foreign vessel to pay customhouse charges and the wages of his crew..... 684

Repairs and materials furnished in a foreign port do not create a lien where the owners have ample credit and actual funds in the port, of which the creditor has implied notice..... 459

Where the owners inform persons who furnish supplies at the request of a charterer that the ship would not be responsible, they cannot acquire a lien therefor... 554

A lien for supplies furnished in the home port of a vessel by material men residing in another state can only by enforced under the local law of the owner's domicile..... 952

Priority and enforcement.

A lien for repairs furnished in the home port is entitled to be paid in preference to a subsequent mortgage..... 910

A mortgage duly recorded takes precedence over a lien for supplies to a domestic vessel, subsequently furnished, although the mortgagor retains possession..... 952

Maritime liens in favor of seamen and material men are to be enforced in rem only under salutary restrictions arising from the demands and interests of navigation... 82

A lien for repairs may be enforced notwithstanding the bond and mortgage given to secure it are not tendered back to the mortgagor, or surrendered in court at the trial. 910

A sale under an admiralty decree, obtained without fraud, cuts off all claims of the builders of the boat, her owners and creditors. 55

Waiver: Discharge: Extinguishment.

Limitations prescribed by the common law do not apply to claims in admiralty except by statutory provisions, but admiralty liens will not be permitted to lie dormant to the injury of third parties..... 82

A maritime lien should not be protracted beyond a reasonable opportunity for its enforcement. 82

On the Great Lakes tacit maritime liens will not be extended beyond the season of navigation except under special circumstances. 82

No cognizance will be taken of tacit liens where the circumstances create a presumption that the same are waived and other security looked to..... 82

Allowing a claim to slumber three years with repeated opportunities to enforce it, and no excusatory circumstances, is conclusive that it is waived..... 82

A lienholder is bound to diligence in the enforcement of his right, though a subsequent mortgagee may not have suffered directly by the delay 910

A lien for repairs is waived by acts showing that other securities have been substituted therefor, and, in examining testimony to this point the court will make all presumptions that a jury ought to make on a trial of a question of fact..... 29

A mortgage received simply as collateral security, though payable at a distant day, does not operate to extend the time of payment of the original debt, and the lien is not waived thereby..... 910

Where the person doing work on a vessel stipulates for other and different security from that of the vessel, the maritime lien is waived. (Reversing 758.)..... 756

As to the right of subrogation in admiralty in the case of the payment of the claims of seamen and others..... 684

A sale by order of a state court under a foreign attachment law does not divest a lien in admiralty for seamen's wages..... 797

On a sale of a vessel on a final decree in a proceeding in rem, all liens and incumbrances are transferred from the vessel to the proceeds..... 592

A purchase by a mortgagee at such a sale will not extinguish the mortgage by a merger of title..... 592

Liens under state laws.

The lien given by Act Pa. June 13, 1836, is not discharged by taking a note and giving a receipt in full, where such was not the intention 465

A lien acquired under the New York statute by rendering services or furnishing materials to a vessel in distress in a port of the state is lost if she depart therefrom more than 12 days before commencement of the action to enforce the same....329, 330

MARSHAL.

The marshal of the District of Columbia is not entitled to poundage upon the arrest of a debtor on a ca. sa. in Alexandria county, who has been discharged from such arrest by order of the plaintiff without payment 508

MASTER AND SERVANT.

See, also, "Apprentice."

Defendant, employing children, is not liable for an injury caused by dangerous machinery where the child left his work, and carelessly exposed himself to danger.....1276

MECHANICS' LIENS.

Page

In Iowa, mechanics and material men are entitled to a lien on railways for their work and labor..... 737

Such lien dates from the commencement of the building of the road, and is prior to a mortgage executed pending such building, and before the particular work was done or materials furnished for which the lien is claimed 737

The Virginia mechanic's lien law does not apply to a ship building in a public shipbuilder's yard under a contract by which she becomes the property of the owners from the laying of her keel, where credit is given to the builder..... 57

MINES.

Under the act of congress a location may include 1,500 feet along the linear course of the lode and 150 feet on either side of it.. 44

If a locator fails to locate his claim parallel with the apex, so that the latter passes out through a side line, he can take nothing except what lies within his boundaries.. 44

"Top" and "apex," as used in the act of congress, mean that part of the vein which comes nearest to the surface, and may include a part standing in the solid rock below a body of the superficial mass..... 44

The apex of a vein is the part which approaches nearest to the surface, if it there discloses a broken edge; but if, at the highest point, it merely turns over and pursues its downward course, such point is merely a swell, and not a true apex..... 40

A vein, lode, or ledge, in the meaning of the acts of congress, is a mineral body of ore within defined boundaries in the general mass of a mountain..... 40

"Vein" or "lode," in the acts of congress, embrace any description of deposit inclosed in the general mass of the country rock, regardless of technical geological distinctions as to beds, segregated veins, gash veins, true fissure veins, or mere deposits..... 44

If, in following the vein, the contact should be found barren of ore for a considerable distance because the two kinds of rock come together, then the deposit ceases to be a vein, and cannot be followed until another body of ore some distance beyond is reached 44

The right to follow the dip beyond the vertical side lines includes all veins which do not lie in a practically horizontal position 44

The owner of a claim may follow the dip beyond his vertical side lines at any point where the apex is within his boundaries, though his location is not for its entire length along the apex. He may follow the vein in its departure in any degree from the perpendicular until it reaches the horizontal.. 40

A vein is "in place," in the meaning of the acts of congress, when inclosed in the general mass of the "country rock," as distinguished from the superficial mass known as "alluvium," "detritus," or "débris".... 44

"In place," in the statutes, means in the general mass of the mountain, as distinguished from merely on the surface, or covered only by "slide" or "débris"..... 12

Where the mass overlaying the ore is mere drift, or a loose deposit, the ore is not "in place," within the meaning of Rev. St. § 2320, so as to give the owners of a claim the right to follow the dip within the lines of an adjoining claim..... 615

Whether or not "the contact" is to be regarded as a lode or vein is to be determined by its value, whatever may be the rule in regard to true fissures..... 12

Page

Where the "contact" of a lode existing in one claim comes to the surface in an adjoining claim, the question whether the apex is in the latter is to be determined by finding whether there is something of value there; not for purposes of treatment, but something more than a mere trace, something positively verifiable as existing in the ore. In the case of silver, the value must be reckoned by ounces, one or more to the ton of ore..... 12

A court of equity has the power in a mining case to compel an inspection and survey of the claims and works of the parties....1113

MORTGAGES.

See, also, "Chattel Mortgages"; "Shipping."

A mortgage, under Act Ohio 1831, takes effect only from the time it is left for record, and a mortgage of subsequent date, first recorded, is a prior lien..... 316

The rule governing the application of payments does not apply to mortgage notes given to secure indorsements.....1098

A bill of foreclosure by a junior mortgagee will not be sustained where he has already been impleaded by a prior mortgagee 459

Prior incumbrancers are necessary parties to a bill of foreclosure by a junior mortgagee, where there is substantial doubt as to the amounts due them, or the property covered by their liens..... 459

A court of equity may sell mortgaged premises free from incumbrances, remitting the lienholders to the proceeds of sale.... 459

MUNICIPAL CORPORATIONS.

See, also, "Railroad Companies."

Power to grade streets, etc., necessarily implies power to make contracts respecting the same in regard to the work to be done and the compensation to be paid..... 338

NEGLIGENCE.

Negligence is the doing of some lawful act in a careless, unusual, and improper way, or omitting the performance of some act required by law to be done, by which injury results to the person or property of another 180

The failure of a railroad company to keep its turntable locked, so as to prevent its being turned by children or others, is not negligence, where prudent and well-managed railroads are not in the habit of guarding or securing their turntables. (But see 183.) 180

Under what circumstances a railroad will be *held* liable for an injury to a child of tender years, caused by playing on its unguarded and unlocked turntable..... 183

Negligence of the parents in permitting a child to wander from home and go upon a dangerous piece of machinery will not prevent liability of the owner for an injury to the child, resulting from his carelessness in not properly guarding and securing the same 180

Negotiable Instruments.

See "Bills, Notes, and Checks"; "Bills of Lading."

NEUTRALITY LAWS.

Property may be seized by the commanding officer of a military force ordered out to

Page

prevent the violation of the neutrality act of 1838, with a view to detaining the same until it should be proceeded against in the manner directed by law..... 177

A vessel laden with arms for insurgents in Canada, though not intended to pass the frontier herself, is subject to seizure, and, where wrecked after such seizure, without any fault on the part of the seizing officer, he is not liable..... 177

NEW TRIAL.

A new trial will not be granted in a case of tort on the ground of excessive damages, unless they were so excessive as to imply gross partiality or corruption on the part of the jury..... 504

A new trial will not be granted on account of excessive damages unless the jury have mistaken the principles of law which govern their estimate, or have been guilty of some gross error which shows an improper feeling or bias.....1189

Where the judge used the expression "exemplary damages," but it appears that the jury did not go beyond the actual injuries sustained, the verdict will not be disturbed . 744

OFFICE AND OFFICER.

The commission of a justice of the peace and judge of the court of common pleas in Pennsylvania is conclusive evidence of his appointment..... 644

A public officer, who buys a bill of exchange for public use, is not personally responsible..... 157

An officer is personally liable where he did not act in good faith, and with intention to perform duly the duties of his office, and where he acted with malice..... 140

PARTIES.

A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel in admiralty..... 408

An assignee of a nonnegotiable contract cannot sue upon it in his own name in the circuit court for the Southern district of New York, as the state procedure is not adopted by such court..... 474

An assignee of a chose in action may sue in his own name in the admiralty..... 544

Where a husband, with the assent of his wife, filed a libel as owner for injury to a canal boat, wholly owned by her, and she gave material testimony at the trial, *held*, that she would be estopped from bringing another suit, and the libel could be maintained.1267

Where two whalers are under a contract of mate-ship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion..... 605

In a suit by a surety to cancel a conveyance of land made by him in trust to secure a note of the principal, the trustee is a necessary, and not a nominal, party..... 822

The court has no jurisdiction where a person within its jurisdiction, deemed an indispensable party, is not joined.....1331

Bondholders of a railroad company which has united with another railroad company cannot join the trustees of the latter company as defendants in a suit for the removal of the trustees of the former for misconduct or negligence..... 9

A mortgagee in possession of a vessel may intervene, and contest claims affecting his lien..... 952

Page

An assignee of complainant's interest in the subject-matter, pending the litigation, must file an original bill in the nature of a supplemental bill to be substituted to complainant's right..... 688

PARTNERSHIP.

See, also, "Bankruptcy."

A contract to work a farm on shares *held* to constitute a partnership, and to be abandoned by the failure of the party who went into possession to carry out its terms.....1193

A purchase of land for speculation by several persons, where a part of the lots were sold, and others built upon, and debts incurred, *held* a partnership adventure, and on the bankruptcy of one party the other would be protected, as to the partnership debts, as against individual creditors of the bankrupt.1161

A person loaning money to another carrying on business in his own name with the suffix "& Co." cannot be held liable as a partner, where he neither held himself out as such, nor allowed others to do so..... 511

On an issue of partnership, an offer to pay the partnership note if the holder would take property is evidence in connection with defendant's confession that the note was signed by his partner..... 982

Partners are liable for the tort of one of their number committed by him as a partner in the course of the partnership business.... 116

A member of a firm cannot engage the firm in another partnership, so as to bind a member, not privy thereto. But his consent or ratification may be presumed by his silence without objection after he has knowledge of the fact..... 595

An agreement to sell a member certain articles expressly for his individual use, to be paid for out of the partnership goods, is void as to the other partners..... 789

The firm is liable on a note signed by the members with their individual names, where the consideration is treated as copartnership funds..... 923

In Massachusetts all the partners are held as general partners, if the transaction, while showing an apparent contribution in cash by a special partner, resulted in fact in putting in goods and debts equivalent to cash..... 898

In Illinois, if the certificate of dissolution of a limited partnership does not fulfill the requirements of the statute, the partnership still continues as to creditors..... 852

Persons dealing with a limited partnership are chargeable with notice as to the scope of its business as set forth in its duly-recorded articles..... 788

A common or long-continued departure by general partners, not consented to or acquiesced in by the special partners, cannot change the scope of the business as specified in the copartnership articles..... 788

Where all the property of a partnership belongs to one member, and the others have no interest in the gains and profits, such property will be liable in the first instance to the individual debts of the person owning it..... 511

The interest of a partner in the firm's brand or trade-mark cannot be reached in equity at the suit of a judgment creditor.. 733

A partner in a steamboat company, who acted as master and engineer, cannot maintain an action at law against his copartners for compensation as engineer..... 806

PATENTS.

Patentability.

The invention must be both new and useful to authorize a patent.....1040

Page

The abandonment of a perfected invention or the fact that it fell into disuse will not affect the question of priority..... 336
The mere making of a model by a person does not constitute invention, as against a patent granted another for the same thing.. 95
The omission of an element from a device so that the less number of parts will perform all the functions of the greater may be an invention 195
The inventor of a new means of carrying into effect a patented process is entitled to a patent therefor, but he has no right to use the process 1236
An old combination of machinery, applied in the practical development of a newly-discovered principle, producing a new and useful result, is patentable..... 718
A change of a machine, not involving invention, so as to adapt it to different uses, is not patentable..... 563
The desirability of an improvement, the difficulties to be encountered, and the unsuccessful experiments of others, tend to show inventive skill in the successful inventor.... 858
The covering of a whip with a tubular knit fabric is patentable, though such fabric and the whip, and the idea of covering the whip, taken separately, were all old..... 249

Who may obtain patent.
Where the idea, although not executed, was suggested to the patentee by another, a patent executed to him as the sole inventor is invalid 978

Abandonment: Laches.
The inventor must sue out his patent where the invention is yet recent, and before it has come into general use.....1040

Application and issue: Interference.
On the death of the inventor, the patent may be issued to his executor as such, though it is not stated to be in trust for the devisees in the will. (Act July 4, 1836, § 10.)..... 105

Appeal from commissioner's decision.
Where the reasons of appeal in an interference case take no exception to the claim of the appellee, upon the ground of forfeiture by laches, the court cannot consider such question 336
Where the applicant is put upon inquiry by the ruling of the board of appeal that his claim is not properly limited, the court, upon appeal, will not relieve him from the effect of a failure to amend his specifications..... 921

Validity.
The degree of utility is not pertinent to the question of the validity of a patent.....1260
A patent taken out by assignees of an alien and nonresident inventor is invalid..... 720
An American assignee of an alien inventor, who obtained letters patent in his own name under Act March 3, 1837, § 6, is not required to put and continue the invention on sale, under Act July 4, 1836, § 15..... 721
The common knowledge in the business of life must be kept in view in construing the general terms of a description.....1236
The specification must be sufficiently clear to distinguish the thing patented from all others previously known, and to enable a person skilled in the art to construct it.... 832
The invention should be so clearly described as to enable the public to put it in use.. 357
A patent for an improvement should describe the machine in use..... 357
Where the specification in a patent for "a new and useful improvement in the steam towboat" did not mention the invention as an improvement, but simply described a towboat, *held*, that the patent was void. 357
A failure to deposit in the patent office a sample of one of the ingredients of a composition of matter does not invalidate a patent for such composition, when the specification describes all the ingredients... 704
After a patent is granted for a composition it cannot be impeached on the ground that the deposit of the ingredients in the patent office has not been made..... 704

Extent of claim.
Unless plainly so intended, a construction will not be put upon the specification which would extend the claim so as to make the invention unpatentable.....1269
An inventor may claim in one patent a combination covering the entire machine, and also a combination of a less number of elements, when he is the inventor of both.. 24
A claim to "the communication of motion * * * produced as follows" *held* limited to the specific machinery described in the specifications..... 161

Alien patentee.
An alien patentee need not take active measures for putting his invention in the market within 18 months after the grant. It is sufficient if he is ready at all times to sell at a fair price when a reasonable offer is made. (Act 1836, § 15.).....718, 721

Vacation or repeal of patent.
The entitling of an affidavit intended to be used as the foundation for a rule to show cause why a patent should not be vacated as in a proceeding already pending in court, when in fact no proceeding has yet been instituted, is good ground for vacating the rule to show cause.....1039
An affidavit to the effect that a patent has been obtained "surreptitiously and upon false suggestions" is sufficient to warrant a judge in his discretion to grant a rule to show cause why the patent should not be vacated. He may also receive other affidavits and evidence in corroboration.....1039
Error committed in granting a rule to show cause why a patent should not be vacated as surreptitiously obtained cannot be corrected upon a motion to make absolute such rule.....1039
Form of decree declaring a patent void and ordering the same canceled, under Act July 8, 1870, § 58..... 315

Reissue: Disclaimer.
A reissue may be obtained in order to claim a subcombination omitted from the original by inadvertence or mistake..... 24
New features cannot be introduced in a reissue, but errors and defects may be cured, and ambiguities made clear..... 24
A reissue is presumed to be for the same invention as that of the original, until the contrary appears. 24
A reissue will be upheld unless, on a comparison with the original, it appears as matter of legal construction that it is for a different invention..... 24
The claims in the reissue must be construed so as not to embrace any invention broader than that described or substantially indicated in the original patent..... 485
In the reissue, under Act July 8, 1870, § 53, of a chemical patent, it is necessary to its validity that the subject-matter should be found described in the original patent.. 706
The reissue is void where it was fraudulently extended beyond the claims of the original for a deceptive purpose..... 563
The patentee or his assignee may incorporate in the claims for a reissue any portion of his invention which was omitted in his original specification and claim..... 563
New features cannot be interpolated into a reissue which are not described, suggested, or substantially indicated in the specification, drawings, or patent-office model of the original patent..... 971
A reissue may be granted to an assignee of letters patent upon his application with-

Page

out the consent, approbation, or knowledge of the original patentee..... 563
The decision of the commissioner in granting a reissue is final and conclusive, except where he has apparently exceeded his authority..... 971
Where a disclaimer has been filed pending the suit, plaintiff is not entitled to costs 731
Sufficiency of disclaimer limiting the claim of a patent..... 731

Extension: Renewal.
The expiration of a prior English patent will not affect the validity of the subsequent extension of the patent for the United States.....1231

Assignment.
The subject-matter of a patent is not separable except territorially..... 473
Assignees of an invention can take only such rights as the inventors could have taken .....720; contra, 721
The conveyance of an undivided interest in the "invention as secured" by letters patent, to be enjoyed "to the full extent of the term for which said letters patent are or may be granted," passes an interest in the extended term..... 903

Infringement—What constitutes.
Where the gist of an invention is the discovery of a principle in science made practically useful by the process described, he who adopts the principle to a practical extent is guilty of infringement.....1260
The fact that the patentee did not know that his device would perform a certain function or office will not prevent the patent from protecting it in such use..... 195
Tests for determining what is a substantial change in a machine..... 709
A screw and a lever are mechanical equivalents. So, also, a spring, a weight, and a pulley are mechanical equivalents..... 709
Though the machine is not in its arrangement substantially different from that of the patent, yet there is no infringement if its action upon the material operated upon is essentially different, and the result is new..... 718
The sale of a substance containing caustic alkali, with oil or rosin mechanically distributed through, but not in chemical union with it, inclosed in a metallic integument, infringes a patent for caustic alkali inclosed in a metallic integument.....1053

—— Who liable.
Principals are responsible for infringements by their agent, acting within the scope of his authority, and the legal implication of their concurrence therein will dispense with proof of it..... 10
A principal is not liable for the claim of a patentee under work done by a contractor who held a license, even though he has not paid his license fees or royalty..... 195

—— Remedy generally.
Patent infringement suits are of equitable cognizance, though no injunction has issued, and the patent has expired..... 19
The suit may be brought in any district in which defendant is found, regardless of the place where the infringement was committed.....1061
Quære, whether state statutes of limitation are applicable to suits for infringement..... 19
The mere discontinuance of a suit and forbearance to sue any of the parties thereto for over a year thereafter *held* not an acquiescence in the infringement.....1053
Permitting infringement for several years does not waive or impair the patentee's rights, but it deeply affects his claim to an injunction..... 10

—— Preliminary injunction. Page
Act Feb. 15, 1819, does not alter the principles on which injunctions are granted, but merely extends the jurisdiction of the court to parties not before falling within it.. 357
An inventor himself suing for infringement must make oath that he is the true inventor, and this, together with the patent, is adequate proof on which to claim an injunction..... 10
Complainant is not required, in addition to his patent, to present, in the first instance, full evidence that he is the first inventor. Very slight evidence thereof is sufficient to put defendant on his justification..... 10
An injunction will not be granted unless the right has been settled by suit at law, or the patentee's possession has been undisputed for a long time..... 10
The case should be such as to leave little, if any, doubt in the minds of the court as to the validity of the patent, especially if it rests upon complainant's own showing.... 357
It must be stated in the bill or by affidavit that complainant is the first inventor, and the bill must be sworn to..... 357
Where the patent was not attacked for want of novelty, and the infringement was clear, but it appeared that defendant had publicly used his apparatus for three years without objection, the application was denied, with leave to renew the motion on defendant's giving security and keeping an account..... 585
The patentee must either show an exclusive possession for such a length of time as to warrant the presumption of right, or show a clear and unquestionable right in the first instance..... 978
It is not a sufficient reason against the awarding of an injunction that it does not furnish plaintiff effectual relief, or that it may be avoided by defendant.....1061
Assignment by complainant after preliminary injunction granted is no ground on which to dissolve it.....1023

—— Procedure.
An assignee of a patent has an exclusive right of action for an infringement only where his assignment gives him a whole interest in the patent with or without territorial limitations..... 473
A person having only an exclusive right to manufacture a certain class of articles under a patent cannot sue in his own name for an infringement of such right..... 473
In a suit for infringement of a patent issued to an executor in trust for the devisees of the inventor, both the executor and the devisees should be joined as plaintiffs.. 105
Where the original patent was reissued in divisions, the bill need not aver that each division was for a distinct invention.....1053
An allegation of the particular claims infringed is not necessary; a general allegation of infringement is sufficient..... 894
The affidavit annexed to the bill that the patentee was the original and first inventor of the thing patented, can be made by the assignee of the patented, as well as by the patentee himself.....1053
Whether an invention is patentable is a mixed question of law and fact, and will not, in ordinary cases, be disposed of on demurrer 831
Letters patent cannot be attacked by defendant on the ground that they were procured by fraud in prosecuting the application before the commissioner..... 971
A license to practice the invention is a complete defense to a suit for infringement, though defendant has not fulfilled his contract 1223, 1224
A license under a patent to another is no defense 272

Page

Where defendant claims to have manufactured the machines in question under patents issued to him, the only question is one of infringement where complainant produces a patent of prior date..... 168
The construction of the specification in the application is a question for the court.. 832

— **Evidence.**

The production of the patent is prima facie evidence of novelty..... 832
Testimony of eminent chemists and books of reputation in science and art are competent evidence that a coloring matter patented was not previously known..... 10
Where defendants offered no testimony, *held* the infringement was sufficiently proved by testimony of their admissions that they had sold certain articles, which were substantially the same as the articles described in plaintiff's patent..... 897

— **Accounting: Damages.**

An account of profits taken before a master should be made up to the time of the hearing before him..... 722
Where defendants have not all been jointly concerned in the infringement for the whole time covered by the account their several liability must be apportioned in making up the decree..... 722
Computation of profits in the use of an invention in producing fat acids and glycerin from fatty bodies.....1224
Interest will be allowed on the profits to the date of the master's report..... 722
Necessary expenditures for counsel fees and other charges, though not taxable costs, cannot be allowed as part of plaintiff's damages 103
A verdict making such allowance under the court's direction will not be set aside where the misdirection was not assigned as a reason for new trial, and the same result might have been reached by trebling the damages 103
Interest by way of damages may be given by the jury..... 709

Various particular inventions and patents.

Boiler. Reissue No. 3,618 (original No. 93,244), for feed-water heater and filter, *held* valid and infringed..... 95
Boots and Shoes. Nos. 28,181, 39,546, 42,555, for improvements in machines for burnishing the edges of soles and heels of boots and shoes, *held* not infringed..... 544
Candles. No. 12,492, for improvement in machine for making candles, *held* valid and infringed 902
Clocks. No. 84,517, for improved pallet of clock escapement, *held* invalid for want of novelty..... 859
Coffin handles. Patent to Strong of December 14, 1869, for improvement in, *held* void for want of novelty..... 225
Corsets. Reissue No. 6,100 (original No. 97,418), for improvement, *held* valid and infringed 1099
Furnaces. No. 71,244, for improvement in hot-air furnaces, *held* valid..... 894
Glycerine. No. 11,766, for a process for producing fat acids and glycerine, *held* valid and infringed.....1224, 1231, 1260
Mop-head. Reissue No. 3,682 (original No. 22,990), for improved mop-head, construed, and *held* not infringed..... 767
Paints. Reissue No. 1,598 (original No. 40,515), for paints for ship's bottoms, *held* invalid for want of novelty..... 706
Paints. Reissue No. 4,599 (original No. 40,515), for paints for ship's bottoms, *held* valid and infringed..... 704
Pavements. Tillman's invention *held* no infringement of Kirk's invention.....1269
Pipes. No. 1,980, for machine for making lead pipe by pressure, *held* valid and infringed 709
Pipes. No. 1,980, for machine for making lead pipe by pressure, construed, and found not to be infringed..... 718
Planing machines. No. 32,904, for improvement, *held* valid and infringed..... 190
Rubbing machine. Nos. 75,217 and 75,218, for an apparatus for exercise, *held* infringed by Wood's patent for an improved apparatus for treating diseases by mechanical movement..... 807
Rubbing machine. No. 77,933, for an oscillating rubbing machine for medical uses, *held* infringed by Wood's patent for an improved apparatus for treating diseases by mechanical movement 807
Sand cutting. No. 108,408, for improvement in cutting and engraving stone, metal, glass, etc., *held* valid and infringed.....1238
Sewing machines. Reissue No. 6,550, for improvements, *held* valid and infringed.... 971
Shoes. Priority of invention of an improvement in pegging machines awarded to Greenough 336
Stamper. No. 114,068, for improvement in machines for punching and stamping sheet metal, *held* null and void, and ordered to be canceled..... 315
Stoves. No. 80,235, for an improved guard plate, *held* valid and infringed..... 272
Towboat. Patent to John L. Sullivan for improvement *held* invalid for want of invention 357
Tubing. No. 46,507, for improved flexible tubing for illuminating gas, *held* valid and infringed..... 731
Well. Tillotson's patent for an improved filter well, *held* invalid for want of novelty..1272
Whips. No. 60,606, for improvement, *held* valid and infringed..... 249

Unlawful marking of articles as patented.

The penalty of not less than $100 (Act Aug. 29, 1842, § 5) for the offense of marking the word "Patent" on unpatented articles, is a penalty of $100, and no more... 101

PAYMENT.

Treasury notes issued under Act 1814, cc. 77, 699, being receivable in payment of duties, taxes, and land debts due the United States, are a good tender in payment of such debts 1124
The interest on such notes continues to run until their payment.....1124
The word "dollars," as used in a note made in the United States, means lawful money of the United States..... 179
A deposit by a debtor of a sum of money with a third person for his creditor, who assented thereto, or gave the depositary a new credit, will discharge the original debtor... 562
The ratification by one of the unauthorized act of another cannot have a retroactive effect so as to defeat the rights of intervening third persons..... 214

PILOTS.

See, also, "Salvage."

A claim to half pilotage for a tender and refusal of services, supported only by the oath of the pilot, and contradicted by two witnesses from the other vessel, cannot be sustained where the pilot might have produced other witnesses, whose absence he did not account for.....1014

PLEADING AT LAW.

Page

In an action for goods sold by a firm, plaintiffs must prove themselves to be the firm 1197

The assignee of a note assigned by a firm need not aver and prove the names of the persons who composed the firm....1033

A general averment of the citizenship of the plaintiff is sufficient....1033

In case of a plea of limitations and a general demurrer defendant was allowed to withdraw the latter.... 345

The powers of the court in cases of amendments are liberally exercised to promote justice 1202

A declaration in an action brought in the name of a firm may be amended by inserting the names of the persons who compose the firm 1196

In a suit on several promissory notes, *held* that an amendment was proper which added a count on another note embraced in the same transaction 1202

An error of the attorney in stating the name of defendant as "James" instead of "William" may be corrected....1266

A party will be allowed to amend before trial his writ and declaration by striking out the name of one of the defendants....1323

An attachment to answer in a plea of trespass on the case founded on a promissory note, having a scrawl for a seal, will be quashed, and plaintiff will not have leave to amend, and to declare in debt.... 839

An administrator may be permitted to amend by adding a plea where judgments have been obtained to the amount of the assets in his hands since he first pleaded.... 824

A note, stating on its face where it is payable, cannot be given in evidence on a count on a note omitting such description, but it is admissible on account for money had and received 157

Under a statute providing that the writing on which the suit is founded is receivable without proof of execution, unless the execution is denied, plaintiff must prove an indorsement, where he relies upon the same, but the suit is not founded thereon.... 256

The plea of nonassumpsit puts plaintiff to the proof of all material averments in his declaration, and where he relies on an indorsement he must prove it.... 256

Where an unsworn plea is put in, denying the instrument on which the action is founded or the indorsement of it, the note and the indorsement as averred in the declaration are admitted 936

A plea which admits the execution of an instrument sued on and sets up matter in avoidance is not objectionable, as amounting to the general issue.... 963

Under the plea of non assumpsit, a former recovery upon attachment in a court of another jurisdiction is admissible in evidence 162

In an action for deceit in selling goods fraudulently marked with plaintiff's trademark, evidence may be given of any number of sales under a count for selling on a particular day and divers others between that and the date of the writ.... 744

In an action for an escape, the record is inadmissible where varying from the judgment described in the declaration.... 472

PLEADING IN ADMIRALTY.

Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable.... 957

A libel for a tort will be dismissed unless it contain on its face sufficient averments as to place to show that it is within the admiralty jurisdiction 957

Page

A supplemental libel, filed before the process is returnable, becomes part of the pleadings, without further notice to respondent, and he is bound to answer it.... 942

An objection that the demand in suit is stale or barred by the statute of limitation cannot be made without being properly stated in the pleadings.... 491

Where respondent has been arrested in a suit in personam, the answer is not filed, within the meaning of the eighteenth rule, until bail is perfected.... 942

An answer to a libel for information must be full and explicit to each article.... 401

A plea to the jurisdiction can only be interposed by defendant himself in propria persona, and on oath.... 824

A replication merely denying the truth of the answer is not required in the district of Massachusetts 605

Where libelant relies on new matter in avoidance, he should file a supplemental libel, which respondent should answer.... 605

A party who sets up an admiralty lien which fails cannot set up and rely upon a common-law or statutory lien. (Reversing 758.) 756

A charter party under seal, made out in the name of a person who acted merely as agent for another, without stating that fact, is admissible in evidence on a libel for breach of contract brought by the principal....647, 648

PLEADING IN EQUITY.

Copies of deeds filed with the bill as exhibits become a part of it and can be objected to only before the hearing.... 436

A plea for want of parties is not matter in abatement, but goes in bar to the whole bill 1331

A general answer overrules the pleas.... 778

A denial according to defendant's "recollection and belief," in an answer to a direct charge of a thing done by defendant, will be treated as a mere evasion.... 778

Matter of avoidance in an answer responsive to the bill on a motion for an injunction is treated as the affidavit of defendant. On the trial it must be proved....1331

An answer admitting the right of complainant, but setting up new matter in bar, or an affirmative claim, or averring a discharge, is not evidence in defendant's favor.1243

A general allegation of fraud and duress is not sufficient 362

Every material averment in the bill not denied is admitted 436

Matters germane to and connected with the subject-matter of a suit may be introduced by cross bill, although new, and not mentioned in the original bill.... 459

Matters existing at the time of filing the bill and omitted therefrom should be brought in by amendment, but matters arising thereafter and after answer filed can only be brought in by a supplemental bill.... 525

Leave will not be given to file a supplemental answer based upon a fact which was known to the party at the time of the original answer, and was not omitted through mistake 476

PLEDGE.

Corporate stock is bound for the payment of interest, where it is pledged for the redemption of certificates of debt, which in turn bind the debtor for the payment of "the sum therein mentioned and the interest thereon." 518

POWERS.

A power of attorney, which authorizes a conveyance to be made in as full and ample

Page

a manner as the principal could execute, authorizes a deed with covenants of general warranty 615

PRACTICE AT LAW.

Plaintiff, who has offered competent evidence, cannot be nonsuited against his consent 1027

Where no declaration or plea has been filed, a rule to try or non pros. cannot be enforced 348

After the court has given its decision on a plea of *nul tiel* record, it is too late to take a nonsuit 59

Where there are no parties litigant before the court, original papers filed may be withdrawn without leaving copies.....1349

PRACTICE IN ADMIRALTY.

On a libel to recover possession of a vessel wrongfully taken from the owner, brought against the wrongdoer and a purchaser from him in possession, where no decree for damages is asked against the wrongdoer, the libel against him will be dismissed, without costs 1179

A motion by libelants to strike from the record as a party libelant the name of a person who is a mere agent will be granted where it does not appear that respondent will be deprived of any means of defense thereby..1050

Testimony given viva voce in open court should be taken down by way of narrative, and not by way of questions and answers.. 594

Objection to the right of a person to intervene as claimant cannot be taken for the first time at the hearing..... 952

Advantage must be taken of the failure to file a replication when evidence is offered at the hearing, or it will be *held* to be waived.. 942

Adm. Rule 53, requiring respondents in a cross libel to give security to respond in damages as claimed therein, applies as well to actions in rem as to those in personam..1355

A vessel which has been once arrested and discharged on a stipulation for her value cannot be rearrested for the same cause of action, though the former action was discontinued by consent 883, 884

The circuit court on appeal will give leave to amend by striking out the names of parties improperly introduced, where necessary to enable it to dispose of the appeal upon its real and substantial merits..... 773

A decree of the district court will not be opened, and an amended answer allowed to be filed, on the ground of the subsequent discovery of a prior decision of the circuit court in conflict therewith.....1009

PRACTICE IN EQUITY.

The authority to refer to a master is inherent in the courts of the United States in the exercise of their chancery jurisdiction...1092

A master's report cannot be objected to on the ground that he was not sworn, where the order of reference did not require him to be sworn 1092

Exceptions will not be allowed where made under circumstances calculated to effect a surprise on the party..... 436

The discontinuance of proceedings for infringement of a patent does not estop complainant from bringing a second suit.....1053

A party is not entitled to bring a bill of review unless he obeys and performs the decree..... 500

On filing a bill of review, complainant must give security, or deposit a sum of money for satisfying the costs, and damages for delay..... 500

Page

Where complainant fails to give security or make a deposit, the bill will not be instantly dismissed, but he will be required, on motion, to give the security or make the deposit..... 500

PRINCIPAL AND AGENT.

See, also, "Factors and Brokers"; "Master and Servant."

A power of attorney, sent by mail to a person, which never came to his possession, is not operative.....1186

A letter from a part owner of a steamboat, requesting another to advertise the writer's interest for sale, and in thus advertising to act as his agent, confers no authority to sell.....1186

But where such part owner adopts or ratifies a sale made by such agent he cannot subsequently disaffirm it.....1186

An agent, unless expressly authorized, cannot bind his principal by receiving in satisfaction of a note held by him for collection a greatly depreciated currency, which is not a legal tender..... 179

An agent for subscriptions or a canvasser for books has no right to cancel subscriptions or to transfer them to another party.. 130

An agent or canvasser, who has taken orders or subscriptions for a book, is not liable to the publisher except as a guarantor, or where bad faith is shown..... 130

A collection agent, who transmits bills to his private agent, under an arrangement whereby the latter credits him personally with the proceeds, is personally liable for a loss caused by the failure of any of the parties. 609

Money paid on account of suretyship for an agent in a matter where he is acting for the principal, and within the scope of his authority, creates a debt against the principal. 1199, 1200

PRINCIPAL AND SURETY.

To release a surety, the holder of a note must, for a valuable consideration, give time to the principal..... 477

The surety is not discharged where time is given the principal at his instance, or with his consent..... 477

The surety is not discharged by a confession of judgment at the first term, with stay of execution until the second, where it appears that in the ordinary course of the business of the court a judgment could not have been obtained before the second term 477

Sureties on a replevin bond are entitled to have their lands sold under the law in force at the date of the bond..... 115

The liability of a surety for a debt, to indemnify him against which the principal has contracted to deliver certain property in process of manufacture, will not justify a court of equity in taking such property out of the hands of innocent third persons, whose rights have intervened..... 642

An indorser of a note is entitled to the benefit of a deed of trust given by the maker to indemnify a subsequent indorser, as against the holders of subsequent deeds of trust, who took with knowledge thereof.. 497

PRIZE.

An innocent shipment will share the fate of the vessel and other cargo, where an attempt has been made to violate a blockade of which the shipper had notice..... 407

Where the testimony of witnesses from the delinquent vessel is dispensed with,

Page

adequate proof must be supplied aliunde of the delictum charged.....1014
Libelants were allowed 30 days' time to produce such evidence.....1014
Claimant has the burden of showing by clear evidence that the vessel was compelled to enter the blockaded port, as alleged, by overwhelming necessity, arising from injuries received at sea, and the loss of fuel, water, and provisions..... 402
The prize property will be sold on petition stating that it is in a perishing condition. 130
Vessel and cargo acquitted, with costs, there having been no probable cause for their seizure. 577
Vessel and cargo condemned for an attempt to violate the blockade of Beaufort, N. C..... 346
Vessel and cargo condemned for violation of blockade..... 679
An appeal to the circuit court from a decree of condemnation operates as a stay of all proceedings in the district court..... 406

PUBLIC LANDS.

See, also, "Grant."

Effect of certificate from commissioners of Virginia as to lands subsequently found to be within the limits of Pennsylvania.... 499
An occupation entry in Tennessee, made without an occupancy, *held* good except as against persons who entered their claims as soon as the preference in favor of occupants ceased. 1062
An unapproved Mexican grant, not segregated from the public domain before the treaty of Guadalupe Hidalgo, gives no rights except against a trespasser.....1338
A coclaimant of a Mexican grant, who presents his separate claim for his half, and denies the execution of an alleged deed by him to the other, is entitled to a confirmation, as against the United States....1182
The neglect to support a petition for land by evidence within two years after it is presented to the board of land commissioners does not bring the claim within the limitation of Act March 3, 1851, § 13..... 521
Land *held* not "mineral land," within the meaning of a treaty in relation to its purchase, because a coal deposit underlies it.. 257
Where a settler under the donation act fraudulently procures a certificate and patent to his wife's share, equity has jurisdiction to correct the error by requiring him to convey the premises to her..... 32

RAILROAD COMPANIES.

A railroad corporation, though its shares are owned by private individuals, is a public corporation..... 652
Railroad aid bonds *held* validated by Act Kan. Feb. 25, 1868, as to irregularities in the order of submission, and the location of the line of the road..... 900
Where county railway aid bonds were issued pending certiorari to review the decision of the county judge that the parties petitioning for the issuance of the bonds were a majority of the taxpayers, etc., *held*, that after a reversal of the judgment the bonds were void..... 62
Under authority to issue bonds to a certain company, *held*, that bonds might be issued to a consolidated company, of which the original company formed a part, where the facts were recited in the bond..... 968
Where county bonds are properly signed and sealed by the officers of the county, it is no defense to an action on the coupons that they are signed by only one of the county officers..... 901

Page

A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object..... 901
Under a sale of a road, the franchises, right of way, depots, rolling stock, tools, and all other property, real, personal, and mixed, *held*, that the purchaser was not entitled to surplus earnings in the hands of the receiver, but was entitled to all property used to carry on the business of the road and keep it in repair..... 218
On a railroad mortgage foreclosure, interest coupons, which have been partly paid, will be paid before coupons coming due afterwards; and detached coupons in the hands of third parties will be paid before the bonds themselves..... 22

Real Property.

See, also, "Adverse Possession"; "Deed"; "Ejectment"; "Estates"; "Grant"; "Public Lands."

REFERENCE.

Additional exceptions, discovered since the period for filing exceptions to the report has passed, will be allowed to be filed..... 908

RELEASE AND DISCHARGE.

The presumption in favor of the validity of a receipt will prevail in the absence of evidence that it was obtained by fraud, mistake, or ignorance of the rights of the party..1036

REMOVAL OF CAUSES.

See, also, "Courts."

Right of removal.
A corporation created by the laws of a foreign country is an "alien" (Act 1789, § 12), and when sued by a citizen may remove the cause..... 855
The right of one of the class of corporations mentioned in Rev. St. § 640, when sued in a state court to remove the cause, does not depend upon the citizenship of the parties 871
The fact that a state is plaintiff in the action will not affect the right of removal.... 871
Where it is shown that the controversy is wholly between citizens of different states, and can be fully determined as between them, the cause is removable, though some of the formal or nominal plaintiffs or defendants may be citizens of the same state.. 792
A criminal prosecution against a negro cannot be removed from the state to the federal court, on the ground of local prejudice against his race and color, preventing a fair trial..... 869
Time of removal.
After a case regularly on the calendar for trial goes over the term, though by consent of the parties, it is not thereafter removable 177
Proceedings to obtain.
The filing of the petition for removal is a sufficient appearance to the suit to give the court jurisdiction of the person..... 538
A party who fails to file a petition for removal at the time of entering his appearance will be precluded from doing so at a subsequent stage of the proceedings..... 538
Under the act of 1789, the petition for removal need not be verified by affidavit, but under the acts of 1833, 1863, 1866, and 1867, the petition must be verified by affidavit 538

Page

The federal, and not the state, court has the power to determine whether the case is a proper one for removal under the act of congress..... 792

The truth of an averment that defendant has a defense arising under or by virtue of the constitution or laws of the United States cannot be inquired into upon motion to remand..... 871

Effect of removal: Subsequent proceedings.

In the case of a suit on a nonnegotiable contract, brought by assignees thereof, *held*, after removal the case should be continued in the name of the assignor, where the federal court had not adopted the state statute requiring suits to be brought in the name of the real party in interest..... 474

REPLEVIN.

Goods in the hands of an officer of the law under an attachment levy cannot be replevied 724

The failure of an attorney to enter an appearance as requested is no ground for reinstating the action discontinued at the return term of the writ on default of defendant..1098

Where the title to the goods is in issue, a new trial will be granted where defendant obtained a verdict for the value of the goods, as well as damages for taking them..1028

REVIEW, WRIT OF.

Erroneous proceedings must be reversed on a writ of error, or they are binding....1070

RIGHT, WRIT OF.

The seisin shown by demandants will be presumed to continue until some adverse seisin or disseisin is shown..... 946

Though persons entering upon state lands are to be deemed mere intruders, yet, as against all others, the entry will be sufficient seisin to support a writ of right.... 946

RULES OF COURT.

Signing a bill as "solicitor for complainant" in a court in which there is no distinction between an attorney and a counselor, is a sufficient compliance with equity rule 24, requiring all bills to be signed by "counsel." 107

SALE.

See, also, "Vendor and Purchaser."

Under a contract to pay for goods as delivered, and to have an agent at the destination to receive the goods from the carrier, *held*, that the risk of transportation was on the seller.....1031

In case of loss in transit, the rule of damages is the difference between the contract price and the market value at the time and place of the delivery.....1031

SALVAGE.

Right to salvage compensation.

The contract of seamen is dissolved by the abandonment of their vessel in distress at sea, and where the rescuing vessel subsequently falls in with the derelict, and they perform services in saving part of her cargo, they are entitled to salvage..... 752

Capture by a public or private armed vessel of a belligerent power or by a pirate terminates or suspends the contract, which binds the seamen to the ship, and rescue or recapture by the master and crew entitles them to salvage..... 262

Capture by a Confederate cruiser in July, 1861, was capture by a belligerent within the rule..... 262

The master, being also a part owner, is entitled to salvage as against the other part owners and the shipper or insurers of the cargo 262

Where a vessel is in such peril as to be the subject of salvage service, a pilot is not bound to give his aid for mere pilotage... 440

The fact that the services were rendered in response to a signal for a pilot will not prevent the recovery of salvage compensation 440

A wrecking corporation cannot be considered as a salvor, and where the masters and crews of their vessels are not entitled to a share in the recovery, they cannot be considered 226

Persons going out to and securing a canal boat, with no one on board, cut adrift from her moorings by ice in New York harbor, and carried by the tide towards the sea, *held* entitled to salvage compensation..... 94

A steamboat towing other boats from a wharf to prevent them from coming in contact with a vessel which is on fire is entitled not to salvage, but merely to towage compensation 34

There is no usage or custom of binding obligation whereby steam tugs in New York harbor are obliged to render towage services to each other without compensation when found disabled and in need of assistance within their common field of employment.. 323

A vessel in distress may refuse the services of salvors, but, where services are accepted without stipulation for absolute compensation, the capacity in which they were rendered will not prevent a recovery of salvage compensation..... 440

Contracts for salvage services.

Aid in saving a vessel from a sea peril, rendered under a contract, is a salvage service where there is no stipulation for absolute compensation 440

Salvage contracts will be set aside, not merely in case of fraud or extortion, but where the compensation is excessive..... 322

A contract to pay $2,000 for towing a rudderless bark from her anchorage off the highlands below Sandy Hook, where she was in no immediate danger, to New York, *held* excessive, and the allowance was reduced to $1,000..... 322

Services of a wrecking tug in towing a ship from a dangerous shoal, which proceeded upon a negotiation for compensation not involving any idea of salvage, and not accepted as a salvage service, *held*, should not be compensated as such.....226, 229

Forfeiture or reduction of salvage.

Gross neglect or wanton injury to the property saved works a forfeiture of all claim for salvage, and renders the salvors liable for damages..... 383

An allowance of $23,000 was reduced $5,000 for the failure of a wrecking master to make careful soundings, resulting in an ineffectual effort to heave the vessel off of a shoal in the wrong direction..... 378

Salvors must land the property saved at the nearest port of safety, and see that it is properly cared for..... 383

Salvors who carry the property stripped from a vessel directly past her home port, where her name and port were painted on her stern, *held* guilty of embezzlement.... 383

Amount.

The risk run, the service rendered, and the amount of property saved will all be considered in determining the compensation... 806

Page

Associations for wrecking purposes will be encouraged by the compensation awarded for salvage 440
The award for services rendered by wrecking vessels is not to be measured on the principle of salvage, but rather on that of a quantum meruit 330
The owners of salved property cannot avail themselves of a contract, made by the salvor wrecking tug with marine insurance companies, to give services on their request to vessels in need of aid, at $15 per hour, except as evidence of what might be regarded as a reasonable reward for services rendered.... 330
The value of a wrecking tug is not to be considered where the salvage service consists in towing merely, which might have been as well done by a vessel of less power..... 323
A wrecking tug allowed $25 per hour for towing into New York harbor in cold and tempestuous weather a bark anchored on the south shore of Long Island..... 330
One-third allowed on a gross value of $4,500, in the case of a bark drifting at sea, with the greater part of her crew dead, and the rest rendered helpless by disease, discovered 40 miles from a port..... 333
$1,000 allowed a tug for towing into New York harbor a steamer, whose machinery was disabled by a collision, drifting out to sea in a storm..... 323
$11,931 awarded on a net value of $35,821, in the case of a wreck upon the Florida Reef 835
$15,000 allowed to two tugs as towage compensation for towing a ship worth, with cargo, $250,000, from Romer Shoal into the port of New York.....226, 229
$23,000 allowed upon a net value of $127,000 to 12 wrecking vessels, carrying 108 men, for services rendered a vessel aground upon Couch Reef 378
20 per cent., 50 per cent., and 60 per cent. allowed, respectively, on net value of $23,904, $7,967, and $1,283, in the case of three expeditions to a wreck..... 834

Remedies for recovery.

The crew of a salvor vessel may recover their share of the reward by libel in admiralty from the owners, who have received salvage on a settlement with the owners of the property saved..... 275
The fact that the owners of the salvor vessel did not consider the services of the crew in making the settlement is immaterial where they signed a receipt "for the owners, master, and crew."..... 275
The lien for salvage is lost by an assignment of the claim..... 333

Apportionment.

The owners and master of a lighter were allowed three-fourths of the award, where the actual work of lightering was done by the crew of the vessel in distress..... 275

SCIRE FACIAS.

A sci. fa., in which the name of one person is written for another by mistake, may be amended 727

SEAL.

There cannot be a joint seal for diverse persons not incorporated 1291

SEAMEN.

See, also, "Admiralty"; "Maritime Liens."

The contract of shipment.

A description of the voyage as "from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States," *held* sufficiently certain 1064
A port where colored seamen are obliged to remain in jail or on board the vessel while she stays there, is not a port of discharge within the United States..... 225
A parol understanding that the vessel was not to complete the voyage described in the shipping articles is not admissible.....1064
Inability to obtain freight is not such a necessity as absolves the owner from his contract to perform the voyage described in the articles 1064
Retaining seamen on board, by direction of the owner, after the determination of the voyage for which they shipped, amounts to a new contract for the return voyage upon the same terms as the outward voyage.....1036
New shipping articles at reduced wages, signed by colored seamen, under protest, in a port where they are obliged to remain in jail or on board the vessel while she stays there, are not binding..... 225
Parol evidence is admissible to show that illiterate seamen signed a contract not read to them, which differed from their oral agreement 702
Seamen, who sign articles without reading them, after their services have commenced under an oral contract, will not be held bound by the written agreement..... 537
Shipping articles signed by the seamen after they leave port are not binding upon them and they may leave at any time without incurring the penalty of desertion..... 914
When a seaman is incorrigibly disobedient, and will not submit, and offer to do duty and make amends, the master may discharge him, or correct and confine him on board, or dock him of his provisions.....1132
Where the seaman submits to the master's authority, in ordinary cases, his services must be accepted 1132
The crew are justified in leaving the ship, and may recover full wages, where they are fed on unwholesome or spoiled provisions... 560
A seaman falling sick during the voyage is to be cured at the expense of the vessel.. 560

Conduct of master or mate in respect to seamen.

The relative duties of the inferior officers and seamen to the master and of him to them defined 1024
A master who commences a dispute with a seaman by illegal and improper behavior risks the consequences.....1132
Where a master, being present, does not interfere to prevent an assault on a seaman by his officers, he is jointly liable for the tort 957
A receipt given on payment of wages, stating that it is in full for all demands for assault, battery, etc., will not bar a suit for damages 957

Wages—Right to.

Persons not strictly mariners may charge a vessel or owners in admiralty for services on ship board, which were necessary to her navigation or safety 408
The services of a manservant or attendant upon the master, who contracted a sickness in a foreign port, are not a charge upon the vessel or her owners..... 408
Seamen, who, after stranding of the vessel, are retained at a near-by port, under direction of the master, until hope of getting her off is abandoned, are entitled to wages to the time of their actual discharge..... 701
Where the vessel is lost on her homeward voyage, full wages are due to her arrival at the last port of delivery of the outward cargo, and half wages from that time until her departure from the last port at which the return cargo is taken on board.....1036

Page

A mate improperly dismissed from his office is entitled to wages, and is not bound to perform the duties of a common seaman....1024

In the case of a skillful, sober, and diligent first mate, whom the master frequently abused in the presence of the crew, *held*, that his dismissal was not justified by frequent disrespectful allusions made to members of the crew in his absence.....1024

A discharge ordered by the consul in a foreign port on clear prima facie proofs of criminal conduct, will bar a claim to continuing wages 1294

The propriety of the consul's interference is to be determined upon the facts before him at the time, and not by the case which may be afterwards shown on trial.....1294

The master can claim no benefit from a discharge by a consul in a foreign port, where it was obtained by deceit or collusion practiced by the master.....1294

—— Remedies for recovery.

The clerk of a steamboat is a mariner, and entitled to a lien for wages..... 379

The wages are not payable until the expiration of the period allowed for collecting the freight 560

A suit for wages cannot be maintained until the contract of service is performed or released 489

The right to a personal suit is not suspended by Act 1790, which provides that process shall not issue against the vessel until 10 days after she has arrived at her last port of discharge 443

Time given beyond 15 days for unloading, where it appeared that the vessel could not be unloaded within such time.....1069

A receipt for less than the amount due will not be set aside where the legal rights of the party were doubtful, honestly contested, and opportunity given him to satisfy himself in relation thereto 1036

—— Deductions: Extinguishment, etc.

In the case of a special indulgence to a seaman, wages cannot be deducted for failure to render himself on board at the time appointed in the articles.....1069

A seaman cannot recover wages during the time that he was imprisoned by local authorities in the home port on a charge of mutiny. 942

Such imprisonment may be deemed an adequate punishment, and prevent a subtraction of prior wages..... 942

The loss or damage accruing to the vessel by negligence or crime of the seamen may be set off against wages.....1132

The wrongful assault by a mate on one of the seamen on the voyage, to the damage of the ship, may be set off against his claim for wages, though the deduction is not entered in the log nor claimed in the statement made to the shipping master..... 873

A usage or custom in fishing voyages to carry only a partial supply of bait, relying upon catching sufficient fish to supply the deficiency, is reasonable..... 702

All the crew must contribute to make up the loss of cargo by embezzlement, but proof is admissible to show the innocence of some. 350

Seamen forfeit all wages by refusing duty before a fishing voyage is ended, and obliging the master to return with only part of a fare 702

Seamen employed by the voyage or month, who leave before the expiration of their term of service, without good cause or the consent of the master, forfeit wages previously earned..... 489

A forfeiture of wages may be decreed for the refusal of the seamen to unload and reload cargo on the voyage, but not for such a refusal at the last port of delivery..... 560

Page

A desertion does not work a forfeiture of all wages by the general maritime law. The court has power to mitigate the forfeiture according to the circumstances..... 483

Act June 7, 1872, § 23, which requires the master to furnish to seamen or to the commissioner an account of wages and deductions to be made therefrom 48 hours before paying off, does not apply to the case of a seaman forfeiting his wages by desertion, which is provided for by section 55. 47

When the crime of a sailor is beyond the master's power to punish, he should put him in irons, and bring him to justice on the return home.....1132

Wages are not forfeited by acts for which seamen are amenable to criminal prosecution. 1132

Broils, assaults on or resistance to masters do not ordinarily operate to forfeit wages, nor do they amount to mutiny or revolt, punishable criminally.....1132

SHIPPING.

See, also, "Admiralty"; "Affreightment"; "Average"; "Bills of Lading"; "Bottomry and Respondentia"; "Carriers"; "Collision"; "Demurrage"; "Maritime Liens"; "Pilots"; "Salvage"; "Seamen"; "Towage"; "Wharves."

Public regulation.

A voyage to a foreign port within the usual voyage of vessels licensed for the fisheries is not a "foreign voyage." (Act Feb. 18, 1793, c. 8.).....1162

A whaling voyage is not a foreign voyage, within the meaning of Act 1803, c. 62, and a bond executed under, but not required by, nor in accordance with, such act, is a nullity..... 611

A single act of trading will forfeit a vessel licensed for the fisheries. (Act Feb. 18, 1793, § 32.)..... 494

The carrying of cattle from an island to the main land in going out or returning, when done gratuitously, is not an act of trading. 494

A vessel engaged in transporting merchandise is not subject to a penalty for failure to have her hull and boilers inspected under Act Aug. 30, 1852..... 401

A vessel engaged in carrying freight between ports in different states, which on one occasion carries a load of passengers for purposes of a prize fight between ports in the same state, is not subject to a penalty for failure to comply with Act Aug. 30, 1852, §§ 5, 9.....1011

A steamboat running on a ferry line between New York and Port Richmond is a ferryboat, within Act Aug. 30, 1852, § 42, and is not obliged to have on board a licensed pilot and a licensed engineer..... 586

In the case of a ferryboat running between Astoria and New York on the East river, proof of the carriage of passengers and merchandise is sufficient to throw upon claimants the burden of showing that such passengers and freight were not destined for other states. (Act Feb. 28, 1871, § 11.)... 424

Title to and possession of vessel.

Rev. St. § 4192, requiring the conveyance or mortgage of a vessel to be recorded, is inapplicable to a vessel which has never been enrolled or licensed.....1179

A bona fide purchaser of a vessel from the owner of record will be protected as against a prior unrecorded sale..... 426

A purchaser at a sheriff's sale, without notice or a bona fide purchaser for value from the legal owner of record, will be protected as against a sheriff who has allowed the attached vessel to escape, and has paid

Page

a claim for supplies and repairs subsequently furnished..... 428
A statute sale, if fraudulent, will not bind the owner unless in favor of a bona fide purchaser for a valuable consideration, without notice, actual or constructive, or the fraud.....1277
A wreck sale made by authority of state laws is valid to pass title to the property, where there is no owner or agent present to protect or claim it.....1277
A stipulation given to a minority owner for the safe return of a vessel "from the said voyage to the port at New York" is not satisfied by her return to Boston, from which port she is sent out without objections from the minority owner, and lost.... 445
The amount due upon an accounting between the majority and minority owners cannot be applied to diminish the liability of the stipulators on their bond..... 445
The forcible taking possession of a vessel is a maritime tort, and no rights can be acquired thereunder, either by the wrongdoer or purchaser from him.....1179
Members of a voluntary association, who purchase a vessel and stores in the name of certain persons as their agents, have a right to a decree for title and possession, except as to property purchased without their authority..... 696
An attachment of the vessel at common law by a creditor of the agents in a suit against them will not affect the right of the real owners to a decree for title and possession..... 696
A material man's lien is not affected by a decree in such suit..... 696
In a petitory or possessory suit material men cannot intervene to enforce a lien which they may have upon the vessel.... 696

The master.

The master of a ship has not, in virtue of his office, any authority to sell a ship, except in cases of extreme necessity, where the vessel is wrecked or unnavigable, etc...1277
As between the owner and purchaser, a sale without necessity, though made in good faith, is invalid.....1277
The vessel owner is liable where another is injured from the want of care or skill of the master..... 156
Part owners are liable for the torts of one of their number while acting as master in the execution of the business in which the boat is engaged..... 735
The vessel owners are not liable for personal torts committed by the master without their knowledge or approval..... 408
The owners are estopped to assert that one acting as master had no right as such to order stores for the voyage, where they permitted him to order the articles and retained them..... 236
Under the custom of the Hudson river, to pay a master for a season's work of 10 months, *held*, that the master was entitled to a proportionate amount for a part of the season..... 491
The master is entitled to an extra allowance for services rendered out of the line of his duty, such as painting the ship..... 235

Employment of vessel.

A lessee of a vessel which explodes from some hidden defect is not liable to the lessor 76
A stipulation in a lease of a vessel that she was received in good condition estops the lessee, where she is lost by explosion, from defending against a suit by the owner on the ground of any defects which were known or might have been known by him or his servants..... 76
Where the nonfulfillment of a contract to transport a passenger is caused by shipwreck or other casualty, the passenger may

Page

recover back passage money paid in advance, or damages..... 158
In such case the passenger is obliged to wait a reasonable time for repairs, only where the interruption was not caused by an original defect and unseaworthiness in the vessel 158

Liabilities of vessels or owners.

Where the contract for the carriage of a passenger is broken by the interruption of the voyage, he has an action in rem, as well as in personam, to recover back passage money paid or damages..... 158
The vessel owners, by abandoning ship and freight, are discharged from personal responsibility for obligations of the master arising ex delicto, both under the general maritime law of Europe and the statutes of Maine..... 108
The liability in the case of a collision on the high seas between vessels of different foreign nations is determined by the law maritime according to the law of nations, and is limited to the value of the ship and freight, which must be abandoned to the injured party.....1006
A tender in the answer and upon the trial, by a written surrender of defendant's interest in the vessel, *held* sufficient.....1006
Where the vessel at fault was subsequently wrecked on her voyage, sold by direction of her owners, and delivered to the purchasers after the libel for collision was filed, *held*, that the owner waived his exemption from personal liability.....1006

Limiting liability.

A suit brought against a part owner of a vessel, who was charterer and owner for the voyage and acting as master, is within Act March 3, 1851, c. 43, exempting vessel owners from personal liability for damages arising out of a collision.....1158
The whaling equipment, provisions, and supplies of a whaling ship are not within the meaning of the words "ship or vessel," as used in Act March 3, 1851, § 3, limiting the liability of owners to the value of their interest in the "ship or vessel and her freight then pending." 555
There is no "freight pending" on a whaling voyage within the meaning of the act..... 555
The limited liability act cannot be invoked in an action between foreigners arising out of a collision between foreign vessels on the high seas, where none of the owners are residents of the United States.....1006
A person cannot take advantage of the limited liability act by answer to a libel for collision, but must institute separate proceedings therefor, for which leave of court is not necessary 1009

SLAVERY.

Act Feb. 12, 1793, providing a procedure for the reclaiming of a fugitive slave escaping into another state, is valid, and the remedy thereunder supersedes the remedy given by state laws 444
Right to freedom of slave carried into foreign country and returned with his master. 702
Right to freedom of slaves sent out of the state for three years and brought back.... 591
An importation of slaves by the owner of the life estate, though without the consent of the reversioner, *held*, would entitle them to freedom 737
Upon a petition for freedom, defendant may appear and disclaim without entering into the usual recognizance..... 970
A note given for slaves taken to Texas in 1835 in violation of the laws of Mexico, is invalid 1349
Forfeiture of vessel built for the slave trade under Act April 20, 1818, c. 91..... 240

SPECIFIC PERFORMANCE.

Page

The specific performance of an agreement is not a matter of right, but rests in the sound discretion of the court.....1313

Specific performance of an agreement will not be enforced where the decree would be a vain and imperfect act, or where the specific performance might be productive of injustice to the parties.....1313

Unfair conduct of complainant in relation to a parol agreement to convey lands, is good ground of refusing performance.....1094

Only those acts are considered as part performance which would operate as a fraud on parties unless the whole contract is executed 162

The payment of part of the price is not such an act of part performance as to form the basis of relief in equity..... 162

Otherwise as to possession taken of land, or where improvements are made..... 162

Specific performance will not be decreed where the consideration is grossly inadequate, or the contract is oppressive and against conscience 436

Where the agreement admitted by the answer differs from that stated in the bill, complainant must prove the contract aliunde...1094

Specific performance of an agreement to convey directed where the party in expectation thereof had been put in possession, and had made valuable and expensive improvements 1055

STATES.

The federal court may take jurisdiction where a state is a party in interest, but not a party to the record of a suit in relation to property of the state in the hands of its agent 518

STATUTES.

See, also, "Constitutional Law."

In construing a statute, the whole act must be considered 236

The construction put by a state court upon its statute, which is subsequently adopted verbatim by another state, is not controlling where the constitution of the latter shows that a different construction was intended. 527

SUBSCRIPTION.

Subscriptions in aid of college endowments become fixed and legal obligations as soon as the college performs its undertaking..... 308

TAXATION.

See, also, "Internal Revenue."

The legislature, and not the judiciary, is to determine what is a public use for purposes of taxation 652

School lands held by the state of Alabama, under Act June 22, 1854, in the state of Nebraska, are not taxable by the latter state.. 185

Placing the property of a corporation in the hands of a receiver does not exempt it from the operation of the tax laws of the jurisdiction in which it lies..... 21

A state statute passed under a compact with the United States exempting lands sold by them therein from taxation for five years from the sale, cannot be repealed, as to prior purchasers, before the termination of such time 1049

An assessment of real property should substantially comply with the requirements of the statute by definitely describing the land. (Code Or. p. 898.).....1289

An assessment of real property, which contains no valuation except certain figures without mark or sign to indicate for what they stand, is void for uncertainty.....1289

The court will not, on the petition of railroad receivers appointed by it, enjoin the execution of state tax warrants which are regular on their face, and where the collectors are acting in good faith..... 21

The collection of an illegal tax upon real property will be restrained where its enforcement will result in a cloud upon the title...1289

A sale of land for taxes in an Indian reservation not subject to state taxation is void 576

A tax sale will not be set aside for an alleged fraudulent combination among bidders, where there were more lands for sale than all wanted, and it does not appear that they did not bid against each other..... 517

A tax deed, made to the assignee of a tax-sale certificate assigned by the county clerk without authority of law, is void on its face; and is insufficient to set the statute of limitations in operation 577

TELEGRAPH COMPANIES.

A telegraph company, negligently delivering a forged dispatch, is liable for the damage thereby sustained, though plaintiff has a remedy ex contractu against a solvent indorser of a forged draft, which was the subject of the dispatch..... 230

TENANCY IN COMMON.

Where there is no visible adverse seisin of any part of the land, an entry by one of the cotenants gives a seisin of the whole according to their titles..... 946

A tenant in common can recover no more than his own portion of the estate, where he has not disseised his cotenant..... 27

TENDER.

A tender after suit brought must include costs, though the process has not been served 424

TOWAGE.

See, also, "Collision"; "Salvage."

A steamboat owner, calling for the assistance of another steamboat to remove his boat from a position of danger from fire, cannot escape paying for such services on the ground that his boat would have been safe in its original position..... 34

The tug is not liable as a common carrier, but is bound to the exercise of ordinary skill and diligence in taking up, arranging, and managing its tow..... 220

The tug is prima facie at fault in a case of damages resulting from the slipping of the tow line..... 541

The master of the tug has the duty of making up the tow, and he may exercise his judgment in that regard without reference to directions by the master of the tow.... 541

In passing through the channel of St. Clair Flats, the vessel of the heaviest draft should be placed last..... 541

A vessel with a heavy tow in passing from the North river into the East river, where the harbor is crowded with vessels at anchor, should pass around Governor's Island.. 593

The failure of canal boats towed through Long Island Sound to have anchors ready for use, where the tug takes shelter in the

Page

lea of an island on a storm arising, and to use the same on notice from the master of the tug, where the latter's anchor breaks in the increasing sea, and the boats are cut adrift, will cast upon the tow the burden of the loss..... 997

A tug using ordinary care is not liable for damages to the tow in striking a sunken rock, caused by the sudden and unexplained shearing of the tow..... 220

A contract for towage at the risk of the tow does not exempt the tug from liability for damages caused to the tow by the negligence of those in charge of the tug..... 593

Where the tow is sunk in a collision without any fault on the part of the tug, the latter's obligation is at an end, and she is under no obligation to mark the wreck by a light or otherwise, so as to prevent injury to other vessels thereby..... 495

The lien for towage is divested by an assignment of the claim..... 333

TRADE-MARKS AND TRADE-NAMES.

A trade-mark adopted by a partnership may be used by either member after its dissolution, and where one obtains letters of registration in his own name he may be compelled to transfer an equal interest to the other..... 734

An alien manufacturer abroad is entitled to protection in our courts against a fraudulent infringement of his trade-mark in this country.....742, 744

It is no bar to protection in our courts that a remedy is not reciprocally allowed to aliens in the country to which such owner belongs..... 744

The alien owner in such case is entitled to recover to the extent of his damages in the loss of sales and their profits, though defendant's goods were of inferior quality 744

A long delay of alien manufacturers to prosecute after knowledge of a fraudulent use of their trade-mark may be competent proof to show their acquiescence in it, but is not an absolute bar to recovery unless extending to the period of the statute of limitation 744

TREATIES.

See, also, "Extradition."

A treaty, whose subject is within the legislative power of congress, may be repealed by congress so far as it is a municipal law.. 784

A promise in a treaty for nondiscriminating import duties comes within the political, and not the judicial, department of the government, and the courts cannot try the question of its observance..... 784

The commissions of a supercargo of a cargo sequestered by the king of the Sicilies is a charge on the indemnity fund provided for by treaty..... 54

TRESPASS.

Possession in fact or in law is necessary to maintain trespass quare clausum fregit.. 727

TRIAL.

See, also, "Appeal"; "Continuance"; "Evidence"; "Judgment"; "New Trial"; "Practice;" "Reference"; "Witness."

Defendant has the right to open and close in all cases where he holds the affirmative of the issue..... 471

Page

After a special verdict, a motion by plaintiff to enter the verdict on certain counts and nol. pros. the others was granted.... 141

TRUSTS.

The mere deposit of money in a savings bank, entered in the name of the depositor "in trust for" another person, without notice to him, is not sufficient to show that the money passed to him, especially where he had no knowledge thereof until after the death of the depositor..... 154

The beneficiaries may follow a trust fund into the hands of any one receiving it with notice of the trust..... 866

A trustee who uses trust money in trade is chargeable with all profits which he has made, and in case of loss it must be borne by himself.....1153

UNITED STATES.

The United States has no preference in the payment of debts, except in the case of an assignment for the benefit of creditors or a legal insolvency..... 908

Usury.

See "Discovery."

VENDOR AND PURCHASER.

See, also, "Bankruptcy"; "Deed"; "Grant"; "Sale"; "Specific Performance."

A purchaser holding under a deed cannot set up a defect of title to defeat a recovery of the purchase money in an action by the grantor 615

In such action defendant cannot set off the amount paid on the compromise of an outstanding claim made without the consent or knowledge of the grantor..... 615

A knowledge of facts which, if traced and understood, will lead to a knowledge of title, is sufficient to charge a purchaser.... 700

The land in an unorganized county in Minnesota is regarded for all purposes, including registry, as being within the territorial limits of the county to which it is attached for judicial purposes..... 899

A vendee of land who never took the title, but resold it to his vendor, taking a bond with surety for the amount due, has no vendor's lien for the same..... 234

A person who has a lien on a lot for improvements made under expectation of obtaining a title may enforce his claim against the insolvent owner of the lot as a general creditor 1056

War.

See, also, "Insurance"; "Prize."

WASTE.

A tenant for 99 years, renewable forever, with leave to purchase at a stipulated sum, may be restrained from cutting and selling young and green wood.....1176

In the District of Columbia, defendant in equity is not bound to discover the waste, unless complainant in his bill expressly waives the forfeiture and penalty.....1176

WATERS AND WATER COURSES.

In Rhode Island one does not lose his right to water but by 20 years' adverse oc-

Page

cupation. No parol license or acquiescence short of that is enough..... 83

Where parties on opposite sides of a stream between two states each have a water power, and own the land to the center line, so that each owas one-half of a dam, they are tenants in common of the water; and if one construct a canal on his own side, and draw off the water, the other has a right of action which he may enforce by injunction in the state where the canal is built 83

In such case the laws which govern are those of the state within whose borders the injurious act is done..... 83

WHARVES.

A claim for wharfage for a period during which a vessel lay sunk in a pier cannot be enforced in admiralty..... 778

WILLS.

A will is legally executed where the hand of a testator, by his consent, is guided by another, and he afterwards acknowledges the will 35

The presumption is in favor of the sanity of the testator, and the burden of proof is on the party questioning it. Contra, if a previous state of insanity has been established.. 35

Whether a testator had a sound and disposing mind is to be determined by finding whether his mind and memory were sufficiently sound to enable him to understand the business in which he was engaged at the time of executing the will. The only time to be looked to is the time of the execution of the instrument 35

Declarations of a party to a deed or will, either before or after its execution, are inadmissible to control its construction or affect its validity 35

On an issue as to the validity of a will, evidence for defendant that plaintiff purloined a former will of the testator is inadmissible, there being no purpose to prove the contents of the former will..... 35

The word "estate" will apply to real or personal estate, or to both, according to the manner in which it is used in reference to the respective clauses of the will..... 278

A clause of a will construed as not charging the real estate with a debt..... 278

The renunciation of the provisions in a will by the widow will have no effect on a clause manumitting slaves, where there is sufficient other personal estate to satisfy her claim 1032

Interest commences on a pecuniary legacy at the expiration of one year from testator's decease, whatever may be the posture of the estate, where not otherwise specified in the will 371

The cases of infant children and of adopted children under age, not otherwise provided for, are exceptions to the rule..... 371

Executors may, at their discretion, pay over legacies at any time within the year after testator's decease 371

An investment by executors, in the name of a legatee, of a sum less than the whole amount of the legacy, *held* a payment pro tanto, entitling the legatee to the interest accruing thereon 371

WITNESS.

See, also, "Bankruptcy"; "Costs."

A witness who is interested equally on both sides is competent to testify..... 280

A surety in an administration bond is a competent witness for the administrator...1023

A surety in a replevin bond is not a competent witness for plaintiff in replevin, although he has an indemnifying bond.....1027

A slave cannot be a witness if a free white man be a party 952

Complainant *held* not a competent witness in a suit to restrain the removal of his slave from the district 961

A witness, who voluntarily became interested after acquiring knowledge of the subject-matter in dispute, may be compelled to testify 723

The vice president, who was also secretary and treasurer, of a foreign railroad corporation, having an office in New York, *held* could not be required to produce books of the company, which had been in his control, but several years before had been sent to the home office, in another state, and were there in charge of a co-ordinate officer, over whom he had no control..... 579

Where all the witnesses are equally trustworthy the court is governed more by their means of knowledge than the number.... 773

Where fees of travel and one day's attendance, demanded by a witness at the time of the service of the subpœna in a civil cause in the federal court, are not paid, the witness is not liable for contempt for failure to attend 932

A witness, subpœnaed at the place of trial on the day on which he is required by the subpœna to attend in court, is not entitled to travel fees 413

WRITS AND NOTICE OF SUITS.

Service by a deputy marshal of a summons, previously in his hands, on the day after a new marshal files his bond and takes the oath, is valid..... 60

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.